

26 March 2019

Submission via email to: domesticabuseconsultation@gov.scot

SUBMISSION TO THE SCOTTISH GOVERNMENT: CONSULTATION ON PROTECTIVE ORDERS FOR PEOPLE AT RISK OF DOMESTIC ABUSE

Thank you for this opportunity to respond to this call for submissions on protective orders and domestic abuse in Scotland. This submission has been prepared by members of the Monash Gender and Family Violence Prevention Centre ('the Centre').

More details about our research centre and our current related research are provided in the section one of the submission and as an appendix to this submission.

Please find our submission attached to this letter.

We would welcome the opportunity to discuss any aspects of this submission or our wider research further.

Kind regards,

Ms Ellen Reeves

Dr Faith Gordon

THE SUBMISSION

The Scottish Government’s review of the protective order system represents a significant opportunity to address key problems and potential reforms to the system. This submission draws on Australian research relating to the implementation of protective orders, and raises particular concerns regarding police-initiated protective orders. We commend the work being done in this area and look forward to reading the Scottish Government’s recommendations.

This submission is structured to chronologically address questions 1, 12 and 23 of the consultation paper, which are questions which align with the authors’ areas of expertise.

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1. WHO WE ARE

The Monash Gender and Family Violence Prevention Centre focuses on research examining the intersection of gender and the long-term prevention of family violence. Centre researchers work collaboratively with partners in government, social services, legal services, health and policing working to contribute to changing family violence patterns and outcomes. We identify family violence as a catastrophic and preventable social problem.

The Centre draws on local, national and international expertise as well as expertise from across the University, including social science, law, and medicine with a focus on building an evidence base to inform primary, secondary and tertiary prevention. Members of the Centre have been engaged in work that includes ground breaking research, engagement with government and civil society stakeholders, and innovative education offerings. Our research is grounded in qualitative and quantitative methods, combined with a well-developed understanding of the contemporary policy landscape.

Members of the Gender and Family Violence Prevention Centre are engaged in:

- **Contract research and consultancy** - including on all aspects of family violence, family violence prevention and responses to family violence;
- **Policy development** – including on perpetration interventions, risk assessment and risk management, mapping and developing linkages and collaborations between sectors and between multiple intersecting reforms and reform agendas;
- **Evaluations of programs and reforms** – including large-scale multi-sector reforms;
- **Workforce capability building** – on family violence prevention for practitioners and policy makers from a wide range of sectors; and
- **Expert lectures, seminars, industry briefings and opinions on family violence.**

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Ellen Reeves is a postgraduate researcher with the Monash Gender and Family Violence Prevention Centre. She is completing her PhD at Monash University, within the discipline of Criminology, supervised by Dr Kate Fitz-Gibbon and Professor JaneMaree Maher. Her research focuses on family violence intervention orders and the misidentification of women as primary aggressors within the Australian state of Victoria. Ellen's research is developing a significant evidence-base which can be utilised by policymakers and practitioners to ensure that practices are tailored to ensure that the rights of victims and survivors are of paramount importance.

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Dr. Faith Gordon is a Lecturer in Criminology at Monash University; Director of the Interdisciplinary International Youth Justice Network; a Research Associate at the Information Law & Policy Centre,

Institute of Advanced Legal Studies, London and a Senior Visiting Research Fellow at the Centre for the Study of Democracy, University of Westminster. Faith has conducted extensive research on media representations of children in conflict with the law; media representations of women prisoners who had been the survivors of domestic violence; older victims of crime and crime clearance rates; children's rights in the digital age. Her research has been referred to by the UK Court of Appeal, the High Court in Northern Ireland and made explicit reference to by the United Nations Committee on the Rights of the Child.

2. OUR RESPONSE TO THE CONSULTATION PAPER

Question 1: Do you think the police should have the power to bar a person from a home that they share with a person at risk of domestic abuse for a period of time and prohibit them from contacting that person, without the need to obtain court approval?

In light of the findings from research conducted within the Monash Gender and Family Violence Prevention Centre (Monash GFV Centre), we do not recommend that police should be given sole authority over emergency barring orders (EBOs). Rather we suggest that judicial oversight should still be required when applying for an EBO or any other form of protective order within the context of family and intimate partner violence (IPV).

The Monash GFV Centre acknowledges the significant impact that EBOs may have on the immediate protection of a victim-survivor, and also on their ability to assist victim-survivors in seeking long-term protection. We also recognise the importance of ‘shifting the paradigm’ and reinforcing the idea that victim-survivors should not be the party forced to leave the family home in the face of abuse. Such upheaval may cause further distress, particularly if there are children within the family unit. However, it is the Centre’s belief that the power to grant EBOs should remain with the judiciary, who are better equipped to deal with the dynamics and nuances of gender and family violence.

Based on a critical analysis of research in other jurisdictions, the Monash GFV Centre is concerned that police-issued EBOs may have the potential to inadvertently harm victim-survivors of family violence, and place them at further risk of abuse. Australia has observed trends in the misidentification of female victim-survivors of family violence as primary aggressors and this phenomenon has largely been attributed to inadequate police training and understandings of the complexities of family violence (George & Harris 2014; Victorian Royal Commission into Family Violence 2016). We believe that by removing judicial oversight from this process, it may be more likely that victim-survivors are misidentified as perpetrators by the police and there will be limited mechanisms in places to correct such mistakes.

In Australia, several studies have suggested that approximately two-thirds of women who are listed as respondents to protective orders have been incorrectly identified as a primary aggressor, when they are in fact the victim in their relationship with the ‘affected family member’ (AFM) (Mansour, 2014; Women’s Legal Services Victoria, 2018). In approximately 85-90 per cent of these applications, the police are listed as the applicant. The Centre recognises two key issues in regards to the misidentification of primary aggressors. The first, is that there is evidence to suggest that some perpetrators of family violence have learnt how to ‘play the system’ and utilise it as a tool of abuse against the victim-survivor. Perpetrators may alter their behaviour when the police arrive - acting calm and reasonable, whilst also playing off the genuine victim’s behaviour, which may be characterised by agitation, aggression and distress as a result of experiencing abuse. By doing so, the perpetrator is well placed to create a narrative that frames her as the aggressor and himself as the

victim. Subsequently, the police will sometimes apply for a protective order against the genuine victim-survivor.

The second issue recognised by the Centre, is that manipulative techniques used by perpetrators may be successful in continuing to abuse victim-survivors psychologically, as the result of inadequate understandings of family violence and victimhood on behalf of the police (Victorian Royal Commission into Family Violence 2016; Wangmann 2012). There is evidence to suggest that Australian family violence policing is still characterised by a focus on single incidents of abuse, rather than ongoing and/or extended patterns of control (Wangmann, 2012). As a result, responding police officers may attend an incident where it appears that the female is the primary aggressor, but will not properly investigate evidence (such as medical records and previous protective order applications) that suggests that she in fact has a history of victimisation at the hands of the 'affected family member'.

There is also a concern that police perceptions of what a victim of family violence looks like and how they behave, may still be influenced by outdated conceptions of the passive, defenceless victim (Goodman-Delahunty & Crehan 2016; Victorian Royal Commission into Family Violence 2016; Reeves 2017). As a result, victim-survivors who use self-defence or who react to violence aggressively, may be misidentified as primary aggressors by the police.

Australian research demonstrates that applications for Orders wherein a female victim-survivor has been identified as the aggressor, are often not granted by the Courts. Further to this, whilst many victim-survivors will not contest an order incorrectly made against them by police, due to the re-traumatising effect of the court process, in cases where they do, the predominant outcome is that a Magistrate will dismiss the order due to the clear evidence that the female is a victim rather than a perpetrator (Reeves, 2017). This demonstrates the value of having judicial oversight over all protective orders, interim protective orders and other temporary orders such as EBOs. This oversight allows for mistakes to be identified and rectified, with the benefit of more rigorous accountability mechanisms, thus better protecting victim-survivors and holding perpetrators to account.

In Victoria, family violence safety notices (FVSNs), which are emergency interim orders, allow for police to remove perpetrators from the family home without court approval. A study conducted within the Monash Gender and Family Violence Centre (Reeves, 2017) found that this has adversely affected victim-survivors of family violence who have been misidentified as aggressors, as they may be forced to leave the family home. Contextually, due to a lack of available emergency housing, they may become temporarily homeless until the order is dismissed by a judge. They may also have to leave children in the house under the care of the perpetrator, which may be extremely distressing and breaches those children's right to family life and is often not in the best interests of the child/children. Where family law disputes are taking place at the same time, police issue of an order against the wrong party can also have a significant impact. If for example, the victim-survivor is temporarily homeless, the Family Court may view her as unfit to care for her children (Reeves, 2017). A lawyer interviewed for the study stressed the significant impact that misidentification can have:

...the problem is the ramifications of that decision by the police are massive because you really see how much that undermines a victim's ability to leave, and just emboldens the perpetrator, like that does the reverse of what the system is designed to do... (Reeves 2017, p. 42).

Whilst family violence safety notices are eventually overseen by the court, Victoria Police are currently pushing for police-initiated orders that will not require court approval. The Victorian Royal Commission into Family Violence (2016) however, deemed that police responses to family violence are simply not yet at the appropriate standard that they should be allowed this power. The Centre recommends that the Scottish Government does not allow for their police forces to be given the same power until they are certain that responses are not likely to harm victim-survivors of family violence. To reach the conclusion, research into the misidentification of primary aggressors within a Scottish context is needed. It is our belief that this problem is not exclusive to Australia and that other jurisdictions may also face the same system shortcomings.

Question 12: We would welcome views on whether it should be a criminal offence to breach measures put in place to protect a person at risk of domestic abuse.

We recommend that criminal sanctions should not be considered in response to a breach of an EBO. As noted, EBOs may have potential to harm victim-survivors of family violence when incorrectly made against them. Research from an Australian context suggests that women who have been misidentified as primary aggressors may be more likely to breach protective orders, thus facing criminal sanctions despite being a victim (Reeves 2017). It has also found that manipulative perpetrators may encourage a victim-survivor to make contact, and then call the police stating that she has breached the protective order.

The Centre does recognise that misidentified victim-survivors make up a small minority of protective orders and that this can be expected to also be the case with EBOs, however, we believe that using the criminal law, especially at this stage of the family violence legal process, will not be effective. Not only are breaches of protective orders often poorly enforced, but when they are enforced, the utilisation of fines or incarceration are shown to have an extremely limited effect on the behaviour of the offenders and are often paid by the victim-survivor (Douglas 2007; Australian Law Reform Commission 2010). Also, by making it a criminal offence to breach an EBO, the ideals of that order are also compromised. An EBO is designed to have the perpetrator leave the house in order to provide the victim-survivor with immediate protection without forcing her to engage in the civil or criminal justice systems. Yet, if a breach of an EBO is a criminal offence, then the agency of the victim-survivor may be undermined.

Question 23: Do you consider that any of the reforms proposed in this paper will have a particular impact – positive or negative – on a particular equality group (e.g. gender, race, disability, and sexual orientation).

Within the context of victim-survivors being misidentified as primary aggressors, existing research suggests that certain groups of women are more likely to be misidentified by the police and thus we view the proposition of police-issued EBOs and protective orders as having the potential to harm certain marginalised groups in society (Mansour 2014; Women’s Legal Service Victoria 2018). In Australia, culturally linguistically diverse (CALD) women, women with a disability (mental or

physical), women who have substance dependency issues, and Aboriginal and Torres Strait Islander (ATSI) women are at higher risk of being misidentified as a perpetrator of family violence (Mansour, 2014; Women's Legal Services Victoria, 2018). Each of these groups face complex and unique barriers to seeking protection from the criminal/civil justice system. The Centre contends that any introduction of new measures and subsequent training for professionals implementing such measures, needs to ensure that diversity is recognised. Measures and related training should be culturally sensitive to the range of needs and experiences of victim-survivors.

One issue that is particularly prominent for CALD victim-survivors, is the failure of the police to use interpreters in many incidents where one or more parties speaks English as a second language, or does not speak English at all (Reeves, 2017). Where English is not a first language for the victim-survivor, it has been recorded that in instances when police do not use an interpreter, a victim's-survivor's version of events and experiences of victimisation are trumped by the abusive partner's narrative. The aggressor's narrative becomes the dominant narrative relayed to the police, as the perpetrator is able to speak English. In our study, we found that it may be common practice for police, due to a lack of available professional interpreters, to use the perpetrator as an interpreter (Reeves, 2017). This is deeply concerning, as it means that from the beginning of the process, the victim-survivor's experiences are minimised or completely denied by the criminal justice system. It also creates a window for the perpetrator to manipulate the system and further control the victim-survivor. We recommend that if the Scottish Government does choose to implement police-issued EBOs/protective orders, that they recognise this as a potential issue and ensure that they have sufficient resources to use interpreters, particularly interpreters who have been trained in the dynamics of family violence.

We have also found that women with a disability and women with substance dependency issues are at a particular risk of being misidentified. This is an area where more research is required, but initial findings¹ suggest that some victim-survivors who are experiencing these factors may deviate from traditional idealisations of what a victim of family violence looks like. Lenore Walker's (1984) initial conceptualisation of 'the battered woman', who is defenceless, passive and helpless still permeates much collective understanding and this may affect their interactions with victims. There was a concern amongst the lawyers who participated in our study that women with the aforementioned issues may be more likely to present as aggressive when the police arrive. This is demonstrated by one study participant who commented:

If a victim presents as angry there's still this pervasive myth in the judiciary and in the police that "oh well, she's aggressive, she can hold her own, she's not a victim" or "I can't believe she would just stand around and take this because look at how she's presenting – obviously she's not really a victim" (Reeves, 2017, p. 38).

Similarly, research has found that Aboriginal and Torres Strait Islander women may be more likely to "fight back" against abusers, and this, paired with an extremely damaged relationship with police due to Australia's ongoing colonial history, may also place them at further risk of being misidentified as a primary aggressor (Douglas and Fitzgerald, 2018).

¹ The author, Ellen Reeves, is currently conducting further research on this issue on behalf of Monash GFV. The project will see approximately 50 legal stakeholders and victim-survivors interviewed on the topic of misidentification in Victoria.

Based on previous research conducted in other jurisdictions, we recommend that guidelines for the media be produced to ensure that victims are not demonised or placed in a vulnerable position due to media reporting or jigsaw identification, whereby through select pieces of information released into the public domain, a victim's identity can be worked out (Gordon, 2008). We note that this is of particular importance in the digital age with the permanency of information and imagery.

We recommend that the government of Scotland consider not only the way that police-issued protective orders may harm female victim-survivors of family violence, but also how it specifically may harm marginalised women. If police-issued orders are implemented, it is important that an intersectional feminist approach be adopted to ensure the protection of all victim-survivors.

3. REFERENCES

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4. APPENDIX A: CURRENT RESEARCH

Members of the Monash Gender and Family Violence Prevention Centre are currently engaged in a range of project related to preventing and improving responses to intimate partner and family violence. Details of these projects are provided below.

- **Review of the Victorian Information Sharing Scheme**

Investigators: Jude McCulloch, JaneMaree Maher, Kate Fitz-Gibbon, Marie Segrave, Kathryn Benier, Kate Burns, Jasmine McGowan and Kate Thomas (contract research, Family Safety Victoria).

The research team have been contracted by Family Safety Victoria to conduct an independent Review of the new family violence Information Sharing Scheme that commenced in Victoria in 2018. The scheme is part of the broader reforms recommended by the Royal Commission. The Review considers any adverse impacts or unintended consequences of the scheme, as well as make recommendations to improve its operation. The findings of the Review will be tabled in Parliament and likely impact on family violence information sharing practice, policy and legislation.

- **Securing women's lives: Preventing intimate partner homicide**

Investigators: Jude McCulloch, Kate Fitz-Gibbon, Sandra Walklate, JaneMaree Maher (Funded by Australian Research Council)

This project aims to develop a framework for a new systematic preventive approach to intimate partner homicide. Intimate partner violence is the most common type of violence against women worldwide and the leading cause of death amongst Australian women aged between 15 and 44. The project intends to review a decade of intimate partner homicides in Australia to identify potential points of intervention that might have provided opportunities to prevent such killings. This new knowledge is intended to inform and assist in developing a more risk sensitive preventive approach to intimate partner homicides in Australia and overseas, enhancing women's security and preventing their deaths.

- **Perpetrator interventions in Australia: A national study of judicial views and sentencing practice for domestic violence offenders**

Investigators: Kate Fitz-Gibbon, JaneMaree Maher, Jude McCulloch. Partner Investigators: Victorian Sentencing Advisory Council, Australasian Institute of Judicial Administration (Funded by Australia's National Research Organisation for Women's Safety)

- **Identifying economic abuse amongst women with disability**

Investigators: JaneMaree Maher, Jasmine McGowan, Tricia Malowney and Kate Thomas (Funded by The Victorian Women's Benevolent Trust)

Members of the research team and partners will develop a fully accessible toolkit designed to assist service providers and victim/survivors identify economic abuse amongst Victorian women with disability. The toolkit will be a set of questions developed in Auslan, Easy English and through images designed to help women and their service providers talk about economic abuse.

Evidence of the under-recognition of economic abuse amongst women with disability suggests such a toolkit has the potential for wide-ranging direct impact. This project will contribute to the goal of strengthening the economic security of Victorian women by increasing awareness of this form of domestic and family violence and by assisting women with disability identify the presence of economic abuse in their lives.

- **The killing of women in Victoria: Examining risks of violence and points of intervention**

Investigators: Kate Fitz-Gibbon (Funded by the Victorian Women's Trust).

This project examines the killing of women in Victoria (Australia). Using case analysis and interviews, the project will generate an in-depth understanding of the risks of violence and points of intervention common to cases of lethal violence against women in Victoria. The findings will provide an evidence base to illuminate women's experiences of lethal violence and to inform support services, prevention initiatives and justice system responses in Victoria.

5. APPENDIX B: RECENTLY COMPLETED RESEARCH

Members of the Monash Gender and Family Violence Prevention Centre have recently completed a range of project related to preventing and improving responses to intimate partner and family violence. Details of our recently completed projects are provided below.

- **Investigating Adolescent Family Violence**

Investigators: Kate Fitz-Gibbon, JaneMaree Maher, Jude McCulloch, Jan Coles and Deborah Western (Funded by Monash University Faculties of Art and Medicine)

This project was recently finalised by a multidisciplinary team of Monash University researchers from the School of Social Sciences, the Department of General Practice, and the Department of Social Work at Monash University. It explored attitudes towards, patterns of, and the impact of AFV. The findings are relevant to all Australian jurisdictions, and have the potential to inform and reform legal, health and social responses to AFV, and provide a greater understanding of 'risk'.

The [Final Report](#) can be downloaded via the [project website](#).

- **Women, disability and violence: Creating access to justice**

Investigators: JaneMaree Maher, Claire Spivakovsky, Jude McCulloch, Jessica Cadwallader (People with Disability Australia) (Funded by Australia's National Research Organisation for Women's Safety)

This project explored the experiences of women with disability in seeking access to justice when they have faced violence and/or sexual assault either inside or outside their relationships. The research team's approach centred women's voices and experiences, and explored their insights in relation to those of service providers and other justice sector stakeholders.

The Final Report and access to the Knowledge Translation and Exchange Workshop Resources can be downloaded via the [project website](#).

- **Review of Minimum Standards for Men's Behaviour Change Programs**

Investigators: Jude McCulloch, Kate Fitz-Gibbon, JaneMaree Maher, Marie Segrave and Kathryn Benier (Contracted research, Victorian Department of Health and Human Services)

Following the Victorian Royal Commission on Family Violence (Recommendation 91), the Department of Health and Human Services (DHHS) contracted with the research team to conduct a consultation and review of the Minimum Standards for the effective delivery of Men's Behaviour Change Programs.

- **Temporary migration and family violence: An analysis of victimisation, support and vulnerability**

Investigators: Marie Segrave and [InTouch Multicultural Centre Against Family Violence](#). (Funded by Monash University Faculty of Arts and InTouch Multicultural Centre Against Family Violence)

The aim of this project was to undertake a comprehensive review of family violence cases managed by inTouch that involve women (victims) who have or are experiencing family violence whose migration status is temporary. The project documented the ways in which migration status is connected to and impacts both vulnerabilities to family violence and access to support. The project also documented the breadth of situations of violence and exploitation, identifying, for example, the extent to which some cases may better be identified as cases of human trafficking and in so doing contribute towards the development of a risk assessment tool to enhance both data gathering and improved access to the appropriate legal and welfare-related support.

The [full report](#) was released in September 2017 and can be accessed via the [Project website](#).

- **The Monash Review of the Family Violence Common Risk Assessment Framework in Victoria**

Investigators: Jude McCulloch, JaneMaree Maher, Kate Fitz-Gibbon, Marie Segrave and James Roffee. (Contracted research, Victorian Department of Health and Human Services)

In 2016, the Victorian Department of Health and Human Services (DHHS) contracted with the research team to conduct a review of the Common Risk Assessment Framework (CRAF) as part of the DHHS response to Recommendation 1 of the Victorian Royal Commission on Family Violence. The [final report](#) of the CRAF Review, findings and recommendations are now published. The Review makes twenty-seven recommendations aimed at enhancing the use and usability of the CRAF and more effectively embedding it across different professional groups.

- **Innovative legal responses to the prevention of intimate partner homicide in the UK, US and Canada**

Investigators: Kate Fitz-Gibbon (Fellowship awarded by The Winston Churchill Memorial Trust)

This project was part of a 2015 Churchill Fellowship awarded to Dr Kate Fitz-Gibbon to investigate the effectiveness of innovative and recently introduced legal responses to intimate homicide in the UK, USA and Canada. The project examined the merits of the offence of coercive control in England and the proposed offence of domestic abuse in Scotland, the New York integrated domestic violence court model and domestic violence death review committees internationally.

The full report, [2015 Churchill Fellow Report: The Peter Mitchell Fellowship to examine innovative legal responses to intimate homicide in the UK, USA, Canada](#), was published in 2016.