Occupation Order Project

Student Law Office, Northumbria University, Law School

Report conducted for Surviving Economic Abuse

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SURVIVING ECONOMIC ABUSE

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Introduction

This research was undertaken by the Student Law Office, Northumbria Law School. The Student Law Office provides free legal advice to members or the public in a variety of legal areas. In 2018 the Student Law Office established the Policy Clinic, to undertake research on behalf of organisations and charities. The purpose of the Policy Clinic is to provide research and evidence, aiming to influence policy and law reform. All work in the Policy Clinic is overseen by an experienced research member of staff at Northumbria University. The students taking part work in the Student Law Office are in the third year of their law degree.

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The Law underpinning Occupation Orders

What is an occupation order?

An occupation order is an order made by the court conferring, declaring, restricting or regulating rights of occupation in the family home between parties who are in, or who have been in, certain categories of relationship.[1] Occupation orders are usually granted in situations where domestic violence is present and one party requires protection from the other, albeit there is no requirement of domestic abuse for an order to be granted.

Which statute regulates the law on occupation orders?

The law regulating occupation orders is set out in the Family Law Act 1996. Sections 33-38 set out who can apply for an order, the legal tests which must be met for an order to be granted and the application process.

Who can apply for an order?

In order to apply for an occupation order, the parties must be 'associated persons'. Section 62 of the Family Law Act 1996 defines the meaning of an 'associated person'.

A person is associated with another if:

- they are or have been married or in a civil partnership with the other;
- they cohabitate with each other or have previously cohabited;
- they live or have lived together in the same household;
- they are relatives;
- they have agreed to marry one another;
- they have or had an intimate personal relationship which is or was for a significant duration; or
- they are both either the parent of the child or has/had parental responsibility for the child

There are five different categories of applicants, set out in the FLA 1996 under which an occupation order can be made. The occupation order must be made under the correct section of the FLA 1996[2] to ensure that the appropriate threshold tests are applied. Furthermore, the rights which are attached to an order will vary between the different categories of applicants.

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[1] Family Law Act 1996 s33-38

[2] Family Law Act 1996

Under section 33 of the FLA 1996 an application can be made if the applicant is entitled to occupy the house by virtue of a beneficial estate, a beneficial interest, a contract, home rights or any enactment giving the applicant the right to remain in occupation. This will be satisfied where a victim is named on the title deeds or rental agreement to the property or, if the property is solely owned or rented by the respondent, the victim has contributed to the property and is therefore able to establish a beneficial interest. In cases where the parties are married, a non-owning spouse will nonetheless be entitled to occupy a property as they will have home rights. In all cases under section 33, the property must also have been or have been intended to be the home of the applicant and the respondent.

Section 35 of the FLA 1996 relates to a former spouse (or former civil partner) with no existing right to occupy the property. This section applies if one party does not have a right to occupy the property but the other party does have such a right. Moreover, the property must have been or was intended by them to be their matrimonial/civil partnership home.

Replicating the provisions under section 35, section 36 of the FLA 1996 allows an application to be made by a cohabitant or former cohabitant with no existing right to occupy the property against a party with a right to occupy. As with the other sections, the home must have been or must have intended to be the home of the applicant and the respondent.

Section 37 and 38 of the FLA 1996 applies when neither party is entitled to occupy. Section 37 relates to spouses and civil partners who occupy the property but neither of them are entitled to remain in occupation by virtue of a beneficial estate or interest or contract or by virtue of any enactment giving them the right to remain in occupation. Section 38 mirrors these provisions for cohabitants or former cohabitants.

The broad categories of applicants ensure that victims are not excluded or otherwise discriminated against by virtue of their legal standing in relation to the property.

As has been considered, in all cases the property (referred to in the legislation as a ‘dwelling house’), must relate to the home (or intended home) of the applicant and the associated person (s33(1)(b)) FLA 1996. A dwelling house can be described as:

- Any building or part of a building;

- Caravan, houseboat, or structure; or
- Any yard, garden, garage, or outhouse belonging to the above and occupied with it

Which is likely to apply to most residential properties occupied by applicants and respondents.

Threshold tests for granting an occupation order

In all cases, the court must consider the balance of harm test, in deciding whether to grant an order.

The threshold criteria

The court is under a duty to balance the harm caused to the applicant, the respondent and any relevant children, if the order was or was not made. In accordance with Section 33(7) FLA 1996, the court must make an order if it appears to the court that the applicant or any relevant child is likely to suffer significant harm attributable to the conduct of the respondent if an order is not made. If this is satisfied in favour of the applicant, then the court will be under a mandatory duty to make the order. The Supreme Court has emphasised that the draconian nature of occupation orders and the need for a strong justification for ejecting property owners. Denning LJ stated that occupation orders "make the County Court the first aid post when there has been serious infringement of the basic human right of wife or child not to be subjected to violence",[3]

The concept of harm is more serious than mere hardship. The FLA 1996 defines 'harm' as ill-treatment or impairment of health and ill-treatment includes non-physical forms. Health is also defined as meaning physical or mental health and, in relation to a child, child abuse[4].

A case example provides further clarification on this matter. In Chalmers v Johns[5], the Court of Appeal indicated what may amount to significant harm. The husband and wife had what the Court described as being a "tempestuous relationship". Both parties had made allegations against each other resulting in the police being called out four times due to a heated argument however the injuries sustained were of a minor nature. The court granted the wife an

[3] Davis v Johnson [1979] AC 264, 286
[4] Family Law Act 1996, s63(1)
[5] Chalmers v Johns [1999] 1 FLR 392

occupation order to exclude the husband from the family home. In upholding the husband's appeal against the order, Otton LJ stated that the evidence "fell very far short of establishing that A was likely to suffer considerable or noteworthy or important harm if the order was not made"[6], evidencing that the harm suffered is significant is necessary, but not sufficient to meet the requirements of section 33 (7). Significant harm has to be attributable to conduct of the respondent. It does not necessarily have to be intentional conduct, although lack of intent may be a relevant consideration.

If the balance of harm test does not apply or is not met in favour of the applicant, the court will consider whether to make an order by applying the discretionary checklist of factors under section 33(6) FLA 1996. In deciding whether to exercise its powers the court shall have regard to all the circumstances including:

- The housing needs and resources of each of the parties and of any relevant child;
- The financial resources of each of the parties;
- The likely effect of any order, or of any decision by the court not to exercise its powers on the health, safety or well-being of the parties and of any relevant child; and
- The conduct of the parties in relation to each other and otherwise[7].

The case of Dolan v Corby[8] raised questions as to whether the courts should approach the tests separately or whether they could be conflated. The question was also raised as to what extent section 33 (6) FLA 1996 provides the courts discretionary power to grant an order. The guidance in Chalmers v Johns[9] per Lord Justice Thorpe insinuates that applying the two subsections simultaneously to the facts of a case would be "fatal" in determining the matter. However, in Dolan v Corby[10] per Lady Justice Black, "conflating" the two provisions does not "necessarily vitiate" the exercise of discretion section.33 (6) FLA 1996 provides in granting an order. It could be argued that these two judgments are not consistent and contradict each other. Barristers Eleanor Fletcher and Juliet Chapman concluded that "despite first

[6] Ibid 398 per Otton LJ
[7] Ibid, s33(6)(a)-(b)
[8] Dolan v Corby [2011] EWCA Civ 1664
[9] Chalmers v Johns [1998] 9 WLUK 204
[10] Dolan v Corby [2011] EWCA Civ 1664

appearances”[11], the guidance in Dolan v Corby[12] follows the pre-existing guidance found in Chalmers v Johns[13]. They further explained that “the court must consider section 33 (7) and the balance of harm test first, then look at the discretionary factors under section 33(6). Conflating the provisions in the judge's reasoning will not prove fatal, but only if the case can still be properly construed as coming under the discretionary regime of section 33(6)”[14]. In regard to discretionary power provided under section 33(6) FLA 1996, they concluded that “when the court is looking at the discretionary factors, it should only grant such a “draconian' order if, per G v G, the case is 'exceptional'[15].

If the applicant is not entitled to occupy the home but is nevertheless a spouse or former spouse of the respondent, the court may have regard to some additional considerations provided in section35 (6) FLA 1996. These include:

- The length of time that has elapsed since the parties last lived together;
- The length of time that has elapsed since the marriage was formally ended; and
- Any ongoing financial remedy applications or disputes regarding the ownership of the property.

Similarly, if the applicant is not entitled to occupy the home but is a cohabitant or former cohabitant of the respondent, then the court may also have regard to the following factors laid out in section 36 (6) FLA 1996:

- The nature and length of the parties’ relationship;
- The length of time that has elapsed since the parties’ relationship came to an end;
- Any relevant children; and
- Whether there are any ongoing applications in relation to maintenance under Schedule 1 to the Children Act 1989[16].

[11] ibid
[12] Dolan v Corby [2011] EWCA Civ 1664
[13] Family Law Week, ‘Dolan v Corby: Opening the Door to Confusion in the Test for Occupation Orders?’ (2012)
[14] ibid
[15] G v G [2000] 3 FCR 53
[16] Children Act 1989, Schedule 1

One limitation is that it must be shown that the likely harm on the applicant is attributable to the conduct of the respondent. This makes the test harder for the applicant to satisfy and raises the issue of what link between the conduct and the harm is required. G v G built on the foundation of Chalmers to clarify what harm attributable to conduct means. In answer to that question, the Court of Appeal stated that "the court's concentration must be upon the effect of conduct rather than on the intention of the doer. Whether misconduct is intentional or unintentional is not the problem".

Another example of the court's interpretation of 'harm attributable to the respondent's conduct' was shown in B v B[17]. Having fled the family home owing to the husband's violence, the wife and baby were housed by the local authority in temporary, extremely poor, bed and breakfast accommodation where the mother and child occupied one room with a shower and a shared bed and 12 other people lived in the house, with only one kitchen, one toilet, and two bathrooms. The judge found that, particularly in winter when poor weather would confine them to their room, this accommodation was significantly likely to impair the baby's health and development. The Court of Appeal agreed that this was attributable to the father's conduct.

The significant harm must be 'likely'. This proves a further difficulty due to its hypothetical nature: the court must consider what is likely to happen should it make, or not make an order. At that stage, the court does not know what precise terms any order that it might make would contain. For the test to make practical sense, the court should consider the harm in the light of specific possibilities.

The Court of Appeal has highlighted on numerous occasions that the threshold for fulfilling the criteria for an occupation order is set at a high standard. In Chalmers v Johns[18] it was stated that an order that requires "a respondent to vacate a family home and which overrides property rights is a draconian order that was 'only justified in exceptional circumstances"[19]. His Lordship noted that an order may be warranted where there is actual, or a risk of, violence or harm to the victim but that this was not the situation in Chalmers v Johns. The

[17] B v B (Occupation Order) [1999] 2 FCR 251
[18] Chalmers v Johns [1999] 1 FLR 392
[19] Ibid 397 per Thorpe LJ

circumstances amounted to "domestic disharmony" which could have been controlled through the imposition of a non-molestation order. In more recent cases the Court of Appeal has adopted a broader interpretation of what amounts to an exceptional case. Grubb v Grubb[20] gives an example of circumstances supporting an occupational order which are exceptional, but do not extend to violence. The husband's conduct was controlling, including not allowing the wife her own set of keys to the house, and threatening to lock her out of the house if she did not return in time for an evening out. The Court of Appeal upheld the wife's occupation order to enable herself and the five children to reside in the six-bedroomed family home during a bitter and defended divorce. The Judge found that the wife was "under stress and needs to be separated from the husband if possible"[21]. This is an example of a broad interpretation of exceptional circumstances for granting an occupation order despite the applicant failing to establish the prospect of significant harm as required by the Act. In addition, it demonstrates that non-physical abuse can give rise to a need for an occupation order.

Furthermore, in the more recent case of Dolan v Colby[22], the Court of Appeal clearly stated that it was wrong to construe s33 as requiring violence; but that other factors were capable of making the case exceptional. Black LJ stated that Chalmers v Johns or G v G should not be read as "saying that an exclusion order can only be made where there is violence or a threat of violence. That would be to put a gloss on the statute which would be inappropriate. Exceptional circumstances can take many forms and the important thing is for the judge to identify and weigh up all the relevant factors of the case whatever their nature"[23]. In the present case, the psychiatric state of the Applicant was the central feature which made the case 'exceptional'. Barrister Kevin Gordon concluded that "it is left to the court to identify any particular exceptional circumstances, weighing their relevance to the matter before determining the final outcome"[24].

[20] Grubb v Grubb [2009] EWCA Civ 976
[21] Ibid [15]
[22] Dolan v Colby [2011] EWCA Civ 1664
[23] Ibid [24] per Black LJ
[24] Family Law week, 'Occupation Orders: Are We There Yet?' (2016)

A further case which demonstrates this is PF v CF [2016][25]. In this case, the husband appealed on the grounds that the judge had been "plainly wrong to make an occupation order where no finding of significant harm had been made…" It was held that the Judge was entitled to accept the wife's assertion as to the husband's intimidating and provocative behaviour throughout the marriage. Though the judge did not expressly say so in her Judgment, it was clear that she had concluded that the harm which the wife had suffered and was likely to suffer if the order was not made, was significant harm within the meaning of Family Law Act 1996 s.33(7)[26], therefore showing the Act does not require violence to be proved to justify the making of an occupation order.

Inevitably, issues arose in relation to the Covid-19 pandemic, particularly in the initial lockdown in March 2020. The police continued to assist victims of domestic violence in leaving their homes and seeking protection[27]. However, difficulties arose in the form of how a victim of domestic abuse, who cannot leave their home in the presence of the perpetrator could be able to seek legal advice. Another issue is that, where parties live in the same household, serving an abusive partner with an occupation order could result in further abuse as the hearing will take place remotely via telephone or video conferencing. This could lead to an aggressive reaction or pressure being placed on them to withdraw the application. Finally, issues such as financial instability and increased reliance on the family home, which have increased during Covid-19, are likely to be important considerations under section 33 (6) FLA 1996, which could potentially reduce a victim's prospects of securing an order.

Terms of an occupation order

An occupation order usually consists of either a declaratory or regulatory order. Declaratory orders generally declare existing occupation rights to the home, grant occupation rights to non-entitled applicants and extend statutory occupation rights beyond termination of the marriage or death.

Regulatory orders usually regulate the occupation rights of the dwelling for either one or both of the parties. These types of orders can also require one party to leave the home by

[25] PF v CF [2016] 12 WLUK 48
[26] Family Law Act 1996, s.33(7)
[27] Speed, A. Richardson, K. Thompson, C (2020 "Stay Safe, Stay Home, Save Lives? An analysis of the impact of Covid-19 on the ability of victims of gender-based violence to access justice" The Journal of Criminal Law

suspending or terminating occupation rights and excluding them from entering the vicinity of the home.

If an occupation order is breached, it is contempt of court. When making an occupation order, a power of arrest can be attached to the order if the respondent has used or threatened violence. This power will remain unless the court is satisfied that there is no risk of harm and the victims will be protected without the power. Where a power of arrest is attached, the police do not require a warrant to arrest the party in breach of the order. This power could provide additional protection to victims of abuse as the power may be a deterrent for abusers. However, if the power of arrest is not attached to the occupation order and the order is breached, the victim would still be able to enforce the order by applying to the court that made the order to have the respondent arrested, however this will require further recourse to the family courts.

Under section 46 FLA 1996, where the court has the power to make an occupation order, the court may accept an undertaking from any party to proceedings. An undertaking in law is a legal promise to the court generally to do something or to refrain from doing something. Under section 46 (4) FLA 1996, an undertaking is enforceable as contempt of court punishable by committal proceedings, meaning a perpetrator can face a prison sentence or an unlimited fine. However, breach of an undertaking does not constitute a criminal offence and therefore offers the victim a lower form of protection. The court may accept an undertaking in any case where it has the power to make an occupation order. An undertaking can only be made with the consent of the applicant.

Under section 33 (3) FLA 1996, an order may be granted for an indefinite period or until a specified event or further order of the court. However, this only applies if the applicant has an estate, interest or home rights in a dwelling house. For the remainder of the categories of applicants which are mentioned earlier in the review, the duration of an occupation order is usually limited to six months initially (with, in limited circumstances, the potential one or more six month extensions). In addition, if an occupation order is made without notice, the duration must be fixed and include a date and time when the order is to end. In practice, because of the restrictions on the respondent, orders are unlikely to be granted for longer than six months.

What is the court process?

Occupation orders do not attract a court fee, meaning applications are free. However, applications may incur costs of legal representation if they are not eligible for legal aid. When an occupation order is made on an emergency basis it is possible to apply to the court for an order on an 'ex parte' basis. This refers to legal proceedings which are conducted without notice and without the presence of the respondent(s). The court may make an order without notice where it considers it 'just and convenient' to do so.[28] The applicant is obliged to file evidence in support of the application, stating why it has been made without notice[29]. When an order is made without notice then the court must allow the respondent an opportunity to make full representations as soon as possible[30]. An ex parte order must be made with a fixed end date, typically no longer than 14 days. After this hearing there is a number of potential outcomes including:

- The respondent may agree to the order, in which case the order would be finalised.
- With the applicant's consent, the court may permit the respondent to give an undertaking which would be legally binding.
- The respondent may contest the order. In this case, a fact-finding process may commence to determine whether the allegations should be upheld, after which a final hearing would be needed to fully resolve the matter.

In practice, however, courts are reluctant to grant ex-parte occupation orders and will consider the respondents' human rights which may result in the application being re-listed on notice. This is because a successful application may restrict the respondents' use of the home and/or leave them without suitable alternative accommodation.

[28] Family Law Act 1996, S.45(1)
[29] Family Procedure Rules, 2010 SI 2010/2955 10.2(4)
[30] Family Law Act 1996, S 45(3)

Legal AId

Scope of legal aid in family law proceedings

In order for a victim of abuse to be eligible for legal aid, the dispute must fall within the scope of the legal aid scheme, as set out in the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Following the introduction of LASPO, the majority of private family law matters were removed from the scope of legal aid. However, the Act created an exemption which maintained public funding for parties who are able to provide evidence that they are a victim of domestic violence where the alleged perpetrator is the other party to proceedings. Once a victim of domestic abuse qualifies for legal aid in one set of proceedings then they should be eligible in all proceedings that may be required[31]. This recognises that "the issues surrounding an abusive relationship can rarely simply be dealt with by way of an injunctive order alone and other inter-related family proceedings may be required. For example, there may be property issues to resolve, arrangements to be made for children or, if the victim and the perpetrator are married, divorce proceedings to be considered"[32].

In order to demonstrate that a victim falls within this exemption, they must provide the necessary gateway evidence.

Gateway Evidence

Victims of abuse must evidence that they have experienced domestic abuse. The Civil Legal Aid (Procedure) (Amendment) Regulations 2016 outlines the gateway evidence requirements. Under Regulation 33, evidence must be provided in one or more of the following forms as described. These include:

- A relevant unspent conviction for a domestic offence;
- A relevant police caution for a domestic violence offence;

[31] UK Government, 'Legal Aid' (2020) < https://www.gov.uk/legal-aid/what-you-can-get> [Accessed 21 November 2020]

[32] Richardson, K and Speed, A (2019) "Two Worlds Apart: A Comparative Analysis of the Effectiveness of Domestic Abuse Law and Policy in England and Wales and the Russian Federation" The Journal of Criminal Law p.5.

- Evidence of a relevant criminal proceedings for a domestic violence offence which have not been concluded;
- A relevant protective injunction which is in force or had been granted;
- An undertaking in England and Wales, under section 46 of the Family Law Act 1996;
- A Domestic Violence Protection Notice;
- A letter from a relevant health professionals or domestic abuse support service; or
- An undertaking in England and Wales under section 46 of the Family Law Act 1996.

Controversially, at the onset of the legislation, much of this evidence needed to relate to incidents that took place within the two years prior to the date of the legal aid application. Many victims were unable to meet these requirements due to not reporting the abuse or it taking place outside of the relevant time periods. In addition, the restrictive gateway evidence did not accommodate difficult to evidence forms of domestic abuse such as financial abuse. The consequence was that many victims of domestic abuse were not eligible for legal aid and therefore able to secure the representation they needed in court proceedings (Amnesty International 2016; The Law Society 2017). In February 2016, the Court of Appeal found that the limited evidence requirements prevented survivors of abuse from qualifying for legal aid and were therefore unlawful (*Rights of Women v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91). The court described that there was a 'formidable catalogue of areas of domestic violence not reached by a statute whose purpose is to reach just such cases' (Ibid, 44). In April 2016, new regulations were introduced extending the 24-month time limit to 60 months and introducing new forms of acceptable gateway evidence for financial abuse into regulation 33(2) of the Civil Legal Aid (Procedure) (Amendment) Regulations 2016. The regulations were subsequently amended again in January 2018 to remove the time limit on abuse evidence and to broaden the scope of acceptable gateway evidence to include letters from domestic violence support organisations, independent domestic violence advocates and housing support officers (Legal Aid Agency 2018).

Whilst the amendments have clearly been a positive development, it remains the case that many victims are still not able to secure the necessary evidence. Domestic abuse is an underreported offence and many victims cannot therefore obtain evidence from the police (Office of National Statistics 2019). Research has also highlighted that some organisations are

not willing to prepare letters that would allow a victim to secure legal aid, charge fees for preparing letters which are unaffordable and that victims experience data protection issues when attempting to access evidence from the police (Syposz 2017).

If the victim is able to provide the necessary gateway evidence, they must then satisfy the means and merits test.

Means test

The legal aid means test requires an assessment of the applicant's income and capital. Firstly, under the income test, the applicant must have a gross monthly income of £2,657 or less. If the applicant has more than four dependent children a further £222 should be added to this figure for the fifth child and each additional child after that.[33] Regulation 21 of LASPO provides that gross income is an applicant's income, including wage, benefits and any other form of income, before any deductions are made.[34] However, some deductions are excluded from this calculation. These deductions are; any housing benefit paid under section 130 of the Social Security Contributions and Benefits Act 1992 and those that are disregarded in regulation 24.[35] Some of the disregarded benefits under regulation 24 are Disability Living Allowance, Carer's Allowance, and transfer advances of Universal Credit.[36] Applicants will immediately satisfy the income threshold if they receive certain benefits (known as passporting) such as Income Support, Income-Based Job Seekers Allowance, Universal Credit, Guarantee Credit element of Pension Credit or Income-Related Employment and Support Allowance.[37]

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[33] *ibid*

[34] Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (gov.uk, February 2019)

[35] 'Guide to Determining Financial Eligibility for Controlled Work and Family Mediation April 2019' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793459/Guide_to_determining_controlled_work_.pdf> accessed 20 November 2020

[36] Legal Aid Sentencing and Punishment of Offenders Act 2012, regulation 24

[37] 'Civil legal aid: means testing' (gov.uk, 1 June 2014) <https://www.gov.uk/guidance/civil-legal-aid-means-testing> accessed 30 October 2020

If an applicant's gross income exceeds £2,657 (or the higher amount, depending on their number of children) they will not be eligible for funding and will not progress to the next stage. If an applicant has an income that differs on a monthly basis the calculation is based on the calendar month prior to the application.[38]

Assuming the gross income test is satisfied, the second element that is considered under the means test is the applicant's disposable income. This is calculated by deducting certain living costs from the applicant's gross income.[39] Fixed allowance deductions are made for employment expenses, partners and dependants. The fixed rate allowance for employment expenses is £45, for a partner is £184.46, and for each dependent child is £296.65. Other deductions are made for tax, national insurance, maintenance paid for the care of children, housing costs (to a maximum of £545), child-care costs incurred because of work or a course of study outside the home.[40] The disposable income limit is £733 per month, meaning the applicant's monthly disposable income should be less than this figure in order to be eligible for legal aid.[41] If an applicant's disposable income is between £315 and £733 the applicant will only be eligible for partial legal aid, meaning the applicant will have to contribute to part of the costs.[42]

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[38] 'Guide to Determining Financial Eligibility for Controlled Work and Family Mediation April 2019' <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793459/Guide_to_determining_controlled_work_.pdf> accessed 20 November 2020

[39] Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (gov.uk, February 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf>accessed 3 November 2020

[40] Legal Aid agency (April 2020) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/899469/Eligibility-keycard_56.pdf> accessed 19 November 2020

[41] 'Civil legal aid: means testing' (gov.uk, 1 June 2014) <https://www.gov.uk/guidance/civil-legal-aid-means-testing> accessed 30 October 2020

[42] 'Means Assessment Guidance' (Legal Aid Agency) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793462/Means_Assessment_Guidance.pdf> accessed 20 November 2020

Finally, the applicant's capital position must be considered, even for those who have been passported through the income element of the means test.[43] Regulation 30 of LASPO provides that, unless exempt by the regulations, every capital resource belonging to the individual on the date the application is made must be included.[44] Capital includes any stocks and shares, savings, premium bonds and property etc.[45] The first £100,000 of equity in an applicant's main dwelling is disregarded in the financial determination.[46] The capital limit is set at £8,000 for all civil legal services.[47] Any applicant with capital above £3,000 is required to pay a contribution to the costs and are only entitled to partial legal aid.[48]

The Legal Aid Agency has discretion to waive all upper eligibility limits if the applicant is applying for legal aid for an order for protection from domestic violence (such as an occupation order).[49] Therefore, victims of domestic abuse could satisfy the means test even if they surpass the upper eligibility limits. Although upper eligibility limits can be waived, any contribution from income or capital cannot be waived. Therefore, contributions will still be required by the victim which may be unaffordable.

Despite the government's objective that victims of domestic abuse should continue to be eligible for legal aid, research demonstrates that over 40% of victims are no longer able to access public funding (LAPG 2017). Whilst the government have committed to reviewing the

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[43] 'Civil legal aid: means testing' (gov.uk, 1 June 2014) <https://www.gov.uk/guidance/civil-legal-aid-means-testing> accessed 30 October 2020

[44] Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (gov.uk, February 2019) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf>accessed 3 November 2020

[45] 'Civil legal aid: means testing' (gov.uk, 1 June 2014) <https://www.gov.uk/guidance/civil-legal-aid-means-testing> accessed 30 October 2020

[46] 'Civil legal aid: means testing' (gov.uk, 1 June 2014) <https://www.gov.uk/guidance/civil-legal-aid-means-testing> accessed 30 October 2020

[47] 'Civil legal aid: means testing' (gov.uk, 1 June 2014) <https://www.gov.uk/guidance/civil-legal-aid-means-testing> accessed 30 October 2020

[48] 'Means Assessment Guidance' (Legal Aid Agency) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793462/Means_Assessment_Guidance.pdf> accessed 20 November 2020

[49] 'Civil legal aid: means testing' (gov.uk, 1 June 2014) <https://www.gov.uk/guidance/civil-legal-aid-means-testing> accessed 30 October 2020

legal aid means test, it is unlikely that wide-reaching revisions will be made, in light of the cost-saving objectives.

Merits test

The Legal Aid Agency will look at the strengths and weaknesses of the case to establish whether an applicant will pass the merits test.[50] The Civil Legal Aid (Merits Criteria) Regulation 2013[51] sets out a number of factors that the Legal Aid Agency should consider. Primarily, this includes the applicant's prospects of success.[52] In order for legal aid funding to be available the prospects of success must be at least 45% (this having been amended by the Secretary of State for Justice from 50%).[53] The Legal Aid Agency will also look at whether it is in the public interest for funding to be granted.[54] The benefit can be to the public at large[55] or to an identifiable class of persons[56]. Finally, the proportionality test will be considered.[57] Where the Legal Aid Agency is satisfied that the likely benefits of the proceedings to the individual and others justify the likely costs, having regard to the prospects of success and all the other circumstances of the case then the proportionality test will be met.[58]

The impact of being denied legal aid

In the absence of legal aid, the victim will have to decide between representing themselves as a litigant in person, not pursuing an application or paying privately for legal representation – an option which is not financially viable for all litigants. According to research by Rights of Women, 53% of women who could not provide the necessary gateway evidence stopped

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[50] 'A guide to family law legal aid' (rights of women) <https://rightsofwomen.org.uk/wp-content/uploads/2014/10/A-Guide-to-Family-Law-Legal-Aid-DIGITAL.pdf>accessed 2 November 2020
[51] The Civil Legal Aid (Merits Criteria) Regulation 2013, part 1
[52] The Civil Legal Aid (Merits Criteria) Regulation 2013, part 1(4-5)
[53] Steve Hynes, 'Change to legal aid merits test' (November 2016) <https://www.lag.org.uk/article/201635/change-to-legal-aid-merits-test> accessed 19 November 2020
[54] The Civil Legal Aid (Merits Criteria) regulation 2013, part 1(6)
[55] *ibid*, part 1(6)(1)(a)
[56] *ibid*, part 1(6)(1)(b)
[57] The Civil Legal Aid (merits criteria) regulation 2013, part 1(8)
[58] *ibid*

pursuing action, 29% paid for their own legal representation and 28% of those victims represented themselves at court.[59] The benefits of legal advice and representation are well documented. Potential litigants without access to early legal advice may not have sufficient knowledge of their legal rights to understand they have a case (Sullivan 2010). They may also struggle to identify the key issues in dispute and put forward their strongest legal arguments (Richardson and Speed 2019). In the case of applicants, this can result in cases lacking merit or serial applications (Trinder et al 2014). Litigants in person report experiencing difficulties with following court procedures including feeling unable to prepare and file paperwork, comply with directions, and secure necessary evidence, such as appointing and funding relevant experts (Organ and Sigafoos 2018).Moreover, unrepresented litigants may be required to cross-examine their abuser, which is a daunting prospect for many.[60] These factors invariably impact the participatory nature of family proceedings as litigants may not have sufficient opportunity to be heard and findings/decisions may be reached on the basis of insufficient information.

In 2014, The Bar Council issued the report 'LASPO: One Year On'[61] which highlighted how the strict legal aid means tests made it difficult for litigants to access justice. The report highlighted a steep decline in new matters started following the introduction of LASPO, with a more gradual decline over the last 3 years. This illustrates that since the implementation of the Act the lack of financial help has been a continuous problem in helping people start their cases.

The increase in unrepresented litigants has led to delays in processing cases in the family courts. The Family Court statistics show that between April and June 2017 private law cases took an average of 24 weeks to reach final resolution. This is an increase from 14.7 weeks over the same period in 2015.[62] There are various reasons why cases are taking longer to

[59] ibid Appendix A
[60] *R (Rights of Women) v Lord Chancellor and Secretary of State for Justice Court of* Appeal [2016] EWCA Civ 91
[61] The Bar Council, *The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO): One year on final report* (2014)
[62] Kayliegh Leanne Richardson & Ana Kate Speed. 'Restrictions on legal aid in family law cases in England and Wales: creating a necessary barrier to public funding or simply

process. Judges are taking more time to ensure litigants in person understand the different stages of a case and the demands that may be required from them. Moreover, judges are also more willing to grant extensions to litigants in person to ensure there is a fair trial. Whilst this is seemingly fair to ensure support for litigants in person, this can result in the courts' time being diverted to cases which are not as urgent and can lead to victim disengagement.

Barriers to legal aid specific to victims of economic abuse

Victims of economic abuse may face difficulties when attempting to obtain occupation orders. As this report has already considered, the initial legal aid regulations were overly restrictive and did not sufficiently allow victims of economic abuse to obtain gateway evidence. In Rights of Women v The Lord Chancellor and Secretary of State for Justice[63] it was successfully argued that the regulations were not inclusive of all forms of domestic abuse. The Civil Legal Aid (Procedure) (Amendment) Regulations 2016 were revised to give the Legal Aid Agency discretion to accept any form of evidence of economic abuse.[64] Nonetheless, research suggests that the victims continue to experience problems accessing appropriate documents (for example, bank statements and mortgage statements).[65] Evidencing this, a respondent in Syposz's study stated "*how unbelievably stupid is it that somebody can't receive public funding because they haven't been able to provide bank statements in relation to their means when the bank account is controlled by the person who's financially abusing them, who won't give access to the woman, to his bank statement, and so she's not able to get public funding until she can show something about which the protective order relates to?".*[66] Going forward, it is hoped that the new statutory definition of domestic abuse in the Domestic Abuse Act

increasing the burden on the family courts?' (2019) < oscola_4th_edn_hart_2012.pdf (ox.ac.uk)> accessed 23 November 2020

[63] *R (Rights of Women) v Lord Chancellor and Secretary of State for Justice Court of Appeal [2016]* EWCA Civ 91

[64] ibid

[65] Farai Syposz, 'Research investigating the domestic violence evidential requirements for legal aid in private family disputes' [2017] <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719408/domestic-violence-legal-aid-research-report.pdf> accessed on 05 November 2020

[66] ibid

2021 will create more awareness and training around economic abuse and the need to accommodate such forms of abuse more effectively within the legal aid rules.

Statistics

What do the Government National Statistics show from 2010 to now?

The five tables used in this section are based on official Government statistics.[67]

Table 1: number of non-molestation orders and occupation orders made each year

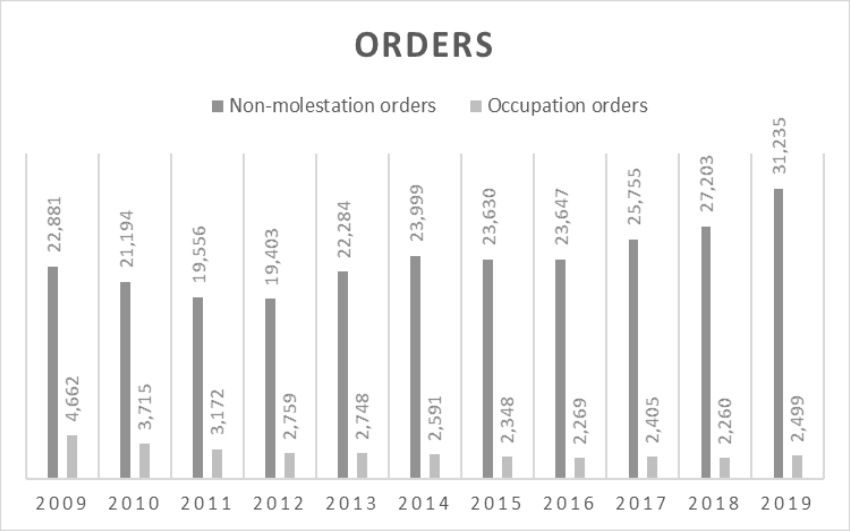


Table 2: number of applications made for non-molestation orders and occupation orders each year

[67] Govuk, 'Family Court Statistics Quarterly: January to March 2020 ' (*National Statistics*, 25 June 2020) < https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2020 > accessed 12 November 2020.

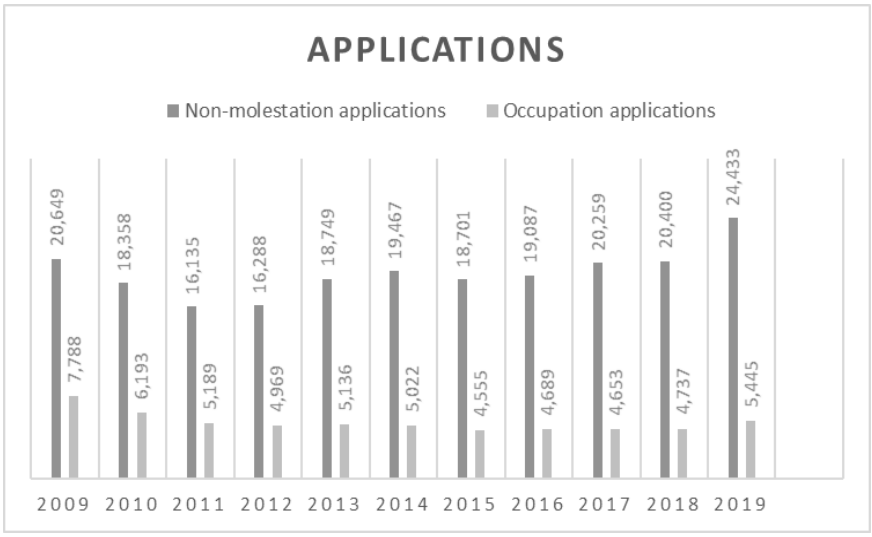


Table 3: Full data set taken directly from Family Court Statistics Quarterly: January to March 2020

Year	Quarter	Applications				Orders made			
		Non-molestation applications	Occupation applications	**Total applications**	**Total cases started**	Non-molestation orders	Occupation orders	**Total orders made**	**Total cases concluded**[3]
2009		20,649	7,788	**28,437**	-	22,881	4,662	**27,543**	-
2010		18,358	6,193	**24,551**	-	21,194	3,715	**24,909**	-
2011		16,135	5,189	**21,324**	**17,057**	19,556	3,172	**22,728**	**14,512**
2012		16,288	4,969	**21,257**	**17,318**	19,403	2,759	**22,162**	**14,574**
2013		18,749	5,136	**23,885**	**19,738**	22,284	2,748	**25,032**	**16,915**
2014		19,467	5,022	**24,489**	**20,295**	23,999	2,591	**26,590**	**17,197**
2015		18,701	4,555	**23,256**	**19,508**	23,630	2,348	**25,978**	**16,400**
2016		19,087	4,689	**23,776**	**20,056**	23,647	2,269	**25,916**	**16,611**
2017		20,259	4,653	**24,912**	**21,214**	25,755	2,405	**28,160**	**17,497**
2018		20,400	4,737	**25,137**	**21,358**	27,203	2,260	**29,463**	**17,828**
2019		24,433	5,445	**29,878**	**25,373**	31,235	2,499	**33,734**	**21,640**

Looking at Tables 1-3, it is clear to see that there are some trends occurring. The first of these being that there are far more applications made for non–molestation orders compared to occupation orders. The yearly average from 2009 to 2019 for non–molestation applications is 19,321 compared to 5,307 for occupation order applications. Looking at the change over this period of time; there has been little fluctuation between applications made on both parts as they have both been fairly consistent. In relation to the orders being granted there are many more non molestation orders granted. This aligns with the fact that there are more applications made.

Table 4: Non-molestation orders made compared to applications

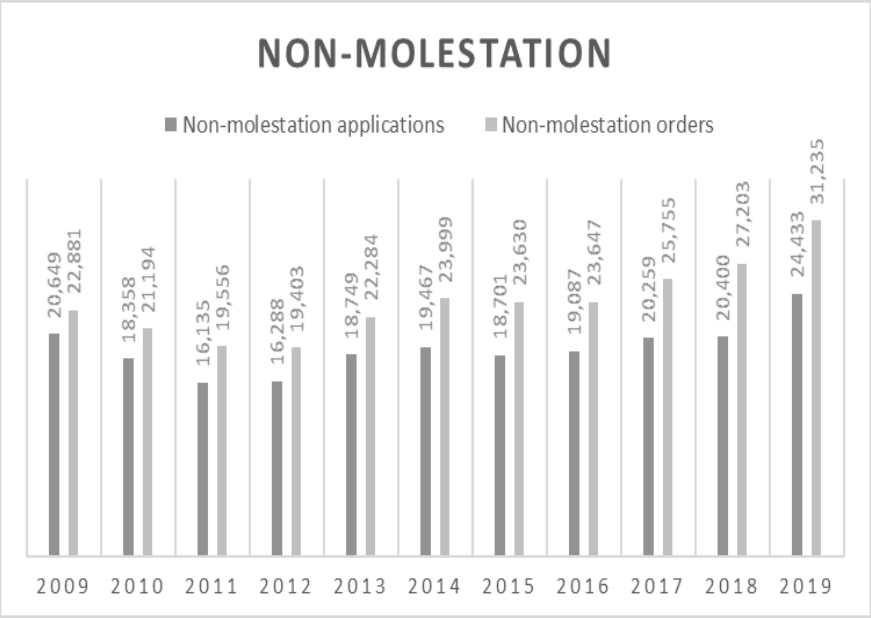
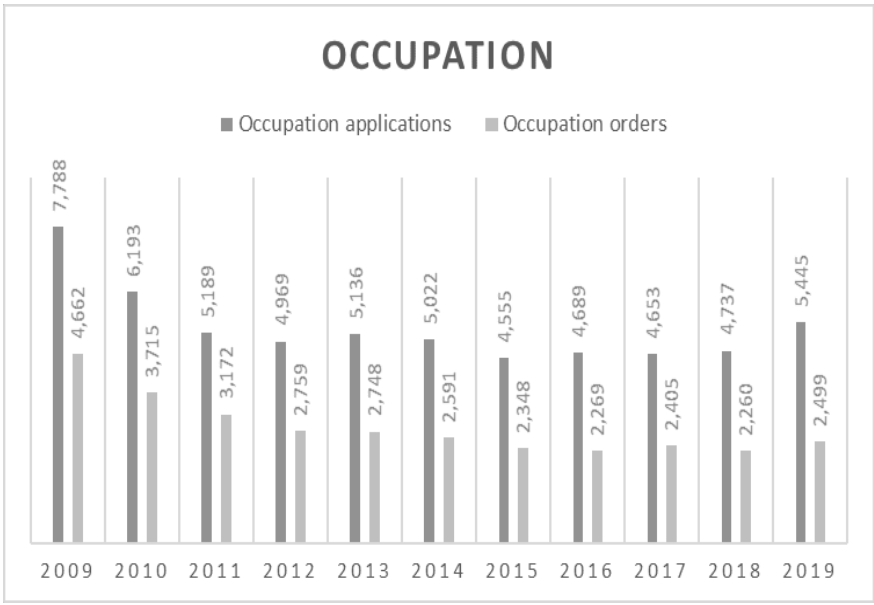


Table 5: Occupation orders made compared to applications



The non-molestation order to application ratio is much higher than that of the occupation ratio. Through the early years of 2009 – 2014 there has been around 2,000 – 3,000 more non-molestation orders granted than applications made. This may be because some non-molestation orders are granted alongside an occupation order which means that an

application for a non-molestation order hasn't been made but it has been granted[68]. Under section 42 (2) (b) of the Family Law Act 1996, the courts can grant a non–molestation order for the benefit of any other party/children to the proceedings even if an application has not been made[69]. The court may also find it necessary to grant a non– molestation order with a zonal clause (setting out that the respondent is not to go within a certain distance of the property) instead of an occupation order.

From 2015 –2019 the difference between the number of applications and orders for non-molestation orders has increased to 4,000 – 7,000. Therefore, there is a clear trend of more non–molestation orders being granted through recent times.

However, this is not the same for occupation orders. According to the statistics there are around 2,000 – 3,000 fewer occupation orders granted compared to applications made. The ratio has stayed fairly consistent from 2009 – 2019 with the orders falling and rising in accordance with the number of applications made. Recently over 2018 – 2019 there has been a rise in occupation order applications and a fall in orders given.

In conclusion, there has been fairly little fluctuation in applications for both non-molestation orders and occupation orders but the main findings are that many more non-molestation orders are granted in comparison to the applications made. For occupation orders it is the opposite, with less orders being granted in comparison to the applications. There has also been a steady increase in the number of non-molestation orders granted over this time period and the number of occupation orders granted over this time period has slowly fallen. In 2009 the percentage of occupation orders granted in relation to applications was 59.86%. This then fell to 51.59% in 2014 and in 2019 it has fallen even further to 45.9%.

Have Domestic Violence Protection Orders (DVPO) replaced Occupation orders?

[68] Rights of Women < https://rightsofwomen.org.uk/get-information/violence-against-women-and-international-law/domestic-violence-injunctions/?fbclid=IwAR2nkVClaqcVUcbaUtVIlb2PliJsbz3OwR2lAl_NinZ--jCIOGLtHTqIkoc#An%20occupation%20order > accessed 13 November 2020.
[69] Family Law Act 1996 s 42 (2)(b).

The reason for this slight fall in occupation orders could be due to the introduction of Domestic Violence Protection Orders (DVPO) in 2014. "DVPOs are a civil order that fills a "gap" in providing protection to victims by enabling the police and magistrates' courts to put in place protective measures in the immediate aftermath of a domestic violence incident where there is insufficient evidence to charge a perpetrator and provide protection to a victim via bail conditions."[70]

The statistics for the years 2014[71], 2017[72], 2018[73] and 2019[74] (the only years for which statistics were easily available) were used to create Table 6 and 7 below.

As we can see from Table 6 below, the number of applications and granted DVPOs has risen from 2014 to 2019. From 3,000 DVPOs granted in 2014 to around 6,500 in 2019 which shows an increase of 116.67%.

[70] 'Domestic Violence Protection Notices (Dvpns) And Domestic Violence Protection Orders (Dvpos) Guidance' (*GOV.UK*, 2020) < https://www.gov.uk/government/publications/domestic-violence-protection-orders/domestic-violence-protection-notices-dvpns-and-domestic-violence-protection-orders-dvpos-guidance-sections-24-33-crime-and-security-act-2010 > accessed 17th November 2020.

[71] Home office, 'One year on – Home Office assessment of national roll-out ' (*Domestic Violence Protection Orders (DVPO)*, 8 March 2016), pg7 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/506148/2016-03-08_DVPO_report_for_publication.pdf > accessed 17th November 2020.

[72] Office for National Statistics, 'Domestic abuse in England and Wales - Appendix tables' 'Year Ending March 2017 edition of this data set' (*Crime and justice*, 22 November 2018), table 25 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/domesticabuseinenglandandwalesappendixtables > accessed 17th November 2020.

[73] Office for National Statistics, 'Domestic abuse in England and Wales - Appendix tables' 'Year Ending March 2018 edition of this data set' (*Crime and justice*, 22 November 2018), table 25 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/domesticabuseinenglandandwalesappendixtables > accessed 12 November 2020.

[74] Office for National Statistics, 'Domestic abuse in England and Wales - Appendix tables' 'November 2019 edition of this dataset (*Crime and justice* , 25 November 2019) ,table 2 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/domesticabuseandthecriminaljusticesystemappendixtables> accessed 17th November 2020.

Table 6: number of DVPO applications compared to the number of DVPOs granted

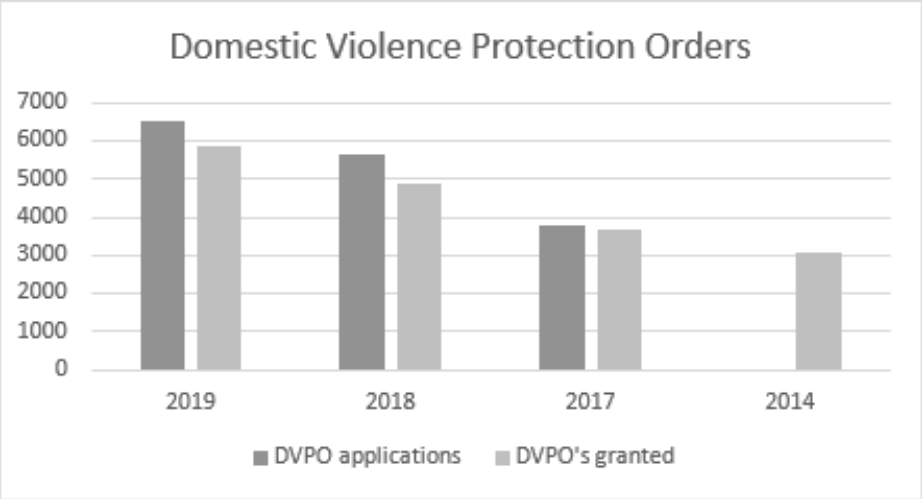
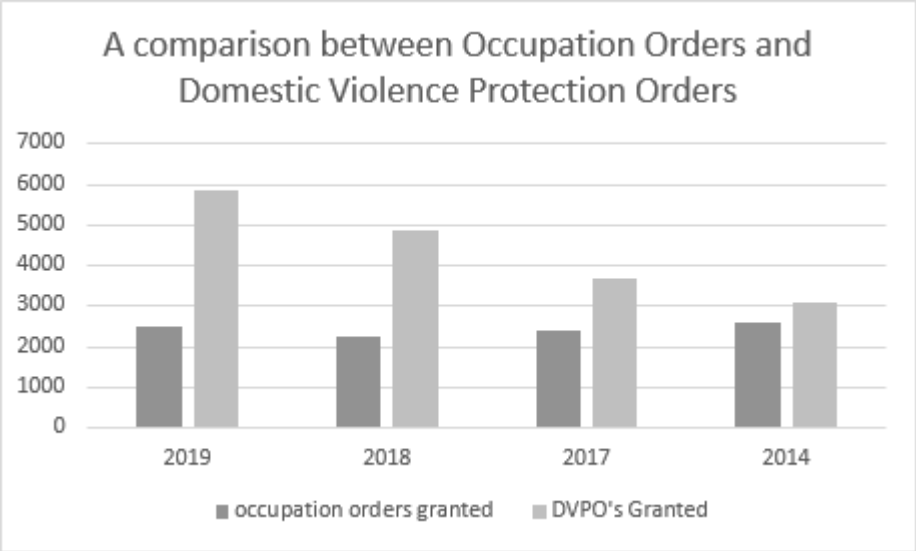


Table 7: A comparison between occupation orders and DVPOs



When comparing occupation orders and Domestic Violence Protection Orders (Table 7) we can see clearly that there is a higher amount of DVPOs granted. In 2019, only 2,499 occupation orders were granted compared to almost 6,000 DVPOs.

Although occupation orders have fallen slightly from the data shown it is not clear whether the reason for this is because occupation orders have been replaced by DVPOs.

Summary of the statistics

In the recent years, there have been more applications and fewer orders being granted. It is important that we look into the reason for this as it does not seem to be a problem with victims being able to apply but rather the courts' reluctance to grant orders. Based on the statistics considered in this section, less than 50% of applications for occupation orders are successful.

One reason that may account for the number of unsuccessful applications is the issue of representation. Table 8[75] below illustrates the number of represented and unrepresented applicants and respondents in domestic violence family court proceedings. As we can see from the table, more applicants are unrepresented in the recent years, than 2015/2016. This may be a reason why there is a slight decrease in occupation orders granted as it shows people may not be receiving proper legal advice and support to make a successful application. This issue will be considered in more detail in the next part of this article.

Table 8: number of represented vs unrepresented parties in domestic violence family court proceedings

Year	Quarter	Total number of cases started	Cases with at least one hearing	Applicants		Respondents		Total number of parties
				Represented Parties	Unrepresented Parties[3]	Represented Parties	Unrepresented Parties[3]	
Domestic Violence								
2011		**17,057**	**10,918**	9,390	1,609	2,612	8,697	**22,308**
2012		**17,318**	**10,558**	8,853	1,751	2,233	8,683	**21,520**
2013		**19,738**	**11,621**	9,427	2,256	1,839	10,163	**23,685**
2014		**20,295**	**12,452**	9,552	2,966	1,828	11,056	**25,402**
2015		**19,508**	**13,196**	9,967	3,313	1,778	11,908	**26,966**
2016		**20,056**	**14,382**	10,614	3,841	1,882	13,020	**29,357**
2017		**21,214**	**16,155**	11,557	4,663	1,981	14,596	**32,797**
2018		**21,358**	**16,565**	11,055	5,590	1,955	14,834	**33,434**
2019		**25,373**	**19,619**	13,063	6,625	2,204	17,677	**39,569**
2012	Q1	**4,326**	**2,699**	2,280	442	605	2,198	**5,525**
	Q2	**4,265**	**2,580**	2,177	411	558	2,096	**5,242**
	Q3	**4,468**	**2,730**	2,281	459	571	2,261	**5,572**
	Q4	**4,259**	**2,549**	2,115	439	499	2,128	**5,181**
2013	Q1	**4,571**	**2,730**	2,282	460	540	2,259	**5,541**
	Q2	**4,712**	**2,765**	2,225	554	422	2,451	**5,652**

[75] Govuk, 'Family Court Statistics Quarterly: January to March 2020 ' (*National Statistics*, 25 June 2020) < https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2020 > accessed 12 November 2020.

Methodology

This report draws on data obtained from a mixed-methods study conducted between November 2020 and January 2021. Ethical approval for the study was granted by Northumbria University.

An online questionnaire was designed to elicit the views of professionals and support services who had represented or otherwise supported victims to apply for occupation orders in England and Wales. Questionnaires were selected for their capacity to allow a large research population to be assessed with relative ease.[76] A combination of closed and open questions were used to enable patterns to be identified from the data whilst also providing the respondents an opportunity to expand upon or justify their responses.[77] The questionnaire was completed by 40 professionals. Responses were received from trainee solicitors, solicitors, barristers, Independent Domestic Violence Advisers (IDVAs), support workers/advocates and McKenzie Friends from all judicial circuits across England. Two of the responses were excluded from the analysis on the basis that the practitioners' experience was outside the jurisdiction.

In-depth semi-structured interviews were also conducted by the supervisors of this project with eight survivors of domestic abuse about their experiences of applying for occupation orders. The researchers were keen to 'establish rather than deny a relationship between the researcher and the researched' in order to 'encourage elaboration and the empowerment of interviewees'.[78] Recent research suggests that 'sharing the story' is an important component of 'thrivership' – the transition from surviving to thriving after domestic abuse.[79] Notwithstanding the potential benefits for survivors of participating in the study, the researchers were mindful of the need to mitigate the potential for re-traumatisation[80] and

[76] S. Rasinger, Quantitative research in linguistics: An introduction (Research Methods in Linguistics) (2013) (London: Bloomsbury Academic, 2013)
[77] S. Rahman, 'The Advantages and Disadvantages of Using Qualitative and Quantitative Approaches and Methods in Language "Testing and Assessment" Research: A Literature Review' (2017) 6:1 Journal of Education and Learning 102
[78] C. Hoyle, 'Feminism, victimology and domestic violence' in S Walklater (ed) Handbook of Victims and Victimology (Abingdon: Routledge) 148.
[79] I. Heywood, D. Sammut, C. Bradbury-Jones, 'A qualitative exploration of 'thrivership' among women who have experienced domestic violence and abuse: development of a new model' (2019) 19 BMC Women's Health 106
[80] P. Dunn, 'Matching service delivery to need' in S Walklate (ed) Handbook of Victims and Victimology, (Abingdon: Routledge) 255–281

this was a guiding feature in the research design. In an effort to reduce any ethical concerns, the researchers acted in compliance with the World Health Organisation ethical and safety recommendations for intervention research on violence against women.[81]

Interview participants were recruited through a poster providing key details of the study. The poster was sent to domestic abuse support services (including Surviving Economic Abuse) and shared on social media. Eight individuals from across England and Wales responded to the invitation. The invitation was not restricted to any gender but all of the individuals who came forward were female. Interviews were conducted with all of the women who wished to participate notwithstanding that two did not satisfy the study's criteria because the applications were made outside the jurisdiction of England and Wales. Supporting Heywood et al's findings[82], many of the interview respondents volunteered that their rationale for participating was to improve the effectiveness of the law for other victims of abuse. The analysis which follows represents the views of the six women whose application fell within the jurisdiction of England and Wales (Participants A, B, C, E, F and G).

All of the interviews were conducted remotely on Microsoft Teams. This decision was one of 'methodological necessity' owing to the lockdown regulations.[83] Johnson et al recognise that whilst interviews conducted remotely 'do not significantly differ in interview length, subjective interviewer ratings and substantive coding, they likely do often come at a cost to the richness of information produced'.[84] This is largely because in-person interviews 'provide the most natural conversational setting, the strongest foundation for building rapport, and the best opportunity to observe visual and emotional cues' whereas remote interviews can be 'difficult to manage, more likely to result in misunderstandings and limited in their ability to generate meaningful conversations'.[85] It is the researchers' position that the risk of remote interviewing affecting the validity of the findings was mitigated by virtue of the interviewers being qualified family law solicitors. Accordingly, the researchers are experienced in both

[81] World Health Organisation and RTI International, 'Ethical and safety recommendations for intervention research on violence against women: building on lessons from the WHO publication Putting women first: ethical and safety recommendations for research on domestic violence against women' (Geneva: World Health Organisation, February 2016)
[82] I. Heywood, D. Sammut, C. Bradbury-Jones, n 34 above
[83] D. Johnson, C. Scheitle and E. Ecklund.'Beyond the In-Person Interview? How Interview Quality Varies Across In-person, Telephone and Skype Interviews' (2019) *Social Science Computer Review* 3
[84] ibid 1
[85] ibid 2-3

conducting fact-finding exercises and the interviews were overwhelmingly natural and conversational interactions. Utilising video conferencing facilities also ensured that non-verbal and emotional cues could be identified. A notable benefit of conducting the interviews remotely, was that it allowed the researchers to gain access to participants in geographical regions which would otherwise be unrepresented in the data. Further, it allowed the participants to participate from a location which was comfortable to them. The survivors could protect their anonymity by blurring out their background or joining the call using a pseudonym. At the start of the interview and, if necessary, at appropriate intervals throughout, the researchers made the interviewees aware of the availability of support through formal and informal channels. All interviews were recorded with the recordings being deleted once they had been transcribed. At this stage, any potentially identifying information was anonymised. The qualitative data was coded using NVivo, which is recognised for providing a more rigorous approach than manual or other digital processes.[86]

[86] R. Hoover and A. Koerber 'Using NVivo to Answer the Challenges of Qualitative Research in Professional Communication: Benefits and Best Practices Tutorial' (2011) 54:1 *IEEE Transactions on Professional Communication* 68

Results of the survey of professionals

A copy of the full survey and summary of responses can be found at Appendix A of this report. This section presents the findings of some of the key questions from the survey.

Rates of enquiries, applications and orders

See questions 5-8 of Appendix A.

Thirty of the professionals surveyed had been supporting victims of abuse for over five years. Half reported an increase in enquiries about occupation orders over that period, 23% noticed no change and 23% stated there had been fewer enquiries. In relation to orders sought, 40% reported that they apply for more orders now than they had done five years previously, 17% stated they apply for fewer orders and a third noted no change. The majority (57%) considered that the family courts are less willing to grant occupation orders now than they were five years ago, which is in line with the national statistics considered above.

When examining the results by geographical area, the only areas where any professionals noted an increased willingness by the judiciary to grant occupation orders were the South East and North West. Despite this, there were still more professionals in those areas who perceived that the judiciary were less willing to grant orders. This indicates that there is not an inconsistency which can be accounted for by an approach in a specific geographical area but rather there may be inconsistencies amongst individual judges working within specific courts. This is further compounded by the reasoning proposed by the professionals for their response. Professionals who reported an increased willingness by the judiciary to grant orders, attributed this to increased awareness of domestic abuse. However, within those same areas, some of the professionals who reported that the judiciary appeared to be stricter when making orders, considered this was due to a lack of awareness of the impact of domestic abuse on the victim. This suggests there is a difference in experience depending on the judge involved and raises concerns about a potential judicial lottery.

Comparisons with non-molestation orders

All professionals were in agreement that clients will usually apply for a non-molestation order alongside an occupation order and the majority (65.7%) stated that, in their experience, the courts would be more likely to grant a non-molestation order than an occupation order. This mirrors the national statistics outlined earlier in this report.

The impact of Covid-19 lockdown measures

See questions 9 – 11 and 17-18 of Appendix A.

Number of enquiries

The majority of professionals (52.6%) reported a change in the number of enquiries received about occupation orders since Covid-19 lockdown measures were introduced in March 2020. There was a split between those who felt that the number of enquiries had increased (42.1%) and those reporting that they had received fewer enquiries (18.4%).

Two of the professionals stated:

> *Lockdown has resulted in a significant increase in domestic abuse, with victims who have experienced abuse for years feeling that it has become so significant as a result of being with their abuser constantly that once lockdown rules were lifted, they finally sought support and advice*.

> *When Covid-19 broke and many victims were forced into lockdown with their abusers this highlighted the situation and brought about a need to leave the relationship and end the abuse. The relief of work, seeing family and friends became almost impossible. Therefore, many victims have stated that Covid-19 has highlighted to them the impact of DV on their mental health and quality of life – for them and their children – and this had led to more victims reaching out for support and protection orders.*

Whilst Covid may therefore have been the 'final straw' for some survivors, for many other survivors Covid-19 has exacerbated pre-existing barriers to accessing advice and support which, for many, is a precursor to engagement with the family courts. Existing research has highlighted physical barriers to seeking support where victims remained in the same home as

their perpetrator and that women are disproportionately more likely to take on physical and psychological burdens as caregivers, resulting in time barriers to accessing support.[87] These factors may go some way to explaining why not all professionals experienced an increase in victims seeking advice, even when rates of abuse have been on the rise more generally.

Number of applications

Comparing the number of enquiries with the number of applications made, 28.9% reported that they had made more applications during the pandemic. In contrast, 23.7% noted making fewer applications. 26.3% felt the pandemic had resulted in no change in the number of applications for occupation orders. Given that over 42% of professionals noted an increase in enquiries, this suggests that not all victims went on to pursue an application. This may be for a variety of reasons including that applications lacked merit, or another remedy was more appropriate. Inevitably, as the next section will consider, some victims who made enquiries would not have been eligible for legal aid or otherwise able to fund the costs of pursuing legal action, leading to them take no action or pursue the case as a litigant in person. As such, the data will not necessarily reflect all of the applications which were made by the victims who made enquiries.

Number of orders made

When asked about the court's approach to granting orders during the pandemic, 15.8% felt that the courts have been stricter, whilst 2.6% considered the courts were more lenient and 34.2% reported no change in the courts' approach. A few respondents provided examples of the pandemic disrupting the ordinary progression of a case, such as hearings being delayed or rearranged where an order was not in place, leaving victims without protection.

[87] [87] A. Speed, C. Thomson and K. Richardson, 'Stay Home, Stay Safe, Save Lives: an analysis of the impact of Covid-19 on the ability of victims of gender-based violence to access justice' (2020) 84:6 The Journal of Criminal Law Volume 84 539-572; S. Gearheart, M. Perez-Patron, T. Hammond, D. Goldberg, A. Klein, and J. Horney, 'The Impact of National Disasters on Domestic Violence: An analysis of Reports of Simple Assault in Florida (1999–2007)' (2018) 5:2 Journal of Violence and Gender 87-92; N. Renwick, 'The 'Nameless Fever': The HIV/AIDS Pandemic and China's Women' (2002) 23:2 Third World Quarterly, 377-393.

Barriers to making an application

At question 31, professionals were asked 'In your experience, what are the key barriers to applying for an occupation order?'. The results were as follows:

- Strict legal aid criteria – 28 votes (73.7%)
- Difficulties securing evidence to satisfy the threshold tests – 26 votes (68.4%)
- Fear of further abuse – 20 votes (52.6%)
- Lack of access to pro bono advice and representation – 19 votes (50%)
- Fear of pursing an application – 17 votes (44.7%)
- Fear of attending court – 16 votes (42.15)
- Distrust of the court system – 15 votes (39.5%)

What does this show?

Lack of access to funding for legal representation is a key barrier to making an application. However, fear is another common reason, whether that be fear of further abuse, pursuing an application or attending court. It is therefore imperative that safety measures are in place to ensure that applicants feel safe when making such applications. One component to this is access to special measures. These issues were considered in the literature which preceded the questionnaire and it was therefore anticipated that they would be raised as key barriers by the professionals. For this reason, the professionals were also asked a number of follow up questions about legal aid eligibility and safety at court:

Availability of legal aid

See questions 12 – 14 of Appendix A.

Question 13 - In your experience, what are the main barriers to victims of domestic abuse face to securing legal aid?

- 23/38 responded "Falling within the capital threshold (means test)"
- 20/38 responded "Satisfying the gross income limit (means test)"
- 18/38 responded "Satisfying the disposable income threshold (means test)"
- 16/38 responded "Securing the necessary gateway evidence"
- 9/38 responded "Securing bank statements etc to demonstrate financial position"

- 5/38 responded “Other”
- 1/38 responded “I don’t believe there are any barriers”

What does this show?

It is notable that only one respondent believed there to be no barriers to securing legal aid. All other respondents noted at least one barrier to exist, the most common response being the strict means test. As explained earlier in this report, since the introduction of LASPO, amendments have been made to legal aid eligibility requirements but these have largely centred around the permissible gateway evidence rather than changes to the means test. This was one of the reasons for the judicial review brought by the Public Law Project last year which has led to changes in the amount of mortgage that can be disregarded as part of a means test.[88] Previously, this was capped at £100,000, whereas now it has been agreed that the full amount of a person’s mortgage can be disregarded.

Question 14 - In your experience, where legal aid is not available, what action will clients/service users usually take?

- 27/38 responded “Act as a litigant in person.”
- 24/38 responded “Not pursue a case.”
- 10/28 responded “Pay privately at full cost.”
- 6/38 responded “Utilise an unbundled service.”
- 5/38 responded “Other.”
- 4/38 responded “Pay privately at reduced rates.”

What does this show?

When legal aid is not available, most clients will decide to either not pursue a case or to act as a litigant in person. This accords with the research conducted by Women’s Aid and outlined in the earlier literature review, which found that 53% of women who could not provide the

[88] Public Law Project, ‘Legal aid rule change for home-owners on low incomes & domestic violence survivors’ (2020) at: https://publiclawproject.org.uk/latest/legal-aid-rule-change-for-home-owners-on-low-incomes-domestic-violence-survivors/ (last visited 22 April 2021); The Civil Legal Aid (Financial Resources and Payment for Services) (Amendment) Regulations 2020

necessary gateway evidence stopped pursuing action, 29% paid for their own legal representation and 28% of those victims represented themselves at court.[89]

This indicates that the number of applications being made would actually be much higher if it wasn't for legal aid restrictions and may also account for why less orders are being made than applications, as previous research outlined in the literature review has indicated that litigants in person may not be able to put forward their strongest legal arguments.[90]

Special Measures

Questions 26 – 27 of Appendix A.

This data suggests that protective measures are both requested and granted in the majority of cases in which the professionals have acted or supported survivors. This is in contrast to existing literature on the topic which has indicated that special measures are granted on a more ad hoc and inconsistent basis.[91] That said, it should be noted that the success of these applications may be due to the litigant having representation or the support of an experienced service. The contrast with the experiences of survivors without representation will be discussed in the next section of this report in the context of the interviews conducted.

Length of proceedings

See questions 22 – 24 of Appendix A

In non-contested proceedings, the majority of professionals said that proceedings were resolved within 4 weeks. This is in contrast to contested proceedings where the majority of professionals said that proceedings took over 9 weeks, with 31.5% saying that on average proceedings would take over 16 weeks. This is of particular concern given that professionals

[89] *R (Rights of Women) v Lord Chancellor and Secretary of State for Justice Court of* Appeal [2016] EWCA Civ 91

[90] K. Richardson and A. Speed 'Restrictions on Legal Aid in Family Law Cases in England and Wales: Creating a Necessary Barrier to Public Funding or Simply Increasing the Burden on the Family Courts?' (2019) 41:1 Journal of Social Welfare and Family Law 135-152.

[91] M. Coy, K. Perks, E. Scott, and R. Tweedale. 'Picking up the Pieces: Domestic Violence and Child Contact' (London: Rights of Women, 2012); M. Coy, E. Scott, R. Tweedale, K. Perks, 'It's Like Going Through the Abuse Again: Domestic Violence and Women and Children's (Un)safety in Private Law Contact Proceedings' (2015) 37:1 Journal of Social Welfare and Family Law 53-69; J. Birchall and S. Choudhry, 'What about my right not to be abused? Domestic abuse, human rights and the family courts', (Bristol: Women's Aid, 2018).

indicated in a previous question indicated that it was common for proceedings to be contested. This is a significant amount of time for survivors to be involved in proceedings, especially if they are acting without any representation.

Length of the order

See question 16 of Appendix A.

The responses indicate that in the professionals' experience occupation orders are granted for around 6 months, which matches with the findings of the literature review. To generalise the results a little more, it can be said that the majority of occupation orders are granted for 1 year or less. There was an overwhelming response that occupation orders should be granted for longer, with 66.7% stating that they do not feel the length of these occupation orders are sufficient to allow users to take action to regulate their living arrangements.

When asked about what steps a survivor will take whilst an occupation order is in force, responses were as follows:

- 25/38 responded "Commence divorce proceedings"
- 24/38 responded "Remove the abuser from the tenancy of the family home"
- 17/38 responded "Apply for/secure local authority accommodation"
- 12/38 responded "Secure privately rented accommodation"
- 10/38 responded "Remove the abuser from the ownership of the family home"
- 8/38 responded "Start proceedings under TOLATA 1996 to force the sale of the home"
- 6/38 responded "Negotiate a resolution with the respondent/perpetrator"
- 4/38 responded "Take no action"
- 4/38 responded "Don't know – our involvement ends after an order is obtained"

Whilst a number of these are positive steps which may allow the survivor to remain in the family home longer term such as removing the abuse from the tenancy/ownership, other popular answers indicate that many survivors will go on to seek other accommodation of their own rather than remaining in the property long term. What isn't clear is whether that was out of choice or necessity as a result of the protective order coming to an end too quickly.

Reasons why occupation orders may be refused

Question 29 - What are the reasons most commonly given for refusing to grant occupation orders?

- Non-molestation orders (with a zonal order) are granted instead – 25 votes (65.8%)
- The perpetrator has no alternative accommodation – 25 votes (65.8%)
- Evidential difficulties in proving abusive conduct – 19 votes (50%)
- Undertakings given instead – 19 votes (50%)
- Perpetrators financial position – 13 votes (34.2%)
- Abusive conduct not sufficient to satisfy the balance of harm test – 12 votes (31.6%)
- Disproportionate response to abusive conduct – 7 votes (18.4%)
- Perpetrator's reliance on family home for work - 5 votes (13.2%)
- Don't know – 1 vote (2.6%)
- Other – 1 vote (2.6%)

<u>What does this show?</u>

On of the most common answers with a vote of 25 (65.8%) was that non-Molestation orders (with zonal order) are granted instead, this links with the findings in with the literature review which demonstrates that there are many more non-molestation orders granted each year than there are applications.

The other most common answer with a vote of 25 (65.8%) is that the perpetrator has no alternative accommodation. This was not explored in the literature review; however, it seems to be a common theme throughout our survey results that there was a reluctance to interfere with property rights by the court and this could be because the perpetrator has no alternative accommodation. This is a cause for concern because it means the perpetrator's property rights are being prioritised over the survivor's safety and places the onus on the survivor to then seek their own alternative accommodation at a time when refuge places are limited.

Breaches of occupation orders

See questions 32 and 33 of Appendix A.

The results of the survey show that breaches are a common occurrence but that there are problems with enforcement measures. The responses suggest that breaches will rarely be dealt with as a contempt of court or be pursued by the police. A lack of appropriate enforcement measures may deter a survivor from seeking further protection through the criminal or family justice systems.

Difference in responses from solicitors and Independent domestic violence advisors

Solicitors appeared to raise more issues relating to the courts being reluctant to grant an occupation order (even on an emergency basis) and they also highlighted their reluctance to override a person's right to reside in their property. Most participants stated that the courts are less likely to grant the occupation order when the property is owned by the respondent. Non-molestation were noted to have been granted as an alternative to an occupation order.

IDVAs highlighted more issues concerning the process. They seemed to highlight concerns surrounding breaches and undertakings not being taken seriously/ ignored by the police. They stated that police are reluctant to pursue any action as they may find there is little evidence. Evidential difficulties and breaches on behalf of the police was also brought up by solicitors and trainee solicitors.

IDVAs also raised issues relating to eligibility for legal aid. They found that there was an increase in survivors who do not qualify for legal aid and even if they do qualify, the timescale for legal aid to be granted was too long. It enables the perpetrator to continue abuse in the meantime and increases risk.

IDVAs also commented that the language on the application may be difficult for people to understand without representation. Some said the length of the order should be longer to give clients more time to arrange what they want to do in the long term.

Results of the interviews conducted with survivors

What led the participants to make an application?

Whilst domestic abuse is not a requirement for an application for an occupation order to be successful, they are often used by individuals who have subjected to domestic abuse as a means of protection against the abuser. Protection available under such an order may include removing the abuser from the property or by otherwise regulating the occupation of the property. Each participant interviewed in this study had made an application for an occupation order as they were victims of various types of abuse including sexual, physical, emotional, religious, financial and verbal abuse. The perpetrators of the abuse were either their husband or partner. As explained in the earlier literature review, in order to apply for an occupation order the parties must be 'associated persons'. Section 62 Family Law Act 1996 provides a list of those who are regarded as 'associated persons' in which a husband and partner are included. This therefore was not an issue for any of the participants.

Some participants applied for an order as they required protection for themselves. Participant G was going through divorce proceedings and a series of events conducted by the perpetrator such as him blocking her from using her driveway when he no longer lived there and sending her threating messages lead her to make an application. Participant B also applied for a non-molestation order as she already experienced verbal and emotional abuse but felt like it was going to turn physical, and she no longer felt safe. The participant stated "*it had escalated through different steps. Started with financial abuse and then emotional abuse and then the non-mol was the day that I realised that it was gonna turn physical*." The fear that abuse could turn physical was the motivation for making the application.

For other participants the motivation for making an application arose out of concern for their children's safety. Participant A's husband not only abused her but he also physically abused her eldest son which influenced her decision in making an application for an occupation and non-molestation order as she was worried for the welfare of both herself and her son.

Whilst the majority of the participants had identified they were experiencing abuse and therefore sought measures to protect them against the abuse continuing and escalating further, others weren't as aware. Participant C's husband raped her numerous times however, he led her to believe for a long period of time that she had consented throughout the night but had forgotten. She stated "*every time if I said no, it would be oh you came onto me and then you fell asleep don't you remember. And so for a long time I actually thought that I was some kind of a nocturnal nymphomaniac and I just didn't remember what the hell I was doing. You know I just, it took me a long time to understand what I'd gone through.*"

Participant A was also initially unaware that she was a victim of abuse although she acknowledged the serious risk of harm her eldest son encountered. It wasn't until she visited a local domestic abuse charity that she recognised the abuse and applied for both an occupation and non-molestation order.

The participants were encouraged and informed about the different orders that they could apply for by various groups of people including professionals and non-professionals. Participants E and F were informed by solicitors that the orders were available to them. Participant A was referred by her GP to a domestic abuse charity who quickly recognised that she was a victim of domestic abuse who then advised her to apply for both an occupation order and non-molestation order. Participant E was also encouraged by a national domestic abuse charity that she should apply for an occupation order. Others were informed by family members, for example participant B was informed of the orders by her mum as she herself had experienced domestic abuse and had carried out research on what could be done to prevent this.

Some of the participants had experienced abuse throughout their marriage but didn't apply for such orders until they had separated as the separation itself had been a trigger for an increase in the threat of violence towards them. Participant E explained that "*I broke down a relationship I had been in for a long time that was abusive in nature and at that point it wasn't crazy level stuff but when we split it kind of escalated*." Following the separation, she suspected her ex-partner had entered the house and cut an electric cable in the house before

hiding it under the dog's bed whilst it remained plugged into the wall. This imposed a serious threat of danger towards her and contributed to her reasons for applying for an order.

Participant C also experienced abuse during her marriage but didn't apply for an order until they separated. She referred to her husband breaking into her property on numerous occasions saying, "*I was on the phone to 999, I went downstairs and I could see that my husband had broken into the house. And when he saw me he jumped out of the window. So I tried to lock him out the window, he was trying to get back in again."* The fact the abuse continued and escalated after the relationship ended was one of the reasons that led her to apply for an occupation order and a non-molestation order.

Were the applications made ex-parte (without notice) or on notice? Why?

As explained earlier in this report, Section 45(1) of the Family Law Act 1996 provides that the court can grant non molestation or occupation orders without giving notice to the respondent where they consider it 'just and convenient' to do so. When deciding whether or not to grant ex-parte applications the court considers a number of circumstances, including the risk of significant harm if the desired order is not made immediately. There was a fairly even split of the Participants making applications both ex-parte and on notice. Participants A, B, G and F all made their applications for occupation orders on notice.

Both Participants C and E made ex-parte (without notice) applications for occupation orders. As explained in the previous section both of these participants were motivated by fear for their safety.

Participant B also said she applied for a non-molestation order as well as an occupation order, however, only the non-molestation order was made via an ex-parte application. As addressed earlier in this report, the court will rarely order ex-parte occupation orders and in cases with exceptional circumstances. This is because non molestation orders are not seen to infringe on a person's rights, as no one has the right to inflict 'molestation', whereas occupation orders involve depriving someone of their home.

Participant C's divorce solicitor informed her that her ex-husband's matrimonial home rights trumped her own personal safety. In her interview she stated; "*I was absolutely flabbergasted that his matrimonial home rights, his rights to the property, were more important than my fear of being raped again*. *So I applied for an occupation order ex-parte".* Participant C was initially not granted her occupation order at the ex-parte hearing, however, at the return hearing, the judge decided to grant her the order.

Did the applicant secure an occupation order? If the application was refused, what were the reasons for this?

Not all applicants were successful in securing an order. Out of the six participants, three were granted their order straight away by the judge, two were refused an order. Participant C was initially refused an order but then granted an order by the judge in a later hearing. Unfortunately, she discovered upon moving home her occupation order did not apply to the new home, which meant that the order was limited in duration. Those participants who were granted an occupation order were also granted non-molestation orders.

Each of the participants experienced abuse which would warrant an occupation order needing to be granted. However, in some cases the judges they went in front of believed that a non-molestation order provided sufficient protection and therefore an occupation order was not necessary. Participant E is an example of this, "*I didn't actually get the occupation order because the court decided that as I had gone for a non-molestation order that's all I needed I didn't need anything else it could all be dealt with in the divorce proceedings*." This is a direct contrast to the experience Participant A had as her judge granted her both a non-molestation order and an occupation order. This demonstrates how different judges have different opinions on what sufficient protection is. The outcome can be very much dependant on the judge you get on the day and therefore there is a risk when applying for both orders together as one judge may grant them both or one may believe a non-molestation order is sufficient.

In other cases, there was a lack of evidence which is why the applications were dismissed. For Participant F the judge dismissed all allegations of domestic abuse and was only concerned regarding the harm of the children. This therefore highlights the importance of having evidence that the abuse occurred otherwise it can be more difficult to get an order. However, for victims of abuse it is not always easy to report incidents to the police and when they do, they do not always feel heard or believed. Participant E experienced this, "*I came out of that whole process feeling very discouraged with the police and in fact I concluded I would never report anything to the police ever again and I actually mean that because they were absolutely shit*." Recent statistics also support this, in the year ending March 2020 the police recorded a total of 1,288,018 domestic abuse-related incidents and crimes in England and Wales. Of these, 41% (529,077) were incidents not subsequently recorded as a crime. The remaining 59% (758,941) were recorded as domestic abuse-related crimes. Therefore, just over two fifths of those incidents which were not recorded as a crime and no further action was taken.

Were the applicants legally represented and if so, how was this funded?

As shown by the results of the survey, the legal process involved in applying for an occupation order can be and is often long and complex. Having legal representation from a qualified solicitor or barrister therefore provides an applicant with some much-needed relief in what is already likely to be a highly sensitive and emotionally exhausting situation. However, out of the six participants involved in this study, three had no representation whatsoever, two had very limited representation and only one participant had full representation. From analysing the transcripts, it reveals that all participants actively sought legal representation however funding was a key barrier to the majority of them accessing this. As a result of this the participants had to attend hearings as a litigant in person and sought help from domestic abuse charities.

Similar to the findings of the survey, concerns were raised about the legal aid means test. Out of the six participants, four actively sought funding for legal aid however they did not qualify as their calculated income/assets exceeded the threshold. One interesting finding in particular was two participants (A, E) found that owning the very house they sought an

occupation order for, was the thing that held them back from qualifying for legal aid. It didn't matter how serious the situation was, as one participant (E) commented her scenario "*was risk assessed as high but yet I wasn't able to get any help or any funding because I part owned the house*". Likewise, participant A stated "*because I owned a house*" her solicitor informed them that they would not be able to access legal aid. As explained earlier in this report, the first £100,000 of equity in an applicant's main dwelling is to be disregarded in the financial determination.[92] After disregarding the first £100,000 of the applicants main dwelling, the capital limit is set at £8,000 for access to all civil legal services.[93] Any applicant with capital above £3,000 and below £8,000 is required to pay a contribution to the costs and are only entitled to partial legal aid. By capping the amount of equity to be disregarded in an applicant's property at £100,000, the government "*believed that the policy would ensure that limited legal aid resources are not expended on those who own high value properties but instead are focussed on those most in need*".[94] However, in doing so it appears to have left victims of domestic abuse such as participant A and E unable to qualify for the legal aid they desperately needed to help them secure protective orders such as occupation orders.

The two other participants that actively pursued legal aid (C, G) did not qualify as they did not pass the required income threshold. Participant C stated how she narrowly missed qualifying as she earnt "*30 pounds a month over the required threshold*". As a result, she had to self-fund any and all representation which she could not afford for every matter. There were "*just under 20 hearings in total*" and she was a litigant in person for all "*with the exception of two of them where there was direct access to a barrister*". From analysing these transcripts there is a common trend in that many of the participants opted to self-represent to overcome the barrier of legal costs and being denied legal aid.

In total, five of the six participants (A, B, C, E, G) represented themselves in court during proceedings and only two of them (C, E) had partial representation which they had to fund

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[92] Regulation 38, The Civil Legal Aid (Financial Resources and Payments for Services) Regulations 2013 < https://www.legislation.gov.uk/uksi/2013/480/regulation/38/made> accessed 21 March 2021

[93] Regulation 8, The Civil Legal Aid (Financial Resources and Payments for Services) Regulations 2013 < https://www.legislation.gov.uk/uksi/2013/480/regulation/38/made> accessed 21 March 2021

[94] Ministry of Justice, 'Post-Implementation Review of Part 1 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO)' (gov.uk, February 2019) < https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/777038/post-implementation-review-of-part-1-of-laspo.pdf> accessed 21 March 2021

themselves/through the help of friends and family. Out of the five participants who self-represented, four of them explained the reasoning behind this to be because they "*couldn't afford to have a solicitor"* (Participant A). Some participants (E, G) had other court proceedings either before or running simultaneously to their applications for protective measures and had already spent the money they could afford on representation in these proceedings. One of the participants commented "*I represented myself in child arrangement and non-molestation order because of the costs I found with dealing with the solicitors on divorce*" (Participant G). Another participant (E) attempted to crowdfund for representation when her ex interfered and "*shut that down*", she then applied for 'Pro-Bono' representation however didn't qualify as she owned the house. It is clear that all of the participants who self-represented attempted to (sometimes desperately) to find a way of not having to do this but were left with no choice.

If participants were unable to "*throw themselves on the mercy of friends*" (Participant E) or family to help fund representation and had to self-represent, they often turned to domestic abuse charities and community law services to receive advice. Participant E stated "*if you can't access legal help or advice then you're going to go through charities*". This was the case for three of the participants (A, B, E) and these services would "*come along (to hearings) as a support mechanism*" (Participant A). Whilst the help these charities gave provided the participants with some much-needed relief from the stress of their proceedings, the advice given was not always advantageous. One participant noted that "*their advice may be mixed, or they might tell you some things but not other things that you might need to know*" (Participant E) and went on to say had she received she more specific advice about the risks that came with applying for a non-molestation order, she "*probably wouldn't have done it*" (Participant E). Receiving mixed, poor quality or no advice at all is clearly problematic and may mean that findings/decisions are being reached on the basis of insufficient information.

Overall, only one participant (F) had full legal representation, and this was funded and paid for privately. In conclusion, access to legal representation appears to be inadequate as a result of high legal costs and restrictive requirements needed to obtain legal aid. More needs to be done to provide victims of abuse with access to legal representation or at the very least,

reform is needed to improve services that support the applicants who have no choice but to act as litigant in person.

Were there any barriers/difficulties to the participants securing an order? If so, what were they?

In relation to difficulties with the application process in the family court, all participants interviewed experienced some difficulty whether it be with serving the order on the perpetrator or understanding the proceedings. For example, participant A was unfamiliar with the legal proceedings having no prior knowledge of the English legal system. She had feelings of isolation and fear due to her inability to articulate herself in court clearly in a coherent manner. This was further exacerbated by the fact that the participant had no legal representation. Additionally, she felt the judge in the proceedings lacked sympathy and was acting in a dismissive matter towards her issue. Again, she felt the judge became increasingly frustrated due to her lack of understanding of the process. Nevertheless, despite the lack of empathy displayed by the judge, the participant was granted both orders.

It further appears that due to some victims being unable to afford legal representation and therefore having to represent themselves, this affects the judicial attitude towards the applicant. Participant A commented on her feelings of intimidation due to not understanding the legal processes. As a result, the judge in the case was hasty in his decision making and lacked sympathy and compassion for the participant.

Furthermore, it has been stated that litigants in person have been regarded almost as nuisances for the court system. This has meant that the focus has generally been upon the difficulties that litigants in person pose for the courts rather than the other way around.[95]

The disadvantages faced by litigants in person stem from their lack of knowledge of the law and court or tribunal procedure. For many their perception of the court environment will be

[95] Judicial College, *Equal Treatment Bench Book* (Feb 2021) 16

based on what they have seen on the television and in films.[96] They tend to be unfamiliar with the language and specialist vocabulary of legal proceedings and have little knowledge of the procedures involved therefore finding it difficult to apply the rules even if they do read them. Ultimately, applicants seeking an occupation order must be treated with the same level of respect and dignity as those who are able to afford legal representation. The judiciary should acknowledge legal representation in this country is difficult to attain for many people due to the exorbitant fees charged; nevertheless, respecting one fundamental tenet of the rule of law, that being, the law must be readily available and accessible to everyone regardless of background.

For litigants in person, the frustration of trying to work through the court process is immense. However, one has sympathy for the judiciary who have to ensure a level playing field within the court. Some litigants in person say judges are so unhelpful it is difficult to get a fair hearing, while some practitioners say judges are bending over so far backwards to help litigants in person that represented clients are being unfairly treated.[97] Senior judges are aware of the problem. District Judge Nick Crichton, who sits in the Inner London Family Proceedings states that '*we are getting more and more people coming to court in private law cases without the benefit of sensible, structured legal advice, wanting to spill blood on the court carpet. Angry with each other, they shout across the court, they refuse to listen when you try to calm them down and it is very difficult to find a solution that they will go away and work with*'.[98]

In the case of one participant (E), it appears there was a power imbalance during the hearing leaving the applicant feeling uneasy and confused. Seven days after the occupation order had been granted there was a return hearing at which she was unrepresented while her spouse had a solicitor. Before the hearing her husband's legal representation approached her and asked her to withdraw the occupation order in its entirety because he did not agree with the

[96] Ibid
[97] Law for Life's Advicenow project, 'Meeting the information needs of litigants in person' (*Law for Life*, June 2014) < http://www.lawforlife.org.uk/wp-content/uploads/Meeting-the-information-needs-of-litigants-in-person.pdf> accessed 28/04/2021
[98] Grania Langdon-Down, 'Litigants in person could struggle to secure access to justice' (*The Law Society Gazette*, 19 Jan 2012) < https://www.lawgazette.co.uk/analysis/litigants-in-person-could-struggle-to-secure-access-to-justice/63815.article> accessed 28/04/2021

content. Although the participant recollects initially speaking normally with the judge at the beginning of the hearing, she felt alienated as she struggled to understand what the judge and the respondent's solicitors were discussing with each other due to the complex legal jargon used within the second court hearing. This provides an increasing emphasis and need for the simplification of proceedings within the family courts. For example, the use of terminology such as applicant and respondent should be replaced with simpler terms to enable those applicants unable to afford legal representation to engage fully with the process Similar to the critical reforms to the civil justice system suggested and implemented by Lord Woolf during the 1990s, using simpler terminology will assist applicants in their task of applying for occupation orders should they wish not to be legally represented.

Additionally, when reflecting on how this applicant felt during the hearing, she continuously doubted herself in her application, which was exacerbated by the lack of compassion and sympathy displayed by the judge: *"the solicitors were oh ma'am and oh but and they were doing this strange vernacular talk amongst them...that was foreign to me but I know its legal*". She described the experiences akin to those court room situations in many American shows. She did not understand the process and she assumed she had something wrong by ticking the box (for occupation order). She explained that she "*lost track quite quickly compared to my first meeting with her [Her Honour] where I felt I was given a lot a lot of help and I was treated with a lot of respect*".

Participants also discussed difficulties understanding the terms of the order. For one participant, a difficulty that arose later with her occupation order is that she moved to a new house and wanted to change the address that the occupation order was linked to. Unfortunately, the court said the occupation order was on the property rather than on her, so her request was denied, and she therefore had to apply for a non-molestation order for protection instead. The participant said "*I tried to get the occupation order, the address amended to the address I was moving to and the court said no. The occupation order is on the property, it's not on you. So, then I had to file for a non-molestation order*". With regards to the non-molestation order the participant had evidential difficulties as she couldn't prove her ex-husband had done anything, "*So then I had to file for a non-molestation order, but the non-molestation order, he hadn't done anything, I couldn't prove he had done anything*."

Therefore, the participant had to agree to an undertaking otherwise the judge threatened that to be granted a non-molestation order she would have to be in court for a 3-day fact finding hearing which she'd have to pay for and that terrified her. The participant mentioned she could not get legal aid and could not afford legal representation for all matters so this could have been a contributing factor putting her off the fact-finding hearing.

Many participants discussed the stress caused by participating in the proceedings and the associated impact on their mental health. One participant explained: "*It's not such a simple process especially as you have to put all the evidence together*". This represents the plight of many self-representing applicants who find the court processes difficult and intimidating due to the complexity of legal matters and intense courtroom setting especially when the applicant must search through often traumatic text messages, pictures and other evidence relating to the case which inevitably is distressing for the applicant: "*going back over the experience is emotionally just a nightmare".* One participant described that "*when it came down to it, I was having nightmares days before court*".

Were any 'special measures' granted to protect the participants during the hearings?

It is a requirement for the court to consider whether a party's participation in proceedings may be diminished as a result of vulnerability, and whether it is necessary to make participation directions.[99] Additionally, all parties and their representatives are required to work with the court to ensure that each party can participate in proceedings without the quality of their evidence being diminished, and without being put in fear or distress by reason of their vulnerability.[100]

Four out of five participants were allocated a separate waiting room as a special measure to ensure they did not come in direct contact with their abuser before the hearing. Participant B was not initially allocated a separate waiting room until her abuser's solicitor approached

[99] Family Procedure Rules 2010, Part 3A
[100] 'Vulnerable persons – participation and evidence in family proceedings' <Lexis PSL> accessed 20 March 2021

her trying to get her to drop the order. This participant then became uncomfortable and requested a side room and she was given one immediately.

Unfortunately, one participant (participant F) was not given any special protective measures at all; not even a separate waiting room. In this case the power imbalance and lack of protection at court affected the participant as she stated: "*I was not able to advocate for myself anywhere near what I could have done*". This demonstrates the importance of the use of special measures at court in order to ensure each party can effectively participate in proceedings without their vulnerability and fear prohibiting them.

Another particular participant (participant C) stated that she wrote to the court saying, "*please give me protection measures, I don't want to see my rapist*". This exemplifies the necessity of special measures to protect participants such as this one who are evidently fearful of the opposition and the traumatising effects facing them in court will have on them, and on their ability to litigate. Special measures should be a given in cases such as this one, the participant should not have to plead with the court in order to receive protection at court from her abuser.

One interesting finding was that none of the participants were granted any special measures other than a separate waiting room. These findings suggest that there is a lack of use of many other protective measures such as screens and evidence via video link. One of our participants (participant C) said she "*was actually paralysed with fear*" when she saw her abuser in the courtroom. In this case the use of additional special measures such as a screen or evidence via video link would have been appropriate to protect the vulnerable participant and her ability to litigate.

The findings show that there is an apparent need for reform regarding the availability of special measures at court for domestic abuse victims. This is further illustrated by previous research carried out by the All-Party Parliamentary group on domestic violence, which found that 55% of women who had been to the family courts had no access to any special

measures.[101] However, in contrast the report by the APPG found that special measures in the criminal court were widely available. Given domestic abuse is such a prominent issue in family court proceedings, there is a need for the family courts to mirror the criminal courts availability of special measures. The Domestic Abuse Act 2021 creates a welcome statutory presumption that victims of domestic abuse are eligible for special measures in the family courts and, if implemented appropriately by judges, should improve the position for vulnerable litigants in these proceedings.

Was the participants' experience of applying for an order largely positive or negative? Why?

The participants had different views regarding their experience of applying to court for an order. Some of the participants had mixed views as they had both positive and negative experiences.

The first participant (A) applauded the pro bono services she had accessed including the community law clinic and the student law clinic which explained some of the legal terminology used within the family courts. However, her experience was overall negative due to her self-representation in the court. The participant was left feeling fearful, isolated, alone, intimidated and general dissatisfaction with the judicial process of applying for the orders as the judge lacked empathy in his questioning.

Further, the participant (A) felt dissatisfied with the process for serving the occupation order. She commented that her husband has refused to engage in the process after being removed from the house. The participant acknowledged that she could "*have an order for another five years, but unless it was served on him there was just no value*". Nevertheless, the participant acknowledged that her husband complied "*as soon as it was served on him he complied*". She commended the police in this regard for serving the notice on her husband as otherwise she

[101] Women's Aid and All-Party Parliamentary group, 'Domestic Abuse, Child Contact and the Family Courts' <https://www.womensaid.org.uk/wp-content/uploads/2015/11/APPG-Inquiry-report-domestic-abuse-child-contact-and-the-family-courts.pdf> accessed 21 March 2021

realised the situation would have been extended further. The police served the order on him whilst he was arrested in custody due to child abuse and cruelty charges.

Furthermore, the next participant (B) initially went to the court to apply for an ex-parte non-molestation order and ended up also applying for an occupation order. The judge seemed to help, and she felt that she was treated with a lot of respect. She stated: "*I completed the form and went in for the non-mol emergency order and the judge stopped the proceedings for the day and saw me. She then told me to go back and speak to a service that will guide me*".

That being said, when arriving seven days later for the hearing with her husband she said she was made to feel like she had done something wrong. The judge made regulatory provisions which meant her husband could return to the home, which impacted her mental health: *"I felt then the judge went to detail in hand where he was allowed in the house and what time he was allowed in the house to do whatever he wanted".*

Another negative experience the participant had was that she was forced to serve her own husband with the order. The judge had given her a handwritten order but he did not give her any information about who would serve it. She felt pressure from her family to serve it herself as they did not want to get involved, stating "*That bit was hard. That that was the hardest part of the process that day. And reliving that day is hard*". At no point did the judge offer her the services of the court bailiff despite knowing that she was self-representing.

Subsequently, whilst proceedings were ongoing her husband left the home and reduced his mortgage payments to £10 a month, even though the mortgage was in both of their names. The judge had not discussed who would pay the bills or mortgage on the matrimonial home, ignoring the possibility of financial abuse, despite this being one of the types of abuse previously present in her case.

Following on, a different participant (C) found the experience humiliating and stressful for multiple reasons. Firstly, she had to represent herself in court as she couldn't afford legal representation and didn't satisfy the legal aid requirements. Secondly, she had to take advice on her own and do any research herself which she found hard as she lacked the skills of a

professional solicitor/barrister. The participant regarding her experience stated "*All I know is that the occupation order, the application I had to do it myself and I used the internet. And so I Googled things like, family court without a lawyer, you know, Lucy Reed's book, and few other things, for somebody, I now understand looking back, I had been traumatized, I had been distressed, I had been sleep deprived, all of these things required an awful lot of work on my part. But also what they really required was an awful lot of attention span and cognition that I didn't have at the time*".

Furthermore, being granted an undertaking instead of a non-molestation order was seen as useless in her opinion as the abuse continued and didn't provide her with the protection, she needed which contributed negatively to her experience of applying for an order. Reflecting on the undertaking she stated: "*So what happened was, I moved house, I had a stupid undertaking which was supposed to be in place of the occupation order and he kept doing things like driving past the house and telling our child, who at this point was only 4, telling her 'oh tell your mum you've got a nice house*."

Participant (E) also overall had a negative experience. The participant was not granted an occupation order, instead she was granted a non-molestation order which she believes made things a lot harder for her. She feels being granted an occupation order initially would have helped her greatly. Participant E also had a negative experience of the police involvement in her case. She believes the police did a poor job of following through with their investigation and focused more on older incidents of sexual assault that were more difficult to prove rather than the newer incidents which there was more evidence for. Regarding her experience with the police, she stated "*I just felt like that the police were focused only on that thing right and we all know that it's almost impossible to get a sexual crime through the court system and certainly not one in the past and certainly not one where there isn't really any evidence*". She reported not feeling heard during the family court proceedings leading to a negative experience of both justice systems: *"some of these judges are like that they don't give people a chance to speak, they shut down conversations and they definitely I think in domestic situations quite often the impression I got a little bit is that it's almost like they see it as you know oh it's like you split up from a partner so probably it's like a bit of one and six of 1/2 a dozen of the other kind of narrative"*. *"I felt like they didn't have a lot of insight into how it*

impacts on women and how even something subtle like being stuck in a room with the person sat on the same row as you with their legal advocate that they've managed to pull in free from family whilst you're sat there on your own it's like it's significant and I just see the court process isn't really set up for it that's the problem".

For Participant (F), their experience was so negative that they abandoned their application. The order was refused based on there being a lack of evidence of the abuse. The participant felt as though they were not believed or listened and did not feel the outcome was fair as they felt they did not get justice. They then abandoned their application. Regarding the matter the participant (F) stated "*Yeah there's nothing I can do and there's nobody to help at all. And I do not want to go to the police and report it all because of my experience of going to court was actually horrendous. And the same thing would just happen again. It would just be me being painted as kind of hysterical. You know I'm not a hysterical person...I was thinking the whole family court system is unbelievable*."

Lastly, the last participant (G) had a mixed experience when applying for the order. As explained in an earlier section, she found going through the evidence traumatic and she was having nightmares before court and struggling with anxiety. However, her experience in court was quite positive as she said she could not have asked for a nicer judge on the day stating "*He was very very to the point, very careful and considered, and actually very gentle with me*". The participant also implied that the clerk and the judge kept her right at times. Further, she had some safety measures in place such as separate waiting rooms and she was told to wait in court for a little while to be sure her abuser had left first. Although she stated that she wished she had known she could have had a screen up, so she did not have to face him.

To sum up everything that has been stated above, even though some of the participants had mixed views, most of the participants had a negative experience overall regarding their application to the court for an occupation order or a non-molestation order. In some cases, that experience had a direct impact on their mental health. Despite the fact that some participants described the judge who was assigned to their case as understanding and helpful most participants faced a judge who was intimidating, which led the participants to feel humiliated, fearful and let down.

If an order was granted, did it achieve the applicant's aim?

As explained above, Participant E wanted to prevent her ex-partner from returning to the family home after a dangerous incident. She believed he had entered the house after their breakup and cut an electric cable then hid it under the dog's bed while it remained plugged into the wall. Since they were both joint owners of the property she could only do this with an occupation order. Her application for an occupation order was not granted however she did obtain a non-molestation order. This participant stated how her ex-partner would often go to the house and ask the children if he could use the bathroom, if she ever told him to leave he would respond with "*it's my own house so I'm allowed to use my own toilet in my own house*". She went on to say that had she received the occupation order it would have been a "*flat no*" with regards to him entering the house. Although she received a non-molestation order this did not give her the ability to stop him occupying the home and it did not protect her and her children from another potentially dangerous incident.

Another (Participant C) who had been granted an occupation order later left the property and moved into a new house. As explained earlier, the applicants aim was to amend the address on the order to allow her to feel safe in her new home but this was not possible. She went on to make an application for a non-molestation order but this was rejected due to lack of evidence, and she had to agree to an undertaking instead. She explained how the undertaking did not achieve her aim as the abuse continued.

One participant (A) left the family home with her children and moved in with her father on a temporary basis to prevent any further abuse. She applied for an occupation order with the aim of removing the respondent from the house so she could safely return with her children. Although she was granted an occupation order, it could not take effect until it had been served. As the respondent had failed to attend the hearing and no one knew his whereabouts the applicant felt the order had "*no value*". Had the police not served the order on him whilst conducting an interview under caution for a criminal offence the order would not have had effect and the applicant would not have received the protection she required.

Some of the participants secured occupation orders containing provisions which allowed the respondent to return to the property, but the court dictated how they could occupy it. This meant the court decided where both parties could go within the house and what times they could be in the house. Although Participant B received an order containing provisions which stated where her and her husband were allowed within the property, her husband decided not to return. Since the order did not prevent him from returning, she was concerned he would "*come home at anytime that he pleased*" which she later said caused her mental health to suffer. Similarly participant F explained "*I spent about a year just basically locked in my bedroom because he was hovering around outside the door and it was horrible*". In this participant's case she found the experience to be too intimidating and moved out of the house. Nevertheless, in both cases occupation orders were granted however their ultimate aim to feel safe from their abuser was not met.

For Participant G the main aim was to get a financial order attached to the occupation order so her husband would make certain payments towards the house. The participant was going through divorce proceedings however her husband was being uncooperative in declaring his finances. He had moved out of the home and refused to contribute towards the mortgage or bills. The occupation order was granted however it was only designed to last three months and after this period her husband refused to make any additional financial contributions. Although initially her aim was met by the order, due to its short time frame she was quickly placed back in the same situation as she was prior to obtaining the order.

To conclude, not all participants were successful in obtaining an occupation order and even where the court did grant one, the applicant's overall aim was not always met. Given the infringement of property rights it is understandable why occupation orders are taken seriously by the court and are viewed as a temporary measure. However, the court appears to place these rights as a prime concern rather than the safety of the applicants who are seeking protection from the order.

Were there any other proceedings going on around the time of the application for an occupation order? What was the outcome of these proceedings and did this relate to the participant's housing situation at all?

At the time of applying for an occupation order, all of the applicants had other proceedings going on at the same time. All but one of the interviewees applied for a non-molestation order alongside an occupation order and these were all granted, although it was not clear if the terms included a zonal clause. Participant F did not apply for a non-molestation order and she considered that this was 'an issue' for the judge hearing her case…

> *He said, 'there's no non-molestation order here, why is that?' But you know I didn't want it to be about [my husband], making accusations about him, I just wanted him to stay out of my way so I could just enjoy a bit of a life in my house on my own with my children.*

One possibility is that when faced with both applications, the ease of granting a non-molestation order results in due consideration not being given to the occupation order application on the basis that 'some protection' will suffice. This reflected Participant E's experience, who noted:

> *I didn't actually get the occupation order because the court decided that as I had gone for a non-molestation order that's all I needed. I didn't need anything else*.

The vast majority of the interviewees were also engaged in divorce proceedings at the time of their occupation order proceedings. It was clear that the divorce proceedings were used to regulate their longer term housing situation. For example, Participant B and Participant F noted that through the divorce she was able to sell the house and release the equity in the property. This view was also backed up by participant E who stated that "*I didn't need anything else it could all be dealt with in the divorce proceedings*".

It is clear from this that where participants had multiple orders and proceedings occurring around the same time that this was affecting the respondent's wellbeing causing stress, confusion and affecting the children involved where applicable.

If an order was granted, how long was it granted for? Was this a sufficient amount of time?

In common with the survey respondents, the most common response amongst the interviewees were that orders were granted for six months (Participants A and B). Participant G had two orders in place, an occupation order and an undertaking. The occupation order was in place for 3 months and the undertaking lasted for 6 months. She believed this was not granted for enough time and hoped that the judge would grant an extension to the orders because these few months were not long enough for her to deal with her housing arrangements. She mentioned in the interview that, 'it doesn't give you long enough really and that's that was my frustration he did say you can go back and re-file to get an extension.' At the other end of the spectrum, Participant C's occupation order was granted for two years. She mentioned in the interview, 'the judge read through my statement and everything and he gave the order for, I think it was, two years. Which unless I'm mistaken is actually quite unusual because I think they are normally only about six months to a year.' In some instances, the divorce proceedings which dealt with the longer term arrangements for the property took much longer than the occupation orders had been granted for. This suggests that in many cases, it would be more sensible for orders to be granted until the conclusion of the divorce proceedings rather than for any set period.

Conclusions/Recommendations

Whilst it is clear that there is no one barrier to a survivor obtaining an occupation order, two were particularly prominent in the responses from professionals and the discussions with survivors: strict legal aid eligibility requirements and safety measures at court. The restrictive legal aid means test means that many survivors are either choosing not to apply or are forced into representing themselves in the proceedings. A lack of representation can lead to a survivor not presenting their evidence to their best ability, in particular when faced with a represented opponent or an unsympathetic judge. In regards to safety at court, professionals and survivors had very different experiences of Special Measures. Unrepresented litigants were unlikely to even know that this option is available and judges are unlikely to discuss the option with them. Safety measures for those litigants were likely to be restricted to separate waiting rooms rather than measures within the proceedings themselves. This is in contrast to litigants with representation, where an application is more likely to be made for special measures and more likely to be granted. This is again an indicator of how important access to funding and appropriate representation is in these proceedings.

In line with the official statistics set out earlier in this report, the results of the survey and the interviews with survivors have indicated that the courts are more likely to make a non-molestation order than an occupation order, with some judges taking the view that the former offers sufficient protection on its own. A key reason for this may be due to the lower threshold for obtaining a non-molestation order than an occupation order, as discussed earlier in this report. However, assuming that a non-molestation order offers sufficient protection ignores the additional provisions that can be attached to an occupation order such as directions for the respondent to continue paying towards the mortgage and bills. Provisions of this type will be imperative to ensuring continued protection to victims of economic abuse, as evidenced by the interviews with survivors who gave examples of the perpetrator attempting to sabotage their occupation of the home post order by refusing to pay towards the mortgage/rent and bills.

Where occupation orders are made, professionals and survivors were both in agreement that the length of orders is usually insufficient to allow for longer term arrangements to be put in

place. Many of the survivors interviewed were involved in a multitude of concurrent proceedings including children proceedings and divorce proceedings. It is unlikely that those proceedings would have been resolved within 6 months of an occupation order being granted. The length of orders therefore needs urgent consideration and reform.