

# COVID-19 AND THE FAMILY COURTS: KEY PRACTITIONER FINDINGS IN APPLICATIONS FOR DOMESTIC VIOLENCE REMEDY ORDERS

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## Abstract

In the year following the introduction of social distancing measures in March 2020, applications for non-molestation orders in England and Wales increased by up to 27% whilst applications for occupation orders increased by up to 22%. The heightened need for recourse to the family courts during this time supports a more general concern that rates of domestic abuse have increased during the pandemic. This paper presents the findings of in-depth interviews conducted with professionals in the North East of England who have represented or otherwise supported victims of domestic abuse in the family courts since the start of the Covid-19 pandemic. The aims of this article are not to 'name and shame' any particular court, but rather to evaluate the capacity of the remote family court to provide a safe and fair process for victims of domestic abuse. Where appropriate, the authors will also make recommendations for improving practitioners' and litigants' experiences within the current restrictions.

**Key words:** Covid-19; remote family court; domestic abuse, access to justice

## Introduction (A)

In the initial weeks after social distancing measures were introduced in March 2020, reports emerged that patterns of domestic abuse were changing, with research indicating that the frequency and severity of abuse had worsened for many victims who remain in a relationship with their abuser.<sup>1</sup>

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<sup>1</sup> R Ivandic, T Kirchmaier and B Linton, *Changing patterns of domestic abuse during Covid-19 lockdown*, Discussion Paper No.1729 (Centre for Economic Performance, November 2020); Women's Aid, *A Perfect Storm: The impact of the Covid-19 pandemic on domestic abuse survivors and the services supporting them* (Womens Aid, August 2020); N van Gelder, A Peterman, A Potts, M O'Donnell, K Thompson, N Shah and S Oertelt-Prigione, 'Covid-19: Reducing the risk of infection might increase the risk of intimate partner violence' (2020) 21 *EClinical Medicine* 1; A Speed, K Richardson, C Thomson, 'Stay Home,

Family court statistics regarding the two principal forms of domestic violence remedy orders, non-molestation orders and occupation orders, support this claim. Applications for non-molestation orders increased by 12% between January and March 2020, 26% between April and June 2020, 27% between July and September and 23% between October and December 2020 as against the same periods in 2019, representing an overall annual increase of 22%.<sup>2</sup> Similarly, applications for occupation orders increased by 8% between January and March 2020, 17% between April and June 2020, 22% between July and September and 3% between October and December 2020, an average increase of 12.5%.<sup>3</sup> These statistics indicate that the family courts' approach to prioritising applications for injunctive protection as 'work that must be done' in the face of the pandemic has been both necessary and successful in ensuring victims continue to have access to protective remedies during this time.<sup>4</sup> Nonetheless, the literature also reveals that some victims have experienced barriers to the remote family court, both as a result of social-distancing measures and because pre-existing barriers to justice have been exacerbated in the current climate.<sup>5</sup>

Whilst earlier research has focussed on the ability of victims of domestic abuse to access statutory and third sector support services during the pandemic,<sup>6</sup> this paper focusses on the response of the family court. It explores the findings from in-depth interviews conducted with professionals in the North East of England who have represented or otherwise supported victims of domestic abuse in applications for injunctive protection in the family courts since social distancing measures were introduced. There are four main types of injunctive protection available through the family courts – non-molestation orders,<sup>7</sup> occupation orders,<sup>8</sup> Forced Marriage Protection Orders<sup>9</sup> and Female Genital Mutilation Protection Orders.<sup>10</sup> But since the latter two specialist remedies are sought far less frequently, this article will focus on the most heavily used forms of protection, non-molestation orders and occupation orders. However, it is clear that many of the issues raised will have a similar effect on victims applying for all forms of injunctive protection. This article aims not to 'name and shame' any

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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* 539

<sup>2</sup> Figures directly obtained from Ministry of Justice and National Statistics 'Family Court Statistics Quarterly' January to March 2020; April to June 2020; July to September 2020; October to December 2020. [www.gov.uk/government/statistics/family-court-statistics-quarterly](http://www.gov.uk/government/statistics/family-court-statistics-quarterly). Last accessed 24 April 2021.

<sup>3</sup> Ibid.

<sup>4</sup> Courts and Tribunals Judiciary, 'Coronavirus (COVID-19) update from the Lord Chief Justice'. [www.judiciary.uk/announcements/coronavirus-update-from-the-lord-chief-justice/](http://www.judiciary.uk/announcements/coronavirus-update-from-the-lord-chief-justice/). Last accessed 8 March 2021.

<sup>5</sup> Speed et al (2020), n 1 above.

<sup>6</sup> C Gunby, L Isham, S Damery, J Taylor and C Bradbury-Jones, 'Sexual Violence and Covid-19: all silent on the home front' (2020) 3:2 *Journal of Gender-Based Violence* 421; M Sacco, F Caputo, P Ricci, F Sicilia, L De Aloe, C Bonetta, F Cordasco, C Scalise, G Cacciatori, A Zibetti, S Gratteri and I Aquila, 'The impact of the Covid-19 pandemic on domestic violence: The dark side of home isolation during quarantine' (2020) 88:2 *Medico-Legal Journal* 71.

<sup>7</sup> Family Law Act 1996, s 42.

<sup>8</sup> Family Law Act 1996, ss 33-38.

<sup>9</sup> Family Law Act 1996, s 73.

<sup>10</sup> Female Genital Mutilation Act 2003, sch 2 para 1.

particular court, but rather to evaluate the capacity of the remote family court to provide a safe and fair process for victims of domestic abuse. Where appropriate, the authors also make recommendations for improving practitioners' and litigants' experiences within the current restrictions bearing in mind the possibility that some reliance on remote courts may continue even after pandemic-related reasons for their use no longer apply.

### **Domestic violence remedy orders (A)**

The most commonly sought family law injunctions, non-molestation orders, aim to 'prevent domestic abuse, stalking and harassment by prohibiting the offender from contacting the victim and/or attending certain places'.<sup>11</sup> Additionally, or alternatively, victims may require an occupation order to exclude the perpetrator from the family home or otherwise regulate its occupation following a relationship breakdown. Occupation orders are both applied for and granted at a much lower rate than non-molestation orders, reflecting a series of judgments confirming that they should only be granted in 'exceptional circumstances' because of the 'draconian effect' of excluding a perpetrator from the property.<sup>12</sup> More recent case law has indicated a slightly less restrictive approach to granting occupation orders. In *Dolan v Corby* for example, Black LJ stated that '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'<sup>13</sup>. Further, it was held in *Re L (Children) (Occupation Order)*<sup>14</sup> that 'harm' should be interpreted broadly and was not limited to physical harm. This less restrictive approach, however, does not appear to be reflected in an increased willingness to grant orders, with research indicating that occupation orders have in fact become more difficult to obtain over the last five years.<sup>15</sup> Where orders are granted, however, the court has jurisdiction to determine who should or should not live in all or part of the property and can exclude one of the parties from living in or attending a specified area around the home. Orders can also deal with practical arrangements such as who will bear responsibility for payment of the rent or mortgage on the property and whether the occupying party should pay a rent to the party who has been excluded.<sup>16</sup>

### **Domestic abuse and the remote family court (A)**

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<sup>11</sup> L Bates and M Hester, 'No Longer a Civil Matter? The Design and Use of Protection Orders for Domestic Violence in England and Wales' (2020) 42:2 *Journal of Social Welfare and Family Law* 135.

<sup>12</sup> See *Chalmers v John* [1999] 1 FLR 392; *G v G (Occupation Order)* [2000] 3 FCR 53; *Dolan v Corby* [2011] EWCA Civ 1664.

<sup>13</sup> *Dolan v Corby* [2011] EWCA Civ 1664 at para 27.

<sup>14</sup> *Re L (Children) (Occupation Order)* [2012] EWCA Civ

<sup>15</sup> K Richardson K and A Speed, (2021) 'Should I Stay or Should I Go Now? If I Go There Will be Trouble and if I Stay There Will be Double: An Examination of Trends in Accessing Occupation Orders in England and Wales'. Unpublished Paper.

<sup>16</sup> Family Law Act 1996, s 40.

At the outset of the pandemic, applications for injunctive protection were categorised as ‘work that must be done’ by the family courts.<sup>17</sup> This meant that new and existing applications were progressed, albeit hearings (as at the time of writing in May 2021) continued to be heard remotely. The following sections will consider some of the key implications of the pandemic on accessing non-molestation orders and occupation orders.

### *Access to advice, representation and support services (B)*

Following the introduction of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), legal aid was removed from the scope of private family law proceedings unless specified evidence could be produced of domestic abuse or child abuse, or the application related to a protective injunction under the Family Law Act 1996. Whilst LASPO therefore intended to preserve legal aid for victims of domestic abuse, the rates of unrepresented applicants have increased year on year, including in domestic abuse cases.<sup>18</sup> Research indicates that approximately 40% of victims do not qualify for legal aid, primarily because they are unable to satisfy the strict means test.<sup>19</sup> Although the number of victims with legal representation have not been adversely impacted by the pandemic,<sup>20</sup> it is widely reported that social distancing measures have reduced both formal and informal support networks to whom victims might ordinarily turn for help leaving abusive relationships and seeking legal recourse in cases where they do not qualify for funding.<sup>21</sup>

In the voluntary sector, the scope and availability of assistance has been limited by difficulties in moving to online delivery, the availability of technology for service users, a reduction in staffing and volunteers, and a loss of funding income.<sup>22</sup> Women’s Aid identified that 84% of respondents to their study reported being forced to reduce or cancel one or more of their services owing to Covid-19.<sup>23</sup> These findings support the Nuffield Family Justice Observatory conclusions that domestic abuse services are only able to offer ‘very limited levels of support in the current circumstances’.<sup>24</sup> A key area where limitations on services has been felt is in the level of support provided to victims during

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<sup>17</sup> Courts and Tribunals Judiciary, n 4 above.

<sup>18</sup> Ministry of Justice and National Statistics, ‘Family Court Tables: October to December 2020’, Table 11 [www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2020](http://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2020). Last accessed 24 April 2021.

<sup>19</sup> D Hirsch, *Priced out of Justice: Means Testing Legal Aid and Making Ends Meet* (Loughborough University Centre for Research in Social Policy, 2018).

<sup>20</sup> Ministry of Justice and National Statistics, n 2 above.

<sup>21</sup> Speed et al, n 1 above; Women’s Aid, n 1 above.

<sup>22</sup> Speed et al, n 1 above.

<sup>23</sup> Women’s Aid, n 1 above.

<sup>24</sup> Nuffield Family Justice Observatory, *Remote hearings in the family justice system: a rapid consultation* (Nuffield Family Justice Observatory, May 2020).

court proceedings. In Speed et al's study, 40 out of the 51 respondent organisations reported usually providing support to victims of domestic abuse whilst at court.<sup>25</sup> At the outset of the pandemic, however, only 17 were continuing to provide this support – a reduction of 42%. This finding is concerning because research indicates that support services are often one of the first sources of information about victims' legal options and, for many victims, are a precursor to engagement with legal services or the family courts.<sup>26</sup> In the absence of legal advice, it is often Independent Domestic Violence Advisors (IDVAs) who attend hearings with clients, assist them with preparing the paperwork, collect evidence and ensure they have necessary special measures in place.<sup>27</sup> Support services are therefore able to minimise many of the barriers to the courts including distrust in the justice system, fear of retaliation from the perpetrator and concerns about traumatising and insensitive processes.<sup>28</sup> Subsequently, approximately £25 million has been allocated to enable specialist Violence against Women and Girls charities to continue delivering core services and respond to needs generated as a result of the pandemic.<sup>29</sup> This is clearly necessary and welcomed funding. However, it is yet to be seen whether this has enabled more charities to support victims through legal proceedings or whether the funds have been committed to back-office costs.

The reduction in service provision for victims has been compounded by an increase in barriers to seeking support. In Richardson and Speed's study, the majority of professionals surveyed (52.6%) reported a change in the number of enquiries received specifically in relation to occupation orders since March 2020.<sup>30</sup> 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%). The absence of a shared experience across all professionals was mirrored in Speed et al's study of domestic abuse support services which found that the pandemic had not resulted in higher rates of general requests for assistance amongst all domestic abuse support services.<sup>31</sup> Although 21% of the organisations cited an increase in requests, nearly double the number of respondents – 41% – had experienced a decrease in calls and web-based contacts. The respondents highlighted that the primary reason for this was the existence of physical barriers to seeking support where victims remained in the same home as their

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<sup>25</sup> Speed et al, n 1 above.

<sup>26</sup> L Kelly, *Combating violence against women: minimum standards for support services* (Directorate General of Human Rights and Legal Affairs, Council of Europe; Strasbourg, 2008); C Sullivan 'Understanding How Domestic Violence Support Services Promote Survivor Well-being: A Conceptual Model' (2018) 33 *Journal of Family Violence* 123.

<sup>27</sup> Speed et al, n 1 above.

<sup>28</sup> Kelly, n 26 above; Sullivan, n 26 above.

<sup>29</sup> Ministry of Justice, 'Covid-19 funding for domestic abuse and sexual violence support services' [www.gov.uk/guidance/covid-19-funding-for-domestic-abuse-and-sexual-violence-support-services](https://www.gov.uk/guidance/covid-19-funding-for-domestic-abuse-and-sexual-violence-support-services). Last accessed 23 April 2021.

<sup>30</sup> Richardson and Speed, n 15 above.

<sup>31</sup> In the study, 21% of organisations had reported an increase in requests for support whilst 41% noted a decrease. See Speed et al, n 1 above.

perpetrator. In addition, they considered that victims (a disproportionate number of whom are women) take on additional physical and psychological burdens as caregivers during pandemics and humanitarian crises, resulting in time barriers to accessing support, a finding which is supported in previous literature.<sup>32</sup> Ivendic et al found that whilst many support services had experienced a greater demand for their services, this was all driven by third party reporting/referrals, suggesting that under-reporting of domestic abuse was still present, particularly during periods of lockdown.<sup>33</sup> Responding to the need to engage victims in creative ways, and in line with the approach taken in other jurisdictions, efforts have since turned to establishing 'safe spaces' within public venues (such as pharmacies and supermarkets) to allow victims who remain in the same home as their abuser to speak to a professional safely and confidentially about their options.<sup>34</sup> As at the end of October 2020, over a quarter of pharmacies were participating in the scheme and safe spaces had been used over 3,700 times, demonstrating a clear need for such an initiative.<sup>35</sup>

#### *Access to the virtual court room and protective remedies (B)*

Throughout the pandemic, the family courts have sought to improve accessibility for victims seeking protective injunctions by enabling applications to be made by post or email. This removes the usual requirement for applications to be made in person. This change in practice is mirrored in other jurisdictions, such as Peru and Puerto Rico, where applications for protective injunctions are currently being allowed via WhatsApp or email.<sup>36</sup> Whilst this is a step in the right direction, for victims who appear as litigants in person, the process of applying for protection can be problematic. Although there is no court fee for pursuing an application for a domestic abuse-related injunction and therefore there are limited financial barriers to applying, practitioners have noted that the process 'presumes victims are able to locate a safe and confidential space away from their abuser, complete an application, draft a witness statement and attend a telephone hearing'.<sup>37</sup> Aside from practical difficulties, many self-representing litigants understandably lack the substantive knowledge about

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<sup>32</sup> 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; N Renwick, 'The 'Nameless Fever: The HIV/AIDS Pandemic and China's' Women (2002) 23:2 *Third World Quarterly* 377; R Rezaeian, 'The Association Between Natural Disasters and Violence: A Systematic Review of the Literature and a Call for more Epidemiological Studies' (2013) 18:12 *Journal of Research in Medical Sciences* 1103.

<sup>33</sup> Ivendic et al, n 1 above.

<sup>34</sup> For more information about the scheme, see <https://uksaysnomore.org/safespaces/>.

<sup>35</sup> Hestia and General Pharmaceutical Council, 'A Safe Space has Saved my Life: How Pharmacies are Helping People Find a Way Out of Domestic Abuse' [www.pharmacyregulation.org/regulate/article/safe-space-has-saved-my-life-how-pharmacies-are-helping-people-find-way-out](http://www.pharmacyregulation.org/regulate/article/safe-space-has-saved-my-life-how-pharmacies-are-helping-people-find-way-out). Last accessed 9 April 2021.

<sup>36</sup> The World Bank, 'The Shadow Pandemic: Violence Against Women During Covid-19' <https://blogs.worldbank.org/developmenttalk/shadow-pandemic-violence-against-women-during-covid-19>. Last accessed 4 March 2021.

<sup>37</sup> Speed et al, n 1 above.

what information should be included in the application documents and therefore may not put forward their strongest legal arguments to improve their prospects of securing a protective order.<sup>38</sup>

As demonstrated in Table 1<sup>39</sup> and Table 2,<sup>40</sup> there has been a higher than average number of applications for both non-molestation orders and occupation orders throughout all quarters of the pandemic. This indicates that the vast majority of victims who would have pursued an application absent the pandemic have not been deterred or prevented from pursuing applications, despite potentially facing difficulties in accessing support services and/or the relevant technology and that others who might not otherwise have needed legal protection sought it. Applications have continued in similar proportions to previous years, with roughly 83% relating to non-molestation orders and 17% to occupation orders.<sup>41</sup>

In terms of orders granted, however, the number of occupation orders have declined, as compared to the same period in 2019. Whilst this is consistent with a more general trend that the number of occupation orders granted have been falling over the last five years,<sup>42</sup> it is particularly concerning that in all quarters of 2020, fewer than half of applications for occupation orders were successful, whilst this fell below 40% in two quarters – a larger fall than in other years. This can be contrasted with the equivalent rates for non-molestation orders (see Table 2) where consistently more orders are granted compared to the number of applications. In part, this may be attributed to the courts' power under section 42(2)(b) of the Family Law Act 1996 to make a non-molestation order where the parties are already engaged in family proceedings without a formal application having been made. There is no equivalent provision in relation to occupation orders. Research also suggests that the criteria for securing non-molestation orders are 'generous' and 'victim-focussed',<sup>43</sup> requiring the court to have regard to the need to secure the health, safety and wellbeing of the applicant and any relevant child.<sup>44</sup> There must be evidence of molestation,<sup>45</sup> the applicant must need protection and the court must be satisfied on the balance of probabilities that judicial intervention is required to control the

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<sup>38</sup> Richardson and Speed, n 15 above.

<sup>39</sup> Figures derived from Ministry of Justice and National Statistics, 'Family Court Statistics Quarterly: January to March 2020; April to June 2020; July to September 2020; October to December 2020' <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-january-to-march-2020> Last visited 20 May 2021.

<sup>40</sup> Ibid.

<sup>41</sup> Ministry of Justice and National Statistics 'Family Court Statistics Quarterly: April to June 2020' [www.gov.uk/government/publications/family-court-statistics-quarterly-april-to-june-2020/family-court-statistics-quarterly-april-to-june-2020](https://www.gov.uk/government/publications/family-court-statistics-quarterly-april-to-june-2020/family-court-statistics-quarterly-april-to-june-2020). Last accessed 10 April 2021; Ministry of Justice and National Statistics 'Family Court Statistics Quarterly: July to September 2020' [www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2020](https://www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2020). Last accessed 10 April 2021.

<sup>42</sup> Richardson and Speed, n 15 above

<sup>43</sup> M Burton, 'Civil law remedies for domestic violence: why are applications for non-molestation orders declining?' (2009) 31 (2) *Journal of Social Welfare & Family Law* 110.

<sup>44</sup> Family Law Act 1996, s 42(5).

<sup>45</sup> *C v C (Non-molestation order: jurisdiction)* [1998] 1 FLR 554.

respondent's behaviour.<sup>46</sup> Over 92% of the 40 practitioners surveyed by Richardson and Speed agreed this was an easier threshold to reach than in occupation order proceedings, with their balance of harm test and wider discretionary checklist of factors, used to determine precisely what order to make (where the balance of harm test requires that *an* order be made) or whether to make an order at all (where that test is not met in the applicant's favour).<sup>47</sup> That checklist applied depends on the section being applied under but will include the housing needs and housing/financial resources of each of the parties; the parties' conduct; and the likely effect of an order not being made on the health, safety or well-being of the parties and any relevant child.<sup>48</sup> As the findings section will consider, many people's increased dependence on the family home as a result of Covid-19 and the difficulty of finding alternative accommodation may go some way to explaining why the courts have been more reluctant to grant occupation orders during the pandemic.

Table 1: occupation orders - 2020

<b>Quarters of 2020</b>	<b>Applications</b>	<b>% difference on same period in 2019</b>	<b>Orders granted</b>	<b>% of applications granted</b>	<b>% difference on same period in 2019</b>
Jan-Mar	1,364	+8%	610	45%	+1%
Apr-Jun	1,504	+17%	568	38%	-4%
Jul-Sept	1,790	+22%	631	35%	-3%
Oct-Dec	1,468	+3%	624	43%	-5%

Table 2: non-molestation orders - 2020

<b>Quarters of 2020</b>	<b>Applications</b>	<b>% difference on same period in 2019</b>	<b>Orders granted</b>	<b>% of applications granted</b>	<b>% difference on same period in 2019</b>
Jan-Mar	6,658	+12%	8,105	122%	+9%
Apr-Jun	7,341	+26%	8,895	121%	+18%
Jul-Sept	8,154	+27%	9,875	121%	+19%
Oct-Dec	7,705	+23%	9,780	127%	+22%

If injunctive protection is granted, an order will only become effective from the point that it is served on the respondent. Prior to Covid-19, non-molestation orders and occupation orders were served personally, pursuant to Rule 10.6 (1) of the Family Procedure Rules 2010, which provides that 'the applicant must, as soon as reasonably practicable, serve on the respondent personally... a copy of the order'. Following the introduction of social distancing measures, the majority of courts have either

<sup>46</sup> *C v C* [2001] EWCA Civ 1625.

<sup>47</sup> Richardson and Speed, n 15 above.

<sup>48</sup> Burton, n 43 above.



taken the view that personal service continues to be mandatory or that 'good reasons' (i.e. those over and above the existence of the pandemic) are required to dispense with the requirement for personal service.<sup>49</sup> In these courts, personal service has continued, albeit some modifications may be required to ensure the safety of the process server and the recipient. In contrast, however, a small number of courts have automatically permitted alternative means of service, typically through first class post to the respondent's last known address and via electronic means such as email, text or WhatsApp.<sup>50</sup> To secure the required clarity and consistency, a temporary Practice Direction 36U was implemented on 3 August 2020 which is expected to remain in place until 30 September 2021. This confirms that the court can grant alternative service in respect of applications and orders for family court injunctions.

However, whilst the approach of Practice Direction 36U can be commended for supporting victims by providing flexibility where personal service is proving difficult, other related justice agencies have adopted stricter processes. In the early stages of the pandemic, it was reported that the Crown Prosecution Service (CPS) has been refusing to prosecute alleged breaches of protection orders which have been served through email and/or WhatsApp. This has been reflected in policing practices, with one force informing a respondent that the CPS would not pursue him because they would not be able to prove that he 'read the papers'.<sup>51</sup> In another case, an applicant had been advised that the CPS would not pursue a respondent who had been served via WhatsApp because he could 'legitimately plead he had not taken it seriously because of the medium by which it was served'.<sup>52</sup> Given that 'the effectiveness of a protection order relies on the threat of consequences for breach', this approach is concerning because it imposes a higher standard than is required by law.<sup>53</sup> In order to be prosecuted for breaching a family law injunction, a respondent simply needs to be aware of its existence and not its contents, regardless of how it is served.<sup>54</sup> This approach has also exacerbated difficulties which existed prior to Covid-19 about the low frequency of enforcement against regarding breaches of protective injunctions. Bates and Hester, for example, note that owing to cuts to legal aid and an increase of litigants in person, the police are not always notified that orders have been made and/or properly served.<sup>55</sup> Even when orders are sent to the police, there are often delays in the police recording orders or subsequent breaches.<sup>56</sup> Likewise, Her Majesty's Inspectorate of Constabulary, Fire

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<sup>49</sup> R Cooper and M Horton, 'Non-molestation orders: valid service in the time of Coronavirus' (June 2020) [www.familylawweek.co.uk/site.aspx?i=ed211488](http://www.familylawweek.co.uk/site.aspx?i=ed211488). Last accessed 24 March 2021; R Cooper and M Horton (July 2020) 'Non-molestation orders: valid service in the time of Coronavirus (Part 2)' [www.familylawweek.co.uk/site.aspx?i=ed212030](http://www.familylawweek.co.uk/site.aspx?i=ed212030). Last accessed 24 March 2021.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Bates and Hester, n 11 above, 138.

<sup>54</sup> Family Law Act 1996, s 42A(2).

<sup>55</sup> Bates and Hester, n 11 above.

<sup>56</sup> Ibid.

and Rescue Services found evidence that victims often reported multiple breaches to the police before any action was taken, leading to delays and reduced confidence in the authorities.<sup>57</sup> The Inspectorate concluded that ‘breaches are not always reaching court and these measures are at risk of becoming a toothless instrument’.<sup>58</sup>

### *Ensuring victim safety and participation (B)*

The court has discretion about how applications for protective injunctions are heard. Whilst ex parte applications are likely to be dealt with via telephone, subsequent hearings could be conducted in the courtroom (either fully attended or as a hybrid hearing), by telephone or through a video platform. The Family Justice Council’s (FJC) guidance on special measures in remote and hybrid hearings indicates that victims should be consulted about their preferred mode of participation prior to a hearing being arranged.<sup>59</sup> Whilst this is commendable, it is also likely to add to already high levels of court administration. Moreover, it is unclear what rights a victim will have if their preference cannot be accommodated or if the victim and perpetrator have different preferences. In all cases, the guidance provides that victims should be informed about the format for the hearing and provided a joining link (if applicable) in good time.<sup>60</sup> This guidance was implemented in response to findings by the Nuffield Family Justice Observatory that parties have often been given very late notice of hearings.<sup>61</sup>

In relation to the conduct of remote hearings, the guidance requires the court to be mindful of the ‘invasive, (re)traumatising and endangering’ nature of hearings for victims of abuse.<sup>62</sup> This is an acknowledgement that remote hearings may pose different, but no less important, safety and wellbeing risks from those entailed in in-person hearings. They provide an opportunity for perpetrators to ‘see and note details of the victims’ private, safe space, which may also be used to track them down, break into their home, continue the exercise of coercive control or harass or intimidate them in other ways’.<sup>63</sup> Newcastle Crown Court has attempted to overcome this issue within criminal proceedings where the defendant attends in-person and the victim provides evidence

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<sup>57</sup> Her Majesty’s Inspectorate of Constabulary, Fire and Rescue Services, *A progress report on the police response to domestic abuse* (London: HMICFRS, 2017).

<sup>58</sup> Her Majesty’s Inspectorate of Constabulary, *Increasingly everyone’s business: A progress report on the police response to domestic abuse* (London: HMIC, 2015), 59.

<sup>59</sup> Family Justice Council, *Safety from Domestic Abuse and Special Measures in Remote and Hybrid Hearings* (Family Justice Council, November 2020), s 2.

<sup>60</sup> Ibid.

<sup>61</sup> Nuffield Family Justice Observatory, *Remote Hearings in the Family Justice System: Reflections and Experiences* (Nuffield Family Justice Observatory, September 2020).

<sup>62</sup> Family Justice Council, n 59 above, s 4.

<sup>63</sup> Ibid.

remotely. In such cases, the court is using moveable screens, which can be manoeuvred into positions where they can only be seen by the judge, jury and counsel (not the defendant or public gallery) when a vulnerable victim or witness is giving evidence over video link.<sup>64</sup> This is possible in criminal proceedings, where the defendant will be present in the courtroom itself. It is more difficult in family proceedings, where both the applicant and respondent may be attending remotely on the same video call.

To mitigate risks to victims in family court proceedings, the FJC guidance recommends that a number of procedural safeguards should be implemented.<sup>65</sup> Primarily, a victim should never be left alone in a hearing with the perpetrator or the perpetrator's legal representative. Further, in order to reduce the risk of the court providing a forum for further abusive conduct, the guidance recommends that victims use a blurred out/generic background or that they participate in the hearing from a neutral space (such as a legal representative's office, should they have one). Victims can be permitted to join a remote call by audio only or where not required to give evidence, a victim may be excused from attending at all. Inevitably, the option to be excused from a hearing will only be available to represented litigants.

To assist litigants in person, the guidance provides that either party should (subject to the judge's power of refusal) be allowed to be accompanied by a supporter or McKenzie Friend.<sup>66</sup> This is particularly important in light of findings by the Nuffield Family Justice Observatory that some judges have questioned the necessity of support workers or otherwise made it difficult for them to engage in court proceedings by listing or rescheduling hearings at the last minute.<sup>67</sup> Moreover, that study found that litigants were often not even informed about their right to have a supporter or advocate present at the hearing.

## **Methodology (A)**

The paper draws on data obtained from 15 in-depth interviews with professionals in the North East of England who had participated in remote and/or hybrid hearings in the family courts since social distancing measures were introduced. The interviews took place between September and December 2020. This paper draws specifically on findings relating to proceedings for non-molestation orders and

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<sup>64</sup> Northumbria Police, 'New Technology to Make it Easier for Vulnerable Victims and Witnesses to Give Evidence at Newcastle Crown Court and Help Bring Criminals to Justice' <https://beta.northumbria.police.uk/latest-news/2021/february/new-technology-to-make-it-easier-for-vulnerable-victims-witnesses-to-give-evidence-at-newcastle-crown-court-and-help-bring-criminals-to-justice/>. Last accessed 16 April 2021.

<sup>65</sup> Family Justice Council, n 59 above, s 3.

<sup>66</sup> Ibid, s 4.

<sup>67</sup> Nuffield Family Justice Observatory, n 61 above.

occupation orders. The findings in relation to private and public children proceedings are reported separately.<sup>68</sup>

The study is one of the first of its kind to consider the effectiveness of the remote family court during the pandemic. The Nuffield Family Justice Observatory has published two reports on the capacity of the remote family court to provide fairness and justice for court users, but those reports were based primarily on quantitative survey data.<sup>69</sup> Based instead on in-depth interviews, this is the first paper to provide qualitative understandings of some of the issues raised in the Nuffield Family Justice Observatory's reports.

Semi-structured interviews were used to elicit respondents' feelings, create openness and expose new areas not been initially considered by the researchers.<sup>70</sup> All interviews were conducted remotely, using either Microsoft Teams or telephone. This decision was one of 'methodological necessity' owing to the lockdown regulations.<sup>71</sup> 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'.<sup>72</sup> 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'.<sup>73</sup> The authors consider that the risk of remote interviewing resulting in misunderstanding or otherwise affecting the validity of the findings was mitigated by their experience as family law practitioners. Whilst the authors had not participated in remote hearings themselves, they are experienced in both conducting fact-finding exercises and discussing cases with other professionals. As a result, the interviews were overwhelmingly conversational and detailed interactions. Further, using video conferencing facilities for most of the interviews ensured that at least some non-verbal and emotional cues could be identified.

The 15 interviewees in this study comprised: seven qualified solicitors, two trainee solicitors, one paralegal, two barristers, two volunteers at a court-based service and one representative of Cafcass.

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<sup>68</sup> K Richardson, A Speed, C Thomson and L Coapes, 'Covid-19 and the Family Courts: Key Practitioner Findings in Children Cases' (2021) *Journal of Social Welfare and Family Law* (accepted/in press).

<sup>69</sup> Nuffield Family Justice Observatory, n 24 above; Nuffield Family Justice Observatory, n 61 above.

<sup>70</sup> 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.

<sup>71</sup> 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.

<sup>72</sup> *Ibid*, 1.

<sup>73</sup> *Ibid*, 2-3.

All except one of the respondents, were female. Six of the legal professionals worked in predominantly legal aid practices, whilst two described their work as mostly privately paid. Two of the solicitors worked for different local authorities in the region, while the others were in private practice.

The respondents had varying experiences of supporting victims of abuse throughout the pandemic. Given that applications for injunctive protection are typically considered lower-level advocacy (at least until the point at which they become contested), it is perhaps unsurprising that the trainee solicitors and paralegal interviewed reported that preparing applications and attending *ex parte* and return hearings was a considerable part of their day-to-day work. These respondents reported overwhelmingly representing victims in proceedings. Two of the respondents volunteered at a court-based charity that supports litigants in person (both victims and perpetrators) in applications for injunctive protection, alongside other family and civil proceedings. The remaining professionals specialised in private and/or public children law, but had either encountered domestic abuse as a welfare/safeguarding concern within those proceedings or had clients who required a protective injunction, leading to interrelated proceedings being commenced. One respondent, for example, noted '*in the majority of private law cases... there are some allegations of domestic abuse*'. This mirrors Barnett's findings that the prevalence of domestic abuse in private law children cases is considerably higher than in the general population, with the studies cited in her report indicating that allegations or findings of domestic abuse are made in up to 62% of cases.<sup>74</sup> Several of the qualified practitioners reported that they also supervised trainees and paralegals and so oversaw the conduct of any domestic abuse proceedings.

In terms of geographical spread, the respondents' offices were located in various places across the region: mostly Newcastle (seven) and Durham/Darlington (four), but with two in Sunderland and one in each of South Tyneside and Northumberland. Many of the interviewees reported having experiences of multiple courts in the North-East region over the relevant period. The data focus on the *geographic* region of the North East of England rather than the *judicial* region (which also includes York, Bradford, Sheffield, Leeds and Hull). Whilst a regional study, many of the issues that have emerged will resonate with the national and international legal community.

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<sup>74</sup> A Barnett, *Domestic Abuse and Private Law Children Cases: A Literature Review* (Ministry of Justice, 2020).

Respondents were recruited as a snowball (or chain-referral) sample. Naderifar et al note that ‘in snowball sampling, the fragile population is selected in a social context and in a multi-stage process... [A]fter gaining access to the preliminary samples, the samples begin to introduce other people to take part in the research... [T]his process will continue in a semi-automatic and chain-like manner until data saturation’.<sup>75</sup> As the research team comprised family law practitioners, initial access proved unproblematic and referrals to other colleagues were forthcoming. Qualitative thematic analysis was conducted on the interview data using NVivo, which is recognised for providing a more rigorous method of coding than manual or other digital processes.<sup>76</sup> Two of the authors separately coded three of the interview transcripts to ensure a consistent approach. Thereafter, each of the remaining transcripts were coded by one of those two authors. Following the work of Lisa Given, saturation was considered to be reached at the point in coding where there were ‘mounting instances of the same codes’, but no new codes or themes emerged from the data.<sup>77</sup>

### Limitations of the study

A limitation of the study relates to the findings on litigants in person. The family court statistics on legal representation, which group all ‘domestic violence’ family court cases together, indicate an increase in the number of unrepresented applicants from 3,313 in 2015 to 6,423 in 2020.<sup>78</sup> Trinder et al’s study recognised that most litigants in person are acting as such because they are ineligible for, or have been unable to obtain, legal aid, but cannot afford legal representation.<sup>79</sup> Only around one quarter of the respondents in that study appeared in person out of choice.<sup>80</sup> Whilst it is a central claim of the article that the move to remote hearings has exacerbated pre-existing barriers to the family courts for litigants in person, the authors had no direct contact with litigants themselves. Instead, the data on which these findings are reached reflect the experiences and perceptions of the professionals interviewed. Moreover, as the respondents in this study worked in varied settings, their interactions with litigants in person were also varied. Principally, the respondents reported facing unrepresented opponents (or other parties) in the cases in which they were involved. However, the two volunteers

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<sup>75</sup> M Naderifar, F Ghaljaei and H Goli, ‘Snowball Sampling: A Purposeful Method of Sampling in Qualitative Research Strides’ (2017) 14:3 *Development of Medical Education* 3.

<sup>76</sup> 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.

<sup>77</sup> L Given, *100 Questions (and Answers) About Qualitative Research* (Sage, Thousand Oaks 2016), 135.

<sup>78</sup> Ministry of Justice, ‘Family Court Statistics Quarterly: October to December 2020’ (National Statistics, 25 March 2021) at <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2020> Last accessed 20 May 2021.

<sup>79</sup> L Trinder, R Hunter, E Hitchings, J Miles, R Moorhead, L Smith, M Sefton, V Hinchly, K Bader, J Pearce, *Litigants in Person in Private Family Law Cases* (Ministry of Justice, 2014).

<sup>80</sup> Ibid.

who worked at a court based charity had roles that involved them providing practical and emotional assistance to litigants in person before, during and after family court hearings. And the trainee solicitors and paralegal interviewed also reported triaging prospective clients and endeavouring to facilitate referrals to alternative sources of advice and support where the individuals were not eligible for legal aid.

Earlier studies have highlighted that there is value in seeking practitioners' views about the challenges faced by litigants in person because of their understanding of legal process and the issues being litigated.<sup>81</sup> The authors are nonetheless mindful that as legal professionals conducting interviews with other practitioners, the researchers and respondents may have had common understandings and shared experiences 'about' litigants in person that are reflected in the data. This absence of data 'from' litigants in person represents a gap in this research. The authors have sought to address this in a separate study which draws on litigants in persons' experiences of applying for non-molestation orders and occupation orders.<sup>82</sup>

The second limitation of the data is that, given the small sample size, it cannot claim to be representative of all professionals who have represented or supported parties in applications for injunctive protection during the Covid-19 pandemic, either in the North East or across England and Wales more generally. Nonetheless, as the preceding section has outlined, the interviewees comprised practitioners in different roles, at different stages of their careers and operating from varied settings. The authors therefore consider that the data collected present a fairly comprehensive – at least a wide-ranging – picture of the experiences of practitioners working in this area and the small sample size does not undermine these findings.

## **Findings and discussion (A)**

### *Leaving abusive relationships and seeking legal advice (B)*

Many of the respondents felt that victims were prevented from leaving abusive situations during periods of lockdown because of difficulties in seeking advice about their legal options when they remain living with a partner. The difficulties raised related primarily to physical barriers to reporting rather than an absence of available support. A respondent noted, *'I've had clients calling in when*

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<sup>81</sup> Trinder et al, n 79 above; Nuffield Family Justice Observatory, n 24 above; Nuffield Family Justice Observatory, n 59 above.

<sup>82</sup> Richardson and Speed, n 15 above.

*they've gone out for their walk, exercising. But that's difficult because they're not in a place where they can really talk in detail about it'. Moreover, in the first lockdown between March and June 2020, respondents felt victims were confused about whether they could flee to the safety of a friend/family member's house. One respondent reported 'a lot of clients were ringing in saying 'I don't know if I can leave this situation. I'm not allowed to go to my family's address'. These findings are consistent with research conducted by Hohl and Johnson, which identified a sharp decline during the first lockdown in victims telling police they had recently separated or attempted to separate.<sup>83</sup> Further, data from Women's Aid highlighted that during the first lockdown, nearly 68% of victims felt that they had no one to turn to and over 48% reported feeling that they could not leave/get away from their partner because of the pandemic.<sup>84</sup> It is possible that this position has somewhat improved in subsequent periods of lockdown as the government issued guidance that 'household isolation instructions as a result of coronavirus do not apply if you need to leave your home to escape domestic abuse'.<sup>85</sup>*

As soon as the first lockdown restrictions eased in around June 2020, many of the respondents noticed an increase in instructions for non-molestation orders and occupation orders.

*I've done more (applications for non-molestation orders) in the last few months than I have the whole time I've been here.*

*At the very beginning of lockdown, we were quite quiet... but as soon as they eased restrictions a little bit, it was mental. I was personally taking on three to four new cases a week.*

*There was a massive increase. It's eased off a little bit now, but when lockdown eased, it went up massively.*

*The new cases we've got, there seems to be a massive increase in domestic violence within the home during the lockdown, the first lockdown period... I think it is going to come out in the next few months to be honest; I don't think that's going to be something that's just immediately apparent.*

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<sup>83</sup> K Hohl and K Johnson, 'A Crisis Exposed - How Covid-19 is Impacting Domestic Abuse Reported to the Police' <https://campaignforsocialscience.org.uk/news/a-crisis-exposed-how-covid-19-is-impacting-domestic-abuse-reported-to-the-police/>. Last accessed 21 April 2021.

<sup>84</sup> Women's Aid, n 1 above

<sup>85</sup> Home Office, 'Domestic Abuse: Get Help During the Coronavirus (Covid-19) Pandemic' [www.gov.uk/guidance/domestic-abuse-how-to-get-help](http://www.gov.uk/guidance/domestic-abuse-how-to-get-help). Last accessed 18 April 2021.



The data therefore indicate that victims found it easier to contact legal professionals and apply for protection once lockdown measures had been lifted. This is consistent with Hohl and Johnson's findings that where domestic abuse features in a relationship, separations are delayed until restrictions are eased.<sup>86</sup> Similarly, in Richardson and Speed's study, the professionals surveyed identified that, for many victims, lockdown measures were a 'final straw'.<sup>87</sup> One of the respondents in their study noted that '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'.<sup>88</sup> Furthermore, family court statistics indicate that whilst 8,844 applications for non-molestation orders and occupation orders were made between April and June 2020 when the UK was in the first lockdown,<sup>89</sup> this increased to 9,944 applications between July and September 2020 once lockdown restrictions had been eased.<sup>90</sup>

### *Effectiveness of remote platforms (B)*

The respondents reported that ex parte and return hearings for injunctive protection had mainly taken place via telephone (BT Meet Me) and contested hearings had predominantly been conducted through a video platform (most commonly, CVP). This is broadly in line with the interim practice guidance for the Designated Family Centre for Cleveland, Durham and Northumbria issued on 7 April 2020, which states that hearings under Part 4 of the Family Law Act 1996 (non-molestation orders and occupation orders) will be dealt with via telephone or Skype.<sup>91</sup> In relation to FJC guidance on remote hearings, there was no indication by any of the respondents that victims had been consulted about their preferred method of holding the hearing for either ex parte or return hearings. For final hearings, however, the respondents reported that parties were required to prepare a 'case plan' indicating their client's preferred forum. There is clearly scope for greater consultation at earlier stages of proceedings. It was not clear from the data how often preferences were accommodated or how disputes between the parties about their preferred forums were resolved. Inevitably, litigants in person will find it difficult to weigh up their options without the benefit of legal assistance.

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<sup>86</sup> Hohl and Johnson, n 83 above.

<sup>87</sup> Richardson and Speed, n 15 above.

<sup>88</sup> Ibid.

<sup>89</sup> Ministry of Justice and National Statistics, (April to June 2020) <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-april-to-june-2020> Last accessed 20 May 2021.

<sup>90</sup> Ministry of Justice and National Statistics, (July to September 2020) <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-july-to-september-2020> Last accessed 19 May 2021.

<sup>91</sup> HHJ Hudson and HHJ Matthews QC, 'Interim Practice Guidance (4) for Cleveland, Durham and Northumbria Designated Family Court', para para 6.2, para 6.6, para 6.8 <https://wmflba.files.wordpress.com/2020/05/newcastle-teeside-dfj-areas-interim-guidance-v3-7apr20.pdf> Last accessed 18 April 2021.

Overall, the respondents considered that remote hearings worked well for ex parte and return hearings. Echoing previous research, which found that non-molestation orders were still being granted 'swiftly'<sup>92</sup> and 'without delay'<sup>93</sup>, the respondents in this study praised the speedy and straightforward nature of telephone hearings. However, there appeared to be inconsistency as to whether representatives were being provided with a designated hearing time for ex parte hearings. The respondents noted that being allocated a specific time allowed them to manage their time more effectively than being placed in the list and waiting for a judge to call. Having an advance hearing time also brings clear benefits for self-representing litigants, who need to find a safe and private space to conduct the hearing. A strict interpretation of the FCJ special measures guidance supports victims being provided with a time for ex parte hearings in order to reduce potential anxiety.

All of the respondents identified benefits to remote hearings both for themselves and their clients. For practitioners, remote hearings were reported to save time compared to in-person hearings because of the removal of travel and waiting time. For clients, remote hearings were seen to better protect the safety of victims because they did not need to come 'face-to-face' with their perpetrator and litigants had greater control over the nature of their participation (for example by opting to turn off their video or blur their background). Several respondents reported that when given the option, clients overwhelmingly opted for remote hearings over attending in person '*just because they feel more comfortable*'. This contrasts with the findings of the Nuffield Family Justice Observatory, where victims reported feeling unsafe when they had to listen to or see their alleged abuser from their own home.<sup>94</sup> Commenting specifically on the first Nuffield report, one of the respondents noted:

*It heavily criticised remote hearings being used for domestic violence at home and I was quite surprised by it. I suppose in one respect, it does kind of invite that abuser in your house and seeing what's in your house. But on the other hand, you've got that level of protection there that being in court can't [provide] or that anxiety building up waiting to go in a separate room or whatever. So my view is yeah it probably is beneficial but that isn't what's come back from that report.*

In contrast to in-person hearings, the respondents identified that a benefit of remote hearings was that victims are not dependent on judges approving the use of special measures or courts having

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<sup>92</sup> Nuffield Family Justice Observatory, n 24 above; Nuffield Family Justice Observatory, n 59 above.

<sup>93</sup> Speed et al, n 1 above, 567.

<sup>94</sup> Nuffield Family Justice Observatory, n 59 above.

appropriate facilities in place. The respondents gave the following examples of where special measures had not been forthcoming at in-person hearings:

*I had a judge who took a screen away from a mum and the perpetrator was a litigant in person... he allowed him to cross-examine her without a screen. I was flabbergasted so I had to complain about it, it had been horrendous domestic abuse... the fear in that woman's eyes, you could just see... if it was to be dealt with remotely then it works because you've almost got the screen there ready for you.*

*I've had cases where we've walked in and screens haven't been in place when they should have and so with remote hearings you don't have to deal with all of that.*

These findings are consistent with research which indicates that special measures in many family courts are granted on an ad-hoc and inconsistent basis.<sup>95</sup> As well as lacking available good quality screens and space for separate waiting areas, research suggests that some judges refuse the use of special measures or question their necessity.<sup>96</sup> Whilst the literature noted above specifically relates to private law children proceedings, the underlying procedural rules that empower judges to grant special measures apply to all 'family proceedings'.<sup>97</sup> In addition, given that many of the difficulties in securing special measures relate to the condition of the court estate rather than the nature of the proceedings, similar issues are likely to be encountered in applications for injunctive protection. In practice, where proceedings for both injunctive protection and child arrangements have been initiated, proceedings will often be consolidated and heard together.

Considerably less research has been conducted about the use of special measures in injunctive proceedings. However, Richardson and Speed have considered this in the context of occupation orders.<sup>98</sup> In their study, most of the professionals surveyed reported that special measures were granted in the majority (between 75% and 100%) of the cases in which they were requested. That said, when asked about why a request for special measures might be rejected, the professionals

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<sup>95</sup> 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); 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 and 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.

<sup>96</sup> Coy et al (2012), n 95 above; Coy et al (2015), n 95 above.

<sup>97</sup> Family Procedure Rules 2010, Part 3A and Practice Direction 3AA.

<sup>98</sup> Richardson and Speed, n 15 above.

reported issues similar to those identified in the private law children literature, namely a lack of equipment/facilities, administration issues, insufficient time to put the measures in place or the judge not being persuaded that they were necessary.<sup>99</sup> Concerns were also raised about the judiciary's awareness of the impact of domestic abuse on a victim's evidence, with one judge being quoted as having said 'well they have children together – they will have to be civil together' or that the victim 'can't be that frightened' because they have allowed child contact. Further, whilst five out of the six victims interviewed as part of Richardson and Speed's study were offered a separate waiting room before the court hearing, none were offered other forms of special measures such as screens and many of them did not know that this option was available. One of the interviewees explained that she was 'paralysed with fear' when she saw her abuser in the courtroom to the point that she could not speak. This was despite having written to the court to plead for special measures stating in her letter: 'please give me protection measures, I don't want to see my rapist'.<sup>100</sup> Another of their participants was directly cross-examined by their perpetrator. This would undoubtedly have impacted the evidence that these victims were able to provide to the court.

These findings are concerning given the evidence that many victims who attend court without special measures find the experience traumatising and degrading.<sup>101</sup> Attempts have recently been made to address this issue through provisions in the Domestic Abuse Act 2021, which has created a statutory presumption that special measures should be granted to victims of domestic abuse because 'the quality of [a victim's] evidence and participation in proceedings is likely to be diminished by reason of vulnerability'.<sup>102</sup> The Act also prohibits direct cross-examination of victims where there is evidence of domestic abuse.<sup>103</sup> Whilst these provisions derive from recommendations made in the Ministry of Justice's Harm Report<sup>104</sup> which focussed on private law children proceedings, they will apply across all family proceedings, including applications for injunctive protection. Until these provisions of the Act come into force, judges must show willingness to grant participation directions under Part 3A and Practice Direction 3AA of the Family Procedure Rules 2010, if and when there is a return to in-person hearings, to ensure that the quality of victims' participation and evidence is not compromised.

The respondents to this study generally agreed that remote hearings should continue for ex parte and some return hearings even after it was safe to return to the physical courtroom. However, it was noted

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<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Birchall and Choudry, n 95 above; Coy et al (2012), n 95 above; Coy et al (2015), n 95 above.

<sup>102</sup> Domestic Abuse Act 2021, s 63.

<sup>103</sup> Domestic Abuse Act 2021, s 65.

<sup>104</sup> Ministry of Justice, *Assessing Risk of Harm to Children and Parents in Private Law Children Cases: Final Report* (Ministry of Justice, 2020).

that remote hearings pose a bigger challenge in return hearings where one of the parties is self-representing, where it is not uncommon for the applicant's representatives only to have an address for service and no other contact details, which precludes the possibility of pre-hearing negotiations. Court administrators need to be vigilant in securing sufficient details for these discussions to take place, potentially by sending a short questionnaire to respondents alongside the application form and notice of hearing. In contrast, at in-person hearings, the respondents to this study mentioned that discussions often led to agreements being reached, such as cases being disposed of by undertakings or orders continuing without any findings being made; of course, undertakings should not be accepted where there has been actual or threatened violence against the applicant or child.<sup>105</sup> In the absence of these discussions, a higher number of cases may become contested, not necessarily owing to legal complexity. Where additional contact details cannot be obtained, it would be prudent for judges to take a robust approach in exploring the options for settling the dispute at the outset of return hearings or set aside time for such negotiations to take place within an allocated hearing time. This point is illustrated by one of the respondents who noted:

*In my contested hearing in August, we were saying we would accept an undertaking, rather than findings being made. And I think if we were maybe there [in person] before [the hearing] and explained it they would have understood. But we had to explain it in the hearing. And the respondent just said 'no' and findings got made against him. Obviously, it was good for our client, but I don't think he had had that help there to really understand what he was really saying no to.*

In another case, a respondent discussed the delays caused by judges being unwilling/unable to provide time for the parties to negotiate:

*The client was interrupting a lot... and the judge did say 'if this was live there may be an opportunity for me to adjourn while you have a discussion about it'. As to whether they wanted basically a fact finding hearing on allegations of domestic abuse, because the indication was that the former partner may actually not want to go down that route. And so they may have been able to have a discussion, if we were actually in court and say, 'right, you know, how are we going to progress that?' You can't do that [in remote hearings]. So that means they have to go away to*

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<sup>105</sup> Family Law Act 1996, s 46 (3A).

*decide. And then we wait until, you know, for another three or four weeks.... So there's disadvantages in that sense without any doubt.*

Where both parties were represented, respondents accepted there was more scope for negotiations to still take place, as they would prior to in-person hearings.

*I have been on one case where the other party has a solicitor, and the judge did ask that the parties got together ahead to discuss this specific issue. And so that was organised by the solicitors involved.*

The vast majority of respondents questioned whether remote hearings were appropriate for final contested applications. One respondent noted that video platforms were far from ideal for final hearings because technical issues such as delays and feedback interrupted the clarity of parties' evidence, whilst another was concerned that remote hearings made it difficult for a judge to assess clients' credibility and empathise with their situation. Based on these respondents' accounts, there appeared to be a conflict between representatives's preference for their clients to appear in person, and victims' preference to attend remotely to safeguard their wellbeing.

#### *Availability of remedies (B)*

Consistent with the family court statistics, the respondents identified a disparity between the ease with which non-molestation orders are granted compared to occupation orders. It was noted that occupation orders are currently *'very difficult to get'* and *'the court rarely grants occupation orders'*, whilst another respondent described that with non-molestation orders *'the judge has read through the papers, they've usually agreed it before... the only question they have is about the metres' distance [on 'stay away' clauses]'*. The difference in treatment was attributed not only to the usual (pre-pandemic) difficulties in satisfying the strict balance of harm test, but to perceived difficulties for respondents to secure alternative accommodation with informal support networks (who may be clinically vulnerable or otherwise not willing to accommodate non-household members at this time) and increased reliance on the family home by perpetrators working from home. The view that occupation orders have been more difficult to secure is supported by the family court statistics, which demonstrate that the number of successful orders have declined during the pandemic.<sup>106</sup>

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<sup>106</sup> Richardson and Speed, n 15 above.

The declining number of occupation orders is concerning for several reasons. Primarily, respondents to non-molestation orders with a ‘stay away’ clause (regulating whether a perpetrator can attend the vicinity of the family home) cannot be ordered to pay (or make contributions to) the rent, mortgage payments or other outgoings, nor can they be required to grant possession or permission to use the contents of the house.<sup>107</sup> These powers are often necessary to protect victims’ financial wellbeing, particularly in cases of economic abuse. At present, the only other remedy available to remove an unwilling perpetrator is a Domestic Violence Protection Order (DVPO) which can exclude a perpetrator from the home for up to 28 days.<sup>108</sup> However, this relies on the proactivity of the police at a time where resources are already stretched. In any event, the short duration of DVPOs offers limited benefit in supporting victims to regulate the occupation of the family home for any meaningful amount of time. DVPOs/DVPNs will soon be replaced by Domestic Abuse Protection Notices (DAPNs) and Domestic Abuse Protection Orders (DAPOs) through the Domestic Abuse Act 2021. Whilst the main features of DAPNs/DAPOs will be the same as their predecessor, orders can be granted for a potentially unlimited duration which may make them a more viable alternative to occupation orders.<sup>109</sup> The commencement date for DAPOs/DAPNs has not yet been determined. In relation to longer term options for regulating the family home, a victim may seek to divorce the perpetrator and deal with the family home as part of financial arrangements. However, there are continuing delays and backlogs in progressing ‘non-urgent’ cases, such as applications for financial relief. The limited availability of other family law remedies means that victims may not be able to achieve financial independence from the perpetrator. Moreover, social distancing measures have reduced the availability of alternative accommodation for victims, which increases the risk that women will stay in abusive situations.<sup>110</sup> Speed et al’s study identified a 26% reduction in refuge accommodation across the UK since March 2020.<sup>111</sup> Women’s Aid estimate that in England this is closer to 41%.<sup>112</sup> Both studies highlight that refuges have closed due to capacity issues, the lack of suitable follow-on accommodation, and to minimise the risks posed by communal living. As a result, refuges have experienced a considerable loss of income which may jeopardise their ability to reopen and provide accommodation in a post Covid-19 landscape.

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<sup>107</sup> The court’s power to make such provisions can be found in the Family Law Act 1996, s 40. However, as the case of *Nwogbe v Nwogbe* [2000] 2 FLR 744, [2000] 3 FCR 345 illustrates, the courts do not have the power to enforce such provisions if they are breached.

<sup>108</sup> Crime and Security Act 2010, ss 27-29.

<sup>109</sup> Domestic Abuse Act 2021, ss 22-46.

<sup>110</sup> Previous studies have identified that women who had experienced domestic abuse referred to the lack of alternative housing options as having an impact on their ability to leave abusive relationships. See A Clough, J Draughon, V Nije-Carr, C Rollins and N Glass, “Having Housing Made Everything Else Possible”: Affordable, Safe and Stable Housing for Women Survivors of Violence’ (2014) 13:5 *Qualitative Social Work* 671.

<sup>111</sup> Speed et al, n 1 above.

<sup>112</sup> Women’s Aid, n 1 above.

### *Litigants in person (B)*

It was clear that the respondents perceived there to be problems for litigants in person accessing support and advice at all stages of the court process. Where victims were not eligible for funding, practitioners reported feeling unsure about where to refer them for legal advice, given that some of the pro bono organisations in the region remained closed and many were operating at a reduced capacity. The Nuffield Family Justice Observatory report similarly found that 42% of professionals did not know what support is currently available to litigants in person.<sup>113</sup> These findings suggest there would be merit in a central database of pro bono advice organisations so that representatives have a clear referral route when contacted by litigants in need of support.

In particular, respondents to this study acknowledged that the closure of the courts and the transition to filing applications for injunctive protection electronically was likely to have reduced physical opportunities for victims to seek support. This is because, prior to the pandemic, litigants in person wishing to file an application were likely to be signposted by court staff to Support Through Court, who could then assist with the preparation of the preliminary documents. Whilst Support Through Court are still assisting unrepresented court users remotely, a litigant does need to know that the service exists. Moreover, as one respondent mentioned, Support Through Court in Newcastle was operating at a reduced capacity during the initial stages of the pandemic. This is consistent with the findings of the Nuffield Family Justice Observatory, where respondents from other regions noted ‘Support Through Court is... a scarce resource and in the vast majority of cases not available’ and ‘while members are aware that the Support Through Court service is available, they have not generally seen evidence of the service being available during hearings’.<sup>114</sup> Demand for services is currently likely to considerably exceed the availability of volunteers.

Several respondents highlighted that the disadvantage caused by limited practical assistance being available to litigants in person was exacerbated by judges in remote hearings placing increased importance on statements of case, compared to in-person hearings.

*One big issue is if you're a litigant in person and your statement is not very detailed, the court's saying they're not going to hear any oral evidence at a without notice*

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<sup>113</sup> Nuffield Family Justice Observatory, n 59 above, 30.

<sup>114</sup> Ibid.



*hearing. But the litigant might not have put enough evidence in there to get a non-molestation order.*

*They might just have put in what's happened recently, whereas we'd put in all the acts of serious physical violence. And most of the time when I'm speaking to a client, they don't give me times and dates which is probably one of the most important things when you get cross examined.*

Under the interim guidance for the North East, judges in the region will not hear oral evidence as a matter of course at remote ex parte hearings.<sup>115</sup> The guidance states, 'it is important therefore that applicants set out their case for emergency protection in a written statement so that the Court can consider whether the case is appropriate to be considered without notice to the other party and requires protection through a non-molestation order'.<sup>116</sup> However, this guidance must not be interpreted so as to deny litigants in person an opportunity to provide more information about their case where there are deficiencies in their written application. Evidence provided by a local judge at the North East Local Family Justice Board seminar in August 2020 indicates that this guidance is being interpreted strictly and may need to be reviewed. A judge from the region noted that several applications for injunctive protection have been refused during the pandemic on the basis that they contained irrelevant information about historical incidences of abuse and insufficient information about recent events which formed the basis of the application. The litigants in question were not told (either during the hearing or afterwards) why their application was refused or given an opportunity to remedy the defects. This exposes victims to further risk of harm and indicates that an approach which is more empathetic and 'attuned to lay parties' is required from some judges.<sup>117</sup> This is also likely to impact applicants' trust in the justice system and view of the courts' appreciation of the seriousness of domestic abuse. Following recommendations from the Nuffield Family Justice Observatory, courts may also wish to consider appointing at least one judge as a member of the Litigant in Person Support Network to ensure access to the latest information about how self-representing litigants can be supported.<sup>118</sup>

These findings demonstrate a need for specific guidance to assist self-representing litigants prepare applications. Trinder et al observed that a single authoritative 'official' family court website should be

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<sup>115</sup> HHJ Hudson and HHJ Matthews QC, n 91 above.

<sup>116</sup> Ibid, para 6.3.

<sup>117</sup> Nuffield Family Justice Observatory, n 59 above, 1.

<sup>118</sup> Ibid.

established with all resources self-representing litigants need in one place.<sup>119</sup> This research confirms the potential value of such a website. Several respondents working in legal aid practice also highlighted that the digital service provided by RCJ Citizens Advice, CourtNav, had recently launched a module for protective injunctions and this had increasingly been used throughout the pandemic for new referrals. Litigants can register for free online and are asked questions the answers to which are used to generate and complete the relevant court form and supporting witness statement. On completion, the application is sent to a panel law firm of the litigant's choice who will assess their eligibility for legal aid. In the event that they are not eligible, the case can be reviewed by legal advisors at RCJ Citizens Advice. Currently, only a handful of legal aid practices in the North East are registered to receive applications through CourtNav and there is scope for the Local Family Justice Board to disseminate information regarding its benefits, both for legal aid practices and litigants. Moreover, domestic abuse support services unable to assist litigants with preparing application documents should refer litigants to this tool.

### *Service (B)*

Respondents noted that, at the outset of the pandemic, most injunctive orders were served via substituted service, typically through postal service, Facebook or WhatsApp. This approach is consistent with regional guidance.<sup>120</sup> Whilst this approach has been affirmed by Practice Direction 36U, respondents noted a gradual return to using process servers in the latter part of 2020. There was no indication whether this was because process servers had developed Covid-19 secure means of personal service or whether there had been difficulties with enforcing orders which had been served electronically because of the CPS's stricter protocol. However, given that a significant number of orders have been served through electronic means over this period, it would clearly be in the interests of victims for the family courts, CPS North East and the relevant Police and Crime Commissioners to reach a local agreement that upholds the law and puts victims first by ensuring perpetrators are not able to use the technicality of a lack of personal service to 'defeat the purpose for which the order was designed'.<sup>121</sup>

The main issue that respondents identified with service, however, related to delays in the court preparing orders. A few respondents noted that they had waited weeks for orders to be typed up owing to administrative backlogs, whilst one respondent waited over a month and a half for a minor

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<sup>119</sup> Trinder et al, n 79 above.

<sup>120</sup> HHJ Hudson and HHJ Matthews QC, n 91 above, para 6.5.

<sup>121</sup> Cooper and Horton, n 49 above.

amendment to be made to a non-molestation order. This delay is perhaps unsurprising, given the cuts made to court staffing over recent years: the number of full-time staff employed by HMCTS fell from 20,392 in 2010 to 14,269 in 2017.<sup>122</sup> A similar issue was identified by the respondents to the Nuffield Family Justice Observatory study, who felt there were insufficient staff to support the administration process.<sup>123</sup> The Family Procedure Rules 2010 stipulate that non-molestation orders are only enforceable once they have been served and that this should be done as soon as reasonably practicable.<sup>124</sup> For criminal law purposes, a respondent is bound by the order once he is made aware of its existence.<sup>125</sup> A respondent to an ex parte protective order, however, will not become aware of the order until he is served. Accordingly, any delays in preparing the order and effecting service could put the victim at further risk of harm. To speed up the process, practitioners should ensure they assist the court by providing a draft order.

Once service has taken place, the order must be registered with the police: Rule 10.10 of the Family Procedure Rules 2010 states that 'where the court makes an occupation order to which a power of arrest is attached or a non-molestation order, a copy of the order must be delivered to the officer for the time being in charge of the police station for the applicant's address or such other police station as the court may specify'. The general position under Rule 10.10 is that the applicant is to serve the order on the police unless the court has also served the order itself on the respondent because the applicant is a litigant in person or the court has made an order of its own volition. This provision seeks to protect litigants in person who may not be familiar with the required procedural steps. This position has been somewhat modified for represented applicants by the North East regional guidance, which states that 'at the conclusion of the hearing, the Court will draw any orders and will send them to the relevant police force'.<sup>126</sup> Respondents in this study identified some potential difficulties with this revised approach, however. Particularly, where applicants (or their representatives) were required to serve orders, there was a risk that the court could register an order with the police which had not yet been served on the respondent, in which case action could not be taken to pursue a breach. Accordingly, one respondent felt that it would be more logical for the applicant's representative to take responsibility for both service and registration with the police, as would happen pre Covid-19. If

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<sup>122</sup> F Kaganas, 'Justifying the LASPO Act: Authenticity, Necessity, Suitability, Responsibility and Autonomy' (2017) 39: 2 *Journal of Social Welfare and Family Law*, 168; Transform Justice, 'Court Closures Briefing' (2018) <https://www.transformjustice.org.uk/wp-content/uploads/2018/02/Court-Closures-Briefing.pdf>. Last accessed 20 May 2021.

<sup>123</sup> Nuffield Family Justice Observatory, n 59 above.

<sup>124</sup> The Family Procedure Rules 2010, rule 10.6.

<sup>125</sup> Family Law Act 1996, s 42A(2).

<sup>126</sup> HHJ Hudson and HHJ Matthews QC, n 91 above, para 6.4.

this cannot happen, there must be clear communication between the different parties to ensure that each party has correctly fulfilled their responsibilities.

## **Conclusions (A)**

This study reveals that remote hearings can work effectively for ex parte and return hearings where an application is made to the family court for injunctive protection. The authors recommend that in a post Covid-19 landscape, victims should continue to be given the option to attend these hearings remotely, perhaps with similar procedures being implemented to those currently in Newcastle Crown Court, whereby the alleged perpetrator is prevented from seeing the victim during the hearing. This would facilitate compliance with section 63 of the Domestic Abuse Act 2021 and ensure victim safety, particularly at a time when the courts are busy and separate waiting areas are difficult to facilitate. Concerns have been raised by practitioners about the quality of evidence provided by video link at contested final hearings, so there needs to either be significant financial investment in video link facilities to bring them up to the standard of the criminal courts or other types of special measures may need to be considered for those hearings.

Regardless of those measures, it is imperative that victims are also able to access legal advice and support before, during and after proceedings. The authors therefore recommend that a national database of service providers be created, together with a comprehensive website of accessible information, in line with the proposals of Trinder et al.<sup>127</sup> In the short term, the CourtNav service should be publicised widely as a resource which can be used by litigants in person. It is also imperative that the issues with service are resolved as a matter of urgency to ensure that breaches can be dealt with appropriately by the police and the CPS, which requires consultation at a local level between practitioners, the judiciary and the CPS.

At the heart of all these proposals is a requirement for a joined-up, multi-agency approach to domestic abuse. But this can only be achieved by each agency involved being appropriately funded and resourced. This issue was at the forefront of the debate around the Domestic Abuse Act 2021 and must continue to be the focus of discussion in this area.

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<sup>127</sup> Trinder et al, n79 above.