WHEELS OF JUSTICE & CYCLES OF ABUSE: WHAT BARRIERS DO VICTIMS OF DOMESTIC VIOLENCE IN SOUTH AFRICA FACE WHEN SEEKING THE PROTECTION OF THE COURTS?

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Abstract

This dissertation considers the barriers facing victims of domestic violence who seek protection orders under the South African Domestic Violence Act 1998 (DVA).[1] It looks at the key players responsible for implementing the protection order process: clerks, court support workers, magistrates and police, and the challenges posed by the way that they interact as the 'courtroom workgroup.'[2] This topic is examined through qualitative empirical research in the Western Cape with court support workers, independent victims' advocates who sit within the courts, advising and assisting applicants, and offering them psychosocial support.

Domestic violence victims often present at court seeking a protection order during a time of crisis; some are at risk of their life.[3] Therefore, for many applicants, in order for the protection of the courts to be effective, it should be provided on the day of application. Interim protection orders and interim warrants of arrest are intended to give immediate protection to the applicant. However the way in which the courts and police have implemented their respective obligations under the DVA leads to inconsistency, arbitrariness, unfairness, delay and ultimately a failure to provide protection to vulnerable applicants within an appropriate time period, or at all.

Participants suggested that systemic issues including complex forms, long waiting times, over-stretched staff, poor communication by the courtroom workgroup with service users, and non-compliance with the DVA by police create significant barriers to applicants. Many applicants are left bewildered or disillusioned and do not complete the protection order process, leaving them without protection. Consequently, under the current system, the courts and police are failing to uphold their human rights obligations towards applicants for protection orders. These are long-standing issues, which have been noted by academics and civil society for 20 years, yet it appears that there has been little improvement.[4]

Reform of the DVA should be accompanied by improved training, accountability and victim-centric policy guidance for the courtroom workgroup. As well as widening the scope of the DVA, these should address the deficits in implementation of the current law.

Abstract footnotes

1. Domestic Violence Act 1998 (116 of 1998)
2. Kathleen Currul-Dykeman 'Domestic violence case processing: a matter of local legal culture' (2014) 17 *Contemporary Justice Review*
3. N. Abrahams, R. Jewkes, L. J. Martin, S. Mathews, L. Vetten & C. Lombard 'Mortality of women from intimate partner violence in South Africa: A national epidemiological study' (2009) 24 *Violence and Victims* 1
4. Penny Parenzee, Lillian Artz & Kelley Moult 'Monitoring the implementation of the Domestic Violence Act : first research report, 2000-2001' (2001); Shanaaz Mathews & Naemah Abrahams *Combining stories and numbers : an analysis of the impact of the Domestic Violence Act (no. 116 of 1998) on women* Cape Town, Gender Advocacy Programme (2001); Rachel Carter *The Domestic Violence Act (116 of 1998): increased safety for women experiencing domestic violence in South Africa?* (2002) University of Cape Town

Chapter 1 Introduction

Preface

I have been interested in the state protection available to victims of domestic violence for some time. It started when, whilst working as a solicitor in the UK, I represented the family of a victim of intimate partner femicide at her inquest. She was well-known to the local police service, who had attended her home more than 50 times following complaints of domestic violence. The inquest found that a cumulation of failings by the police and the courts contributed to her death. Since this case, a recurring thought in my mind has been: how can the state prevent such cases from slipping through the net? After coming to South Africa to study an LLM at the University of Cape Town, I gained insight into the unique legislative protection offered to victims under Domestic Violence Act 1998 (DVA).[1] I therefore decided to focus this research on the barriers which victims of domestic violence face in accessing protection from the courts under the DVA.

The DVA – on the face of it a victim-friendly piece of legislation - has been in force for 20 years. The challenges in the early days of its implementation are well documented.[2] However, there is a little up to date research in respect of the current implementation of the protection order process.[3] I was prompted to take up this topic after hearing informal reports in the women's rights and activism sector which suggested a paucity of improvements in implementation. In my desk-based review, I could not find any evidence to suggest that courts or the police have made changes which have substantively improved their enactment of the DVA; in fact, anecdotal evidence from the sector suggests that access to justice for victims of domestic violence may even have got worse. For example, in spite of longstanding pressure from civil society, and claims by the South African Police Service (SAPS) that they have been providing comprehensive training on domestic violence to officers, research

[1] Domestic Violence Act 1998 (116 of 1998)
[2] Penny Parenzee, Lillian Artz & Kelley Moult 'Monitoring the implementation of the Domestic Violence Act : first research report, 2000-2001' (2001); Shanaaz Mathews & Naemah Abrahams *Combining stories and numbers : an analysis of the impact of the Domestic Violence Act (no. 116 of 1998) on women* Cape Town, Gender Advocacy Programme (2001); Rachel Carter *The Domestic Violence Act (116 of 1998): increased safety for women experiencing domestic violence in South Africa?* (2002) University of Cape Town
[3] The last qualitative data on the courts' implementation of the DVA was gathered in 2008.

published in January 2020 showed that 67% of VISPOL (visible police officers) and 74% of Detectives at the 20 stations in the Western Cape with the highest number of domestic violence reports have not undergone the five-day DVA training course.[4]

The reasons behind this failure to train police officers fall outside of the scope of this dissertation. However, a similar long-standing lack of attention and priority is mirrored in other aspects of implementation of the DVA; among these, the challenges experienced by victims of domestic violence seeking the assistance of the courts. This dissertation will focus on the barriers faced by individuals seeking protection orders. I explore this topic through qualitative research with court support workers (CSWs), independent victim advocates who sit within courts, to advise and assist applicants obtain protection orders. Whilst I focus on the process rather than politics, in reality of course the two are inseparable. Transformation of the government's attitude towards domestic violence is essential to improving the service provided to applicants on the ground. There is hope that the tide of political obliviousness to domestic violence is turning. In his February 2020 State of the National Address President Ramaphosa announced that the government will be reviewing the DVA this year. Mid-way through my research, a draft bill amending the DVA was published. In my conclusion, I compare the proposed changes with recommendations arising from this research. I hope that the empirical data which I have collected will contribute in a small way to the evidence base for how the law and its implementation can be improved to better serve the needs of applicants.

The dynamics of domestic violence in South Africa

Domestic violence is violence and abuse which occurs within the home, or within close familial or intimate relationships. It is endemic throughout the world. One prevalent form of domestic violence is intimate partner violence, which occurs within romantic, sexual, marital and other forms of intimate relationship.[5] Women are known to be more at risk than men

[4] Western Cape Government 'SAPS fails to comply with Domestic Violence Act' 13 January 2020 available at *https://www.westerncape.gov.za/news/saps-fails-comply-domestic-violence-act* accessed on 15 March 2020

[5] World Health Organisation 'Understanding and addressing violence against women - intimate partner violence' available at *https://www.who.int/reproductivehealth/publications/violence/rhr12_36/en/* accessed on 1 March 2020.

from grievous and fatal incidents of intimate partner violence;[6] thus it can be understood as form of gender based violence. Intimate partner violence is believed to be a particularly commonly occurring dynamic in Southern Sub-Saharan Africa, where it is estimated that 26.67% of women have experienced physical or sexual violence from their intimate partner.[7] In the Western Cape province of South Africa, where this research is based, up to 45% of women self-reported violence at the hands of their intimate partners.[8] Unsurprisingly, therefore, the majority of protection orders applications in this region are sought by women against their male intimate partners.[9]

However, applications relating to other types of family violence are also highly prevalent; for example, the abuse and harassment of elderly people by their younger relatives represents a significant minority of protection order applications in the Western Cape.[10] These varying forms of domestic violence are important to consider when examining the barriers which applicants face in seeking court protection; for example, older people may face specific difficulties in accessing the courts.

Substance abuse is a known trigger for IPV, as well as for these other forms of domestic violence.[11] Patterns of substance use often follow socio-economic factors such as the availability of funds at the end of the week, which places victims particularly at risk over the weekend, and therefore in need of out of hours support. Substance users, when under the influence, may lack capacity for rational decision making which might suggest they are unlikely to appreciate the deterrent effect of a protection order; therefore the strength of such an order lies chiefly in the ability of the applicant to report a breach; and the response by SAPS to such a report.

6 UNODC 'Global study on homicide gender related killings of women and girls' (2018) available at *https://www.unodc.org/documents/data-and-analysis/GSH2018/GSH18_Gender-related_killing_of_women_and_girls.pdf* accessed on 5 August 2019. 17

7 KM Devries, JY Mak, C García-Moreno, M Petzold, JC Child, G Falder, S Lim, LJ Bacchus, RE Engell, L Rosenfeld, C Pallitto, T Vos, N Abrahams, CH. Watts, 'The global prevalence of intimate partner violence against women' 340/6140 (2013) *Science* 1527

8 Nomathamsanqa Masiko, & Selby Xinwa *Gender based violence in South Africa, a brief review* The Centre for the Study of Violence and Reconciliation (2016) 60

9 Mathews & Abrahams op cit (n2)15; Kelley Moult *Gatekeepers or Rights Keepers? Domestic Violence court clerks and the administration of justice in South Africa* American University (2010) 97

10 Mathews & Abrahams op cit (n2) 21 & 36; Ibid Moult 118-119

11 Centre for the Study of Violence and Reconciliation, 'Substance abuse in South Africa, its linkages with gender based violence and urban violence' (2017) 4

Domestic violence represents a significant cause of homicide in South Africa. In 2018/19, of the 21 022 reported murder cases, at least 1071 people were murdered in domestic violence related deaths.[12] 288 of these took place in the Western Cape, making it the province with the highest recorded number of domestic violence-related murders.[13] Intimate partner femicide, where a woman is murdered by their intimate partner accounts for 34% of all killings of women globally.[14] Women are over four times more likely than men to be murdered by their intimate partners.[15] In an analysis of South African mortuary records in 2009, 50% of the women's deaths in the sample occurred as a result of intimate partner femicide making it the leading cause of female murder.[16] Intimate partner murders do not usually come out of the blue; often there is a pattern of increasingly dangerous behaviour by the perpetrator in preceding time period.[17] Threats to kill or to harm with dangerous objects and a victim's perception of being in danger of death are documented risk factors.[18] Intimate partner femicide frequently occurs in cases where a woman is seeking or has recently been granted a protection order;[19] suggesting that the very act of seeking a protection order is a risk factor, and the time surrounding a protection order application is a dangerous for the applicant.

Rather than the occurrence of an individual event, domestic abuse is usually a 'continuous interactional process that takes place over time.'[20] Psychologists identify a

[12] South African Police Service *Annual performance plan 2018/19* available at *https://www.saps.gov.za/about/stratframework/strategic_plan/2018_2019/annual_performance_plan_2018_2019_updated.pdf* accessed on 5 March 2020 ;South African Police Service *Police recorded crime statistics - crime situation in the Republic of South Africa 12 months April to March* ((2018/19) available at *https://www.saps.gov.za/services/april_to_march2018_19_presentation.pdf*, accessed on 19 September 2019. 25. The number of domestic violence deaths is probably significantly higher, as police statistics only appear to have captured causative factors in 5721 murders, which is just over one quarter of the total number of murders.
[13] Ibid. *Police recorded crime statistics*
[14] UNODC op cit (n6) 17
[15] Ibid.18
[16] N. Abrahams, R. Jewkes, L. J. Martin, S. Mathews, L. Vetten & C. Lombard 'Mortality of women from intimate partner violence in South Africa: A national epidemiological study' (2009) 24 *Violence and Victims* 1
[17] Shanaz Mathews, Rachel Jewkes & Naemah Abrahams "So now I'm the man': Intimate partner femicide and its interconnections with expressions of masculinities in South Africa' (2015) 55 *British Journal of Criminology* 12; Gun Free South Africa *Firearms Control Briefing 4 of 2019: Women under the gun: actions to protect women from gun violence* (2019) 1
[18] Enrique Echeburúa, Javier Fernández-Montalvo, Paz Corral & José Goñi 'Assessing risk markers in intimate partner femicide and severe violence a new assessment instrument' (2008) *Journal of Interpersonal Violence* 925-39
[19] Abrahams et al op cit (n16) 12
[20] Tertia Vogtt *The impact of an interim protection order (Domestic Violence Act 116 of 1998) on the victims of Domestic Violence* University of Stellenbosch (2007) 21

pattern of abuse which can be broken down into 3 phases: the tension-building phase, the explosion phase and the honeymoon phase.[21] The cyclical nature of domestic violence contributes to dynamics whereby a victim may seek the assistance of the courts after an upsurge in abuse, but withdraw from the process when their partner seeks to make amends. Female victims of domestic abuse have a tendency to forgive their partners and hope that 'he will change' and that it will not happen again.[22] Post-separation violence is known to be part of the continuum of domestic abuse and is an attempt by the former partner to maintain ongoing control.[23] Women are most at risk being killed by their partners shortly after their relationship has ended.[24]

The cyclical pattern of abuse can contribute to negative perceptions by court staff and police of 'recidivist' complainants who seek out, and then retreat from the justice system multiple times in an attempt to resolve their situation.[25] Often, allegations by one partner are followed by counter-allegations by the other. This can lead to the conclusion that both partners are equally to blame.[26] However, evidence suggests that usually one partner is at greater risk; therefore, part of the challenge for court staff and police is that they must determine who is the primary and who is the secondary abuser.[27] As the femicide data above highlights, in heterosexual intimate relationships the woman is statistically more at risk of being killed by their partner.[28]

The process for obtaining a protection order

A protection order is a form of injunctive relief which prevents the respondent from undertaking specific acts, such as abusive behaviour. It can also, among other things, exclude

[21] Ibid. 21-23
[22] Agnes Tshidi Seabi *Marriage, cohabitation and domestic violence in Mpumalanga, MSocSci dissertation, University of Pretoria, Pretoria* University of Pretoria, (2010) 63
[23] Vogtt op cit (n20) 91
[24] Gun Free South Africa op cit (n17) 2
[25] Doraval Govender 'Is domestic violence being policed in South Africa?' (2015) 28 *Acta Criminologica* 43
[26] Elizabeth Bates 'Current controversies within intimate partner violence: overlooking bidirectional violence' (2016) 31 *Journal of Family Violence* 937
[27] See for example *Who is doing what to whom* (undated) factsheet by US organisation National Coalition against Domestic Violence available at *https://assets.speakcdn.com/assets/2497/who_is_doing_what_to_whom.pdf* accessed on 14 June 2020.
[28] UNODC op cit (n6) 17-18

the respondent from the applicant's home, or from the shared home, or from specific parts of the home.[29] According to the DVA, a protection order must be accompanied by a warrant of arrest.[30] Where an applicant reports a breach of the order to SAPS and there is a risk of imminent harm, the warrant mandates the police to arrest the respondent.

If an applicant has suffered domestic violence from which they are at imminent harm they have the right to apply for a protection order[31] by attending court. If they are not legally represented the court clerk is obliged to inform the applicant of the remedies which are available to them under the DVA[32] and hand them a written notice advising them of their rights.[33] The applicant must give their application form together with a signed affidavit to the clerk who shall 'forthwith' submit these documents 'to the court' – in other words, the magistrate.[34] The magistrate must then consider the application 'as soon as reasonably possible.'[35] In order to reach their decision, the magistrate is entitled, but not required to hear oral evidence from the applicant.[36]

The DVA allows for applications to be brought outside of court opening hours if the court is satisfied that the applicant may suffer 'undue hardship' if the matter is not dealt with immediately.[37] However, it does not establish a framework for how courts should deal with applications made during times when the court building is closed.

The court must issue an interim protection order (IPO) if it finds that the respondent is committing or has committed an act of domestic violence, which may cause undue hardship to the complainant if a protection order is not granted immediately.[38] According to Justice College guidelines, the clerk is responsible for notifying the magistrate if an application is urgent.[39] The reasons for urgency must also be flagged in the application form.[40] The

[29] DVA supra (n1) 7(1) c-e
[30] Ibid. para 8
[31] Ibid. para 4
[32] Ibid. para 4
[33] Regulations under the Domestic Violence Act 5 November 1999 para 5
[34] DVA supra (n1) 4(7)
[35] Ibid. 5(1)
[36] Ibid. 5(1)
[37] Ibid. 4(5)
[38] Ibid. 5(2)
[39] Justice College 'Domestic violence' available at *https://www.justice.gov.za/juscol/docs/article-02.html* accessed on 15 June 2020.
[40] Ibid.

applicant must also be notified of the return date, which should not be less than 10 days from the date of the IPO.[41] In order for the IPO to be in force, it must be served upon the respondent together with a copy of the application.[42] Service can be effected by the clerk, sheriff of the court, peace officer or police.[43] Once service has been effected, the return of service must then be returned to the court; only then can the court issue a certified copy of the IPO to the applicant, together with the warrant of arrest.[44] The IPO will remain in force until the return hearing takes place, where the court will decide whether to grant a final protection order.

Protection orders do not have an expiry date. The warrant of arrest remains in force as long as the protection order.[45] This means that both the protection order and the warrant remain in place unless the respondent makes a successful application to court for the order to be discharged. If there are reasonable grounds that the complainant may suffer imminent harm as a result of a breach of the protection order, the warrant of arrest obliges the police to arrest the respondent 'forthwith.'[46] When making this assessment of imminent harm, the arresting officer must consider the risk to safety, health or well-being of the complainant, the seriousness of the conduct comprising the alleged breach of the protection order, and the length of time since the alleged breach occurred.[47] The court has the power to order SAPS to seize weapons from the respondent if they have expressed an intention to kill or injure themselves or others, or if possession of such weapons is not in the best interests of the respondent or any other person in a domestic relationship.[48]

To apply for a protection order, the applicant must complete Form 2 under section 4 of the DVA regulations. Whilst the process is designed to allow individuals who cannot afford lawyers to access the courts, this form is written in technical legal language which is inaccessible to the average applicant, and is often completed incorrectly.[49] The regulations do not address how applicants with limited literacy, or who are too traumatized to write, will be

[41] DVA supra (n1) 5(5)
[42] Ibid. 5(6)
[43] Regulations supra (n33) para 15
[44] DVA supra (n1) 6(6)
[45] Ibid. para 8
[46] Ibid. 8(c)
[47] Ibid. para 8
[48] Ibid. para 9
[49] Parenzee, Artz & Moult op cit (n2) 24-39

able to complete the form. The applicant must also write an affidavit setting out their circumstances. It is essential that this is comprehensive, accurate, and does not contradict their Form 2 otherwise this may lead to their application being refused. Most applicants need advice and support in order to complete the form correctly,[50] and to prepare an affidavit which does their circumstances justice.[51] Consequently, civil society and non-governmental organisations (NGOs) have stepped in to fill this gap by providing court support services to applicants.

Existing studies on the implementation of the Domestic Violence Act 1998

Between 2000 and 2010 there were several valuable contributions to the literature regarding how the courts are implementing the DVA in the Western Cape and the barriers which applicants face in obtaining protection orders. From 2000 to 2002, Parenzee, Artz & Moult explored the challenges faced by the courts in implementing the DVA as did Mathews & Abrahams and Carter.[52] In 2004, Artz explored the challenges faced by magistrates in implementing the DVA[53] and Smythe explored missed opportunities to confiscate weapons.[54]

In 2005, Moult explored informal mechanisms for dealing with domestic violence[55] and Artz and Smythe produced a five year retrospective on the DVA.[56] Smythe also explored structural challenges with implementing the DVA.[57] In 2006, Naidoo explored the implementation of the DVA at Johannesburg family court.[58] In 2007, Vogtt explored the impact of IPOs upon the psychological health of applicants.[59] In 2008, Artz and Jefthas

[50] Ibid. 54
[51] Ibid. 32
[52] Parenzee, Artz & Moul op cit (n2); Mathews & Abrahams op cit (n2); Carter op cit (n2)
[53] Lillian Artz 'Better safe than sorry: magistrates' views on the Domestic Violence Act' (2004) 7 *SA Crime Quarterly*
[54] Dee Smythe 'Missed opportunities: confiscation of weapons in domestic violence cases' (2004) *SA Crime Quarterly*
[55] Kelley Moult 'Providing a sense of justice: informal mechanisms for dealing with domestic violence' (2016) 12 *SA Crime Quarterly*
[56] Lillian Artz & Dee Smythe 'Bridges and barriers: a five year retrospective on the Domestic Violence Act' (2005) 200 *Acta Juridica*
[57] Lillian Artz & Dee Smythe 'Money matters: structural problems with implementing the DVA' (2005) *Agenda: Empowering Women for Gender Equity*
[58] K. Naidoo '"Justice at a snail's pace" : the implementation of the Domestic Violence Act (Act 116 of 1998) at the Johannesburg Family Court' (2006) 19 *Acta Criminologica*
[59] Vogtt op cit (n20)

worked with Mosaic to explore the reasons why women do not return to court to finalise their protection orders, which was published in 2011.[60] In the same year, Moult undertook a detailed empirical study of the exercise of discretion by court clerks in implementing the DVA, which was published in 2010.[61] In 2013, Peltzer et al published a quantitative study in respect of the effect of protection orders on reducing abuse.[62]

There has not been any recent qualitative research in respect of the procedure for obtaining a protection order in South Africa and the barriers facing applicants in doing so. By all accounts, the challenges facing applicants in accessing protection under the DVA have not lessened. This is the gap in the evidence that this dissertation aims to address.

Unpacking my research question

What barriers do victims of domestic violence in South Africa face when seeking the protection of the courts? Here I break down the components of my research question. I provide some key definitions, highlight the main issues which I seek to explore and set out the parameters of this dissertation, highlighting what I aim to cover, and what falls outside of the scope of this research.

Barriers

This dissertation defines 'barriers' as the difficulties, challenges and obstacles which face individuals who have chosen to seek the protection of the courts in respect of their experiences of domestic violence in urban areas of the Western Cape. It will look at systemic barriers arising from the way that the DVA is implemented by the actors which comprise the South African domestic violence courtroom workgroup:[63] magistrates, court clerks, CSWs and police. It will also explore the barriers posed by the way these stake-holders interact in

[60] Lillian Artz & Diane Jefthas *Reluctance, retaliation and repudiation: the attrition of domestic violence cases in eight magisterial districts,* Gender Health and Justice Research Unit, *University of Cape Town*

[61] Moult op cit (n9)

[62] Karl Peltzer, Supa Pengpid, Judith McFarlane & Mercy Banyini 'Evaluation of the effectiveness of protection orders for female victims of intimate partner violence in Vhembe District of South Africa' (2013) 23 *Journal of Psychology in Africa*

[63] For an explanation of the courtroom workgroup concept in the US context see Kathleen Currul-Dykeman 'Domestic violence case processing: a matter of local legal culture' (2014) 17 *Contemporary Justice Review*

the functioning of the different *ad hoc* systems and practices which have arisen in courts in their attempt to implement the law. Another barrier which will be explored is positionality of CSWs, whose role in the protection order process is integral but lacks statutory recognition.

It will also consider barriers relating to victims, which CSWs perceive limit their ability to access the system. This includes practical difficulties which they face in accessing the courts, such as the cost of travel, distance of travel and their ability to communicate their case in written English. It also considers the psychological barriers which CSWs feel that applicants experience, through the way in which the DVA is implemented. The plight of those victims of domestic violence who do not approach either the courts or the police for assistance, and the reasons for their reticence, falls outside of the scope of this dissertation. However, this dissertation considers how systemic and victim related barriers make it more difficult for applicants to complete the court process, suggesting that this offers an insight into why so many victims withdraw from the protection order process before obtaining their final order.

Victims

The word 'victims' is used to describe the category of individuals who approach the courts and the police seeking their assistance in respect of domestic violence. This is primarily because the word victim is included within the preamble of Domestic Violence Act 1998.[64] Victim is also a recognised term under International Human Rights Law, (IHRL) for example the UN's Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power 1985, which was adopted by South Africa in 1996.[65] IHRL is relevant to this research question, because the South African Constitution imposes an obligation upon South African courts to consider international law when interpreting the Bill of Rights.[66] The courts are bound by the bill of rights to protect the constitutional rights of citizens, such as their right to

[64] DVA supra (n1)
[65] United Nations Human Rights Office of the High Commissioner, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res 40/34 of 29 November 1985
[66] The Final Constitution of the Republic of South Africa, 1996, Chapter 2 Section 39.

equality,[67] their right to live free from violence,[68] their right to dignity,[69] and their right to life.[70]

Many individuals who have experienced domestic violence prefer to self-define as 'survivors.' This choice of lexicon is undoubtedly powerful and valuable in seeking to redress the lack of agency suggested by the word 'victims'. However, 'survivor' has an ulterior definition in law which is not pertinent to the question that this dissertation seeks to answer. Moreover, the rhetoric of personal empowerment does not alter the obligation of the state under IHRL and under the Constitution to assist the vulnerable, and to prevent further interference with their human rights, thus the term victims is preferred. The terms 'applicant(s)'[71] and 'complainant(s)'[72] are used inter-changeably with 'victim(s).'

Domestic violence

The definition of domestic violence given in the preamble to the DVA is 'physical', 'sexual', 'emotional, verbal and psychological', and 'economic' abuse.[73] The definition also includes 'intimidation', 'harassment', 'stalking', 'damage to property', 'entry into the complainant's residence without consent where the parties do not share the residence' or 'any other controlling or abusive behaviour towards a complainant.'[74] Such behaviour falls within the remit of the DVA where parties are in a 'domestic relationship.'[75] This includes married or previously married couples, including those married according to any law, custom, or religion; cohabiting people; family relationships; those in intimate relationships, and those sharing the same residence.[76]

This dissertation adopts the above definition, using the phrases domestic abuse and domestic violence inter-changeably. Whilst appreciating that female victims of intimate

[67] Ibid. Section 9
[68] Ibid. Section 11
[69] Ibid. Section 10
[70] Ibid. Section 12
[71] In this dissertation, applicant is used to refer to a person seeking a court order.
[72] Complainant is used to refer to a person lodging a criminal complaint.
[73] DVA supra (n1) para 1
[74] Ibid.
[75] Ibid.
[76] Ibid.

partner violence comprise the majority of protection order applicants,[77] I have chosen to consider the barriers faced by victims of domestic violence holistically. The significance of this to my research question is that IPV is an inherently gendered form of violence. Therefore issues surrounding the experience of women in the court space are highly relevant to understanding the barriers faced by this group of applicants. By contrast, family violence is not necessarily gendered in the sense that men frequently present as victims.[78] Nonetheless, the concept of gender is key to understanding the barriers faced by victims of domestic violence seeking the protection of the courts. This is firstly because the home is seen by society as the female domain, whereas by contrast, the court space is steeped in patriarchal tradition, and prioritizes masculine attitudes, processes and practices.[79] Secondly, women are more at risk of death from family violence.[80] Gender is therefore an ineludible aspect of domestic violence, and is pertinent to many of the barriers which applicants face when seeking the courts' protection.

Protection

The DVA gives a victim the right to seek the protection of the court where domestic violence 'harms or may cause imminent harm' to their 'safety, health and wellbeing.'[81] The DVA also gives the victim a right to lodge a criminal complaint with the police, however this dissertation will not delve into this. This dissertation will focus on the civil protection available from the courts which comprises the interim and final protection order and the accompanying warrants of arrest. It will consider CSWs' perceptions of the police's role, but only insofar as this relates to their obligations to serve protection orders, and arrest upon breach of a protection order.

The speed of the courts' response to a protection order application is key to whether the protection offered is effective. According to the Magistrates Guidelines on Domestic Violence each case must be treated with the appropriate urgency that it deserves.[82] What does

[77] Mathews & Abrahams op cit (n2) 13-14
[78] Moult op cit (n9) 97
[79] Joan Acker 'From sex roles to gendered institutions' (1992) 21 *Contemporary Sociology* 567
[80] UNODC op cit (n6) 5; Abrahams et al op cit (n16) 7
[81] DVA supra (n1) para 4
[82] The Domestic Violence Guidelines 2008, Guiding Principle 2

urgent protection mean in the context of domestic violence? Urgency can have different meanings in different legal contexts. For a victim of domestic violence, the threat is at home; they cannot escape it without leaving their whole life behind. Sometimes leaving is impossible due to children or other dependents. Because the violence occurs behind closed doors it is difficult, often impossible, for the court to accurately assess the true level of the threat on the date that the applicant presents seeking assistance. Consequently, all cases qualifying for protection under the DVA are time sensitive, in the sense that the applicant will suffer harm if it is not dealt with promptly. Nonetheless, some domestic violence cases are more urgent than others. For example, cases where the respondent poses an imminent risk to the life of the applicant or their relatives, or is sexually abusing children in the household, or where the applicant is in mental health crisis. In such cases, for the court's protection to be effective, the relief provided to the victim must be instant or immediate.[83]

The interim protection order (IPO) is a form of urgent protection which is available to an applicant whilst the court considers whether to grant a final order.[84] The DVA engages with the test for urgency in two ways. Firstly, by asking the magistrate to consider if the applicant is at risk of 'imminent harm.'[85] Secondly, by asking them consider if the applicant will suffer 'undue hardship' if the IPO is not granted immediately.[86] When considering urgency, the guidelines say that magistrates should consider the applicant's perceived risk of further harm by the respondent and the implications of not providing the applicant with an immediate remedy.[87] The IPO procedure raises two potential barriers in respect of the provision of protection to the applicant. Firstly, the tests for imminent harm and urgency are a discretion exercise by the magistrate. Secondly, even if the magistrate acts swiftly to grant an IPO, the court's protection does not become effective until the all the procedural steps have been satisfied, i.e. the order has been served, the return of service reaches the court, the order is finalised, and the warrant of arrest is issued. Without these steps being taken, an IPO is unenforceable and is of little value to the applicant.

[83] See Council of Europe guidance on Section 52 of the Istanbul Convention (for reference only as this does not apply in the jurisdiction of South Africa). This provides that emergency barring measures removing the perpetrator from the home of a victim of domestic violence must be 'instant' or 'immediate' available at https://rm.coe.int/article-52-convention-istanbul-english-version/168073cae6 9 accessed on 15 June 2020
[84] DVA supra (n1) para 5
[85] Ibid. DVA para 1 Definitions
[86] Ibid. 5(2)(b)
[87] Domestic Violence Guidelines supra (n**Error! Bookmark not defined.**) 5(a) & (b)

The courts

Where the research question refers to the protection 'of the courts', it refers to Magistrates' courts or family courts, which are the designated courts for applications under the DVA.[88] This dissertation addresses the power of these courts to make protection orders and issue warrants of arrest, and the execution by SAPS of these warrants. It also explores the courts' physical spaces, their accessibility and whether they appear to be places of sanctuary and protection.

Why the protection of the courts for victims of domestic violence in South Africa matters

Protection orders are not a panacea to domestic violence; after being granted an order, many applicants experience incidents of violence, and some are still killed.[89] However, they are a crucial option for victims of domestic violence, which the government has a both a statutory and constitutional obligation to implement effectively. Although protection orders are not a perfect remedy, they are an essential step in securing a victim's safety, and empowering them to take control of their situation. One study found that protection orders are effective in reducing applicants' exposure to domestic violence.[90] Another suggested that whilst IPOs were not significant in reducing the exposure to abuse, applicants perceived that it had helped them[91] and obtaining a protection order improved their mental, physical and social well-being.[92] More generally, improved service provision to victims of domestic violence leads to a decrease in domestic violence related murders; for example in the United States, the implementation of a domestic violence hotlines, and increased availability of safe houses led to a reduction in domestic violence deaths.[93]

[88] DVA supra (n1) Preamble
[89] Abrahams et al op cit (n16) 12
[90] Peltzer et al op cit (n62) 489
[91] Vogtt op cit (n20) iv
[92] Ibid. iv
[93] Nonhlanhla Sibanda-Moyo, Eleanor Khonje & Maame Kyerewaa Brobbey *Violence against women in South Africa, a country in crisis* (2017) *The Centre for the Study of Violence and Reconciliation* available at *https://www.csvr.org.za/pdf/CSVR-Violence-Against-Women-in-SA.pdf*, accessed on 21 January 2020. 67

Chapter 2 Literature Review

Introduction

This literature review begins by contextualising the South African courts' implementation of the DVA in the wider human rights discourse, which has been slow to recognise domestic violence as a human rights abuse. A human rights orientated approach to considering the barriers which victims of domestic violence face when seeking protection enables us to look at victims' needs holistically. For example, by recognising the need to uphold applicants' dignity, as well as their physical safety. I then move to consider the courtroom workgroup and the systems which have evolved amongst these different stakeholders in their attempt to implement the DVA. From there, I look at the role of the key players in the courtroom work group in turn: clerks, court support workers, magistrates, and police. Finally I consider the space of the court, and how theories on gendered spaces may be of use in analysing the experience of applicants.

Domestic violence and human rights

Domestic violence was neglected from early human rights discourse because, as a form of human rights abuse which occurs in the private sphere of the home, it was perceived to be outside of the grasp of state accountability.[94] Specific international recognition that the state has responsibility to protect its citizens against domestic violence did not come until 1992, over 40 years after the Universal Declaration on Humans Rights was ratified.[95] Domestic violence is now understood as a human rights violation which interferes with the right to life as well as the rights to equality; to live free from violence and to dignity.[96]

When it came into force, the DVA was regarded as highly progressive because it specifically addresses the rights of victims of domestic violence.[97] In the protection order process, the police and courts are obliged to meet their statutory obligations under the DVA.

[94] Ibid. 39 & 43
[95] The first UN Convention document to mention domestic violence was in 1992, General Recommendation No. 19, Committee on the Elimination of Discrimination Against Women, U.N. Doc A/47/38 of 1992
[96] Final Constitution supra (n66-70) S9-12
[97] Penny Parenzee 'ISS Today 'A law isn't enough to stop domestic violence'' available at *https://issafrica.org/iss-today/a-law-isnt-enough-to-stop-domestic-violence*, accessed on 7 April 2020.

They must also uphold applicants' constitutional rights to equality, to dignity and to access the courts.[98] The right to life entails that in certain circumstances, the state (arguably) has a positive obligation to take action to protect the life of a victim of domestic violence.[99]

The right to equality means that every citizen in South Africa who is eligible to apply for a protection order should receive equitable service provision from the courts. Currently this is not the case. Due to the enduring effect of racist segregationist policies by the apartheid regime, such as the Group Areas Act,[100] the distribution of the population in the wider Cape Town area is still divided by race.[101] One of the ongoing impacts of this law is that criminal justice resources are more sparse in areas inhabited by black and coloured communities.[102] Therefore, criminal justice services in these areas tend to be overburdened,[103] with those seeking assistance, being required to travel further and incur higher travel costs than in white suburbs.[104] These inequalities in service provision and access to justice interfere with applicants' constitutional right to equality.

In summary, human rights are helpful in understanding the state's obligations towards applicants in the protection order process. Human rights are also a way in which we can measure the courts' service provision to victims of domestic violence. The human rights to life, equality, freedom from violence, dignity, and access to justice are a good yardstick against which to measure whether the protection order process is fit for purpose. A human

[98] The Final Constitution supra (n66-70) S9,11, 12 & Chapter 8 S34 and 165(2).
[99] In recent years, international human rights litigation has addressed this topic in detail. See: Existing legal standards and practices regarding violence against women in three regional human rights systems and activities being undertaken by civil society regarding the normative gap in international human rights law, Special Procedures' report, 2015, June A/HRC/29/27 29/27 Chapter III – IV available at https://www.girlsrightsplatform.org/node/1257 accessed on 11 March 2020; European Court of Human Rights Press Unit 'Factsheet - Domestic Violence' (2020). A duty protect domestic violence victims has been recognised in some limited circumstances in South Africa. See: *Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC)* cf. para 62. However, discussion of these legal developments is outside of the scope of this dissertation.
[100] Group Areas Act 41 of 1950
[101] In 2011, Mitchell's Pain was 91% Coloured, Census 2011 available at *http://resource.capetown.gov.za/documentcentre/Documents/Maps%20and%20statistics/2011_Census_CT_Suburb_Mitchells_Plain_Profile.pdf* accessed on 1 March 2020. 2; In 2011, Khayelitsha was 98.6% Black African Census 2011 available at *https://census2011.adrianfrith.com/place/199038*_accessed on 1 March 2020.
[102] Lisa Vetten 'Addressing domestic violence in South Africa: Reflections on strategy and practice' (2005) *Violence against women: good practices in combating and eliminating violence against women UN Expert Group Meeting* 6
[103] For example, Western Cape Government op cit (n4): in 2018/19 Mitchell's Plain police station had the highest number of police reports relating to domestic abuse in the Western Cape in 2018/19, 3155 in total. Khayelitsha was second, with 1105 police reports relating to domestic violence.
[104] Vetten op cit (n102) 6

rights orientated approach encourages us to adopt a victim centric approach, which focusses upon the needs of applicants.

Courtroom workgroup

Scholars, particularly in the United States, have considered the impact of local legal culture on service provision for victims of domestic violence.[105] Local legal culture is derived from the shared understanding of the professionals who work within the court space, who develop mechanisms for how to manage heavy workloads in order to get the job done.[106] These professionals include lawyers, prosecutors, judges and court staff. Together they are known are the courtroom workgroup.

The courtroom workgroup concept has been used to explain dynamics within the courtroom which keep repeating themselves, in spite of changes to law and policy.[107] These norms are difficult to change[108] because they exist in unwritten behaviours, and shared motivations of the workgroup. For example the desire for case efficiency, can create informal systems which cut corners, for example by encouraging the court to turn its attention away from seemingly weaker cases, where the applicant's evidence base is more difficult to establish.[109] The idea of the courtroom workgroup is useful in characterising how behavioural norms within the court can create barriers for victims of domestic violence. In this dissertation, I used this concept to explore the behaviour of clerks, court support workers, magistrates and police officers in the protection order process. It should be noted however, that these individuals interact within the wider court space, rather than specifically the courtroom. Nonetheless, I adopt this phrase for its conceptual value.

[105] Currul-Dykeman op cit (n63) 251
[106] Ibid. 251
[107] Richard Young 'Exploring the boundaries of the criminal courtroom workgroup' (2013) 42 *Common Law World Review*
[108] Currul-Dykeman op cit (n63) 251
[109] Ibid. 251

Domestic violence courts as systems

Varying *ad hoc* systems have developed in different magistrates courts in their respective attempts to implement the DVA. These systems blend national policies; idiosyncratic working relationships with the local police station[110] and unwritten rules or preferences of magistrates,[111] court managers and clerks.[112] Often these systems are fragmented[113] and result from adaptation due to lack of resources, lack of time, lack of staff, lack of a proper infrastructure for implementation,[114] and/or attitudes which do not prioritize the rights of applicants within the process.[115]

Niklas Luhman describes the legal system as a self-referential sociological system[116] that comprises a series or a network of communications,[117] and which is distinct from its societal environment.[118] Luhman uses the term 'autopoiesis' to describe these qualities of the legal system collectively.[119] Luhman conceptualises the legal system as being in a constant state of interaction with, or 'cognitive openness' to its environment.[120] Exploring the boundary between the legal system and its environment provides a useful framework with which to explore the partnerships which have arisen between the courts and the NGOs which provide court support services.[121] Whilst operating within the courts, these NGOs sit on the boundary of the legal system and is environment, bringing with them an alternative set of values, such as an emphasis on listening skills and empathy.[122]

Luhman characterises an inevitable disappointment of the individual victim in the capability of the legal system:

110 Artz op cit (n53) 5
111 Moult op cit (n9) 108
112 Ibid.153
113 Ibid.153
114 Parenzee, Artz & Moult op cit (n2) 107
115 Artz & Jefthas op cit (n60) 71
116 Niklas Luhmann 'System as difference' (2006) 13 *Organization* 47
117 Ibid. 11
118 Ibid. 38
119 Ibid. 47
120 Andreas Philippopoulos-Mihalopoulos *Niklas Luhmann: law, society, justice* Nomikoi: critical legal thinkers London, Routledge (2011) 80
121 Parenzee, Artz & Moult op cit (n2) 81; Moult op cit (n9) 45
122 Moult op cit (n9) 135

> Expectations are projected into the legal system by society… one can reliably expect the law to deliver what it is expected to deliver, regardless of factual conditions which may cause personal disappointment.[123]

Here, Luhman describes the dissonance between societal and individual expectations of justice. Applying this to the remedies available under the DVA, the courts' implementation of the DVA often does not accord with the expectations of applicants.[124] This goes some way to explaining why many victims lose faith in the system, and do not complete the process.[125]

Luhman suggests that the legal system is incapable of seeing its own blind spots;[126] and therefore tends towards maintaining the status quo.[127] This helps us understand why the barriers which victims of domestic violence face are being reinforced in the way that the courts implement the DVA. Each individual magistrates' court has formed its own institutional perception of what law and justice mean under the DVA and drives forward its own interpretation of the law, based on the interactions the courtroom workgroup, their innate attitudes and behaviours, and the resources available to them.

These idiosyncratic interpretations of the law are experienced by applicants as barriers to service delivery. One of the most commonly recurring, and immediately visible issues with the protection order process is that applicants are often subject to long waits at court, and are forced to return to the court multiple times in the process of making and awaiting the outcome of their IPO application.[128] Research from 2001, 2006 and 2010 shows that this is a long-standing issue with the way that the DVA is being implemented.[129]

Another harmful failing in the implementation of the DVA is the varying speed with which IPOs are granted. In 2010, Moult found inconsistent practice within and across courts as to whether IPOs were granted on the day of application, often with no explanation for the delay.[130] Some courts such as Khayelitsha had a maximum number of applications they would accept each day, after which applicants were turned away. Mathews et al found that

123 Ibid. 70
124 Parenzee, Artz & Moult op cit (n2) 96
125 Artz & Jefthas op cit (n60) 66
126 Andreas Philippopoulos-Mihalopoulos op cit (n120) 103
127 Craig Calhoun 'Social theory and the law: systems theory, normative justification, and postmodernism' (1988) 83 *Northwestern University Law Review* 456
128 Mathews & Abrahams op cit (n2) 28; Naidoo op cit (n58) 79; Moult op cit (n9) 168
129 Ibid. all
130 Moult op cit (n9) 72

the process lasted at least two days.[131] Vogtt found that most applicants received the IPO either that day or the following day.[132] The literature is clear that widely different practices are being undertaken across different courts in respect of how quickly the IPO is granted.

Another systemic flaw which reoccurs in the literature is the lack of a coherent and transparent process for triaging and prioritizing urgent and emergency cases. The protection order application form contains a section where applicants can state whether the application is urgent. However in practice, research has shown that the courts do not always appear to use the information applicants write in this section to decide which are the urgent cases. In 2001, Parenzee et al found that because all applicants pleaded urgency in this box, in practice, completing it did not result in an application being processed more quickly.[133] In 2010 Moult found that clerks exercised their discretion on the facts of each case as presented to them, in determining urgency, rather than the designation on the form.[134]

Whilst the DVA intends that applicants should be able to apply for protection orders when the courts are closed, on the ground there is currently very little, if any, implementation of the provision for an out of hours applications in the Western Cape.[135] If someone is in urgent need of a protection order at 7pm on a Friday or 3pm on a Saturday, they must wait until the court opens on a Monday. Many domestic violence incidents including murders occur over holidays and weekends.[136] Complainants who report to the police on weekends are frequently turned away and sent to the court on Monday. When the DVA was brought into force, many magistrates refused to work outside of office hours.[137] In one court, where an out of hours procedure was established, complainants were discouraged from pursuing it.[138]

131 Mathews & Abrahams op cit (n2) 28
132 Vogtt op cit (n20) 176
133 Parenzee, Artz & Moult op cit (n2) 34
134 Moult op cit (n9) 172
135 Ibid.176; Parenzee, Artz & Moult op cit (n2) 93; Jeanette Smit & Francisca Nel 'An evaluation of the implementation of the domestic violence act: what is happening in practice?' (2002) 15(3) *Acta Criminologica* 51
136 Tshidi Seabi op cit (n22) 71; Commission of Inquiry into allegations of police Inefficiency and a breakdown in relations between SAPS and the community in Khayelitsha - towards a safer Khayelitsha 'Report of the Commission of Inquiry into Allegations of Police Inefficiency and a Breakdown in Relations between SAPS and the Community of Khayelitsha' (2014) 143
137 Moult op cit (n9) 154; Parenzee, Artz & Moult op cit (n2) 93; Smit & Nel op cit (n135) 51
138 Ibid. Smit & Nel 51

There does not appear to have been any attempt to introduce uniform implementation of this provision, or any systems and processes associated with an out of hours service.

A further recurring failing is that whilst the DVA mandates that a warrant of arrest should always be provided with an IPO, the literature suggests that many courts do not issue one as a matter of course. A 2013 study reported that 70.47% of participants who had received an IPO did not receive a warrant of arrest.[139] Moult's 2010 study found that some courts issued an interim warrant whereas others did not;[140] at Bellville, a warrant was only issued pursuant to further allegations by the applicant, which she noted represents a 'clear subversion of the content and intention of the act.'[141] The failure to provide an interim warrant of arrest with the IPO renders the IPO unenforceable.

Another common issue cited in the literature is a long delay between the date of application and the return date. A return date for a protection order application must be at least 10 days after the IPO is issued.[142] However, in practice it nearly always takes much longer than this, with applicants usually having to wait between 5 weeks and – at most - 6 months for their matter to be resolved.[143] In 2001, Parenzee et al found an average wait of 40 days at Cape Town; 79 days at Mitchell's Plain and 71 days at George.[144]

Applicants experience this wait as draining and stressful.[145] Many withdraw their application, or do not show up, as they cannot face returning to court, finding the space overwhelming and chaotic.[146] Others do not understand or are not provided accurate information regarding the need to return to court to finalise their applications.[147] There is a high attrition rate in the protection order process i.e. the majority of applications do not result in a final order being granted.[148] Applicants often do not attend the return hearing. This is for

[139] Vogtt op cit (n20) 180
[140] Moult op cit (n9) 179
[141] Ibid. 181
[142] DVA supra (n1) 5(5)
[143] Mathews & Abrahams op cit (n2) 28; Naidoo op cit (n58) 85
[144] Parenzee, Artz & Moult op cit (n2) 45
[145] Mathews & Abrahams op cit (n2) 28
[146] Ibid. 28
[147] Ibid. 30
[148] Parenzee, Artz & Moult op cit (n2) 49 found that in 34% of cases neither party attended the final hearing; Moult op cit (n9) 123 found that in 83% of cases in Atlantis and 67% of cases in Bellville, the matter was struck off and no final order was granted because neither party attended the final hearing; Naidoo op cit (n58) 85 found that only 8% of cases analysed resulted in a final protection order being made; Lillian Artz 'Fear or failure: why

a variety of reasons, including lack of understanding by applicants of the process, not receiving notice of the court date, and fear of reprisal by the respondent.[149]

Understandably, the prospect of facing the respondent in court is daunting for many applicants. Applicants also report dropping out of the legal process after an IPO is granted because their partner's behaviour temporarily improves.[150] The DVA does not prohibit the making of a final protection order in the absence of the applicant, however magistrates are reluctant to do so and make assumptions in respect of the reasons for the applicant's non-appearance.[151] Non-appearance of the applicant usually leads to the case being struck off the roll, which means if they later return to court they have to begin the process again from the start. Some courts have developed alternative systems to make it easier for applicants to revive their case.[152] This is another example of how magistrates courts have adopted varying practices in their implementation of the DVA, which lead to unequal results for applicants.

Clerks

Court clerks play a significant role in the administration of justice in the protection order process.[153] An applicant's interaction with the clerk is their first and potentially most important interaction with an official decision-maker.[154] Whilst research suggests that clerks are mostly helpful and perform their duties under the DVA,[155] the breadth of discretion afforded to them can be problematic. Policy guidelines set out magistrates' obligations in detail but do not directly address the role of clerks.[156] In practice, tasks attributed to magistrates in the guidelines are nearly always completed by clerks, such as obtaining a full history of domestic violence and considering the applicant's perceived risk of further harm.[157] The magistrates' guidelines offer a significant amount of discretion to magistrates – and by

victims of domestic violence retract from the criminal justice process' (2011) 37 *South African Crime Quarterly* 4 found that in over half of 365 hearings in the Western Cape, the applicant did not attend.

149 Artz & Jefthas op cit (n60) 57

150 Moult op cit (n9) 77

151 Ibid.125

152 Ibid. 125

153 Parenzee, Artz & Moult op cit (n2) 14; Carter op cit (n2)76; Moult op cit (n9) ii

154 Ibid. Moult 2

155 Artz & Jefthas op cit (n60) 67

156 Moult op cit (n9) 79; Domestic Violence Guidelines supra (n**Error! Bookmark not defined.**)

157 Ibid. Moult 75-89; Ibid. Domestic Violence Guidelines 5(a) and 5(b)

extension clerks,[158] in making a judgement upon the merits of an applicant's case. Research into court clerks' implementation of the DVA has argued that clerks exercise discretion above and beyond that sanctioned by the Act.[159] Whilst this can work to the advantage of an applicant who catches the ear of a helpful clerk, clerks' tendency to bend the rules or go the extra mile for complainants can result in consistent application of the law.[160] Whilst this discretion is often used to assist applicants, it can also work against them – for example by allowing clerks to 'screen out' cases that they perceive do not qualify for protection.[161] Time-pressures upon clerks; [162] an unwieldy paper-based system;[163] a lack of basic resources such as access to a working photocopier[164] and unsafe work environments[165] lead to impatience with those applicants who do not understand the system.[166]

Moult described how clerks occupy a position of respect, and symbolise the administration of law and justice within their communities.[167] This status became a detriment to applicants where clerks were judgmental and would use moral and value-laden language in their interactions with them.[168] Sometimes clerks failed to listen to applicants. [169] This echoes Mathews & Abrahams who suggested that clerks have to no time to help applicants,[170] and therefore do not obtain a 'full history' from them; essentially, they were so overworked they could not fulfil their role. [171] These workload pressures manifest in the service provided to applicants who report experiencing some clerks as abrupt, unhelpful and even rude.[172] Clerks and CSWs frequently replace the personal stories of applicants with standardized phrases in their affidavits.[173] This causes problems for applicants where this results in inconsistencies

[158] Ibid. Moult 79
[159] Ibid. 100
[160] Ibid. 141-153
[161] Ibid. 122
[162] Artz op cit (n53) 2
[163] Moult op cit (n9) 156
[164] Ibid. 50
[165] Ibid. 161
[166] Ibid. 207
[167] Ibid. 156
[168] Ibid. 186-187
[169] Ibid. 76
[170] Mathews & Abrahams op cit (n2) 30
[171] Ibid. 30
[172] Ibid. 30
[173] Carter op cit (n2) 76; Artz & Smythe op cit (n56) 208; Parenzee, Artz & Moult op cit (n2) 106; Moult op cit (n9) 175

between facts stated on their application form and those set out in their affidavit.[174] By adding stock phrases, clerks may be playing to the preferences of a particular magistrate,[175] attempting to manage workload pressures[176] or perhaps responding to the de-sensitizing effect of hearing many traumatic stories on a daily basis.[177] However well-intentioned, this results in the applicant's voice being lost, and important details from their cases being omitted.[178] This may mean that the court fails to appreciate the true facts of their case, which could lead to their case being dismissed, or an order being granted which does not provide effective protection.

Court support workers

The role of CSWs overlaps with that of clerks. Although CSWs work for NGOs, in practice they are integral to the court's functioning and often share an office with court clerks.[179] The vast majority of applicants for protection orders do not have legal representation, therefore CSWs play a key role in supporting and advising applicants in respect of their options; providing psychosocial support, and assisting with the screening and assessment process of applicants seeking protection orders.[180]

CSWs fulfil a vital in assisting applicants in completing their forms and affidavits, as well as translating applicants' accounts from IsiXhosa to English, as required by the court.[181] Applicants find CSWs helpful.[182] In fact, they are essential to assisting applicants to access justice. Frequently, there is no one to assist applicants when CSWs are not present in court full time (for example, because of funding constraints).[183] Moult's study showed that there are many similarities between clerks and CSWs: their work tasks are very similar,[184] the two groups shared a passion for assisting victims of domestic violence, and CSWs felt were part

174 Ibid. Parenzee, Artz & Moult 32; Artz op cit (n53) 3
175 Moult op cit (n9) 173-174
176 Ibid. 139
177 Ibid. 138
178 Carter op cit (n2) 76; Artz & Smythe op cit (n56) 208
179 Moult op cit (n9) 91
180 Ibid. 91
181 Ibid. 91
182 Vogtt op cit (n20) 177
183 Parenzee, Artz & Moult op cit (n2) 20
184 Moult op cit (n9) 45

of the same team as the court clerks, to the extent that one described the relationship as being 'part of the family.'[185]

Yet, despite these perceptions, we can question the extent of this cohesion. Within the court space, the CSWs defy the norm because they are not employed by the DOJCD, but rather they are answerable to their NGOs. There are key differences between the two groups of workers. Court officials are trained in the administration of justice and their goals are often linked to following protocol. Meanwhile, CSWs largely come from a social work background, with the aim of providing psycho-social support to their clients. Whilst a CSW has a huge influence over an applicant's case, they are not officially a decision-maker.

Magistrates

The two key concerns raised in the literature in respect of the magistrates' role within the protection order process are the amount of discretion allowed to them, and the way that this discretion is used. Magistrates exercise power over the crucial decision of whether to grant an IPO; a motion putting the respondent on notice of the court date, or to dismiss the applicant.

In 2010 Moult found that magistrates in different courts interpreted the circumstances in which they should grant an IPO differently, as could be seen from the wide disparity in the proportion of IPOs granted at different courts.[186] In the same year, Vetten found that in spite of an increase in the number of applications for protection orders, the number of protection orders granted had fallen; in 2010 half of all applications for protection orders were refused.[187] This lack of consistent practice[188] is an issue for applicants because it means that their case will be treated differently depending on the court in which they apply.

Magistrates are more likely to grant protection orders where there has been physical violence and particularly where there was visible evidence of injuries to the applicant such as

[185] Ibid.136
[186] Ibid. 172
[187] Lisa Vetten, Teresa Le, Alexandra Leisegang & Sarah Haken *The right and the real, a shadow report analysing selected government departments' implementation of the 1998 Domestic Violence Act and 2007 Sexual Offences Act* (2010) Braamfontein, *Tshwaranang Legal Advocacy Centre to End Violence Against Women* available at *https://shukumisa.org.za/wp-content/uploads/2017/09/The-Right-and-The-Real.pdf* accessed on 1 September 2019. 50-55
[188] Ibid. 50-55

bruising.[189] Magistrates are more cautious to grant protection orders where there are allegations of sexual, psychological or emotional abuse, but no evidence of physical abuse.[190] Applicants are rarely afforded the opportunity to look at and comment upon the proposed order and or to see a magistrate at the interim stage.[191] Particularly when paired with the tendency by clerks and CSWS to replace an applicant's story with standardized phrases, this lack of direct contact between the magistrate and the applicant can lead to dangerous additions and omissions within the protection orders granted where the nuances of their situation are lost.[192] Magistrates are also reluctant to use some of the powers granted to them under the DVA. For example, Section 7(4) DVA allows for emergency monetary relief to be paid to the applicant, to assist in circumstances where, for example, they are unable to return to their own home. Due to backlogs in the maintenance courts, the use of this provision can sometimes elide with ongoing maintenances matters, where the courts have not been effective in enforcing orders for maintenance.[193] Magistrates are reluctant to make orders for monetary relief in such circumstances.[194] Similarly, whilst the DVA gives magistrates the power to make an order excluding the respondent from his/her home and granting exclusive occupation to the applicant, magistrates are reluctant to take this step, which they perceive as drastic.[195]

The wide discretion afforded to magistrates by the DVA poses a barrier to applicants due to the way that this discretion is exercised; such as when magistrates fail to appreciate the less visible forms of domestic violence, and when they fail to exercise their power to assist applicants.

189 Parenzee, Artz & Moult op cit (n2) 42; Moult op cit (n9) 176
190 Artz op cit (n53) 3
191 Carter op cit (n2) 76; Moult op cit (n9) 47
192 Ibid. Carter 76
193 Artz & Smythe op cit (n57) 27
194 Ibid. 28; Parenzee, Artz & Moult op cit (n2) 22
195 Lillian Artz 'Tough Choices: Difficulties facing magistrates in applying Protection Orders' (2004) 8 *South African Crime Quarterly* 25

Police

SAPS are obliged to advise a complainant of their rights under the DVA, including their right to apply for a protection order.[196] The police also have a role in serving protection orders and in executing warrants of arrest where there has been a breach.

Generally, SAPS are unwilling to intervene in cases of domestic abuse; SAPS' complaints directorate admits that many officers fail to advise complainants of their legal options under the DVA.[197] SAPS are also frequently criticised for directing complainants to court to obtain protection orders without also advising them of their right to lay a criminal charge.[198] Some suggest that these failings arise because police officers view domestic abuse cases as a private matter.[199] Others cite conservative attitudes within the police, such as a belief in reconciliation over separation; or a preference for referring complainants to social services intervention over making a referral to the court for a protection order.[200] It is difficult to measure the number of cases which fall through the gaps between the police and the courts as, until recently, police did not gather disaggregated data in respect of domestic violence reports.[201]

SAPS are usually responsible for serving protection orders upon the respondent. Research suggests that service of protection orders upon respondents is often extremely delayed and sometimes does not ever take place.[202] Some courts report that they facilitate service with the police 'seamlessly' whilst others 'struggle to serve IPOs in a timely manner

196 DVA supra (n1) para 2
197 Independent Complaints Directorate *A study of the factors contributing to SAPS non-compliance with the Domestic Violence Act* Pretoria (2010) 9
198 Yasmin Head of KZN Community Safety Hub and Liaison Bacus *The South African Domestic Violence Act: Lessons from a decade of legislation and implementation* (2008) The Parktonian Hotel, Braamfontein, 13
199 Mathews & Abrahams op cit (n2) 36
200 Govender op cit (n25) 38
201 Carol Bower & Naeemah Abrahams *Report on the development of an information management system on violence against women and children in South Africa* (2015) available at *https://www.samrc.ac.za/sites/default/files/files/2016-07-08/SAMRCUNICEFreport.pdf* accessed on 8 January 2020.
202 Amanda Spies 'Continued state liability for police inaction in assisting victims of domestic violence: a reflection on the implementation of South Africa's domestic violence legislation' (2019) 63 *Journal of African Law* citing *Civilian Secretariat for Police Report on the Implementation of the Domestic Violence Act (October 2016–March 2017)* 1

or at all.'[203] SAPS are also criticised for frequently failing to provide the return of service to the court.[204] SAPS, who like the courts remain heavily reliant on paper-based systems, have also been criticised for not storing protection orders and warrants of arrest appropriately so that they can be located on the respondent's file.[205] SAPS also do not always fulfil their obligations to arrest where a protection order has been breached.[206] Many officers say they struggle to interpret the test of 'imminent harm'[207] and are reluctant to arrest respondents for breaching their protection orders unless there is evidence of physical harm.[208]

There is ample evidence of SAPS failing disastrously in respect of their obligations under the DVA.[209] Where SAPS do not uphold the DVA, individual officers often escape accountability as disciplinary action is only undertaken in a small minority of cases.[210] In a briefing to parliament by the Civilian Secretariat for Policing, it was highlighted that:

> SAPS members refused to go to informal settlements and hand over a protection order…Increases in verbal warnings given to SAPS members who failed to deliver a protection order did absolutely nothing as it did not affect the pockets, promotion or even security of these members…Women were killed every day because of the failure of SAPS members to simply deliver a protection order.[211]

Clearly, SAPS as an institution have not taken a strong enough stance in respect of non-compliance under the DVA and insufficient political priority had been directed towards improving SAPS' response.[212] Whilst acknowledging the pervasiveness of these negative attitudes, Mogstad et al also note positive examples of specific changes, such as an

[203] Western Cape Government *Effective implementation of the Domestic Violence Act workshop minutes* (2016) Cape Town Lodge, , available at *https://www.westerncape.gov.za/assets/departments/community-safety/-_report_on_effective_implementation_of_the_domestic_violence_act_2.pdf* accessed on 1 September 2019. 13
[204] Khayelitsha Commission of Inquiry op cit (n136)142-143; Parenzee, Artz & Moult op cit (n2) 48
[205] Spies op cit (n202) 58
[206] Lillian Artz *Affidavit submitted to the Khayelitsha Commission of Inquiry* (2012) 15 para 33
[207] Spies op cit (n202) 59
[208] Ibid. 89
[209] For example, Tshidi Seabi op cit (n22) 67 cites two participants who reported breach of a protection order, whose partners were not arrested and no follow up was done by police. Western Cape Government Workshop minutes op cit (n203) 2 discuss the case of *S v Bennie Adams* in the Western Cape High Court, a tragic example of SAPS failing to protect a woman with a protection order and her son, resulting in the son's death.
[210] Vetten et al op cit (n187) 21; Parliamentary Monitoring Group *Domestic Violence Act Reports: SAPS & Civilian Secretariat for Police briefing* (2017) available at *https://pmg.org.za/committee-meeting/24944* accessed on 13 September 2019.
[211] Ibid. Parliamentary Monitoring Group
[212] Spies op cit (n202) 59

improvement in LBGTQI sensitive policing in Khayelitsha.[213] However there is a strong consensus within the literature that SAPS is failing to fulfil its role under the DVA.[214]

Experiences of court spaces and court processes

The literature suggests that many applicants experience the court space as a confusing and hostile environment, which is not adaptable to their needs. One of the most obvious barriers which applicants face is language. Whereas IsiXhosa is the mother tongue for many African applicants based in the Western Cape, protection order application forms must be completed in English or Afrikaans.[215] Where applicants cannot write to a good standard in English, they are reliant upon clerks and CSWs to assist them with completing their application.

The physical space and atmosphere of the court building can also pose a barrier to applicants. Smit and Nel describe:

> [T]wo full benches outside a closed door and women were also standing and trying to complete application forms. No one assisted them. Most of them were not sure what was required of them to complete the application. The room had a serving counter, which was inaccessible owing to a bookshelf that was placed in front of it.[216]

The composite impact of an unsympathetic environment together with attitudes lacking care upon applicants can be severe. Several studies cite a phenomenon where applicants arrive a court but give up on the idea of obtaining a protection order, leaving empty handed because of long queues and staff shortages.[217] Mathews & Abrahams report that some applicants felt that they had 'wasted' time and 'energy' in the process of seeking the court's protection and found the court process disempowering due to the lack of information and the complexity of applications.[218] Moreover, abusers are aware of the inefficiencies of the court process and use them to their advantage; for example, by destroying the protection order, aware of the barriers that the applicant will face in obtaining another copy.[219]

[213] Heidi Mogstad, Dominique Dryding & Olivia Fiorotto 'Social barriers to the effective policing of domestic violence' (2016) 56 *SA Crime Quarterly* 11
[214] Ibid. 13; Spies op cit (n202) 59; Govender op cit (n25) 40
[215] Carter op cit (n2) 81; Moult op cit (n9) 173
[216] Smit & Nel op cit (n135) 51
[217] Mathews & Abrahams op cit (n2) 14; Carter op cit (n2) 67
[218] Ibid. Mathews & Abrahams 38
[219] Carter op cit (n2) 78

Courts as gendered spaces

Gendered spaces is a phrase coined by Daphne Spain to explore the relationship between space and status in different contexts, such as the home, and the workplace.[220] Spain considered the spatial corollaries of social institutions; for example the connection between the traditionally male dominated labour force and the space of the workplace.[221] This concept will be used to explore the experience of applicants and of CSWs within the court space.

Phelps draws upon Spain's theory to explore the gendered dynamics of sexual harassment cases, highlighting that women and men experience workplace behaviour differently;[222] a comment that a man perceives as light-hearted banter, may be deeply unsettling and offensive to a woman.[223] This disparity arises because the workplace is gendered space, which can become a hostile environment that is toxic to women.[224] Laura Bates, a British Feminist has created a blog called 'Everyday Sexism' where women can share their experiences of – sometimes small and seemingly insignificant – incidences of sexist behaviour . She highlights that these events can be 'so niggling and normalised that you do not even feel able to protest.'[225]

Joan Acker argues that gender and gendered attitudes are 'present in the processes, practices, images and ideologies, and distributions of power' of society's institutions.[226] She suggests that the family as a site of reproduction, a feminine space, is undervalued, and seen as subordinate to systems of production such as the courts, a male space.[227] This is particularly salient to the protection order process in which the court asserts its jurisdiction over the domain of the family. Acker asks us to question:

[220] Teresa Godwin Phelps 'Gendered space and the reasonableness standard in sexual harassment cases.' (1998) 12 *Notre Dame Journal of Law, Ethics & Public Policy* 278
[221] Ibid. 278
[222] Ibid. 269
[223] Ibid. 283
[224] Ibid. 269
[225] Laura Bates 'The everyday sexism project' available at *https://everydaysexism.com/* accessed on 11 April 2020.
[226] Acker op cit (n79) 567
[227] Ibid. 567

> How are men's interests and masculinity of certain kinds intertwined in the creation and maintenance of particular institutions, and how have the subordination and exclusion of women been built into ordinary institutional functioning?[228]

Applying Acker's theory, applicants are seeking assistance within a court space and court system which is fundamentally gendered, regardless of the proportion of male and female staff within the court building. The courtroom workgroup will also experience the effect of gender whilst carrying out their roles within the court space.

[228] Ibid. 568

Chapter 3 Research Methodology

This dissertation uses data collected from CSWs employed by NGOs providing court support services: Mosaic and Mitchell's Plain Network Opposing Abuse (MPN). It also uses data from observations of their work and environment in five courts in the Western Cape. This section provides an overview of these two NGOs and the research partnership with Mosaic. It then discusses research methodology and ethical considerations. I explain the anticipated format for this research; what actually took place; and the challenges experienced in the process of data collection and analysis.

Mosaic Training, Service and Healing Centre for Women

Mosaic was founded in 1993.[229] Their vision is to 'ensure that abuse and violence against women in all its forms and manifestations is eradicated in our society.'[230] Mosaic's mission is to 'work to prevent and reduce abuse and domestic violence by providing holistic, integrated services for the healing and empowerment of women through support services, access to justice and skills training.'[231] Mosaic offers a range of empowerment and psychosocial services, including a court support programme which aims to help survivors understand the court process, offer emotional support, and refer clients on for additional psychosocial support.[232]

Mosaic's court support work is wide-reaching; in 2018, they helped 11 418 clients apply for protection orders at court, in respect of whom 9 239 IPOs were granted.[233] In spite of the huge demand for their services, in 2017/18 Mosaic was under-funded, and consequently reduced its CSWs' hours from five days to three days per week. The number of courts in which they have a presence was also reduced from fifteen to ten.[234] Mosaic

[229] Mosaic Home Page available at *http://mosaic.org.za/main/*_accessed on 15/03/2020
[230] Mosaic Annual Report 2018/19
[231] Ibid.
[232] Mosaic 'Our Approach Access to Justice' available at *http://mosaic.org.za/main/our-approach/access-to-justice/* accessed on 15/03/2020
[233] Mosaic Annual Report 2018/19 op cit (n230)
[234] Ibid.

currently works in nine courts in the Western Cape: Bellville, Bishop Lavis, Cape Town, Khayelitsha, Mitchell's Plain, Paarl, Philippi, Wellington and Wynberg.[235]

Mosaic's court support programme is a public-private partnership between Mosaic and the Department of Justice and Constitutional Development (DOJCD) that aims to 'promote human rights (safety and security), to develop and enhance the dignity and equality of all abused clients and to contribute to access to justice.'[236]

Mitchell's Plain Network Opposing Abuse

MPN is a community based NGO based in Mitchell's Plain, which has been in operation since 1996.[237] MPN's vision is to create 'dignified, self-reliant survivors of abuse, violent crimes and disasters.' Their mission is to empower their clients with coping skills, and to promoting and advocate for prevention of abuse. They help approximately 340 clients per month.[238] The organisation describes its challenges as 'the safety of our members due to gang/taxi violence, lack of space and lack of funds.'[239] MPN almost became bankrupt in 2011, but has since secured funding from the Department of Social Development.

MPN has 6 lay counsellors who undertake court support work on a rota, in exchange for a small stipend. As well as helping applicants apply for orders, they refer them to MPN's other psychosocial services such as counselling, group therapy and mentoring.[240] MPN does not have any official partnership with the DOJCD, and therefore its presence at court is at the court's discretion. Although MPN court workers are present in the court 5 days per week, their operational manager describes how the organisation has 'nothing on paper' with the DOJCD, other than the occasional 'thank you note' acknowledging services rendered.[241]

[235] Ibid.
[236] Public-private Partnership Agreement between DOJCD and Mosaic Training and Healing Service for Women dated 15 November 2013
[237] Meeting with MPN team on 20 January 2020
[238] Ibid.
[239] Ibid.
[240] Mitchell Plain Network Brochure (undated)
[241] Data collected from MPN participants

Research partnership with Mosaic

This dissertation forms part of a research partnership between the Centre for Criminology at the University of Cape Town and Mosaic. The fieldwork took place as part of an ongoing baseline study conducted by Mosaic to inform their implementation of the SAFE project, a pioneering initiative which aims to promote multi-disciplinary working and collaboration across the stakeholders in the protection order process. Permission to collect data from CSWs was provided by Mosaic and MPN respectively.[242] The study was cleared by the Law Faculty Research Ethics Committee reference L0133-2019.

More data was gathered at to Mitchell's Plain than at other courts. This focus added value to the larger Mosaic baseline study as anecdotal evidence suggested that this court was engaging in particularly problematic practices that pose significant barriers to applicants. However, this has had the effect of reducing the comparability of my results to other courts in the Western Cape.

Fieldwork

I undertook fieldwork in Mitchell's Plain, Khayelitsha, Philippi, Cape Town and Wynberg courts. The domestic violence courts are all based within Magistrates' courts, apart from Cape Town, which is located in the regional court building. I observed the operation of the domestic violence protection order application office for a period of between one to three days. I stayed at each court until I had reached saturation point with new observations. This meant that I spent three days at the first court, but gradually decreased these periods towards the end of the research, when court processes became more familiar. Each period of observation was followed by interviewing the CSW(s) at that court. In addition, I convened a focus group meeting of all of Mosaic CSWs, and observed one of their CSW monthly meetings. The director of Mosaic and operational manager of MPN were each interviewed. I also convened with MPN's team to learn about their work, and the services that they offer to clients.

[242] Mosaic negotiated research access from the DOJCD for the larger SAFE project baseline study, which aimed to collect data in the courts and from protection order case files.

Individual in-depth open-ended interviews (see Appendix 1) with the court support workers were conducted at court, usually in the room they use to see clients. This allowed for a reasonable amount of privacy, although interruptions by court staff were common. With participants' consent, all interviews were audio recorded, and later transcribed. Eight CSWs plus the director of Mosaic and the operational manager of MPN were interviewed. For the latter two, the questionnaire was adapted in order to explore their organisational perspectives on barriers facing applicants in the protection order system.

Focus group meetings are a useful supplement to observation and interview based research because they offer 'the opportunity to observe a large amount of interaction on a topic in a limited period of time.'[243] They also offer the chance to observe free-flowing conversation between participants, with less intervention by the researcher than in a one to one interview.[244] A potential downside is the risk that the views of more dominant members of the group will polarize others, giving an unjustified sense of conformity.[245] The focus group of Mosaic's CSWs was valuable because it provided views across all of the courts that Mosaic serves across the Western Cape. It took place at Mosaic's head offices in Wynberg in February 2020, attended by twelve CSWs. The discussion was focussed around broad talking points such as 'clerks', and 'warrants of arrest'. It was audio recorded, and later transcribed.

Data Analysis

I developed a list of themes with which to code the transcribed data. These began as broad categories (such as 'magistrates' and 'systems'), with corresponding colour codes to highlight relevant sections of data. I then compiled the relevant sections into a thematised spreadsheet, and organised the information into smaller sub-categories, such as magistrates/discretion, or clerks/attitudes. Noticing that many of these sub-categories overlapped and involved multiple stakeholders was useful in emphasising that many barriers

[243] David L Morgan *Focus groups as qualitative research* Qualitative Research Methods Series 2nd ed London, Sage Publications (1997) 5
[244] Ibid.15
[245] Ibid.15

to applicants arise from systems which have developed over time through interactions between key players in the protection order process. These categories and themes are used as a structure for presenting my results.

Ethical considerations

Participants made themselves vulnerable in order to share their thoughts, opinions and feelings on a topic that was deeply personal to them in that in related to their own experience, and the experience of those that they were there to assist in the courts. Moreover, given the nature of the work that CSWs do, and the people whom they help, reflecting on their work inevitably entailed recalling cases which 'went wrong', where they were not able to help, and where a party to the court proceedings was seriously harmed or killed. Participants were asked to reflect critically on the individuals, systems and processes in their own workplace. If a negative comment was linked back to them, this could well have a detrimental impact upon their working life. I therefore spent time with each participant discussing how their confidentiality would be protected to ensure that they gave their well-informed consent to taking part in the interviews and focus group meetings.

It was more challenging to obtain consent for data acquired through observation, because events were happening in real time. CSWs operate in the public space of the court, and their space and time is frequently interrupted by court clerks and other court staff. Therefore they do not have an expectation of confidentiality in their work or workplace conservations. Yet albeit that observations took place in a public space, 'in which participants conventionally or knowingly accept the responsibility for the public character of their actions and expressions' individuals may have chosen to behave differently if they were directly made aware in that moment that their behaviour would be written about afterwards.[246] Also, incontrovertibly, where individuals are aware that they are being observed, this alters their behaviour. Social realities are transformed by the process of observing and transcribing

[246] A. A. van Niekerk 'Moral perspectives on covert research.' (2014) 7 *South African Journal of Bioethics and Law* quoting Shils E. 'Social enquiry and the autonomy of the individual.' In: Bulmer, M, ed. *Social Research Ethics*. 55

them.[247] In spite of pleas to continue as usual, my presence in the room, as an additional person, but also specifically a white, foreign (English) woman, who is not conversant in Afrikaans or IsiXhosa undoubtedly had an impact on interactions between clients and CSWs, leading to risks of both being an object of curiosity, and a Colonial echo. Literature on decolonising methodologies is clear that to be culturally acceptable to research participants, the researcher must take additional steps to understand local customs and values, and must also accept the limitations posed by their status as an outsider.[248] With a longer research window, it would have been beneficial to spend more time not only in the courts, but also in their surrounding areas to gain a deeper understanding of the context in which they operate. However, for this project it has been necessary to work with what is perhaps a superficial snapshot of these places, which limits the conclusions which can be drawn from it.[249]

There are also potential benefits of being an outsider, such as being a fresh pair of eyes and – relatively speaking – coming to the research without preconceptions. Whilst being an outsider is challenging when seeking to research in spaces which are culturally different from the researcher's own, Isaacs suggests that it is nonetheless possible 'when the researcher is able to exhibit a culturally appropriate and sensitive attitude towards the research, [and] adheres to the right values and protocols.'[250] I tried be helpful by assisting with photocopying, making cups of coffee for CSWs, helping applicants to complete forms, and bringing snacks to help with the long days which often proceeded without a break. Having previously undertaken similar work to the CSWs in the UK, it was possible to share experiences at moments with research participants, and at times to feel like one of them, or as Moult describes in her research with court clerks 'part of the furniture.'[251] Despite trying to be 'unobtrusive,' and adopt a role of 'observer-as-participant,' I sometimes found myself becoming 'more of a participant than an observer.'[252] At these times obtaining valuable observation data could feel like a transgression of an unspoken sense of privacy and

[247] J. A. Jones 'Ethical considerations in criminal justice research: informed consent and confidentiality.' (2012) 4(08) *Inquiries Journal/Student Pulse* 1
[248] Hugh Pepper Anton Neville Isaacs, Priscilla Pyett, Hilton A. Gruis, Peter Waples-Crowe, Mark A. Oakley-Browne, 'What you do is important but how you do it is more important' (2011) 11 Issue 1 *Qualitative Research Journal* 51-52
[249] Ibid. 57
[250] Ibid. 57
[251] Moult op cit (n9) 50
[252] Monique Marks 'Researching police transformation: the ethnographic imperative' (2004) 44 *The British Journal of Criminology* 873

comradeship; for example, whilst joining a CSW and a clerk for a smoking break. When reporting on such observations, extra care has been taken to ensure that this information is written up with sensitivity and upholding the confidentiality of participants.

The focus group discussion presented an obvious difficulty with confidentiality, as the participants all know each other, and heard each other speak. However as longstanding work colleagues, who view themselves as a community of activists fighting for a common cause, they were comfortable in each other's company. They were all passionate about helping their clients, and consequently invested in improved service provision within the courts. They welcomed the opportunity to be asked about their views on barriers facing applicants, and did not appear to have any concerns regarding sharing these views with their colleagues.

To preserve CSWs' confidentiality it was initially agreed that interview and focus group transcripts (without the names of CSWs or the courts where they are based) would be provided to the SAFE project's independent consultant researcher but not to Mosaic's management, who would instead receive a summary of the findings. However, subsequently, the consultant has been made a permanent member of staff at Mosaic in their head office, and it is therefore her responsibility to meet the expectation of participants that the data not be shared with Mosaic as an organisation. An aggregate of the data has been provided to Mosaic which conforms with the expectation of participants.

Potential benefits of this research to participants were the opportunity to reflect upon the system in which they work, and the importance of the work that they are doing. Participating in this research gave participants the opportunity for their voice to be heard across a potentially wide audience, to help make the system better for applicants. To maximise this benefit[253] they were offered the option to receive a copy of the completed dissertation so that they could view their contribution in context. Also, if the SAFE project is successful in obtaining further funding this will have a positive impact upon their future job security.

The principles of justice, fairness and equity were taken in account when designing, collecting and writing up this research.[254] For example, a fair and representative sample of

[253] Douglas R. Wassenaar 'Ethical issues in social sciences research ' in Terre Blanche M, Durrheim K and Painter M (eds), *Research in practice* 2nd ed Juta (2006) 67
[254] Ibid. 68

participants were selected by interviewing CSWs both in the courts based in the Cape Flats and in central Cape Town. Participants were allowed sufficient time to explain their views, and were encouraged to give me a call or send me a message if they had any further comments to make later. Whilst some seemed a little nervous or shy about being interviewed, none appeared to be upset or distressed by topics of conversation which arose.

Chapter 4 Results

This dissertation analyses the barriers experienced by victims of domestic violence seeking the protection of the South African domestic violence courts. Victims often present at court seeking a protection order during a time of crisis.[255] Therefore, for many applicants, in order for protection to be effective, it must be provided immediately i.e. on the day that they first present at court seeking assistance. Consequently, this results section hones in on the urgent remedies available under the DVA; the IPO and an interim warrant of arrest. I therefore focus on issues arising from the applicant's first attendance at court, and the interim steps prior to the return date. This analysis is conducted through the lens of participant CSWs, who are key to applicants' experience within the court, but are not formally recognised by the DVA.

The courts do not always implement the DVA in a victim-central manner which upholds the rights of applicants to dignity, equality and procedural fairness.[256] I suggest that these deficits in service provision arise due to problematic norms perpetuated by the courtroom workgroup:[257] clerks, magistrates, court support workers, other court staff, and to some extent, the police. This results section analyses the barriers posed by each of these stakeholders separately,[258] before looking at systemic issues within the courts.[259]

I suggest that CSWs sit in a liminal space, on the parameter between the legal system and its environment.[260] As advocates for applicants, they seek to bring environmental influences to bear upon the system, yet their capacity to do so is limited by virtue of the fact that their role is not fully acknowledged by the system and does not hold formal power. They sit within the courts, and yet they are not on the DOJCD's payroll. Because of the nature of their role, they gain the trust and confidence of applicants. Consequently, CSWs are well-placed to comment upon the sometimes hostile[261] atmosphere of the courts, and the experience of gender within this space.[262] This results section begins by considering the interaction between CSWs and clerks in the protection order process. The two groups have

[255] Abrahams et al op cit (n16)12
[256] See discussion on domestic violence and human rights 19-21
[257] See discussion on courtroom workgroup 21
[258] See discussion on clerks 26-28, court support workers 28-29, magistrates 29-30, police 30-32
[259] See discussion on courts as systems 21-26
[260] Ibid.
[261] See discussion on the experience of court spaces 32-33
[262] See discussion on gendered spaces 33-34

overlapping duties and work closely together, therefore they are, perhaps, the court staff upon which CSWs are best placed to comment.

Clerks: *'if you mess up with the clerk, you've messed up your whole case'*

Two key themes emerged in relation to the clerks' role; their use of discretion, and their attitude towards applicants and towards their work generally. Participants were clear that clerks were the 'gatekeepers' to accessing the court's protection. One participant emphasised the power of clerks, saying 'if you [an applicant] mess up with the clerk, you've messed up your whole case.' [P8] This participant questioned clerks' understanding of the DVA, suggesting that 'the clerk is not considering the law or anything, he's just like putting it on affidavit.' Another participant suggested that magistrates expect the clerk to 'fill out' the draft protection order, so that by the time the magistrate reviews the papers, it is 'almost like the decision must have been made by the clerk.' These concerns highlight a scenario where the clerk is effectively being placed in the role of decision-maker, but without legal training. This can manifest problematically for applicants where clerks are applying their perception of rules, which is at odds with what is provided under the DVA.

Clerks are usually obliged to apply the informal rules preferred by the presiding magistrate, regardless of whether these are in accordance with the DVA. For example, one participant described how in her court, a magistrate has circulated a 'memo to the [SAPS] station commander' suggesting that certain offences such as assault and kidnapping were 'not a protection order' but rather a criminal complaint [P1]. The clerk had interpreted this to mean that if an applicant mentions an assault on their affidavit, and 'she don't feel like she wants to accept the application' she would refuse their application and send them to the police station to open a criminal case. This example shows a combination of a use of discretion based on a perceived authority from the magistrate i.e. the memo, combined with the clerk's own personal interpretation. The result is an improper application of the law, which unjustly denies the applicant the court's protection.

CSWs had negative perceptions of the clerks' attitude towards their work. They frequently described the clerks as lazy, being 'a bit lax'[P10] and lacking attention to detail. This critique could also be interpreted as a lack of appreciation by the clerks of the importance of administrative aspects of their work – such as one clerk who left the protection

order applications on their desk all day, rather than taking them through to the magistrate 'forthwith' as required by the DVA. During observation, one clerk failed to notify an applicant that their application was missing a signature, so that when she returned to court expecting to collect her protection order, she discovered that it was in a box labelled 'incomplete applications' [P4].

Participants also felt that some clerks lack care: that they don't 'understand the meaning of helping clients' [P2]. Examples included refusing to help an applicant who arrived in the afternoon to make an application even though she couldn't afford to return to court the following day, and declining assistance to people who could not write their own forms. Of course, these behaviours could also stem from time pressure, and/or from a shortage of staff and resources. However, CSWs felt that the clerks' reticence to assist went beyond workplace pressures and spoke more clearly to the clerks' attitude towards their work. They felt that the workload was emotionally 'too heavy' for younger clerks [P12], whilst clerks who had been in the job for too long had become de-sensitised to the stories of domestic violence. The CSWs often complained that clerks did not listen, or did not hear the stories of applicants.

Another criticism levied at clerks was that they performed their function, without considering whether they were communicating effectively with applicants. One CSW described a clerk shouting out court dates to the line of applicants, and handing out their IPOs and notices without explaining what they were; applicants left court with no idea of whether their IPO had been granted, or of their next steps [FG Participant]. Some believed that these unsympathetic attitudes were due to a lack of training on domestic violence and communication skills. Others felt that some types of people were inherently ill-suited to the clerk role, and that it 'depends on the person… and how [they] were brought up' [P10]. These understandings of clerks' behaviour must be understood in the frame of CSWs' own role; most of them are trained auxiliary social workers, highly experienced in empathic skills and able to listen for hours on end, even to the most challenging of clients. The clerks, on the other hand, hardly receive formal training.[263] The clerks' sometimes acerbic behaviour stands in strong juxtaposition with the CSWs' own role and values.

[263] Moult op cit (n9)134

Court support workers: *'I'm blessed with knowing I helped someone today'*

The way in which CSWs viewed themselves and understood their own role was illuminating in understanding the challenges facing applicants, as CSWs and their organisations take it upon themselves to fill the gap which is left unaddressed by the court system. As applicants do not generally have lawyers representing them, CSWs fulfil an important role as a partisan advisors to applicants, as well as psycho-social counsellors. Their room is a safe space within the court where emotions can unravel. CSWs viewed themselves both as a feminine and feminist force. They hold crying babies, feed treats to hungry children and hand out boxloads of tissues to crying applicants, male and female. CSWs viewed their role as chiefly one of empowerment; assisting in the transformation from victim to survivor. One described the importance of giving a client 'that relief' so that they could go out into the world 'stand for themselves' and decide their plan of action [P2].

In a system which does not make it straightforward for applicants, CSWs encouraged their clients to empower themselves, for example by memorizing their case number, and by telling clients that the power of protection order lies in how it is used by them. A self-empowerment narrative ran throughout the advice of the CSWs: to succeed in the system applicants need to know their rights, insist upon them, and if state officials breach their duties, report them. Sometimes this rhetoric, whilst practical and accurate, ran counter to the DVA in that it placed all of the responsibility upon applicants, rather than upon the state to assist them.

CSWs are not well paid. For most, the role was a vocation, demonstrated their desire to go the 'extra mile' for applicants. For example, one came in on her day off to support a client who was struggling to navigate the system. Others frequently help victims of domestic violence in their spare time at their own homes, and on an ongoing basis via Whatsapp. One volunteered at the SAPS victim support room at weekends. Without this good will and personal commitment, CSWs were aware that there would be no one to support clients in the protection order process.

In the way that CSWs spoke about themselves, it was clear that they had internalised their organisations' empowerment messaging. Working in a world and specifically within a court space which often felt unsafe, one CSW in her 60's, said confidently that she was not

scared because she could hold her own with self-defence techniques and pepper spray. Another said: 'I have learnt a lot through Mosaic, to stand up for what you believe in' [P1]. Beyond their individual role, CSWs view themselves collectively as a force with which to be reckoned. Many CSWs are grandmothers or even great-grandmothers who have shared collective strength over the years, through many difficult events such as bereavement and experiences of violence within their own families. This life experience is immensely valuable to applicants.

However, CSWs often find their time taken up by playing a supportive role to their female court staff colleagues. For example, in one court, the CSW spent a significant portion of each day supporting a member of court staff who was going through a difficult time, whilst applicants queued outside her door. CSWs are providing a unique and sought-after listening service within the court space, which stands in stark contrast to the abrupt and brusque *modus operandi* of the court. However, the use of this resource by under-supported court staff can represent a barrier to applicants, where it takes valuable time out of the CSW's day, leading to delays in assisting applicants.

Court support workers: *'We are just there to do their dirty work'*

Whilst they were experts in assisting applicants with their forms, sometimes CSWs lacked understanding of subsequent aspects of the court process, and felt cut off from being fully integrated into the court's processes. They are only very rarely permitted to enter the courtroom. Some lacked insight into the type of wording which would be likely to make it onto a court order. Often, CSWs and court staff alike seemed to be operating in siloes, unaware of what was happening in the office next door to them. One CSW cited this as a barrier, as she felt that in her court she had no right to find out the outcome of the cases she had assisted with [P1].

Within this segmented space, CSWs often felt underappreciated. One felt that court staff viewed CSWs as people who were coming to invade or interfere with court processes. Many CSWs felt that court staff did not see value in their role, or as one suggested, that

CSWs were 'just there to do their dirty work' [FG Participant].[264] Another described how they were 'not part of the family' [FG Participant]. During observation, one CSW who was assisting a client over her lunchbreak, asked the clerks next door to lower their voices as they were joking and laughing loudly, to no avail.

The extent to which CSWs were integrated with clerks varied depending on the court; generally a higher level of integration appeared to result in a better working relationship, and a more nuanced and responsive service to applicants. One CSW felt that the court as an organisation was not open to her input, citing how she had been invited once to their meeting, but 'when I approached them with all my questions and stuff, they didn't invite me again!' [FG Participant]. This exclusion clearly poses a barrier to applicants, as CSWs are not afforded the opportunity to advocate for applicants or themselves in these forums. Notably, there was no discernible difference between the level of integration of Mosaic CSWs, whose presence in the courts is governed by a written MOU, and MPN, who are there purely at the court's discretion.

Often CSWs work in very small offices. These are challenging spaces to operate within as applicants are often accompanied by a relative and/or a small child. At one court, the CSW's door did not shut properly, and clients were asked to wedge it shut with a piece of folded tissue. At another, the office was located outside of the court building next to the toilet. CSWs perceived their allocation to these spaces as a sign of disrespect. This points to a tension between the CSWs' inclusion within the court space, and a narrative of 'othering' whereby other court staff did not regard them as equal, and worthy of 'decent' working conditions. As CSWs' chief role is to help and support applicants for protection orders, the way in which they are treated by the court tells us about how the court perceives the value of this activity.

However it was equally clear that the protection order process could not operate without the assistance of CSWs. Participants were frustrated by the fact that on days when they are not present in the court, no one helps applicants complete their forms. Even for urgent cases – one cited rape by a family member - the clerks' still send applicants away,

[264] This reference is used to indicate focus group discussion participants because it was not possible to reliably identify individual speakers when transcribing.

telling them to come back on a day when CSWs are working [FG Participant]. Furthermore, CSWs describe frequently taking on duties which they perceive to be part of the clerks' role, such as screening and triaging clients. Some experienced this as 'draining' [FG Participant]. Others felt empowered within the system; such as one participant, who felt personally responsible for accelerating urgent matters:

> There was one client who was very beaten up,… raped and threatened to be killed… I had to make the grant urgently… it was granted and the warrant was done… I contacted the police who is dealing with domestic violence, please assist that client, and luckily she was assisted at that time, the guy was arrested, and he was sent to Pollsmoor. [FG Participant]

This quote demonstrates how it fell to the CSW to assess the urgency of the application and ensure that it was expedited. 'Luckily' it was, however this *ad hoc* process is inherently fragile, and susceptible to cases falling through the gaps.

Magistrates: '*the magistrate doesn't put his shoes in her shoes'*

CSWs highlighted the inconsistency in practice between individual magistrates at their court, which they find 'confusing'. For example, some magistrates allow adolescent minors to appear to apply for protection orders, whilst others do not [P1]. This makes it difficult for CSWs to advise their clients accurately. The way that magistrates use their discretion can be problematic, and at times this may conflict with the provisions of the DVA. For example, some 'make judgements based on their gut feelings and not necessarily what's on paper' [P8]. This results in a devastating lack of legal certainty for applicants arriving at court in distress, seeking urgent protection, where 'you can go to Cape Town court and have a completely different experience to what you have in Wynberg… [or] Mitchell's Plain, and it all depends on who is sitting on the bench'[P8].

CSWs cited that magistrates frequently applied their discretion unreasonably in their interpretation of 'imminent harm,' and that their mechanisms for deciding which cases were worthy of urgent protection lack attention to detail. For example:

> Some of them…I would say they don't read through the affidavit…if you read through the, affidavit, you will see there's some blue marks on the woman, and [she] was beaten up….and then… they still gave a notice… which means nothing.. what if she gets attacked in the time that she had to get back to court [P10].

In another court, the magistrate was reported to only grant IPOs in a small percentage of applications. To decide which ones were worthy of urgent protection, according to the CSW, he would 'browse' through the statements and grant IPOs in approximately one sixth of the applications [FG Participant]. Another CSW felt that her magistrate's aptitude for declining IPOs stemmed from a lack of empathy for the applicant, a failure to 'put his shoes in her shoes' [P4].

CSWs criticised magistrates for failing to make an order which reflected the danger which the applicant was facing. One CSW reported that too often 'important conditions' were not granted on the order, which had led to an applicant being killed by the respondent [P1]. CSWs also cited a failure by magistrates to respond to allegations of financial abuse or to grant emergency monitory relief, preferring to refer these matters to the maintenance courts. Respondents were wise to this, and would threaten to leave their job so as to avoid paying maintenance [FG Participant]. CSWs described this as a significant barrier to applicants, who would be forced to return to their abuser due to lack of funds.

CSWs were concerned that magistrates were operating without oversight or accountability. Some appeared to feel that there was a gendered aspect to magistrates' decision-making:

> If a woman sit[s] in front of them and she is beaten up black and blue, he will just say no I am not giving you an interim order… a client came to me and she was still full of bruises and she was crying, and she wanted an interim protection order… I took the client with me and I told the chief magistrate, if this magistrate doesn't have any sympathy with our clients, then I don't think they should deal with domestic violence, because [he's] a man, they don't understand. [FG Participant]

CSWs perceived that certain magistrates were rude, lacked empathy, and failed to appreciate the nature of CSWs' work by suggesting they spent too long counselling individual clients, attributes which some CSWs linked to the gender of the magistrate. These perceptions highlight how the court space can itself feel gendered and inherently hostile to feminine concerns.

CSWs recognised that magistrates are often constrained by heavy workloads. In several courts, magistrates read the applications that were submitted in the early morning first, they would then spend the day dealing with court hearings, and return to the rest of the applications late afternoon. One CSW witnessed a magistrate breaking down in the clerks' office from the pressure:

> [T]he magistrate cried he said I don't know how… it's too much. You can't stop the applicants [P4].

Therefore whilst CSWs cited the use of discretion and magistrates' attitudes as a significant barrier to applicants, they acknowledged that these behaviours were inextricably linked to an over-burdened system, in which applicants cannot always receive the efficient service which they deserve.

CSWs were not globally negative in their appraisal of magistrates. They praised certain magistrates who were 'sweet' and 'considerate' towards applicants [P2]. Particular magistrates stood out to CSWs, as kind, empathic, professional, and appreciative of the CSWs services, for example engaging effectively with them for referrals when dealing with difficult cases. The Domestic Violence Court at Cape Town was described as having an advantage because it comprises four magistrates, governed by a (female) Senior Magistrate with a thorough understanding of the DVA. This magistrate insists that every applicant for an IPO goes before a magistrate, rather than the application being dealt with on the papers. Clients are helped on the day of application, and have the opportunity to explain anything which might be unclear on their application form or affidavit. This accords with policy guidelines,[265] however it is not common practice in the other courts observed in this research. This practice enables applicants to get the help that they need; this is how they 'should be treated' [P5]. The example of Cape Town court shows how effective leadership can have a pervasive effect upon the behaviours of the courtroom workgroup, and how the implementation of effective systems at a local level can result in much better service provision to applicants.

Police: *'if only SAPS could come to the party'*

Participants suggested that whilst police are often the first port of call for a victim of domestic violence who is in need of urgent protection, initial interactions with the SAPS officers were often dismissive and discouraging. One explained that her client was given a domestic violence hotline number by a police station, which did not work. Others described SAPS casting judgments on complainants – for example based on where they live, what they

[265] The Domestic Violence Guidelines supra (n82) Guiding Principle 11

wear, and whether they drive a car. Whilst some officers 'know exactly how to talk to the client,' others do not understand domestic violence, for example asking victims 'why don't you go away, why don't you leave?' [P3]. As with magistrates, participants felt that there was a gendered aspect to SAPS' attitudes, suggesting that female officers had an innately better understanding of domestic violence. One also described how SAPS refused to acknowledge male victims of domestic violence, and would 'laugh at them' saying 'it's only for women' [FG Participant].

Participants had many stories to tell about SAPS' failures. A commonly recurring theme was the tendency of SAPS to refer all domestic violence matters to the court, regardless of whether a criminal offence had occurred. CSWs described a perception by SAPS that before a criminal case could be started, the participant must obtain a protection order. One described how, when a victim attended the police station to report an assault, there was a female police officer who would take women into a private room so that they could show their bruises [FG Participant]. Once they had done so, they would be sent straight to court to apply for a protection order, and no criminal case would be opened. One officer told a CSW's client that he would not open a case for her because he was convinced that 'she will cancel the case' [P5]. The victim was adamant that she would not cancel the case, but the police still refused to help. Another participant told the following story:

> There was an applicant that was beaten by her boyfriend… she went to the police station, at 10pm, the police station said no go and sleep and go to the court and open a protection order. They didn't even go and arrest that person, and then when the applicant wanted to take the name of the policeman, the policeman jump over the counter and beat the applicant, the applicant that was beaten by the boyfriend, was beaten by the police officer, on the same day [FG Participant].

This account suggests a denial of the urgency of the applicant's situation. When she tried to enforce her rights, the police reacted brutally to her, subjecting her to secondary victimisation by beating her. Whilst CSWs seek to empower victims of their rights, this story suggests that the system does not always respond well to empowered victims.

Several other CSWs shared a perception of police as the perpetrators of, rather than guardians against violence, leaving the applicant with nowhere to turn. One told of a victim who was raped by a policeman after reporting domestic violence to him. The officer allegedly said to the victim, words to the effect of 'your husband's been *jolling* around, now it's time

for you to have a *jol'*[266] [FG Participant]. This story demonstrates not only a gross misuse of power, but also a disturbing assumption by the police officer that the domestic violence victim would enjoyed being raped by him.

One CSW was informed by an applicant that police officers were complicit with her abuser; officers had attended her home on three occasions to harass her, and witness her husband making threats to kill her. Another CSW questioned a family link between a police officer who shared a surname with an alleged perpetrator of domestic violence and was advised, in strong terms, to stop asking questions. These experiences of police complicity and corruption form part of a continuum of uncaring and dismissive attitudes by police officers to victims of domestic violence whereby some officers appear are generally dismissive of victims, whereas others specifically side with the abuser due to personal connections.

CSWs described how obtaining a protection order and warrant of arrest was just the first part of the battle for an applicant: 'if the protection order has been breached, then the struggle comes for the client, the police they don't do what they need to do' [FG Participant]. Where the applicant had not been given a warrant by the court, even if they are physically injured, SAPS will not arrest until the applicant obtains a warrant. CSWs reported that some SAPS officers appear to believe that warrants of arrest have an expiry date, after which they are no longer valid. CSWs said that police officers do not always respond to call-outs for the breach of a protection order, and when they do they are not always effective, describing, for example that 'the police… just come drive to your gate, in the road, they hoot, they don't come in' and if no one goes out 'they drive off' [P6]. Clearly, this practice is of little assistance to victims of domestic violence, who may be in need of urgent assistance and may not be at liberty to walk outside.

CSWs felt that SAPS are letting down the other stakeholders in the DVA process, leading one to lament, 'if only SAPS could come to the party' [P5]. Another explained that new recruits did not understand the process and would tell applicants 'this is a family issue and we are not going to get involved' [P9]. CSWs expressed frustration that in spite of

[266] Afrikaans: *having fun/a good time*

attempts to train SAPS, there seemed to be little motivation to make these ideas a reality – describing how an attempt to set up workshops to train police 'went down the drain' [P4].

Systems: '*it doesn't matter how urgent… the applicant must just wait*'

CSWs reported a wide disparity in the processes at courts for granting the IPO. At some courts, applicants received the IPO in their hand on the day of application, whereas in other courts, they were required to return to court the following day or on subsequent days to collect their IPO, which CSWs described as 'frustrating' [P3]. One CSW highlighted that magistrates were previously reluctant to grant IPOs at all at her court, but their attitudes changed after there was a serious incident where an applicant was brutally attacked by the respondent whilst her application was under consideration [FG Participant].

At Mitchell's Plain, even where an IPO is granted, the applicant is not served with a copy, they are simply notified of their return date. This means that the applicant is left without any 'concrete' proof of her/his application. Also, applicants are frequently unclear whether they had been granted an IPO. The applicant is able to obtain a copy of their IPO, but only if they specifically return to court asking for it. One participant suggested that this system is all the more confusing as applicants often attend court on the specified court date, only to find that their hearing does not even take place that day. Sometimes applicants were not even given a court date, but instead were only given a telephone number to phone to find out if the IPO had been granted. This is potentially dangerous because it relies upon the applicant having the means to telephone the court to follow up on her/his application. The fact that the applicant is not served with a copy of the IPO is also problematic as it means that they do not get given a copy of their affidavit. This can harm their prospects at the return hearing, where the respondent has had the advantage of reading the applicant's evidence, but the applicant cannot refresh their own memory.

Another commonly recurring systemic issue is that courts do not grant an interim warrant of arrest with the IPO, which renders the IPO unenforceable, and 'just a piece of paper' [P8]. One CSW said that her court requires the applicant to return to court to request the warrant of arrest, explaining the respondent's conduct and why they now need it [P4]. The same participant said that in 'very, very severe' cases, an interim warrant was granted immediately with the IPO. Another participant described whether to grant an interim warrant

as a decision that was made by the clerk, on a case by case basis, with approval from the magistrate. These systems bears no relation to the DVA, which is clear that an interim warrant should accompany the IPO as a matter of course. Consequently, applicants cannot secure the police's assistance for breach of the IPO without a circuitous trip to the court, followed by the police station:

> It's a pity for people because if he has got the interim and he has breached it, and they call the police and the police tell them tomorrow or this afternoon you go to court and get your warrant and then only we can arrest him because you don't have a warrant [FG Participant].

This system causes a delay in securing protection, which presents a grave danger to applicants.

The interim warrant of arrest cannot be issued until the IPO has been served upon the respondent. The court requires the return of service as proof of service. This presents a barrier to applicants because service of the IPO upon the respondent is often very delayed. Participants explained a variety of possibilities for service of the IPO upon the respondent. Service sometimes occurred by the applicant themselves; or by the sheriff. Service by the police was by far the most common, either where the police collect the IPO from court; or where the applicant takes the order to the police. However CSWs were concerned that this task often fell low on SAPS' priority list. One participant suggested that at Mitchell's Plain, service of the IPO was only effected 21 days before the return date. At the time of my research, the listing times at Mitchell's Plain were over 3 months for a return date, which, if this participant is correct, meant that the IPO was being served over 2 months after the date of application. Other CSWs also cited significant delays in service; or failure to serve at all, where the IPO 'just goes nowhere' [FG Participant]. CSWs have developed strategies where they feel that an order needs to be served immediately. For example, one mentioned she would ask the police officer responsible for domestic violence to 'serve ASAP' [P6]. Another advises applicants in urgent cases to go to the police station and wait there until there is a van available to serve the order.

CSWs highlighted that courts did not have transparent systems in place for prioritizing emergency applications. CSWs expressed concern that 'it is not possible to do urgent applications' suggesting that 'it doesn't matter how urgent the application is… the applicant must just wait, as any other applicant' [P1]. Another CSW struggled to imagine a

circumstance where the clerks would treat an application as a priority saying, 'nothing is urgent, is it must be really life threatening now the person's life must really be in great, great danger and they [the clerks] witness it' [P1]. A different CSW concurred, explaining how in her court, the clerks had refused to treat one woman's application as urgent until she left the court building and was beaten by her partner outside; he then followed her back into court and tried to grab her. Only then was the application prioritised [P2].

Some courts had a form of *ad hoc* system in place for urgent cases. In one court, clerks deployed a high level of discretion in cases they perceived to be urgent, by writing a memo to police, asking them to assist the applicant immediately rather than waiting for the application to be granted. One CSW explained how if the clerk felt a certain case was urgent, they would take it straight through to the magistrate. Another CSW described writing 'urgent' in the top corner of application forms, though she questioned whether the court would treat these cases differently. Another suggested that if she felt an application was urgent she would 'personally approach the clerk, and I try my best to convince them, but they say no the magistrate won't accept urgent applications, procedure needs to be followed' [P1]. Another would take urgent cases to the court manager. One CSW was able to use personal relationships with court staff that she had developed over many year to open doors for clients.

Evidence of physical harm, such as a medical report showing cuts and bruises was sometimes sufficient to secure urgent treatment by the court, but not always. One CSW suggested that in her court, the presence of a firearm, or evidence of psychological harm, such as a letter from a psychologist might also do the trick. However, these suggestions were possibilities rather than a definitive list. CSWs felt that the lack of a clear system for emergency cases was problematic, as where such cases fell through the gaps, applicants were forced to return 'back to the same person who is causing the problem at home' without any protection [P3]. This could have disastrous consequences for applicants as well as for the court:

> [T]here was a client who… came for a protection order. And then the perpetrator was in the house … he talked to her smoothly, but he was only playing, playing the game so well. He strangled her and killed her and then he ended up killing himself. … So you can imagine how we feel when we said the application is urgent and doesn't get attended to. … As soon as we do that protection order, then it's out of our hands. Then it depends on the magistrate and their clerks, and then they can't do nothing after that. [P3]

Whilst this CSW was clear that the legal responsibility for the case fell on the magistrate and the clerks, there is no doubt that the CSWs also felt traumatized by failing to protect this applicant.

Regardless of urgency, participants felt that the waiting time at court to submit an application was a barrier to applicants. The rigid routine of the court space whereby applicants who arrive early are more likely to be helped on the same day prejudices against applicants who are delayed due to – for example – childcare arrangements or a long distance to travel. In most courts, applicants queued on benches in the common court area or corridor; it is often crowded and security does not permit food or drink to enter the building. In one court, there was a waiting room but it was uncomfortably hot. When describing which applicants should be prioritized, CSWs often focussed on those who could not wait due to personal characteristics, rather than those who were in imminent danger. For example, one described how they would use their own powers of discretion to ensure that 'old people, different abled people, pregnant people, always come first' in the queue for her assistance [P4].

None of the CSWs whom I spoke with were aware of a system for making applications for protection orders outside of court opening hours. Over the summer vacation, courts were closed between 17 December 2019 and 9 January 2020. During that time, there was a fatal case where, before the court's closure, the applicant had told the court that the respondent had threatened to kill her father and 'it wasn't regarded as priority' [P9]. During the break, the respondent murdered the applicant's father. This tragic story highlights the lacuna in service provision over the summer break; it is also suggestive of the courts not taking threats to kill sufficiently seriously.

CSWs described the psychological impact of the long wait for the return date upon applicants. The state's failure to serve IPOs, and to issue interim warrants of arrest is especially challenging for applicants because the time gap between date of application and return date can be up to 3.5 months. This wait was described by one CSW as 'long enough for the person to be killed' [P3]. Another described how this delay 'is a major stumbling block in the lives of applicants, because most of the time they lose confidence in the courts, they say that the court is doing an injustice unto them, [P6]. The same CSW explained how the prospect of a long wait for a return date impacted one client, who foresaw herself arriving

at court 'in a body bag' [P6]. This applicant was refused an IPO; instead the court granted her a motion, which left her with no protection prior to the court date in 3 months' time:

> She is a nervous wreck, she was walking up and down, she couldn't sit…she is actually suicidal at the moment, she said all doors are being closed for her [P6].

Whilst this woman's case was complex and may not have been suitable for an IPO, the 3 month wait for the return hearing was highly damaging to her.

Returning applicants with lost or damaged paperwork, who are seeking urgent protection, are often placed at the back of the queue due to the courts' reliance on paper-based systems. For example, an elderly lady attended court with a torn warrant of arrest. She wanted the police to urgently arrest her abuser. Because the warrant was torn, the police would not act upon it. The clerk could not locate her file, therefore she was advised she would have to make a fresh application, and wait three months for the return date before she could obtain a replacement. Lost files within the courts were a common occurrence. In one court, an entire room of files had been damaged by water leakage. Moreover, files are ordered by date and case number, therefore if an applicant does not remember this information they can prove difficult to retrieve. Paired with the vulnerabilities of victims of domestic violence who often lack a safe space to store their documents, courts' paper-based filing systems form a significant barrier to accessing urgent protection. This is a long-standing issue with the protection order system.[267]

Applicants: '*She said all doors are being closed for her'*

CSWs agreed that applying for a protection order placed a significant financial burden upon applicants. Travel costs to court – a taxi fare of between R 22 and R60 per day, were a major barrier to applicants, as were missed days of work [P2], particularly when they were required to return to court on multiple days. In Mitchell's Plain, the fact that applicants are not granted their IPO on the date of application left them in a predicament in respect of how to follow up the outcome of their application [P6]. For socio-economic reasons, requiring applicants to make telephone contact with the court is not a viable system; this will inevitably lead to cases

[267]Moult op cit (n9) 164

as falling through the gaps where an applicant does not have a working phone or airtime. These seemingly straightforward administrative issues are currently causing a significant barrier to applicants.

Another struggle for applicants is that their expectations of the protection available to them from the courts are often at odds with reality. Applicants come to CSWs with a desire to be made safe, but struggle in concrete terms to consider what a protection order could do to help them, particularly where excluding the perpetrator from the residence is not a viable option:

> They come with the…idea …that, 'I want to be protected'… now you ask them, what do you ask the court to do? … And some people would say, now why must I ask? I just want to be protected. People think once they [have] that piece of paper they gonna be protected, but it don't necessarily work like that [P9].

Moreover, the prolific impact of organised crime, gangsterism, and violence generally within communities can often leave applicants feeling as though a piece of paper which promises that the police will assist them is not enough. During observation one client told a CSW that her abuser had told her that many of his acquaintances had guns and that he would not have to lift a hand to kill her. Another applicant told a CSW that the perpetrator's family had threatened to hire gangsters to break into the shack where she lived with her children and evict them. In the face of organised crime, in which police are often implicated, and high levels of interpersonal violence generally, some applicants question whether a protection order will offer the urgent protection that they require.

Many applicants withdraw their case before the final protection order is granted, leaving them without any court protection. CSWs gave various reasons for withdrawal by applicants. These ranged from 'they are scared,' [P1]; to, when the interim order is served 'all hell breaks loose and applicants realised they were 'more unsafe' than before [P6]; to financial dependence on the respondent. Some believed applicants were manipulated by the respondent 'talking smooth'[P3] or 'buying their love' [P3] or believing they had changed. Inter-family pressure was also cited as a common reason. One CSW described a case where a woman had been poisoned by her partner and yet withdrew from the protection order case after a family meeting [P4]. Another CSW suggested that the notion of a protection order was considered disrespectful in Muslim and Xhosa cultures, and was perceived as an attempt to

end a relationship, whereas often it was an attempt by a woman to ask her partner to stop specific abusive behaviours [P9].

Whilst CSWs did not specifically mention challenges within the court process as a reason for withdrawal, the complex reasons for which applicants withdraw are intrinsically linked to the challenges which applicants face within the process. The reasons for withdrawal suggest the limited scope of a protection order, in its current context: it is too easy for the respondent to play the system against the applicant; the applicant cannot be confident of the state's protection in that dangerous moment after the order is served; and family mechanisms are seen as a more effective way of resolving a dispute than a drawn-out court process.

Reflecting back on the research

Victims of domestic violence were not participants in this research and thus they are voiceless. The cumulative ethical implications of working with victims outweighed the likely benefits to them in a short project such as this one. We would have had to justify the risk of participants being re-traumatized by being asked to re-tell their experiences; and the potential risk to their safety posed by contacting them by telephone or by being identified in the write-up. Consequently, the plight of victims is told through the lens of CSWs. This decision raises the question: are CSWs reliable and credible narrators of the barriers which victims face?

CSWs are – by employment, and for many, by vocation - victims' advocates. We could conclude that they are partisan towards victims; and that sometimes this advocacy places them in opposition to the other stakeholders in the protection order process. However of course CSWs are not simply a mouthpiece for victims. As Henry David Thoreau wrote:

> [I]t is, after all, always the first person that is speaking. I should not talk so much about myself if there were anybody else whom I knew so well.[268]

What CSWs are best able to tell us of is their own experiences. To draw conclusions about other members of the courtroom workgroup, it would have been best to interview them directly. Such triangulation was not possible due to the limited scope of this LLM research project. Mosaic's SAFE project research will interview these stakeholders in time, and will .

[268] Henry David Thoreau *Walden, or, Life in the woods* London, JM Dent (1908) 1

review qualitative findings against a quantitative data analysis of protection order applications in the courts in which this research was based. The conclusions of that research will therefore be firmer, and broader than the results of this project. Nonetheless, this research is still useful in indicating the barriers which applicants face in securing the urgent protection of the courts. CSWs have seen thousands of applicants pass through the courts: they see some succeed, some fail and others get lost within, and drop out of the process. CSWs have a unique positionality within the courts, and are able to see the flaws in the service provided to applicants; consequently, they were helpful and insightful research participants.

Chapter 5 Discussion

Safety, culture and the othering of the feminine within the court space

Even as a legal practitioner, arriving on the first day at each new magistrates court was bewildering and intimidating. The buildings were difficult to navigate and the external security guards did not always know the whereabouts of the domestic violence court. I shared the experience of applicants, who often 'walk around' [P5]the building, disorientated, until someone assists them. On this journey, I passed cells full of prisoners, and armed police officers taking defendants into court. At Wynberg court, I was told that security was increased after three people were stabbed in the building last year.

Court staff sometimes behaved in small ways which made me feel uncomfortable, such a security guard saying 'I love you my sweetie'; and a clerk referring jokingly to a younger female colleague as 'my girlfriend.' I interpreted these comments as examples of every day sexism.[269] At one court, I was accompanied by a CSW to the bathroom, who explained that a woman had been sexually assaulted in there. At another court, a member of the public, who appeared to be inebriated followed me and the CSW into a staff area, and tried to initiate a flirtatious conversation. Later, he attempted to enter the CSW's room and at which point security were called to remove him. Through these experiences, I gained a personal insight into how a court space can be experienced as gender hostile. This atmosphere interferes with the courts' aim of providing protection for victims of gender-based violence.

The CSWs in this study, who were all female, also appeared to experience the effect of gender in the way that their contribution is valued in the court space. Psychosocial support services is not only a female-dominated field, but also exhibits stereotypically feminine qualities such as listening skills,[270] caring for others and emotional expression.[271] CSWs allow applicants to tell the full story (even the parts which do not have legal significance). They hand out tissues and commiserate on applicants' personal tragedies. They therefore

[269] Bates op cit (n225)
[270] Michael W. Purdy 'Listening and gender: stereotypes and explanations' (2000) *Presented to the International Listening Association* 1
[271] Marie Buscatto and Bernard Fusulier ' Presentation. "Masculinities" challenged in light of "feminine" occupations' (2013) 44-2 *Recherches sociologiques et anthropologiques* para 3

occupy a liminal feminine space within the courts. CSWs view themselves as grass roots feminist advocates, and a conduit by which applicants can access justice within a patriarchal court system and challenge patriarchal family structures. As such as they are both respected by those they help, and disliked and even stigmatised by whom they challenge. Whilst CSWs' strength is their independence, where their values conflict with the predominant values of the court, CSWs are 'othered.' This othering arises due to an 'a-symmetry in power relationships'[272] between the CSWs, who are permitted at the courts by courtesy of the DOJCD, and other court officials. As a result, the CSWs are not on equal footing with others in the court and are not able to assert their rights to the space in the same way. Their positionality is characterised by a sense of longstanding precariousness. These dynamics contribute to the barriers which applicants face when seeking urgent protection because although CSWs support applicants, they have limited capacity to influence an applicant's case or to suggest improvements to the system generally.

Barriers facing victims of domestic violence seeking protection orders

This dissertation addresses the barriers posed to victims of domestic violence seeking the protection of the courts under the DVA. It focusses on the challenges arising from the way in which the courtroom workgroup are implementing the protection order process, specifically the systems in place for obtaining IPOs and interim warrants of arrest. These remedies are intended to give immediate protection to the applicant; however the way in which the courts and police have implemented their respective obligations leads to inconsistency, arbitrariness, unfairness, delay and ultimately a failure to provide urgent protection to vulnerable applicants.

These deficits arise due to ambiguities within the DVA and its accompanying policy guidance, paired with implementation that does not centre the rights of the applicant. Long waiting times to receive IPOs and delays to serve these upon the respondent are the norm. Because of the urgent nature of domestic violence cases, delay in these processes is tantamount to system failure. There is an accountability gap where neither the court or the

[272] Jean-François Staszak 'Other/Otherness' in Kitchin and Thrift (eds), *International Encyclopedia of Human Geography: A 12-Volume Set* 1 ed Oxford, Elsevier Science(2009) 2

police are held responsible when the system fails. Contrary to the provisions of the DVA, applicants are routinely given no interim warrant of arrest which means that the police decline to arrest perpetrators upon breaching the IPO, even where the victim faces imminent harm. There is no functional system for making applications out of hours, which is a significant barrier as victims of domestic violence are particularly at risk over weekends.[273] These failings interfere with applicants' rights to dignity, equality, and access to justice. In addition, where victims of domestic violence or their loved ones are killed whilst waiting for the court's protection, these delays can also result in a failing of the state's positive obligation to protect life.

Court systems by their nature, repeat themselves, fuelled by their own momentum, and are resistant to change.[274] The *ad hoc* systems which have developed under the DVA do not serve applicants well, and often fail in their intended aim to provide urgent protection. CSWs, and their NGOs sit as 'others' on the edge of the legal system with limited ability to influence it, therefore in spite of providing an essential service, their concerns often go unheard. Thus the courts can be understood to exist in a state of autopoiesis[275] in which they unthinkingly recycle the same unsuccessful responses to applicants.

These responses are imbued with the patriarchal history of the courts, which continue to interpret the law and its processes from a symbolically male standpoint.[276] For example, the courts interpret their duty of equality to applicants under the DVA by implementing a 'first come first served' approach. This is a bright lines approach (meaning a clear distinction between right and wrong) that does not make adjustments for vulnerability such as differentiable processes to accord with the needs of different types of applicant e.g. mothers with young children, the elderly, and or those with mental health issues, and therefore fail to deliver justice equitably. The DVA courts deal with applicants whose life is at risk every day; yet in over 20 years no sustained strategy has been developed to support applicants in this situation. The courtroom workgroup lack the training to understand the nuances of domestic violence. Meanwhile, they nonetheless exercise their discretion – for example by a clerk seeing an applicant with a stab wound to the eye and reacting by taking her file straight to the

[273] Tshidi Seabi op cit (n22) 71; Khayelitsha Commission of Inquiry op cit (n136)169
[274] Philippopoulos-Mihalopoulos op cit (n120) 80; Calhoun op cit (n127) 456
[275] Ibid. Philippopoulos-Mihalopoulos 80
[276] Acker op cit (n79) 67-68

magistrate, yet failing to do the same for another applicant who is experiencing severe psychological trauma [witnessed during observation]. This use of discretion paired with a lack of training propagates rash judgments and dangerous perceptions of domestic violence, which depart from the evidence base on risk factors for fatal incidences of abuse.[277] The courtroom workgroup are frustrated by recidivist cases, and the high rate of withdrawal by applicants; this can deter clerks, magistrates and police officers from giving applicants the time that they deserve. These failures in implementation are not due to carelessness by court managers or their staff; but rather due to a sustained lack of training, short staffing, and a lack of resources due to lack of political priority.

The DVA has the potential to provide access to justice for victims of domestic violence. However, the way it has been implemented has failed to cater to the needs of applicants. Consequently, court systems surrounding the process for obtaining protection orders pose significant practical and psychological barriers to applicants, often leaving them without effective protection. These failings are a breach of the courts' constitutional obligations towards applicants to protect life, and to uphold their rights to dignity and equality.

In order to remove these barriers, legal reform must address the needs of victims of domestic violence, not simply in legislation but also in the details of policy, and in the practicalities of implementation. This can be achieved through creating, and enforcing systems that are fit for purpose, taking into account the demographic and socio-economic profile of applicants. Changes to law and policy must focus on what victims need in order access the system, maintain their personal safety, and for their human rights to dignity and equality to be upheld. Systems and policies of the domestic violence courts should acknowledge the vulnerability of applicants. For example, court forms should be written in a way which is comprehensible to a person with limited literacy. Where waiting times pose a barrier to applicants – such as parents with young children and the elderly, court policies must address this, perhaps through providing an appointment system, or through formalizing a procedure for prioritizing applicants who, due to their personal characteristics, cannot wait. Protection orders are only valuable to victims of domestic violence if they are aware of how

[277] Echeburúa et al op cit (n18) 925

to use them. Therefore, the courtroom workgroup needs to improve its communication with applicants, throughout the protection order process, so that on each visit to the court, the applicant leaves knowing whether they are protected, and what the next steps will be in their case. The recommendations section sets out some suggestions for how these changes could be achieved.

However, improving the service provided to applicants will require additional time, training and resources. Reform must take into consideration the practicalities of implementation by the courtroom workgroup, who are already operating at stretched levels of staffing in a resource scarce environment. Imposing additional obligations upon the courtroom workgroup, without allocating extra funds for their protection order work, is unlikely to be successful. Therefore, where additional burden is placed upon the courtroom workgroup, this must be backed up by a specifically allocated budget.

Chapter 6 Recommendations

What would improve the protection order process for applicants?

Participants had many suggestions of how the protection order process could be improved for applicants. Generally, they felt that a more consistent service across different courts would improve legal certainty and make the system fairer. Several participants suggested that interim protection orders should be served on the day of application. Others mentioned that an interim warrant of arrest should always be granted. Reducing the wait for the return date was also widely mentioned. Participants also felt that because court support services are essential for applicants, they should be available five days a week. They also felt that a functional system for making an application at times when the court is closed would be useful for emergency cases. Many participants felt that training for SAPS on their role in respect of the DVA would be beneficial. Others felt that improving accountability for all stakeholders within the DVA was important; for example by promoting dialogue between their organisations' managers and managers within the justice system.

How to make the change

How do we remove the barriers which victims of domestic violence experience when seeking the urgent protection of the courts? A multi-faceted approach is required to improve the process for applicants, comprising law/policy reform; better implementation; improved accountability, and more training for the courtroom workgroup.

Law reform

Reform of the DVA is already underway. In January 2020, mid-way through this research, the government published a bill amending the DVA. This contains many positive developments, such as allowing for directives to clerks which will provide detailed guidance on their role. Promisingly, the Bill also provides for an electronic system for out of hours applications.

Whilst the Bill represents positive change for applicants, it misses the opportunity to address deficits in implementation by which the original DVA has been afflicted. Based on

this research, here are some further suggestions. Courts should develop transparent systems and processes for prioritizing 'emergency' cases. Applicants should receive their IPO on the date of application, thereby removing the need for them to return to court on subsequent days. Guidance to the courts and the police should clarify an expectation that IPOs are to be served within 24 hours, and provide for a robust infrastructure for dealing with out of hours cases.

The Bill makes it clear that an interim warrant of arrest must be granted with an IPO. This is positive but will only help applicants in urgent situations if the IPO is served promptly upon the respondent to enable the warrant to be issued without delay. The Bill proposes to use electronic technology to effect service of the IPO upon applicants. Again, this is positive, so long it is implemented effectively, and provision is made for applicants without access to technology.

Whether by use of electronic technology, or telephone, applicants should be kept updated in respect of developments in their case – for example, if their IPO has been served upon the respondent, or if the court date has moved. To prevent the danger and psychological harm caused to applicants by delay and to reduce the number of unfinalized cases, courts should aim to provide a return date no more than 3 weeks from the date of application. Sufficient resources must be allocated to enable courts to complete cases more expediently. Because they are essential to enabling applicants to access justice, CSWs should be funded by the DOJ to be present in the courts five days per week.

Training

Some discretion by court clerks, magistrates and police officers when dealing with domestic violence cases is unavoidable; in fact, to ensure that the facts of each specific case are taken into account, it is desirable. However, magistrates, clerks and SAPS must be trained to use their discretion appropriately. This training should focus on the gendered nature of domestic violence, and the challenges of adjudicating upon this topic in traditionally masculine spheres such as the courts and the police service. Stakeholders should be encouraged to reflect on how their own attitudes and preconceptions play into their decision making. It should ensure that the courtroom workgroup understand emotional, verbal and psychological abuse, and new categories of abuse proposed by the bill, including elder abuse and coercive and controlling behaviour.

Magistrates should also be given guidance in respect of when emergency monitory relief should be granted; how to deal with applications by minors; and the circumstances in which an IPO should be granted. Clerks and SAPS should be trained in respect of their role in implementing the DVA. This should also include communication skills for interacting with vulnerable individuals. Training for all members of the courtroom workgroup should occur regularly.

Accountability

In order for the upcoming changes to the DVA to be successful, failures in implementation by the courtroom workgroup must have consequences attached. Mechanisms for holding state bodies to account for their role in implementing the DVA must be strengthened. For example, a group of NGOs has lobbied in favour of the implementation of intimate femicide case reviews, which would allow government to gather lessons learned in cases where the protection order process has failed to protect.[278] Additionally, magistrates, clerks and police officers should face disciplinary repercussions if they fail to implement the letter of the law. Courts should be monitored in a victim-centric way, in order to ensure that they are providing a fair, just and efficient service to applicants.

Potential future research topics

It is hoped that this research has made a small but useful contribution to the literature in respect of the barriers facing victims of domestic violence in South Africa. Like most research to date, it has focused on urban areas. It would be interesting to undertake research on this topic based in rural areas, where the challenges facing applicants are different, and where CSW NGOs are not present in the courts. Another potentially interesting angle for future research would be to work closely with magistrates. CSWs rarely have access to the courtroom, and therefore this research was unable to interrogate the process which magistrates follow in making their decisions. Conducting observation with magistrates, including attending their training sessions, would offer a new and valuable insight into their decision-making.

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Appendix One: questionnaire to court support workers

1. Talk me through your daily work routine
2. Describe any particular frustrations or difficulties that you experience in your job.
3. What are the challenges for applicants in obtaining protection orders?
4. Can you tell me about the time that it takes from an application being submitted to an Interim Protection Orders being granted?
5. How does the court clerk decide if a case is urgent?
6. What happens when a case is considered to be urgent?
7. What would make the process better for applicants?
8. What can an applicant do if they need to apply for a protection order outside of court opening hours?
9. How does an applicant get a warrant of arrest with their interim protection order?
10. Why do you think that applicants withdraw their cases?
11. Can you think of any particular examples of where the court handled an application for a protection order:
    a. Well? What was good?
    b. Badly? What was bad?
12. Anything else to add?