

Section 5

Formal justice responses to family violence

*Do Apprehended Violence Orders stop family violence?
What does and doesn't work?
Could Apprehended Violence Orders work better?*

Despite policy and legal reforms that have aimed to improve legal protection and prosecute physical and sexual violence against women, much goes unreported to the justice system. The most recent relevant quantitative data comes from the Australian Women's Safety Survey, which found that:

Overwhelmingly, the main action taken after experiencing an assault by a man was talking to other people, particularly family and friends. ...
4.5% of women who were physically assaulted contacted a crisis service organisation, as did 8.1% of women who were sexually assaulted....
19% of women who were physically assaulted and 15% of women who were sexually assaulted ... reported the incident to the police. (Australian Bureau of Statistics 1996:8)

Researchers and policy makers are increasingly aware of the need for improved understanding of the desires and actions of women who use the justice system in efforts to stop domestic and family violence.

...women may use the criminal justice system as a resource in complex 'management strategies' vis a vis the violence and other aspects of their lives. Feminist criminologists....now argue for a re-thinking of the criminal justice system as a 'resource not a solution' in women's struggles to end violence in their lives.
(Holder 2001:3)

This Section discusses the legal protections available through the criminal and civil jurisdictions of the New South Wales justice system, and participants' perceptions of systemic barriers and disincentives for rural Aboriginal women seeking safety from family violence. It details limitations in the civil ADVO processes administered by police and courts, and concludes with ideas for strengthening and extending justice responses.

5.1 Criminal and civil responses – barriers and disincentives

The New South Wales justice system can provide legal protection from interpersonal, domestic and family violence through criminal and/or civil proceedings. Where an incident of family violence involves a criminal offence, such as assault or physical assault, it can occur that both a criminal charge is laid against the perpetrator and a civil ADVO application is made to seek victim protection from further violence against the perpetrator. Where actual or threatened violence has occurred that might not constitute a criminal offence, a person can seek legal protection through the civil jurisdiction to apply for an ADVO.

Criminal prosecution

The criminal justice response can be invoked when police become aware of violent incidents. Police exercise their discretion when deciding whether the violence constitutes a criminal offence and whether to charge, arrest and prosecute the alleged perpetrator. Their decision to initiate criminal proceedings is based on information provided by witnesses to the incident and evidence gathered by police attending the scene. Having decided that there is sufficient evidence to support a criminal prosecution to initiate criminal proceedings, police must decide whether to issue the alleged perpetrator with a summons to attend court or to proceed by arrest. When proceeding by way of arrest they must decide whether to grant or refuse bail. A perpetrator who is granted bail may be subject to conditions that restrict their activities and/or impose on them a requirement to report to police on a regular basis. Bail refusal results in the perpetrator being detained in prison until court proceedings are finalised.

Civil protection

Civil proceedings are initiated when an individual or a police officer applies to the court for a personal or domestic AVO, as described here previously. When police are called to a domestic violence incident and they have no reason to believe that the victim will initiate an ADVO, they must initiate an application when:

... they suspect or believe that one of the following offences has been committed, is imminent or is likely to be committed:

- a domestic violence offence
- an offence of stalking or intimidation
- an offence of child abuse ...

(McAllister
1999:1112)

Individuals can initiate an application themselves through the Police or the Chamber Magistrate of the Local Court. Police and individuals can also seek interim orders by making a telephone application.

An ADVO is intended to provide legal protection from violence, intimidation and harassment, by bringing the perpetrator to the notice of the Local Court Magistrate, who can then make an order restricting their contact with and/or conduct toward the victim. An ADVO is not dealt with under the criminal jurisdiction. However, a breach of the conditions of an ADVO constitutes a criminal offence. As an offence against justice a reported breach can be subject to criminal proceeding and sanctions, and the defendant faces the potential outcome of a sentence of imprisonment.

Systemic barriers and disincentives

Participants identified some systemic barriers and disincentives within the operation of the criminal and civil jurisdictions that they perceived to impair access to and the effectiveness of legal responses in providing protection from family violence.

i) Criminal prosecution – police failures and victims fears

In the criminal jurisdiction, a significant operational problem was identified in the apparent misconception held by police and by members of the community who might

potentially use justice processes, that civil AVOs can be a substitute for investigation and prosecution of criminal violence. Police can fail to respond to family violence as they would other crime scenes. They might not identify or interview witnesses, or gather the evidence needed to support a criminal charge. Participants discussed the need to improve the police response to family violence that constitutes criminal violence. More than one example was given in which police reportedly attended an incident of family violence, witnessed injury to a victim that resulted in medical treatment and did not lay a criminal charge and/or initiate ADVO proceedings. The following quotation focuses on criminal assault that constitutes a breach of an ADVO:

Another thing is she might have a black eye and she'll think, "Oh, gee, he blackened my eye. Next time is he going to stab me, or is he going to break my arm or what? So I won't charge that person because he's done this once, he's going to do it again and the police are not going to do anything. He's already assaulted me and I've got the DVO order on him, so why haven't they taken him?" Nothing done. (Wagga Wagga participant I 458-474)

The failure of police to initiate criminal prosecution and breach of an ADVO in circumstances where witnesses and victims perceive clear evidence of criminal or sexual assault undermines confidence in the protective ability of the justice system.

Another barrier to effective legal protection can be the reluctance of victims of domestic and family violence to contribute to legal proceedings, either criminal or civil. Contributing factors include their ambivalence about continuing their relationship with a violent partner, or their fear of reprisals from perpetrators or their supporters. Police investigating criminal violence affecting a reluctant victim/witness must rely on evidence found at the crime scene, statements by witnesses other than the victim and forensic evidence that is sometimes available from health professionals who have provided treatment.

In some Australian and overseas jurisdictions, systemic changes have been introduced to overcome the impact of police failings or victims' fears that can impede the effectiveness of the criminal justice response. In some jurisdictions elsewhere, attending police are required to approach incidents of domestic violence as potential crime scenes and gather evidence to support criminal prosecution. Another approach involves shifting responsibility for decision making from the victim to police. Examples include compelling witnesses to give evidence, and 'no drop' provisions that prevent criminal charges being withdrawn before being concluded (Holder 2001). On this issue, participants' opinions were divided:

I think too, within my experience of talking to other Aboriginal women and taking an order, if police are called to a domestic incident a lot of responsibility is given over to the woman about, "Oh, do you want him charged? We'll charge him if you want him charged." What's she going to say?
She's going to say, "No, he'll belt me. He'll belt me."
You know, if it's breached, it's breached.
Then saying, "We'll take care of it," try and calm her down and saying, "This is our responsibility." (Wagga Wagga participant I433-444)

Those who promoted this approach thought that it should also apply to the police role in breaching ADVOS. Arguments against the approach were based in concern that women would experience reprisal if the perpetrator were granted bail and could approach them:

Well, if you're a victim of domestic violence, how can you make that decision?
It doesn't make her any safer, though. In fact, it puts her more at risk.
Because she's called the police, he's going to make damn sure that she doesn't turn up at court.
Yes, - or turn up anywhere.
I often wonder where the women are that don't turn up to court.
Are they locked up? (Dubbo participant P.2376-2393)

ii) Civil protection – differing definitions and commitments

Civil proceedings provide women experiencing violence of both a criminal and non-criminal nature to seek police assistance in crisis, and ongoing protection through a legally enforceable court order.

A problem arises in the failure of the justice system to respond to the wide range of harmful behaviours included in definitions of family violence publicly promulgated in anti-violence efforts. These definitions are used in public education campaigns that expose the harm and wrongfulness of domestic and family violence, and by practitioners in formal support services who validate victims' perceptions of a wide range of harmful behaviours that should not be tolerated and justify a protective response. Public educators and practitioners adopt definitions of family violence similar to that described here in Section 3.1, which includes physical, sexual, verbal, psychological, financial and social. However, women seeking legal protection from these forms of harmful behaviour often perceive that police and other justice personnel do not adopt these definitions in civil proceedings.

And these other forms of domestic violence need to be acknowledged in law, too.
(Dubbo participant P1742)

There's far better ways of controlling a woman and children than belting them.
Yes, and (this mental violence), you can't get anybody to acknowledge that. The police have no idea what you're talking about. (Dubbo participant P1849-1858)

... it's all the psychological stuff that goes on in a family. Sometimes that's even worse. At least with a hit you get a bruise. (Wagga Wagga participant P483-494)

Thus there is a perception that unless the violence is objectively verifiable, by observable physical injury or medical evidence, that legal protection will not easily be obtained. Women who attempt to justify their fear of violence through evidence of other forms of threatening or intimidatory conduct may feel further victimised by the legal process. This can generate reluctance to seek legal protection amongst women who justifiably fear that a situation of repeated non-criminal harm could potentially escalate into criminal violence.

The lack of commitment by many women ADVO applicants to follow the legal process through is often criticised by police and other justice personnel. In Bourke, where the percentage of ADVOS withdrawn/dismissed was the highest of the three towns in this study, practitioners have cynically coined the term the 'Bourke defence'.

Taking account of the lack of knowledge about women's use of the justice system in seeking protection, it is important to consider the possibility of positive or negative reasons behind victims' decisions not to pursue a legal course. Positive choices might involve their selective use of justice processes to achieve a desired level of protection.

For example, a woman subject to abuse by a partner that did not result in physical injury might use police assistance in a crisis that involved extreme verbal abuse and threats. After the crisis she could believe her future safety to have improved as a result of the deterrent impact on the perpetrator of police intervention, and her increased access to informal and formal social supports. On the negative side, victims could be influenced by fear, or barriers and disincentives in the legal processes.

iii) Criminalisation as a disincentive

The risk of criminal proceedings that might result in imprisonment of a perpetrator has previously been identified here as a disincentive for a victim of family violence to initiate legal action. Thus, practitioners often emphasise the civil nature of AVO proceedings when encouraging victims of violence to make an application. They might argue that AVOs do not present the risk of perpetrators being sentenced to imprisonment.

...usually, when you talk to an Aboriginal woman who's been pretty well assaulted by their man, they won't lay charges because they say, "We just want him to stop. We don't want him to go to gaol. We just want him to stop." And you can explain the process to them, "Okay, an AVO doesn't mean a criminal offence unless he breaches that AVO," and you do explain it to them but still - the thought of gaol - - (Dubbo participant P395-405)

In fact the risk of criminal process and sanctions can arise after an order is made and can be legally enforced. When a person who is bound by an order breaches one or more of its conditions, the matter falls within the criminal jurisdiction. Thus, a perpetrator of family violence can now be charged with an offence against justice, and can be dealt with under criminal law, and subject to decisions regarding arrest, bail and sentence. This applies to orders initiated as a result of incidents of violence of both a non-criminal and criminal nature. It could be argued that in some cases this can result in the criminalisation of non-criminal family violence.

For many Aboriginal women the connection of legal protection from family violence with the criminal justice process is a disincentive in their deciding whether to initiate any form of help, to report it to the police, to pursue an ADVO application through court or to report a breach of the order to police. They are simply reluctant to contribute to a justice response that can directly or indirectly result in criminal sanctions.

Discussions about how to reduce this disincentive focused on the role of police in criminal and civil proceedings, the potential to introduce additional decision making forums and increase the range of orders. These are discussed more fully below and in Section Six.

5.2 ADVOs - the police response

..the predominant policy claim in Australia...is that 'domestic violence is a crime'. Whilst all behaviours common in domestic violence relationships may not constitute criminal offences, nonetheless law enforcement agencies in these countries have instituted policies that promote arrest and change as a primary intervention where there is a 'belief on reasonable grounds' that an offence may have been committed.
(Holder 2001:11)

Much work has been done in New South Wales toward monitoring and attempting to improve the police response to domestic and family violence. Police Service measures include the designation of specialist positions and the recruitment of these personnel at the Local Area Command (LAC) level. Domestic violence specialists aim to monitor and improve the effectiveness of the police response to domestic and family violence in the general population. Aboriginal liaison specialists aim to improve communication and co-operation with Aboriginal communities.

In these discussions about the police crisis response to incidents of family violence, Aboriginal women identified individual police officers in whom they had confidence. In keeping with the findings of other research into the policing of AVOs in Aboriginal communities (Kelly 1999:4-7), participants in this study disclosed that contact between Aboriginal women seeking protection and police is often marked by misunderstanding, misinformation, discrimination and racism.

... It depends on who you get on duty. I mean some of the coppers - they're really good. They'll do everything they can to help you. Others tell you to come back the next morning - Or they're very arrogant.
Every time I go there - they talk smart. I just walk out ... (Bourke participant I731-747)

(Police have) got to drop this attitude about Kooris, that we like being battered. I think it all comes back to training; whether the younger officers are now going through anything like that. (Wagga Wagga participant I746-749)

Reasons given for dissatisfaction with the police response included perceived failures to respond to crisis in a timely or appropriate manner, provide information about legal rights and resources, and investigate or comply with laws or Police Service Instructions, policies or procedures.

The police should be educated more, because (when an Aboriginal person reports) the police don't really act on it, so that makes it hard for a lot of Aboriginal people, ... to report it because they know that the police are not going to ...do anything about it (Wagga Wagga participant I331-336).

When there's an associated assault. Police (are obliged to) take out an apprehended violence order if they're of the opinion that an offence has occurred or is likely to occur. ...but they don't do it.
...Or they've ... misled women into believing that it's a criminal charge, so they're feeling responsible that their man is being charged. (Wagga Wagga participant I445-457)

As previously noted, there is a perception that police will not use their legal powers to intervene in incidents of family violence unless there is evidence of a physical assault and resulting injury that can provides evidence for criminal prosecution.

Yes, you're actually better off if you've got an injury, a physical injury, because none of this other stuff is ever acknowledged. (Dubbo participant P1628-1629)

So, while women are encouraged to seek legal protection from a wide range of types of family violence, these are not recognised in justice responses.

Another concern was that some women, who have applied for an ADVO, and whose only source of assistance has been a police officer, are not provided with the information they need to participate fully in the justice process.

5.3 ADVO applicants - pre-court information and support

Participants believe the absence of adequate information and support for applicants contributes to the apparently high rates of withdrawals of ADVO applications. There was discussion about ways to provide legal information to women about the legal process in efforts to address gaps of information and reduce fear of the legal process:

It's better to heal from the inside out, yeah. You start with the ones that are currently in that situation. I'm sure we could probably name three people that we know each that are involved in that sort of situation. Take them down to the courts, take them through it. Get (CAS workers) down there and just go through and answer their questions, because it's the women out there that are suffering at the hands of this violence, that are intimidated by the institution. Take them down there and go through it and just sort of kill all the myths and answer the questions. (Wagga Wagga participant P1239-1249)

Applicants' experiences in the days or weeks that pass between initiating an application and attending court have a strong influence on the eventual outcome. Women who utilise specialist accommodation or support services during this time have access to additional sources of information and support. Other women return to their previous situation with no access to information or support other than the police officer who attended the crisis.

(Also) when the smoke settles and the police have gone ... and the rellos have gone home, and that woman's sitting in that house at night alone. (Imagine) with the kids there, and you've just been through this emotional experience with your partner, and you're in that house on your own, that's when you listen to the voices in your head and you start to weigh up the options: "Do I want to sit here on my own with these kids or - yes, he abuses me but, you know, he's company and he helps da-da-da-da-da."
And he's a good father. And he always looks after them.
So, you know, you need to have that ongoing support with them. (Wagga Wagga participant P1555-1576)

When applicants' information needs are not met there is a greater risk of their withdrawing the application, or of it being dismissed at court because they did not understand the process or their role in it. Participants provided examples of applicants not knowing of the requirement to attend court to obtain a final order, and of applications being dismissed in the applicant's absence. Women seeking greater protection from harmful conduct while continuing to live in the same household as an abusive partner might withdraw their application without knowing that an order can allow cohabitation and impose conditions on the perpetrator's conduct. Another source of misinformation is the distinction between a protection order and a criminal charge. Aboriginal women might fear that they are initiating criminal charges that could result in the perpetrator's arrest, prosecution and imprisonment.

Unmet support needs of women during this time can undermine their confidence in their decision to initiate legal action. While the mere availability of a legal response to family violence can validate a woman's concern about being wrongly treated, it might not be sufficient to sustain her motivation through the complex and stressful process of court proceedings. The stress caused by the violent incident is compounded by the stress of the application process. Women who have left the family home experience loss and disruption to all aspects of their lives. Women who return to the family home can confront increased hostility and intimidation. Many

women lack validation, encouragement or support from family or friends, and some are actively dissuaded from proceeding to court.

Women practitioners in health and welfare agencies at Bourke have recognised the time before court as critical to women's success in gaining legal protection. They have responded by establishing a roster of volunteers who attempt to meet the information and support needs of women in the period preceding court. The idea was also the subject of discussion at other locations:

... they have volunteers here that go down and sit with the young kids when they're at the police station - buddy system. Is it possible to set up a buddy system for women on a volunteer basis where, if the police are called out to a home, they can call on volunteer or buddy women?

There'd be men in the same situation.

Or men?

Yeah, but what if it's from your own people though?

That's even better. (Wagga Wagga participant P1493-1505)

5.4 ADVO applicants – court support, information and legal services

When applicants do not attend court the Magistrate has little alternative but to dismiss the application. Reasons for an applicant's failure to attend include not knowing that they are required to be there, fear of repercussions from the defendant or fear of the court process and/or outcome.

Adjournments can increase the risk of the applicant not being present when the order is eventually considered. The Magistrate can order an adjournment when the defendant has not been served the summons by police, is not present at court, has requested more time to obtain legal advice or does not consent to an AVO. An interim order is usually granted during the adjournment. Adjournments can result in an applicant becoming confused by the delay, or exhausted by repeated requirements to attend court. Applicants can thus lose confidence in the integrity of the justice response and experience the legal system as unresponsive or as additionally victimising.

The likelihood of an ADVO application resulting in a final order is greater when an applicant's support and information needs are met before and during the court process. The idea of a continuum of support was proposed:

That would be the person that would go in homes and do that support before we go to the courthouse, and be with the person when they go to the courthouse.

The women who have been victims themselves seem to understand the system and cope with the system that much better because they know their way around the system

Often the support person who brings in an Aboriginal woman has been through our service before or has supported someone before. (Wagga Wagga participant P1508-1544)

(Victims can wait at court) for the whole day (for their matter to be heard) and they will just sit. (A support person has) been very useful. (Wagga Wagga participant P1545-1554)

Support needs include emotional support and a physically safe environment. They need information about the process, their matter and legal advice.

Concern for physical safety is affected by the visibility of rural courthouses within the towns, and the lack of privacy afforded by many court buildings. This public exposure can enable defendants and their supporters to intimidate, harass or threaten the applicant while they are waiting for the matter to be heard. Some courthouses have established witness protection rooms that provide a private place in which applicants can wait. Practitioners at court houses in the smaller towns surrounding Bourke, Dubbo and Wagga Wagga reported that many court buildings lack satisfactory witness protection rooms, and applicants wait in the court foyer or on the footpath. In some Local Courts, administrative measures have been introduced in efforts to enhance physical safety. These include workflow strategies that aim to shorten the time victims spend waiting for their matter to be heard on the day of court.

Specialist CAS and Local Courts' personnel who provide information about the justice process and possible outcomes can reduce an applicant's level of fear and apprehension, and enable their increased participation in the process and decisions. They can identify other potentially helpful resources and services and assist applicants to access them. Funding for specialist positions in CAS and Local Courts has been slow to reach these rural towns. CAS funding provides for services to women on the day they attend court at the three towns included in this study, and some funding is provided for services to women attending court at outlying nearby towns. Limitations in current funding levels result in the service only being provided to women on the day of court, and not being accessible to ADVO applicants at many rural and remote courts.

Access to legal advice is not available to all applicants. While the Police Prosecutor represents those whose application was initiated by police, others have no legal advocate. Many applicants experience court process as being stacked against them, as they are unrepresented and the alleged perpetrator is often well represented. Aboriginal women can find themselves arguing their application against a lawyer employed by the Aboriginal Legal Service, who mounts a strong defence in order to avoid the defendant's risk of criminal sanctions. While applicants who meet the Legal Aid Commission's income test are eligible for subsidised legal representation, they lack information that can assist them to apply for legal aid and instruct a lawyer prior to court.

When the Police Prosecutor supports an ADVO application, control is removed from the applicant, and replaced by police imposed processes and decisions. This is regarded as positive when it removes the responsibility for pursuing the application from women with experience of extreme or repeated violence, or who under pressure to not seek a final order. However, police imposed decisions can result in an order with conditions that are either not desired by the applicant or simply unenforceable.

Aboriginal Legal Services (ALS) are provided at the three towns in this study. In order to avoid a conflict of interests the service has a practice of representing only one party to a legal proceeding. While ALS does not represent defendants over applicants, the service is widely perceived to act for defendants more frequently than for applicants.

... Aboriginal Legal Aid, they won't fight ...Aboriginal on Aboriginal... this might happen, say, in the night and the woman wants to go and see the Legal Aid in the morning, it's too late

because the guy is picked up by the police (and) they have already rang the Aboriginal Legal Aid and they are going to represent the guy, and there's no-one ...to represent the woman. I think it's unfair ... because the guy gets in first ...they get all the help and the woman is sort of left out (Wagga Wagga participant I800-922)

The experience of being unrepresented in a situation in which a male defendant has a strong legal advocate can be perceived by an ADVO applicant as the ALS condoning community tolerance for family violence.

One consequence of unequal legal representation is that an applicant withdraws their application due to lack of information, misinformation or persuasion. This sometimes occurs when the defendant's solicitor obtains agreement of both parties to written undertakings. Such undertakings are signed by the alleged perpetrator and lodged with the court, but are not enforceable by the police. These negotiations typically occur without the applicant having access to independent legal advice, and without an understanding of the legal implications of agreeing to undertakings as an alternative to a court order.

Specialist personnel in social or justice agencies can find themselves being expected to fill the gap in legal services to ADVO applicants, and fulfill a para-legal role. This is sometimes a source of tension for Aboriginal specialists employed at some Local Courts to promote access to justice for all parties to proceedings.

"Yeah, I can do this for you, but I can't do this." Sometimes that little bit - they know, too, what they can expect of you too. It's no good me going and saying, "Oh, well, we'll go and put him behind bars tomorrow," because he's got to have his say too, I suppose. He's got rights too, and besides that, you're only hearing one side of the story. You can't turn around and take sides; you just do the action. (Wagga Wagga participant P332-339)

Similarly, CAS practitioners who provide information and support to women ADVO applicants on the day of court can find that applicants, police and legal personnel expect them to fulfil a para-legal role.

...the workers in these schemes spend a lot of their time going in between police prosecutor and the client where, if there was a solicitor funded for the court support schemes, that they would be focused totally on domestic violence and the issues for the women and children. And the support worker could do more of the support role for the women through the court process, rather than being that go-between for police prosecutor or solicitor. Whereas if the solicitor was attached to the court support schemes, it would be a lot better approach And then the workers could spend more time with the women explaining - (things like), "If you decide to get together later on, that you can actually (apply to the court again to) tailor that AVO to meet your needs." (Dubbo participant P1321-1341)

Some thought that an expansion of the CAS scheme to include a pre-court service and legal personnel would be an appropriate way to address these service gaps and manage applicants' experiences of court process.

The big need, and it is happening, is with Court Assistance Scheme workers. There needs to be more of them funded, plus a solicitor to go with each scheme. (Dubbo participant P707-711)

5.5 ADVOs - court proceedings

A majority of rural courthouses were built in the late 19th and early 20th century and most are easily distinguishable from other town buildings. The style of architecture and interior design reflects the authority of the judiciary and the centralised control of the state. The 19th century Italianate court house buildings at Bourke and Wagga Wagga house formal high ceiling court rooms in which the raised magistrate's platform, bar table, juror's seating, witness box and defendants' dock are carved from red cedar. At Bourke the furnishings are embossed in gold lettering with the official titles of participants that were in use at the turn of the century. At the back of the courtroom are rows of cedar benches for observers, who access them from doors in the court foyer. At Dubbo the courthouse has been modernised and extended, but retains a similarly imposing atmosphere.

The legal processing of civil AVO proceedings in the Local Court differs from criminal proceedings with respect to legal representation of the parties. The criminal standard of proof of 'beyond reasonable doubt' is replaced by the lesser standard that requires the magistrate to be satisfied 'on reasonable grounds' that the applicant has cause to fear for their safety. In other respects the proceedings mirror criminal justice process. Similarly to criminal matters, the parties are referred to by legal personnel as 'victims' and 'defendants'. The proceedings are adversarial in style, with legal experts presenting their arguments to the Magistrate from the bar table, and witnesses being called to give evidence from the witness box.

Participants reported that applicants for ADVOs experience as intimidating the formality of the physical environment and the language and behaviour of justice personnel involved in proceedings. Their experience is well described in one participant's reflection on her court experience:

The (legal professionals) even go like, "Section such-and-such," and you don't know what the hell it is. He probably knows what it all means, but we're left here in the dark. We just don't know.

I actually found that more horrific, walking in there and having these guys in suits sitting there talking between each other. They'd glance over at you ... I had my daughter with me as well, because she was a victim, and she's sitting there going, "What are they saying, mum? What's going on? Are they talking about me? What do they know?" And that was really horrific; not the action that had taken place to get us there. That went right out the door. It was the fact of being in there. You've got huge ceilings, you've got darkness ... so many nooks and crannies ... you don't know who's there, you don't know what's being spoken. Then you've got this other person that sort of sits up there, all high and mighty, not even at your level; wouldn't even talk to you - they're talking about you. Everybody ... talks about you but nothing is ever said to you. We would have walked out if it hadn't been for (the Court Assistance Scheme Worker) saying, "It's okay, it's okay." ... "they're just doing their own thing". Otherwise we would have walked, definitely. (Wagga Wagga participant P850-887)

The dehumanising impact that this experience can have on applicants could serve as a sobering reminder for legal professionals of the importance of effective communication with all those involved in court process:

Once you do anything with court ... you don't become a person any more. Once you walk in that door you're in the court world; that's it. You've got solicitors and you've got barristers and you've got all those top knob people who use you. You're a number, you're a case, you're an action that happened. That's it. So you don't have any rights ... (Wagga Wagga participant P916-928)

The openness of the courts is reportedly another source of discomfort for applicants. The public scrutiny afforded by the centrality and visibility of courthouses in the towns, and their lack of off street or private waiting areas exacerbates this. It is not uncommon for members of the public to observe proceedings out of curiosity. The interior design of some courtrooms makes it possible for observers to have eye contact with witnesses without being visible to the magistrate or legal personnel. A practitioner at one such court reported that it was not uncommon for harassment and intimidation of applicants by defendants and their supporters to go unchallenged during the court proceedings.

And the set-up of the court - I mean, when the witness is in the box, the guy's sitting there staring at them. ... I mean, you've got to be put off by that. When I used to work there I asked the Magistrate if I could put a screen there, because she didn't want to look at him because he'd be there making movements with his mouth and face, you know, expressions, and punching his hands together ... the Magistrate wouldn't let me because the solicitors were against it, so I had to stand at the witness box to protect that woman ... so I was the barrier between them. so I stood there so she'd feel comfortable in speaking, and I said, "If you don't want to look at him, look at the Magistrate, look on something up at the wall, or the prosecutor, but don't look that way." (Bourke participant I1364-1399)

The openness of the court proceedings, the occurrence of threats and intimidation of witnesses by perpetrators outside and in the court room and the protective actions of some practitioners shows that victims and their supporters continue to be at risk of harm while participating in court proceedings. The highly charged emotion involved in legal proceedings concerning family relations has been evidenced in Australia's Family Law Courts, where homicides in and around the court buildings have resulted in the death of a Judge and a female witness.

The damaging impact of the court experience for women who might wish to seek legal protection from domestic and family violence through the AVO scheme is summed up in the following comment:

.... I would not, for the life of me, take out another AVO and go through the process here. I just couldn't put myself through that. (Bourke participant I1274-1281)

5.6 Enforcement of ADVOs

As previously noted here, a breach of a final ADVO constitutes a criminal offence. This is also the case for interim orders obtained from the police by telephone prior to court and from the court to cover a period of adjournment.

The previously cited report of the evaluation of the New South Wales AVO scheme states that "police allegedly did nothing in response to 30 (73.2%) of the 41 breaches reported to them" (Trimboli and Bonney 1997:68). Trimboli and Bonney (op. cit.:69) observe that the police failure to enforce breaches can seriously undermine defendants' compliance with an order, victims' sense of safety and the willingness of the community to actively confront family violence. A failure to enforce orders thus damages both the integrity and credibility of the justice response to domestic and family violence and undermines the system's deterrent potential.

Consistent with Trimboli and Bonney's findings, Aboriginal women in this study reported failures by police to act on reports of ADVOs having been breached:

But the order - when you've got one, the police won't act on it.
I reckon there's a big problem with Aboriginal people, that the police won't act because they couldn't care less what happened. We've had women in the refuge that (had) AVOs in place but the police wouldn't act. (Wagga Wagga participant 1420-430)

One practitioner observed that the additional disincentives to using the justice system that confront Indigenous people also contribute to reluctance by Aboriginal women in these towns to report breaches.

So, (a) the police won't listen, and if they do get an AVO the police won't act on breaches, and (b) very often they don't report breaches anyway because, again, they don't want their blokes to go to gaol. (Dubbo participant P1366-1372)

5.7 Strengthening formal justice responses

Another inhibitors for rural Aboriginal women to using formal justice responses concerned deficiencies in access to information and services. Suggestions were made for overcoming the lack of information through cultural outreach:

.. they're developing in Kempsey through the legal centre ...an indigenous initiative. ... two Aboriginal workers are ...assisting not only Aboriginal women but also non-Aboriginal women, and that's actually working with the community - - -
....that was community driven. ... the Indigenous Women's Program has done all the legal education ...and there's a report on it - Macquarie Valley, the Kempsey project -
... even the family violence project - delivered all over New South Wales - on the effects of violence. They got really good roll-ups from the community people. They explained the AVOs, the court process, the whole bit, so all the state - has had a lot of this education delivered to grassroots people.
Well, it was effective while it was there. And there were as many men as women that attended these workshops on that - the Aboriginal ... (Dubbo participant P2980-3022)

There was also discussion about the untapped potential for support before and during court from within the Aboriginal community:

We have a number of the elders in that group who are quite skilled in matters of domestic violence and other social issues. Often they will take it up as a person or as a group themselves and address it. (Wagga Wagga participant P1902-1910)

Practitioners also identified the need for improved communication and collaboration between personnel in social service and justice agencies.

... another thing about the AVO process - - - - all the agencies working together - - - - need to have somebody who ... knows and understands their various roles and can link people - - - - through the police/court process with the services that they need - - to get to a safe place, and to support them through the justice process.
Well, it's support them through, but it's also that referral to the specialist services that, you know - - -
(CAS) very rarely gets referrals from either the police or the court staff. (Dubbo participant P1931-1938)

5.8 Summary

Participants regarded the New South Wales justice system, both criminal and civil proceedings, as providing a resource that can assist efforts to stop family violence.

Prosecution of criminal violence is sometimes the only effective way to protect women and children against physical violence that poses threats of physical injury or death, and sexual violation. Protection orders can demonstrate the lack of social tolerance for criminal and non-criminal violence within family relations and set limits on the conduct of perpetrators. However, the justice system is not universally perceived by rural Aboriginal women to provide sufficiently accessible or effective protection.

Two main limitations of the criminal justice response were identified. Firstly, the substitution by police of criminal investigation and prosecution with civil ADVO proceedings leaves criminal violence unaddressed. Secondly, reluctance by victims of criminal violence to provide evidence to support criminal proceedings, due to the impact on the perpetrator and/or fear of reprisal, also limits the protective potential of the criminal jurisdiction. These limitations could be addressed by systemic reforms that improve the police response to criminal acts of violence, and remove the reliance on the victim for criminal evidence and decisions relating to the laying of criminal charges.

One limitation in the civil AVO jurisdiction is perceived as the narrow definition of violence operationalised by justice personnel and apparent in the kind of evidence they seek to support ADVO applications. This can result in victims of non-criminal violence experiencing difficulty in obtaining a civil protection order. Another limitation is the link between the enforcement of ADVOS and the criminal jurisdiction. A person who is protected under an ADVO and seeks police assistance to enforce the order exposes the perpetrator to the risk of criminal prosecution by police on the ground of their having breached the order. Thus, a protected person who seeks police assistance to enforce a condition such as 'to not approach' the protected person confronts a dilemma in their knowledge that this could result in criminal prosecution, something that may offer temporary protection but may also escalate the conflict and cause more harm to the perpetrator than they would want. The too close connection of the civil and criminal jurisdictions in law and practice contributes to a reluctance of women seeking legal protection to use the civil jurisdiction.

Through their experience of police and courts in ADVO proceedings, women perceived deficiencies that undermined both their access to and participation in these proceedings. There was a desire for a more effective police response, with some deficiencies being attributed to misinformation, discrimination and racism. Another problem area is the tendency of applicants to not proceed with their application. Contributing factors are the lack of legal information and personal support in the time between the crisis and the court hearing and time delays and adjournments in the court process. Court proceedings are regarded as an unequally stacked and harrowing process. While defendants are often strongly represented by legal services such as the ALS, the availability of legal advice and representation for applicants is uncertain and representation by Police Prosecutors can be perceived as inadequate. Thus, applicants can find themselves subject to persuasion and intimidation that results in an outcome that is not enforceable, either legally and/or practically. Potential solutions lie in increasing applicants' access to legal information and personal support in the time before the matter is finalised at court, and to independent legal advice and representation.

Court proceedings are often experienced by ADVO applicants as intimidating and incomprehensible. Contributing factors are the formal and imposing architecture and interior of the court house, the seemingly high number of justice personnel in the court room and the appearance and language of members of the legal profession. There was a consensus amongst participants that the openness and formality of proceedings should be reduced in ADVO proceedings. Under the current system, that requires ADVOs to be decided through formal justice proceedings measures could be introduced to provide applicants with greater privacy and safety during court proceedings. Applicants would be more protected and able to participate in the process and in decisions about the outcome in a closed court, or by giving evidence through closed circuit television (CCTV), as occurs with child witnesses in child sexual assault matters.

Formal justice proceedings, both criminal and civil, are regarded as a potentially valuable resource in seeking protection from family violence. Other measures needed to strengthen the credibility and effectiveness of justice responses are outreach initiatives that deliver education and services to Aboriginal communities in culturally accessible and appropriate ways. Finally, optimal access to and participation in all services, both generic and culturally specific requires effective communication and co-operation between agencies and practitioners.

Civil proceedings confront ADVO applicants with quasi-criminal proceedings and the potential for criminal sanctions to be the outcome of a breach of an order. There was discussion about the greater potential to use the civil jurisdiction to respond to non-criminal forms of violence before they become repeated and present the gravest of safety risks. Some discussion focused on extending the magistrate's authority to refer parties to court connected facilitated processes such as mediation or restorative conferencing, and to make an order requiring one or both parties to participate in educational, counselling or rehabilitation programs. These ideas are discussed more fully in Section Six.

