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A Consequence of Blurring the Boundaries – Less Choice for the Victims of Domestic Violence?

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If the main aim of civil law is to regulate and improve matters for the future, by, for example, making orders about the future behaviour of parties rather than punishing past behaviour (criminal law), then a fundamental question is whether the civil law is adequately fulfilling these requirements regarding domestic violence. This is a particularly pertinent question given the implementation of the Domestic Violence, Crime and Victims Act 2004. This article will examine whether the Government's reforms offer protection to all victims of domestic violence as proposed in the Consultation Paper 'Safety and Justice' and will suggest that instead of achieving a clear coherent framework for dealing with domestic violence, the Act has taken a step towards blurring the boundaries between the criminal and civil law.

Introduction

Nearly a year after the original Bill was introduced into the House of Lords, the Domestic Violence, Crime and Victims Act 2004 (hereafter referred to as DVCVA) received Royal Assent on 15 November 2004. Implementation is being rolled out from the 21st March 2005 onwards, although the timescale for full implementation is, at the time of writing, uncertain. It has been described, in both Houses of Parliament, as representing 'the most radical overhaul of domestic violence legislation in 30 years' (Baroness Scotland of Asthal, 2003: 949; David Blunkett, 2004: 536). However, this may well be just the usual political hyperbole, especially when one considers the fundamental reforms implemented by Part IV of the Family Law Act 1996 (FLA) and the Protection from Harassment Act 1997 (PHA), which arguably affected the civil law to a much greater extent than the current reforms.[1]

Although the DVCVA is 'radical' in terms of the new criminal elements, such as the new crime of 'causing or allowing the death of a child or vulnerable adult' (ss. 5–8), this article suggests that the area where protection for the victim has taken second-place to prosecution of the perpetrator and is arguably 'radical' in the sense of removing choice from the victim, concerns the implications of making a breach of a non-molestation order a criminal offence. Despite some very positive developments within the DVCVA, instead of achieving a clear coherent framework for dealing with domestic violence, I will demonstrate that the Act has taken yet another step towards blurring the boundaries

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between the criminal and civil law. In so doing, I draw on comparisons with Anti-Social Behaviour Orders (ASBOs), introduced by the Crime and Disorder Act 1998, which have also resulted in a blurring of the civil/criminal boundaries. In addition, I will question the aims of the primary Consultation Paper that preceded the Domestic Violence, Crimes and Victims Bill. A particular emphasis contained within the Consultation Paper was the aim of protecting victims of domestic violence. I will question whether this aim will be reflected in reality upon implementation of the statute (will it actually achieve its purpose?), and thereby consider whether the reforms to the civil law will indeed offer the maximum protection to all victims of domestic violence.

Background

In the civil sphere, the two remedies available under the FLA 1996 are non-molestation and occupation orders. This will not change upon implementation of the DVCVA. A non-molestation order prohibits the respondent from molesting an 'associated person' which includes spouses, cohabitants, former spouses and cohabitants, people living in the same household or relatives. 'Molestation' is not defined in the Act as the concept is defined and recognised by the courts. The term is taken to be wider than physical violence, also encompassing harassment and serious pestering. Enforcement is by the police and this depended in the past on whether the court attached a power of arrest to the original order. The other type of order under the FLA 1996 is an 'occupation order'. This can be obtained where significant harm to the applicant or 'relevant child' is likely, and might require the respondent to leave the home or exclude him or her from a defined area of the home. If the applicant is married to the respondent or entitled to occupy the property then one type of order can be made (section 33). However, if the applicant is not entitled to occupy the property, the key question is whether the applicant is the ex-spouse, cohabitant or former cohabitant of the respondent, then different categories apply (sections 35–38). Just as with non-molestation orders, enforcement by the police depends on whether the court attaches a power of arrest to the original order.[2]

In the 2003 Consultation Paper 'Safety and Justice', the Government outlined its strategy for tackling domestic violence: Prevention, Protection and Justice, and Support (Home Office, 2003). The recommendations for legal reform were contained within the middle element of this three-prong approach, 'Protection and Justice'. Notably, these key words of the strategy are placed together, perhaps highlighting in both symbolic and legal terms how the Government sees the law progressing in this particular area: 'making sure that the civil and criminal law offers the maximum protection to all victims to stop the violence recurring' (Home Office, 2003: 11). Although this is only one of the Government's 12 main aims identified in the strategy, it is possibly one of the most important. Research (Hoyle and Sanders, 2000) has demonstrated that what victims want is the violence to stop, whether that be through the ending of the relationship, a period of peace and quiet or the abuser's arrest. Consequently, the key question in relation to the implementation of the DVCVA 2004 is whether the reforms to the interface between the civil and criminal law, will actually offer the maximum protection to all victims to stop the violence recurring? In order to respond to such a question, this article will concentrate on section 1 of the DVCVA, which makes breach of a non-molestation order a criminal offence. However, despite this focus, the DVCVA should nevertheless be recognised as a wide-ranging statute that covers both the criminal and civil law.

Blurring the boundaries

In English law, there has traditionally been a distinction between civil and criminal proceedings with different courts dealing with different types of law, with the two approaches being seen as largely conceptually separate. In recent years this distinction has become a little blurred with 'cross-overs' beginning to develop in certain areas. This is highlighted by the introduction of ASBOs, which are civil orders applied for in civil courts. But under section 1(10) of the Crime and Disorder Act 1998, the breach of an ASBO is a criminal offence dealt with in the criminal courts. A similar provision can be found under the Protection from Harassment Act 1997, a statute, which, although originally intended to deal with the phenomenon of stalking, has proved useful in relation to domestic violence. Under this statute, a breach of an injunction[3] is not a contempt of court (a civil matter – see further below), but, by section 3(6), an arrestable (criminal) offence carrying a five year maximum sentence.

At its most simple level, the main aim of civil law is to regulate and improve matters for the future, with an individual bringing proceedings against another individual. In the sphere of Family Law, examples include the making of orders about the future use or division of property, finances or the future behaviour of parties. The underlying ethos of the criminal law is different. In criminal law, proceedings are brought on behalf of the state with the aim of, broadly speaking, punishment. This description, is, of course, at its most basic, with the range of standard justifications for criminalising conduct ranging from the law serving a symbolic purpose, such as indicating the moral unacceptability of a certain course of action; deterrence; exacting retribution; treating the offender; rehabilitation and incapacitation of the offender to, ultimately, political expediency. Given the centrality of a broad notion of punishment within the purposes of criminal law, Burton suggests, '(o)n the face of it criminalisation is a politically attractive option, in that it might convey a message that domestic violence is being taken seriously by the government' (Burton, 2003: 301). However, devising a combined civil and criminal law response to domestic violence is controversial.

During the passage of the Bill through Parliament, there was a large degree of agreement and consensus concerning the proposals themselves, leading the Home Secretary David Blunkett, upon introducing the Bill at its second reading, to thank MPs from all parties 'for their support and co-operation' (Blunkett, 2004: 536). Indeed, reforms such as section 3 of the DVCVA, which will amend the definition of cohabitant to include same-sex couples, have generally been welcomed. At Committee Stage in the House of Commons, Paul Goggins (Parliamentary Under-Secretary of State for the Home Department) stated: 'The spirit of the discussion of this clause is again one of consensus. The clause has never been contentious' (Standing Committee E, 2004: 52). However, this was not the case for all clauses within the Bill. Clause 1 (which became section 1 – criminalising the breach of a non-molestation order) caused some discussion in both Houses of Parliament, which was controversial due to the impact that it may have on the victim.

I will argue throughout the course of this article that if we evaluate Part 1 of the DVCVA from the basic premises, identified above, then some important issues are being subsumed under the Government's umbrella phrase of 'protection and justice'. The criminal law is taking precedence over the civil jurisdiction and victims' needs are being overlooked in favour of increased 'justice' and retribution.

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Criminalising breach of a non-molestation order and the impact upon victim choice

Section 1 of the DVCVA makes a breach of a civil law non-molestation order issued in the civil court a criminal offence dealt with by the criminal courts.[4] The 2003 Consultation Paper, 'Safety and Justice' described the problems the Government saw with the enforcement provisions for non-molestation orders under the FLA prior to reform by the DVCVA: '(G)iven that the power of arrest is often only attached to specific parts of an order, police officers may be unclear whether they can arrest the respondent or not. If no power of arrest was attached, the victim has to apply to the civil court for an arrest warrant, which can put the victim at risk of further violence until the warrant is issued' (Home Office, 2003: 33). Up until implementation of the Act, the judge making the non-molestation order had discretion whether to attach a power of arrest to the order (section 47), and whether to attach it to parts or all of the order. If the order is breached under the current system, it is punishable by a civil contempt of court. Although this is a civil law measure, it could be argued that the principle brings some of the characteristics of the criminal law into the civil law courts as it is punishable with a maximum of two years in prison, and/or unlimited fine. However, contempt is dealt with by the same civil law courts which made the original order so the ethos at hearings is still that of the civil law, albeit with an added element of punishment.

Section 1, however, will make a breach of a civil non-molestation order a criminal offence. In addition, the five year maximum sentence means that it would become an arrestable offence under section 24 of the Police and Criminal Evidence Act 1984. This will mean that the criminal law courts will be dealing with what was originally a civil matter (as with ASBOs) and more power will be passed to the police, rather than the victim, as the prosecuting authorities will decide whether to prosecute for a civil law breach rather than the victim deciding whether to pursue contempt proceedings. As a result, victims of domestic violence will lose control over proceedings. As empowerment is such an important issue for abused women,[5] I suggest that this is a worrying development. On the other hand, it does strengthen provisions against abusers and also sends a powerful symbolic message about how domestic violence is viewed.

The consequences of criminalisation: a loss of autonomy

As Mandy Burton identifies, 'Part IV of the Family Law Act 1996 was specifically designed to provide coherent and effective remedies for victims of domestic violence . . . (It) enjoins the court to take a victim-focused approach when deliberating whether or not to make a non-molestation order' (Burton, 2004: 317). But does this purpose conflict with the stated aim of making a breach of a non-molestation order a criminal offence as articulated in 'Safety and Justice' (Home Office, 2003: 11 and 33)? In one sense, criminalising a breach of a non-molestation order may protect the victim through the act of incapacitating the offender by his arrest and subsequent prosecution. The decision is taken out of the victim's hands and placed into the hands of the prosecuting authorities. But therein lies the difficulty. The FLA 1996 is a civil statute, dealing with and regulating the lives of (generally) two individuals and consequently begging the question of whether the criminal law should creep into such an emotionally charged arena. In other words, should the breach of a non-molestation order be criminalised?

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It is therefore fundamental to this question to ask whether the DVCVA will actually take that decision-making capacity out of the victim's hands or will it, as the Government argues (Standing Committee E, 2004: 37), empower the victim, by retaining choice.[6] This is an important issue that has caused some confusion in terms of legal discussion.[7] The technical legal issues are not dealt with here but concern the implications of making a breach of a non-molestation order a criminal offence. This is a matter of some confusion because, although the civil law route for dealing with breaches remains, the power of arrest has been abolished,[8] which means that the only civil route available would be for the victim who has a non-molestation order with no power of arrest attached to go back to court for a warrant, so that a civil contempt case can follow. This will mean that, once implemented, abusers who breach orders could be dealt with in the civil courts under contempt law, whilst others (the vast majority), will be prosecuted in the courts using the new criminal law offence of breaching a non-molestation order. In the former case a woman retains control but in the latter, the police and prosecution authorities will take the key decisions.

This would require a victim who wishes to use the civil route to enforce the order, to make a conscious decision *not* to call the police upon the breaking of the non-molestation order, and instead return to the county court for a civil warrant of arrest. The resulting statute is therefore a curious hybrid; extremely prescriptive on the one hand – detailing that all breaches will be a criminal offence, and yet attempting to suggest victim empowerment through the tiny crack of the county court door. To suggest that a victim, who has just had a non-molestation order breached will sit at home in a lucid frame of mind, considering the pros and cons of whether to call the police or to go back to court for a warrant of arrest is an unlikely scenario. Likewise, given that there has been confusion at both the Parliamentary[9] and judicial[10] level, is it at all realistic to suggest that the victim will understand such legal complexities as regards the civil or criminal law? I suggest not. The obvious method of enforcement is of course, to call the police. Not only will this mean that civil arrest warrants for non-molestation orders could almost disappear, but also once the police are called, the only route the police will be able to pursue (if they choose to do so), is the criminal law route. This will remove the victim's choice from the equation. The prosecution decision will be in the hands of criminal justice system personnel, as with any other criminal offence, and the victim will not be a party to the proceedings.

A further argument against the criminalisation of breach of a non-molestation order, which is related to the victim's unwillingness to call the police, is that victims may not want their partners to carry the stigma of a conviction. In responses to 'Safety and Justice', the Solicitors Family Law Association, believed that section 1 'would have a number of detrimental effects, including taking away the sufferer's choice to have the perpetrator dealt with without criminal sanctions' (House of Commons, 2004: 28–29). The human rights organisation, Liberty, goes further and 'suggests that the effect might be to dissuade a victim from seeking a non-molestation order if she were concerned that her partner might receive a criminal record in consequence' (House of Commons, 2004: 28). Ultimately, this statute is about domestic violence and for all the debate about the term itself (Edwards, 1996: 180), it is easy to forget one important factor; that victims of such violence are in domestic relationships of one sort or another and all the emotions that play upon individuals within that relationship: love, hate, dependency – financial and emotional. Victims within such relationships may therefore be reluctant to foist upon the 'father of

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her children', the stigma associated with a criminal conviction. This is emphasised by the Court of Appeal in *Lomas* v. *Parle* [2004] 1 All ER 1173:

> As this case illustrates, sentences of imprisonment for harassment do not necessarily deter repetition. Those who molest others are usually trapped in an obsessional emotional state derived either from a past relationship (unresolved feelings of hate or love) or from a fantasy (compelling feelings of attachment to a near stranger). For domestic violence, anger management programmes are widely available and referrals from the court have become commonplace. More extensive emotional management programmes might prove effective in helping some offenders to resolve such emotional attachments. (para 51)

However, one argument in favour of criminalising the breach of an order is that the costs of the proceedings are paid for by the state in criminal cases (in civil cases the party bringing the action pays unless supported by community legal service – formerly legal aid). Consequently, committal proceedings (in the civil court) for the victim could be financially prohibitive. By criminalising the breach, enforcement would be placed in the hands of the police and Crown Prosecution Service (CPS) and thereby the need for financial support is side-stepped. But that is the fundamental difficulty. Will this 'side-stepping' also occur in relation to the communication between the CPS, police and the victim? Will the victim be empowered only to the extent that the prosecution authorities are willing to do so? The Parliamentary Under-Secretary suggested that this would not happen and the process would involve all three parties in the decision about whether to prosecute (Standing Committee E, 2004: 45).

Moreover, as the Liberal Democrat spokesman, Lord Thomas of Gresford argued in the Lords Grand Committee there are a collection of other concerns including speed, which may mean that criminalising breaches of non-molestation orders will in many respects not benefit or protect the victim:

> Making the breach of a non-molestation order a criminal offence really does nothing. The objectives can be better achieved through the civil route. The advantages are manifold . . . The evidence provisions in the civil court are more favourable to the victim. Evidence can be given by affidavit: the judge has discretion whether to order cross-examination . . . There is a great deal more speed in the civil courts. Applications can be made ex parte . . . In civil courts, applications can be made out of hours and expeditiously. (The judge) may also, in his discretion, have the defendant or respondent before him and give him a last chance. Magistrates cannot do that; if they find a person guilty they have to make an order of some kind.
>
> Then there are practical matters. The papers whereby the non-molestation order was obtained in the first place from the civil court will no doubt have to be passed to the magistrates' court. If there is a breach, the matter must go to the police, who make recourse to the CPS, which then decides whether to prosecute. It may take a long time for the matter to come to court. The magistrates will then start from scratch and will have to be informed of all the background (information). So the bringing of proceedings for a criminal offence are less flexible, certainly less speedy and do not add to the protection that the victim is entitled to expect.
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> It is in those circumstances that I suggest that the Government in Clause 1, are doing no more than making a gesture that is of no practical use to victims of domestic violence. (GC231–232)

The consequences of criminalisation: blurring the boundaries and victim protection

Despite the objections to criminalisation raised during and prior to the passage of the Bill, there are two main benefits which are arguably inter-related. First, the symbolic import of making the breach of an order a criminal offence and, secondly, the wider range of powers open to the criminal court in sentencing the perpetrator. Viewing criminalisation as a more effective sanction than the civil law remedy of contempt of court can link both benefits. As touched upon previously, if we look to the nature/purpose of the criminal law, criminalisation is not only a politically attractive option, but the symbolic message that is being conveyed is that domestic violence is being taken seriously by, not only the Government, but by the police and court system. This is consistent with current police and CPS guidance that stress the need to pursue prosecutions of abusers even when the victim withdraws if at all possible.[11] This is of course disempowering the victim, but the perceived benefit is meant to be in terms of the number of convictions and of taking domestic violence seriously. Moreover, unlike the civil courts a wider range of powers are open to the criminal court in sentencing the perpetrator, such as mandatory attendance on anger management programmes.[12] Defendants in civil proceedings can be referred to such programmes, but they cannot be forced to attend as part of their sentence. Although the wider array of sentencing options is a compelling argument for making breach of a non-molestation order a criminal offence, could not the same result have been achieved by allocating further powers to the County Court? – for example, ordering attendance at anger/emotional management courses rather than mere referrals and, additionally, longer sentences, rather than the maximum of two years available under section 14(1) of the Contempt of Court Act 1981. It could be argued that this would in itself further blur the boundaries between the civil and criminal proceedings by introducing additional 'criminal' punishments into the civil courts and, although there is some merit to this view, perhaps it is the whole notion of criminal punishment for intractable domestic violence disputes that needs to be considered. As considered above, the Court of Appeal in *Lomas* v. *Parle* has emphasised the futility of imprisonment in those intractable disputes, as it does not necessarily deter repetition of the conduct. There is of course no easy answer, but will moving the process from the civil court, where the order has been made and the District Judge is aware of the case, to the criminal sphere (with its associated problems), actually ameliorate the situation for the victim, and as the Government desires, 'stop the violence recurring'? (Home Office, 2003: 11).

However, even if additional 'criminal' punishments were introduced into the civil courts, this would only blur the boundaries to a limited extent in comparison with the criminalisation of a breach of a civil order, particularly when, in the latter case, there are different rules of evidence for civil and criminal proceedings. So, an order that was made in the county court under the civil standard of proof (on the balance of probabilities), would then be subject to criminal sanctions which should be decided on the criminal rule of evidence – beyond reasonable doubt. This can be linked to a legal issue that has come to the fore recently which questions whether the standard of proof on application for a non-molestation order has changed post *R (on the application of McCann)* v. *Manchester Crown Court* [2003] 1 AC 787 (hereafter known as *McCann*).

This case concerned ASBOs and whether the proceedings for their imposition were civil or criminal. Given the fact that the breach of an ASBO is a criminal offence,

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punishable by a maximum of five years' imprisonment, it was successfully argued in that case that, although the relevant proceedings are civil in nature, given the serious implications of making the order 'at least some reference to the heightened civil standard would usually be necessary (see *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1 at 16–17 per Lord Nicholls of Birkenhead). . . . But in my view, pragmatism dictates that the task of magistrates should be made more straightforward by ruling that they must in all cases under section 1 apply the criminal standard' (*McCann* per Lord Steyn at para 37).

Therefore, as breach of a non-molestation order will be a criminal offence, will the standard of proof on application for a non-molestation order change to the criminal standard as it has for the making of ASBOs? Prior to *Jones* v. *Hipgrave* [2004] All ER 217, it was suggested by some academic commentators that '(w)hilst obtaining a non-molestation order would, by analogy with . . . *McCann* remain a civil matter, within those civil proceedings the court may feel it appropriate to adopt a heightened burden of proof, or criminal standard of proof, when deciding whether or not to grant an order' (Burton, 2003: 308). However, in *Jones* v. *Hipgrave*, the issue concerned what standard of proof should be applied to civil proceedings under section 3 of the PHA 1997. Section 3 of the PHA 1997, was the basis from which the new section 42A was modelled, and it is suggested that as the court in *Jones* distinguished the making of ASBOs under the Crime and Disorder Act 1998 from civil proceedings under the PHA 1997 (where the civil standard of proof is to apply), it is more than likely that a future court will apply the decision in *Jones* to applications for non-molestation orders, rather than *McCann*. The basis of the decision in *Jones* was that a division needs to be recognised between crime and preventative measures under the Crime and Disorder Act for the benefit of the community, and the 'the protection of the rights of individuals, which civil proceedings under the PHA are designed to ensure' (*Jones* v. *Hipgrave*, per Tugendhat J at para. 64). On this line of reasoning, given that non-molestation orders are made essentially to protect the rights of individuals, it is likely that the normal civil standard will continue to apply to the application for non-molestation orders.

On the premise that *McCann* were to apply, Burton was concerned that, if a heightened or criminal standard of proof were applied to the application for a non-molestation order, then it may become more difficult for victims of domestic violence to obtain non-molestation orders. Although this concern looks like being misplaced given the recent decision in *Jones* v. *Hipgrave*, her related concern that there 'is a possibility that more applications for non-molestation orders will be contested if breach of a non-molestation order is made a criminal offence' still holds water given the 'wider consequences of conviction and acquiring a criminal record' (Burton, 2003: 309).

Consequently, by moving the breach into the criminal sphere, victim protection could be in severe danger of being obscured through criminal prosecution of the wrong. The original purpose of the order – to protect – may well be lost in the hustle of the criminal process. Whilst it has been recognised by the judiciary themselves that punishment of a contemnor is based as much for their affront to court authority in breaching the order made by the court, as well as for the behaviour towards the applicant (see *H* v. *H* [2001] 3 FCR 628), I would suggest that moving the process into the criminal sphere will develop a different kind of criticism: one that can be demonstrated by reference to Home Office research that has been conducted on ASBOs (Campbell, 2002). Campbell suggests that '(t)he way in which breaches were dealt with was a contentious issue in many areas and a source of discontent. . . . Some victims were concerned that partnerships were not

adequately enforcing the order or prosecuting the breaches they found. In some cases victims felt they had been empowered to report breaches, but then felt let down when these reports were not acted on' (2002: 78).

Suggested reasons for the breach not being acted upon by the police ranged from lack of resources for enforcement, through to an act that constituted a breach being too trivial to prosecute. As Campbell stated: 'In an environment where police work is largely response driven, breaches may be far down their list of priorities' (2002: 78). Campbell has also suggested that the CPS may not want to prosecute for a breach and instead go for a more substantive offence, or wait until a number of breaches had occurred before commencing prosecution. If we apply these findings to criminalising a breach of a non-molestation order, similar practical difficulties may well ensue. For example, the victim who receives an occasional abusive telephone call from an ex-partner may have to wait for a number of incidents to occur or until a more severe breach, at which point it may be felt by the prosecuting authorities that there is a strong enough case to prosecute. The obvious danger here is that ('trivial') breaches of non-molestation orders will not be top of the list for a response-driven police force. Consequently, criminalising breach of a non-molestation order may also have the (unintended) effect of not only failing to protect the victim, but of not achieving justice either, particularly if 'justice' is evaluated against the Government's strategy involving the term itself: 'ensuring that victims are not deterred by the way they will be treated at any stage of the justice process' (Home Office, 2003: 11). If these potential consequences ensue, it places doubt over the Government's stated aim of 'protection and justice' and, more specifically, of offering 'the maximum protection to all victims to stop the violence recurring.'

Conclusion

In passing the DVCVA, the Government was clear in its strategy: Prevention, Protection and Justice, and Support. On the one hand, the statute may well fulfil the Government aim of 'stopping violence recurring' through imprisonment and incapacitating the offender by the simple and straightforward means of increasing the length of a custodial sentence, as well as providing a measure of symbolic import, but, on the other, what this basic evaluation does not take into account are three main difficulties. First, a blurring of the traditional distinction between the criminal and civil law, secondly, the (potential) practical problems related to enforcement and, thirdly, the issue related to victim choice – will the statute deliver what the victim wants?

In the Lords Grand Committee, Lord Thomas of Gresford argued that because the non-molestation order is made by a civil court and by a civil judge 'making a breach of the order a criminal offence means that the order has effectively to be transferred to a criminal court, decisions have to be taken by the Crown Prosecution Service and the matter is placed in the hands of another judge' (Lord Thomas of Gresford, Column 1210, 9 March 2004, HofL). Not only does this have practical implications, but also the conceptual distinction between the civil and criminal courts is being merged. In the recent decision of *Lomas* v. *Parle* [2004] 1 All ER 1173, the Court of Appeal handed down heavy criticism of the domestic violence regime. Per curiam, the court offered guidance on the interaction of the 1996 and 1997 Acts and concluded that the current legal regime for domestic violence was wholly unsatisfactory. It further suggested that the DVCVA was

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the perfect opportunity for reconsideration of the present dual system of civil and criminal courts and to look to the possibility of integrated courts (para. 51).

Although the Government's Consultation Paper, 'Safety and Justice', noted the commitment to consider the expansion of specialist domestic violence courts, beyond the current five already in existence, the Act itself contains no proposals for a more integrated court system. This is disconcerting given the many and varied problems identified here with making a breach of a non-molestation order a criminal offence. If the research that has been done in relation to ASBOs is used as a point of comparison, then the future of criminalising breaches of a non-molestation orders does not look bright: lack of resources, breaches of civil orders being low on the list of police priorities, and response-driven policing, all contribute to a number of potential difficulties in the practical enforcement of non-molestation orders.

These practical difficulties mean that the victim is placed in a position where they cannot make a true choice. The law, instead of empowering the victim (as the Government suggests it is), is actually disempowering the victim through the lack of choice foisted upon her, either through financial issues, practical enforcement problems, or the fact that the law fails to recognise the reluctance of victims on many different levels: the reluctance to call the police, the reluctance to report and the reluctance to go through with prosecution, to name but three. As Hoyle and Sanders (2000) highlight in their research, victims want a variety of different things from the arrest of their partner – from the police merely to calm the perpetrator, through to arrest and prosecution. This reflects one of the main criticisms of the Act, the statute fails to recognise that victims want/need different things – not all victims, for example, will want to criminalise their partner, and as I have demonstrated, the dual route approach means that the victim will have, in effect, little practical choice as to whether to use the criminal or civil avenue. Unfortunately, what this statute does, is fail to recognise the individual needs of the victim, and treats all victims as if the state knows best.

Notes

1 The current law on domestic violence is embodied in these two main statutes. Prior to their implementation, there was a rather haphazard and defective scheme of protection for victims of domestic violence: Matrimonial Homes Act 1976; Domestic Violence and Matrimonial Proceedings Act 1976 and the complex Domestic Proceedings and Magistrates' Courts Act 1978. There was no protection for unmarried couples, orders were difficult to obtain and as Lord Scarman pointed out in the House of Lords case of *Richards v Richards* [1984] AC 174, the statutory provisions were 'a hotchpotch of enactments of limited scope passed into law to meet specific situations or to strengthen powers of specified courts.' (206) The Family Law Act 1996, has therefore been described as replacing the previous statutes with a 'consistent set of remedies available in the courts having jurisdiction in family matters' (Cretney, 2003: 756).

2 The consequence of attaching a 'power of arrest' to an order is that the police are thereby authorised to arrest a person reasonably suspected of being in breach of an order *without* a warrant. The victim is therefore able to ring the police in the case of a suspected breach. However, if a power of arrest is not attached to an order, the victim must return to the civil court for an arrest warrant.

3 The PHA 1997 provides an unusual combination of civil and criminal remedies, in that the same conduct may constitute both a civil wrong and a criminal offence. In order for a victim to have effective protection against harassment (prohibited by section 1 of the Act), the civil court may grant an injunction 'for the purpose of restraining the defendant from any conduct which amounts to harassment' (section 3(3)(a) PHA 1997).

4 Section 1 DVCVA 2004 inserts a new section 42A into the FLA 1996.

5 For discussion of the victim choice and victim empowerment models see for example, Hoyle and Sanders (2000), Friedman and Shulman (1990), Stark (1993), Edwards (1989), Hart (1996).

6 See note 5 above for discussion of the victim choice and victim empowerment models.

7 See for example, Hill (2005a and 2005b), Standing Committee E (2004).

8 Section 58(2) DVCVA 2004, Schedule 11 and Schedule 10, para 38. See also Schedule 10, para 36 for further amendments to s. 42 FLA.

9 See Standing Committee E (2004, 37–46).

10 See Hill (2005a and 2005b).

11 See Home Office (2000).

12 However, some commentators have expressed concerns over the effectiveness of specific 'anger management' programmes. See Mullender and Burton (2001: 64).

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