

**DOMESTIC VIOLENCE PROTECTION ORDERS AND CIVIL  
PROCEDURE:  
ASSESSING RISK AND ENHANCING SAFETY**

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A THESIS SUBMITTED FOR THE FULFILMENT OF THE DEGREE OF DOCTOR OF  
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2025

# Certificate of Original Authorship

CERTIFICATE OF ORIGINAL AUTHORSHIP I, Kathryn Thomas declare that this thesis, is submitted in fulfilment of the requirements for the award of Doctor of Philosophy, in the Faculty of Law at the University of Technology Sydney. This thesis is wholly my own work unless otherwise referenced or acknowledged. In addition, I certify that all information sources and literature used are indicated in the thesis.

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# Format of the Thesis

This thesis is formatted as a conventional thesis. The style and referencing format are based on the Melbourne University Law Review Association and Melbourne Journal of International Law, *Australian Guide to Legal Citation* (4<sup>th</sup> ed, 2018).

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## List of Acronyms

ADVO / AVO	Apprehended Domestic Violence Order (NSW)
ANROWS	Australia's National Research Organisation for Women's Safety
ALRC	Australian Law Reform Commission
BOCSAR	Bureau of Crime Statistics and Research (NSW)
CRAF	Common Risk Assessment Framework
DVEC	Domestic Violence Evidence in Chief
DFV	Domestic and family violence
DVLO	Domestic Violence Liaison Officer (NSW)
DVSAT	Domestic Violence Safety Assessment Tool
DVDRT	Domestic Violence Death Review Team (NSW)
FVIO	Family Violence Intervention Order (Victoria)
IPV	Intimate partner violence
NRAP	National Risk Assessment Principles
NSW	New South Wales
NSWLRC	NSW Law Reform Commission
OIC	Officer in Charge
PINOP	Person in need of protection
PO	Protection order (general term)
PPO	Police Provisional Order (NSW)
RCFV	Royal Commission into Family Violence (Victoria)
SAM	Safety Action Meeting
UNSW	University of New South Wales
US	United States
WDVCAS	Women's Domestic Violence Court Advocacy Services

## Abstract

A multitude of national and state-based legal and non-legal responses have attempted to address domestic and family violence (DFV) in Australia, with mixed success. Recognition of the pervasiveness of DFV and severity of harm it causes has prompted government and sector responses increasingly focused on identifying, assessing and managing 'risk'. Risk-based approaches can be observed across the DFV service delivery system, including in court processes for protection orders (POs): a widely used civil legal intervention in Australia aimed at protecting victims/survivors from DFV. Due to their ubiquity, considerable research has focused on the effectiveness of POs and, separately, risk-based approaches to DFV. Yet few studies examine how DFV risk considerations inform the making of POs and the implications for victims/survivors' safety. This gap in the research is striking considering the heavy reliance on POs and their oft-assumed role (albeit with mixed efficacy) in mitigating risk and preventing further DFV. This study aims to fill this gap by examining how DFV risk considerations inform the making of POs, and what this means for the safety of victims/survivors' safety. As POs in Australia are administered under diverse state and territory legislative regimes, this study focuses on New South Wales (NSW), where POs are known as Apprehended Domestic Violence Orders (ADVOs).

The ADVO system is technically complex and involves multiple, diverse professionals. This study's findings are based on qualitative interviews conducted with key court-involved professionals, made up of 12 magistrates, eight lawyers and eight court support workers. Three implications for considering 'risk' in the NSW ADVO system emerge from these interview findings. Firstly, adopting a structured approach to 'risk' throughout the ADVO process, underpinned by a clear conceptual framework of 'DFV risk' would assist in more *consistent* risk considerations being undertaken for the purposes of ADVOs. Secondly, embedding opportunities for victims/survivors' input at all stages in the ADVO process is necessary to ensure any adopted risk-based approaches result in *enhanced safety*. Thirdly, constraints in the underlying design and operation of the ADVO system and the currently ambiguous conceptual framework of 'risk' indicates inherent challenges and limitations exist in adopting any structured approaches to 'risk' in the ADVO context. Effectively addressing these challenges and limitations requires resolving more profound questions about how we define the role and 'effectiveness' of ADVOs, what benefits we expect risk-based approaches to provide in the ADVO context, and to what extent expansive understandings of 'safety' underpin these concerns.

## A Note on Terminology

This thesis examines the Apprehended Domestic Violence Orders (ADVOs) court process in New South Wales (NSW), Australia. Across Australian and international jurisdictions, similar orders are referred to by a wide array of terms. In this thesis, references to 'ADVOs' therefore refers to the scheme in NSW, and 'Protection Orders' (POs) is used to refer to these types of orders in general.

Similarly, a range of terminology is used to refer to the parties to these orders within and across Australian states and territories, and international jurisdictions. Therefore, the person protected by a PO or ADVO may be referred to interchangeably throughout this thesis as the 'protected person', 'person in need of protection', 'complainant' and 'applicant' (if they initiate the application), depending on the context. 'Victim/survivor' may also be used, although noting that the victim/survivor may not always be accurately identified as the person in need of protection.<sup>1</sup>

The person who is subject to the order may be interchangeably referred to as the 'respondent' and 'defendant', reflecting the common usage of both terms in the NSW context including in civil proceedings. The use of 'defendant' therefore does not necessarily indicate an intersection with criminal proceedings in this thesis.

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<sup>1</sup> Heather Nancarrow et al, *Accurately Identifying the "Person Most in Need of Protection" in Domestic and Family Violence Law* (Research Report No Issue 23, ANROWS, 2020); Ellen Reeves, 'Family Violence, Protection Orders and Systems Abuse: Views of Legal Practitioners' (2020) 32(1) *Current Issues in Criminal Justice* 91; Ellen Reeves, 'A Culture of Consent: Legal Practitioners' Experiences of Representing Women Who Have Been Misidentified as Predominant Aggressors on Family Violence Intervention Orders in Victoria, Australia' (2023) 31 *Feminist Legal Studies* 369

# Chapter 1: Introduction

## 1.1. Introduction to Thesis

Domestic and family violence (DFV)<sup>1</sup> is a widespread and pervasive form of gender-based violence in Australia.<sup>2</sup> A multitude of legal and non-legal responses to reduce or eliminate DFV have been attempted by national, state and territory governments in Australia over decades. Yet DFV remains pervasive. Recognition of the ‘devastating, incalculable and ... long lasting’<sup>3</sup> harms inflicted on victims/survivors – primarily women and their children<sup>4</sup> – of DFV have led to government and community sector responses increasingly focusing on identifying, assessing and managing ‘risk’, in the hopes of enhancing victims/survivors’ safety. The extensive adoption of these risk-based approaches can be seen across DFV service systems in Australia, including in relation to widely used state-based protection orders (POs), which are a civil legal intervention aimed at protecting victims/survivors from DFV. POs are commonly framed in Australian and international research and policy as future-focused interventions intended to mitigate risk and keep victims/survivors safe from ongoing harm. Consequently, there has been considerable research into the effectiveness of POs, with mixed findings. Few of these studies, however, examine how DFV risk considerations inform the making of POs or identify the implications for victims/survivors’ safety. Considering the primacy of risk-based approaches to DFV and the heavy reliance on POs in state-based responses, this is a striking gap in the current state of knowledge on a key legal response to DFV. Therefore, this thesis aims to address this gap by examining how

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<sup>1</sup> Varying definitions of DFV are used in literature and policy materials: see, eg, Stella Tarrant, Julia Tolmie and George Giudice, *Transforming Legal Understandings of Intimate Partner Violence* (Research Report No 03/2019, ANROWS, 2019); Sylvia Walby and Jude Towers, ‘Untangling the Concept of Coercive Control: Theorizing Domestic Violent Crime’ (2018) 18(1) *Criminology & Criminal Justice* 7. This thesis applies an understanding of DFV that is characterised by social entrapment and coercive control, which can involve an array of behaviours including emotional, psychological, physical, sexual, economic and spiritual abuse (Family Violence Death Review Committee, *Fifth Report: January 2014 to December 2015* (Family Violence Death Review Committee, New Zealand, 2016) <[FVDR-5th-report-Feb-2016-v2.pdf](#)>13; Julia Tolmie, Rachel Smith and Denise Wilson, ‘Understanding Intimate Partner Violence: Why Coercive Control Requires a Social and Systemic Entrapment Framework’ (2024) 30(1) *Violence Against Women* 54). As intimate partner violence (IPV) is the most common form of DFV studied in extant literature, the two terms are used interchangeably in this thesis unless otherwise stated.

<sup>2</sup> According to the Australian Bureau of Statistics (ABS), in 2021–22 ‘An estimated 4.2 million adults (21%) have experienced partner violence or abuse since the age of 15’: ABS, ‘Partner Violence, 2021–22 Financial Year’ (22 November 2023) <<https://www.abs.gov.au/statistics/people/crime-and-justice/partner-violence/latest-release>>).

<sup>3</sup> Helen McLaren, Jane Fischer and Lana Zannettino, *Defining Quality of Life Indicators for Measuring Perpetrator Intervention Effectiveness* (Research Report No 05/2020, ANROWS, 2020) 16.

<sup>4</sup> This thesis adopts a gendered understanding of DFV and uses gendered language, in recognition that women are more likely to experience IPV than men and 75% of victims killed by an intimate partner in Australia between mid-2002 to mid-2012 were women (see ANROWS, ‘Violence Against Women: Accurate Use of Key Statistics’, *ANROWS — Australia’s National Research Organisation for Women’s Safety* (2018) <<https://www.anrows.org.au/publication/violence-against-women-accurate-use-of-key-statistics/read/>> (‘*Violence against Women*’)). This is not to ignore or downplay that DFV can be, and is, perpetrated by some women against their male partners, and that DFV can occur in many types of family relationships. However, as DFV is most prevalently perpetrated by men towards women, the gendered nature of DFV is recognised and reinforced throughout this thesis.

considerations of risk of DFV occur in the PO court process in one Australian state, New South Wales (NSW), and what this means for enhancing victims/survivors' safety.

## 1.2. Study Context

### 1.2.1. Apprehended Domestic Violence Orders as a Primarily Legal Intervention

In NSW, POs are known as Apprehended Domestic Violence Orders (ADVOs) and are 'a cornerstone ... response to domestic violence and the most common intervention received by domestic violence victims'.<sup>5</sup> According to the NSW Bureau of Crime Statistics and Research (BOCSAR), almost 50,000 orders were commenced between October 2023 and September 2024.<sup>6</sup> Administered under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ('ADVO Act'), ADVOs offer a unique civil remedy aimed at protecting victims/survivors from future violence,<sup>7</sup> and essentially operate as either a temporary or final court order to constrain 'the defendant from engaging in certain behaviours'<sup>8</sup> in relation to the person protected by the order ('the protected person'). The future-focus of ADVOs is evident in the first two objectives of the *ADVO Act*, to 'ensure the safety and protection of all persons, including children, who experience or witness domestic violence'<sup>9</sup> and 'reduce and prevent violence',<sup>10</sup> by '(a) empowering courts to make [ADVOs], and (b) ensuring that access to courts is as safe, speedy, inexpensive and simple as is consistent with justice'.<sup>11</sup> This is mirrored in the PO legislation of other states and territories.<sup>12</sup>

ADVOs may be dealt with on their own as standalone applications, or alongside the criminal prosecution of associated DFV offences. They are generally dealt with by magistrates in the NSW Local Court,<sup>13</sup> following an application made by the police (a police application) or the person

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<sup>5</sup> Bureau of Crime Statistics and Research (NSW) (BOCSAR), 'New Domestic Violence Data: Monitoring Apprehended Violence Orders and Coercive Control in NSW', BOCSAR (9 October 2024) <<https://bocsar.nsw.gov.au/media/2024/new-domestic-violence-data-avo-and-coercive-control.html>>.

<sup>6</sup> BOCSAR, *Data to September 2024* (NSW Trends in Domestic & Family Violence — Quarterly Report, BOCSAR) <[https://bocsar.nsw.gov.au/documents/topic-areas/domestic-violence/Domestic\\_Violence\\_Quarterly\\_Trends\\_Report.pdf](https://bocsar.nsw.gov.au/documents/topic-areas/domestic-violence/Domestic_Violence_Quarterly_Trends_Report.pdf)> 4.

<sup>7</sup> Heather Douglas, 'Domestic Violence Protection Orders and Their Role in Ensuring Personal Security' in Kate Fitz-Gibbon et al (eds), *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Routledge, 1st ed, 2018) 216; Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC), *Family Violence — A National Legal Response* (ALRC and NSWLRC, 2010) [4.23].

<sup>8</sup> Women's Legal Service NSW, *A Practitioner's Guide to Domestic Violence Law in NSW* (2018) 19.

<sup>9</sup> *ADVO Act*, s 9 (1)(a).

<sup>10</sup> *Ibid* s 9 (1)(b).

<sup>11</sup> *Ibid* s 9 (2).

<sup>12</sup> See, eg, *Family Violence Protection Act 2008* (Vic) s 1 (a); *Domestic and Family Violence Protection Act 2012* (Qld) s 3 (1) (a).

<sup>13</sup> The title for 'magistrates' in NSW was changed to 'Local Court Judges' in November 2024: NSW Government, 'Magistrates to Be Called Judges under Historic Change to Local Court Act', *Ministerial Releases* (20 November 2024) <<https://www.nsw.gov.au/media-releases/magistrates-to-be-called-judges-under-historic-change-to-local-court-act>>. 'Magistrates' is retained throughout this thesis however, to accurately reflect the participants and NSW policy context at the time of the study.

seeking protection (a private application) to the court that sets out the grounds of the application. Although a commonly claimed benefit of such orders internationally is their ability to offer autonomy to victims/survivors to apply for orders themselves with conditions tailored to their individual circumstances,<sup>14</sup> in NSW ADVOs are overwhelmingly applied for by police.<sup>15</sup> This predominance of police-initiated applications reflects a general trend observed across Australian jurisdictions,<sup>16</sup> and undermines some the assumed benefits in terms of victim/survivor- agency in regards to private applications. And, as with other Australian jurisdictions, NSW ADVOs 'are supported primarily through (the threat of) criminal prosecution and sentencing for any breach of the DVO ... and by placing police on notice of potential risk'.<sup>17</sup> Police are also able to issue temporary ADVOs, known as Police Provisional Orders, in some circumstances. This means that, overwhelmingly, ADVOs are police-initiated and police-led, including involvement of a police prosecutor to represent the application in court. Other key actors commonly involved in the ADVO court process include lawyers (representing either defendants or victims/survivors in private applications) and court support workers. Regardless of the type of order, once made by a court,<sup>18</sup> an ADVO is legally enforceable; breaching any condition of the ADVO is a criminal offence.<sup>19</sup> These features, combined with the central role of police at all stages of the ADVO process, mean that ADVOs are technically civil in nature, but deeply entwined with policing and criminal legal responses.<sup>20</sup>

Notwithstanding their widespread use over decades, Australian and international studies into POs such as ADVOs have produced mixed evidence of their effectiveness in reducing or mitigating the risks of DFV, and in enhancing victims/survivors' safety.<sup>21</sup> Recurring issues identified are that

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<sup>14</sup> Lauren Bennett Cattaneo, Jessica Grossmann and Aliya R Chapman, 'The Goals of IPV Survivors Receiving Orders of Protection: An Application of the Empowerment Process Model' (2016) 31(17) *Journal of Interpersonal Violence* 2889, 2891.

<sup>15</sup> According to BOCSAR, 'Police apply for 98% of domestic AVOs, while 1% are initiated by a member of the public' in NSW: BOCSAR (n 5).

<sup>16</sup> E.g. 73.3% of FVIO applications in Victoria in 2023-24 were initiated by police and 83.6% of applications were lodged by police in QLD in 2024-25: Victorian Law Reform Commission, *Examining Aspects of Family Violence Intervention Orders for Children and Young Adults: Stage 1 – Protection for Children Who Trun 18 While on a Family Violence Intervention Order* (Issues Paper, March 2025) 9; Queensland Courts, 'Nature of Applications: Table 3. Lodging Authority, 2024-25 YTD (to 31 May 2025)', *Queensland Courts' Domestic and Family Violence (DFV) Statistics* (Web Page, 19 June 2025) < <https://www.courts.qld.gov.au/court-users/researchers-and-public/stats>>.

<sup>17</sup> Douglas (n 7).

<sup>18</sup> And served on the defendant, if not present at court: *ADVO Act* s 14 (2).

<sup>19</sup> Maximum penalties including imprisonment for up to two years or a fine of 50 penalty units: *ADVO Act* s 14 (1). Note that in September 2024, the NSW Government introduced more serious penalties and additional offences relating to ADVOs: NSW Government, 'A Safer NSW: Stronger Protections for Victim-Survivors of Domestic and Family Violence', *Ministerial Releases* (2 September 2024) <<https://www.nsw.gov.au/media-releases/a-safer-nsw-stronger-protections-for-victim-survivors-of-domestic-and-family-violence>>. As these reforms occurred at the conclusion of this study, this thesis describes the ADVO regime in operation during the study period.

<sup>20</sup> Alesha Durfee, 'The Use of Structural Intersectionality as a Method to Analyze How the Domestic Violence Civil Protective Order Process Replicates Inequality' (2021) 27(5) *Violence Against Women* 639, 657.

<sup>21</sup> See, eg, Douglas (n 7) 217–218; Reinie Cordier et al, 'The Effectiveness of Protection Orders in Reducing Recidivism in Domestic Violence: A Systematic Review and Meta-Analysis' (2019) 22(4) *Trauma, Violence, and Abuse* 804; Christopher T Benitez, Dale E McNeil and Renee L Binder, 'Do Protection Orders Protect?' (2010) 38(3) *Journal of the American Academy of Psychiatry and the*

judicial officers grade ‘harm’ differently,<sup>22</sup> and the extent to which victims/survivors’ views and preferences are considered by different court-involved actors is variable.<sup>23</sup> There has also been policy recognition at both the federal and state-level of the need to improve PO systems to enhance victims/survivors’ safety. The most recent *National Plan to End Violence against Women and Children 2022–2032* (‘National Plan’)<sup>24</sup> states that ‘uphold[ing] victim-survivor safety and reduc[ing] or stop[ping] a perpetrator’s use of violence’ should be monitored and evaluated for ‘legal and justice interventions’,<sup>25</sup> and emphasises a need to improve justice responses including ‘the provision of police and court ordered intervention orders’<sup>26</sup> across Australia. Similarly, the *NSW Domestic and Family Violence Plan 2022–2027* (‘NSW Plan’) aims to ‘prioritise victim-survivor’s safety and needs’<sup>27</sup> and ‘support victim-survivors to secure immediate and long-term safety’<sup>28</sup> when responding to DFV.<sup>29</sup> Specifically, it commits to continuing ‘to monitor the operation of ADVOs, including in relation to recent reforms, and identify opportunities for improvement’.<sup>30</sup> These policy and research findings suggest the need for further inquiry into ADVO processes in NSW.

Questions about how to improve PO processes and the extent to which they deliver safer outcomes for victims/survivors are not new. In practice, ‘practitioners place a great deal of emphasis on victims gaining protection orders and these are often the focus of safety plans to deal with IPV’,<sup>31</sup> and the safety (or otherwise) afforded by POs is regularly scrutinised following DFV homicides and coronial inquiries.<sup>32</sup> Consequently, various studies — primarily conducted in

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*Law* 376, 385; TK Logan and Robert Walker, ‘Civil Protective Order Effectiveness: Justice or Just a Piece of Paper?’ (2010) 25(3) *Violence and Victims* 332; Brenda Russell, ‘Effectiveness, Victim Safety, Characteristics, and Enforcement of Protective Orders’ (2012) 3(4) *Partner Abuse* 531; Kate Thomas, Kate Fitz-Gibbon and Janemaree Maher, ‘The Use of Protection Orders in Response to Adolescent Family Violence: Mapping Divergent Australian Approaches and the Merits of This Criminal Justice Intervention’ (2019) 31(4) *Current Issues in Criminal Justice* 461.

<sup>22</sup> Eg, Patricia Easteal, Lorana Bartels and Reeva Mittal, ‘The Importance of Understanding the Victims’ “Reality” of Domestic Violence’ (2019) 44(1) *Alternative Law Journal* 11, 13.

<sup>23</sup> Silke Meyer and Ellen Reeves, ‘Policies, Procedures and Risk Aversity: Police Decision-Making in Domestic Violence Matters in an Australian Jurisdiction’ (2021) 31(10) *Policing & Society* 1168; Kate Fitz-Gibbon et al, *The Views of Australian Judicial Officers on Domestic and Family Violence Perpetrator Interventions* (Research Report No Issue 13, ANROWS, 2020) 39–40.

<sup>24</sup> A joint initiative of the Commonwealth, state and territory governments.

<sup>25</sup> *National Plan to End Violence against Women and Children 2022–2032* (Commonwealth Government of Australia, 2022) <<https://www.dss.gov.au/system/files/resources/national-plan-end-violence-against-women-and-children-2022-2032.pdf>> 74 (‘National Plan’).

<sup>26</sup> *Ibid* 62.

<sup>27</sup> NSW Government, *NSW Domestic and Family Violence Plan 2022–2027* (December 2022) <<https://dcj.nsw.gov.au/documents/service-providers/domestic-and-family-violence-services/NSW-Domestic-and-Family-Violence-Plan-2022-2027.pdf>> 25 (‘NSW DFV Plan 2022–2027’).

<sup>28</sup> *Ibid* 34.

<sup>29</sup> *Ibid*.

<sup>30</sup> *Ibid* 35–36.

<sup>31</sup> Tarrant, Tolmie and Giudice (n 1), 20.

<sup>32</sup> See, eg, Lisa Benny-Morrison and Ava Visentin, ‘Years of ADVOs Failed to Protect Allegedly Murdered Mother of Five Sharon Michelutti’, *The Sydney Morning Herald* (online, 7 February 2016) <<https://www.smh.com.au/national/nsw-years-of-avos-failed-to-protect-allegedly-murdered-mother-of-five-sharon-michelutti-20160205-gmn0cp.html>>; Inga Ting and Alex Lim, ‘A Pattern Set to Failure’, *ABC News* (online, 5 June 2024) <<https://www.abc.net.au/news/2024-06-06/nsw-police-failures-to-properly-investigate>>

the US — have examined factors influencing PO outcomes, including what may be influential in judicial decision making.<sup>33</sup> Yet, within this field, there has been little examination of how considerations of DFV risks inform the making of POs, and what this means for victims/survivors' safety. A small number of studies have made recommendations to improve PO decision-making processes and outcomes, such as the greater incorporation of standardised risk assessments to be conducted as part of broader court processes.<sup>34</sup> However, there is a particular absence of Australian or NSW studies in this area. This is notable given the extensive adoption of risk-based approaches across the NSW DFV service system in recent years.

### 1.2.2. Increasing Adoption of Risk-Based Approaches

Alongside the heavy reliance on ADVOs in NSW and policy recognition of 'safety' as a priority in DFV responses, risk-based approaches are often characterised as 'techniques of harm prevention'<sup>35</sup> to support victims/survivors' safety<sup>36</sup> and have been broadly embraced in government policy and the DFV service system's approaches.<sup>37</sup> The primacy of risk-based approaches to DFV can be observed in multiple features of NSW's DFV service system. The Domestic Violence Safety Assessment Tool (DVSAT),<sup>38</sup> a standardised risk assessment tool, has

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domestic-violence/103927244><https://www.abc.net.au/news/2024-06-06/nsw-police-failures-to-properly-investigate-domestic-violence/103927244>; Sarah Conte and Ewa Staszewska, 'Arman's Father Killed His Mother. He Says Protection Orders Do Little to Protect Women', *SBS News* (online, 10 May 2024) <<https://www.sbs.com.au/news/article/amrans-father-murdered-his-mother-he-says-this-system-is-failing-vulnerable-women/gae503zpu>>. See also Alesha Durfee and Leigh Goodmark, 'Re-Envisioning Protective Orders for Domestic Violence' in Ruth E Fleury-Steiner, M Kristen Hefner and Susan L Miller (eds), *Civil Court Responses to Intimate Partner Violence and Abuse* (Cognella, 2020) 63, 63, who report that 'whether the "victim"(s) filed for and obtained a PO is a normative component of news coverage of IPV homicides' in the US as well.

<sup>33</sup> See, eg, Karol Lucken, Jeffrey W Rosky and Cory Watkins, 'She Said, He Said, Judge Said: Analyzing Judicial Decision Making in Civil Protection Order Hearings' (2015) 30(12) *Journal of Interpersonal Violence* 2038; Christine Agnew-Brune et al, 'Domestic Violence Protective Orders: A Qualitative Examination of Judges' Decision-Making Processes' (2017) 32(13) *Journal of Interpersonal Violence* 1899; Ruth E Fleury-Steiner et al, "'No Contact, Except ...": Visitation Decisions in Protection Orders for Intimate Partner Abuse' (2016) 11(1) *Feminist Criminology* 3.

<sup>34</sup> These studies do not necessarily recommend the use of such tools by judicial officers, but discuss the greater use and communication of risk in the process, for example, to inform the writing of petitions that will be considered by the court, or use of assessment tools by prosecutors and communication of risk between police and prosecutors: Corey Nichols-Hadeed et al, 'Assessing Danger: What Judges Need to Know' (2012) 50(1) *Family Court Review* 150; Susanne JM Strand, Sofi Fröberg and Jennifer E Storey, 'Protecting Victims of Intimate Partner Violence: Swedish Prosecutors' Experiences of Decision-Making Regarding Restraining Orders' (2018) 19(2) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 170.

<sup>35</sup> Pat O'Malley, *Crime and Risk* (SAGE, 2010) 3.

<sup>36</sup> See, eg, Cherie Toivonen and Corina Backhouse, *National Risk Assessment Principles for Domestic and Family Violence* (ANROWS Insights 07/2018, ANROWS, 2018) 5.

<sup>37</sup> Corina Backhouse and Cherie Toivonen, *National Risk Assessment Principles for Domestic and Family Violence: Companion Resource* (ANROWS Insights 09/2018, ANROWS, 2018) 9. The application of risk-based approaches to DFV can be tracked back to the 1980s: Elizabeth A Stanko, 'Safety Talk: Conceptualizing Women's Risk Assessment as a "Technology of the Soul"' (1997) 1(4) *Theoretical Criminology* 479, 481. Their continuing primacy can be seen in the NSW Government's announcement of a common risk assessment framework in 2024: Kate Newton, 'New Domestic Violence Framework to Improve NSW First Responder Skills', *UNSW Newsroom* (University of New South Wales (UNSW), online, 5 March 2024) <<https://www.unsw.edu.au/newsroom/news/2024/03/domestic-and-family-violence--new-framework-to-improve-first-res>>.

<sup>38</sup> NSW Government, *Domestic Violence Safety Assessment Tool* (NSW Government, June 2015) <<http://www.domesticviolence.nsw.gov.au/data/assets/file/0020/301178/DVSAT.pdf>>.

been mandated for NSW police to use when responding to DFV matters since 2015<sup>39</sup> and is routinely employed by other court-involved actors such as Women’s Domestic Violence Court Advocacy Services (WDVCAS). ‘Risk’ language also underpins the NSW Government’s *Safer Pathway Program*, which provides protocols for agencies such as police and WDVCAS regarding information sharing and management of high-risk DFV matters,<sup>40</sup> and is prominent in the Government’s current focus areas detailed in the *NSW Domestic and Family Violence Plan 2022–2027*.<sup>41</sup> This includes commitments to:<sup>42</sup>

- develop ‘a common risk assessment framework that can be used by all agencies and providers’;<sup>43</sup>
- improve ‘the effectiveness of integrated, cross-agency responses’, including the DVSA;<sup>43</sup>
- expand the *Safer Pathway Program* to include ‘new referral pathways so victims who do not report to police can be triaged for risk and referred to adequate support services’; and
- review information sharing arrangements ‘to ensure victim-survivors receive coordinated supports that meets their specific safety and welfare needs’.

Within these broader policy settings, certain court-involved professionals, such as police and court support workers, have interconnecting roles in both the ADVO court process and undertaking formal risk assessment and management actions. For example, when a report is made to police by a victim-survivor, the police are required to complete the DVSA risk assessment tool, refer the case to a Local Coordination Point, share information in accordance

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<sup>39</sup> Clare Ringland, ‘The Domestic Violence Safety Assessment Tool (DVSA) and Intimate Partner Repeat Victimization’ (2018) 213 *Crime and Justice Bulletin (BOCSAR): Contemporary Issues in Crime and Justice* 1, 2.

<sup>40</sup> See NSW Government, *It Stops Here: Safer Pathway Overview* (State of New South Wales, 2014) <[http://www.domesticviolence.nsw.gov.au/\\_data/assets/file/0013/301180/Overview\\_Safer-Pathway.pdf](http://www.domesticviolence.nsw.gov.au/_data/assets/file/0013/301180/Overview_Safer-Pathway.pdf)>.

<sup>41</sup> *NSW DFV Plan 2022–2027* (n 27) 35–36.

<sup>42</sup> The following options are paraphrased from: *NSW DFV Plan 2022–2027* (n 27) 35.

<sup>43</sup> Work to develop a common risk assessment framework for organisations in NSW to ‘better assess and manage domestic and family violence risk’ was announced by the NSW Government in March 2024, but not released at the time of writing: see Newton (n 37). Such a framework is consistent with similar frameworks that have been adopted by other Australian states and territories across the country in the past decade, eg, Community Services Directorate, *ACT Domestic and Family Violence Risk Assessment Framework* (ACT Government, July 2022) <[https://www.act.gov.au/\\_data/assets/pdf\\_file/0006/2388453/ACT-Domestic-and-Family-Violence-Risk-Assessment-Framework.pdf](https://www.act.gov.au/_data/assets/pdf_file/0006/2388453/ACT-Domestic-and-Family-Violence-Risk-Assessment-Framework.pdf)>; Department for Child Protection and Family Support, *Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2<sup>nd</sup> ed, Western Australian Government, 2015) <<https://www.wa.gov.au/system/files/2021-10/CRARMF.pdf>>; Family Safety Victoria, ‘Family Violence Multi-Agency Risk Assessment and Management Framework’ (30 June 2018) <<https://www.vic.gov.au/family-violence-multi-agency-risk-assessment-and-management-framework>>; Government of South Australia, *Practice Manual: Family Safety Framework* (Government of South Australia, 2022) <<https://officeforwomen.sa.gov.au/documents/family-safety-portal/Family-Safety-Framework-Manual.pdf>>; Northern Territory Government, *Northern Territory Domestic and Family Violence Risk Assessment and Management Framework* (Northern Territory Government, September 2020) <[https://families.nt.gov.au/\\_data/assets/pdf\\_file/0008/942074/risk-assessment-management-framework.pdf](https://families.nt.gov.au/_data/assets/pdf_file/0008/942074/risk-assessment-management-framework.pdf)>; Queensland Government, *Domestic and Family Violence Common Risk and Safety Framework* (Version 2, The State of Queensland, December 2022) <<https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/c927ea9b-6973-4912-966e-dc11d1d46a67/common-risk-safety-framework-2022.pdf?ETag=70793b6943532f9f1f2c9f038704f600>>.

with relevant protocols and participate in a Safety Action Meeting (SAM) (for high-risk cases), as well as seek an ADVO on behalf of that victim/survivor. Similarly, WDVCS workers often provide court support services to women for DFV matters including ADVOs, while also operating as the Local Coordination Point and being involved in SAMs and information-sharing protocols under the *Safer Pathway Program*. In contrast, other pivotal court-involved actors, such as lawyers and magistrates, are not governed by these broader risk-based policy frameworks. The extent of interconnections between the ADVO process and these broader state-wide risk policy settings are explained in **Chapter 4**. At a high-level however, observing these interconnections raises the question as to whether, and how, considerations of ‘risk’ by various court-involved actors inform the ADVO process in NSW, and what implications this has for the efficacy of ADVOs. No empirical study has been conducted on if and how risk considerations within the NSW ADVO process occur, or whether such considerations do, or could, contribute to safer outcomes. This is a striking gap, considering the heavy reliance on ADVOs as a key intervention, the increasingly dominant focus on ‘risk’ across the DFV sector and the apparent synergies between the future-focused aims of both POs and risk-based approaches more generally.

In sum, if it is true that ‘police and the justice system have the primary role in managing perpetrator risk’<sup>44</sup> and ADVOs are to continue to be used as a key intervention for doing so in NSW, it is important to understand the extent to which risk is — and should be — considered in the ADVO process, and what this means for victims/survivors’ safety. As the Victorian Royal Commission into Family Violence (RCFV) stated in 2016, ‘strong justice responses are needed to ensure that perpetrators who continue to use violence are subject to consistent and appropriate penalties and consequences’.<sup>45</sup> Conversely, ‘The consequences of ineffective responses can be frustrating, disempowering and potentially lead to lethal consequences’.<sup>46</sup> Considering that legislative provisions and published guidelines ‘may provide some indication of the views of a particular jurisdiction but it is unlikely that there will be a transparent system of risk assessment informing court decision’,<sup>47</sup> further empirical study with court professionals involved in ADVO matters provides an important opportunity to enhance a key legal intervention used in response to DFV. The primary aim of this study is, therefore, to examine how ‘risk of DFV’ is considered in

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<sup>44</sup> State of Victoria, *Royal Commission Into Family Violence Volume I: Report and Recommendations* (Parliamentary Paper No 132 (2014–16), March 2016) 144.

<sup>45</sup> *Ibid.*

<sup>46</sup> Annabel Taylor et al, *Domestic and Family Violence Protection Orders in Australia: An Investigation of Information Sharing and Enforcement: State of Knowledge Paper* (ANROWS Landscapes 16/2015, ANROWS, 2015) <[https://anrows-2019.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2019/02/19024752/16\\_4.1-Legal-WEB\\_FINAL\\_0-1.pdf](https://anrows-2019.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2019/02/19024752/16_4.1-Legal-WEB_FINAL_0-1.pdf)> 44.

<sup>47</sup> *Ibid.* 16.

the making of ADVOs in NSW, via qualitative empirical study with key court-involved professionals.

### 1.3. Research Aim and Questions

In order to address the study's primary research aim, five interrelated research questions arise:

- RQ1** To what extent do relevant civil procedures enable 'risk of DFV' to be considered by key court-involved actors in the making of ADVOs in NSW?
- RQ2** How do key ADVO court-involved actors conceptualise 'risk of DFV' in NSW?
- RQ3** What formal and informal practices do key court-involved actors engage in to consider 'risk of DFV' in the making of ADVOs in NSW?
- RQ4** What implications do these conceptualisations, civil procedures and practices have for the assessment and management of 'risk of DFV' in the making of ADVOs?
- RQ5** Can civil procedures and practices be improved to enable 'risk of DFV' to be appropriately considered by key court-involved actors in the making of ADVOs?

These research questions are complex and must be informed by detailed and technical knowledge of the legislative and administrative regimes under study. Therefore, I answer these research questions based on findings from qualitative interviews I conducted with 28 key court-involved actors in the NSW ADVO system between August 2021 to February 2023, namely: magistrates (the primary decision makers on ADVOs); lawyers (including a combination of duty lawyers, community and private legal practitioners who provide legal support to DFV victims/survivors and/or defendants on ADVOs); and court support workers (who support victims/survivors during the ADVO process and are governed by risk-based protocols under the *Safer Pathway Program*).

Being able to compare and contrast the perspectives of multiple professional groups and individuals within those groups allows the study to contextualise different constructions and conceptualisations of 'risk' amongst various court-involved actors. At the outset, it is important to note the lack of police perspectives in this study despite my substantial efforts to include them. As detailed above, the police role is pivotal in every stage of the ADVO process from application (applying for the vast majority of ADVOs and prosecuting them in court) to enforcement. Despite early, promising engagement with NSW Police when scoping the project in early 2021, the NSW Police Research Office ultimately declined to permit police employees to

participate in data collection interviews. This means their perspectives are missing from this research, which is a significant albeit unavoidable limitation. As will be seen, the study's findings produce a number of important insights to inform further research with police.

Additionally, there is an absence of first-hand accounts from victims/survivors' about their lived experiences in this study and of those most marginalised by embedded structural inequities in the legal and policing systems in which ADVOs are administered.<sup>48</sup> The central focus of this study is on establishing what shapes decision making and outcomes currently occurring in the ADVO court process. This requires obtaining insights from key informants working in the system, who can provide detailed knowledge of the technical processes and other formal and informal factors that may influence their considerations, such as civil legal procedures and professional practices. This is both a strength and a limitation – while the study's access to the 'insider' knowledge of multiple court-involved professionals delivers a detailed picture of the system in which risk considerations are made and ADVOs are administered, these perspectives are confined to those who make those decisions, rather than those directly impacted by them. Conscious of this, in thematically analysing these interviews, I have applied a critical theoretical framework that incorporates components of Charmaz's constructivist grounded theory,<sup>49</sup> feminist legal theory, structural intersectionality and risk society scholarship. Applying this theoretical framework enables the study to engage critically with interviewees' insider perspectives of the ADVO system. Specifically, I have drawn out three conceptual features informed by these theoretical approaches, which explicitly and implicitly inform my analysis:

1. An ontological emphasis on understanding 'risk' as a constructed concept, and that constructed meanings of risk will shape individuals court-involved actors' approaches to risk.
2. Resisting universalising framings of 'risk', 'safety' or experiences and dynamics of DFV, as these fail to account for victims/survivors' individual lived realities and the impacts of embedded structural inequities on their experiences of DFV, 'risk' and 'safety'.
3. Foregrounding the role of structures, systems and processes, rather than isolating discrete issues within these systems.

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<sup>48</sup> Durfee (n 20) 651; Siobhan O'Brien and Sarah Morton, 'Listening to Less-Heard Voices' in John Devaney, Caroline Bradbury-Jones, Rebecca J Macy, Carolina Øverlien and Stephanie Holt, *The Routledge International Handbook of Domestic Violence and Abuse* (Routledge, 2021) 627.

<sup>49</sup> Kathy Charmaz, 'Grounded Theory Methods in Social Justice Research' in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE, 4<sup>th</sup> ed, 2011) 359, 366; Kathy Charmaz, *Constructing Grounded Theory* (SAGE, 2<sup>nd</sup> ed, 2014) 117; Ylona Chun Tie, Melanie Birks and Karen Francis, 'Grounded Theory Research: A Design Framework for Novice Researchers' (2019) 7 *SAGE Open Medicine* 1, 2–3.

In relation to the latter, the role of structures and systems is a central focus in this thesis, as it allows me to ‘identify ... and address complex problems and barriers as a whole, rather than as a series of separate issues with individual solutions’,<sup>50</sup> as the extant literature on POs has tended to do. This lends a particularly valuable strength to the study’s findings.

In sum, my approach in this study is to adopt a critical lens to identify and account for complex underlying and structural factors that shape both the consideration of risk and the operation of the ADVO system, and how these may interact to produce different experiences of ‘safety’ for different victims/survivors. Adopting this theoretical framework is necessary to ensure any new knowledge and/or subsequent reforms in this area do not replicate biases in the knowledge systems underpinning ‘risk’ or inequities embedded in the legal system under study,<sup>51</sup> particularly for those victims/survivors most marginalised by society. In relation to answering the research questions, this requires critically examining not only *whether* risk considerations are occurring in the ADVO system, but *how* and *by whom* those considerations are undertaken in practice. In light of this critical lens, it is important to note at the outset several complexities that shape the scope of this study.

## 1.4. Scope of the Study

The research design I have adopted in this thesis seeks to build a detailed picture of the system in which risk considerations are undertaken and ADVOs are administered in NSW. Framing this picture are several significant conceptual and contextual complexities that have inherently shaped the scope of my research questions and analysis.

### 1.4.1. Conceptual Complexities of ‘Risk’ and ‘Safety’

The widespread incorporation of risk-based approaches to DFV is underpinned by substantial attention in academic and grey literature on the perceived benefits of adopting risk-based approaches for DFV, such as:

- raising the policy profile of the seriousness of DFV;<sup>52</sup>
- providing a shared language to communicate between diverse professionals;<sup>53</sup>

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<sup>50</sup> Durfee (n 20) 640.

<sup>51</sup> Martha Albertson Fineman, ‘Introduction’ in Martha Albertson Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge, 2013) xiv.

<sup>52</sup> Jude McCulloch et al, *Review of the Family Violence Risk Assessment and Risk Management Framework (CRAF)* (Final Report, Prepared for the Department of Health and Human Services by the School of Social Sciences, Focus Program on Gender and Family Violence: New Frameworks in Prevention, Monash University, 2016) 35, [rec 1]; Sandra Walklate and Gabe Mythen, ‘Beyond Risk Theory: Experiential Knowledge and “Knowing Otherwise”’ (2011) 11(2) *Criminology & Criminal Justice* 99, 104.

<sup>53</sup> *Ibid* (McCulloch et al).

- assisting in prioritising interventions;<sup>54</sup> and
- better tailoring responses.<sup>55</sup>

Common risk assessment and management frameworks for DFV are often framed by policy makers as especially useful ways to target ‘resources on high risk domestic violence cases’ and improve the efficacy of ‘interventions for families who are experiencing domestic violence’ across the DFV service system.<sup>56</sup> Risk-based approaches have therefore been framed by proponents as key mechanisms to improve DFV interventions and responses to better ensure victims/survivors’ safety, and have become an increasingly central focus in both literature and Australian DFV policy approaches. This includes substantial attention given to identifying ‘good practice’ principles for assessing and managing risk, such as the *National Risk Assessment Principles* published by Australia’s National Research Organisation for Women’s Safety (ANROWS),<sup>57</sup> and on developing predictively accurate standardised risk assessment tools used by various DFV professionals.<sup>58</sup>

Complicating any analysis of ‘risk’, however, is the fact that ‘risk’ is not uniformly viewed as beneficial and critiques have been levelled at the widespread adoption of ‘risk’ as a guiding conceptual framework. In particular, risk society’ theorists<sup>59</sup> raise important questions requiring further interrogation, including:

- difficulties in conceptualising ‘risk’;
- the (in)ability to predict risk; and
- flaws and limitations in the design and administration of standardised risk assessment tools.

Equally important is the recognition that victims/survivors have diverse experiences of both ‘risk’ and ‘safety’. These experiences are inherently shaped by the lived realities of DFV and structural inequities embedded in the systems in which POs are administered. Yet these differing experiences and conceptual ambiguities are not always adequately accounted for in literature on ‘risk’ or the design and implementation of risk-based approaches. These latent conceptual

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<sup>54</sup> Juan Jose Medina Ariza, Amanda Robinson and Andy Myhill, ‘Cheaper, Faster, Better: Expectations and Achievements in Police Risk Assessment of Domestic Abuse’ (2016) 10(4) *Policing* 341, 348.

<sup>55</sup> *Ibid* 341.

<sup>56</sup> Carolyn Hoyle, ‘Will She Be Safe? A Critical Analysis of Risk Assessment in Domestic Violence Cases’ (2008) 30(3) *Children and Youth Services Review* 323, 325.

<sup>57</sup> Toivonen and Backhouse (n 36).

<sup>58</sup> See, eg, Claudia E van der Put, Jeanne Gubbels and Mark Assink, ‘Predicting Domestic Violence: A Meta-Analysis on the Predictive Validity of Risk Assessment Tools’ (2019) 47 *Aggression and Violent Behavior* 100.

<sup>59</sup> Eg, Ulrich Beck, *Risk Society: Towards a New Modernity* (SAGE Publications, 1992); Pat O’Malley, *Risk, Uncertainty and Government* (GlassHouse, 2004); Walklate and Mythen (n 52).

complexities therefore require a nuanced interpretation of my primary research aim in examining how ‘risk of DFV’ is considered; one that does not assume the oft-cited benefits of risk-based approaches are universal or uncontested. I examine these complexities in more detail in **Chapters 2 and 3**.

#### 1.4.2. Evolving Socio-Political Landscape in New South Wales

Adding further ambiguity to the conceptual complexities underpinning my primary research aim is the fact that the DFV landscape is constantly in flux. Much can be learned from examining the persistent and structural challenges that exist in this area, as this thesis seeks to do. However, several significant developments in NSW commenced, or were ongoing, during this study and warrant specific mention, as they provide important context for the scope of my interviews and analysis.

##### *i. Review of the Domestic Violence Safety Assessment Tool (2022–ongoing)*

The first is that the DVSAT has been in the process of being redesigned by NSW Police (for police officers) and Legal Aid (for WDVCS workers) since 2022, following an independent evaluation of the DVSAT in 2019.<sup>60</sup> The redesigned tool was originally ‘scheduled to be finalised by the end of 2022’,<sup>61</sup> but was still under development at the time of writing. As a result, interview discussions of risk-based approaches in this study were based on the original version of the DVSAT, but sometimes referred to the version under development. Detailed consideration of the DVSAT in use at the time of the study and relevant evaluation findings occurs in **Chapter 6**.

##### *ii. NSW Criminalisation of Coercive Control (2021–2024) and Apprehended Domestic Violence Order reforms*

The second major development was an inquiry into criminalising coercive control conducted in 2021 by the NSW Joint Select Committee on Coercive Control (‘NSW Coercive Control Inquiry’).<sup>62</sup> While the question of whether to introduce a criminal offence of coercive control is not directly relevant to the NSW ADVO regime, several outcomes of the inquiry and debates surrounding it had important implications for this study. Most significantly for this study on ADVOs, in addition to recommending a criminal offence of coercive control be introduced, the NSW Coercive Control

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<sup>60</sup> ARTD, *Safer Pathway Evaluation Final Report* (NSW Government, February 2019); and NSW Domestic Violence Death Review Team, *Report 2019–2021* (NSW Government, 2022) <[https://coroners.nsw.gov.au/documents/reports/2019-2021\\_DVDRT\\_Report.pdf](https://coroners.nsw.gov.au/documents/reports/2019-2021_DVDRT_Report.pdf)> 214–218.

<sup>61</sup> *Ibid* (NSW Domestic Violence Death Review Team) 221.

<sup>62</sup> Joint Select Committee on Coercive Control, *Coercive Control in Domestic Relationships* (No 1/57, Parliament of New South Wales, June 2021) <<https://www.parliament.nsw.gov.au/ladocs/inquiries/2626/Report%20-%20coercive%20control%20in%20domestic%20relationships.pdf>>.

Inquiry recommended a definition of ‘domestic abuse’ be inserted into the *ADVO Act*.<sup>63</sup> The NSW Government accepted both of these recommendations and introduced the offence and the new definition via a bill passed in 2022.<sup>64</sup> Before this amendment the NSW *ADVO Act* was ‘an outlier’ amongst Australian states and territories in not containing a legislative definition of DFV;<sup>65</sup> an issue raised by multiple interviewees.

Further, in September 2024, the NSW Government announced the introduction of multiple reforms to introduce stronger penalties for *ADVO* breaches and create new offences for serious and repeated breaches.<sup>66</sup> These various legislative reforms substantially alter the *ADVO* regime that was operating at the time interviews were conducted, while leaving intact broader structural, cultural and environmental features of the *ADVO* court process in which those reforms will be implemented. I discuss the implications of my study’s findings in the context of these initiatives at the conclusion of this thesis. However, the state of flux of the DFV service system at the time in which this study occurred is relevant to note at the outset as it provides important context and nuance to the perspectives shared by interviewees.

In particular, the NSW Coercive Control Inquiry was characterised by considerable and, at times, divisive debate amongst the DFV research and service sectors, victims/survivors, advocates and the general public, about the potential benefits or harms of introducing such an offence. Debates reflected differing experiences and views of the role of legal and police-led responses in addressing DFV, and whether those institutions currently offer sites of safety or harm for different victims/survivors and their families seeking help.<sup>67</sup> Themes from these debates extend to the *ADVO* regime and are evident throughout this study. For example, interviewees frequently speculated about the potential impact of a criminal offence of coercive control in improving

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<sup>63</sup> Ibid xiv.

<sup>64</sup> See *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW).

<sup>65</sup> *NSW DFV Plan 2022–2027* (n 27) 15.

<sup>66</sup> NSW Government (n 19).

<sup>67</sup> NSW Domestic Violence Death Review Team (n 59) 221–233; Jane Wangmann, ‘Coercive Control as the Context for Intimate Partner Violence: The Challenge for the Legal System’ in Marilyn McMahon and Paul McGorery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer Singapore, 2020) 219; Megan Davis and Emma Buxton-Namisnyk, ‘Coercive Control Law Could Harm the Women It’s Meant to Protect’, *The Sydney Morning Herald* (online, 2 July 2021) <<https://www.smh.com.au/national/nsw/coercive-control-law-could-harm-the-women-it-s-meant-to-protect-20210701-p5861e.html>>; Kathleen Calderwood, ‘Coercive Control Underpins Most Domestic Violence Deaths but Making It Illegal Is Complicated’, *ABC News* (online, 27 February 2021) <<https://www.abc.net.au/news/2021-02-27/nsw-parliamentary-inquiry-into-coercive-control/13197524>>; Kate Fitz-Gibbon, Sandra Walklate and Silke Meyer, ‘Australia Is Not Ready to Criminalise Coercive Control — Here’s Why’, *The Conversation* (online, 1 October 2020) <<http://theconversation.com/australia-is-not-ready-to-criminalise-coercive-control-heres-why-146929>>; Balawyn Jones and Akuch Kuol Anyieth, ‘CALD Communities as “Collateral Damage” in the Criminalization of Coercive Control: An Argument for Prioritizing Civil System Reform Over Further Criminalization in Victoria’ (2025) 31(2) *Violence Against Women* 598. Also see advocacy by Antoinette Braybrook, in Crowley, where she ‘cautioned that any “tough on crime” approaches should be “mindful” of the different experience of the justice system. “In our work what we see is Aboriginal women seeking safety, but they’re treated as criminals, they’re mis-identified as perpetrators and incarcerated,” she said.’ (Tom Crowley, ‘There Is Renewed Scrutiny on the Government’s Gendered Violence Plan. What Is It?’, *ABC News* (online, 29 April 2024) <<https://www.abc.net.au/news/2024-04-29/what-is-in-the-governments-gendered-violence-plan/103781850>>.

ADVO court-involved actors' understandings of the dynamics of DFV, whilst also grappling with conflicting views they may have about when and what legal responses — including police-led ADVOs — are appropriate to address DFV, and for whom they will deliver 'safety'.

iii. *Domestic and Family Violence as both Personal and Political*

These debates and the topical nature of my research also illuminated the fact that for many people working in this field and participating in this study, DFV remains both deeply personal and deeply political.<sup>68</sup> In addition to the debates surrounding the NSW Coercive Control Inquiry, during the study there were multiple high-profile DFV homicides,<sup>69</sup> followed by fluctuating cycles of intense public and media scrutiny on responses to addressing endemic violence against women and calls for governments to take action.<sup>70</sup> Several state, territory and Commonwealth inquiries, reform activities and government commitments occurred in response, including those I have detailed in NSW. Against this backdrop and with heightened scrutiny of DFV responses, much of the interview data and my analysis reflects the fact that both participants and I were grappling with our own unsettled or evolving views on 'risk', 'safety' and what necessary and appropriate responses to DFV can — and should — look like.

On a more personal level, many who participate in these debates and/or work in the field, including researchers, judicial officers, support workers, lawyers, politicians and police, are touched by violence and abuse in their own lives, whether as an adult or a child. They may also experience secondary and vicarious trauma and moral injury in observing and/or feeling complicit in the failures of the systems in which they work.<sup>71</sup> Such experiences inevitably shape people's attitudes, responses and professional practices. The level of individual commitment and profound moral and personal impacts participants expressed in working in the ADVO system is

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<sup>68</sup> Carol Hanisch, 'The Personal Is Political' (1970) *Notes From The Second Year: Women's Liberation: Major Writings of the Radical Feminists* (Shulamith Firestone, New York City).

<sup>69</sup> Many women and children's lives have also been lost without receiving sustained media coverage – itself a representation of inequities some women experience: Senate Legal and Constitutional Affairs References Committee, *Missing and Murdered First Nations Women and Children* (Commonwealth of Australia, August 2024) <[https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000085/toc\\_pdf/MissingandmurderedFirstNationswomenandchildren.pdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000085/toc_pdf/MissingandmurderedFirstNationswomenandchildren.pdf)> 181; Hannah McGlade, Kylie Cripps and Marlene Longbottom, 'Indigenous Women Are Most Affected by Domestic Violence but Have Struggled to Be Heard. It's Time We Listened', *The Conversation* (online, 11 May 2024) <<http://theconversation.com/indigenous-women-are-most-affected-by-domestic-violence-but-have-struggled-to-be-heard-its-time-we-listened-229720>>.

<sup>70</sup> See, eg, Tom Stayner, 'Bipartisan Inquiry Demands Australia "Must Do Better" in Response to Domestic Violence', *SBS News* (online, 1 April 2021) <<https://www.sbs.com.au/news/article/bipartisan-inquiry-demands-australia-must-do-better-in-response-to-domestic-violence/f8lhr4b6>>; Crowley (n 67).

<sup>71</sup> Joanna Fleck and Rachel Francis, *Vicarious Trauma in the Legal Profession* (Legal Action Group, 2021); 'Vicarious Trauma', *The Law Society of NSW* <<https://www.lawsociety.com.au/practising-law-nsw/mental-health-and-wellbeing/wellbeing-articles/vicarious-trauma>>; Jacqueline Ball, Clare Watsford and Brett Scholz, 'Psychosocial Impacts of Training to Provide Professional Help: Harm and Growth' (2022) 24(2) *Trauma (London, England)* 115; Edgar Jones, 'Moral Injury in a Context of Trauma' (2020) 216(3) *British Journal of Psychiatry* 127; Victoria Williamson et al, 'Moral Injury: The Effect on Mental Health and Implications for Treatment' (2021) 8(6) *The Lancet Psychiatry* 453; Williamson, Emma et al, 'Secondary Trauma: Emotional Safety in Sensitive Research' (2020) 18(1) *Journal of Academic Ethics* 55.

notable throughout this study; many described active ways in which they personally tried to create positive impacts for individual victims/survivors in their day-to-day professional practices. Many also conveyed they were deeply aware of the structural limitations of the system they worked within, and the breadth of transformative work required both within and beyond the legal system to achieve the systemic shifts required to accomplish and sustain meaningful societal-wide change to eliminate DFV. This reinforces my focus in this study on critically examining the structures and systems at play, rather than evaluating discrete, micro-level practices of individual court-involved actors.

In light of these complexities, the scope of my study's primary research aim is not in adjudicating so-called 'best practice' in either DFV risk assessment or ADVO decision making in NSW. The conceptual, contextual and socio-political intricacies are too complex to allow any study to '[present] easy answers'.<sup>72</sup> Instead, the thesis represents an 'exploration of ambiguity and complexity'<sup>73</sup> that aims to offer 'new insights that contribute substantially to or challenge current understandings' about 'risk' and the process of making ADVOs in NSW.<sup>74</sup>

## 1.5. Organisation of the Thesis

In this chapter, I have introduced the topic and scope of the study, including setting up its context and significance in NSW and its primary research aim.

In **Chapter 2**, I detail how the study's primary aim emerges from, and connects to, existing knowledge. This literature review includes an overview of the current state of knowledge on risk-based approaches to DFV, including widely accepted good practice principles and key critiques and limitations of 'risk' as a conceptual framework. I also review the small number of studies that have suggested a greater role for risk considerations to occur in PO court processes. Finally, I discuss the need for expansive understandings of 'safety' in DFV responses and risk-based approaches, particularly given the mixed evidence of POs' efficacy in mitigating risk of DFV, and in recognition of victims/survivors' diverse goals for POs and differing experiences of DFV and 'safety'.

In **Chapter 3** I detail and justify my theoretical framework and methodology. That is, a theoretical framework informed by components of constructivist grounded theory, feminist legal theory, structural intersectionality and risk society theorists; and qualitative thematic analysis of 28

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<sup>72</sup> Kate Seymour, Sarah Wendt and Kristin Natalier, *Responding to Domestic Violence: Difficult Conversations* (Routledge, 1<sup>st</sup> Ed, 2023) [inside cover].

<sup>73</sup> *Ibid.*

<sup>74</sup> Kirsti Malterud, Volkert Dirk Siersma and Ann Dorrit Guassora, 'Sample Size in Qualitative Interview Studies: Guided by Information Power' (2016) 26(13) *Qualitative Health Research* 1753, 1759.

semi-structured interviews with key court-involved actors with experience in the ADVO system (comprising 12 magistrates, eight lawyers and eight court support workers).

In **Chapter 4** I report my findings about the ADVO landscape in which NSW court-involved actors currently work and the extent to which it enables or inhibits the consideration of DFV risk for the purposes of ADVOs. The findings in this chapter primarily address **RQ1** and detail ways in which both the legislative framework under the *ADVO Act* and broader environmental settings of the ADVO system enable and constrain opportunities for risk considerations by court-involved actors to occur.

In **Chapter 5** I examine interviewees' conceptualisations of 'risk' in answer to **RQ2**, in the context of the landscape that emerges in **Chapter 4**. I discuss the varying understandings of 'risk' and 'assessment' court-involved actors bring to their considerations of ADVOs in the absence of a clear conceptual framework provided by the legislation, and differing conceptualisations of court-involved actors' roles in undertaking these considerations.

In **Chapter 6**, I examine the risk-based practices interviewees described as adopted by various court-involved actors within the ADVO process in answer to **RQ3**. I explore different court-involved actors' professional practices, and whether and how screening, assessment and management of risk occurs throughout the ADVO process. Having identified the occurrence of siloed and inconsistent practices, I also detail benefits, challenges and limitations identified by interviewees for adopting a more embedded, structured approach to risk across the court process.

In **Chapter 7** I discuss several key implications that arise from the findings in **Chapters 4 to 6 (RQ4)** and explore how civil procedures and practices could be improved to better enable 'risk of DFV' to be considered by key court-involved actors for the purposes of ADVOs (**RQ5**). I argue that adopting a structured approach to 'risk' in the ADVO process, underpinned by a clear conceptual framework of 'DFV risk', would assist in more consistent risk considerations being undertaken by various court-involved actors. However, to meaningfully enhance victims/survivors' safety — rather than simply improve consistency in decision making and outcomes — such a framework also needs to embed opportunities for victims/survivors' input into risk considerations and ADVO decision making at all stages in the ADVO process. This is integral to improving the effectiveness of ADVOs in addressing risk and enhancing victims/survivors' safety. Furthermore, the study findings strongly suggest that inherent constraints and unique challenges exist for embedding more structured risk-based approaches in the NSW ADVO setting. These essentially constrain the potential benefits of any structured

approach to risk that may be implemented and therefore raise more profound questions about the current design, role and purpose of ADVOs in responding to DFV.

In my concluding chapter (**Chapter 8**), I set out the significance of this study, situate its findings within the broader field of literature, and identify important areas for further research.

# Chapter 2: Literature Review

## 2.1. Introduction

This chapter sets out how the study's primary aim emerges from, and connects to, existing knowledge. The question of how 'risk of domestic and family violence (DFV)' is considered in the making of Apprehended Domestic Violence Orders (ADVOs) in New South Wales (NSW), and what this means for enhancing victims/survivors' safety, engages with two broad fields of literature: (1) socio-legal research on the effectiveness of protection orders (POs); and (2) interdisciplinary academic and grey literature on identifying, assessing and managing DFV risks.<sup>1</sup> Although there is an expansive field of international and Australian research evaluating multiple features of POs and, separately, exploring the benefits and limitations in adopting risk-based approaches to DFV, little empirical research has been conducted into the influence and relevance of risk considerations on the making of POs, and what this means for enhancing victims/survivors' safety. In outlining this gap in the research, I begin this chapter by reviewing the current standards of 'good practice' in DFV risk assessment. Recognising the 'ghostly relationship between theory and practice'<sup>2</sup> regarding risk assessment, I draw on examples of standardised tools and structured frameworks that have been adopted in different jurisdictions throughout.<sup>3</sup> At the end of this section, I detail the key priorities for courts and court-involved actors from this body of work and review what is currently known about risk considerations specifically in PO processes.

Next, I explore key critiques and limitations of risk-based approaches identified in the literature and complexities in understanding 'effectiveness' and 'safety' in relation to POs. These nuances are important to highlight as they add complexity to the question of whether and how risk considerations may benefit PO processes. In particular, the nuances I identify in this section

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<sup>1</sup> Academic and grey literature on DFV risk-based approaches and, separately, POs is voluminous and ever-growing. To navigate this rapidly evolving field, this literature review was continuously updated between 2020–2024, using multiple academic databases available publicly or via the UTS Library platform (eg, HeinOnline, Lexis, Scopus, Westlaw AU, Informit, Google Scholar, JSTOR, ProQuest, SAGE, SpringerLink). I also conducted targeted online searches of publicly available grey literature at critical junctures in the study. I supplemented this literature with key sources I became aware of via my professional networks, interviewees and discussions with colleagues in the field. Reviewing this voluminous literature base is complicated by the fact that there are wide variations in international and state-based legislative and regulatory regimes, and local service settings, regarding DFV responses. Throughout this chapter I therefore prioritise literature relevant to the NSW context and, in the absence of NSW-specific research, selectively engage with relevant broader Australian and international research. I indicate where critical differences may distinguish these studies from the NSW context.

<sup>2</sup> Sandra Walklate, 'Criminology, Gender and Risk: The Dilemmas of Northern Theorising for Southern Responses to Intimate Partner Violence' (2018) 7(1) *International Journal for Crime, Justice and Social Democracy* 1, 5.

<sup>3</sup> Note that I discuss the primary assessment tool used in NSW, the Domestic Violence Safety Assessment Tool (DVSAT), in detail in **Sections 6.3.2 (i) and (ii)**.

strongly indicate the need to adopt an expansive understanding of what ‘safety’ may mean in relation to POs and to apply a critical lens in examining the potential role of risk-based considerations in improving POs as a response to DFV.

## 2.2. Risk-Based Approaches to Domestic and Family Violence

The widespread adoption of risk-based approaches across DFV service delivery systems in NSW, and more broadly across Australia and internationally, can be partially attributed to campaigns by feminists to raise the policy profile of DFV.<sup>4</sup> Their extensive adoption also reflects the broader emergence of a ‘risk society’ observed by risk society theorists,<sup>5</sup> which has seen ‘risk-based routines and practices of government’<sup>6</sup> emerge as a ‘dominant framework for conceptualising the social problems of advanced post-industrial societies’.<sup>7</sup> Australian studies of common multi-agency DFV risk assessment and management frameworks have identified a range of benefits of risk-based approaches in the DFV field, including:<sup>8</sup>

- the symbolic value of ‘risk’ language in ‘highlight[ing] the seriousness of family violence’ and ‘overcom[ing] the resistance to discussing family violence that some people feel’;
- ‘provid[ing] an effective means of communication between service providers and victim/survivors’; and
- affirming and educating victims/survivors.

International literature indicates DFV risk-based approaches are also ‘seen as a means to improve more tailored responses to victims’,<sup>9</sup> and target ‘prevention interventions on those cases that need them most because they present the highest risk’.<sup>10</sup> Proponents of structured professional judgement approaches to risk argue they provide a shared language for practitioners, which improves ‘the consistency and visibility in risk judgements’<sup>11</sup> and allows practitioners ‘to respond

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<sup>4</sup> Elizabeth A Stanko, ‘Safety Talk: Conceptualizing Women’s Risk Assessment as a “Technology of the Soul”’ (1997) 1(4) *Theoretical Criminology* 479, 481.

<sup>5</sup> Eg, Pat O’Malley, *Risk, Uncertainty and Government* (GlassHouse, 2004); Sandra Walklate and Gabe Mythen, ‘Beyond Risk Theory: Experiential Knowledge and “Knowing Otherwise”’ (2011) 11(2) *Criminology & Criminal Justice* 99.

<sup>6</sup> Ulrich Beck, *Risk Society: Towards a New Modernity* (SAGE Publications, 1992).

<sup>7</sup> Anne-Marie McAlinden, ‘Reconceptualising “Risk”: Towards a Humanistic Paradigm of Sexual Offending’ (2022) 31(3) *Social & legal studies* 389, 389.

<sup>8</sup> Jude McCulloch et al, *Review of the Family Violence Risk Assessment and Risk Management Framework (CRAF)* (Final Report, Prepared for the Department of Health and Human Services by the School of Social Sciences, Focus Program on Gender and Family Violence: New Frameworks in Prevention, Monash University, 2016) 35, [rec 1].

<sup>9</sup> Juan Jose Medina Ariza, Amanda Robinson and Andy Myhill, ‘Cheaper, Faster, Better: Expectations and Achievements in Police Risk Assessment of Domestic Abuse’ (2016) 10(4) *Policing* 341, 341.

<sup>10</sup> Carolyn Hoyle, ‘Will She Be Safe? A Critical Analysis of Risk Assessment in Domestic Violence Cases’ (2008) 30(3) *Children and Youth Services Review* 323, 325.

<sup>11</sup> P Randall Kropp, ‘Intimate Partner Violence Risk Assessment and Management’ (2008) 23(2) *Violence and Victims* 202, 207.

and manage the safety of adults and children exposed to violence appropriately and consistently'.<sup>12</sup>

Risk-based approaches encompass a wide range of considerations, practices and models that DFV professionals may adopt, including in relation to screening and identification, assessment, and management of risks in different contexts and for different purposes. The proliferation of potential approaches to assessing and managing risk have consequently led to a body of academic and grey literature developing standards of good practice. In Australia, these standards and expectations are largely set out in common multi-agency risk frameworks that have now been implemented in most states and territories,<sup>13</sup> and in ANROWS' *National Risk Assessment Principles for Domestic and Family Violence*, which provides a 'guide for policy-makers, practitioners and services in the development, review and refinements of risk assessment tools and resources'.<sup>14</sup> However, these tools and frameworks are not necessarily required to be adopted and implemented by all professional groups across the DFV service delivery system.

### 2.2.1. Standards of Good Practice

Currently accepted standards of good practice in DFV risk assessment and management include: routine screening and identification of risk by practitioners;<sup>15</sup> practitioners using structured professional judgement to assess risk;<sup>16</sup> and risk being managed based on four central features of monitoring, support services, supervision and safety planning.<sup>17</sup> In terms of assessing risk, the current state of knowledge emphasises the importance of evidence-based risk assessment tools,

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<sup>12</sup> Cherie Toivonen and Corina Backhouse, *National Risk Assessment Principles for Domestic and Family Violence* (ANROWS Insights 07/2018, ANROWS, 2018) 4.

<sup>13</sup> See, eg, Community Services Directorate, *ACT Domestic and Family Violence Risk Assessment Framework* (ACT Government, July 2022) <[https://www.act.gov.au/\\_data/assets/pdf\\_file/0006/2388453/ACT-Domestic-and-Family-Violence-Risk-Assessment-Framework.pdf](https://www.act.gov.au/_data/assets/pdf_file/0006/2388453/ACT-Domestic-and-Family-Violence-Risk-Assessment-Framework.pdf)>; Department for Child Protection and Family Support, *Western Australian Family and Domestic Violence Common Risk Assessment and Risk Management Framework* (2<sup>nd</sup> ed, Western Australian Government, 2015) <<https://www.wa.gov.au/system/files/2021-10/CRARMF.pdf>>; Family Safety Victoria, 'Family Violence Multi-Agency Risk Assessment and Management Framework' (30 June 2018) <<https://www.vic.gov.au/family-violence-multi-agency-risk-assessment-and-management-framework>>; Government of South Australia, *Practice Manual: Family Safety Framework* (Government of South Australia, 2022) <<https://officeforwomen.sa.gov.au/documents/family-safety-portal/Family-Safety-Framework-Manual.pdf>>; Northern Territory Government, *Northern Territory Domestic and Family Violence Risk Assessment and Management Framework* (Northern Territory Government, September 2020) <[https://families.nt.gov.au/\\_data/assets/pdf\\_file/0008/942074/risk-assessment-management-framework.pdf](https://families.nt.gov.au/_data/assets/pdf_file/0008/942074/risk-assessment-management-framework.pdf)>; Queensland Government, *Domestic and Family Violence Common Risk and Safety Framework* (Version 2, The State of Queensland, December 2022) <<https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/c927ea9b-6973-4912-966e-dc11d1d46a67/common-risk-safety-framework-2022.pdf?ETag=70793b6943532f9f1f2c9f038704f600>>. Development of multi-agency risk assessment and management framework was also announced in NSW in 2024: Kate Newton, 'New Domestic Violence Framework to Improve NSW First Responder Skills', *UNSW Newsroom* (University of New South Wales (UNSW), online, 5 March 2024) <<https://www.unsw.edu.au/newsroom/news/2024/03/domestic-and-family-violence--new-framework-to-improve-first-res>>.

<sup>14</sup> Corina Backhouse and Cherie Toivonen, *National Risk Assessment Principles for Domestic and Family Violence: Companion Resource* (ANROWS Insights 09/2018, ANROWS, 2018) 32.

<sup>15</sup> Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC), *Family Violence — Commonwealth Laws* (Discussion Paper 76, ALRC and NSWLRC, August 2011) <[https://www.alrc.gov.au/wp-content/uploads/2019/08/whole\\_document\\_dp\\_76.pdf](https://www.alrc.gov.au/wp-content/uploads/2019/08/whole_document_dp_76.pdf)> [4.27].

<sup>16</sup> Backhouse and Toivonen (n 14) 23.

<sup>17</sup> *Ibid* 24–25.

ongoing assessments and obtaining victims/survivors' input. Additionally, integrated and coordinated risk assessment and management across the DFV service delivery system is an important system-level component of the efficacy of risk-based approaches.

*i. Evidence-based risk assessment tools*

As assessing risk is a complex task, much of the DFV risk literature is concerned with establishing evidence-based risk factors and crafting predictively valid assessment tools to inform practitioners' risk assessments.<sup>18</sup> Use of these tools is favoured as they have been found to achieve more accurate assessments than those that rely solely on practitioners' unstructured professional judgement.<sup>19</sup> Such tools may involve a purely actuarial approach, where tools developed based on statistical evidence-based risk factors are used to screen and score risk or threat levels.<sup>20</sup> Others, known as 'structured professional judgement', combine actuarial risk factors with professional judgement to inform the assessment.<sup>21</sup> The latter is currently accepted as the most effective approach for DFV.<sup>22</sup>

The risk factors included in these tools are based on empirically supported indicators of risk established in academic literature.<sup>23</sup> The scoring methods usually 'correlate certain identified risk factors to potentially violent outcomes such as re-abuse or death',<sup>24</sup> or escalation of DFV. A substantial body of literature has established 'key signifiers'<sup>25</sup> of risk, such as:<sup>26</sup>

- previous history of DFV;
- separation;
- sexual violence;
- non-fatal strangulation;
- stalking;

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<sup>18</sup> See, eg, Jill Theresa Messing and Jonel Thaller, 'The Average Predictive Validity of Intimate Partner Violence Risk Assessment Instruments' (2013) 28(7) *Journal of Interpersonal Violence* 1537; Claudia E van der Put, Jeanne Gubbels and Mark Assink, 'Predicting Domestic Violence: A Meta-Analysis on the Predictive Validity of Risk Assessment Tools' (2019) 47 *Aggression and Violent Behavior* 100.

<sup>19</sup> 'there is broad consensus across both academic and practice-based literature that the structured professional judgement approach to risk assessment and safety management is most effective in most circumstances of domestic, family and sexual violence': Backhouse and Toivonen (n 14) 23. See also Chris Newman, *Expert Domestic Violence Risk Assessments in the Family Courts* (Commissioned by Respect (UK)) 6.

<sup>20</sup> *Ibid* (Backhouse and Toivonen) 21.

<sup>21</sup> *Ibid* 21–22.

<sup>22</sup> *Ibid* 23.

<sup>23</sup> *Ibid* 24; McCulloch et al (n 8) 33; Newman (n 19) 5.

<sup>24</sup> Lynn McLain and Amanda L Hitt, 'Stop the Killing: Potential Courtroom Use of a Questionnaire That Predicts the Likelihood That a Victim of Intimate Partner Violence Will Be Murdered by Her Partner' (2009) 24(2) *Wisconsin Journal of Law, Gender and Society* 277, 306.

<sup>25</sup> Heather Douglas, *National Domestic and Family Violence Bench Book* (The Australasian Institute of Judicial Administration, 2024) <<https://dfvbenchbook.aija.org.au/contents>> [4.2].

<sup>26</sup> The listed risk factors are paraphrased from Toivonen and Backhouse (n 12) Appendix 1 'High-risk factors for domestic and family violence'. See also, Backhouse and Toivonen (n 14) 26; and Douglas (n 25) [4.2].

- threats to kill;
- access to weapons;
- escalating frequency and/or severity of violence;
- coercive control;
- pregnancy and new birth;
- victims/survivors' self-perception of risk;
- suicide threats and attempts;
- court orders and parenting proceedings;
- misuse of drugs or alcohol;
- isolating behaviours and barriers to help-seeking;
- animal abuse.

During the time of this study, police and Women's Domestic Violence Court Advocacy Services (WDVCAS) workers used slightly different versions of the same tool, the Domestic Violence Safety Assessment Tool (DVSAT).<sup>27</sup> Both versions rely on a scoring method of 'research-based risk factors combined with prompts to exercise professional judgement'.<sup>28</sup> However, the scoring method is not an actuarial tool and the reliability of the tool and its administration has been questioned in multiple evaluations.<sup>29</sup>

#### *ii. Ongoing assessment*

Evidence-based assessment tools are generally viewed as improving the accuracy of assessments, however the current state of knowledge establishes that relying on a one-off assessment of risk is not sufficient, even where it is based on the exercise of structured professional judgement using an evidence-based assessment tool. While screening, assessment and management are often discussed as distinct stages, the literature emphasises that in DFV contexts, 'Events and circumstances may change frequently which will alter the severity of risk at points in time'<sup>30</sup> and 'risk can change quickly and unpredictably, [meaning] it must be continuously assessed, monitored and reviewed'.<sup>31</sup> Monitoring has an important role, therefore, in ensuring continuous risk assessments are conducted 'so that risk management and safety

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<sup>27</sup> The DVSAT provides a 'risk identification checklist' in Part A, and directs practitioners to 'use their professional judgement' in Part B. See NSW Government, *Domestic Violence Safety Assessment Tool* (NSW Government, June 2015) <[http://www.domesticviolence.nsw.gov.au/\\_data/assets/file/0020/301178/DVSAT.pdf](http://www.domesticviolence.nsw.gov.au/_data/assets/file/0020/301178/DVSAT.pdf)>

<sup>28</sup> ARTD, *Safer Pathway Evaluation Final Report* (NSW Government, February 2019) 46.

<sup>29</sup> Ibid 47–48; Clare Ringland, 'The Domestic Violence Safety Assessment Tool (DVSAT) and Intimate Partner Repeat Victimization' (2018) 213 *Crime and Justice Bulletin (BOCSAR): Contemporary Issues in Crime and Justice* 1; Felix Leung and Lily Trimboli, 'Improving Police Risk Assessment of Intimate Partner Violence' (2022) 244 *Crime and Justice Bulletin (BOCSAR): Contemporary Issues in Crime and Justice* 1.

<sup>30</sup> Toivonen and Backhouse (n 12) 4.

<sup>31</sup> Backhouse and Toivonen (n 14) 3.

strategies can be adjusted over time as necessary to respond to changing experiences and contexts of violence'.<sup>32</sup> Further, the accuracy of risk assessments relies on identifying and/or eliciting relevant risk information from the victim/survivor and other sources, which may occur over time.

*iii. Victims/survivors' self-assessments*

There is consensus across the literature that DFV victims/survivors' own views of risk should inform all stages of identification, assessment and management.<sup>33</sup> Generally victims/survivors have been found to be 'good predictors of their own risk of experiencing future violence', with some studies finding their perceptions as accurate as predictively validated actuarial tools.<sup>34</sup> For example, Heckert and Gondolf found in the US that 'women's perceptions of risk by themselves were around as accurate in predicting reassault by their partner as key international risk assessment tools which have undergone predictive validity testing'.<sup>35</sup> This evidence base illustrates the importance of obtaining victims/survivors' input in order to obtain a well-informed picture of risk. For example, in 2008, US researcher Kropp reviewed the literature on intimate partner violence (IPV) risk assessment, finding that 'Most agree that risk assessments should be victim-informed',<sup>36</sup> citing multiple empirical studies demonstrating the importance of this information for the accurate assessment of risk.<sup>37</sup> In Australia, the *National Risk Assessment Principles (NRAP) Companion Resource* highlights:

There are multiple examples, particularly from the reports of DFV and child death review committees and Coroner's Courts, of cases in which a failure to listen to women's and other victim-survivors' own voices and self-assessment of the risk of experiencing future violence has led to their subsequent homicide.<sup>38</sup>

Therefore, according to the NRAP: 'A survivor's knowledge of their own risk is central to any risk assessment'.<sup>39</sup>

Collecting information from multiple sources is also important,<sup>40</sup> as studies have found some victims/survivors may minimise their experiences or underestimate risks.<sup>41</sup> This may be because

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<sup>32</sup> Ibid 24.

<sup>33</sup> Toivonen and Backhouse (n 12) 6; Kropp (n 11) 211–212.

<sup>34</sup> Backhouse and Toivonen (n 14) 22.

<sup>35</sup> Ibid 22, citing D Alex Heckert and Edward W Gondolf, 'Battered Women's Perceptions of Risk Versus Risk Factors and Instruments in Predicting Repeat Reassault' (2004) 19(7) *Journal of Interpersonal Violence* 778.

<sup>36</sup> Kropp (n 11) 211.

<sup>37</sup> Ibid.

<sup>38</sup> Backhouse and Toivonen (n 14) 22.

<sup>39</sup> Toivonen and Backhouse (n 12) 6.

<sup>40</sup> State of Victoria, *Royal Commission Into Family Violence Volume I: Report and Recommendations* (Parliamentary Paper No 132 (2014–16), March 2016) 96.

<sup>41</sup> Backhouse and Toivonen (n 14) 22–23; Kropp (n 11) 212.

of desensitisation to the violence, fears of retaliation from the abuser and/or judgement from others and low self-esteem.<sup>42</sup> There may also be practical challenges in engaging victims/survivors in risk assessment processes.<sup>43</sup> They may be unavailable or reluctant to engage with risk assessment processes, be concerned about confidentiality or perceive that disclosing relevant information may put them *at risk*, not only of further violence,<sup>44</sup> but because of fears of the potentially adverse impacts of service system intervention discussed further below in **Section 2.3.4 (ii)**. These issues may be difficult to overcome, but, in the US context Kropp emphasises ‘that if victim information is not available, risk assessments should be appropriately qualified’ when being communicated to others,<sup>45</sup> and ‘whenever possible, risk assessments should be communicated to the potential victim(s)’.<sup>46</sup> Similarly, the *NRAP Companion Resource* emphasises that ‘at a minimum, it is important to consult with victim-survivors during risk assessment’.<sup>47</sup>

In addition to these core components of good practice in assessing risk, sector-wide integration, coordination and collaboration is widely viewed as a necessary precondition for consistent and effective DFV risk assessment and management.

*iv. Sector-wide integration, coordination and collaboration*

Recognising victims/survivors ‘have diverse and complex needs, often requiring multiple interventions provided by a range of services’,<sup>48</sup> the DFV risk literature establishes that the effectiveness of risk-based approaches in responding to DFV requires integration, coordination and collaboration between service responses across the DFV service system.<sup>49</sup> Multi-agency common risk assessment and management frameworks (now common across Australian states and territories), aim to establish ‘referral pathways, governance structures, and assignment of roles and responsibilities across all relevant services engaged in a coordinated, multi-agency response’,<sup>50</sup> in order to support integrated and coordinated service delivery throughout the DFV service system. These tools and frameworks generally exist as overarching guidance documents and are not necessarily required to be adopted and implemented by all professionals who may have a role in DFV responses.

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<sup>42</sup> Backhouse and Toivonen (n 14) 23; Kropp (n 11) 212.

<sup>43</sup> Kropp (n 11) 212.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid* 213.

<sup>46</sup> *Ibid.*

<sup>47</sup> Backhouse and Toivonen (n 14) 22.

<sup>48</sup> *Ibid* 29.

<sup>49</sup> *Ibid* 29–31.

<sup>50</sup> *Ibid* 25.

In relation to PO processes and court-involved professionals, some formal risk-based frameworks explicitly capture legal and court-involved actors when defining multi-agency roles and responsibilities,<sup>51</sup> while others may not. Regardless of whether courts and POs are explicitly mentioned however, sector-wide risk frameworks often emphasise that ‘Identifying and responding effectively to domestic and family violence is a key part of the work of all frontline service delivery staff’,<sup>52</sup> and it is well recognised that ‘For many victims and perpetrators of family violence, courts are central to their experience of the family violence system’.<sup>53</sup> Moreover, PO processes are frequently characterised in grey literature as important opportunities for risk management considerations to occur,<sup>54</sup> and the Victorian Royal Commission into Family Violence suggests that the policing and legal systems have ‘the primary role in managing perpetrator risk’.<sup>55</sup> The roles of certain court-involved actors, such as police, are also frequently detailed in risk-based frameworks and researched in DFV risk literature in recognition that they are frontline responders with a ‘unique role in risk assessment and management’.<sup>56</sup> Other court-involved actors, such as lawyers and judicial officers, generally do not receive as much attention, and there is a particular dearth of empirical studies about risk considerations from the perspectives of the judiciary, specifically in relation to POs.

In sum, current standards of good practice in risk-based approaches to DFV involve a number of components, including use of evidence-based assessment tools, ongoing assessment and being informed by victims/survivors’ self-assessments. The extent of integration and coordination between agencies and services that may be involved in responding to DFV is also influential for the efficacy of risk-based approaches. Understanding the role envisioned for POs and for different court-involved actors within broader, sector-wide risk-based approaches to DFV, is therefore very relevant to this study. However, within existing formal risk-based frameworks and multi-agency responses, the role of courts and POs in considering risk is not always clearly

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<sup>51</sup> See, eg, ‘Risk assessments should be able to be carried out within all organisations who work regularly with victims of domestic and family violence (including those for whom it is not their only core business) and who have a primary function of providing support to clients. This includes (but is not limited to) school psychologists and counsellors, social workers, specialist court workers, community legal centre staff, statutory workers, specialised housing workers and anyone whose role includes case management.’ (Community Services Directorate (n 13) 32). Also see State of Victoria, *Royal Commission Into Family Violence Summary and Recommendations* (Parliamentary Paper No 132 (2014–16), March 2016), which states that ‘A whole-of-government response calls for the police, courts, human services and other relevant service providers to share information from different systems’ (p. 12), and ‘Managing the dangers posed by perpetrators is also achieved through effective monitoring by the police, the courts and corrections agencies’ (p. 20).

<sup>52</sup> Community Services Directorate (n 13) 23.

<sup>53</sup> State of Victoria (n 51) 26.

<sup>54</sup> Eg, ‘considerations around duration of an order represent an opportunity for overt risk management’: Elena Campbell et al, *More than Just a Piece of Paper: Getting Protection Orders Made in a Safe and Supported Way: Responding to Recommendation 77 of the Royal Commission into Family Violence* (Centre for Innovative Justice, RMIT University, February 2021) 68.

<sup>55</sup> State of Victoria (n 40) 144.

<sup>56</sup> *Ibid* 95.

articulated. This gap in knowledge and existing frameworks for risk-based approaches to DFV raises the question: what is currently known about the consideration of risk in these processes?

### 2.2.2. Considering Risk in Protection Order Processes

Underlying assumptions about the role of POs and the court-involved PO processes in mitigating DFV risks are evident in much of the literature on risk-based approaches to DFV and in examining the efficacy of POs. For instance, the potential for POs to address DFV risks is often premised on their forward-looking focus in protecting victims/survivors ‘from future harm’, in contrast to ‘the backward-looking focus of criminal law responses’.<sup>57</sup> This focus leads key international scholars such as Benitez, McNeil and Binder to state that ‘Protection orders are widely used in an attempt to reduce harm to those who are at risk’.<sup>58</sup> Further, international research has established ‘that the severity of violence experienced by a plaintiff does not consistently predict whether a judge will grant [an order],’<sup>59</sup> and that other factors may influence whether final orders are made.<sup>60</sup>

Mixed evidence has emerged about the influence of different types of alleged abuse on judicial decision making.<sup>61</sup> For example, in a number of US studies the severity of violence and presence of children has not been found to be associated with the PO being granted,<sup>62</sup> despite judicial interviewees saying it heavily influences their decisions.<sup>63</sup> In attempting to make sense of these findings, some researchers have speculated certain factors are influential on judicial decision making because they ‘prompt a more thoroughgoing assessment of “blame and believability” ... and ultimately risk’ by judicial officers.<sup>64</sup> For example, Lucken, Rosky and Watkins speculate in their study of PO outcomes in an urban US county ‘that when judges are faced with factual uncertainties or issues of believability, they err on the side of whether someone is threatened

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<sup>57</sup> Heather Douglas and Robin Fitzgerald, ‘Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders’ (2013) 36(1) *University of New South Wales Law Journal* 56, 59.

<sup>58</sup> Christopher T Benitez, Dale E McNeil and Renee L Binder, ‘Do Protection Orders Protect?’ (2010) 38(3) *Journal of the American Academy of Psychiatry and the Law* 376, 385.

<sup>59</sup> Cara J Person et al, ‘“I Don’t Know That I’ve Ever Felt Like I Got the Full Story”: A Qualitative Study of Courtroom Interactions Between Judges and Litigants in Domestic Violence Protective Order Cases’ (2018) 24(12) *Violence Against Women* 1474, 1476.

<sup>60</sup> See, eg, Gist et al’s 2001 study in the US, which found ‘that 61% of the women requesting a PO in this study had experienced appreciable threats of abuse, actual physical assault and stalking, yet did not receive a PO. Although the specific reason(s) each woman did not receive a PO was not recorded, the major reasons tended to be a lack of a cohabiting relationship or inability to locate the abuser to serve the order’: Julia Henderson Gist et al, ‘Protection Orders and Assault Charges: Do Justice Interventions Reduce Violence Against Women’ (2001) 15(1) *American Journal of Family Law* 59, 69.

<sup>61</sup> See, eg, Alexa Bejinariu, Emily Troshynski and Terance Miethe, ‘Civil Protection Orders and Their Courtroom Context: The Impact of Gatekeepers on Legal Decisions’ (2019) 34(3) *Journal of Family Violence* 231.

<sup>62</sup> Karol Lucken, Jeffrey W Rosky and Cory Watkins, ‘She Said, He Said, Judge Said: Analyzing Judicial Decision Making in Civil Protection Order Hearings’ (2015) 30(12) *Journal of Interpersonal Violence* 2038, 2060; Christine Agnew-Brune et al, ‘Domestic Violence Protective Orders: A Qualitative Examination of Judges’ Decision-Making Processes’ (2017) 32(13) *Journal of Interpersonal Violence* 1899, 1934; Tami P Sullivan et al, ‘Criminal Protection Orders for Women Victims of Domestic Violence: Explicating Predictors of Level of Restrictions Among Orders Issued’ (2021) 36(1–2) *Journal of Interpersonal Violence* NP643, NP646; Person et al (n 59) 1476.

<sup>63</sup> Agnew-Brune et al (n 62) 1934.

<sup>64</sup> Lucken, Rosky and Watkins (n 62) 2059.

with becoming a murdered victim of IPV, rather than just a victim of IPV, as is required by statute'.<sup>65</sup>

Others in the US, such as Agnew-Brune and colleagues, have examined the role of heuristics in judicial decision making and found that where insufficient information is contained in complaint narratives and judges have limited time to consider PO matters, judges may 'rely on heuristics'.<sup>66</sup> These heuristics, Agnew-Brune et al contend, may include using evidence and visibility of physical injuries, the applicant's demeanour in court and the timing of the PO application 'as proxies for determining the severity of violence perpetrated by the defendant, which in turn represents the level of threat posed by the defendant toward the plaintiff'.<sup>67</sup> Agnew-Brune et al concluded, however, that 'what constitutes a sufficient level of threat varies from judge to judge due to differences in how individual judges' apply those heuristics'.<sup>68</sup> Others in Australia have speculated that when there are time constraints combined with 'poorly written or incomplete' complaint narratives 'magistrates might not be able to fully understand everything that the applicant wishes to convey and may focus on facts or factors that do not represent the dangerousness, duration or magnitude of violence that the applicant has endured or may miss important parts of the story'.<sup>69</sup>

Findings on the varied factors that may influence judicial decision making have led some researchers to call for judicial training on the dynamics of DFV<sup>70</sup> and DFV risk factors<sup>71</sup> to minimise the influence of 'problematic heuristics',<sup>72</sup> and to ensure judicial officers are making the best-informed considerations.<sup>73</sup> For example, Wakefield and Taylor's 2015 study on judicial education in Australia found inconsistencies in judicial officers' approaches to risk factors such as controlling behaviours, and suggested judicial training should address risk assessment frameworks.<sup>74</sup>

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<sup>65</sup> Ibid 2060.

<sup>66</sup> Agnew-Brune et al (n 62)1934.

<sup>67</sup> Ibid 1934.

<sup>68</sup> Ibid 1934.

<sup>69</sup> Robin Fitzgerald and Heather Douglas, 'The Whole Story: The Dilemma of the Domestic Violence Protection Order Narrative' (2020) 60(1) *The British Journal of Criminology* 180, 192.

<sup>70</sup> Eg, Julie M Kafka et al, 'Judging Domestic Violence From the Bench: A Narrative Analysis of Judicial Anecdotes About Domestic Violence Protective Order Cases' (2019) 29(8) *Qualitative Health Research* 1132, 1140.

<sup>71</sup> Shellee Wakefield and Annabel Taylor, *Judicial Education for Domestic and Family Violence: State of Knowledge Paper* (ANROWS Landscapes No 02/2015, ANROWS, 2015) 38.

<sup>72</sup> Agnew-Brune et al (n 62)1935; Kafka et al (n 70) 1140–1141.

<sup>73</sup> Wakefield and Taylor (n 71); Lucken, Rosky and Watkins (n 62) 2062.

<sup>74</sup> Wakefield and Taylor (n 71) 6.

Noting the significant discretion the court exercises in determining the conditions to be included in a PO and how courtrooms are managed,<sup>75</sup> the extent to which different considerations of risk influence the decision making of judicial and legal professionals and tailoring of POs is therefore an important factor in understanding the effectiveness of POs in achieving their intended aims.<sup>76</sup> Yet this is a starkly under-researched area in Australia, and the international field has so far largely focused on ‘identif[y]ing a number of individual and situational factors that mediate the potential effectiveness of [POs],’<sup>77</sup> rather than examining considerations undertaken by multiple, interacting court-involved actors or the operation of the PO process at a systems level.<sup>78</sup> Most relevant to the specific concern in this thesis with the assessment of risk by court-involved actors for the purposes of POs, are a limited number of studies in the US,<sup>79</sup> a Swedish study on prosecutors’ decision making<sup>80</sup> and tangential findings from a small number of Victorian studies.<sup>81</sup> No relevant studies have been conducted in NSW.

In regard to the international studies that exist, both Nichols-Hadeed et al’s 2012 mixed-methods US study on judiciary<sup>82</sup> and Strand, Fröberg and Storey’s Swedish study on prosecutors’ decision making concluded PO outcomes would be improved by requiring these court-involved actors to use evidence-based tools and ‘structured violence risk assessments as grounds for decision-making on restraining orders.’<sup>83</sup> Nichols-Hadeed et al’s study uses data collected from interviews

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<sup>75</sup> Person et al (n 59) 1479. Also see various studies on differing judicial behaviour in PO proceedings: Karol Lucken and Jeffrey Rosky, ‘Making the Grade: Judicial Behavior In Civil Protection Order Hearings for Intimate Partner Violence’ (2016) 22(3) *International Review of Victimology* 269; Lucken, Rosky and Watkins (n 62) 2038; Agnew-Brune et al (n 62) 1925; James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, 1999).

<sup>76</sup> Lucken, Rosky and Watkins (n 62) 2061–2062; Corey Nichols-Hadeed et al, ‘Assessing Danger: What Judges Need to Know’ (2012) 50(1) *Family Court Review* 150; Susanne JM Strand, Sofi Fröberg and Jennifer E Storey, ‘Protecting Victims of Intimate Partner Violence: Swedish Prosecutors’ Experiences of Decision-Making Regarding Restraining Orders’ (2018) 19(2) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 170; Colin James and Nicola Ross, ‘Did He Ever Hit You? Exploring the Attitudes of Lawyers in the Assessment of the Seriousness of Threats and Violent Histories in Domestic Violence Cases’ (2017) 30(3) *Australian Journal of Family Law* 205; Carol E Jordan et al, ‘The Denial of Emergency Protection: Factors Associated with Court Decision Making’ (2008) 23(5) *Violence and Victims* 603, 613.

<sup>77</sup> Silke Meyer and Rose Stambe, ‘Increasing Compliance with Domestic Violence Protection Orders: Investing in Perpetrator Education and Support as an Investment in Victim and Family Safety’ (2022) 32(9) *Policing and Society* 1071, 1074.

<sup>78</sup> Although note: Alesha Durfee and Leigh Goodmark, ‘Re-Envisioning Protective Orders for Domestic Violence’ in Ruth E Fleury-Steiner, M Kristen Hefner and Susan L Miller (eds), *Civil Court Responses to Intimate Partner Violence and Abuse* (Cognella, 2020) 63; Alesha Durfee, ‘The Use of Structural Intersectionality as a Method to Analyze How the Domestic Violence Civil Protective Order Process Replicates Inequality’ (2021) 27(5) *Violence Against Women* 639. Miller and Trocchio also argue: ‘Depending on the results of initial or ongoing assessments of the dynamics of practitioner decision making, it may also be important to consciously engineer the way in which court actors interact with one another in the process of completing, sharing and responding to [risk assessments]: Joel Miller and Sarah Trocchio, ‘Risk/Need Assessment Tools and the Criminal Justice Bureaucrat: Reconceptualizing the Frontline Practitioner’ in Faye Taxman and Faye Taxman (eds), *Handbook on Risk and Need Assessment: Theory and Practice* (Routledge, 1<sup>st</sup> ed, 2017) 378, 394.

<sup>79</sup> Nichols-Hadeed et al (n 76). Also see a review of the US literature and policy settings in D Kelly Weisberg, ‘Lethality Assessment: An Impressive Development in Domestic Violence Law in the Past 30 Years’ (2019) 30(2) *Hastings Women’s Law Journal* 211.

<sup>80</sup> Strand, Fröberg and Storey (n 76).

<sup>81</sup> Campbell et al (n 54); Stuart Ross and Sophie Aitken, ‘“If It Hadn’t Been Online I Don’t Think I Would Have Applied”: Applicant Experiences of an Online Family Violence Intervention Order Process’ (2022) 37(1–2) *Journal of Interpersonal Violence* 221; Family Violence Implementation Monitor, *Monitoring Victoria’s Family Violence Reforms Service Response for Perpetrators and People Using Violence within the Family* (Victorian Government, January 2023) <<https://www.fvrim.vic.gov.au/sites/default/files/2023-01/Service-response-for-perpetrators-and-people-who-use-violence-within-the-family-24-January-2023-1745hrs.pdf>>.

<sup>82</sup> Nichols-Hadeed et al (n 76).

<sup>83</sup> Strand, Fröberg and Storey (n 76)183; Nichols-Hadeed et al (n 76)156.

with 169 women in one US court and an analysis of those women's PO applications to examine how the applicants' 'current danger and future risk of violence' was communicated.<sup>84</sup> The researchers then conducted a risk assessment with these women, using an evidence-based assessment tool to compare risk indicators. They found that the assessment tool elicited more risk information than the PO application.<sup>85</sup> They also found that the responsibility for proper completion of the petition to the court was usually left up to applicants. The researchers observed that this was problematic as some victims/survivors can be inhibited by numerous factors such as trauma, illiteracy and lacking understanding about what is relevant information to include on applications, preventing accurate communication of this information.<sup>86</sup> The authors concluded 'safety provided to victims through a PO can be enhanced by addressing specific risk factors',<sup>87</sup> yet:

Judges were clearly making decisions regarding PO provisions and related custody and visitation matters, without vital information related to perpetrator drug and alcohol use, suicidal threats and sexual violence: the perfect storm for future violence and risk of homicide.<sup>88</sup>

They argued that standardising the use of the assessment tool during intake interviews with applicants at court could improve PO outcomes by ensuring specific risk factors are accurately communicated to and, consequently, considered by judicial officers.<sup>89</sup>

Weisberg found in their 2019 review of the role of DFV lethality assessments in US courts that 'Lethality assessment ... plays an important role in civil protection order proceedings'<sup>90</sup> and 'is especially useful to inform decision makers about the best methods of ensuring victims' safety as well as processing offenders in the justice system'.<sup>91</sup> Weisberg outlined various initiatives in the US that 'advised judges in protection order proceedings to conduct more comprehensive assessments of victims' risk ... [and] urged judges to question victims further about their circumstances to shed light on the existence of risk factors'.<sup>92</sup> In reviewing relevant US case law and judicial policies, Weisberg concluded that in the US 'lethality assessment ... is relevant in decision making in many types of legal proceedings and used by a wide range of professionals,

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<sup>84</sup> Nichols-Hadeed et al (n 76)150.

<sup>85</sup> Ibid 155.

<sup>86</sup> Ibid 155.

<sup>87</sup> Ibid 151.

<sup>88</sup> Ibid 155.

<sup>89</sup> Ibid 150.

<sup>90</sup> Weisberg (n 79).

<sup>91</sup> Ibid 238.

<sup>92</sup> Ibid 229.

including law enforcement, prosecutors, probation officers, judges, psychologists, and victim service providers, among others'.<sup>93</sup>

In Sweden, Strand, Fröberg and Storey conducted a study on the influence of risk assessment tools through interviews with five prosecutors.<sup>94</sup> The researchers found prosecutors did not always incorporate evidence-based violence risk assessments conducted by responding police officers into their prosecutorial decisions, meaning they were making decisions based on their own unstructured professional judgement.<sup>95</sup> Strand, Fröberg and Storey observed 'this is problematic because restraining orders are important risk management strategies that are recommended by police for specific victims based on structured risk assessments'.<sup>96</sup> They argued that 'Prosecutors' work on restraining orders would improve if they could find a better way to communicate about risk for violence with the police'.<sup>97</sup> They also highlighted particular concerns that may arise in adopting these approaches in a legal setting. Particularly, the perception that such approaches may undermine legal professionals' objectivity, creating 'dilemmas and compromises' in their work.<sup>98</sup> These concerns have been echoed by other legal professionals in the US about 'abandon[ing] discretion in favor of strict actuarial methods' when assessment tools are used in legal contexts.<sup>99</sup> Concerns were also identified in Strand, Fröberg and Storey's study about whether risk information made available to the court 'would have to be turned over to the perpetrator',<sup>100</sup> and therefore have adverse safety implications for the victims/survivors. These findings indicate specific complexities may arise when considering the adoption of different models of risk-based approaches in PO legal processes.

*i. Australian studies*

In Australia, the need for a formalised approach to risk in the court process has been established in multiple inquiries. The Australian Law Reform Commission (ALRC) and New South Wales Law Reform Commission (NSWLRC) found in 2010 that:

All service providers involved in protection order proceedings under family violence legislation and family law proceedings must, to some extent, identify and manage the risk of family violence for their clients. However, the degree to which risk assessment is a formalised process, and the

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<sup>93</sup> Ibid 237.

<sup>94</sup> Strand, Fröberg and Storey (n 76).

<sup>95</sup> Ibid 179.

<sup>96</sup> Ibid 182.

<sup>97</sup> Ibid 182.

<sup>98</sup> Ibid 181.

<sup>99</sup> Kropp (n 11) 206.

<sup>100</sup> Strand, Fröberg and Storey (n 76)182.

types of risk assessment practices used by different participants in the legal system, varies across courts and jurisdictions.<sup>101</sup>

The development of a national risk-based framework to be used consistently by courts, lawyers and service providers was specifically recommended by the 2016 Royal Commission into Family Violence (Victoria) (RCFV).<sup>102</sup> This was underpinned by the Commission's recognition of courts as an important site where 'various service providers ... frequently come into contact with victims and perpetrators of family violence'.<sup>103</sup> Specifically in relation to the role of judicial officers, the *National DFV Bench Book* — a valuable, but voluntary, resource for judicial officers in Australia — states: 'A key role of judicial responses to domestic and family violence is to assess and respond to risk and promote the safety of those at the risk of harm'.<sup>104</sup> However, the nature of risk assessments by various court-involved actors in the PO process have not been specifically researched in Australian literature.<sup>105</sup> Three studies in Victoria offer relevant tangential findings.

In 2020, Ross and Aitken, examining the impact of updated online Family Violence Intervention Order (Vic) (FVIO) forms, conducted a mixed-methods study and identified aspects of the consideration of risk by Victorian magistrates courts.<sup>106</sup> According to this study, the introduction of an online process for FVIOs was intended 'to provide timely and useful evidence-based risk information to registry staff and magistrates, and to promote earlier risk identification'.<sup>107</sup> Interviews with court registrars identified several benefits from using the form by 'highlighting different types of abuse and in helping them to draw out risk information when talking to applicants',<sup>108</sup> and 'The structure of the online form provided information to the magistrate that supported assessment of the nature of the violence and identification of risks',<sup>109</sup> although the study also found significant limitations in the extent to which this assisted the prioritisation of FVIO matters (discussed below).

In 2021, during a period of substantial reform to the Victorian DFV service system following the 2016 RCFV, the Centre for Innovative Justice produced a research report<sup>110</sup> in response to

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<sup>101</sup> ALRC and NSWLRC, *Family Violence — A National Legal Response* (Australian Law Reform Commission and NSW Law Reform Commission, 2010) <<https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/>> [18.34]

<sup>102</sup> State of Victoria (n 51) 81 [Rec 134]. See also State of Victoria, *Royal Commission Into Family Violence Volume III: Report and Recommendations* (Parliamentary Paper No 132 (2014–16), March 2016) 164–165 for specific discussion of integrating risk assessment and management strategies into processes for the Magistrates' Court of Victoria, which deals with FVIOs in Victoria.

<sup>103</sup> State of Victoria (n 40) 95.

<sup>104</sup> Douglas (n 25) [4.4].

<sup>105</sup> Although some government inquiries have undertaken detailed examinations of both risk-based approaches and court responses to DFV, such as State of Victoria (n 51).

<sup>106</sup> Ross and Aitken (n 81).

<sup>107</sup> *Ibid* 233.

<sup>108</sup> *Ibid* 233.

<sup>109</sup> *Ibid* 233.

<sup>110</sup> Campbell et al (n 54).

Recommendation 77 of the RCFV ‘to investigate how family violence intervention orders by consent are currently negotiated and develop a safe, supported negotiation process for victims’ in Victoria.<sup>111</sup> The report ‘observed Magistrates overtly describe their work in terms of assessing proposed conditions and risk’<sup>112</sup> and found that some magistrates viewed risk considerations — including taking into account victims/survivors’ own assessments — as significant to determining protected persons’ safety.<sup>113</sup> The study recommended that jurisprudence on Victorian FVIOs should be reviewed to ‘[clarify] that risk assessment is the primary consideration relevant to submissions and judicial decision-making in relation to duration of FVIOs’ and ‘decisions to extend an FVIO, including a FVIO imposed by consent, are based on assessment of ongoing risk’.<sup>114</sup> They also recommended that the Victorian Government ‘consult on and develop a standardised model for streamed responses to FVIOs which facilitates pre-court engagement with services for parties to FVIOs, as well as access to differentiated responses following appropriate risk assessment’.<sup>115</sup>

In 2023 the Victorian Department of Premier and Cabinet’s Implementation Monitor of the RCFV reforms released a report on *Service Response for Perpetrators And People Using Violence Within the Family*.<sup>116</sup> The Monitor observed that it was unclear how reforms regarding perpetrator risk assessments were being coordinated with Specialist Family Violence Courts in Victoria. These courts have designated ‘Family Violence Practitioners’, including ‘Respondent Workers’, whose role is to assess respondents’ risk, amongst other matters.<sup>117</sup> The Monitor noted there were no standard operating procedures for how risk management was being coordinated between those workers and other centralised service hubs,<sup>118</sup> but logistical work was being undertaken to improve this. While not specifically examining the role of risk considerations in FVIO proceedings, these three Victorian studies nonetheless provide important insights into how risk considerations may have significant impacts on FVIO outcomes.

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<sup>111</sup> State of Victoria (n 51) 67 [rec 77].

<sup>112</sup> Campbell et al (n 54) 67.

<sup>113</sup> Note that the Victorian legislation includes specific provisions regarding risk considerations that do not have equivalents in the NSW *ADVO Act*, including requiring the court ‘to have regard to the safety of AFMs, including AFMs’ own assessment of their level of risk, as well as the potential duration of that risk’ when determining the duration of the order: Campbell et al (n 54) 31. Court consideration of a risk assessment, including specific requirements to take into account the victims’ views, is legislatively inbuilt regarding the duration of final order (*Family Violence Protection Act 2008* (Vic) s 97). NSW does not have an equivalent provision in its *ADVO Act*.

<sup>114</sup> Campbell et al (n 54) 12.

<sup>115</sup> Ibid 16.

<sup>116</sup> Family Violence Implementation Monitor (n 81).

<sup>117</sup> Ibid 17.

<sup>118</sup> Called ‘Orange Doors’: ‘The Orange Door’ (6 September 2024) <<https://www.orangedoor.vic.gov.au/orange-door>>

In sum, even though researchers often claim that ‘Protection orders are widely used in an attempt to reduce harm to those who are at risk’,<sup>119</sup> the extent to which understandings of DFV risks inform court decision making for POs is an under-researched area. Aside from the small number of studies on PO processes reviewed here, extant literature on risk considerations in legal responses to DFV have mainly examined criminal proceedings<sup>120</sup> or focused on how isolated factors and professions’ practices — particularly police<sup>121</sup> — influence risk considerations. Some of this wider literature informs this study because of the substantial role police play in the NSW ADVO regime and the significant interplay between civil POs and criminal responses generally.<sup>122</sup> However, police are only one court actor in the ADVO process in NSW, and despite the ubiquity of civil POs in Australian legal responses to DFV, ‘the civil response has received much less scrutiny’ than criminal responses to DFV.<sup>123</sup> The lack of examination of risk considerations undertaken collectively throughout the court process, by multiple, interacting court-involved actors presents an especially important gap to address, particularly in light of the recognised benefits of integrated, coordinated and collaborative multi-agency approaches to risk espoused in current DFV risk literature. In examining the effectiveness of ADVOs in enhancing safety via through the lens of ‘risk’, however, it is important to recognise significant critiques that have been levelled at the increasing dominance of risk-based approaches to DFV and the complexities regarding the effectiveness of POs in relation to ‘risk’ and ‘safety’, as they add vital nuance to this study’s inquiry.

### 2.3. Nuances to Consider

Alongside the espoused benefits and increasing primacy of risk-based approaches in DFV service system responses, it is important to appreciate significant limitations, critiques and ambiguities in the current state of knowledge on DFV risk assessment and management. Specifically, there remain substantial ambiguities surrounding ‘risk’ as a concept. There are also substantial limitations in the theorising underpinning DFV risk models and in the administration of risk assessments. Further, there remains inconclusive evidence to support assumptions that POs effectively mitigate risk and enhance victims/survivors’ safety. Finally, and most importantly,

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<sup>119</sup> Benitez, McNeil and Binder (n 58) 385.

<sup>120</sup> Eg, Jan Roehl and Kristin Guertin, ‘Intimate Partner Violence: The Current Use of Risk Assessments in Sentencing Offenders’ (2000) 21(2) *Justice System Journal* 171. See also, on the role of risk assessments in legal decision making generally: Heilbrun Kirk and Richard L Wiener, ‘Prediction Versus Management Models Relevant to Risk Assessment: The Importance of Legal Decision-Making Context’ (1997) 21(4) *Law and Human Behavior* 347.

<sup>121</sup> See, eg, Andy Myhill, Katrin Hohl and Kelly Johnson, ‘The “Officer Effect” in Risk Assessment for Domestic Abuse: Findings from a Mixed Methods Study in England and Wales’ (2023) 20(3) *European Journal of Criminology* 856.

<sup>122</sup> Lis Bates and Marianne Hester, ‘No Longer a Civil Matter? The Design and Use of Protection Orders for Domestic Violence in England and Wales’ (2020) 42(2) *The Journal of Social Welfare & Family Law* 133; Durfee and Goodmark (n 78) 75–76.

<sup>123</sup> Douglas and Fitzgerald (n 57) 59.

victims/survivors have complex and diverse experiences of DFV and ‘safety’, which require the adoption of expansive understandings in considering whether and how POs and risk-based approaches may enhance victims/survivors’ safety.

### 2.3.1. Conceptual Ambiguities about ‘Risk’

#### *i. What constitutes ‘risk’*

One of the central critiques of risk-based approaches generally, is that ‘risk’ is treated as a unifying concept,<sup>124</sup> yet it is not well-defined. Australian research emphasises that, ‘Despite the broad embrace of risk by researchers, and its central focus for governments, organisations and individuals’,<sup>125</sup> there remains ambiguity about ‘what constitutes risk, what risk is being measured, what denotes elevated risk and how risk is measured’.<sup>126</sup> In practice, according to Backhouse and Toivonen, ‘A range of vocabularies [regarding risk] are used by the diverse professionals’, which differ based on ‘professional experiences and ideologies’, ‘diverse geographical and social services contexts’ and related ‘attitudes, policies and practices’.<sup>127</sup> Consequently, as Kropp observes, ‘although risk assessments have been performed in the domestic violence field either formally or informally for decades’<sup>128</sup> there remains a lack of consistent definition for ‘risk’ in policy and practice. This raises questions about ‘who or what is defined as risky — or indeed who is “at risk”, under what circumstances and from whom’.<sup>129</sup>

Indeed, despite the intention of assessment tools to ‘provide more consistency and uniformity in risk classification’,<sup>130</sup> *whose* risk and of *what* can differ widely depending on the focus of the service that is conducting the risk assessment,<sup>131</sup> and the model or assessment tools being used.<sup>132</sup> For instance, ‘risk’ can be understood ‘either in terms of identifying and addressing risks to victim-survivors, or alternatively, in terms of the risk of perpetrators reoffending based on the

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<sup>124</sup> Walklate and Mythen (n 5) 101.

<sup>125</sup> Backhouse and Toivonen (n 14) 9.

<sup>126</sup> Jude McCulloch et al (n 8) 35.

<sup>127</sup> Backhouse and Toivonen (n 14) 9.

<sup>128</sup> Kropp (n 11) 202.

<sup>129</sup> Walklate and Mythen (n 5) 101.

<sup>130</sup> Matthew DeMichele et al, ‘The Intuitive-Override Model: Nudging Judges Toward Pretrial Risk Assessment Instruments’ (2021) 85(2) *Federal Probation* 22, 23. Also see a review of the literature on different models in: Stephanie Holt and Lynne Cahill, ‘International Review of the Literature on Risk Assessment and Management of Domestic Violence and Abuse’ in John Devaney et al (eds), *The Routledge International Handbook of Domestic Violence and Abuse* (Routledge, 2021) 433.

<sup>131</sup> Backhouse and Toivonen (n 14) 9.

<sup>132</sup> Eg, Newman reports on 13 RA tools in common use, each assessing different types of risk and/or variables: Newman (n 19) 15–16. According to McLain and Hitt, ‘Since the late 1970’s ... over thirty-three IPV screening tools have been created’: McLain and Hitt (n 24) 283. See also Cross et al’s review of tools in Canada, where they identified ‘many risk assessment tools in use ... Some are focused on lethality only; others look at recidivism on the part of the abuser; others are focused on general abuse and violence. Many, but not all, are used within the criminal law system’: Pamela C Cross et al, *What You Don’t Know Can Hurt You: The Importance of Family Violence Screening Tools for Family Law Practitioners* (Department of Justice Canada, February 2018) <<https://www.justice.gc.ca/eng/rp-pr/jr/can-peut/pdf/can-peut.pdf>> 17. In Australia, a wide variety of risk assessment approaches and tools are used across services and jurisdictions: Toivonen and Backhouse (n 12) 1; State of Victoria (n 40) 96; ALRC and NSWLRC (n 81) [18.34].

identification of certain violent characteristics'.<sup>133</sup> Risk-based approaches, even when structured around formal risk-based frameworks, can therefore focus on different subjects (eg, the perpetrator versus the victim/survivor) and behaviours (eg, risks of a perpetrator using DFV as opposed to re-offending or the victim/survivor's risk of being (re)victimised or risk of experiencing lethal harm).<sup>134</sup> Illustrating this diversity in approaches, the RCFV noted in 2016 that because of variations in assessment tools used in Victoria at the time, 'The tools used to identify and respond to risk can therefore differ according to the role and function of the practitioner assessing the risk and the service context'.<sup>135</sup> In the PO context, these differing approaches are demonstrated by the fact that some identify 'police and the justice system [as having] the primary role in managing perpetrator risk',<sup>136</sup> yet many assessment models tend to focus on screening victims/survivors for risk of victimisation rather than screening of perpetrators for risk of perpetration.<sup>137</sup> There are also distinctions depending on whether dynamic or static risk factors are assessed, where static factors are 'fixed and unchangeable, such as demographic information and childhood history' and dynamic factors are those 'that can change and influence risk, such as substance abuse'.<sup>138</sup>

Complicating this further in the NSW ADVO context is that there is no standard definition of 'DFV' across Australia,<sup>139</sup> and at the time of this study the NSW ADVO legislation was unique in lacking a legislative definition of DFV for the purposes of an ADVO.<sup>140</sup> As the ALRC highlighted in 2010, 'definitions of what constitutes family violence are inherently likely to differ across the legal sector, researchers and service providers' and 'These definitions do not always necessarily align with community understandings, or victim and offender perspectives, of what constitutes family violence'.<sup>141</sup> The range and variability of potential ways in which DFV may manifest, and be defined and understood by different professionals, led Myhill and Hohl to argue in their UK study on police risk assessment,<sup>142</sup> that:

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<sup>133</sup> Backhouse and Toivonen (n 14) 9.

<sup>134</sup> Backhouse and Toivonen (n 14) 8–9; Sandra Walklate, 'The Politics of Risk, the Risk of Politics' (2011) 15(2) *Theoretical Criminology* 221, 222.

<sup>135</sup> State of Victoria (n 40) 96.

<sup>136</sup> *Ibid* 144.

<sup>137</sup> Silke Meyer, Nicola Helps and Kate Fitz-Gibbon, 'Domestic and Family Violence Perpetrator Screening and Risk Assessment: Current Practice and Future Opportunities' 660 *Trends & Issues in Crime and Criminal Justice: Australian Institute of Criminology* 1, 2–3.

<sup>138</sup> Cross et al (n 132) 16.

<sup>139</sup> ALRC and NSWLRC (n 81) [5.6].

<sup>140</sup> NSW Government, *NSW Domestic and Family Violence Plan 2022–2027* (December 2022) <<https://dcj.nsw.gov.au/documents/service-providers/domestic-and-family-violence-services/NSW-Domestic-and-Family-Violence-Plan-2022-2027.pdf>> 15.

<sup>141</sup> ALRC and NSWLRC (n 81) [5.7].

<sup>142</sup> Based on their analysis of 600 randomly sampled risk assessment forms completed by police following a reported DFV case in England: Andy Myhill and Katrin Hohl, 'The "Golden Thread": Coercive Control and Risk Assessment for Domestic Violence' (2019) 34(21–22) *Journal of Interpersonal Violence* 4477.

coercive control is the “golden thread” running through risk identification and assessment for domestic violence and that risk assessment tools structured around coercive control can help police officers move beyond an “incident-by-incident” response and toward identifying the dangerous patterns of behavior that precede domestic homicide.<sup>143</sup>

The Australian *National DFV Bench Book* similarly emphasises that coercive control should be understood as ‘the distinguishing characteristic of domestic and family violence’<sup>144</sup> and ‘risk assessment tools which fail to take account of the gendered nature of domestic and family violence may be ineffective’.<sup>145</sup> However understandings of DFV and coercive control amongst various legal system actors have been found to be inconsistent, with training and education to improve these understandings a regular feature of research recommendations.<sup>146</sup> This makes it even more difficult to define consistent terminology about ‘risk’ in relation to DFV and make sense of latent meanings underlying different professionals’ use of the word ‘risk’ (as will be examined in **Chapter 5** of this study) and the practices they adopt as a consequence (**Chapter 6**).

Even where the same tool is used by multiple professions, it is important to appreciate that different professional vocabularies, policies and perspectives likely heavily influence court-involved actors’ perceptions and descriptions of considerations of risk in the ADVO process and their interactions and practices in court.<sup>147</sup> Understanding the social constructions of ‘risk’ by different professionals in the context of DFV responses is therefore important because, as Hoyle states, these constructions ‘have significant practical and emotional implications for those deemed to be both at risk of being harmed and at risk of harming others’.<sup>148</sup> As the ALRC and NSWLRC recognised: ‘Critically assessing definitional issues is relevant to the important question of when it is appropriate for the law to intervene to provide protection or other forms of redress to victims’<sup>149</sup> — a key question underlying this study. Understanding how ‘risk’ is differently constructed and understood by various court-involved actors is therefore critical to understanding the implications of risk-based approaches to DFV in contexts such as ADVOs.

## ii. Policy intent

Ambiguities in the scope and focus of DFV risk assessment tools are compounded by potential ambiguities in the underlying policy intent in adopting these approaches — for example,

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<sup>143</sup> Ibid 4492. See also Douglas (n 25) [4.2].

<sup>144</sup> Douglas (n 25) [4.2].

<sup>145</sup> Ibid [4.2]. See also, Myhill and Hohl (n 142) 4480–4481.

<sup>146</sup> See, eg, Stella Tarrant, Julia Tolmie and George Giudice, *Transforming Legal Understandings of Intimate Partner Violence* (Research Report No 03/2019, ANROWS, 2019).

<sup>147</sup> Backhouse and Toivonen (n 14) 9; Miller and Trocchio (n 78) 394.

<sup>148</sup> Hoyle (n 10) 325.

<sup>149</sup> ALRC and NSWLRC (n 81) [5.11].

enhancing safety or efficiently managing finite resources. These are not mutually exclusive aims, noting that ‘Providing the most support to these victims who are at the greatest risk is critical to reduce the extent and severity of the harm caused by DFV’.<sup>150</sup> However, as noted earlier, the emergence of government policy focuses on risk can be partially located in the emergence of a risk society documented by risk society theorists. These scholars have argued that actuarial and statistical methods calculating risk factors have been adopted in order to support the state to control and manage the volume of crime,<sup>151</sup> for example by guiding its allocation of finite resources. In this way, these theorists argue that state governance — initially in relation to general criminal reoffending but now extending to intimate partner violence and victimisation<sup>152</sup> — has moved towards a managerial style that attempts to prevent crime by managing risk factors based on calculations of statistical probabilities of (re)offending. According to Stanko, this ‘criminological theorizing about risk of crime and fear of crime has been dominated by the state’s and disciplines’ discourses about state protection’.<sup>153</sup> This potential managerial motivation for risk-based approaches may support better triaging and more efficient allocation of resources. It may be problematic, however, if it shifts responsibility from the state investing in solutions to broader social problems or providing appropriate services because such an approach may encourage prioritisation of interventions ‘according to what is pragmatic, rather than what may be meaningful to the offender<sup>154</sup> but “unachievable”, because interventions hinge on broader social and structural inequalities, or gaps in services’.<sup>155</sup>

For example, Ross and Aitken’s study of online FVIO forms in Victoria, cited above, demonstrated that the perceived benefits of risk-based approaches in more efficiently allocating finite resources may not always materialise in practice. As discussed earlier, their study identified that use of online forms for FVIOs in Victoria delivered several benefits in eliciting further risk information to inform the making of FVIOs. However they also noted that most applicants were rated as ‘urgent/high risk’, meaning the form did not assist the court in prioritising cases.<sup>156</sup> Moreover, registrars advised ‘that the most accurate assessment of risk came from interviewing the applicant where factors such as visible injuries, level of distress, and whether the person is substance-affected were evident’.<sup>157</sup> The need to consult with the applicant directly was

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<sup>150</sup> Leung and Trimboli (n 29)2.

<sup>151</sup> Walklate and Mythen (n 5) 102. See also Ariza, Robinson and Myhill (n 9) 341.

<sup>152</sup> Walklate and Mythen (n 5) 102.

<sup>153</sup> Stanko (n 4) 490.

<sup>154</sup> Or, in the context of ADVOs, meaningful to the victim/survivor and their sense of safety.

<sup>155</sup> Kelly Hannah-Moffat, ‘Criminogenic Needs and the Transformative Risk Subject: Hybridizations of Risk/Need in Penalty’ (2005) 7(1) *Punishment & Society* 29, 43.

<sup>156</sup> Ross and Aitken (n 81) 233.

<sup>157</sup> *Ibid.*

reinforced by the finding that ‘responses to the online form sometimes provided insufficient detail and needed clarification in the telephone call with applicants’.<sup>158</sup> The benefits that risk-based approaches can therefore offer specifically to PO processes require further interrogation, particularly noting the detailed and complex legal, procedural and environmental landscape that governs PO regimes.

### 2.3.2. Limitations in Theorising and Evidence Bases for Domestic and Family Violence Risk

#### *i. Sample dependence*

Another important nuance to consider in relation to risk-based approaches is that even statistically validated assessment tools are not scientific predictors of further DFV or harm, and judgements based on them remain subjective based on the professional judgement applied by the risk assessor.<sup>159</sup> This is a crucial limitation to note, in light of the prolific field of study that now exists attempting to evaluate tools’ predictive validity.<sup>160</sup> The range of identified DFV risk factors can vary, and consensus has not been reached in the literature about any single tool as being the most effective for assessing risks of DFV.<sup>161</sup> Additionally, the risk factors defined in assessment tools are usually fixed and ‘have been developed through statistical analysis of data such as police records of domestic violence incidents’<sup>162</sup> or other data that offer incomplete pictures of DFV. For example, Ganley notes in relation to lethality tools, ‘Adult victims have to die to make their way into homicide studies’,<sup>163</sup> yet ‘In many domestic violence cases, the abused parties are left [seriously injured] but not dead’.<sup>164</sup> Ganley also highlights that ‘domestic violence homicide statistics often do not capture the perpetrators’ violence toward children, others, or themselves. Nor does homicide research capture the damage done when victims or children fight back to escape or protect themselves’.<sup>165</sup> As Weisberg highlights, ‘It is impossible to know, with any certainty, which victims of abuse, or how many victims of abuse, who score at highest risk will ultimately be killed’, and ‘the absence of lethality indicators is not evidence of the

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<sup>158</sup> *Ibid.*

<sup>159</sup> Walklate and Mythen (n 5) 107.

<sup>160</sup> See, eg, van der Put, Gubbels and Assink (n 18). Predictive validity is viewed by many as critical measure of efficacy for actuarial tools because misclassifications of risk may mean victims who are inaccurately assessed as at higher-risk may receive ‘superfluous’ services and responses, while those inaccurately assessed at lower-risk may not receive the intensive responses they need: Ringland (n 29)14.

<sup>161</sup> Although some have been assessed as more effective than others. See, eg, Newman’s commentary on a series of 13 different tools in Newman (n 19) 15–16.

<sup>162</sup> Backhouse and Toivonen (n 14) 21.

<sup>163</sup> Anne L Ganley, ‘Domestic Violence: The What, Why, and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases’ in *DV Manual for Judges* (Washington State Administrative Office of the Courts, 2006) [2–1], [2–9].

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

absence of risk of lethality'.<sup>166</sup> Thus, risk scores produced by assessment tools should not be treated as predictive or determinative of whether someone is in need of protection.

The latter point can be extended to the fact that most DFV risk assessment tools are almost solely focused on heterosexual, male-to-female IPV/homicide (which has been the main focus of literature in the DFV field).<sup>167</sup> This is often in recognition that male-perpetrated IPV towards women is the most pervasive form of DFV.<sup>168</sup> However, it also means the applicability of existing evidence and tools for other DFV contexts is less clear, such as for non-cis heterosexual relationships,<sup>169</sup> other familial relationships such as child-to-parent violence,<sup>170</sup> and where there are additional victims/survivors of DFV such as children.<sup>171</sup> Indeed, studies have shown that actuarial tools are sample dependent, and may not be as accurate if applied outside of those sample populations.<sup>172</sup> This is a gap that has been identified specifically in relation to the NSW DVSA, discussed in **Chapter 6**, which has primarily been designed based on IPV risk indicators, leaving risk assessors with little structured guidance in assessing risk for other forms of DFV.<sup>173</sup> These characteristics of DFV assessment tools lead Weisberg to conclude that, while risk assessment tools provide professionals with procedures to assist them to identify higher-risk perpetrators, they should be viewed as a 'in terms of the likeguide in the process rather than a precise actuarial tool'.<sup>174</sup>

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<sup>166</sup> Weisberg (n 79) 239.

<sup>167</sup> Eg, 'Since the late 1970's, as researchers clamored to create instruments that could accurately predict the threat of physical violence, over thirty-three IPV screening tools have been created': McLain and Hitt (n 24) 283. A similar range of tools for other forms of DFV are not available. See also: 'The majority of evidence relates to heterosexual relationships with female victims and male perpetrators; few instruments have been developed and evaluated for use with other family and household relationship types. One exception worth noting is the Domestic Violence Screening Instrument — Revised (DVSIR), a family violence risk assessment instrument which has been found to have good predictive accuracy across a range of recidivism measures and for different types of perpetrators': Ringland (n 29) 16. Also see Holt and Cahill (n 130) 436.

<sup>168</sup> Australian Institute of Health and Welfare (AIHW), *Family, Domestic and Sexual Violence in Australia: Continuing the National Story* (AIHW, 2019) <<https://www.aihw.gov.au/getmedia/b0037b2d-a651-4abf-9f7b-00a85e3de528/aihw-fdv-3.pdf?v=20230605172452&inline=true>> vii–viii. The predominance of IPV-focused research underpins both the existing knowledge on DFV risk factors and studies of POs, which are both overwhelmingly focused on IPV contexts. Consequently, throughout this literature review/thesis, 'DFV' is used interchangeably with IPV, unless otherwise specified. Gendered language referring to victims/survivors as 'women' is also used throughout the thesis, reflecting both a recognition of the gendered nature of IPV, and emphasising the predominant focus of the existing evidence base on DFV on cis-, heterosexual, intimate partner relationships, which limits the applicability of findings to other DFV contexts.

<sup>169</sup> Backhouse and Toivonen (n 14) 25 [footnote 4].

<sup>170</sup> Which is a growing area of focus. See, eg, Kate Fitz-Gibbon et al, *Adolescent Family Violence in Australia: A National Study of Prevalence, History of Childhood Victimisation and Impacts* (Research Report Issue 15, ANROWS, September 2022); Kate Thomas, Kate Fitz-Gibbon and Janemaree Maher, 'The Use of Protection Orders in Response to Adolescent Family Violence: Mapping Divergent Australian Approaches and the Merits of This Criminal Justice Intervention' (2019) 31(4) *Current Issues in Criminal Justice* 461.

<sup>171</sup> See also Kate Fitz-Gibbon et al, 'Understanding and Responding to Family Violence Risks to Children: Evidence-Based Risk Assessment for Children and the Importance of Gender' (2019) 52(1) *Australian & New Zealand Journal of Criminology* 23.

<sup>172</sup> Newman (n 19) 6.

<sup>173</sup> NSW Domestic Violence Death Review Team, *Report 2019–2021* (NSW Government, 2022) <[https://coroners.nsw.gov.au/documents/reports/2019-2021\\_DVDRT\\_Report.pdf](https://coroners.nsw.gov.au/documents/reports/2019-2021_DVDRT_Report.pdf)> 216.

<sup>174</sup> Weisberg (n 79) 240.

ii. *Inherent subjectivity*

Furthermore, the judgements practitioners may form when administering such tools remain 'qualitative, and, inevitably, have an element of subjectivity to them'.<sup>175</sup> Assessing DFV risks requires complex and nuanced knowledge and training in how to appropriately administer assessment tools and exercise professional judgement, underpinned by sufficient understandings of DFV, its dynamics and relevant risk factors.<sup>176</sup> As Kropp explains: 'risk is a complex phenomenon; judgments must consider the who, what, where, when, and how of violence'.<sup>177</sup> Yet Kropp observed that, as at the time of a 2008 review, the extant literature was largely confined to discussing 'risk in terms of the likelihood that some form of violence will take place sometime in the future', rather than examining assessors' decision making in practice which 'likely involve[s] consideration of the imminence, nature (e.g., emotional, physical, sexual), frequency, and seriousness of the violence, in addition to the likelihood that it will occur'.<sup>178</sup>

The inherent subjectivity of assessing risk, combined with the skill required to do so in DFV contexts, led Kropp to observe the need for professional standards and minimum qualifications for professionals who undertake risk assessments, yet an absence of discussion of these issues in the literature.<sup>179</sup> Kropp's findings therefore reinforced a 'ghostly relationship between theory and practice'<sup>180</sup> in the assessment of risk in the DFV field that has been observed by others. More recently, Australian researchers Meyer, Helps and Fitzgibbon observe that 'research has identified varying degrees of predictive validity associated with the inconsistent administration of risk assessment tools',<sup>181</sup> yet there remains a 'lack of evidence in relation to the administration of screening and risk assessment tools in the context of wider screening and risk assessment protocols and manuals, along with subsequent risk management'.<sup>182</sup> Recent studies are emerging exploring the practice and administration of assessments in DFV contexts,<sup>183</sup> particularly by police, but this remains an area for further research.<sup>184</sup>

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<sup>175</sup> Maria Ansbro, 'The Nuts and Bolts of Risk Assessment: When the Clinical and Actuarial Conflict' (2010) 49(3) *The Howard Journal of Criminal Justice* 252, 260.

<sup>176</sup> Kropp (n 11) 216.

<sup>177</sup> *Ibid* 203.

<sup>178</sup> *Ibid* 202–203.

<sup>179</sup> *Ibid* 202.

<sup>180</sup> Walklate (n 2) 5.

<sup>181</sup> Meyer, Helps and Fitz-Gibbon (n 137) 3.

<sup>182</sup> *Ibid*.

<sup>183</sup> Eg, Myhill, Hohl and Johnson (n 121); Meyer, Helps and Fitz-Gibbon (n 137); Nicole Youngson et al, 'Domestic Violence Risk Assessment Research to Real-World Practice: The Devil Is in the Implementation' (2022) 37(4) *Violence and Victims* 425.

<sup>184</sup> Note that an independent evaluation of the primary assessment tool used by police and court support workers in NSW, the DVSAT, found administration was variable: see ARTD (n 28). These and other relevant findings from this evaluation are discussed in detail in **Section 6.3.2 (i) and (ii)**.

iii. *'Art' versus 'science'*

Based on the inherent subjectivities and limitations in the evidence base underpinning risk assessment tools currently in use, numerous scholars warn against the 'aura of scientific legitimacy' of actuarial tools in the context of DFV,<sup>185</sup> as 'it may not be possible to develop a tool that calculates with absolute certainty the risk of re-assault or lethal violence'.<sup>186</sup> As the RCFV recognised, 'risk assessment is an art rather than a science and should be considered preventative rather than predictive'.<sup>187</sup> In light of these cautions, scholars identify 'a paradox that runs through policy and literature on risk assessment',<sup>188</sup> where:

On the one hand there is an acknowledgment that risk assessment is part art, part science, an acceptance that future offending can only be anticipated up to a point, and to some extent defies prediction ... On the other hand there is a theme that identifies some risk formulations as correct, and some incorrect.<sup>189</sup>

According to Walklate and Mythen these 'paradoxes ... are also identifiable in the practices of risk assessment and risk assessment tools'.<sup>190</sup> Recognising the subjectivities inherent in assessment tools, and their inability to offer accurate predictions of DFV, is important because different judgements of risk will 'present different implications for victim safety planning, criminal justice intervention, and treatment of the offender'.<sup>191</sup> In turn, 'the impossibility of determining future behaviour ... raises questions about not only how risk assessments are actually made but also about whose knowledge counts in that risk assessment process'.<sup>192</sup> In this sense, DFV risk assessment judgements — even where informed by statistically validated instruments — should not be understood as scientific or objective but rather constructed based on different values and subjectivities.<sup>193</sup>

iv. *Dominance of 'Northern theorising'*

These observations extend to the theorising underlying the development and design of many of these risk-based approaches for DFV, which has been largely dominated by 'northern theorising' of risk.<sup>194</sup> According to Walklate and Mythen, there are 'differential understandings of risk'

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<sup>185</sup> Newman (n 19) 5.

<sup>186</sup> Backhouse and Toivonen (n 14) 23.

<sup>187</sup> State of Victoria (n 40) 97, quoting a submission made by the Melbourne Research Alliance to end violence against women and their children.

<sup>188</sup> Ansbro (n 175) 260. Also see Walklate and Mythen (n 5) 110.

<sup>189</sup> Ansbro (n 175) 260.

<sup>190</sup> Walklate and Mythen (n 5) 110.

<sup>191</sup> Kropp (n 11) 203.

<sup>192</sup> Walklate and Mythen (n 5) 107.

<sup>193</sup> *Ibid.*

<sup>194</sup> Walklate (n 2).

throughout the general risk literature, not all of which account for 'diverse experiences of risk'.<sup>195</sup> Specifically in relation to risk-based responses to DFV, Walklate points out that practices and policies largely 'emanate from assumptions rooted in Northern theorising, the relevance of which, in other parts of the globe and for those whose voices are not reflected in such theorising, is open to critical scrutiny'.<sup>196</sup> Inherent biases may exist in assessment tools and practices, including assumptions that the same 'tools, and ... understanding of risk, are valid across different knowledge systems'.<sup>197</sup> This criticism 'is particularly relevant to [I]ndigenous peoples across the globe who are subjected to assessments presumed to be culturally neutral', whereas 'patterns of crime and victimisation within [I]ndigenous communities [are not] separate and separable from their specific historical and social context'.<sup>198</sup> Similar observations can be made about the fact that characterisations of 'risk' and consequent responses to DFV may have markedly different implications for victims/survivors who, for example, have precarious visa status,<sup>199</sup> rely on familial care for disability support,<sup>200</sup> and/or experience discriminatory and exclusionary treatment when seeking help.<sup>201</sup> In deMichele et al's US study of risk assessments of criminal offenders in pre-trial release contexts, the authors point out that the framing of 'risk' in those actuarial tools 'are rooted in structural racism and punitive traditions that ignore the health and well-being of communities of color and people living in poverty'.<sup>202</sup> Heward-Belle similarly critiques the adoption of standardised risk assessment tools in the organisational policy and practice of Australian child protection social workers, arguing:

given the pervasiveness of neo-liberalism and managerialism in Australian social service settings, there is a risk that tools can be used as weapons to advance state interests. For example, one can argue that the uncritical use of risk assessment models historically has contributed to the over-

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<sup>195</sup> Walklate and Mythen (n 5) 101.

<sup>196</sup> Walklate (n 2) 2.

<sup>197</sup> Ibid 7.

<sup>198</sup> Ibid. See also Gema Varona, 'Misunderstanding Risk, Migration and Ethnicity in Intimate Partner Violence' in Kate Fitz-Gibbon et al (eds), *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Routledge, 1<sup>st</sup> ed, 2018) 142.

<sup>199</sup> Eg, Marie Segrave, 'Temporary Migration and Family Violence: How Perpetrators Weaponise Borders' (2021) 10(4) *International Journal for Crime, Justice and Social Democracy* 26; Jill Theresa Messing et al, 'Culturally Competent Intimate Partner Violence Risk Assessment: Adapting the Danger Assessment for Immigrant Women' (2013) 37(3) *Social Work Research* 263.

<sup>200</sup> Eg, Janemaree Maher et al, *Women, Disability and Violence: Barriers to Accessing Justice* (Research Report, Horizons Issue 2/2018, ANROWS, April 2018).

<sup>201</sup> Marcia Langton et al, *Improving Family Violence Legal and Support Services for Aboriginal and Torres Strait Islander Women* (Research Report, Issue 25, ANROWS, December 2020) 32; Ellen Reeves, Jasmine McGowan and Ben Scott, "'It Was Dangerous, Corrosive and Cruel but Not Illegal": Legal Help-Seeking Behaviours Amongst LGBTQA+ Domestic and Family Violence Victim-Survivors Experiencing Coercive Control in Australia' [2023] *Journal of Family Violence* 1, 2; Ellen Reeves, Mary Iliadis and Naomi Pfitzner, 'LGBTQ+ Domestic and Family Violence Victim-Survivors' Experiences of Remote Court Hearings during the COVID-19 Pandemic: The Gendered Dimensions of Safety, Independence and Visibility' [2023] *Criminology & Criminal Justice* 1.

<sup>202</sup> DeMichele et al (n 13) 23.

representation of Indigenous children in out-of-home care and Indigenous adults in incarceration.<sup>203</sup>

These observations provide an additional, important counterpoint to the perceived benefits of risk-based approaches that are sometimes uncritically promoted in the DFV risk literature. Appreciating that deep conceptual ambiguities and limitations in the theorising of risk assessment approaches exist in the DFV risk literature suggests the need to examine how risk assessors conceptualise and form judgements of 'risk' in practice, in order to better understand 'both how risk assessments are made and whose knowledge counts in the risk assessment process',<sup>204</sup> as this study seeks to do.

### 2.3.3. Mixed Evidence on the Effectiveness of Protection Orders

A third complexity that adds important nuance to this thesis is the mixed evidence on the effectiveness of POs in mitigating risks and enhancing victims/survivors' safety, despite their widespread use for decades. Recent quantitative Australian data, for example, suggests POs can be effective at mitigating short term risk,<sup>205</sup> and international studies indicate POs can both 'decrease risk of intimate partner sexual assault or physical abuse ... and improve a survivor's subjective feelings of safety, security, and quality of life'.<sup>206</sup> In contrast, Cattaneo, Grossmann and Chapman report that while many 'large scale, rigorous studies report a reduction in abuse' following the court ordering a PO,<sup>207</sup> other reported findings 'suggest that abuse can increase post-order and that the effectiveness of the orders varies depending on multiple contextual factors, even within the same case over time'.<sup>208</sup> A systematic review of international literature on the effectiveness of POs was conducted by Cordier et al in 2019.<sup>209</sup> They found there were difficulties assessing the effectiveness of POs due to the use of a range of differing measures of 'effectiveness'.<sup>210</sup> In their meta-analysis of 'violation rates and recidivism',<sup>211</sup> they found that:

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<sup>203</sup> Susan Heward-Belle, 'Assessing Dangerousness: Domestic Violence Offenders and Child Abusers' (2020) 73(3) *Australian Social Work* v, vi.

<sup>204</sup> Walklate and Mythen (n 5) 107.

<sup>205</sup> Christopher Dowling et al, 'Protection Orders for Domestic Violence: A Systematic Review' (2018) 551 *Trends & Issues in Crime and Criminal Justice: Australian Institute of Criminology* 1, 9. Also see Adam Teperski and Stewart Boiteux, 'The Long and Short of It: The Impact of Apprehended Domestic Violence Order Duration on Offending and Breaches' (2023) 261 *Crime and Justice Bulletin (BOCSAR): Contemporary Issues in Crime and Justice* 1, 4.

<sup>206</sup> Kafka et al (n 70) 1141.

<sup>207</sup> Lauren Bennett Cattaneo, Jessica Grossmann and Aliya R Chapman, 'The Goals of IPV Survivors Receiving Orders of Protection: An Application of the Empowerment Process Model' (2016) 31(17) *Journal of Interpersonal Violence* 2889, 2890.

<sup>208</sup> *Ibid.*

<sup>209</sup> Reinie Cordier et al, 'The Effectiveness of Protection Orders in Reducing Recidivism in Domestic Violence: A Systematic Review and Meta-Analysis' (2019) 22(4) *Trauma, Violence, and Abuse* 804.

<sup>210</sup> *Ibid* 822.

<sup>211</sup> *Ibid* 806.

POs were not effective in completely stopping or preventing the continuing use of violence and abuse toward the victims seeking protection. However, there is emerging evidence of reduced subsequent violence to some extent and even more so for some groups.<sup>212</sup>

Cordier et al identified POs as more effective in reducing recidivism for sub-groups of victims/survivors 'who were not stalked by their partner ..., [their] partner did not have a prior history of arrests or high levels of violence', and/or where the victim/survivor had 'discontinued their relationship ... [and had] medium to high median family incomes'.<sup>213</sup> The researchers concluded that 'In order to increase the effectiveness of POs for these subgroups, future research is required to identify the best combinations of legal and treatment responses for perpetrators of varying levels of risk and the optimal types of support required for victims to establish their safety'.<sup>214</sup> Benitez, McNiel and Binder similarly found in their earlier review of the literature 'that there is a substantial chance that a protection order will be violated', and this is most likely to occur shortly after the order is made and if stalking behaviours are present.<sup>215</sup>

According to Meyer and Stambe 'Recent Australian-based research ... argues that only a small minority of victims experience a cessation of violence following a protection order in general'.<sup>216</sup> They also note that existing literature 'identifies a number of individual and situational factors that mediate the potential effectiveness of DVOs'.<sup>217</sup> In particular, 'DVOs have been found to be less effective where perpetrators have an accumulation of criminogenic risk factors, including unemployment, mental health concerns, problematic substance use and/or past and continuing criminal behaviour'.<sup>218</sup> They highlight that 'Understanding the context in which DVOs are initiated, implemented and breached is therefore essential to improve justice responses that can better support perpetrators and their compliance with order conditions and thus maximise victim safety'.<sup>219</sup> The efficacy of POs in mitigating DFV will evidently therefore differ depending on the different risks, characteristics and dynamics of DFV present in individual circumstances, illustrating 'that a great deal of complexity is present in protective order cases and that a "one-size-fits-all" model is inadequate'.<sup>220</sup> This may indicate evidence-based DFV risk assessments undertaken by court-involved actors could improve the tailoring of PO orders to increase their efficacy for individual victims/survivors. On the other hand, as Tarrant, Tolmie and Giudice

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<sup>212</sup> Ibid 825.

<sup>213</sup> Ibid.

<sup>214</sup> Ibid.

<sup>215</sup> Benitez, McNiel and Binder (n 58) 384–385.

<sup>216</sup> Meyer and Stambe (n 77) 1074.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid 1074.

<sup>219</sup> Ibid.

<sup>220</sup> TK Logan and Robert Walker, 'Civil Protective Order Outcomes: Violations and Perceptions of Effectiveness' (2009) 24(4) *Journal of Interpersonal Violence* 675, 686.

explain, 'protection orders are simply court orders and do not automatically generate safety'.<sup>221</sup> Their efficacy depends on enforcement, which in turn depends on victims/survivors reporting violence, meaning 'In effect, the victim/survivor has to be threatened or harmed first'.<sup>222</sup> A critical component to assessing the efficacy of POs then, is understanding the role 'factors related to specific conditions of protection orders'<sup>223</sup> play in addressing different levels of risk and safety.<sup>224</sup> Yet, as Cordier et al note there 'is not yet incontrovertible evidence about the conditions and individuals with which POs are most and least effective'.<sup>225</sup> This has led some researchers to note 'future research should better examine the role specific PO stipulations may play in different situations, and the degree to which women's needs and special circumstances are addressed with PO stipulations'.<sup>226</sup> In arguing this, Logan and Walker suggest examining 'whether there is support for the idea of POs that are graded according to the severity of violence in the relationship'.<sup>227</sup>

Multiple other complex and interacting factors may influence decision making by relevant professionals, and ultimately PO outcomes, however. For example, 'case attributes (e.g., type of abuse and its history, and presence of a child/children)',<sup>228</sup> characteristics of the person using violence, and/or the type of relationship,<sup>229</sup> and 'elements of the decision-making context (e.g., the presence/absence of legal representation, victim advocates, court-appointed interpreters),<sup>230</sup> have all been found to be influential. In the US, where POs are predominantly made by private application, legal assistance in preparing PO applications increases the likelihood of an order being granted.<sup>231</sup> In Australia, where police applications predominate, applications prepared by police are more likely to succeed.<sup>232</sup> Moreover, reporting breaches of orders does not warrant they will be effectively enforced:<sup>233</sup> 'The response to a breach might

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<sup>221</sup> Tarrant, Tolmie and Giudice (n 146) 20. Recognition of this has led Durfee and Goodmark to argue should be re-envisioned to reflect they can only reactive, rather than preventative interventions for DFV: Durfee and Goodmark (n 78) 65.

<sup>222</sup> Tarrant, Tolmie and Giudice (n 146) 20.

<sup>223</sup> Ruth E Fleury-Steiner et al, "'No Contact, Except ...': Visitation Decisions in Protection Orders for Intimate Partner Abuse' (2016) 11(1) *Feminist Criminology* 3, 17.

<sup>224</sup> See also Logan and Walker (n 220) 687; Cordier et al (n 209) 825.

<sup>225</sup> Cordier et al (n 209) 806.

<sup>226</sup> Logan and Walker (n 220) 687.

<sup>227</sup> *Ibid.*

<sup>228</sup> Bejinariu, Troshynski and Miethe (n 61) 232.

<sup>229</sup> Cordier et al (n 209).

<sup>230</sup> Bejinariu, Troshynski and Miethe (n 61) 232.

<sup>231</sup> Alesha Durfee, 'Victim Narratives, Legal Representation, and Domestic Violence Civil Protection Orders' (2009) 4(1) *Feminist Criminology* 7.

<sup>232</sup> Fitzgerald and Douglas (n 69) 191.

<sup>233</sup> Annabel Taylor et al, *Domestic and Family Violence Protection Orders in Australia: An Investigation of Information-Sharing and Enforcement with a Focus on Interstate Orders: Final Report* (ANROWS Horizons 07/2017, ANROWS, 2017) <[https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Horizons\\_legal\\_FINAL.pdf](https://20ian81kynqg38bl3l3eh8bf-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Horizons_legal_FINAL.pdf)>; Annabel Taylor et al, *Domestic and Family Violence Protection Orders in Australia: An Investigation of Information Sharing and Enforcement: State of Knowledge Paper* (ANROWS Landscapes 16/2015, ANROWS, 2015) <[https://anrows-2019.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2019/02/19024752/16\\_4.1-Legal-WEB\\_FINAL\\_0-1.pdf](https://anrows-2019.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2019/02/19024752/16_4.1-Legal-WEB_FINAL_0-1.pdf)> 27.

simply be a further warning to the perpetrator'.<sup>234</sup> The complex array of factors that may influence whether, when and how POs may be effective is therefore incredibly difficult to evaluate and illustrates a more profound difficulty in determining 'what constitutes PO effectiveness'.<sup>235</sup>

In light of these difficulties, in this study I view 'effectiveness' in terms of whether ADVOs enhance victims/survivors' self-defined 'safety'. This in turn requires recognition that 'safety' is not a uniform experience for victims/survivors and they may have diverse goals which will determine what 'effectiveness' means for them in relation to ADVOs.

### 2.3.4. Experiences of 'Safety' are Not Uniform or Universal

'Safety' is often cited as the primary goal of POs and risk-based approaches. However, victims/survivors' experiences of DFV and 'safety' are not uniform, and previous studies have established victims/survivors have diverse perspectives on whether they view POs as helpful and what their goals for POs may be.<sup>236</sup> These nuances require holistic understandings of 'multiple dimensions' of safety<sup>237</sup> to inform examinations of both risk-based approaches and POs as an intervention.

#### *i. 'Safety' from domestic and family violence*

In terms of personal harms of DFV, for example, lethal violence is frequently the focus in DFV responses and government policy as the most extreme form of harm abusers can inflict,<sup>238</sup> and it therefore often informs the focus of assessment tools.<sup>239</sup> Yet a focus on lethality provides an insufficient account of victims/survivors' 'lived realities' of DFV. DFV homicides 'are only the tip

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<sup>234</sup> Tarrant, Tolmie and Giudice (n 146) 20.

<sup>235</sup> Cordier et al (n 209) 823.

<sup>236</sup> Cattaneo, Grossmann and Chapman (n 207); Alesha Durfee and Jill Theresa Messing, 'Characteristics Related to Protection Order Use Among Victims of Intimate Partner Violence' (2012) 18(6) *Violence Against Women* 701; John Costello and Alesha Durfee, 'Survivor-Defined Advocacy in the Civil Protection Order Process' (2020) 15(3) *Feminist Criminology* 299; Heather Douglas, 'Domestic Violence Protection Orders and Their Role in Ensuring Personal Security' in Kate Fitz-Gibbon et al (eds), *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Routledge, 1<sup>st</sup> ed, 2018); Jill Theresa Messing et al, "'Not Bullet Proof': The Complex Choice Not to Seek a Civil Protection Order for Intimate Partner Violence' (2021) 27(2) *International Review of Victimology* 173.

<sup>237</sup> Joanne M Spangaro, Anthony B Zwi and Roslyn G Poulos, "'Persist. Persist.": A Qualitative Study of Women's Decisions to Disclose and Their Perceptions of the Impact of Routine Screening for Intimate Partner Violence' (2011) 1(2) *Psychology of Violence* 150, 158.

<sup>238</sup> In Australia, DFV 'is the main preventable risk factor that contributes to illness and death in women aged 18 to 44': *National Plan to End Violence against Women and Children 2022–2032* (Commonwealth Government of Australia, 2022) <<https://www.dss.gov.au/system/files/resources/national-plan-end-violence-against-women-and-children-2022-2032.pdf>> 15 ('*National Plan*').

<sup>239</sup> See, eg, Weisberg (n 79); Tara N Richards et al, 'An Examination of the Lethality Assessment Program (LAP): Perspectives on Implementation, Help-Seeking, and Victim Empowerment' (2020) 26(12–13) *Violence Against Women* 1517; Margeret E Johnson, 'Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening' (2010) 32(2) *Cardozo Law Review* 519.

of the iceberg<sup>240</sup> and a multitude of non-lethal harms occur as part of the everyday lived experiences of DFV for women and their children.<sup>241</sup> These harms may include ‘poor mental health, problems during pregnancy and birth, alcohol and illicit drug use, suicide, injuries’<sup>242</sup> and homelessness.<sup>243</sup> Further, ‘quality of life for women experiencing intimate partner violence [is] significantly worse than the Australian average’,<sup>244</sup> and ‘Children exposed to violence experience long-lasting effects on their development, health and well-being’.<sup>245</sup> Victims/survivors navigating the PO process may therefore be facing ‘a wide range of difficulties ... including financial stress, housing instability, and social isolation’,<sup>246</sup> and approaches that place ‘priority on the most dangerous perpetrators may leave many women and children without an adequate and safe intervention’.<sup>247</sup> Adequately defining ‘safety’ therefore requires deeper understandings of the experiences, impacts and harms of DFV, as these considerations will inform victims/survivors’ priorities for POs and what ‘safety’ means for them. For example, victims/survivors’ commonly stated goals for POs include not only stopping the respondents’ actual and/or threatened use of violence and/or from contacting them, but also ‘more psychological’ goals ‘including moving on ... [gaining] a sense of control over their lives ... build[ing] a paper trail that can be used later for other purposes ... [and] empower[ing] them to make claims on other agencies or offices’.<sup>248</sup>

ii. ‘Safety’ in system responses

The legal system in which POs are administered is another crucial dimension of ‘safety’. According to Blackburn and Graca, ‘from a victim’s perspective, safety is key in their decisions regarding “staying in” or “dropping out” of the judicial system’.<sup>249</sup> Effective safety planning for risk management purposes has also been found to be dependent on there being non-shaming<sup>250</sup> and ‘collaborative relationships and process between the victim and the professional supporting her’,<sup>251</sup> that takes into account ‘the “whole person” and the contexts of victim-survivors’ lives’.<sup>252</sup>

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<sup>240</sup> Kate Lyons, ‘Almost 30% Spike in Rate of Australian Women Killed by Intimate Partner Last Year, Data Shows’, *The Guardian* (online, 29 April 2024) <<https://www.theguardian.com/australia-news/2024/apr/29/30-spike-in-rate-of-australian-women-killed-by-intimate-partner-last-year-data-shows>>, quoting Patty Kinnersly (Our Watch).

<sup>241</sup> Helen McLaren, Jane Fischer and Lana Zannettino, *Defining Quality of Life Indicators for Measuring Perpetrator Intervention Effectiveness* (Research Report No 05/2020, ANROWS, 2020) 15–16.

<sup>242</sup> Kim Webster, *A Preventable Burden: Measuring and Addressing the Prevalence and Health Impacts of Intimate Partner Violence in Australian Women: Key Findings and Future Directions* (Research to Policy & Practice, Issue 07, ANROWS, November 2016) 7.

<sup>243</sup> *National Plan* (n 238) 15.

<sup>244</sup> ANROWS, *Women’s Quality of Life as a Measure of Effectiveness of Perpetrator Interventions: Key Findings and Future Directions* (Research to Policy & Practice Issue 05, ANROWS, 2020) 5.

<sup>245</sup> *National Plan* (n 238) 15.

<sup>246</sup> Cattaneo, Grossmann and Chapman (n 207) 2892.

<sup>247</sup> Backhouse and Toivonen (n 14) 11.

<sup>248</sup> Douglas (n 236) 218.

<sup>249</sup> Kate Blackburn and Sofia Graca, ‘A Critical Reflection on the Use and Effectiveness of DVPNs and DVPOs’ (2021) 22(1) *Police Practice & Research* 23, 32.

<sup>250</sup> Spangaro, Zwi and Poulos (n 237) 158.

<sup>251</sup> Backhouse and Toivonen (n 14) 11.

<sup>252</sup> *Ibid* 10. See also Jude McCulloch et al (n 8) 36.

These findings support Spangaro et al's observation that, for victims/survivors of DFV, 'safety has multiple dimensions, involving not only the safety from an offender, but from being shamed and from others assuming control'.<sup>253</sup> Indeed, in McLaren, Fischer and Zannettino's interviews with 100 women about the efficacy of male perpetrator interventions<sup>254</sup> in South Australia, Queensland and Victoria, they found that autonomy was one of the most common priorities expressed by women.<sup>255</sup>

Appreciating that 'safety' has multiple dimensions for victims/survivors is important in relation to ADVOs, as studies have found victims/survivors may experience a myriad of adverse impacts from engaging with the PO legal system. Legal processes are stressful and traumatic, and can re-victimise women.<sup>256</sup> In Coumarelos' representative survey of Australian households, she found DFV victims/survivors' 'legal problems cause an array of adverse impacts on broader life circumstances, including significantly greater levels of stress-related illness, physical ill health, relationship breakdown and financial strain and negative impacts on housing circumstances', including homelessness.<sup>257</sup> Specifically, civil PO court processes have been recognised as 'a site of heightened difficulty', where 'victims often lack support'.<sup>258</sup> Perpetrators may also use systems abuse tactics in the legal process,<sup>259</sup> and victims/survivors may also experience 'insensitive treatment or inaction by the police',<sup>260</sup> victim-blaming attitudes,<sup>261</sup> and being cross-examined and exposed to character attacks in adversarial proceedings.<sup>262</sup>

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<sup>253</sup> Spangaro, Zwi and Poulos (n 237) 158.

<sup>254</sup> Defined as 'various forms of individual counselling with men, couples counselling, voluntary/ self-referral support groups, mandated (usually by Magistrates Courts) or voluntary men's behaviour change groups, and Family Court programs for parents in the context of IPV and child protection': McLaren, Fischer and Zannettino (n 241) 8.

<sup>255</sup> Ibid 12.

<sup>256</sup> Heather Douglas, 'Domestic and Family Violence, Mental Health and Well-Being, and Legal Engagement' (2017) 25(3) *Psychiatry, Psychology, and Law* 341; Douglas (n 25) [5.2]; Christine Coumarelos, 'Quantifying the Legal and Broader Life Impacts of Domestic and Family Violence' [2019] (32) *Justice Issues* 1; Ann E Freedman, 'Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witness' (2003) 11(2) *American University Journal of Gender Social Policy and Law* 567; Judith Lewis Herman, 'The Mental Health of Crime Victims: Impact of Legal Intervention' (2003) 16(2) *Journal of Traumatic Stress* 159; Lucinda Jordan and Lydia Phillips, *Women's Experiences of Surviving Family Violence and Accessing the Magistrates' Court in Geelong, Victoria* (Deakin University, November 2013); Donna Roberts, Peter Chamberlain and Paul Delfabbro, 'Women's Experiences of the Processes Associated with the Family Court of Australia in the Context of Domestic Violence: A Thematic Analysis' (2015) 22(4) *Psychiatry, Psychology, and Law* 599.

<sup>257</sup> Coumarelos (n 256) 25.

<sup>258</sup> Mary Iliadis, Kate Fitz-Gibbon and Sandra Walklate, 'Improving Justice Responses for Victims of Intimate Partner Violence: Examining the Merits of the Provision of Independent Legal Representation' (2021) 45(1) *International Journal of Comparative and Applied Criminal Justice* 105, 108. See also Costello and Durfee (n 236) 299–300.

<sup>259</sup> Douglas (n 25) [3.1.11] 'Systems abuse'.

<sup>260</sup> Iliadis, Fitz-Gibbon and Walklate (n 258) 105.

<sup>261</sup> SafeLives and Domestic Abuse Commissioner, *Understanding Court Support for Victims of Domestic Abuse* (June 2021) <<https://safelives.org.uk/sites/default/files/resources/Court%20Support%20Mapping%20Report%20-%20DAC%20Office%20and%20SafeLives.pdf>> 33.

<sup>262</sup> Tracey Booth, Miranda Kaye and Jane Wangmann, 'Family Violence, Cross-Examination and Self-Represented Parties in the Courtroom: The Differences, Gaps and Deficiencies' (2019) 42(3) *University of New South Wales Law Journal* 1106. See also SafeLives and Domestic Abuse Commissioner (n 261) 6, which discusses the traumatic impacts of encountering 'a lack of understanding from judges and other court officials'.

Adverse impacts of ‘assumptions inscribed into law and legal practices’ are particularly heightened for ‘multiply marginalised’ people,<sup>263</sup> many of whom are subjected to deeply embedded structural inequities in society that can manifest in negative and/or harmful interactions with police and other state institutions that create justifiable distrust of the legal system. For example, Aboriginal and Torres Strait Islander women in Australia justifiably fear the involvement of child protection when reporting DFV,<sup>264</sup> being arrested or subject to POs themselves,<sup>265</sup> and the heightened risks of criminalisation for both themselves and their partners if also Aboriginal or Torres Strait Islander,<sup>266</sup> noting that POs in some Australian jurisdictions have been found to be pathways into the criminal system for Aboriginal and Torres Strait Islander men and women.<sup>267</sup> Similarly, according to Costello and Durfee in the US, ‘Women of color and undocumented women may not want to report abusive partners to police for fear that they or their partners will be treated unfairly, receive undue harsh punishment, or be deported’.<sup>268</sup> As Hunter observed in 2008 in relation to the Victorian PO system, ‘The civil justice response to domestic violence certainly reflects more of a mainstream feminist position than one inflected by understandings of difference’<sup>269</sup> and ‘The expectation that women should go to court in order to secure safety for themselves and their children is clearly one with which some groups of women find it far more difficult to comply’.<sup>270</sup> For many victims/survivors, ‘the process [of obtaining a PO] itself is detrimental’.<sup>271</sup> Yet as Cattaneo, Grossman and Chapman state, previous ‘studies explor[ing] the perspective of IPV victims on the impact of pursuing a PO ... do not explore effectiveness with respect to particular needs that victims bring to the system’.<sup>272</sup> These findings indicate the need to account for different priorities victims/survivors may have for their own safety when considering the effective design of legal intervention such as POs.

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<sup>263</sup> Durfee (n 78) 658.

<sup>264</sup> Rachel Loney-Howes, Marlene Longbottom and Bianca Fileborn, ‘Gender-Based Violence and Carceral Feminism in Australia: Towards Decarceral Approaches’ (2024) 32(2) *Feminist Legal Studies* 163, 166; Langton et al (n 201) 45–46.

<sup>265</sup> Heather Nancarrow et al, *Accurately Identifying the “Person Most in Need of Protection” in Domestic and Family Violence Law* (Research Report No Issue 23, ANROWS, 2020); Ellen Reeves, ‘Family Violence, Protection Orders and Systems Abuse: Views of Legal Practitioners’ (2020) 32(1) *Current Issues in Criminal Justice* 91; Ellen Reeves, ‘A Culture of Consent: Legal Practitioners’ Experiences of Representing Women Who Have Been Misidentified as Predominant Aggressors on Family Violence Intervention Orders in Victoria, Australia’ (2023) 31 *Feminist Legal Studies* 369.

<sup>266</sup> Langton et al (n 201) 31; Heather Douglas and Robin Fitzgerald, ‘The Domestic Violence Protection Order System as Entry to the Criminal Justice System for Aboriginal and Torres Strait Islander People’ (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 41.

<sup>267</sup> Douglas and Fitzgerald (n 266). This study established Aboriginal and Torres Strait Islander people are significantly over-represented within the Queensland PO system, ‘as both aggrieved and respondent, at the application stage, in contravention charges and in resulting imprisonment outcomes’ (p. 52).

<sup>268</sup> Costello and Durfee (n 236) 302.

<sup>269</sup> Rosemary Hunter, *Domestic Violence Law Reform and Women’s Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (Cambria Press, 2008) 31. Also see ‘Women’s accounts from positions of “difference” (24–30) for a thorough summary of whose accounts are not represented.

<sup>270</sup> *Ibid* 31.

<sup>271</sup> Costello and Durfee (n 236) 302.

<sup>272</sup> Cattaneo, Grossmann and Chapman (n 207) 2893.

iv. *Accounting for different priorities for safety*

Appreciating that the legal and policing responses to DFV may be a critical dimension of safety for victims/survivors is especially important in the NSW ADVO system, which is primarily police-led. US studies of PO often refer to a primary benefit of POs being that ‘the flexibility of the orders allows petitioners to tailor POs toward their own priorities’<sup>273</sup> and directly request the court include additional types of relief to reflect their individual circumstances.<sup>274</sup> POs are primarily made by private application in the US however, and therefore do ‘offer a measure of control [to victims/survivors because] unlike the criminal legal system, the survivor has the power to initiate the case and has some control over the possible outcomes’.<sup>275</sup> In contrast, in NSW, police apply for the majority of orders on behalf of victims/survivors, and police prosecutors usually make submissions to the court, meaning that ‘it cannot be assumed that the role and helpfulness of DVOs for women in the Australian context will be the same as that for women in the US’.<sup>276</sup> For example, Meyer and Reeves have found that victims/survivors’ preferences may not always be influential on police decision making in DFV matters in Queensland, including in relation to POs.<sup>277</sup> Similarly, a 2019 Australian study that interviewed judicial officers about their views of perpetrator interventions found that improving safety outcomes for victims/survivors was a key consideration for them in deciding to use perpetrator interventions such as men’s behaviour change programs and POs.<sup>278</sup> However, they also ‘noted that victims’/survivors’ views about interventions often differed from those of legal practitioners and/or judicial officers’,<sup>279</sup> and interviewed judges held differing views about how influential victims/survivors’ preferences should be in their decisions to order an intervention.<sup>280</sup>

Consequently, victims/survivors may have very little control over the PO process and possible outcomes. The fact that victims/survivors’ goals and preferences for POs may not be determinative of PO outcomes raises important questions about the extent to which key court-involved actors’ and institutional priorities and goals align with victims/survivors’, and ‘whose knowledge counts’ when they conflict.<sup>281</sup> Johnson, for instance, raises ‘concerns regarding the use of a state intervention that emphasizes a goal of saving lives as paramount to a goal of victim

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<sup>273</sup> *Ibid* 2891.

<sup>274</sup> See, eg, the following US studies citing these benefits: Bejinariu, Troshynski and Miethe (n 61) 231–232; Lucken and Rosky (n 75) 270; Fleury-Steiner et al (n 223) 14.

<sup>275</sup> Fleury-Steiner et al (n 223) 14.

<sup>276</sup> Douglas (n 236) 219.

<sup>277</sup> Silke Meyer and Ellen Reeves, ‘Policies, Procedures and Risk Aversity: Police Decision-Making in Domestic Violence Matters in an Australian Jurisdiction’ (2021) 31(10) *Policing & Society* 1168.

<sup>278</sup> Kate Fitz-Gibbon et al, *The Views of Australian Judicial Officers on Domestic and Family Violence Perpetrator Interventions* (Research Report No Issue 13, ANROWS, 2020) 39.

<sup>279</sup> *Ibid*.

<sup>280</sup> *Ibid* 39–42.

<sup>281</sup> Walklate and Mythen (n 5) 107.

dignity and empowerment',<sup>282</sup> and the potential for implementation of standardised assessment tools to 'create a narrative of women suffering from a "false consciousness" ... that can be remedied by assessment'.<sup>283</sup> Richards et al similarly highlight:

implementation of [standardised lethality assessment tools in the legal system] emphasizes one goal i.e., service connection to reduce homicide risk rather than viewing women as "active decisionmakers . . . [whose] decisionmaking involves weighing options against consequences in their full lives, as opposed to simply accepting that accessing services will reduce homicide risk".<sup>284</sup>

Accounting for victims/survivors' potentially differing priorities or goals is particularly consequential in the ADVO process, where the central mechanism of enforcement depends on victims/survivors reporting breaches to police.<sup>285</sup> As Blackburn and Graca highlight, if orders do not reflect victims/survivors' preferences, 'it is ... unlikely that they will report any breaches, therefore severely impacting the orders' intent'.<sup>286</sup> Most importantly, according to Cattaneo, Grossmann and Chapman, 'interventions that give survivors greater control or voice are related to long-term positive outcomes in mental health, satisfaction with services, and safety'.<sup>287</sup> Designing effective DFV interventions therefore needs to account for, and prioritise, victims/survivors' understandings of their own 'realities'<sup>288</sup> and 'safety', rather than institutionally imposed goals.<sup>289</sup> Consequently, there is increasing recognition by mainstream feminist DFV researchers of the longstanding arguments by advocates for marginalised women in Australia and internationally,<sup>290</sup> that safety is political.<sup>291</sup>

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<sup>282</sup> Tara N Richards et al (n 239) 1521, citing Johnson, Margeret E, 'Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening' (2010) 32(2) *Cardozo Law Review* 519.

<sup>283</sup> Ibid.

<sup>284</sup> Ibid, quoting Johnson, Margeret E, 'Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening' (2010) 32(2) *Cardozo Law Review* 519, 563.

<sup>285</sup> Tarrant, Tolmie and Giudice (n 146) 20; Blackburn and Graca also highlight that: 'Research suggests that from a victim's perspective, safety is key in their decisions regarding 'staying in' or 'dropping out' of the judicial system (Hester, 2006). If a victim only seeks temporary relief for a situation or does not think that reporting a breach of an order will either enhance their safety (or may even decrease it), then it is unlikely that they will report these breaches. If a victim does not want the relationship to end and the perpetrator to leave the family home, it is also unlikely that they will report any breaches, therefore severely impacting the orders' intent (Burton, 2015)': Blackburn and Graca (n 249) 32–33.

<sup>286</sup> Blackburn and Graca (n 249) 33.

<sup>287</sup> Cattaneo, Grossmann and Chapman (n 207) 2893.

<sup>288</sup> Patricia Easteal, Lorana Bartels and Reeva Mittal, 'The Importance of Understanding the Victims' "Reality" of Domestic Violence' (2019) 44(1) *Alternative Law Journal* 11.

<sup>289</sup> Jane K Stoever (ed), *The Politicization of Safety: Critical Perspectives on Domestic Violence Responses* (NYU Press, 2019); Leigh Goodmark, 'Reframing Domestic Violence Law and Policy Anti-Essentialist Principles' in *A Troubled Marriage* (NYU Press, 2012) 136; Donna Coker, 'Domestic Violence and Social Justice: A Structural Intersectional Framework for Teaching About Domestic Violence' (2016) 22(12) *Violence Against Women* 1426.

<sup>290</sup> See, eg, Melissa Lucashenko, 'No Other Truth? Aboriginal Women and Australian Feminism' (1994) 12(4) *Social Alternatives* 21; William Louis Conwill, 'Domestic Violence Among the Black Poor: Intersectionality and Social Justice' (2010) 32(1) *International Journal for the Advancement of Counselling* 31.

<sup>291</sup> Stoever (n 289).

Any examination of the impact of risk-based approaches and POs on victims/survivors' 'safety' therefore needs to incorporate an expansive understanding of safety that accounts for not only the full range of lethal and non-lethal harms of DFV, but also 'safety' in engaging with the legal system and the impact of structural inequities that may manifest there. As McLaren, Fischer and Zannettino argue, 'Whatever decisions women make, and whether they stay or leave, it is critical that women are supported to live in safety and achieve better overall [quality of life]'.<sup>292</sup>

## 2.4. Chapter Conclusion

In conclusion, while numerous aspects of PO processes have been studied by Australian and international scholars to evaluate POs' effectiveness, there is a dearth of research specifically examining the role and influence of risk considerations in the ADVO court process and what this means for enhancing victims/survivors' safety. Considering the dominance of risk-based language and policy in NSW, combined with the important role ADVOs (and, consequently, the court process and court-involved actors within it) play in responding to DFV, this is a surprisingly under-researched area in the PO literature. Given the significant differences between PO legislative approaches and risk-based policy settings throughout Australia and internationally, a targeted study in NSW can help to understand the role of ADVO and risk-based approaches in this specific research setting. Furthermore, as there is limited ability to interrogate legal practices and procedures from documentary analysis of legislation and related procedural rules,<sup>293</sup> further empirical study is appropriate to explore what happens in practice from the perspectives of court-involved actors with key roles within the ADVO system.

Important ambiguities and nuances exist in undertaking this empirical study and exploring the potential implications for risk-based approaches to ADVOs, however. Notably, there is a substantial base of academic and grey literature establishing standards of good practice in DFV risk assessment and management that include the routine and ongoing assessment of risk using evidence-based assessment tools. Yet conceptual ambiguities remain about what constitutes 'risk' and what benefits risk-based approaches may offer, depending on what policy intent underlies their design and adoption. Inherent limitations also exist in the theorising and evidence base that underpins current risk-based models and assessment tools for DFV. Additionally, 'there is not yet incontrovertible evidence about the conditions and individuals with which POs are most and least effective',<sup>294</sup> and evaluating the effectiveness of POs and risk-based approaches

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<sup>292</sup> McLaren, Fischer and Zannettino (n 241) 16.

<sup>293</sup> Terry Hutchinson, *Researching and Writing in Law* (Thomas Reuters, 4<sup>th</sup> ed, 2018) 125–126.

<sup>294</sup> Cordier et al (n 209) 806.

in enhancing victims/survivors' safety is complicated by the fact that victims/survivors do not have universal or uniform experiences of 'safety'. This thesis therefore adopts a critical lens to examining the question of whether and how risk considerations inform the making of ADVOs in NSW, and what this means for enhancing victims/survivors' safety. In adopting a critical lens, the study is informed by a theoretical framework incorporating elements of constructivist grounded theory, risk society scholarship, structural intersectionality and feminist legal theory, as set out in the next chapter.

# Chapter 3: Theoretical Framework and Methodology

## 3.1. Introduction

This chapter details my theoretical framework and methodology. Firstly, I set out four theoretical influences framing my study, including three key conceptual features they share. I also describe my positionality as a researcher in this study. Secondly, I detail my methodology. This includes my research questions, followed by details of the qualitative research methods I used to answer these research questions: namely, in depth, semi-structured qualitative interviews with magistrates, lawyers and court support workers in NSW. I detail the selection, recruitment and final sample of interview participants. I then explain the thematic data analysis I undertook. Throughout, I identify the key strengths and limitations of this qualitative research approach, as informed by my theoretical framework.

## 3.2. Theoretical Framework

Risk society, structural intersectional and feminist legal theorists have contributed substantial knowledge to the existing field on risk considerations and protection orders (POs). Each offers incisive critiques of the utility of 'risk' as a concept, and of POs in enhancing victims/survivors' safety, along with broader theorising on experiences of domestic and family violence (DFV) and the need for DFV responses to adopt expansive understandings of 'safety'. Many of these theorists have exposed underlying issues that motivate my study. Consequently, these three theoretical fields frame my values-stance and aims in conducting this study and provide important sensitising concepts<sup>1</sup> for data analysis. In addition, I have drawn on some conceptual elements of constructivist grounded theory, as developed by Charmaz.<sup>2</sup> Aspects of these theoretical influences were touched on in **Chapter 2**. Here I provide a more detailed overview of each of these four theoretical influences and how they informed this study.

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<sup>1</sup> Kathy Charmaz, 'Grounded Theory Methods in Social Justice Research' in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE, 4<sup>th</sup> ed, 2011) 359, 366; Ylona Chun Tie, Melanie Birks and Karen Francis, 'Grounded Theory Research: A Design Framework for Novice Researchers' (2019) 7 *SAGE Open Medicine* 1, 2–3.

<sup>2</sup> Kathy Charmaz, 'The Power of Constructivist Grounded Theory for Critical Inquiry' (2017) 23(1) *Qualitative Inquiry* 34, 35. My application of Charmaz's constructivist grounded theory is partial: specific conceptual elements inform my theoretical framework, but I do not adopt Charmaz's full methodology in my data analysis. Rather I utilise thematic analysis: Virginia Braun and Victoria Clarke, *Thematic Analysis: A Practical Guide* (SAGE, 2022), as detailed further in **Section 3.4.4**.

### 3.2.1. Constructivist Grounded Theory

I have drawn on several conceptual elements underpinning Charmaz's constructivist grounded theory,<sup>3</sup> although I do not adopt her full methodology. In essence, constructivist grounded theory is an 'inductive, comparative, emergent, and open-ended' approach to qualitative research,<sup>4</sup> which focuses on capturing social processes of action.<sup>5</sup> Several features of constructivist grounded theory are appropriate to examine how risk is considered in the making of Apprehended Domestic Violence Orders (ADVOs). This includes the theory's 'critical stance toward social structures and processes that shape individual and collective life'.<sup>6</sup> The research questions are directed at understanding the process of how ADVOs are made and risk is considered. Constructivist grounded theory recognises 'that any theoretical rendering offers an interpretive portrayal of the studied world, not an exact picture of it',<sup>7</sup> and acknowledges that 'we are part of the world we study, the data we collect and the analyses we produce'.<sup>8</sup> This is important in this study, given that central concepts for this thesis such as 'risk' and 'safety' remain subject to highly variable constructions and interpretations in the literature.

I also adopt an approach consistent with constructivist grounded theory to capture social processes of action,<sup>9</sup> with the purpose of making sense of complex phenomena. The NSW ADVO system, risk assessment and management processes across multiple sectors, and, more broadly, current societal responses to DFV, are very complex. Constructivist grounded theory enables that complexity to be recognised, emphasised and captured. As Corbin and Strauss explain, grounded theory in general recognises that 'events are the result of multiple factors coming together and interacting in complex and often unanticipated ways. Therefore any methodology that attempts to understand experience and explain situations will have to be complex'.<sup>10</sup>

This study is fundamentally a social justice inquiry that aims to be 'alert to power, control, inequality, and oppression'<sup>11</sup> and 'takes a critical stance toward social structures and processes that shape individual and collective life'<sup>12</sup> — both within the NSW legal system, and to societal attitudes and responses to DFV more generally. As a research study focused on a specific legal

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<sup>3</sup> Kathy Charmaz, *Constructing Grounded Theory* (SAGE, 2<sup>nd</sup> ed, 2014).

<sup>4</sup> *Ibid* 12.

<sup>5</sup> Tavis Apramian et al, '(Re)Grounding Grounded Theory: A Close Reading of Theory in Four Schools' (2017) 17(4) *Qualitative Research* 359, 370.

<sup>6</sup> Charmaz (n 1) 359.

<sup>7</sup> Charmaz (n 3) 17.

<sup>8</sup> *Ibid*.

<sup>9</sup> Apramian et al (n 5) 370.

<sup>10</sup> Juliet M Corbin and Anselm L Strauss (eds), *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (SAGE, 3<sup>rd</sup> ed, 2008) 6.

<sup>11</sup> Kathy Charmaz, Robert Thornberg and Elaine Keane, 'Evolving Grounded Theory and Social Justice Inquiry' in Norman K Denzin and Yvonna S Lincoln (eds), *The SAGE Handbook of Qualitative Research* (SAGE, 5<sup>th</sup> ed, 2018) 411, 423.

<sup>12</sup> Charmaz (n 1) 359.

response to DFV, it is critical to understand and account for how the system is shaped by social structures and processes such as gender, law and legal systems. This study is therefore conducted with recognition of the need 'to advance understandings of how power, oppression, and inequities differentially affect individuals, groups, and categories of people'<sup>13</sup> within the ADVO process.

### 3.2.2. Feminist Legal Theory

I adopt a feminist framing of DFV as a gendered phenomenon and its central concern with empowering women's agency and choice within a DFV context. As this study is concerned with a legal intervention, I also draw on feminist legal theory as 'a political theory concerned with issues of power' including as they manifest in law,<sup>14</sup> and interested in critically evaluating 'not only outcomes but the fundamental concepts, values and assumptions embedded in legal thought'.<sup>15</sup> As such, the work of a number of influential feminist legal theorists has broadly shaped my framing of the research problem and approach to the study. This includes Rosemary Hunter<sup>16</sup> and James Ptacek's<sup>17</sup> work on legal responses to DFV more generally; along with leading feminist researchers on POs and/or 'risk' specifically, including, in Australia, Heather Douglas,<sup>18</sup>

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<sup>13</sup> Charmaz (n 1) 362.

<sup>14</sup> Martha Albertson Fineman, 'Introduction' in Martha Albertson Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (Routledge, 2013) xiv; Margaret Davies, 'Law's Truths and the Truth about Law: Interdisciplinary Refractions' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge, 2016) 66.

<sup>15</sup> Fineman (n 15) xiii.

<sup>16</sup> Rosemary Hunter, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (Cambria Press, 2008).

<sup>17</sup> James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, 1999).

<sup>18</sup> Heather Douglas, 'Domestic Violence Protection Orders and Their Role in Ensuring Personal Security' in Kate Fitz-Gibbon et al (eds), *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Routledge, 1<sup>st</sup> ed, 2018) 218; Heather Douglas and Robin Fitzgerald, 'Legal Processes and Gendered Violence: Cross-Applications for Domestic Violence Protection Orders' (2013) 36(1) *University of New South Wales Law Journal* 56; Heather Douglas and Robin Fitzgerald, 'The Domestic Violence Protection Order System as Entry to the Criminal Justice System for Aboriginal and Torres Strait Islander People' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 41.

Jane Wangmann,<sup>19</sup> McCulloch et al,<sup>20</sup> and, internationally, Alesha Durfee<sup>21</sup> and Sandra Walklate.<sup>22</sup>

In drawing on these feminist framings in both my methodology and analysis, I recognise that 'Just as law constructs gender and gendered subjects ... so too does feminist discourse'.<sup>23</sup> As Moreton-Robinson articulated in her book, *Talkin' Up to the White Woman*:

The subject position "middle-class white woman" is embedded in particular material conditions which shape the nature of power relations between white feminists and Indigenous women. These inter-subjective power relations reflect the structural relationship between white society and Indigenous society.<sup>24</sup>

To mitigate 'one-dimensional representations'<sup>25</sup> of those who experience DFV in Australian society as middle-class white women,<sup>26</sup> particularly in light of arguments in **Chapter 2** about the need to adopt expansive understandings of 'safety' that take into account the influence of structural inequities, I also integrate elements of structural intersectional theory into my approach.

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<sup>19</sup> Jane Wangmann, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33(3) *University of New South Wales Law Journal* 945; Jane Wangmann, 'Coercive Control as the Context for Intimate Partner Violence: The Challenge for the Legal System' in Marilyn McMahon and Paul McGorery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer Singapore, 2020) 219; Jane Wangmann, 'Incidents v. Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' (2012) 34 *Sydney Law Review* 695.

<sup>20</sup> Jude McCulloch et al, *Review of the Family Violence Risk Assessment and Risk Management Framework (CRAF)* (Final Report, Prepared for the Department of Health and Human Services by the School of Social Sciences, Focus Program on Gender and Family Violence: New Frameworks in Prevention, Monash University, 2016); Jude McCulloch and Dean Wilson, *Pre-Crime: Pre-Emption, Precaution and the Future* (Routledge, 1<sup>st</sup> ed, 2016).

<sup>21</sup> Alesha Durfee, 'The Use of Structural Intersectionality as a Method to Analyze How the Domestic Violence Civil Protective Order Process Replicates Inequality' (2021) 27(5) *Violence Against Women* 639 ('The Use of Structural Intersectionality'); Alesha Durfee and Leigh Goodmark, 'Re-Envisioning Protective Orders for Domestic Violence' in *Civil Court Responses to Intimate Partner Violence and Abuse* (Cognella, 2020) 63; Alesha Durfee, 'Victim Narratives, Legal Representation, and Domestic Violence Civil Protection Orders' (2009) 4(1) *Feminist Criminology* 7 ('Victim Narratives'); Alesha Durfee, "'Usually It's Something in the Writing': Reconsidering the Narrative Requirement for Protection Order Petitions' (2015) 5(2) *University of Miami Race & Social Justice Law Review* 469 ('Usually It's Something in the Writing'); Alesha Durfee and Jill Theresa Messing, 'Characteristics Related to Protection Order Use Among Victims of Intimate Partner Violence' (2012) 18(6) *Violence Against Women* 701; John Costello and Alesha Durfee, 'Survivor-Defined Advocacy in the Civil Protection Order Process' (2020) 15(3) *Feminist Criminology* 299.

<sup>22</sup> Sandra Walklate, 'Criminology, Gender and Risk: The Dilemmas of Northern Theorising for Southern Responses to Intimate Partner Violence' (2018) 7(1) *International Journal for Crime, Justice and Social Democracy* 1 ('Dilemmas in Northern Theorising'); Sandra Walklate, 'Risk and Criminal Victimization: A Modernist Dilemma?' (1997) 37(1) *British Journal of Criminology* 35 ('Risk and Criminal Victimization'); Sandra Walklate, 'The Politics of Risk, the Risk of Politics' (2011) 15(2) *Theoretical Criminology* 221 ('The Politics of Risk'); Sandra Walklate and Gabe Mythen, 'How Scared Are We?' (2007) 48(2) *British Journal of Criminology* 209 ('How Scared Are We?'); Sandra Walklate and Gabe Mythen, 'Beyond Risk Theory: Experiential Knowledge and "Knowing Otherwise"' (2011) 11(2) *Criminology & Criminal Justice* 99 ('Beyond Risk Theory').

<sup>23</sup> Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge, 2016) 13, 18.

<sup>24</sup> Aileen Moreton-Robinson, *Talkin' Up to the White Woman: Indigenous Women and Feminism* (University of Queensland Press, 2020) 236.

<sup>25</sup> Hunter (n 23) 18.

<sup>26</sup> Elsje Bonthuys, 'Equality and Difference: Fertile Tensions or Fatal Contradictions for Advancing the Interests of Disadvantaged Women?' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge, 2016) 85, 90.

### 3.2.3. Structural Intersectionality

According to Green and Morton, ‘Intersectional research is distinguished by the inclusion of less-heard perspectives and making the lives and experiences of marginalised groups visible’.<sup>27</sup> It recognises the ‘simultaneous, multiple and interlocking oppressions’ individuals experience across gender, race, class, (dis)ability and sexuality.<sup>28</sup> In emphasising multi-dimensional representations of those who experience DFV, intersectionality challenges some mainstream literature on DFV, particularly in how to understand different factors, dynamics and experiences of DFV, and what effective responses look like.<sup>29</sup> This was illustrated in the previous chapter’s findings about how structural inequities may shape different women’s experiences of ‘safety’,<sup>30</sup> and the potential biases in the theorising underpinning risk-based models.<sup>31</sup> To account for these complexities, in this study I draw on elements of a structural intersectional framework advocated by Durfee in relation to POs.<sup>32</sup> This framework builds on the theory of intersectionality, developed by Crenshaw and critical race theorists in the US.<sup>33</sup> Most relevant to this study, Durfee advocates evaluating POs within a historical context that recognises the entwinement or hybridisation of civil and criminal systems,<sup>34</sup> and with attention to how inequalities have been naturalised<sup>35</sup> — for example, through problematic conceptualisations of DFV ‘risks’ as universal and overly reliant on legal interventions.<sup>36</sup> The theory of intersectionality also aims to centre the perspectives of ‘those who are the “most marginalised”’ to ‘reveal barriers and vulnerabilities experienced by, and lead to changes that will benefit, everyone’.<sup>37</sup>

Incorporating structural intersectionality into the project ensures the research and theories I construct from the data are alert to the ways in which multiple systems replicate inequalities and influence the (in)effectiveness of POs in responding to risk of ongoing DFV for victims/survivors

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<sup>27</sup> Siobhan O’Brien and Sarah Morton, ‘Listening to Less-Heard Voices’ in John Devaney, Caroline Bradbury-Jones, Rebecca J Macy, Carolina Øverlien and Stephanie Holt, *The Routledge International Handbook of Domestic Violence and Abuse* (Routledge, 2021) 627, 628.

<sup>28</sup> Natalie J Sokoloff and Ida Dupont, ‘Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities’ (2005) 11(1) *Violence Against Women* 38, 39, quoting Susan Archer Mann and Michael D Grimes, ‘Common and Contested Ground: Marxism and Race, Gender & Class Analysis’ (2001) 8(2) *Race, Gender & Class* 3, 8.

<sup>29</sup> Sokoloff and Dupont (n 28) 39.

<sup>30</sup> See **Section 2.3.4**.

<sup>31</sup> Walklate, ‘Dilemmas in Northern Theorising’ (n 22).

<sup>32</sup> Durfee, ‘The Use of Structural Intersectionality’ (n 21).

<sup>33</sup> Kimberle Williams Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1991) 43(6) *Stanford Law Review* 1241; Anna Carastathis, *Intersectionality Origins, Contestations, Horizons* (University of Nebraska Press, 2016).

<sup>34</sup> Durfee, ‘The Use of Structural Intersectionality’ (n 21) 651; Lis Bates and Marianne Hester, ‘No Longer a Civil Matter? The Design and Use of Protection Orders for Domestic Violence in England and Wales’ (2020) 42(2) *The Journal of Social Welfare & Family Law* 133.

<sup>35</sup> Durfee, ‘The Use of Structural Intersectionality’ (n 21) 643, 657.

<sup>36</sup> Sokoloff and Dupont (n 28) 41, 55.

<sup>37</sup> Durfee, ‘The Use of Structural Intersectionality’ (n 21) 651.

that are ‘multiply marginalised’.<sup>38</sup> This is vital in developing a sophisticated understanding of the effectiveness of ADVOs in the New South Wales (NSW) context, and ensuring any potential reforms in this area do not replicate existing inequities in current systems.<sup>39</sup>

### 3.2.4. Risk Society Theory

The third key theoretical contribution to my critical inquiry is risk society literature. This theoretical field emerged in response to the increasing embeddedness of risk-based thinking over the past half a century.<sup>40</sup> As briefly discussed in the previous chapter, the risk society thesis (originally posited by Beck)<sup>41</sup> is interested in ‘the fact that risk-based routines and practices of government pervade most areas of our lives’ in modern society.<sup>42</sup> As quoted previously, the growing adoption and focus on ‘risk’ as ‘a dominant framework for conceptualising the social problems of advanced post-industrial societies’ has been identified across many disciplines and fields, including law.<sup>43</sup> This extends to the field of DFV, where ‘the notion of risk has become ubiquitous’ across relevant literature, policy and practice materials concerned with addressing DFV,<sup>44</sup> as covered in **Chapter 2**. Yet, as briefly mentioned in that chapter the term ‘risk’ is often not clearly articulated in these materials. Walklate and Mythen highlight: ‘One of the key problems we encounter when we talk of and about risk is the all-encompassing nature of the concept. As Beck (2009: 138) notes: ‘the category of risk exhibits an expansive logic. It embraces everything’.<sup>45</sup>

In attempting to explain both the phenomenon of the risk society that has emerged in Western and Global North jurisdictions and its limitations and dangers, critical risk society theorists such as Beck,<sup>46</sup> Walklate and Mythen,<sup>47</sup> Hannah-Moffatt,<sup>48</sup> Zedner,<sup>49</sup> O’Malley<sup>50</sup> and others<sup>51</sup> offer

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<sup>38</sup> Ibid 640.

<sup>39</sup> Fineman (n 15) xiv.

<sup>40</sup> Ulrich Beck, *Risk Society: Towards a New Modernity* (SAGE Publications, 1992); Gabe Mythen, ‘The Critical Theory of World Risk Society: A Retrospective Analysis’ (2021) 41(3) *Risk Analysis* 533, 534.

<sup>41</sup> Beck (n 40).

<sup>42</sup> Pat O’Malley, *Risk, Uncertainty and Government* (GlassHouse, 2004) 1.

<sup>43</sup> Anne-Marie McAlinden, ‘Reconceptualising “Risk”: Towards a Humanistic Paradigm of Sexual Offending’ (2022) 31(3) *Social & Legal Studies* 389, 389.

<sup>44</sup> Carolyn Hoyle, ‘Will She Be Safe? A Critical Analysis of Risk Assessment in Domestic Violence Cases’ (2008) 30(3) *Children and Youth Services Review* 323, 328.

<sup>45</sup> Walklate and Mythen, ‘Beyond Risk Theory’ (n 22) 101.

<sup>46</sup> Beck (n 40).

<sup>47</sup> Walklate and Mythen, ‘Beyond Risk Theory’ (n 22); Mythen (n 40); Walklate (n 22); Walklate (n 22); Walklate and Mythen, ‘How Scared Are We?’ (n 22).

<sup>48</sup> Kelly Hannah-Moffat, ‘Criminogenic Needs and the Transformative Risk Subject: Hybridizations of Risk/Need in Penalty’ (2005) 7(1) *Punishment & Society* 29.

<sup>49</sup> Lucia Zedner, ‘Neither Safe Nor Sound? The Perils and Possibilities of Risk’ (2006) 48(3) *Canadian Journal of Criminology and Criminal Justice* 423.

<sup>50</sup> Pat O’Malley, *Crime and Risk* (SAGE, 2010); O’Malley (n 42).

<sup>51</sup> E.g. Hazel Kemshall, ‘Social Policy and Risk’ in Gabe Mythen and Sandra Walklate (eds), *Beyond the Risk Society: Critical Reflections on Risk and Human Security* (McGraw-Hill Education (UK), 2006); McCulloch and Wilson (n 20).

useful frameworks to define and explain 'risk' as an emerging focus in DFV responses. These theoretical contributions assist in defining and engaging with the core concepts around 'risk' and 'safety' in my research questions, and how these concepts influence policy priorities and the intervention of the state via ADVOs. They also offer useful approaches for understanding and challenging some of the current focuses on 'risk' in DFV responses, and the focus on addressing 'risk' as a metric for improving the effectiveness of those responses. For example, Walklate discusses how the criminal justice field's pre-occupation with identifying those 'at risk' of offending and/or of being victims/survivors has meant that:

the desire to prevent and extinguish interpersonal violence, especially partner violence, has proceeded to transpose relationships, which include, or once included, and may indeed continue to include, feelings like love and desire, and bind the 'victim' and the 'offender' together in a process, into risk factors that can be measured and managed.<sup>52</sup>

Further, Beck and O'Malley each pose useful conceptual alternatives to 'risk' such as 'uncertainty' to explain the challenges with which governments and professionals must grapple in responding to social phenomena such as DFV.<sup>53</sup>

The critical perspectives offered by risk theory scholarship therefore provide a number of useful conceptual tools to interrogate whether POs are able to offer preventative (rather than reactive) interventions for DFV,<sup>54</sup> and critically examine how 'risks' in relation to DFV are conceptualised, constructed and prioritised in PO processes — that is, through legal rules, judgement and political contexts versus 'objective' scientific analysis.<sup>55</sup> These contributions offer important insights in my data analysis. According to Hoyle, 'whilst there has been over the past decade a steady increase in the development of risk assessment tools and management techniques for domestic violence, and in particular in domestic homicide', work in developing these approaches has not always 'fully engaged with the theoretical literature on risk. Indeed, there has been little critical debate on the use of risk assessment and risk management tools in cases of domestic violence'.<sup>56</sup> Engaging with this theoretical 'risk' literature is therefore important for this study.

### 3.2.5. Three Shared Conceptual Features

Three core features align across these four main theoretical influences for the purposes of this study: (1) an ontological position that meaning is constructed, and those constructed meanings

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<sup>52</sup> Walklate, 'The Politics of Risk' (n 22) 222.

<sup>53</sup> Beck (n 40); Pat O'Malley, 'Uncertain Governance and Resilient Subjects in the Risk Society' (2013) 3(2) 180.

<sup>54</sup> Durfee and Goodmark (n 21) 65; McCulloch and Wilson (n 20) 50.

<sup>55</sup> Zedner (n 49) 424–427; McCulloch and Wilson (n 20) 37–38.

<sup>56</sup> Hoyle (n 44) 328.

shape actions; (2) a resistance to universalising experiences and phenomena; and (3) an interest in examining how systems, structures and processes function to produce certain outcomes. Here, I explain how these three features underpin my critical inquiry into ADVOs as a legal response to DFV, and the consideration of risk. In essence, these three shared conceptual features serve as preliminary sensitising concepts in both the methodological design of my study, and in my data analysis.

*i. Meaning is constructed, and those constructions shape actions*

Feminist legal theory, structural intersectionality and risk society scholarship are wide fields with diverse and divergent theoretical approaches that may or may not be underpinned by explicit constructivist epistemological or ontological positions. However, the main theorists in each of these fields that I draw on in this study emphasise the significance of constructed meanings of 'DFV', 'risk', 'safety' and 'protection' (and the relationship between those constructions and the actions taken by relevant actors in the ADVO system) as important aspects of understanding *why* certain phenomena, structures and processes operate the way they do, and produce the outcomes they do. Consistent with constructivist grounded theory, which 'assumes that people construct both the studied phenomenon and the research process through their actions' and 'recognizes the constraints that historical, social, and situational conditions exert on these actions and acknowledges the researcher's active role in shaping the data and analysis',<sup>57</sup> both feminist legal theory and structural intersectionality expose problematic ways in which DFV is constructed and 'appropriate' and 'effective' responses to address DFV are determined within the law. For example, feminist legal theorists often '[focus] on law not in its own (instrumental) terms but as a discourse which constructs knowledge and subjects' and therefore argue that 'feminists ought to engage with law as a site of discursive struggle upon which to contest meanings about gender, culture and other normative categories'.<sup>58</sup>

Recognising that these meanings and interests are constructed allows us to appreciate that while:

We exist within large social formations in which all knowledge, desires and options are constructed for everyone, some people (men, whites, the wealthy) systematically have more power than others, including power to affect the social formation itself and conditions within it.<sup>59</sup>

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<sup>57</sup> Charmaz (n 1) 360.

<sup>58</sup> Hunter (n 23) 25.

<sup>59</sup> Nancy J Hirschmann, 'Freedom, Power and Agency in Feminist Legal Theory' in Margaret Davies and Vanessa Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Routledge, 2016) 51, 62.

Appreciating these systemic features of the ways in which the legal system is set up and operates to reflect prevailing inequities and power/privilege in broader society, specifically in relation to DFV, enables a more sophisticated inquiry into how the current ADVO system operates to enhance (or otherwise) women's safety — particularly in light of increasingly documented findings about the unintended consequences<sup>60</sup> of legal reforms to address DFV.<sup>61</sup> Further, constructivist grounded theory emphasises:

that individuals are not determined by such constructions, that possibilities of movement, agency, consciousness and choice exist within these parameters, that multiple contexts co-exist with which individuals can identify and ally themselves, and that we create and participate in these constructions in more and less active and conscious ways.<sup>62</sup>

Understanding 'risk', 'DFV' and 'safety' as constructed by different actors in the ADVO process means that a research inquiry examining these processes and implicit understandings needs to 'obtain multiple perspectives on events and build variation into our analytic schemes' that are not divorced from the broader social and political contexts in which those processes take place.<sup>63</sup> As Corbin and Strauss highlight in relation to general grounded theory: 'process is integral to our studies because we know that experience, and therefore any action/interaction that follows, is likely to be formed and transformed as a response to consequence and contingency.'<sup>64</sup>

Further, the extant risk society scholarship suggests a need for deeper inquiry into what meanings are being constructed around the concepts of 'risk' and 'fear' when examining how actors understand, apply and respond to 'risk'<sup>65</sup> and 'safety'<sup>66</sup> in the context of DFV. This shared preoccupation across the feminist legal theory, structural intersectionality and risk society theorists I have drawn on in this study, along with recognition by constructivist grounded theory of the ways in which actors and legal systems construct particular meanings, invites a qualitative study of the ADVO system in NSW and consideration of risk in relation to DFV. The need to examine the *interactions* between multiple professionals' roles within the ADVO process is also consistent with a constructivist grounded theory lens applied to the *processes* that currently

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<sup>60</sup> Though not always 'unanticipated' — See, eg, Emma Buxton-Namisnyk, Althea Gibson and Peta MacGillivray, 'Unintended, but Not Unanticipated: Coercive Control Laws Will Disadvantage First Nations Women', *The Conversation* (26 August 2022) <<http://theconversation.com/unintended-but-not-unanticipated-coercive-control-laws-will-disadvantage-first-nations-women-188285>>.

<sup>61</sup> E.g. Heather Nancarrow et al, *Accurately Identifying the "Person Most in Need of Protection" in Domestic and Family Violence Law* (Research Report No Issue 23, ANROWS, 2020) 19; Ellen Reeves, 'Family Violence, Protection Orders and Systems Abuse: Views of Legal Practitioners' (2020) 32(1) *Current Issues in Criminal Justice* 91.

<sup>62</sup> Hirschmann (n 59) 62.

<sup>63</sup> Corbin and Strauss (n 10) 6.

<sup>64</sup> *Ibid.*

<sup>65</sup> Walklate and Mythen, 'How Scared Are We?' (n 22) 216.

<sup>66</sup> Jane K Stoeber (ed), *The Politicization of Safety: Critical Perspectives on Domestic Violence Responses* (NYU Press, 2019).

operate across the court response, and attempts to capture the complex interactions of multiple actors involved in those processes — an approach which I identified in the previous chapter is under-employed in extant literature. It is therefore important to understand and account for how relevant court-involved actors construct meanings, and how those constructed meanings shape their actions, in complex processes such as the ADVO system.

*ii. Resistance to universalising experiences and findings*

Charmaz emphasises the importance of identifying researchers' standpoints and applying reflexivity throughout the research process, in order to remain 'alert to variation and difference'.<sup>67</sup> These elements, especially the importance of recognising and accounting for different experiences, manifestations and impacts of the law, DFV and 'risk', are reflected in feminist legal theory, structural intersectionality and risk society scholarship in distinct ways. They each challenge embedded constructions in existing institutions, while constructing their own meanings in attempting to explain the dynamics and experiences of DFV and legal system responses.

Feminist legal theory argues:

that the masculine in law has been universalized and appears under the guise of impartiality and neutrality mean[ing] that women's perspectives are understood not as equally universal, but as particular, biased, special interests, not providing the degree of objectivity required for authoritative judgement.<sup>68</sup>

This has historically resulted in women's experiences and realities not being reflected or accounted for in the law, and legal systems perpetuating limiting distinctions between public activities (such as public violence) that should be subject to legal intervention and private activities (such as DFV) that should not be subject to legal intervention, which ultimately 'maintain[s] and exacerbate[s] inequality, exclusion and oppression' of women.<sup>69</sup> In attempting to resist this positioning, feminist legal theorists such as Hunter argue that 'Rather than seeking to extend the regulatory reach of law, feminists should "resist ... the creeping hegemony of the legal order"'.<sup>70</sup> This positioning has implications for how we approach legal interventions generally, and especially in evaluating how 'effective' legal responses to gendered phenomenon such as DFV are implemented within these contexts.

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<sup>67</sup> Charmaz (n 1) 360.

<sup>68</sup> Hunter (n 23) 15.

<sup>69</sup> Hunter (n 23) 19.

<sup>70</sup> Ibid 24, quoting Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 5.

In turn, Moreton-Robinson critiques and resists white Western feminism's universalising of 'women' because it is 'predicated on sex and gender differences' which assume common experiences for women regardless of class, race or sexuality without accounting for the privileges that benefit white, middle-class and heterosexual women.<sup>71</sup> In other words, this form of feminist theory 'is grounded in the assumption that the womanness of all women was the same version of womanness experienced by white middle-class women'.<sup>72</sup> Sokoloff and Dupont further argue that, traditionally, feminists have tended 'to emphasize the common experiences of battered women in the interests of forging a strong feminist movement to end woman abuse'.<sup>73</sup> This 'has increasingly been questioned by scholars and activists who recognize the need to give voice to women marginalized by the largely White, middleclass feminist movement'.<sup>74</sup> Just as the law generalises 'legal persons' to essentially 'male' experiences, 'feminist representations of women may be or become as rigid, limiting, constraining, totalizing and oppressive as legal representations'.<sup>75</sup> Recognising this is critical to ensuring that any approaches to addressing DFV do not replicate these inequities, and, instead respond in ways that attend to the actual realities of people's lives and uneven 'distribution of harms'.<sup>76</sup>

Mythen cogently makes this point in relation to universalising approaches to 'risk' that suggest 'a universality of hazard distribution and a shared experience of danger that is not mirrored by contemporary reality'.<sup>77</sup> Mythen notes that 'if one takes any major quantifiable threat to human existence in the modern world—famine, disease, warfare, terrorism—it is clear that the global distribution of harms is uneven and unequal'.<sup>78</sup> These conceptual critiques of risk have relevance in examining how risk is considered in the making of ADVOs, if we understand that 'the casting of risk as a uniform and totalizing process fails to speak of the underlying significance of power and resource allocation ... in determining who or what is defined as risky — or indeed who is 'at risk', under what circumstances, and from whom'.<sup>79</sup> Notions of 'universal DFV risks' do not account for the fact 'that poor women of color are "most likely to be in both dangerous intimate relationships and dangerous social positions"'.<sup>80</sup> Resisting these universalising conceptualisations of experiences of DFV, and therefore what (legal) responses will be effective

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<sup>71</sup> Moreton-Robinson (n 24) 32.

<sup>72</sup> Ibid 33.

<sup>73</sup> Sokoloff and Dupont (n 28) 41.

<sup>74</sup> Ibid 41.

<sup>75</sup> Hunter (n 23) 18.

<sup>76</sup> Mythen (n 40) 538.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> Walklate and Mythen, 'Beyond Risk Theory' (n 22) 101. See also, Walklate, 'The Politics of Risk' (n 22) 222.

<sup>80</sup> Sokoloff and Dupont (n 28) 41.

in responding to DFV, are central concerns of feminist legal theory, structural intersectionality and risk society scholarship.

*iii. Understanding structures, systems and processes to explain phenomena*

Synthesising constructivist grounded theory, feminist legal theory, structural intersectionality and risk society scholarship helps to understand the structures, systems and processes that operate to produce the phenomena under study. As Charmaz states, applying constructivist grounded theory assists 'to reveal links between concrete experiences of suffering and social structure, culture, and social practices or policies'.<sup>81</sup> This reinforces the relevance of constructivist grounded theory to social justice inquiries, noted earlier. A focus on understanding the implications of how structures, systems and processes operate to produce unequal and marginalising outcomes is also a feature of feminist legal theory and structural intersectionality. For example, Bonthuys explains how previous feminists' work, 'advocates a focus on social structures and institutional contexts, culture, symbols, habits and beliefs, relationships and processes rather than the achievement of rights or legal claims for equality', recognising 'that oppression is group based and structurally imbedded in everyday processes and institutions'.<sup>82</sup>

Similarly, in relation to broader, multiple marginalisations that exist for people who do not conform to the narrow and universalised ideas of victims/survivors of DFV constructed by the legal system and mainstream feminism, Durfee asks: 'How can we identify, analyze, and address complex problems and barriers in the protective order process as a whole rather than as a series of separate issues with individual solutions?'<sup>83</sup> She proposes that structural intersectionality methods provide critical tools to do this, because they account for how 'seemingly neutral institutional practices and policies have differential impacts on individuals, thereby replicating broader inequalities' and that 'these inequalities stem from policies and procedures based on inappropriate assumptions about individuals that do not address other "multilayered and routinized forms of domination that often converge" in the lives of multiply marginalized people'.<sup>84</sup>

Risk society scholarship also emphasises the need to concentrate on structures and processes. Walklate and Mythen argue 'that in the present era of structural uncertainty, there is a strong case for revisiting the rather basic but nevertheless critical question of what constitutes crime and the fear of crime and for whom'.<sup>85</sup> They persuasively argue that broadening our focus to

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<sup>81</sup> Charmaz (n 1) 362.

<sup>82</sup> Bonthuys (n 26) 86.

<sup>83</sup> Durfee, 'The Use of Structural Intersectionality' (n 21) 640.

<sup>84</sup> Ibid.

<sup>85</sup> Walklate and Mythen, 'How Scared Are We?' (n 22) 220.

interrogating the structures operating ‘might encourage us to consider different and perhaps more fruitful ways of thinking about ontological security and its relationship with our wider understanding of fear, risk and crime’.<sup>86</sup> Adopting a broader and more complex account in my study of how the current ADVO processes operate to respond to DFV in NSW is intended to yield more sophisticated and productive understandings of whether and how legal responses can be effectively designed to address risk and enhance safety.

In sum, the four theoretical influences that have informed my approach in this study share three key concepts underpinning my research inquiry: (1) an understanding that concepts and phenomena central to this thesis are constructed, and these constructed meanings influence what actions court-involved actors may undertake within the ADVO process; (2) the need to resist structures, process and approaches that universalise experiences (of men, to women; of white, Western, middle-class heterosexual women to all women; and uniform distributions of harm to people who experience differing types of social inequities); and (3) the consequent need to examine the structures, systems and processes underpinning experiences of DFV and safety, and experiences of legal responses to DFV, to accurately understand the implications of specific responses — such as ADVOs — beyond only white middle-class women. These shared concepts align strongly with key conceptual elements of constructivist grounded theory, both in terms of identifying the questions I have determined as important, and in providing basic sensitising concepts I have applied to my data analysis. Utilising these sensitising concepts allows me to critically engage with key informants’ perspectives and situate their views within the broader systems and structures shaping the ADVO process in which these actors operate.

### 3.3. Locating the Researcher

In undertaking this exploratory study concerned with constructed meanings and complex phenomena in the NSW ADVO, I do not purport to be ‘a neutral observer and value-free expert’.<sup>87</sup> At all stages of this study I have been deeply conscious of my positionality as a socio-legal researcher,<sup>25</sup> and have understood the meanings I have made of interviewees’ reflections as co-constructed by them and me.<sup>88</sup> Reflecting this, I often refer to interview data as ‘discussions’ with interviewees. This is in recognition that interviewees’ contributions were inherently shaped by the questions I asked, and how I framed those questions, which were, in

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<sup>86</sup> Ibid 220.

<sup>87</sup> Charmaz (n 3) 13.

<sup>88</sup> Charmaz (n 1) 366; Chun Tie, Birks and Francis (n 1) 2–3; Nicole Westmarland and Hannah Bows, *Researching Gender, Violence and Abuse: Theory, Methods, Action* (Routledge, 2019) 16.

turn, influenced by the new perspectives and views interviewees contributed throughout the course of the study. Each participant approached their participation in the study as an opportunity to help make sense of the problem and to identify solutions to it. The interview discussions are more like a discursive exchange shaped by both researcher and participants than 'data' extracted by an objective investigator from a research subject.

Additionally, as evident in my theoretical framework, this study is strongly informed by my feminist and social justice values. It is also shaped by the complex views I hold about the role of the law as a tool for justice, which are in turn heavily influenced by my Western-centric legal education and position as a white, middle-class woman who can reasonably expect to encounter positive and supportive responses from policing and legal institutions. My viewpoint is also shaped by my engagement with a range of feminist and structural intersectionality theorists, some of whom I have had the pleasure to work with and/or be mentored by in previous research roles. I have also had the benefit of witnessing deeply emotive and personal stories directly from those with lived experience of the harms of both DFV and injustices in the legal system in previous research and personal contexts. My perspectives are further shaped by my own experiences, and those of friends and family, of navigating a world as a woman where real and/or threatened gendered abuse and violence is prevalent, and by the impacts of vicarious and secondary trauma on committed practitioners and researchers working in this area, many of whom have their own lived experiences of violence. These aspects inevitably 'shape the analysis ... [and] the very facts that [I] can identify'<sup>89</sup> as significant and influential in this study.

## 3.4. Methodology

### 3.4.1. Research Aim and Questions

The primary research aim is to examine how 'risk of DFV' is considered in the making of ADVOs in NSW. Based on the literature and theoretical framework I have set out, five research questions arise as critical to achieving this aim:

**RQ1** To what extent do relevant civil procedures enable 'risk of DFV' to be considered by key court-involved actors in the making of ADVOs in NSW?

**RQ2** How do key ADVO court-involved actors conceptualise 'risk of DFV' in NSW?

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<sup>89</sup> Charmaz (n 3) 13.

- RQ3** What formal and informal practices do key court-involved actors engage in to consider ‘risk of DFV’ in the making of ADVOs in NSW?
- RQ4** What implications do these conceptualisations, civil procedures and practices have for the assessment and management of ‘risk of DFV’ in the making of ADVOs?
- RQ5** Can civil procedures and practices be improved to enable ‘risk of DFV’ to be appropriately considered by key court-involved actors in the making of ADVOs?

Both the existing gaps in the literature, and the theoretical framework I apply, indicate a qualitative research approach is appropriate to answer these questions as it enables deeper and more nuanced engagement with the perspectives and constructed meanings that inform court-involved actors’ considerations than quantitative or documentary analysis would achieve. Scoping activities undertaken early in the project also supported a qualitative design.

### 3.4.2. Research Location

This study focuses on the ADVO process in one jurisdiction, NSW. I initially set out to undertake a multi-methods comparative examination of how risk is considered in ADVOs in NSW and Family Violence Intervention Orders (FVIOs) in Victoria. Consequently, I conducted scoping activities at the start of the project with stakeholders in both NSW and Victoria<sup>90</sup> and an observation of a NSW Local Court’s Domestic Violence list<sup>91</sup> day in February 2021.<sup>92</sup> Subsequent challenges in obtaining data in Victoria,<sup>93</sup> combined with my success in recruiting a large number of NSW magistrates, lawyers and other court support services, meant I decided to concentrate on delivering a stronger, targeted qualitative study focused on NSW that would yield substantial new knowledge specific to the jurisdiction. I adapted my methodology to address the primary research aim and five research questions in NSW only, relying on an expanded number of qualitative interviews with magistrates, lawyers and support services from across the state.

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<sup>90</sup> This included nine semi-structured scoping interviews with 13 key stakeholders from NSW Police, Victoria Police, Women’s Legal Service NSW, Women’s Legal Service Victoria, Women’s Safety NSW and magistrates in NSW, and other professionals who did not consent to their organising being identified. Participants in these scoping interviews are not quoted in this thesis. These scoping activities informed general background information for the thesis and helped to identify relevant sources of data and ideal locations to include in the study.

<sup>91</sup> Many NSW local courts have a dedicated ‘DV list’ day for ADVO mentions.

<sup>92</sup> These scoping activities received low-risk approval from the UTS HREC (ETH20-5457).

<sup>93</sup> Although Victoria Police approved my research application to include Victoria Police Prosecutors and Family Violence Liaison Officers, access to case files and interviews with other cohorts in Victoria was either declined or not sufficient to obtain a necessary sample size. The lack of access to the other Victorian data sets meant that the small number of Victoria Police participants who expressed interest in participating in the study would not be sufficient to provide a robust comparative study of Victoria to answer the research question. Including a different state as a comparator instead of Victoria would not add value to the study as, at the time, other Australian states and territories had not had the same whole-of-sector integration of DFV risk assessment and management practices that followed Victoria’s 2016 *Royal Commission into Family Violence* that justified Victoria’s inclusion.

Expanding the interviews state-wide while narrowing the focus to NSW has allowed me to achieve a deeper and more robust analysis of the specific NSW settings than would have been achievable in a comparative study.

### 3.4.3. Research Methods

My research methods offer a significant strength to the study by accessing critical specialist knowledge to explore a complex issue that is receiving growing public and policy attention, from multiple perspectives. As the research questions are concerned with the considerations of court-involved actors with specialist knowledge of the ADVO process, I undertook a qualitative study in NSW, involving 24 semi-structured interviews with 28 participants across three groups of key court-involved professionals involved in ADVO court processes: magistrates, lawyers and support service workers providing court advocacy for victims/survivors (see **Table 1**). These were conducted between August 2021 and February 2023.

*Table 1: Interview sample*

<b>Interview group</b>	<b>Sample</b>
Group 1: magistrates	N= 12 interviews, with magistrates across NSW.
Group 2: lawyers	N= six group or individual interviews, with eight lawyers in total, from four legal services. Two lawyers were defence lawyers; the remainder were specialist legal services or private lawyers.
Group 3: victim/survivor court support services	N= six group or individual interviews, with eight workers in total, from six support services.

Qualitative interviews with these key court-involved professionals were the most appropriate method for this study for several reasons. Firstly, doctrinal research is a necessary component of this research to identify relevant civil legal procedures that apply to ADVOs and consideration of risk in NSW. It provides a basis to understand the ADVO legislative framework applying in NSW (**RQ2**) and possible legislative and formal procedural options for reform (**RQ5**). However, doctrinal research is not sufficient to understand how risk informs decision making about ADVOs in practice. There is limited ability to interrogate legal practices and procedures from analysis of legislation and related procedural rules.<sup>94</sup> Stakeholders interviewed in the scoping stage of the study also supported deeper qualitative methods to examine the complex systems under study (i.e., ADVO court processes and broader DFV risk assessment and management policies and

<sup>94</sup> Terry Hutchinson, *Researching and Writing in Law* (Thomas Reuters, 4<sup>th</sup> ed, 2018) 125–126.

practices). Therefore, further empirical study is appropriate to obtain ‘rich and thick’ data about the complex systems operating in NSW.<sup>95</sup>

Secondly, while a variety of qualitative methods could contribute meaningful findings in this area,<sup>96</sup> qualitative interviews with key court-involved professionals were critical for this study as I am seeking to examine a ‘specialized issue that requires in-depth knowledge of what goes on in a place and how things work’.<sup>97</sup> As key informants on ADVOs and associated court procedures, magistrates, lawyers and court support workers are able to ‘provide valuable insights into the root of problems, what has been tried and failed, what has been tried and worked, and future trends to watch’.<sup>98</sup> Although the interview data may not produce representative or generalisable findings, it is able to provide richer, in-depth information about the interaction of complex systems at play in the ADVO process than either surveys or documentary data could produce.<sup>99</sup> Thirdly, semi-structured interviews are appropriate here as the particular topic of consideration of risk in ADVO processes is under-examined and, considering the broadness of the concepts and fields being examined, it was necessary ‘to ensure the data gathered specifically relates to the key areas the research seeks to explore’.<sup>100</sup> Semi-structured interviews, as opposed to structured or unstructured interviews, gathered relevant data to address the specific research questions and ‘flexibility to explore broader issues’ raised by the participants.<sup>101</sup>

*i. Selection, recruitment and final sample*

The multiple roles represented in the three groups ensure the study is informed by a breadth of expertise of professionals working within the ADVO system.<sup>102</sup> The three groups of court-involved professionals were identified as ‘key informants’<sup>103</sup> with detailed knowledge of the ADVO court process, who could speak to the legislative, procedural, and formal and informal practices that govern the consideration of risk in ADVO proceedings at court. My intention was to obtain insights from a range of perspectives from a mix of key informants involved in the court process, who could offer ‘in-depth knowledge of what goes on’ and ‘how things work’ in

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<sup>95</sup> Patricia Fusch and Lawrence Ness, ‘Are We There Yet? Data Saturation in Qualitative Research’ (2015) 20(9) *Qualitative Report* 1408, 1409.

<sup>96</sup> Surveys and documentary analysis of ADVO complaint narratives and orders were identified by some stakeholders in scoping interviews conducted in February 2021 to inform the methodological design of the project.

<sup>97</sup> Michael Quinn Patton, ‘Expert Sampling’ in Bruce B Frey (ed), *The SAGE Encyclopedia of Educational Research, Measurement, and Evaluation* (Thousand Oaks, 2018) 648, 648–649.

<sup>98</sup> *Ibid.*

<sup>99</sup> Jennifer A Parsons, ‘Key Informant’ in Paul J. Lavrakas (ed), *Encyclopedia of Survey Research Methods* (SAGE Publications, 2011) 406, 406–408.

<sup>100</sup> Westmarland and Bows (n 88) 48.

<sup>101</sup> *Ibid.* 49.

<sup>102</sup> Pranee Liamputtong, *Qualitative Research Methods eBook* (Oxford University Press ANZ, 5<sup>th</sup> ed, 2019) 1899z.

<sup>103</sup> Parsons (n 99).

relation to the consideration of risk in ADVO proceedings.<sup>104</sup> As Parsons states: ‘While the selection of key informants is not random, it is important that there be a mix of persons interviewed, reflecting all possible sides of the issue at study’.<sup>105</sup> Consequently, participants were purposively recruited<sup>106</sup> from across NSW based on their professional experience in dealing with ADVOs in NSW, including a mix of roles, organisations, and metropolitan and regional locations. Including participants from a mix of geographical settings was important. Although legislation and procedures may be standardised at a state-level, stakeholders who participated in scoping interviews for the study supported the inclusion of interviewees from both metropolitan and regional locations as individual magistrates’ practices, local implementation and access to services may influence ADVO practices and settings. The selection criteria for each of the three interview groups are detailed further below, along with the methods of recruitment.

#### Group 1: Magistrates

The extensive engagement of magistrates with substantial collective experience across different courts, presents a significant strength in the study. As primary decision makers for ADVOs, magistrates’ perspectives are critical to understand how they conceptualise ‘risk of DFV’ (**RQ1**), and the legislative frameworks (**RQ2**) and practising environments (**RQ3**) they operate within. They are also well-placed to provide insights into the implications of different legal and practice factors for assessing risk in ADVOs (**RQ4**), and identify current gaps, good practices and possible areas for improvement across the ADVO system (**RQ5**).<sup>107</sup>

Two rounds of recruitment for magistrate participants were undertaken. Approval to recruit magistrates was conditional on magistrates only being approached via the Local Court of NSW’s Chief Magistrate’s Executive Office. Consequently, in the first round of recruitment, the Office circulated the invitation to participate to magistrates in NSW, and three magistrates expressed interest. Office staff then liaised between me and those three participants to arrange suitable times to conduct the interviews. Initially I estimated that a small sample of three to five magistrates would achieve data saturation on the interview topics due to magistrates’ particular expertise and specialisation.<sup>108</sup> This estimate was revised following initial interviews with three

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<sup>104</sup> Patton (n 97) 648.

<sup>105</sup> Parsons (n 99) 406.

<sup>106</sup> Chun Tie, Birks and Francis (n 1) 3.

<sup>107</sup> As Person et al state in their study, ‘Gaining better insight into how judges make decisions in DVPO cases by asking them directly and observing how they manage DVPO case proceedings can illuminate where court process improvements could be made to provide increased access to justice, ensure efficient use of court resources, and improve the ability of judges to perform their duties as custodians of justice’:

Cara J Person et al, ‘“I Don’t Know That I’ve Ever Felt Like I Got the Full Story”: A Qualitative Study of Courtroom Interactions Between Judges and Litigants in Domestic Violence Protective Order Cases’ (2018) 24(12) *Violence Against Women* 1474, 1480.

<sup>108</sup> Greg Guest, Arwen Bunce and Laura Johnson, ‘How Many Interviews Are Enough? An Experiment with Data Saturation and Variability’ (2006) 18(1) *Field Methods* 59, 74.

magistrates in August 2021, which did not achieve data saturation, and my decision to expand recruitment during a further iteration of the research design. The second round of recruitment followed further support being obtained from the Chief Magistrate's Executive Office in May 2022. The Office supported this second round of recruitment, and a Deputy Chief Magistrate distributed a second call to a select number of magistrates to participate in May 2022. The Deputy Chief Magistrate then provided me with a list of magistrates who agreed to be contacted, along with their preferred contact details. Nine interviews were conducted between May and June 2022.

The final sample of 12 magistrates included those with experience presiding over ADVO matters in regional and urban/metropolitan Local Court locations. Some magistrates had experience sitting in multiple NSW Local Court sites and could speak to experiences in both regional and urban/metropolitan locations. Most participants sat in adult Local Courts at the time of interview. A small number of participants also had experience sitting in other courts (e.g., Children's or Coroner's Courts) and were able to discuss their knowledge of features across different court jurisdictions (e.g., ADVOs in Children's Courts, and/or different magisterial roles in the Coroner's Court), alongside the Local Courts' jurisdiction in relation to adult ADVO matters.

#### Group 2: Lawyers and Group 3: Other support workers

A range of court-involved actors in addition to magistrates are significantly involved in ADVO decision-making processes in NSW, and therefore important informants for this study.<sup>109</sup> The key individuals I identified as able to offer relevant knowledge and insights included the following.

- Court support workers who provide support to victims/survivors regarding ADVOs.
- Lawyers (representing victims/survivors and/or defendants).<sup>110</sup>

Lawyers supporting victims/survivors 'play an important role in assessing risk for victims, connecting families with support services and making decisions to protect people experiencing

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<sup>109</sup> Similar to Skinner's motivations in her PhD project, I attempted to include 'all key individuals in the decision-making' on ADVOs in the study to reduce the 'possibility of the "halo effect" ... combined with the potential for the interviewee to overstate their influence over a particular event' that can arise when interviewing 'elites' such as magistrates: Tina Skinner, 'Researching People in Power: Practice, Analysis and Action' in Marianne Hester, Ellen Malos and Tina Skinner (eds), *Researching Gender Violence: Feminist Methodology in Action* (Willan Pub., 1<sup>st</sup> ed, 2005) 50.

<sup>110</sup> Note that these roles are not mutually exclusive, as victims/survivors may appear as defendants in ADVOs, e.g. Nancarrow et al (n 61); Reeves (n 61); Ellen Reeves, 'A Culture of Consent: Legal Practitioners' Experiences of Representing Women Who Have Been Misidentified as Predominant Aggressors on Family Violence Intervention Orders in Victoria, Australia' (2023) 31 *Feminist Legal Studies* 369.

violence'.<sup>111</sup> Lawyers who act for the defendant also play a role in communicating and negotiating about conditions on ADVOs, and would have relevant insights to share.

I initially recruited ten participants from these two groups from two specific local court sites: Court A (NSW, metropolitan) and Court B (NSW, regional). I subsequently expanded recruitment state-wide, following an adjustment to the study's methodology detailed earlier. Participants were contacted via an email invitation sent to legal services that provide support for ADVO proceedings, and services that provided other services that included support at court or with ADVO matters. These services were identified via scoping activities conducted in February 2021 and searches of public online directories to locate relevant services in the study sites. Invitations were sent to services' generic email, or a direct contact provided during scoping interviews or snowballed from other contacts. The services were asked to distribute the invitation to those they considered had relevant experience, and capacity and willingness to participate. Individual participants then either emailed me directly or provided their contact details via their organisational contact and I emailed them to confirm their interest in participating and schedule interviews.

The final sample consisted of 16 participants, who were interviewed from across the state:

- eight lawyers, from six organisations, including two defendant duty lawyers and six staff members from community or private legal services who primarily represent victims/survivors;
- eight support workers from six court support services that support women through the ADVO process, whether private or police initiated.

*ii. Interview procedures*

The study received ethics approval from the UTS HREC in June 2021 (ETH21-5977). I conducted 30–60 minute interviews via phone, Zoom/Teams, or in person (if located in Sydney)<sup>112</sup> between August 2021 and February 2023, based on the participants' preferences and subject to COVID public health restrictions in place at some times. Most (n= 21) interviews were conducted individually.<sup>113</sup> Three group interviews were conducted, where up to three people from an organisation were interested in participating and it was most convenient for them to schedule

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<sup>111</sup> Annabel Taylor et al, *Domestic and Family Violence Protection Orders in Australia: An Investigation of Information Sharing and Enforcement: State of Knowledge Paper* (ANROWS Landscapes 16/2015, ANROWS, 2015) <[https://anrows-2019.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2019/02/19024752/16\\_4.1-Legal-WEB\\_FINAL\\_0-1.pdf](https://anrows-2019.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2019/02/19024752/16_4.1-Legal-WEB_FINAL_0-1.pdf)> 36.

<sup>112</sup> Consent for interviews via phone/zoom was obtained and recorded verbally using a verbal consent script/checklist, or by the participant completing and returning a written consent form prior to the interview. Consent for in-person interviews was recorded via a written consent form completed by the participant prior to the interview.

<sup>113</sup> The same interview guide was used in all interviews, with questions adapted to the individual participants' roles as necessary during the interview.

an interview together. Regardless of whether a participant was interviewed by themselves or in a group, they have been allocated an individual code and quoted as individuals throughout the thesis, except where a group discussion is relevant to the quote's context. Interviews were audio-recorded and transcribed using transcription services Nibity and Way with Words.<sup>114</sup>

### *iii. Limitations*

The recruitment methods for lawyers and other support workers mean that the final sample mainly included representatives from community and publicly funded organisations and services, rather than private lawyers.<sup>115</sup> Further, the samples of magistrates, lawyers and other support services that were interviewed are not exhaustive, representative or generalisable for any of the professional groups included in the study. However, as an exploratory study, I did not aim for data saturation that 'cover[s] the whole range of phenomena, but to present selected patterns relevant for the study aim'<sup>116</sup> regarding risk considerations. Purposively selecting participants based on their subject matter knowledge and, therefore, ability to generate substantial new insights was therefore appropriate.<sup>117</sup>

As I signposted in **Chapter 1**, an attempt was also made to recruit police personnel to the study; however, NSW Police declined to participate.<sup>118</sup> The limitation this presents for this study is substantial. As has been detailed in previous chapters, and will become apparent in the study's findings, police play a central role in all stages of the ADVO process. Police officers are overwhelmingly the applicants on ADVOs in NSW, and dedicated Domestic Violence Liaison Officers (DVLOs) and police prosecutors are heavily involved in ADVO proceedings at court. Police also have a significant role in various risk considerations and communications, including by administering the primary risk assessment tool in NSW, the Domestic Violence Safety Assessment Tool (DVSAT) and information sharing with court support workers under the *Safer Pathway Program*. The dominant role they play in both DFV risk practices and ADVO processes means understanding how they undertake and conceptualise 'risk' for the purposes of ADVOs is a clear area for further research.

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<sup>114</sup> I reviewed the transcripts for accuracy, and to remove identifying information, and allocated them an anonymous code descriptor. Participants were also offered an opportunity to review their transcripts. A number of participants requested this and requested corrections/deletions for accuracy and to ensure their anonymity. These corrections and deletions were incorporated into a final de-identified version of the transcript. Identifiable transcripts were then deleted. Audio-recordings were stored in a separate password-protected folder to the de-identified data.

<sup>115</sup> The minimal participation of private lawyers may present a limitation, which could be supplemented with a larger study than was feasible in this doctoral project.

<sup>116</sup> Kirsti Malterud, Volkert Dirk Siersma and Ann Dorrit Guassora, 'Sample Size in Qualitative Interview Studies: Guided by Information Power' (2016) 26(13) *Qualitative Health Research* 1753, 1756.

<sup>117</sup> *Ibid* 1759; Chun Tie, Birks and Francis (n 1) 3.

<sup>118</sup> This was despite their initial support for the project during the scoping phase.

### 3.4.4. Thematic Data Analysis

The research questions lend themselves to an exploratory study and inductive approach to examining how NSW court-involved actors consider 'risk' in the ADVO process, including examining participants' constructed meanings of the central concepts under study (i.e., 'risk', 'DFV', 'protection', 'safety', etc.). Consequently, I thematically analysed<sup>119</sup> interview transcripts inductively, by reflexively identifying themes 'driven by the content of the data, by the participants' language and concepts'.<sup>120</sup> This involved iterative stages of familiarising myself with the transcripts, coding them in NVivo and Word, and then generating themes, which I developed, reviewed and refined before and during writing up my analysis.<sup>121</sup> In reporting on my data analysis throughout the thesis, I have de-identified participants' quotes and edited them for clarity and brevity.

I report the insights from this data analysis in the following chapters, specifically what my analysis has revealed about: the NSW ADVO landscape in relation to risk (**Chapter 4**); court-involved actors' conceptualisations of 'risk' for the purposes of ADVOs (**Chapter 5**); and risk-based practices court-involved actors described engaging in within the ADVO process (**Chapter 6**). I then discuss the implications of these findings, including the key strengths and limitations of this study, in **Chapters 7**, along with avenues for future research in **Chapter 8**.

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<sup>119</sup> 'Thematic analysis (TA) is a set of methods for developing and interpreting patterns of meaning across qualitative data': Virginia Braun and Victoria Clarke, 'Thematic Analysis' in Filomena Maggino (ed), *Encyclopedia of Quality of Life and Well-Being Research* (Springer International Publishing, 2023) 7187, 7187.

<sup>120</sup> Ibid 7190.

<sup>121</sup> Ibid 7191.

# Chapter 4: The NSW Apprehended Domestic Violence Order Landscape in Relation to ‘Risk’

## 4.1. Introduction

In this first findings chapter, I report on interviewees’ views about the way in which the Apprehended Domestic Violence Order (ADVO) landscape in NSW operates in relation to ‘risk’. I outline the legislative framework for ADVOs in NSW, under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (‘ADVO Act’), interwoven with interviewees’ reports of how they understand and apply this framework. This provides a foundation on which to understand the context of court-involved actors’ conceptualisation of ‘risk’ for the purposes of ADVOs, and the risk-based practices they adopt within this landscape examined in subsequent chapters. In doing so, I do not comprehensively detail every technical and procedural requirement for applying for and obtaining an ADVO, as these are covered in detail by others.<sup>1</sup> Rather, I aim to provide a general picture of how the ADVO court process functions to the extent it is relevant to risk considerations (however defined), and the extent to which risk considerations are enabled or inhibited by these legal and court settings, in order to answer **RQ1**: To what extent do relevant civil procedures enable ‘risk of DFV’ to be considered by key court-involved actors in the making of ADVOs in NSW?

I begin this chapter detailing the role of ADVOs and courts under the NSW *Safer Pathway Program*. I set this out first, as this program creates obligations for some — but not all — court-involved actors to identify and assess domestic and family violence (DFV) risks. This policy setting is external to, but integrally connected with, the ADVO process. Understanding this policy setting therefore provides foundational context to examine the operation of the ADVO process in relation to ‘risk’. Next, I identify critical features of the New South Wales (NSW) legislation that influence where ‘risk’ may or may not be considered, including the objectives of the *ADVO Act*,

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<sup>1</sup> See, eg, Women’s Legal Service NSW, *A Practitioner’s Guide to Domestic Violence Law in NSW* (Women’s Legal Service NSW, August 2018) <<https://wlsnsw.org.au/wp-content/uploads/domestic-violence-and-law.pdf>>. I provide a diagram in **the Appendix** giving an overview of key features of the court process in relation to three common ADVO ‘pathways’:

1. private applications for standalone ADVOs;
2. police applications for standalone ADVOs;
3. police applications for ADVOs, alongside concurrent charge for criminal offences.

While interviewees discussed aspects of all three pathways throughout their interviews, the consensus was that the majority of ADVOs in NSW are:

- initiated by police application;
- heard alongside/following criminal charges; and/or
- made by consent.

and the lack of legislative definitions of concepts such ‘risk’ and ‘DFV’.<sup>2</sup> I also examine the significance of broader jurisdictional features, such as the ADVO process occurring within an adversarial legal system, and different limitations created by civil versus criminal procedural rules that may apply in certain proceedings. I then discuss the consequences of police primarily being the applicants on ADVOs in NSW, and the impacts of orders made by consent rather than via defended hearings. Lastly, I outline critical extra-legal factors that inhibit the routine consideration of DFV risk in the ADVO process; namely high workloads and resourcing constraints in the NSW Local Courts, along with inconsistent, localised practices and varying degrees of DFV specialisation amongst court-involved professionals.

What becomes clear in detailing this ADVO landscape is that while ‘risk’ may be forefront in many individual court-involved actors’ minds, and these individuals may attempt to prioritise DFV risk throughout different stages of the court process, the operation and design of the existing legal landscape inhibits the consideration of DFV risks in a systematised way. In sum, I argue that the existing ADVO framework creates certain opportunities for risk to be considered, but these opportunities are largely by default rather than design.<sup>3</sup> They are heavily dependent on multiple varying and interacting features of the legal system, which inconsistently occur depending on which ADVO pathway is being followed, and the localised practices and expertise of the court-involved actors involved in a specific proceeding.

## 4.2 How *Safer Pathway Program* Policy Settings Interconnect with Apprehended Domestic Violence Orders

At the time this study was conducted, NSW did not have an officially titled ‘multi-agency common risk-based framework’ applying to the state-wide DFV service system,<sup>4</sup> although some court-involved actors such as police and Women’s Domestic Violence Court Advocacy Services (WDVCAS) workers were required to engage in formalised risk-based processes under the *Safer Pathway Program*. This program, implemented across the state in 2018,<sup>5</sup> was designed to address criticisms that the DFV service system was fragmented and there was ‘no common framework to assess risk or prioritise needs and no shared understanding between organisations

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<sup>2</sup> At least until the passage of the *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW), which inserted a definition of ‘domestic abuse’ into the *ADVO Act*.

<sup>3</sup> Family Violence Death Review Committee, *Fifth Report: January 2014 to December 2015* (Family Violence Death Review Committee, New Zealand, 2016) <[FVDRC-5th-report-Feb-2016-v2.pdf](#)> 14.

<sup>4</sup> In 2024, the NSW Government announced funding for the University of New South Wales (UNSW) to develop one: Kate Newton, ‘New Domestic Violence Framework to Improve NSW First Responder Skills’, *UNSW Newsroom* (UNSW, online, 5 March 2024) <<https://www.unsw.edu.au/newsroom/news/2024/03/domestic-and-family-violence--new-framework-to-improve-first-res>>.

<sup>5</sup> Australian Government, ‘Safer Pathway — National Plan to Reduce Violence against Women and Their Children’, *National Plan to Reduce Violence against Women and their Children* <<https://plan4womenssafety.dss.gov.au/initiative/safer-pathway/>>.

of each other's roles'.<sup>6</sup> The program has several elements that directly underpin certain court-involved actors' risk-based approaches to DFV: specifically, police and WDVCS workers who have designated roles under this program. These elements include: protocols for information sharing between police, WDVCS and other designated services; the required use of a standardised risk assessment tool (the Domestic Violence Safety Assessment Tool (DVSAT));<sup>7</sup> and coordinated risk management through a Central Referral Point, Local Co-ordination Points and Safety Action Meetings (SAMs).<sup>8</sup> Both police and WDVCS participate in SAMs and share information using the Central Referral and Local Coordination Points (which WDVCS operate, in addition to their court advocacy role).<sup>9</sup> This means that police and WDVCS workers' administration of the DVSAT and information sharing with each other via the Central Referral Point, Local Co-ordination Points and SAMs significantly interconnect with these court-involved actors' considerations of risk for the purposes of ADVOs, despite not being a formalised part of the ADVO court process.

For example, because police are mandated to use the DVSAT<sup>10</sup> 'at every domestic and family violence incident reported to Police in NSW',<sup>11</sup> the police should in all cases be making ADVO applications having conducted a DVSAT and considered the level of risk that has been assessed; although previous studies have found this is not always the case.<sup>12</sup> WDVCS workers similarly routinely use the DVSAT during client intakes with women referred to them and as part of their role as the Local Coordination Point.<sup>13</sup> This means that if a protected person is engaged with a

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<sup>6</sup> Lily Trimboli, 'Outcome Evaluation of NSW's Safer Pathway Program: Victims' Experiences' (2017) 202 *Crime and Justice Bulletin (BOCSAR): Contemporary Issues in Crime and Justice* 1, 2.

<sup>7</sup> The DVSAT was implemented as part of the NSW Government's *Safer Pathway* program, to assist in the program's aim to streamline and integrate service coordination, safety assessment and referrals: Clare Ringland, 'The Domestic Violence Safety Assessment Tool (DVSAT) and Intimate Partner Repeat Victimization' (2018) 213 *Crime and Justice Bulletin (BOCSAR): Contemporary Issues in Crime and Justice* 1, 2. Note that the DVSAT was under redesign during the course of the study. See **Section 1.4.2** and NSW Domestic Violence Death Review Team, *Report 2019–2021* (NSW Government, 2022) <[https://coroners.nsw.gov.au/documents/reports/2019-2021\\_DVDRT\\_Report.pdf](https://coroners.nsw.gov.au/documents/reports/2019-2021_DVDRT_Report.pdf)> 215.

<sup>8</sup> SAMs are multi-agency meetings 'where service responses for high-risk cases can be planned, coordinated and monitored': Trimboli (n 6) 2. See also: NSW Government, *Safety Action Meeting Manual* (NSW Government, June 2020) <[https://facweb.squiz.cloud/\\_data/assets/file/0004/592951/SAM-Manual-2020-FNL.pdf](https://facweb.squiz.cloud/_data/assets/file/0004/592951/SAM-Manual-2020-FNL.pdf)>.

<sup>9</sup> 'Women's Domestic Violence Court Advocacy Services', *Linking Communities Network* <<https://lcn.org.au/womens-domestic-violence-court-advocacy-services/>>; NSW Government (n 8).

<sup>10</sup> Use of the DVSAT is mandatory for NSW police, and a slightly different version is intended for use by non-police services. The two versions have 'minor differences in language to cater for the different contexts of the responders administering the tool': NSW Domestic Violence Death Review Team (n 7) 214. According to the NSW Government's DVSAT guide, it is intended 'to help service providers consistently and accurately identify the level of threat to domestic violence victims' to assist them in making referrals and providing supports for the victim/survivor: NSW Government, *Domestic Violence Safety Assessment Tool Guide* (NSW Government, June 2015) <<https://www.legalaid.nsw.gov.au/content/dam/legalaidnsw/documents/pdf/for-lawyers/professional-development/lawyer-education-series/domestic-and-family-violence-essentials/Domestic%20Violence%20Safety%20Assessment%20Tool%20Guide.pdf>>2.

<sup>11</sup> NSW Communities and Justice, 'Further Information', *Safer Pathway* (20 November 2023) <<https://dcj.nsw.gov.au/dcj/legal-and-justice/safer-pathway/further-information.html>>.

<sup>12</sup> See problematic administration of the DVSAT identified in NSW Domestic Violence Death Review Team (n 7) 218–220. Also see: Nicole Youngson et al, 'Domestic Violence Risk Assessment Research to Real-World Practice: The Devil Is in the Implementation' (2022) 37(4) *Violence and Victims* 425.

<sup>13</sup> 'Women's Domestic Violence Court Advocacy Services' (n 9).

WDVCAS and/or referred to WDVCAS by police via the Local Coordination Point, WDVCAS risk assessments conducted with women as part of their service provision will inform their advocacy on behalf of the protected person about what conditions should be included on an ADVO, whether for a police or private application. Action taken by police as result of SAMs may also inform the police of the need to apply for an ADVO or vary conditions on an ADVO that they have already applied for or has already been issued.<sup>14</sup> Equally, where a victim/survivor engages with the police or a WDVCAS in order to obtain an ADVO, they will usually be subject to a DVSAT assessment that may result in the referral of their case to a SAM,<sup>15</sup> and this may result in other actions being considered in order to manage risk.<sup>16</sup>

Many of the components of the *Safer Pathway Program* are therefore external to the ADVO court process, yet integrally connected with it. They create a broader policy and practice environment that envisions risk being considered by some court-involved actors governed by the *Safer Pathway Program* — namely police and WDVCAS workers — and foster an interplay between the ADVO system and the broader multi-agency responses to DFV cases. This is particularly due to the dominant role of police in both the *Safer Pathway Program* and in applying for ADVOS in NSW,<sup>17</sup> the latter to be discussed shortly. Consequently, the *Safer Pathway Program* creates a policy and practice setting in which risk considerations undertaken by police and WDVCAS heavily intersect with the ADVO system.

In contrast, the Local Court and other key court-involved actors such as magistrates, lawyers or registrars are not governed by the *Safer Pathway Program*. It is possible they use their own models of risk assessment or use the DVSAT voluntarily, however they are not mandated to do so as a matter of routine in their work as is the case for police and WDVCAS.<sup>18</sup> Further, neither the *Safer Pathway Program* nor the *ADVO Act* itself overtly require risk considerations

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<sup>14</sup> See 'Referrals to a SAM — Examples' and 'Examples of Items on a Safety Action Plan' in NSW Government (n 8) 19, 40.

<sup>15</sup> Cases assessed as a 'serious threat' as a result of a DVSAT assessment are referred to SAMs, and those assessed as 'at threat' are referred to DFV support services: NSW Domestic Violence Death Review Team (n 7) 215.

<sup>16</sup> See further 'Figure 1. An overview of how NSW authorities respond to female domestic or family violence victims 'at serious threat' in Safer Pathway sites and the rest of NSW' in Trimboli (n 6) 3, for a summary of police and WDVCAS involvement under the Safer Pathway Program.

<sup>17</sup> While ADVOS may be applied for by the protected person or their guardian ('private applicants') (*ADVO Act* s 48 (2)), BOCSAR data indicates that 98% of ADVO applications are made by police ('police applicants') in NSW: BOCSAR, 'New Domestic Violence Data: Monitoring Apprehended Violence Orders and Coercive Control in NSW', BOCSAR (9 October 2024) <<https://bocsar.nsw.gov.au/media/2024/new-domestic-violence-data-avo-and-coercive-control.html>>. Note also that s 48 (3) of the *ADVO Act* includes certain qualifications on who can apply for an ADVO in certain circumstances — e.g. only a police officer can make the application if each person to be protected is a child.

<sup>18</sup> While the 'non-police service' DVSAT is available for any services to use, in practice, it is mainly used by WDVCASs. More comprehensive roll out to other services has been recommended by the NSW Domestic Violence Death Review Team (n 7) 220. However other court-involved actors, such as magistrates, do not appear to receive standard guidance in understanding, using or considering the DVSAT. For example, there is no mention of the DVSAT or 'risk assessment' in the *Local Court Bench Book* (Judicial Commission of NSW, 2024) <<https://www.judcom.nsw.gov.au/publications/benchbks/local/apprehended-violence-orders.html>> [22–120] 'Making orders' (*Local Court Bench Book*).

undertaken for the purposes of the *Safer Pathway Program* to be communicated to, or considered by, the court for the purposes of ADVOs. This means the primary governance of ‘risk’ considerations in relation to ADVOs remains the legislative regime under the *ADVO Act*.

### 4.3. The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and ‘Risk’

The legislative wording of the *ADVO Act* fundamentally underpins court-involved actors’ considerations of risk for the purposes of ADVOs. This was clearly established by magistrate interviewees, all of whom gave the legislation primacy in their discussions and emphasised their discretion to consider ‘risk’ is essentially ‘informed by the applicable legislation’ (Magistrate 9). For example, magistrates stated their considerations are ‘guided by the legislation, nothing else’ (Magistrate 1), they ‘always have [the legislative test] in front of me’ (Magistrate 8) and the legislation is a ‘guiding framework’ (Magistrate 2). Others provided more nuance, saying that ‘it’s not what the statute says. It’s really my interpretation of what the statute says’ (Magistrate 5). However, there was consensus that magistrates’ considerations and judicial discretion are necessarily constrained by the Act’s wording. As Lawyer 6 said: ‘Where the magistrate can be asked to consider in inverted commas “risk”, I mean the Act sets out what they have to consider’. It is therefore important to understand key provisions of the *ADVO Act* in order to make sense of interviewees’ interpretations of what these provisions mean for court-involved actors’ considerations of ‘risk’.

#### 4.3.1. Legislative Framework

##### *i. Emphasis on ‘safety and protection’*

The objectives of the *ADVO Act*, set out under s 9, are to ensure the ‘safety and protection’ of those who experience or witness DFV, reducing and preventing violence in domestic relationships, and giving effect to international human rights instruments,<sup>19</sup> by empowering courts to make ADVOs and ensuring ‘access to courts is as safe, speedy, inexpensive and simple as is consistent with justice’.<sup>20</sup> In determining the need for an ADVO, the magistrate must consider the matters set out in s 17 as follows:

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<sup>19</sup> Paraphrased from *ADVO Act* s 9 (1) (c) and (d).

<sup>20</sup> *ADVO Act* s 9 (2) (b).

(1) In deciding whether or not to make an apprehended domestic violence order, the court must consider the safety and protection of the protected person and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order.

(2) Without limiting subsection (1), in deciding whether or not to make an apprehended domestic violence order, the court is to consider—

(a) in the case of an order that would prohibit or restrict access to the defendant’s residence—the effects and consequences on the safety and protection of the protected person and any children living or ordinarily living at the residence if an order prohibiting or restricting access to the residence is not made, and

(b) any hardship that may be caused by making or not making the order, particularly to the protected person and any children, and

(c) the accommodation needs of all relevant parties, in particular the protected person and any children, and

(d) any other relevant matter.

(3) When making an apprehended domestic violence order, the court is to ensure that the order imposes only those prohibitions and restrictions on the defendant that, in the opinion of the court, are necessary for the safety and protection of the protected person, and any child directly or indirectly affected by the conduct of the defendant alleged in the application for the order, and the protected person’s property.

‘Safety and protection’ as a part of the ADVO decision-making process are emphasised by these provisions. However, the Act does not define ‘safety’, ‘protection’ or — at the time of the study — ‘domestic violence’,<sup>21</sup> and does not refer to ‘risk’ in the legislative criteria for making orders.<sup>22</sup> As will be discussed shortly, the lack of legislative definition of these terms at the time of the study left the relevance of ‘risk’ open to interpretation, without clear legislative guidance, as noted by the interviewees. The matters set out in s 17 apply to both interim and final ADVOs, which are each subject to distinct legislative criteria as to when they may be made.<sup>23</sup>

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<sup>21</sup> At the time interviews were conducted, the Act did not include a definition of ‘domestic violence’. After completion of my interviews, a definition was inserted via the *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW), following recommendations by the Joint Select Committee on Coercive Control, *Coercive Control in Domestic Relationships* (No 1/57, Parliament of New South Wales, June 2021) xiv.

<sup>22</sup> ‘Risk’ is not explicitly referenced in ‘Part 4 (Apprehended domestic violence orders)’ of the *ADVO Act*. Note that some legislative provisions of the *ADVO Act* do explicitly refer to risk, but only for very specific purposes. E.g. consideration of ‘ongoing risk of death or serious harm’ is required when considering the need to issue an ADVO for an indefinite duration (ss 79B(1)(c)–(d) and (2)); and s 79B(2)). Also see ‘risk of harm to the child’ as a required consideration in certain circumstances involving children as the protected person/s (s 72B(3)), and risk as relevant in determining the need to issue a warrant for a defendant’s arrest (s 88).

<sup>23</sup> See **Appendix** for a diagrammatic overview of the ADVO process.

ii. *Interim Apprehended Domestic Violence Orders: 'Necessary or appropriate'*

Interim ADVOs provide protection to a protected person until the need for a final ADVO is determined.<sup>24</sup> Once made, interim orders remain in place until revoked, a final ADVO is made and served on the defendant, or a final ADVO application is withdrawn or dismissed.<sup>25</sup> For an interim ADVO to be made, a magistrate must be satisfied it is 'necessary or appropriate'.<sup>26</sup> Interim orders are usually sought by police or private application to safeguard the protected person until the next court date in circumstances where the defendant is contesting the making of a final ADVO<sup>27</sup> or the matter is adjourned.<sup>28</sup> They are also *required* to be made by the court where the defendant is charged with a serious criminal offence,<sup>29</sup> regardless of whether an application for an ADVO has been made.<sup>30</sup>

A defendant can consent to, or contest, an interim ADVO. For contested orders, an interim hearing will be conducted to determine the need for the interim ADVO,<sup>31</sup> in which case the magistrate must consider the matters set out in s 17 of the *ADVO Act* to determine whether the order is 'necessary and appropriate'.<sup>32</sup> Where the matter is urgent, these hearings may occur without the protected person and/or defendant present.<sup>33</sup> Where both the parties are present, the interim hearing the magistrate may consider the:

written grounds supporting the application; a written statement from any witness intended to be called at the interim hearing; evidence given orally (including in cross-examination) at the interim hearing; and/or any submissions made by the parties or their legal representatives.<sup>34</sup>

As interim orders are effectively short-term orders that provide immediate protection to the protected person, some interview participants characterised interim orders as a point at which risk considerations may be especially relevant because 'obviously the interim [stage is] the crisis point' (Support Worker 4). Lawyer 4 stated 'legislatively [risk assessment is] inbuilt, arguably, in

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<sup>24</sup> *ADVO Act* s 24.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid* s 22 (1).

<sup>27</sup> Women's Legal Service NSW (n 1) 35. In these cases, the parties potentially must go through two hearings: one hearing for the interim ADVO and a second hearing for the final ADVO.

<sup>28</sup> *Ibid* 34.

<sup>29</sup> Unless the court 'is satisfied that it is not required': *ADVO Act* s 40(3).

<sup>30</sup> *ADVO Act* s 40(1). In these circumstances, the magistrate will not need to determine the need for the order but will still need to determine which conditions are appropriate to include.

<sup>31</sup> *ADVO Act* s 22 (1).

<sup>32</sup> If the defendant consents without admissions to the interim ADVO, the order can be made by either a magistrate or a court registrar, without the need for an interim hearing or consideration of the matters under *ADVO Act* s 17. See *ADVO Act* s 23: 'A Registrar may, on application, make an interim apprehended domestic violence order or an interim apprehended personal violence order if satisfied that the protected person and the defendant consent to the making of the order'; and *ADVO Act* s78 (1): 'A court may make a final apprehended violence order, or an interim court order, without being satisfied as to the matters that are prerequisites to the making of those orders if the protected person and the defendant consent to the making of the order'. Also see: Women's Legal Service NSW (n 1) 35.

<sup>33</sup> Subject to specific legislative tests under the *ADVO Act* ss 22 (3) and (4). See Women's Legal Service NSW (n 1) 35.

<sup>34</sup> Women's Legal Service NSW (n 1) 35.

the test for an interim AVO, whether it's "necessary and appropriate". According to Magistrate 3 this is because the interim stage is when risk is most 'immediate' because:

[By] the time they come to a [final] hearing with all the passage of time and the relationship rekindling there is less risk than there was ... [when you] first receive the application ... [later in interview:] So, [for] interim orders generally ... it really is that urgency at the time.

*iii. Final Apprehended Domestic Violence Orders: 'Reasonable grounds to fear', 'reasonable likelihood' and 'necessary'*

Final ADVOs can be made upon application by police or private application. They are also required to be made by the court where the defendant 'pleads guilty to, or is found guilty of, a serious offence'.<sup>35</sup> In considering an application for a final order, under s 16 of the *ADVO Act* a magistrate may make an ADVO if they are:

(1) Satisfied on the balance of probabilities that a person who has or has had a domestic relationship with another person has reasonable grounds to fear and in fact fears—

(a) the commission by the other person of a domestic violence offence against the person, or

(b) the engagement of the other person in conduct in which the other person—

(i) intimidates the person or a person with whom the person has a domestic relationship, or

(ii) stalks the person,

being conduct that, in the opinion of the court, is sufficient to warrant the making of the order.

Under s 16 (2), a magistrate can also make an order even if they are not 'satisfied the person for whose protection the order would be made in fact fears that such an offence will be committed, or that such conduct will be engaged in' in certain circumstances, including if:

(c) in the opinion of the court—

(i) the person has been subjected on more than one occasion to conduct by the defendant amounting to a personal violence offence, and

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<sup>35</sup> *ADVO Act* s 39. 'Serious offence' is defined under s 40 (5) and is quite wide. For both interim or final orders that are required to be made where the defendant is charged with a serious offence, the magistrate will still need to determine the conditions that are appropriate for inclusion on the ADVO.

(ii) there is a reasonable likelihood that the defendant may commit a personal violence offence against the person, and

(iii) the making of the order is necessary in the circumstances to protect the person from further violence, or

(d) the court is satisfied on the balance of probabilities that the person has reasonable grounds to fear the commission of a domestic violence offence against the person.

While final ADVOs may be ‘of indefinite duration’ in some circumstances,<sup>36</sup> they tend to be made for one to two years, or occasionally five years.<sup>37</sup>

*iv. Determining Apprehended Domestic Violence Orders conditions: ‘Necessary and desirable’*

Under the *ADVO Act*, if a magistrate is satisfied an interim or final ADVO is necessary, they:

may impose such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable to the court and, in particular, to ensure the safety and protection of the person in need of protection [(PINOP)] and any children from domestic or personal violence.<sup>38</sup>

Three mandatory conditions are included in every ADVO, regardless of whether the ADVO is interim or final, or made by consent or contested. These mandatory conditions prohibit the defendant from:<sup>39</sup>

(a) assaulting or threatening the protected person or a person with whom the protected person has a domestic relationship,

(b) stalking, harassing or intimidating the protected person or a person with whom the protected person has a domestic relationship,

(c) intentionally or recklessly destroying or damaging any property, or harming an animal, that belongs to, or is in the possession of, the protected person or a person with whom the protected person has a domestic relationship.

Additional conditions may be imposed by the court, including (but not limited to):<sup>40</sup>

(a) prohibiting or restricting approaches by the defendant to the protected person,

(b) prohibiting or restricting access by the defendant to any or all of the following—

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<sup>36</sup> *ADVO Act* s 79B.

<sup>37</sup> Women’s Legal Service NSW (n 1) 26. Where the defendant is sentenced to a period of imprisonment for those offences, the ADVO lasts for term of imprisonment, plus two years (*ADVO Act* s 39 (2B)).

<sup>38</sup> *ADVO Act* s 35 (1).

<sup>39</sup> *ADVO Act* s 36.

<sup>40</sup> *ADVO Act* s 35.

(i) to any premises occupied by the protected person from time to time or to any specified premises occupied by the protected person,

(ii) to any place where the protected person works from time to time or to any specified place of work of the protected person,

(iii) to any specified premises or place frequented by the protected person,

whether or not the defendant has a legal or equitable interest in the premises or place,

(c) prohibiting or restricting the defendant from approaching the protected person, or any such premises or place, within 12 hours of consuming intoxicating liquor or illicit drugs,

(c1) prohibiting or restricting the defendant from locating or attempting to locate the protected person,

(d) prohibiting or restricting the possession of all or any specified firearms or prohibited weapons (within the meaning of the Weapons Prohibition Act 1998) by the defendant,

(e) prohibiting the defendant from interfering with the protected person's property,

(f) prohibiting or restricting specified behaviour by the defendant that might affect the protected person.

However, if the magistrate is making the ADVO where they are 'satisfied there are reasonable grounds to fear but no fears are in fact held' under s 16 (2), only the mandatory conditions will apply.<sup>41</sup> In circumstances where the court is required to make an interim or final ADVO because of criminal charges, as mentioned previously the magistrate will not need to make a decision about the need for an order, but will still need to determine which conditions are appropriate to include on the ADVO.

In sum, the legislative tests for interim or final ADVOs, and what conditions may be included, do not expressly refer to 'risk' being a required consideration by magistrates or other court-involved actors in their decision making, despite the *ADVO Act's* legislative focus on 'safety and protection'. Noting the primacy placed on legislative wording by magistrate interviewees, understanding how interviewees interpret and apply this legislative framework in relation to 'risk' in the absence of clear legislative direction is therefore highly consequential for whether and how risk may be considered for the purposes of ADVOs.

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<sup>41</sup> *ADVO Act* s 16 (2A); *Local Court Bench Book* (n 18) [22–120] 'Making orders'.

### 4.3.2. Interpreting the Legislative Framework

The lack of explicit reference to 'risk' in the legislative criteria for ADVOs was the basis for several magistrates interpreting the *ADVO Act* as constraining their remit to consider DFV risks. For example, Magistrate 9 said: 'I don't think [the Act] refers to risk. It's not a risk focus', and in answering how risk is considered in the ADVO process, Magistrate 6 answered 'It's not, really. It's not the issue, under the law, that we are supposed to consider'. Nevertheless, multiple magistrate and lawyer interviewees suggested a consideration of risk is implicitly required based on the practical application of the legislative criteria under:

- s 17 of the Act, because a court may make an ADVO if it is necessary for the 'safety and protection' of the protected person;
- s 35 (1), because the court may impose conditions that 'appear necessary or desirable to the court and, in particular, to ensure the safety and protection of the person in need of protection'; and
- s 16, because in making an ADVO the court must be 'satisfied on the balance of probabilities' that the protected person 'has reasonable grounds to fear and in fact fears' DFV (s 16 (1)), or will make an order where the court is of the opinion 'there is a reasonable likelihood that the defendant may commit a personal violence offence against the person' (s 16 (2)(c)(ii)).

Some interviewees discussed that risk was necessarily a relevant consideration based on the 'protective' focus of these provisions, and use of wording such as 'necessary', 'fear' and 'safety and protection'. Magistrate 9 best captured this implied requirements while discussing these provisions:

'Necessary', for what purpose? For protective purposes. And that involves a risk analysis. There's no doubt about that ... "Has reasonable grounds to fear" involves an apprehension of risk of the things that are specified in Paragraphs 1 (a) and (b) [of s 16]. And then, Subsection (2)(c)(iii) [of s 16], the making of the order is necessary in the circumstances to protect the person from further violence. So that, necessarily, involves some assessment of risk in the context of "what is necessary".

Similarly, Magistrate 11 said:

It's a Protective Order, isn't it? It's supposed to protect somebody from violence. So, you have to work out whether to make the Order. You have to work out, don't you, what the risk is that

they're going to commit such an act of violence. It's a risk assessment, isn't it? Based on how people have behaved in the past and what they're charged with.

As quoted earlier, Lawyer 4 also suggested that a risk analysis is 'legislatively ... inbuilt, arguably, in the test for an interim ADVO, whether it's necessary and appropriate' (Lawyer 4). Later in the interviews with Magistrates 6 and 9, quoted above, who initially rejected the legislation as creating a risk focus based on the absence of explicit wording to that effect, they each went on to reflect that 'If you equate fear with risk, I suppose it is considered' (Magistrate 6), and 'necessarily tests such as "necessary" and "appropriate" involve a risk analysis' (Magistrate 9).

Some interviewees distinguished risk considerations that are required by the court in determining *whether* an order is required (i.e., under ss 16 and 17), compared to those required in determining the specific conditions to be included on that order (i.e., under ss 36 and 37). For instance, Magistrate 8 suggested there is 'most certainly ... a two-step process' requiring considerations of risk in applying the ADVO legislative criteria:

where you have to be satisfied that the order is warranted. You know, there's a concern, there's a risk, that risk is sufficient to make an order ... Then the second step to the process is, ... in those circumstances, what conditions? And for what length, for that matter? ... The important step two is about those conditions. What conditions are sufficient to warrant risk [sic]?

The intrinsic necessity to consider risk in the practical application of the *ADVO Act's* legislative criteria led Magistrate 9 to express surprise that the *ADVO Act* does not mention risk and that:

It seems quite curious that the term risk hasn't been adopted in these more frequently used sections and circumstances [of the *ADVO Act*], where there's such prominence in the *Bail Act*, for instance, which has protective purposes.<sup>42</sup>

Thus, interviewees' interpretations of the *ADVO Act's* legislative criteria inherently requiring some form of risk assessment, albeit implicitly, reflected Weisberg's characterisation in the US that:

Risk assessments are a fundamental part of a [US] protection order proceeding when the risk of dangerousness of the respondent is at issue and the court must evaluate the predictive quality of the defendant's past acts as to the likelihood of future harm.<sup>43</sup>

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<sup>42</sup> E.g. see *Bail Act 2013* (NSW) s 19 (1), which requires a bail authority to 'refuse bail if the bail authority is satisfied, on the basis of an assessment of bail concerns under this Division, that there is an unacceptable risk'.

<sup>43</sup> D Kelly Weisberg, 'Lethality Assessment: An Impressive Development in Domestic Violence Law in the Past 30 Years' (2019) 30(2) *Hastings Women's Law Journal* 211, 228.

Yet in discussing what an implied ‘risk analysis’ requires, magistrate interviewees did not refer to any formal guidance outlining how to assess risk for these purposes,<sup>44</sup> leaving open the question as to how individual court-involved actors’ conceptualise that analysis (as will be examined in **Chapter 5**). Moreover, interviewees in all three cohorts indicated that several features of the broader ADVO landscape practically constrain their, and others’, capacity to undertake any form of ‘risk’ analysis, regardless of the legislative wording of relevant provisions.

## 4.4. Constraints Imposed by the Broader Apprehended Domestic Violence Order Landscape

### 4.4.1. Adversarial Jurisdiction and Constrained Judicial Role

At a fundamental level, interviewees emphasised the adversarial jurisdiction of ADVO proceedings constrains the capacity of court-involved actors to consider risk — especially judicial officers. As Magistrate 8 said:

This is not a sit-down, have a conversation, and let’s all come to an understanding about how we protect this person, and whether that’s necessary. This is an adversarial process. It is a process where there are opposing sides and procedural things, and there is a decision-maker, that does not facilitate a common understanding of risk and a mutual discussion.

Magistrate interviewees were particularly concerned with the implications of judicial officers stepping outside of their ‘independent’ and ‘clearly defined’<sup>45</sup> judicial role to actively engage in their own risk assessments in ADVO proceedings. For example, three magistrates (Magistrates 1, 6 and 10) distinguished their narrower judicial remit in adversarial ADVO proceedings from the more inquisitorial remit of, for example, the Coroner’s Court where the ‘coroner is able to actively go and seek information that he or she thinks is necessary in the case. And can be informed by any information by anybody that they think is relevant to the case’ (Magistrate 10). Magistrate 7 emphasised that ‘you have to remember that judicial officers aren’t sitting in the

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<sup>44</sup> This is reinforced by the absence of practical guidance on ‘risk assessments’ in the judicial guidance for magistrates in NSW. See, eg, *Local Court Bench Book* (n 18); *Local Court Practice Note No. 2 of 2012: Domestic and Personal Violence Proceedings* (NSW). C.f. Judicial College of Victoria, *Family Violence Bench Book* (Judicial College of Victoria, 2025) <<https://judicialcollege.vic.edu.au/resources/family-violence>>, which has dedicated resources for judicial officers regarding assessing risk. The Victorian legislative framework also include explicit reference to considering ‘risk’ in the FVIO Act, which in one study was identified as underpinning magistrates’ views that risk is a key consideration: Elena Campbell et al, *More than Just a Piece of Paper: Getting Protection Orders Made in a Safe and Supported Way: Responding to Recommendation 77 of the Royal Commission into Family Violence* (Centre for Innovative Justice, RMIT University, February 2021) 31.

<sup>45</sup> Kate Fitz-Gibbon et al, *The Views of Australian Judicial Officers on Domestic and Family Violence Perpetrator Interventions* (Research Report No Issue 13, ANROWS, 2020) 72.

shoes of an inquisitor. This isn't a coronial inquest ... This is a judicial officer in an adversarial system where there is a prosecutor and a defendant'.

Four Magistrates (4, 5, 6 and 10) also distinguished the limitations placed on their role in an adult ADVO system in comparison to the Children's Court. Magistrate 4's view was that the Children Court's had a different focus to adult courts, which enabled court-involved actors to approach matters with 'a primary focus' on 'the rehabilitation of the child', and 'err on the side of compassion in a way that the [adult] Local Court wouldn't support'. Magistrate 5 considered that the Children's Court had better mechanisms for risk management, such as follow-up reports, which are not currently available in the adult Local Courts because 'the way the [adult ADVO] court system is structured is such that you're only going to be able to establish the kind of risk and the appropriate responses to that risk on what's before you at the time ... It's pretty much the nature of the court process'.

For these magistrates, 'given the adversarial system that we live with' in the adult ADVO process, where the magistrate can only make a decision based on 'what one of the parties is telling the court', a magistrate 'entering the arena' would be 'fraught with risk' (Magistrate 10). According to these interviewees, the ADVO system is fundamentally 'an adversarial system. It's a police application or a private application, it's not the courts' application' (Magistrate 8). In other words, many magistrate interviewees were emphatic that the court's capacity to consider DFV risks is 'constrained to a substantial degree by what one of the parties is telling the court is the risk and the need for protection' (Magistrate 10). These adversarial procedural rules place significant constraints on the capacity of the court to consider all relevant risk information for the purposes of making an ADVO. For instance, Magistrate 10 noted that 'if the police are aware of certain things, sometimes they can't tell me because it would be prejudicial. But it informs the risk'. This reflection from Magistrate 10 also raises the question of *who's* views and assessments of risk are captured in submissions made to the court.<sup>46</sup>

Interestingly, one interviewee, Magistrate 7 explained they 'have no difficulty being quite inquisitorial in the way I would run a matter in domestic violence'. This magistrate described adopting a different judicial approach from most other magistrate interviewees, by managing their court in a semi-inquisitorial way to explore the evidence:

Because I like to know that we're actually getting to the nub of the matter, when it comes to these orders being made. And I'll often ask prosecutors and [police] domestic violence officers, what

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<sup>46</sup> See further **Section 6.3.2 (iv)**.

else do we need to consider? And you can drill down to work out, possibly, hopefully, that you're getting the right sort of tailormade order'.

This magistrate described adopting a much more 'active' judicial role, compared to most of the other magistrates who viewed their 'role as independent and clearly defined'.<sup>47</sup> While magistrates expressed a diverse range of views on their roles in this study — which in turn shape their views about 'judicial responsibilities and accountabilities'<sup>48</sup> — Magistrate 7's view was an outlier. Magistrate 10's view was more representative of the magistrate interviewee cohort, that:

The court system is constrained by what is presented to it. The information that we get given to us is not something that we can control ... If you want a local court in domestic violence matters to be able to undertake a situation where more information can be obtained that is now currently not able to be given ... parliament would need to make changes as to what evidence the court can receive in such matters ... to more actively undertake a protective process, where the court is making its assessment of the ... needs of protection, [and] risks.

Interviewees' perceptions of the judicial and court role in relation to risk assessments are examined in more depth in **Chapter 5**; but for the purposes of this chapter, participants emphasised procedural limitations on the role of the court in engaging in risk considerations exist as a result of the adversarial jurisdiction of these legal proceedings.

#### 4.4.2. Evidentiary Rules within a Quasi-Civil Process

Interviewees also discussed constraints created by certain evidentiary provisions and the civil/criminal entwinement<sup>49</sup> that operates in the ADVO process. As a civil application, the onus of proof for issuing an ADVO is 'on the balance of probabilities', rather than 'beyond reasonable doubt' required in criminal proceedings,<sup>50</sup> and different evidentiary rules apply from those for criminal charges. This led some magistrates to describe ADVO proceedings as a 'special' jurisdiction (Magistrate 3) and as a 'protective jurisdiction not a criminal jurisdiction' (Magistrate 5) distinct from criminal proceedings that aim to 'achieve justice, in terms of criminal liability' (Magistrate 9). These interviewees echoed those of Spigelman CJ who in *John Fairfax Publications Pty Ltd v Ryde Local Court* stated: 'The objects served by [ADVOS] are quite

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<sup>47</sup> Kate Fitz-Gibbon et al (n 45).

<sup>48</sup> Ibid 72.

<sup>49</sup> Alesha Durfee, 'The Use of Structural Intersectionality as a Method to Analyze How the Domestic Violence Civil Protective Order Process Replicates Inequality' (2021) 27(5) *Violence Against Women* 639, 657.

<sup>50</sup> *ADVO Act* s 16.

distinct from those that are served by civil adversarial proceedings or proceedings in which an arm of the State seeks to enforce the criminal law'.<sup>51</sup>

Interviewees discussed how this different jurisdiction has an impact on the relevant information available to the court in civil ADVO proceedings — 'information' usually meaning the defendant's recorded criminal history,<sup>52</sup> or the ability to hear submissions about the protected person's fears (e.g. based on victims/survivors' statements recorded at the scene,<sup>53</sup> written statements or evidence given in court). For instance, Magistrate 3 explained for ADVOs:

Different rules apply, different elements, standard of proof, and the police can rely on history ... To rely on history to prove a criminal charge they can do what's called tendency evidence and coincidence evidence where they can actually raise the bad character of a defendant in those limited circumstances under the Evidence Act.<sup>54</sup> In ADVO proceedings there's no such rules of tendency evidence because the legislation actually says the court can take into account the history.

Magistrate 11 explained standard questions asked of victims/survivors by police when recording a DVEC<sup>55</sup> such as 'Do you have any fears going forward, what do you think might happen, are there any other AVOs?' are 'almost a jurisdictional requirement' for civil ADVO proceedings, but not in criminal proceedings 'Because you can't really ask people 'do you think he's going to commit another offence'. That would be prejudicial or irrelevant'. These two magistrates therefore suggested that more risk-relevant information may be available to them in civil proceedings.

In contrast, Support Worker 8's view was that:

The information that's shared with the court around the AVO is very basic. And a perpetrator's history is not included in grounds of AVOs or anything like that. So it limits the magistrate to just that one incident, not the whole background information ... They only get to look at a perpetrator's history of violence if there's a criminal charge attached and he is found guilty.

The adequacy of information available in the grounds of the application (also known as 'complaint narratives') has also been found to be variable by other Australian and international

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<sup>51</sup> *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512 (referring to repealed Pt 15A *Crimes Act* 1900), at [20]

<sup>52</sup> Magistrates 2, 3, 6, 8, 9, 10, 11 and 12; Lawyers 1, 3 and 6; and Support Workers, 1, 4 and 8 all mentioned history of DFV and criminal records as relevant to establishing 'risk', and/or something the court takes in account in its decision making.

<sup>53</sup> Domestic Violence Evidence in Chief (DVECs) are video recorded statements from the victim/survivor that are increasingly used in NSW instead of written statements. For more information see: NSW Police Force, 'Domestic Violence Evidence in Chief (DVEC)' <[https://www.police.nsw.gov.au/\\_data/assets/pdf\\_file/0004/439420/DVEC\\_Brochure.pdf](https://www.police.nsw.gov.au/_data/assets/pdf_file/0004/439420/DVEC_Brochure.pdf)>.

<sup>54</sup> *Evidence Act 1995* (NSW).

<sup>55</sup> A recorded statement: NSW Police Force (n 53). DVECs are only used for criminal charges, not for standalone ADVOs (Scoping interviews).

studies, for various reasons.<sup>56</sup> Beyond factors influencing the quality of these applications however, Support Worker 8's reflections suggest a strong delineation between civil versus criminal law approaches to DFV, which impose different technical or procedural constraints on what information relevant to risk may be able to be submitted to the court.

Other participants raised a contrary view that 'Although strictly speaking the process of the application is said to be civil, in reality it's quasi criminal' (Lawyer 5). The fundamental entwinement of ADVOs with criminal responses to DFV have been identified in other studies,<sup>57</sup> which have highlighted that the aims of POs 'are supported primarily through (the threat of) criminal prosecution and sentencing for any breach of the DVO ... and by placing police on notice of potential risk'.<sup>58</sup> This was highlighted by some interviewees such as Lawyer 5, who viewed it as 'misleading to call it a civil process because it is an application under the *Crimes (Domestic [and Personal] Violence) Act*. It's an application initiated by police'.<sup>59</sup> Police are also responsible for enforcing all types of ADVOs (Police Provisional Orders (PPOs), interim and final ADVOS) and pursuing criminal charges for breaches of ADVOs or associated criminal offences that may have been committed, further emphasising the civil/criminal entwinement of ADVOs.<sup>60</sup> Durfee has made similar observations in US that, despite the intention of POs to offer a civil alternative to the criminal legal system that is intended to provide flexibility to be tailored to the victims/survivors' needs, in practice: 'the two systems have become increasingly entwined to the point where most survivors with protective orders cannot access and enforce them without using the criminal legal system'.<sup>61</sup>

Understanding this civil/criminal entwinement is important for this study because it relates to what relevant risk information may be being taken into account by the court in different proceedings. Significantly, while standalone ADVOs — that is, where there is only an ADVO application before the court — do occur, interviewees agreed it is very common for ADVOs to be dealt with alongside associated criminal charges.<sup>62</sup> This may be before, concurrent with or

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<sup>56</sup> See, eg, Alesha Durfee, 'Victim Narratives, Legal Representation, and Domestic Violence Civil Protection Orders' (2009) 4(1) *Feminist Criminology* 7; Robin Fitzgerald and Heather Douglas, 'The Whole Story: The Dilemma of the Domestic Violence Protection Order Narrative' (2020) 60(1) *The British Journal of Criminology* 180; Alesha Durfee, "'Usually It's Something in the Writing": Reconsidering the Narrative Requirement for Protection Order Petitions' (2015) 5(2) *University of Miami Race & Social Justice Law Review* 469.

<sup>57</sup> Durfee (n 49) 657.

<sup>58</sup> Heather Douglas, 'Domestic Violence Protection Orders and Their Role in Ensuring Personal Security' in Kate Fitz-Gibbon et al (eds), *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Routledge, 1<sup>st</sup> ed, 2018) 216.

<sup>59</sup> Private applications are also possible, although less common.

<sup>60</sup> Durfee (n 49) 643.

<sup>61</sup> Durfee (n 49) 657.

<sup>62</sup> See the **Appendix**, ADVO Pathway 3: 'Police applications with criminal charges' for a diagrammatic overview of the ADVO court process in these circumstances.

immediately following the finalisation of criminal proceedings for associated criminal offences.<sup>63</sup> In those circumstances Magistrate 9 explained ‘The evidence that’s adduced in the criminal proceeding almost always has a bearing on whether you make the AVO ... The reality is that I would say 95% of the time, you’re considering the same evidence’. This suggests that formal evidentiary distinctions between the risk information presented in civil and criminal jurisdictions may be less clear in matters where ADVOs and criminal charges are being considered by the same court.<sup>64</sup>

Indeed, some participants indicated criminal focuses predominate in the ADVO process generally. For example, Support Worker 5 expressed the view that ‘in terms of the justice system, it’s just the justice system. I don’t think [risk is] considered to be quite honest ... [it’s about proving the criminal act] That’s all it’s about. It’s not about her safety’. Others suggested the fact that magistrates presiding over DFV-related matters ‘in reality, often come from a criminal background’ shapes their approaches, and they may have ‘worked in that [criminal] space but [not] turned their mind to all of these sorts of issues [of DFV risk]’ (Lawyer 7). This was demonstrated by some magistrates suggesting criminal charges were indicative of the level of risk for ADVO matters, such as Magistrate 11 who said:

You've got the criminal [ones], and then you've got the ones where it's a police AVO only. So that says to you police don't think this is sufficiently serious to require criminal charges. That's a little bit unusual, given the police seem to have pretty strong operating instructions to charge somebody when there's a domestic violence event. If they're not doing that, there's probably a reason.

This stands in contrast to the experiences that lawyer and support worker interviewees described, reported in **Chapter 6**, of advocating for clients in cases where police may not have all the relevant risk information and/or may not perceive a matter to be sufficiently serious to warrant criminal charges. As such, court-involved actors bringing a criminal lens to ADVO proceedings, particularly where ADVOs are dealt with alongside associated criminal charges,

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<sup>63</sup> Women’s Legal Service NSW (n 1) 34. Note that, according to the *Local Court Bench Book* in NSW, where the ADVO is being considered concurrently with criminal matters, different evidence provisions may apply to a court hearing: ‘When an application is connected to a domestic violence offence, Ch 6, Pt 4B, Div 5 *Criminal Procedure Act* applies to the complainant’s evidence in those proceedings: s 289T(1)(b). The complainant’s evidence is to be heard in closed court unless the court directs otherwise: s 289U. They are also entitled to give evidence by AVL or twoway communication technology, and have visual/other contact with an defendant restricted: s 289V. The prosecution must provide the court with a “Notice: Evidence of domestic violence complainant in criminal proceedings” at the first mention (Attachment E of PN 1/2012). The complainant cannot be examined by a self-represented defendant, but must be examined through a court appointed questioner: s 289VA.’: *Local Court Bench Book* (n 18) [22–100] ‘Procedure to be adopted at a hearing’.

<sup>64</sup> According to Westlaw, *Lawyers Practice Manual NSW* (online at 18 January 2025) [2.6.310] Commencing Proceedings: ‘In some ways, AVO proceedings sit in a vacuum as a hybrid proceeding between civil and criminal proceedings. This is because, while the onus of proof is at the civil standard, proceedings are commenced by way of application notice (s 50 *Crimes (Domestic and Personal Violence) Act 2007*). Additionally, where the *Crimes (Domestic and Personal Violence) Act 2007* is silent on the conduct of the proceedings or a part of the proceedings, the criminal and civil legislation applies dependent on circumstances.’

may form views about 'risk' informed by that criminal lens, regardless of the technically 'civil' jurisdiction of ADVO proceedings. This criminal entanglement appears to be further intensified by the dominant role of police in the NSW ADVO system.<sup>65</sup>

#### 4.4.3. Police as Applicants

In NSW, ADVOs may be applied for by the protected person or their guardian ('private applicants');<sup>66</sup> which may be done with or without legal assistance. In court, private applicants may engage a lawyer or represent themselves.<sup>67</sup> Private applicants may also engage with various court-involved actors onsite (e.g. Domestic Violence Liaison Officers (DVLOs), WDVCS workers, legal services, registrars) on the day/s the application is listed at court. This means that, for private applications, the extent to which the conditions requested on an order are informed by professionals' considerations of risk (whether assessed using a formal tool or not) will highly depend on whether:

- a. the person is engaged with a service that assists them with the application; and
- b. that service is DFV-informed and conducts any form of risk assessment.

Private ADVO applications will therefore be informed by a victims/survivors' own judgement of what they view as relevant to the application, and the extent to which their experiences of DFV are effectively elicited from registrars, and/or other professionals such as lawyers or other advocates who may be assisting them. However, an overwhelming majority of ADVOs are applied for by police,<sup>68</sup> and interviewees in this study indicated that this has significant implications for what — and whose — considerations of 'risk' inform the ADVO process. As Lawyer 5 explained:

The problem ... is that the applicant for the AVO is [usually] a police officer. The police officer instructs the police prosecutor, or quite often the police prosecutor will do whatever he or she thinks appropriate without regard to what the PINOP wants. Not in all cases are PINOPs' views sought and not in all cases are PINOPs' views about what they want to see in an order put before the court.

Applications are usually made by a general duties police officer following a call out to a DFV incident or a report being made to police and the application does not require the consent of the PINOP. Police are also heavily involved throughout the ADVO process — depending on

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<sup>65</sup> Durfee (n 49) 657.

<sup>66</sup> *ADVO Act* s 48 (2). Note that this provision includes certain qualifications on who can apply for an ADVO in certain circumstances — e.g. only a police officer can make the application if each person to be protected is a child (s 48 (3)).

<sup>67</sup> See, eg, Women's Legal Service NSW (n 1).

<sup>68</sup> According to BOCSAR, 'Police apply for 98% of domestic AVOs, while 1% are initiated by a member of the public' in NSW: BOCSAR (n 17).

location, there may be designated police DVLOs who liaise between the protected person, defendant, police prosecutor and/or court support services in the lead up to and/or at court, while prosecutors will represent police applications at court. As mentioned earlier, police are also responsible for enforcement ADVOs once made.

Police are also able to make their own interim orders, known as Police Provisional Orders (PPOs),<sup>69</sup> and are required to make an application for an ADVO in certain circumstances, such as where they suspect a DFV offence 'is imminent, or is likely to be committed'.<sup>70</sup> Applications for a PPO may be made at the request of a protected person, but must be applied for by a police officer.<sup>71</sup> They are 'generally made without the defendant having an opportunity to be heard',<sup>72</sup> however only the police officer who made the PPO can apply to vary or revoke it,<sup>73</sup> or the defendant in certain circumstances;<sup>74</sup> the protected person cannot. As Magistrate 11 explained, for PPOs: 'the police can vary it, and the defendant. I don't think the PINOP can do it. So, if the PINOP puts on an application to vary, you can just reject it on the basis you've got no standing'. This means that for PPOs, where victims/survivors' views on risk differ from those of the police officer, 'under legislation, a woman can't make a private application to vary' the PPO and present their differing views to the court (Support Worker 3), unless the PPO is converted to an interim court order — and this does not always occur. For example, Magistrate 6 described not converting PPOs into interim orders to reduce variation applications (although noting that may be a changing practice):

We avoid playing with [PPOs] at all costs because as soon as they become interim orders, it opens them up to be varied. So, we don't take the opportunity to address those orders at all, which I think is a fault, quite frankly. I think if you've got a defendant in court who's been pushing and shoving their partner around, it's a good opportunity to eyeball them and tell them what the orders are and explain to them. But as soon as we start explaining to them what the orders are, it, basically, converts them into an interim order, which allows them to be varied. And no one likes to do that. Well, that has been the view in the past. We're going to look at that, going forward.

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<sup>69</sup> If police are involved with a DFV matter, a police officer may apply to a magistrate, registrar or senior police officer for a 'provisional order' (*ADVO Act* ss 25 (1) (a) and 26 (1) (a)). Provisional orders operate to provide immediate protection until the matter can be listed for court: *ADVO Act* s 26; and *Local Court Bench Book* (n 18) [22-060]. Essentially, PPOs operate as an interim ADVO made by police: they initiate a court process to determine the necessity for a final ADVO and remain in place until that court determination has been made or the court replaces them with an interim ADVO. Consequently, I deal with PPOs collectively with other types of 'interim orders' in this thesis, unless otherwise stated.

<sup>70</sup> *ADVO Act* s 49 (1) (a). See also subsections 49 (1) (b) and (c) for additional circumstances in orders must be applied for.

<sup>71</sup> *ADVO Act* s 25 (3).

<sup>72</sup> *Local Court Bench Book* (n 18) [22-060] 'Interim and provisional orders'.

<sup>73</sup> *ADVO Act* s 33 (3).

<sup>74</sup> *ADVO Act* s 33A.

The literature on good practice risk assessment in DFV contexts is emphatic that victims/survivors' input on risk is crucial to effectively assessing and managing DFV risks. The importance of obtaining input from victims/survivors about their self-assessments of risk was established in **Chapter 2**, as were the perceived benefits of POs in offering victims/survivors flexibility 'to tailor POs toward their own priorities',<sup>75</sup> and 'a measure of control [because] Unlike the criminal legal system, the survivor has the power to initiate the case and has some control over the possible outcomes'.<sup>76</sup> In contrast to these widely recognised principles in the literature, the primacy of police, rather than the protected person, throughout the ADVO process was emphasised by many interviewees as a feature that meant police approaches to risk tended to determine what ADVOs are made.<sup>77</sup> NSW Police's decision not to be involved in this research is consequently a significant limitation here, particularly as it is notable that multiple interviewees discussed how police approaches to ADVOs are an important factor that influences court-involved actors' considerations of risk and how police operate as gatekeepers on other court-involved actors' communication of differing assessments of DFV risks to the court. For example, Lawyer 4 explained procedural constraints, such as the requirement for the Officer in Charge (OIC) who initially made the application to be consulted about whether any adjustments to the conditions could be made.<sup>78</sup>

While many participants recognised there are 'good public policy grounds' (Magistrate 9) for some of the police approaches described, many also identified certain police policies that meant a limited capacity to respond to evolving risks in the ADVO process. Lawyer 4 described the following experiences:

We've seen at court where the client might have made further disclosures about very serious acts of violence ... The DVLOs don't and can't do anything at that point ... it's a very frustrating system in that the OIC is never on site and they're really the person that ultimately is the person to decide or can assess ... there's a lack of power or resourcing or something that the police can actually take action at court. So, it delays matters. It could leave clients at further risk because, really, they

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<sup>75</sup> Lauren Bennett Cattaneo, Jessica Grossmann and Aliya R Chapman, 'The Goals of IPV Survivors Receiving Orders of Protection: An Application of the Empowerment Process Model' (2016) 31(17) *Journal of Interpersonal Violence* 2889, 2891.

<sup>76</sup> Ruth E Fleury-Steiner et al, "'No Contact, Except ...': Visitation Decisions in Protection Orders for Intimate Partner Abuse' (2016) 11(1) *Feminist Criminology* 3, 14.

<sup>77</sup> The role of police was raised in every single interview (n= 24).

<sup>78</sup> Note that in its most recent Domestic and Family Violence Plan, the NSW Government has committed to reforms 'Giving senior Police the power to immediately vary ADVO conditions to respond to serious and immediate risks to victims, even if a court issued ADVO is in place' (NSW Government, *NSW Domestic and Family Violence Plan 2022–2027* (December 2022) <<https://dcj.nsw.gov.au/documents/service-providers/domestic-and-family-violence-services/NSW-Domestic-and-Family-Violence-Plan-2022-2027.pdf>> 16).

should have stronger protections put in place while they're at court and the court has the power to maybe vary or include conditions on an order.

In the same group interview, Lawyer 3 explained that the gatekeeping role police and prosecutors play between the protected person and the court exacerbates these issues, because 'It makes it a very frustrating process when you need to increase your protections. To actually get the message through to actually get something done and that application to be made and then the magistrate to actually listen to, well, they're asking for some expanded protections'. In a separate interview, Lawyer 5 expressed similar frustrations from the defence perspective, where, conversely, the protected person may want less strict protections in place but 'there is a no tolerance approach by police, so that police are able to obtain provisional orders, and there's no scrutiny of those orders until they get to court'. Another important constraint Magistrate 4 raised is where children are named on an ADVO; in this case only police can apply to vary the order, meaning that 'the mother can't vary it, and the court can't vary it, it's a matter for the prosecution' (Magistrate 4). It also means that the quality of the ADVO application ultimately 'depends [on] how much effort the police put in' (Magistrate 3).

These examples illustrate a consensus amongst interviewees that, procedurally, police are pivotal gatekeepers regarding what ADVO conditions are applied for, and the type and extent of risk information that may be put before the court, due to their standing as 'the applicant' in these adversarial proceedings. For example, Magistrate 3 said, the ADVO process is 'adversarial. It's for the police to choose whether or not they prosecute the application or whether or not they withdraw the application'. Magistrate 10 emphasised that magistrates' 'only information comes from reading what's in that complaint' and therefore they 'rely upon the police assessment'. This is particularly the case when the court is time constrained. Lawyer 3 explained, for instance:

There could be 20 or 30 matters in the list plus criminal charges and on this day the magistrate really doesn't have the time unless there's some issue brought specifically to their attention. They don't have the time to actually go into things in depth, so if everyone's organised it already it's fine. [There is] very much [a] reliance on the police and what the police say and then that comes back to: have the police adequately assessed the risk for appropriate orders and are they sufficient to avert a risk. Or are they too onerous and actually more than the applicant or the protected person wants.

Some other magistrates described instances where they may not agree with the police position on an application, however are reluctant to override the police position as this would infringe the principles of an adversarial proceeding.

It is therefore evident that significant constraints exist as to extent to which victims/survivors' self-assessments of risk may inform the court process where the applicant is a police officer. As Magistrate 11 said in relation to PPOs, the protected person is 'just the person who's being protected by the Police Order. They're not really a party'. Similarly, Lawyer 7 described the treatment of victims/survivors in ADVO proceedings as analogous to the treatment of sexual assault victims/survivors in criminal proceedings, where:

[They are] treated in accordance with the role that [they] are identified as playing in the process. And that is a witness ... [they] have this role in the system that is just as a witness. That just ... plays this one part. And ... is, invariably, often, forgotten throughout the process. Especially in AVO proceedings, specifically.

The lack of embedded opportunities for victims/survivors to communicate their self-assessments of risk — or other preferences and priorities regarding 'safety' — to the court in relation to police applications was recognised by multiple interviewees as a key constraint in the capacity for risk to be effectively considered in the ADVO process. This led Lawyers 5 and 7 each to convey that many legal services (representing both the protected person and defendants) were in 'furious agreement' (Lawyer 5) that legislative change was required to assure the protected person a right of appearance — specifically in relation to PPOs, and more generally to participate throughout the court process. For example, Lawyer 5 was adamant that a right to be heard should be legislatively embedded because 'You can't always guarantee reasonable police', and that other jurisdictions offered a precedent for doing so:

The solution to this issue is that PINOPs should have a right of appearance, and the legislation doesn't provide them with a right of appearance. So, if a police officer is going to stand up and say, these are the orders that are being sought, then a PINOP should have a right to be heard against that. You'll find that in Victoria I believe a PINOP does have that right.

Similarly, Lawyer 7 argued, for police applications, 'ultimately, we would like to see some sort of legislative reform [to provide victims with a right of appearance] because that takes the discretion out of the hands of other power players [such as police and magistrates], to limit the rights of PINOPS to be heard'. Magistrate 6 had similar reflections to Lawyer 7, that 'often, the woman doesn't have a voice, even though the prosecution is kind of acting for them, but they're not always around, and then the police decide no, we want the orders. They don't have a voice'. Magistrate 6 also raised this in relation to child victims/survivors of DFV noting that 'The children have no voice at all. And so someone needs to, not necessarily speak for them, but someone needs to take them into account when assessing risk based strategies'.

In sum, interviewees were emphatic that police play a central gatekeeping role in ADVO proceedings as the primary applicants for most ADVOs in NSW, with implications for what and whose considerations of 'risk' may inform the making of an ADVO. As Magistrate 11 said 'it's pretty important what the police ask for'. The impact of this dominant police role throughout the ADVO process in the context of variable risk-based practices that occur across different court-involved professional roles is further considered in **Chapter 6**.

#### 4.4.4. Culture of Consent Orders

Regardless of whether an application is made privately or by police, interim and final ADVOs may be made with the consent of the defendant,<sup>79</sup> with or without admissions, following a defended hearing,<sup>80</sup> or ex parte.<sup>81</sup> According to interviewees in this study, whether an ADVO is made by consent or following a defended hearing has a significant impact on how the court process operates and the extent to which it enables or inhibits adequate risk considerations by the court. Interviewees generally agreed that the magistrate has a much more involved role in determining the need for an ADVO and in identifying the conditions with which they are satisfied are necessary in defended hearings. The reason for this is that, where an application for an ADVO is contested, the court has the opportunity to hear and consider more evidence and material than for consent orders, which may include relevant risk information. For example, in defended hearings, in addition to the written grounds of the application, the court may hear written and oral evidence from witnesses, and 'and any submissions made by the parties or their legal representatives'.<sup>82</sup> In contrast, a magistrate is not required to be provided with these materials if the order is being made subject to s 39 (i.e., a final ADVO made on guilty plea or finding of guilt) or for consent orders.<sup>83</sup> Therefore, based on more material generally being available to the court in defended hearings, Magistrate 2 said that 'In some ways, in the running of the matter, when it's contested, you probably get a better feel of what needs to be included in an order'.

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<sup>79</sup> *ADVO Act* s 78. This means the defendant consents to be subject to the ADVO and comply with its conditions, as negotiated by the parties. These are usually made 'by consent without admissions', meaning the defendant is consenting to be subject to the ADVO without admitting to any of the particulars in the application.

<sup>80</sup> Where the defendant will not consent to an order and wants the opportunity for the matter to be heard in full by a magistrate, including presenting evidence/calling witnesses. In these cases, the court hears all the evidence and determines whether the order should be made.

<sup>81</sup> Where the matter is heard in the absence of the defendant, in which case, as with defended hearings, the court hears all the evidence and determines whether the order should be made.

<sup>82</sup> See *Local Court Practice Note No. 2 of 2012: Domestic and Personal Violence Proceedings* (NSW) [5.7] for interim orders; and [7.2] for final orders.

<sup>83</sup> *Local Court Practice Note No. 2 of 2012: Domestic and Personal Violence Proceedings* (NSW) [7.1].

Yet interviewees described a strong court culture that prefers consent orders over defended hearings, as have been observed in other Australian jurisdictions.<sup>84</sup> These perceptions of interviewees are supported by Bureau of Crime Statistics and Research (NSW) (BOCSAR) data reported in 2022, indicating that only one third of ADVOs in NSW are contested.<sup>85</sup> Orders made by consent may significantly constrain opportunities for the court to consider risk, and/or for differing views of risk to be conveyed to the court based on who is involved in negotiating the consent orders and what views of risk inform those negotiations. This is because for ADVOs made by consent, 'A court does not need to be satisfied as to the statutory prerequisites for the making of the order as would otherwise be the case'.<sup>86</sup> In other words, the magistrate's role is largely confined to making the order based on the terms agreed by the parties and the magistrate tends not to receive more material or evidence than the application itself. As Magistrate 7 noted 'the only information I have on which to found my decision ... is the application. That's tops four pages. Of which two or three are taken up by formalities. And a page with maybe four paragraphs under the heading, "grounds of application"'.<sup>87</sup>

This view was reiterated by multiple magistrates, who indicated that, in relation to consent orders, they 'give very little consideration to orders ... [and] whether or not they're warranted in those circumstances' (Magistrate 8), and 'would not enter the fray, in terms of deciding upon relevant conditions' (Magistrate 9). Lawyer 3 corroborated these views by observing that:

I don't think [magistrates] consider anything until it gets to the pointy end of the proceedings ... The orders are consented to and 'it's not my [the magistrate's] role then to go much further than that'. Although I think the legislation, probably, does say magistrates should be satisfied on stuff but I think it's very cursory in that situation.

Although a magistrate 'is still empowered to conduct a hearing if the [proposed consent] order is a final order and the court is of the opinion it is in the interests of justice to do so',<sup>87</sup> the limited time and lack of resources available to the court,<sup>88</sup> and the limited involvement of the magistrate for consent orders means that the negotiations about ADVO conditions and views formed about

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<sup>84</sup> Ellen Reeves, 'A Culture of Consent: Legal Practitioners' Experiences of Representing Women Who Have Been Misidentified as Predominant Aggressors on Family Violence Intervention Orders in Victoria, Australia' (2023) 31 *Feminist Legal Studies* 369.

<sup>85</sup> Australian Associated Press, 'Remarkable' Blowout in NSW Local Court Hearing Times as Victims of Crime Wait Average of Nine Months', *The Guardian* (online, 15 December 2022) <<https://www.theguardian.com/australia-news/2022/dec/15/remarkable-blowout-in-nsw-local-court-hearing-times-as-victims-of-wait-average-of-nine-months>>.

<sup>86</sup> *Local Court Bench Book* (n 18) [22–120] 'Making orders'; *ADVO Act* s 78.

<sup>87</sup> *Local Court Bench Book* (n 18) [22–120] 'Making orders'; *ADVO Act* s 78 (3).

<sup>88</sup> There is a lack of empirical data on the average time in which matters are dealt with in ADVO proceedings, however many interviewees reiterated the huge volume of DFV matters courts are required to deal with on relevant sitting days under **Section 4.4.5**. In 2008, a Victorian study estimated 'the median hearing time for all [PO] proceedings other than contested final orders was 3 minutes': Rosemary Hunter, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (Cambria Press, 2008) 81.

risk by other court-involved actors outside of the courtroom are usually determinative. For example, Magistrate 12 explained that in relation to standalone private applications, where the defendant consents to the conditions:

I'm not an inquisitor. I'm the magistrate who says, "these are your options, what do you want to do?" ... I can't put that down the path of a hearing, because she doesn't want a hearing. She just wants to go back to work. But what do you do? If it's by consent, and it's without admissions, you make the order for a period of time.

Magistrate 10 stated in relation to police applications:

If they're by consent, I don't engage in that sort of [decision-making] process because I haven't got the information to do it ... I'm not in a position to conduct a hearing, so I don't know any more than what's there. And you're back to the point where the prosecution and the police have already assessed the risks and worked out what orders are necessary.

#### 4.4.5. Time and Resourcing Constraints

Many interviewees explained the volume of ADVO matters<sup>89</sup> Local Courts have to process substantially limits the capacity, time and resources any individual court-involved actor can sufficiently devote to individual cases to adequately consider 'DFV risks'. For example, Lawyer 3 explained that because 'There could be 20 or 30 matters in the list plus criminal charges ... the magistrate really doesn't have the time unless there's some issue brought specifically to their attention. They don't have the time to actually go into things in depth'. Others emphasised 'the local court is an extremely busy jurisdiction' (Lawyer 6), where 'you have so many time pressures and other pressures' (Magistrate 1). According to interviewees, this materially constrains the time and information available to court-involved actors to adequately consider DFV risks and defines the practices they engage in to navigate the ADVO process efficiently and expediently — such as encouraging consent orders to be negotiated.<sup>90</sup> It also creates a tension between an 'ideal world' (Magistrate 3; Lawyer 3; Magistrate 6) or 'ideal scenario' (Lawyer 7) in which adequate risk assessments can occur, and what interviewees perceived they are pragmatically able to achieve in practice. As Magistrate 8 stated after detailing an extensive list of risk considerations they are conscious of in their decision making regarding ADVOs:

I am conscious of those things when making that order. In terms of how conscious, Kate? There can be a list of 160 of them on any given day ... All of those things are at play and a Magistrate is

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<sup>89</sup> Almost 50,000 orders were commenced between October 2023 and September 2024 according to BOCSAR, *Data to September 2024 (NSW Trends in Domestic & Family Violence — Quarterly Report, BOCSAR)* <[https://bocsar.nsw.gov.au/documents/topic-areas/domestic-violence/Domestic\\_Violence\\_Quarterly\\_Trends\\_Report.pdf](https://bocsar.nsw.gov.au/documents/topic-areas/domestic-violence/Domestic_Violence_Quarterly_Trends_Report.pdf)> 4.

<sup>90</sup> Also see Reeves (n 84).

expected to be able to assess risk based on these unique and individual relationships, on what they see in just a moment in time.

Similarly, Magistrate 11 observed they would like 'more information' to understand what conduct caused the ADVO application, 'but sometimes, in a busy list with 100 matters, you just can't, you've just got to guess'. Interviewees discussed that these time and resourcing constraints extend to other court-involved actors — particularly police prosecutors — as well. For example, Magistrate 1 observed that when considering police applications, 'you might say, well, why do you want [a specific condition] ... and normally it's the first time the prosecutor's had a chance to read it as well'. Similarly, Magistrate 7 acknowledged that 'If a solicitor is acting for the defendant, he or she has five minutes, maybe less to endear their client to me. To paint a portrait about their client, which will form the basis of my determination about the future. It's hardly sufficient, is it?'. These quotes illustrate the recognition interviewees expressed not only about their own workload pressures and lack of institutional resourcing,<sup>91</sup> but also how constrained in effectively undertaking their roles and adequately identifying, assessing, communicating and managing risks other court-involved actors were throughout the ADVO process.

Recognition of these demands also framed interviewees' suggestions for reforms to the ADVO process. For instance, Lawyer 7 discussed wanting an 'ideal scenario that has ... rights [for victims to be heard] built-in' for every ADVO matter, but recognised that magistrates may say 'well, I've still got to get through another 150 matters, and, obviously, [being an] under-resourced initiative, and whatnot, that go hand-in-hand with that'. Support Worker 8 explained the negative impact on victims/survivors of courts having to manage these resourcing constraints, because 'the magistrates have a really, really busy day with all other criminal matters. So this is just treated as another ... matter before the court, when it's really about someone's life and what's happening for them and their children'.

Interviewees indicated court workloads may also undermine the efficacy of ADVOs in addressing evolving risks. For example, there was general recognition amongst interviewees that DFV risks can change, and ongoing assessments of risk are required. As Lawyer 2 emphasised, DFV risks are:

dynamic so you can't just have an assessment at one point in time and think okay we're done and dusted and everything's fine. That's why it's really important to be checking in. That if risk is escalating there can be an easy way to amend or vary the AVO and it can be done in a timely way.

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<sup>91</sup> James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Northeastern University Press, 1999) 134.

However, interviewees observed that while risks may have been considered by certain actors within the court process or at one point in time, the volume of matters can create lengthy and frequent delays in courts, undermining the responsiveness of ADVOs to those identified risks. Magistrate 3 explained ‘it may not be for six or nine months [after the ADVO application] that you will get a hearing date’. Interviewees suggested these factors are highly influential on risk considerations in the court process, because the court needs to balance ‘all of that [i.e. the importance of being informed by risk] up with the reality of day-to-day workings of a busy local court that has X number of matters to get through’ (Lawyer 7). The question of when and how risk considerations occur in the ADVO process cannot therefore be understood in isolation from the institutional settings in which court-involved actors are operating. As Ptacek has previously argued in relation to the US:<sup>92</sup>

Judges are ineffective when they are tired and overworked and ignorant of the local community; but courts also limit judicial effectiveness ... [and] what individual judges can accomplish without an institutional commitment to mobilise resources for abused women.

Similar conclusions can be drawn about the ADVO process in NSW: as Lawyer 4 said, ‘I don’t think somebody’s protection and application should fail on the fact that there’s been delays by the court, really’. Consequently, interviewees were clear that resourcing and time constraints for Local Courts in NSW substantially inhibit risk to be adequately considered and addressed in the NSW ADVO process.

#### 4.4.6. Inconsistent, Individual and Localised Practices

Related to the institutional settings of the NSW Local Court, continuity of personnel and (in)consistent localised practices across courts were raised by interviewees as inhibiting routine and consistent risk considerations being undertaken in the ADVO process. Lawyer 3’s view was that ‘As courts have got busier over the years and the AVOs have got longer ... the magistrates seem to move around a lot more and prosecutors as well’. Inconsistent personnel contributed to the variable practices and inconsistent decision making described by lawyer and support worker interviewees, which they highlighted as dependent on the magistrate and police involved on the particular day, and localised practices of the court in which the matter was dealt with. For example, Lawyer 3 suggested ‘one of the biggest issues is consistency and there’s inconsistency between some individual police officers to individual commands and stations to magistrates and courts and the whole way through’ meaning ‘you can be very much at the mercy of what police

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<sup>92</sup> Ibid.

officer turns up at the first instance and what magistrate you get and what prosecutor you get and what DVLO you get'. Similarly, Support Worker 3 said:

Every magistrate has their own different style, and I think that definitely does play a factor... [e.g. if] they're a bit more strict, or they don't like adding children to the AVOs. Or they're not particularly quite responsive towards victims and their circumstances ... I've experienced that where we've advocated to the police prosecutor or DVO, and they're like "no, sorry, we've got this magistrate. We know it's not going to get through.

As Lawyer 3 went on to explain, there may be good reasons for rotating magistrates out of courts 'because people can get comfortable and complacent. And, yes, you do get a bunch of people who do things a certain way that might not be the appropriate way of doing things'; but the 'flipside' is 'you just don't get that consistency of people who are involved [in the court process]. And ... having that relationship can make a huge difference to the way the process runs'. These findings reinforce those in the literature about the variable factors influencing judicial decision making in PO processes more generally.<sup>93</sup>

Nine interviewees from across the three cohorts<sup>94</sup> emphasised the importance of specialist knowledge in enabling appropriate consideration of DFV risks in the ADVO process. For example, Support Worker 8 thought that the lack of specialist magistrates with specific knowledge about risk 'limits them, and they can't actually make orders or understand orders that are actually required for this woman's safety'. Magistrate 2 and Support Worker 8 discussed specialisation in the context of specialist lists or days designated to DFV matters, which they viewed as enabling court-involved actors with sufficient expertise in DFV to be involved, compared to ADVOs dealt with in generalist court lists. For instance, Support Worker 8 described that in their court location:

We only have that specialised list day on every second [week] in [main court]. So everyone who's at court that day is aware of what is happening, it's all domestic violence related. And the flow is a little bit better at court. People are more aware of what's happening. Whereas [on] a general list day, every man and his dog's there, for everything. And there isn't a lot of time for solicitors, even the police prosecutor, they have limited time because it's a very busy day.

Magistrate 4, who had experience in the Children's Court, distinguished how specialisation in that jurisdiction supported the court's ability to concentrate on safety and risk because 'Nobody's interested in having a fight for the sake of it, and so that specialisation has really

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<sup>93</sup> See Section 2.2.2.

<sup>94</sup> N= 8: Magistrates 2, 4, 6, 10; Lawyer 2; Support Workers 1, 6 and 8.

assisted me, because I don't get stupid fights'. The magistrate went on to express their view that, in the Children's Court: 'We're all specialists' and 'that the watering down of that expertise would be tragic'.

These reflections on the specialisation of court personnel interrelate with interviewees' earlier points about the adversarial versus protective jurisdiction of the adult ADVO process and what this means for whether risk considerations are perceived as within the remit of the court. For instance, Lawyer 2 reflected that specialisation can have a considerable enabling effect on the consideration of risk, based on trials in other adversarial jurisdictions in Australia, such as the Lighthouse Project trial in the Federal Circuit and Family Court of Australia where:

They've got ... specialist people within the family court system doing a risk assessment and screening process. And then that can help them to inform that the processes that it goes through, whether it proceeds, for example, to the high-risk list or it goes to another pathway.

This lawyer went on to note that 'I think people presume that's already happening in the AVO list but ... there's a lot more that could be done to strengthen that'.<sup>95</sup> Others, such as Support Worker 1, discussed how specialist DFV courts and specialist DFV training for magistrates and prosecutors would also assist in the consistency of approaches to risk considerations on the Local Court. Their view was that if NSW:

had [DFV]-specific courts ... with magistrates that are specifically trained in the dynamics of [DFV], ... it would be really helpful... [in those courts] the magistrate's not just looking at the grounds of the AVO from a legal point of view, etc. They're looking at it from, perhaps, a second set of knowledge about the dynamics and psychological impact of coercive control or that kind of thing.

This distinction between looking at ADVOs 'from a legal point of view' as opposed to a broader social science informed understanding of DFV is addressed further in **Chapter 5**. Of relevance to this chapter, is that in the absence of clear legislative guidance and specialisation on what 'risk' may be relevant to consider for the purposes of ADVOs, court-involved actors in the NSW ADVO process are currently left to determine 'risk' — and its relevance to ADVO proceedings — without a clear conceptual framework. And this inevitably results in inconsistent and variable outcomes.

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<sup>95</sup> Findings from a recent pilot in NSW of specialist DFV courts may offer useful insights into the impacts of this specialisation on the consideration of risk in these contexts. See: *Local Court of New South Wales Specialist Family Violence List Pilot Practice Note 2023* (NSW).

## 4.5. Chapter Conclusion

It is clear from the findings reported in this chapter that the ADVO landscape is complex and multi-layered. Different legislative provisions, procedures and court practices interact depending on whether an ADVO is applied for by police or private application, dealt with as a standalone ADVO application or with associated criminal charges, and/or made by consent versus a contested hearing. Amongst these technical and procedural complexities, however, a number of concrete conclusions about the existing ADVO landscape emerged from this study. Firstly, while risk is not overtly referred to in the *ADVO Act* for the purposes of making an ADVO, it is evident that applying the legislative criteria under ss 16, 17 and 35 of the Act creates an implicit requirement for the court to undertake a 'risk analysis' in determining the need for an order, and the conditions necessary to be included. However, there is an absence of legislative definitions or formal guidance establishing what this 'risk analysis' entails for the purposes of ADVOs, or, indeed, what 'risk' means in this legal context.

Secondly, the fundamentally adversarial system for ADVOs inhibits collaboration of diverse professionals in regards to risk assessment and management, and constrains the role of the court in engaging in these considerations. Thirdly, the quasi-criminal nature of ADVO proceedings and evidentiary rules influence what risk-related information may be adduced to the court, and the lens through which court-involved actors may interpret that information. Fourthly, the dominant role of police in the process, both as applicants and in other court-involved roles, means that police are pivotal gatekeepers in most stages of the ADVO process. Relatedly, as a majority of ADVOs (including police-initiated ones) are made by consent, magistrates may have a minimal decision-making role in a large number of ADVOs, raising questions about whose views of risk are prioritised throughout the process. Lastly, time- and resourcing- constraints, alongside inconsistent individual and localised practices, limit the capacity of the court to adequately and consistently consider risk.

In sum, numerous legislative and procedural features of the ADVO landscape in NSW interact to significantly inhibit the consistent and routine consideration of risk throughout the ADVO court process. While there are multiple points at which risk may be considered by certain court-involved actors, these are not embedded in the ADVO process. Many of these opportunities for risk considerations therefore largely appear to occur by 'default' rather than 'design'<sup>96</sup> and depend upon individual or localised practices rather than a clear guiding framework under the

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<sup>96</sup> Family Violence Death Review Committee (n 3) 14.

existing legislative framework or otherwise. Without a structured guiding framework, the lack of clarity as to what 'risk considerations' are required of the court in relation to ADVOs evidently creates constraints on court-involved actors' capacity to develop and communicate shared understandings about DFV risks. These constraints are further exacerbated by multiple interacting features of the broader ADVO environmental setting.

In the absence of clear legal procedures and conceptual framework of 'risk' provided by the legislative framework, questions arise as to what individual understandings and conceptualisations court-involved actors in NSW bring to their considerations of 'risk' for the purposes of ADVOs, as discussed next in **Chapter 5**, and how these conceptualisations influence their risk-based practices throughout the ADVO process, as discussed in **Chapter 6**.

# Chapter 5: Conceptualising ‘Risk of Domestic and Family Violence’ and ‘Assessment’ in Relation to Apprehended Domestic Violence Orders

## 5.1. Introduction

As detailed in **Chapter 2**, risk-based approaches are increasingly framing responses to domestic and family violence (DFV) in NSW, Australia and internationally. The previous chapter established the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (*‘ADVO Act’*) does not provide a conceptual framework for what ‘risk’ means for the purposes of Apprehended Domestic Violence Orders (ADVOs) in New South Wales (NSW), although many interviewees agreed that applying legislative tests under the *ADVO Act* implicitly requires a ‘risk analysis’ (Magistrate 9). The absence of a shared conceptual framework provided by the legislation and the wide variety of potential constructions of ‘risk’ and ‘risk assessment’ that have been established in previous literature,<sup>1</sup> raise questions about what individual conceptualisations diverse court-involved actors bring to this ‘risk analysis’ in NSW ADVO proceedings, and how these understandings influence their risk-based practices. Consequently, this chapter examines how key court-involved actors conceptualise ‘risk of DFV’ in NSW (**RQ2**) in the current ADVO landscape, before discussing their risk-based practices in the following chapter.

I begin this chapter by briefly discussing interviewees’ reflections on the fact that ‘risk’ is inherently difficult to define. Conceptual ambiguities about ‘risk’ have been observed in the literature in **Chapter 2**, and interviewees’ reflections on these ambiguities are important to reiterate here as they underpin much of the discussion about the inconsistent and variable conceptualisations risk-based approaches observed as taking place in the ADVO process. As part of this discussion, I report the differing definitions and understandings of DFV that interviewees expressed in relation to their discussions of ‘risk’, noting that ‘DFV’ was also not defined in the *ADVO Act* at the time of the study.

Next, I examine court-involved actors’ wide range of conceptualisations of ‘risk’ and ‘assessment’ and the role of the court in undertaking these assessments. Discussion of the latter extends upon findings reported in **Chapter 4** about the perceived constraints on the court’s role in undertaking

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<sup>1</sup> Corina Backhouse and Cherie Toivonen, *National Risk Assessment Principles for Domestic and Family Violence: Companion Resource* (ANROWS Insights 09/2018, ANROWS, 2018) 8–9.

risk considerations due to the adversarial jurisdiction of the court. I deal with these perceptions of the court's role together with conceptualisations of 'risk' and 'assessment' together in this chapter, as they were integrally interconnected in my interviewees' discussions. I find a wide range of conceptualisations applied in the ADVO process, ranging from broader, holistic understandings of 'risk assessment' and the roles of all court-involved actors in undertaking these; versus narrower, legalistic understandings that generally constructed the court as having a constrained role in undertaking DFV risk considerations. In discussing this range of understandings of 'risk' and 'risk assessment' conveyed by interviewees, I conclude that court-involved actors' conceptualisations of 'risk' for the purposes of ADVOs vary widely and would benefit from strategies that support the development of more shared understandings of 'risk' between these professionals.

## 5.2. 'Risk' as Conceptually Ambiguous

At the outset, it is important to highlight that many interviewees emphasised that the concept of 'risk' is 'amorphous' (Magistrate 7) and they found describing how they consider risk 'kind of a difficult question to answer' (Lawyer 6). Interviewees in this study were not alone in this, noting the difficulty of defining 'risk' has been well-established in the literature (**Chapter 2**). In addition to the underlying conceptual ambiguities identified in the literature however, interviewees in this study identified particular challenges in conceptualising 'risk' for the purposes of ADVOs due to differing understandings of 'DFV' held by various court professionals, amplified by the absence of a legislative definition of DFV in NSW at the time of this study.

### 5.2.1. Differing Definitions and Understandings of Domestic and Family Violence Risks

It was evident in this study that interviewees brought a range of understandings of DFV to their considerations, which have direct implications for their understandings of 'DFV risks' and who and what they conceptualise as 'risky' (or otherwise). For example, some magistrates conveyed understandings that tended to focus on, or at least privilege, a history of criminal offending, and/or recent incidents and documented physical violence (especially if these met the threshold of a criminal offence), when describing what they considered to be 'high risk' matters. This is consistent with previous literature documenting issues with incident-based police and court responses to DFV.<sup>2</sup> It is worth quoting Lawyer 1 at length, as they comprehensively explained the

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<sup>2</sup> Jane Wangmann, 'Incidents v. Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?' (2012) 34 *Sydney Law Review* 695.

strongly incident-based focus throughout the court process, which directly inhibits effective assessments of risk for the purposes of ADVOs:

Risk is not a static thing ... The AVO might have been ... about an incident when they were in this intact relationship and let's say it's a fairly standard response of the mandatory orders only. But in fact [later on] what she needs is much more than that because ... the relationship's over, and risk increases with that [because he's losing all kinds of power and control that he's had] ... [That need for risk to be constantly assessed] isn't necessarily taken into account as that matter progresses through the AVO proceedings and the charge matter ... So unless you've got a ... caseworker doing that [ongoing assessment] and that the worker is really engaged with the client and that the client feels safe and able to do that, then I think there's a very real risk that that information is never going to get before the court ... Because it's still looking at that incident.

The need for ongoing assessments and challenges in doing effective risk assessment and management during the court process are discussed further in **Chapter 6**. However, this quote illustrates the issues that incident-based understandings of DFV may create for court-involved actors' broader understandings and awareness of what 'risk' may look like in DFV contexts, which are characterised by pattern-based behaviour and evolving dynamics over time.

Other interviewees expressed understandings of 'high risk' that privileged physical violence and a recorded history of violence. For example, Magistrate 5 described how they 'look at [the defendant's] record' and if they see things like 'assault, assault, affray, affray, affray ... you know that's a high risk'. Similarly, other magistrates held views that 'Straightforward [matters] are where there's been actual violence, there's a history of violence and there are threats' (Magistrate 10) or that 'serious matters' involve severe physical violence such as 'an intentional choke. Assault causing actual bodily harm ... We're talking: you've got broken limbs, you've got the kidnapping usually attached to it. You've got a history of DV that you can see and contravened AVOs' (Magistrate 6).

Lawyer 2 suggested a focus on physical violence was particularly dominant in police understandings of risk, expressing the view that 'I think it's both a rescue thing but also a cultural practice with police that they focus on the risk for physical violence'. This is even though the literature establishes that 'in the context of risk assessment ... physical violence may not be the most salient form of abuse and that sometimes the threat of violence alone is enough to reinforce non-physically abusive coercion and control',<sup>3</sup> and coercive control should in fact be

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<sup>3</sup> Andy Myhill, Katrin Hohl and Kelly Johnson, 'The "Officer Effect" in Risk Assessment for Domestic Abuse: Findings from a Mixed Methods Study in England and Wales' (2023) 20(3) *European Journal of Criminology* 856, 858–859.

viewed ‘as the “golden thread” running through risk identification and assessment for domestic violence’<sup>4</sup> (Chapter 2).

In comparison, other magistrates such as Magistrate 8 did emphasise coercive controlling behaviour as more indicative of a ‘high’ risk case:

I’m always concerned about a persistent sense of conduct. So, if it’s repeated, if it’s clearly unwanted. My own personal view is, a lot of people put too much weight on physical violence ... The psychological trauma, in my mind, is something that stands out. I find stalking and that type of harassment something that I view very seriously. I’m concerned it may not be viewed by others as seriously. But certainly, for me, that’s a huge risk.

Overall, the lawyers and court support workers interviewed tended to adopt broader conceptualisations of ‘risk’ as ‘DFV risk factors’ reflected in the DFV literature,<sup>5</sup> than the comparatively mixed views expressed by magistrates. These conceptualisations likely reflected the specialist DFV expertise of many of these participants and the more expansive roles they (especially court support workers) have in working with victims/survivors beyond ADVO proceedings.

Some of the descriptions interviewees provided however, were demonstrative of what they viewed as ‘straightforward’ indicators of ‘high risk’ as opposed to more ‘murky’ legal factual scenarios, that justified the making of an ADVO. For example, in describing ‘circumstances [that] make it quite easy to think that there’s quite a high risk to the complainant’, Lawyer 6 suggested cases with ‘an uncomplicated set of circumstances’ which ‘make it quite easy to come to that view that there might be quite a high level of risk there’ include those where: ‘The [person in need of protection (PINOP)] doesn’t want any contact with the defendant, there’s been an allegation of physical violence where there was unwanted contact and ... allegations of threats’. This characterisation is similar to some of the magistrate conceptualisations, quoted above. Lawyer 6 contrasted these types of cases to those where ‘it gets very, very murky and difficult to kind of form a view about what the level of risk to anyone is’, such as ‘circumstances ... where you have a PINOP and a defendant who want to be in contact with each other, who both say that nothing happened, or who both say that they don’t have any fears of each other’.

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<sup>4</sup> Andy Myhill and Katrin Hohl, ‘The “Golden Thread”: Coercive Control and Risk Assessment for Domestic Violence’ (2019) 34(21–22) *Journal of Interpersonal Violence* 4477, 4492. See also Heather Douglas, *National Domestic and Family Violence Bench Book* (The Australasian Institute of Judicial Administration, 2024) <<https://dfvbenchbook.aija.org.au/contents>> [4.2].

<sup>5</sup> See overview of empirically supported indicators of DFV risk established in academic literature in **Section 2.2.1 (i)**.

Some of these quotes speak to the difficulties of courts in establishing *evidence* of DFV in legal proceedings, rather than individual understandings of ‘DFV risk’. For example, Magistrate 5 explained:

It’s much harder [to determine risk] with the emotional abuse, the coercive control and all that. It’s much harder to find something on the record that indicates that they have a propensity to emotionally abuse people. You won’t even really pick that up from hearing what they say in court.

Thus, challenges in defining DFV risks may be representative not only of potentially differing understandings of DFV, but also of practical challenges in documenting and determining relevant evidentiary information regarding different forms of violence.

It was beyond the scope of this study to establish the extent to which interviewees’ definitions of ‘DFV’ align with the contemporary understandings of DFV in the literature,<sup>6</sup> but interviewees’ differing understandings of what may be considered ‘high risk’ in relation to DFV illustrate the inconsistencies that may exist in court-involved actors’ consideration of, and approaches to, DFV identified in other studies.<sup>7</sup> However, it is clear that this definitional ambiguity interviewees’ expressed about what equates to ‘risk of DFV’ was amplified by the absence of a definition of ‘DFV’ in the *ADVO Act* during the course of the study.<sup>8</sup>

### 5.2.2. Lack of Legislative Definition of Domestic and Family Violence

Interviewees explained the absence of a legislative definition of DFV in NSW inhibited their ability to define and, consequently, establish the relevance of, DFV risks to the *ADVO* process. This was for two reasons. Firstly, the lack of definition limited advocates’ ability to determine what ‘risks’ and behaviour the *ADVO Act* covers, and undermines developing shared understandings with other court-involved actors of what ‘risk’ considerations are relevant for the purposes of an *ADVO*. For example, the absence of a definition of DFV in the *ADVO Act* was raised by Lawyers 1 and 4, who explained that, without a clear definition of DFV, it is difficult to advise clients about what an *ADVO* can protect, and what ‘risks’ may be relevant to the court process:

We don’t even have a definition that we can fall back on in New South Wales. So ... I think probably everybody will bring to it their own bent of what is safety, what is risk, what is domestic and

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<sup>6</sup> Stella Tarrant, Julia Tolmie and George Giudice, *Transforming Legal Understandings of Intimate Partner Violence* (Research Report No 03/2019, ANROWS, 2019).

<sup>7</sup> For example studies on judicial officers’ decision making: see e.g. ALRC and NSWLRC, *Family Violence — A National Legal Response* (Australian Law Reform Commission and NSW Law Reform Commission, 2010) <<https://www.alrc.gov.au/publication/family-violence-a-national-legal-response-alrc-report-114/>> [5.175].

<sup>8</sup> A legislative definition of ‘domestic abuse’ was inserted following the data collection phase of this study *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW). The impact of this legislative definition on risk considerations within the *ADVO* process will be an important area for further research.

family violence and abuse. Which ... highlights the challenges that are faced by all of the players when it comes to domestic and family violence and ADVOs and assessments of risk and safety. (Lawyer 1)

It's so hard to advise [clients] about it ... to even communicate ... effectively to somebody about 'these are all the dynamic risks that you're experiencing and this is what the ADVO can protect'. [The legislation is] clunky, it's confusing, it's convoluted, it's frustrating. So I think, really, there could be some improvement around that to better catch the dynamics of risk and that would be a helpful starting point, I think. (Lawyer 4)

Secondly, the emphasis in the *ADVO Act* on criminal terminology, as discussed in **Chapter 4**, may influence how court-involved actors construct 'DFV' for the purposes of ADVOs — and consequently, what type and thresholds of 'risk' they focus on. For example, Magistrate 3 illustrated how legislative references to 'personal violence offences' influences the types of 'risk' that the court treats as most relevant to the ADVO process. They explained that they understood 'domestic violence is very broadly defined' and 'can include all sorts of manner of things', but that, 'From [the court's] point of view, obviously, the most pressing risk is the risk of personal violence or further violence' (Magistrate 3). Here, the magistrate was not saying that only conduct defined as a 'personal violence offence' under the *ADVO Act* is 'DFV', but rather that DFV that equates to 'personal violence' (as a criminal offence that is legislatively defined) is the most 'pressing' risk from the court's perspective. This was reinforced by other interviewees, who explained the absence of a definition of DFV in the legislation influences police approaches to ADVOs. For instance, Lawyer 4 described they 'had [an ADVO] matter where [the police said], "oh, well, there's a lot of coercion and control in that but that's not criminalised yet, so there's nothing that we could do"'. Lawyer 2 suggested a definition of DFV would assist in shifting ADVO responses to be informed by a more holistic understanding of 'risk' because DFV is 'all about context and we need a definition to help us better unpack that'.

The constraints that the absence of a definition of DFV creates for court-involved actors was recognised by the *NSW Domestic and Family Violence Plan 2022–2027*, which observed that the lack of statutory definition of DFV in the *ADVO Act* 'creates uncertainty and the risk of confusion as to what constitutes domestic abuse under the law'.<sup>9</sup> Interviewees in this study echoed these findings, and described feeling constrained in what 'risks' would be accepted as relevant and admissible in ADVO proceedings (**Chapter 4**), and indeed 'risks of *what*' the court will focus on

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<sup>9</sup> NSW Government, *NSW Domestic and Family Violence Plan 2022–2027* (December 2022) <<https://dcj.nsw.gov.au/documents/service-providers/domestic-and-family-violence-services/NSW-Domestic-and-Family-Violence-Plan-2022-2027.pdf>>15.

in relation to ADVOs. Further, legislation creating a criminal offence of coercive control was introduced in NSW in 2022, as noted in **Chapter 1**.<sup>10</sup> While this offence does not directly have an impact on ADVO processes, interviewees suggested its introduction may support more informed understandings of DFV by court-involved actors generally. It is too early to determine whether this has been borne out in reality but will be a rich area for further study, as is further discussed in the conclusions of this thesis in **Chapter 8**.

In sum, interviewees indicated that the lack of legislative definition of DFV under the *ADVO Act* amplified the conceptual ambiguities court-involved actors encountered when attempting to define 'risk'. While conceptualisations of 'DFV' were not the focus of this thesis, it was clear from my interviews that conceptual ambiguities about DFV were intrinsically interwoven with understandings of 'risk', and therefore an important issue to address. As Portwood and Heany note, 'The importance of definitional consistency cannot be over-emphasized given that how an incident is defined is, of course, essential to how responses will be constructed'<sup>11</sup> — including in relation to 'risk'. In spite of this, as **Chapter 4** established, there was broad agreement in this study that the *ADVO Act* requires a form of 'risk analysis' to be undertaken in the course of ADVO proceedings. What this 'analysis' encompasses was subject to a wide range of interpretations, however.

### 5.3. Conceptualising 'Risk', 'Assessment' and the Role of the Court

As an implicit, rather than explicit, component of ADVO decision making, interviewees conveyed varying understandings of what the implicitly required 'risk analysis' under the *ADVO Act* means, what 'risks' are expected to be assessed, and what the role of the court is in conducting these. At one end of the spectrum are broader, more holistic understandings of DFV and assessing risk, which also tended to envision an involved role for the court and all court-involved actors in considering risk. At the other end were narrower, legalistic understandings that tended to frame a narrow role for the court in undertaking these considerations.

#### 5.3.1. Broader, Holistic Approaches and Involved Court Role

Some interviewees conceptualised risk assessments in a more expansive, holistic way than others, and saw an involved role for all court-involved actors in undertaking these assessments,

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<sup>10</sup> *Crimes Legislation Amendment (Coercive Control) Act 2022* (NSW).

<sup>11</sup> Sharon G Portwood and Julia Finkel Heany, 'Responding to Violence against Women: Social Science Contributions to Legal Solutions' (2007) 30(3) *International Journal of Law and Psychiatry* 237, 239.

or at the very least being informed by them. For example, Support Worker 2 noted that both court support workers and police used the DVSA to establish 'risk', but that their different roles meant they may be attentive to different things:

We consider a lot more of the situation ... around the woman. Her social needs, her financial abuse, the coercive control. I think we're a lot more holistic in what we consider 'risk and safety' issues. Police is protection, and they need evidence and grounds to be able to initiate AVOs... I've had women who, literally, get 100 phone calls, and she considers that intimidation. Maybe, a police officer may not consider that intimidation.

Similarly, Lawyer 4 observed their service adopted a broader approach than police: 'when we see police assess these matters, they are more likely to act in instances where there has been physical violence ... whereas, we would take a more broader approach'. This lawyer expanded that:

As an organisation we try to look at risk very broadly. I mean, risk can be psychological risks, it can be physical risks, the high risk of lethality to that real coercion and controlling behaviours and monitoring. And what I think we've come to learn as an organisation that some of those, what may be perceived as less or "lower-end" ... monitoring and controlling and things like that ... for us, they're actually really red flags that that could escalate to a higher risk of lethality even though there hasn't been indications of that before and we're very, I think, cognisant of that.

Some interviewees also described the importance of approaching risk assessments more broadly to account for each individual women's circumstances. For instance, Support Worker 5 said 'how she identifies her own risk is individual to that woman, based on her experience, upbringing, cultural background, all the rest of it. So, I guess risk looks different for each woman ... depending on her situation and circumstances'.

Similarly, Lawyer 7 explained:

Clients often have very complex issues going on in their life. They come from backgrounds where they experience varying levels of disadvantage and social marginalisation, financial ... All that stuff. And so, support services, in terms of their personal life were often limited or disjointed or non-existent, and whatever ... The difficulty is the police don't really factor in that there are a whole host of other complex issues *on top of* what we in our lives have to deal with as day-to-day, that make their life much more difficult to manage.

Support Worker 4 indicated that they were also alert to DFV risks that are observable in the ADVO process itself — for example, observing defendants' behaviour at court, and/or tactics to manipulate the system:

When you talk about court users, there's an example of the other party's defendant solicitor might be sabotaging [the process] given that they might be saying for her not to show up. So, we get some of that stuff. So, that's a risk factor again. So, they're using the system knowing that if she doesn't show up, then the charges won't go ahead.

Support Worker 5 viewed this as an important reason all court-involved actors should be DFV-informed in order to be alert to DFV risks that can be identified when engaging with court users:

Even the workers at court, ... even the sheriffs, ... everybody becoming more familiar about the nuances of [DFV], and how complex it is. Because you do sometimes see it play out in terms of intimidation in the courtroom foyer, or even just coming through the scanners there at the courtroom. That's quite confronting. (Support Worker 5)

Despite the constrained judicial role magistrates emphasised they had due to the adversarial jurisdiction of ADVO proceedings examined in **Chapter 4**, some interviewees characterised the court having an important (potential) role in assessing risks in terms of the broader dynamics and context of DFV. For instance, in advocating for specialist DFV courts, Support Worker 1's view was that courts where 'magistrates ... are specifically trained in the dynamics of DV' enabled more holistic conceptualisations of risks to be considered because, in those courts 'the magistrate's not just looking at the grounds of the AVO from a legal point of view, etc. They're looking at it from, perhaps, a second set of knowledge about the dynamics and psychological impact of coercive control or that kind of thing'.

A small number of magistrates appeared to be adopting these broader approaches in their judicial practice. For example, Magistrate 2 described their approach as follows:

I like to know that we're actually getting to the nub of the matter, when it comes to these orders being made. And I'll often ask prosecutors and domestic violence officers, what else do we need to consider? And you can drill down to work out, possibly, hopefully, that you're getting the right sort of tailormade order.

Other interviewees, however, expressed much narrower, legalistic approaches, and constrained roles of the court in undertaking these considerations into account.

### 5.3.2. Narrower, Legalistic Approaches and Constrained Court Role

Support Worker 5 suggested some court-involved actors adopted a very narrow approach to risk, in the sense that, in the ADVO process, 'there's a criminal act and there's an AVO applied for. Nothing else is really considered in that' (Support Worker 5). Interviewees pointed to more constrained roles and confined understandings held by police and magistrates, compared to

other court-involved actors, evident, for example, in the discussion about a focus on physical violence or incidents, as detailed earlier. For example, in relation to magistrates, some lawyer and court support interviewees suggested:

[Safety Action Meetings] look at all the different components of what's happening [for a victim/survivor in terms of DFV risks and safety]. But that's not a decision for the magistrate to make. And I think that's probably the gap in magistrates making decisions based on information they don't have. (Support Worker 6)

I don't think [magistrates would] see it as their role at all to do any sort of formal risk assessment. (Lawyer 3)

These reflections significantly interconnect with the discussion of the adversarial jurisdiction and consequently constrained role magistrates have, in ADVO legal proceedings, described in **Chapter 4**. Discussions of magistrates' roles within that adversarial jurisdiction also revealed the conceptualisations some of these magistrates held about what 'risk' and 'assessment' means to them. For example, Magistrate 7 responded to my question 'Would you say you undertake a risk assessment?':

Not like an insurance company does when they decide to give you insurance. Because you have to remember that judicial officers aren't sitting in the shoes of an inquisitor. This isn't a coronial inquest. And even then, there's counsel assisting. This is a judicial officer in an adversarial system where there is a prosecutor and a defendant. And so what we do is we hear the evidence in those matters where it's defended, where the application for an Apprehended Violence Order is opposed. We hear the evidence, we hear the submissions of both sides. And we make a determination that we believe best manages the risks involved. It's a prognosis.

Magistrate 1 explained:

In some respect, you do a risk assessment as to what orders are needed to address what it is you've read [in the application] ... So that risk assessment is really: "has the test in Section 16 been met? Yes." Therefore, there is an existence of *that*, as opposed to a risk of ... domestic violence. What orders are necessary to reduce if not eliminate the risk of the fears that she has entertained when carried out? i.e. therefore Order 1, 2.

This magistrate characterised 'risk' narrowly as that of 'the defendant going on to carry out the threats, [or the] behaviours complained of' (Magistrate 1). Magistrate 5 similarly described they explain ADVOs to defendants as follows: 'They'll [the defendant] say, "okay, I get it. So, I'm not being accused of a crime?" "No, you're not. You just are out of order, and you've done something, and the police want to protect your partner from that kind of behaviour again"'.

As someone who expressed being 'guided by the legislation and nothing else', Magistrate 1's response is illustrative of the findings in **Chapter 4** that applying the legislative test in s 16 of the *ADVO Act* contains an implied requirement to consider risk in order to establish the criteria have been met but has interpreted this very narrowly. Similarly, Magistrate 3 commented that 'the whole thing is a risk assessment, isn't it?', yet they directly quoted the *ADVO Act's* legislative test and available *ADVO* conditions to explain the nature of the risk assessment:

In deciding whether or not to make an Order, the court has to consider safety and protection of the person and any child indirectly or directly affected. And then you need to look at the consequences on the safety and protection of the people. Hardships that can be caused by making or not making the Order. Accommodation needs. And anything else. So you're looking at the risk, and then how intrusive it is on families' lives, you know. Yep, so that's what you're doing. You've got a suite of Orders, you've got the ten Standard Orders, and you say, well, what are the Orders that are going to address those risks? When you look at them, they're kind of in categories.

Many magistrate interviewees distinguished the understanding they may have of a 'DFV risk assessment', from the constrained role of the court in engaging in these considerations due to barriers identified in **Chapter 4**. For example, Magistrate 8 said:

I almost think that the assessment of risk in [the] context [of a unique factorial matrix, and a dynamic relationship that is volatile and individual] has to allow for a flexible approach or something that is responsive, and immediately responsive, to what we understand to be an ever-changing environment of risk. And that cannot be done in the system that we currently have, in a formal — in an adversarial system, with "actors" ... I think there is restrictions in the current system that cannot be overcome with any change ... that's easy to put in.

This quote illustrated an important distinction between conceptualisations of *DFV risk assessments*, and conceptualisations of *the role of the court* in undertaking these assessments, which is why I have included further discussion of this perceived role of the court here, in addition to the analysis in **Chapter 4**. For example, Magistrate 8 understood dynamic, flexible *DFV risk assessments* as important features of *DFV responses*, but saw the court being constrained in engaging in these, and Magistrate 7, quoted above, distinguished the assessment of risk for insurance purposes from the considerations of a magistrate in an adversarial court proceeding. In contrast, Magistrate 2 stated 'I always say to all the parties, this is all about the complainant's safety. So I think risk is an overriding principle for me ... [Later in the interview:] I have no difficulty being quite inquisitorial in the way I would run a matter in domestic violence'.

Magistrate 7 appeared to construct their role narrowly as ‘independent and clearly defined’.<sup>12</sup> They appeared to interpret this narrowly constructed judicial role as limiting the scope of any DFV risk assessment in which they engaged, that is, their role is to make a *legal* decision about a legislative test based on what is put before them by the parties. In contrast, Magistrate 2 (quoted above) expressed adopting a much more expansive inquisitorial approach, where they do not ‘put anything else above risk’, and this appeared to encompass a more expansive view of the court — and all court-involved actors — as having a role in considering victims/survivors’ safety. These different constructions of judicial roles suggest that the use of the term ‘risk assessment’ by some magistrate interviewees, such as Magistrate 7, could be better expressed as an analysis they undertake as part of their interpretation of what the ‘law’ requires to make a court order and justify the court intervening in a DFV matter under the *ADVO Act*. This is connected to their interpretations of ‘fear’, ‘safety’ and ‘necessary’, required in ss 16 and 17 under the *ADVO Act*, as discussed in **Chapter 4**. These determinations involved a type of risk analysis in determining whether ‘the behaviour complained of’ was likely to occur again, but did not encompass undertaking the type of structured professional judgement model of risk assessments as usually understood in the DFV risk literature outlined in **Chapter 2**. These varying understandings illustrate that different court-involved actors’ conceptualisations of ‘risk’ and ‘risk assessment’ for the purposes of ADVOs are subject to several complex factors, including differing understandings of ‘DFV’ and the court’s remit in considering these factors. In relation to the latter, magistrates’ varying perceptions magistrates of their judicial role in this study echo findings in Fitz-Gibbon’s national study on judicial views of perpetrator interventions that found that judicial officers who thought they should be proactive case managers ‘often developed their own checklists about “things to watch for” and focused on developing practices they considered to work better’,<sup>13</sup> compared to judiciary who considered their role as narrowly confined to applying the law.<sup>14</sup>

### 5.3.3. ‘Professional Risk’?

An additional observation relating to interviewees’ conceptualisations of risk in this study, is that a small number of interviewees sometimes referred to ‘risk’ in a way that suggested they were reflecting on considerations of ‘risk’ in terms of institutional or professional risks. For example, Magistrate 6 speculated police may take a strict approach to AVDOs in order ‘to cover [their]

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<sup>12</sup> Kate Fitz-Gibbon et al, *The Views of Australian Judicial Officers on Domestic and Family Violence Perpetrator Interventions* (Research Report No Issue 13, ANROWS, 2020) 72.

<sup>13</sup> *Ibid* 75.

<sup>14</sup> *Ibid* 72–73.

arses'. Similar considerations are also evident in the following quote from Magistrate 11, where they explain that sometimes they have reservations about whether a consent order reflects the level of risk but:

Whilst, you question it, quite often you do what the parties ask for if they're both asking for it. I wouldn't say it's covering my position, but if it is something that both parties ask for and consent to, then if someone comes back and says 'why did you do that?', you go, 'well, they both wanted it'. You still have to apply your mind to it. But I think it's important.

Similarly, Magistrate 6 explained that if a protected person wants to have conditions removed from an order, they put the complainant in the witness box to give evidence in order to '[protect] myself in watering down the orders. She told me she has no fears. She's told me it never happened ... Accordingly, for those reasons, I'm going to remove conditions'. These approaches were not a central theme in magistrate interviews and there was not sufficient data to explore these conceptualisations in more depth. However, it is worth noting that 'risk aversity' in terms of professional and institutional risk may be a feature of court-involved actors' considerations and influence their approaches. For example, in their study on police decision making in Queensland, Meyer and Reeve observed that where:

General duty police officers display an increased risk aversity, they may be less inclined to use discretion and investigative skills, instead relying heavily on available legal responses such as civil protection orders and criminal charges as a one-size-fits all approach that leaves it to the court system to determine whether such responses are necessary in the individual case.<sup>15</sup>

For some police participants in that study this risk aversity arose 'around the unpredictability of risk' and for others because of 'fear of professional repercussions'.<sup>16</sup> Meyer and Reeves found police also felt compelled to issue protection against victims/survivors' preferences in some cases because 'they are ultimately guided by evidence and perceptions of risk of subsequent harm'.<sup>17</sup> Insights from Myhill, Hohl and Johnson's UK study on police decision making also raise questions about how 'heightened awareness of risk may enable sensible avoidance strategies, [but] may equally result in harmful risk-aversion'<sup>18</sup> by various court-involved actors, which would reflect a 'process [that] may benefit agencies most by making them appear accountable'.<sup>19</sup> Further inquiry into whether similar factors may inform magistrates', and indeed, other court-

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<sup>15</sup> Silke Meyer and Ellen Reeves, 'Policies, Procedures and Risk Aversity: Police Decision-Making in Domestic Violence Matters in an Australian Jurisdiction' (2021) 31(10) *Policing & Society* 1168, 1171.

<sup>16</sup> *Ibid* 1175.

<sup>17</sup> *Ibid*.

<sup>18</sup> Myhill, Hohl and Johnson (n 3) 858.

<sup>19</sup> Myhill, Hohl and Johnson (n 3) 858.

involved actors' decision making in the context of ADVOs and risk considerations would therefore be a fruitful area of further research.

#### 5.4. Risk-Based Approaches as Inherently Subjective

While interviewees had differing views on which conceptualisations were most appropriate to the ADVO process, there was widespread agreement that court-involved actors currently have to navigate a multitude of different, subjective understandings of diverse court-involved actors when communicating about risk in the ADVO process, largely based on the 'lens' of their professional role. As Magistrate 8 observed: 'it's very fair to say that everyone in the process brings an element of subjective assessment of risk. And also through the lens of what their role is in that proceedings'. Lawyer 3 said: 'risk is a very subjective thing in each case in terms of how you assess risk or what you think risks are and risk of what. So, it's a bit difficult just to say "risk"', tying back to the underlying conceptually ambiguities of 'risk' discussed at the start of the chapter and in **Chapter 2**.

Even court-involved actors such as support workers who use the DVSAT as a formal assessment tool emphasised risk assessments are 'invariably subjective' and, regarding police assessments, dependent on 'who is attending on the scene [and] who the primary perpetrator and the primary victim is determined as being' (Support Worker 6). Other interviewees similarly explained that how different court-involved actors interpret the same information and definitions of DFV risks may vary widely, for example:

You often get people with kind of flagrantly different views about what the information available means or what you can draw from the information available. (Lawyer 6)

There's so many interpretations of absolutely everything. Everyone interprets their definitions differently and everyone determines risks differently, so it's always going to be something that someone's not going to agree about. (Support Worker 7)

The other thing too is that what my perception of risk is one thing, but the parties have a right of appeal. And they go up to the next level of hierarchy in the court system and the perception of the risk may be entirely different from the judge, he or she may have a completely different perception of what the risk is to the risk that you yourself thought existed. (Magistrate 5)

Interviewees also emphasised these varied understandings may not just be between professional orientations, but may differ from victims/survivors' views too. For instance, Lawyer 3 described in 'some cases [clients are] not acknowledging that there's really an issue there. Where I'm listening to things going, "oh, my God, this has red flags all over it and you're not

worried at all about them". Which is also a concern'. Similarly, in a group interview Support Workers 2 and 3 discussed that:

SW2            The DVSAT is great to use, but it's different perspectives of the woman as well and whether she sees herself as being at risk.

SW3            That's where our professional judgement and experience really plays a role. And there is a section in the DVSAT part for our professional judgement. But from education and training that we undertake in regards to domestic and family violence, there was a thing that came out a couple of years ago about strangulation, and the risk of strangulation. And [so] ... we know that [strangulation is a risk factor], but potentially, the women may not think that that's too concerning...

SW2            And for us, it's a big, red flag.

Interviewees also explained that the inherent subjectivity of judgements of risk can have significant implications for the consideration of DFV risks for the purposes of ADVOs. Lawyer 1's view was that different court-involved actors have 'different views on what is violence ... And there's a lot of downplaying of women's experiences of violence and their expressed fears of risk and safety ... and I think that that is by all players in the system'.

The inherent subjectivity and array of differing understandings amongst court-involved actors of DFV and 'risk' is unsurprising, considering the ADVO process involves 'diverse professionals'<sup>20</sup> who each bring different vocabularies, experiences and ideologies based on their professional roles and service contexts.<sup>21</sup> This diversity creates challenges for risk-based practices in the ADVO system, particularly in terms of the difficulties all court-involved actors encounter in having to navigate a multitude of potentially conflicting views and inconsistent understandings in order to effectively communicate about 'risk' throughout the ADVO process. For example, it is apparent from interviews in this study that different actors' views are heavily influenced by the norms and practices emerging from their professional roles, and their individual understandings and application of these concepts in practice. Interviewees were consequently deeply cognisant of the differing roles, goals and approaches of other court-involved actors, leading many to emphasise that understandings of 'risk' are inherently subjective, while also indicating there are opportunities — and a clear need — to develop more shared understandings amongst diverse

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<sup>20</sup> Backhouse and Toivonen (n 1) 9. For example, in NSW, court-involved professionals may include magistrates, defendant lawyers, lawyers for private applicants, court support workers, police prosecutors, police Domestic Violence Liaison Officers (DVLOs) and general duties police officers — in addition to the defendant and protected person/s themselves, who might be termed the 'risk subjects' of these considerations.

<sup>21</sup> Backhouse and Toivonen (n 1) 9.

professionals. As Lawyer 1 highlighted:

I think probably everybody will bring to it their own bent of what is safety, what is risk, what is domestic and family violence and abuse. Which makes this a really challenging [research] topic for you. But also, I think it highlights the challenges that are faced by all of the players when it comes to domestic and family violence and AVOs and assessments of risk and safety.

And, as Lawyer 1 went on to aptly summarise, these conceptual challenges are exacerbated by a number of factors in the current NSW setting where:

There's no shared language [of risk] ... We don't have a standardised [risk assessment] tool. We don't even have a shared language of what is domestic and family violence and abuse. We certainly don't have a shared understanding of what is coercive and controlling violence... it is very tricky. [And] that lack of understanding [is] made worse by the fact that in New South Wales we don't have a definition of what is domestic violence in the Act.

These findings suggest the need to simultaneously acknowledge court-involved actors' interpretations and understandings of 'DFV risks' may remain inherently subjective, and to identify opportunities to facilitate more shared understandings between these diverse professionals.

## 5.5. Chapter Conclusion

In conclusion, the concept of 'risk' is difficult to define and inherently subjective. In relation to considering 'risk of DFV' for the purposes of an ADVO, interviewees in this study highlighted a number of conceptual ambiguities in the NSW ADVO context, in addition to those identified in the literature, that constrain the capacity of the court to consider DFV risks throughout the court process. These conceptual ambiguities include not only 'risk' generally, but 'DFV risks' specifically, due to a lack of legislative definition of DVF in the *ADVO Act* at the time of the study. In the absence of clear frameworks to develop shared understandings of DFV and risk, my interviews illustrate a wide range of meanings that court-involved actors attach to 'risk' and 'assessment'. Understandings of these concepts are also heavily interwoven with conceptualisations of the role of the court in assessing risk, and in what form. Some interviewees expressed more expansive conceptualisations, that take into account broader, more holistic understandings of the dynamics of DFV and what 'risks' may look like in the court process. These interviewees also tended to see a role for all court-involved actors in considering risk in this way. Other court-involved actors evidently adopt narrower, more legalistic approaches to 'risk assessments', focused mainly on 'assessing' whether the legislative criteria for an ADVO has been

met, and/or conceptualised a much more constrained role of the court in considering broader DFV risk assessments.

The varying characterisations of 'risk considerations' that emerged in this study offer some explanation for the inconsistency of ADVO outcomes and court practices/decision making observed by interviewees in the next chapter. They also reveal how different court-involved actors' conceptualisations of what types of matters may be 'high risk', and 'straightforward', will have consequences for when and what ADVO conditions will be included on an order. These findings also suggest that where diverse professionals with conflicting views on risk are participating in the ADVO process, there is a need to ask 'questions about not only how risk assessments are actually made but also about whose knowledge counts in that risk assessment process'.<sup>22</sup> This is particularly relevant in light of the dominant role police play throughout every stage of the ADVO system and the siloed risk-based practices currently occurring in the court process, discussed in the next chapter.

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<sup>22</sup> Sandra Walklate and Gabe Mythen, 'Beyond Risk Theory: Experiential Knowledge and "Knowing Otherwise"' (2011) 11(2) *Criminology & Criminal Justice* 99, 107.

# Chapter 6: Risk-Based Practices Within the Apprehended Domestic Violence Order Process

## 6.1. Introduction

In this chapter I examine the risk-based practices engaged in by court-involved actors during the Apprehended Domestic Violence Order (ADVO) process, as reported during the interviews. As outlined in **Chapter 2**, 'good practice' principles of domestic and family violence (DFV) risk framework include routine screening and identification, assessing risk using structured professional judgement, and managing risks through ongoing assessments and safety planning. Good practice frameworks also emphasise the importance of victims/survivors' self-assessments of risk and safety informing these considerations, and the need for integrated, coordinated and collaborative service responses. In contrast to these standards of 'good practice', in **Chapter 4**, I detailed how the broader landscape of ADVOs is characterised by inconsistent individual and localised practices and settings that operate across courts generally, and that the legislative framework of the ADVO system currently leaves court-involved actors without a shared conceptual framework to understand 'risk'. **Chapter 5** established that, within that setting, court-involved actors do not hold uniform conceptualisations of 'risk' and bring different understandings of 'DFV' to their considerations. Further, they have varying understandings of what undertaking a 'risk assessment' entails for the specific purposes of an ADVO, shaped by differing understandings of their own professional roles and those of other court-involved actors.

In this chapter I examine the risk-based practices interviewees described as occurring in the context of these varied understandings of 'risk' and constraints created by the existing ADVO landscape. What emerges is that considerations of DFV risks in the ADVO process are inconsistent, variable and highly siloed. Certain court-involved actors — namely Women's Domestic Violence Court Advocacy Services (WDVCAS) and police — currently adopt routine and structured approaches to risk, informed by their approaches and use of the Domestic Violence Safety Assessment Tool (DVSAT) as a formal assessment tool under the *Safer Pathway Program*. In contrast, lawyers and magistrates largely operate without any formal assessment tools, and largely depend on their own unstructured professional judgement. Due to the challenges these differing practices currently create, some interviewees supported the idea of adopting more structured approaches to 'risk' across the court process. Interviewees also raised distinct challenges and limitations that may arise in doing so.

## 6.2. Inconsistent and Siloed Practices

A key finding in this study was the inconsistent and siloed risk-based practices of various professionals in the ADVO system.

### 6.2.1. Women’s Domestic Violence Court Advocacy Services and Police: Routine and Structured Approaches

As discussed in **Chapter 4**, the NSW *Safer Pathway Program* currently involves WDVCS workers and police. It establishes protocols for information sharing, routine screening of risk and use of a standardised assessment tool, the DVSAT. Because police and WDVCS workers both issue and receive referrals of DFV cases via the Central Referral Point and ‘serious threat’ cases to Safety Action Meetings (SAMs), and conduct assessments using versions of the DVSAT, they engage in routine and structured approaches that may inform an ADVO.<sup>1</sup> These policy settings mean that these two court-involved actors engage in routine and structured risk-based practices that are independent of, but integrally interconnected with, the ADVO process. For example, Lawyer 1 explained:

Whichever [police] officer goes out [to an incident], they do the DVSAT, so they make an assessment about whether or not there’s been a crime, whether or not an AVO’s needed, and they also do the DVSAT as a part of that process. And I suppose that DVSAT probably is part of the assessment about whether or not they need an AVO. Although it might not be obvious on the face of it.

Similarly, Support Worker 6 explained ‘we’ll have a sense of [the woman’s risk] by doing that DVSAT in advance, and the police will already have a sense of it as well, of that woman’s particular situation’. Risk information elicited from the DVSAT may also be shared between WDVCS and police to inform each other’s risk assessments and risk management actions — including regarding ADVOs. For example, Support Worker 6 explained:<sup>2</sup>

The [ADVO] conditions will be put in place by the police when they’re doing that DVSAT to determine what are the appropriate conditions [for the ADVO]. And if it goes to SAM or if we advocate [for something different], the police will re-look at it and consider whether there are conditions that need to be changed or added ... then they might say, “yes, at the next [court] mention, we’re going to change that”.

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<sup>1</sup> See **Section 4.2** regarding the interconnections between *Safer Pathway Program* policy settings and ADVOs.

<sup>2</sup> See also: See ‘Referrals to a SAM — Examples’ and ‘Examples of Items on a Safety Action Plan’ in NSW Government, *Safety Action Meeting Manual* (NSW Government, June 2020) <<https://facs-web.squiz.cloud/data/assets/file/0004/592951/SAM-Manual-2020-FNL.pdf>> 19, 40.

These requirements for police and WDVAS workers to undertake risk screening and assessment under the *Safer Pathway Program* therefore clearly inform these court-involved actors' views and advocacy regarding ADVOs, at least in relation to proceedings in which they are involved. In contrast, lawyers and magistrates are not included in *Safer Pathway Program* governance structures and are not required to routinely screen or assess risk using standardised assessment tools in their practice.

### 6.2.2. Lawyers and Magistrates: Unstructured Professional Judgement

With some isolated exceptions, lawyer and magistrate interviewees indicated they do not apply structured approaches to their considerations of risk. For example, Lawyer 1 noted that their legal service screens for DFV risks as a matter of organisational practice, however they do not use the DVSAT and did not consider the conduct of risk assessments to be a widespread legal practice in NSW:

I don't know that any of the lawyers, generally speaking, would apply a screening and risk assessment tool to the process. Whether that's a tool that's an actual tool or whether it's what [my service does]. We don't use the tool, but we do do screening and we do risk assessment, and we would ask all those questions and then base our advocacy around that. But I think that's quite unusual for lawyers to do that.

This view appeared to be corroborated by Lawyer 6, who — albeit working within very different contexts in representing defendants on ADVOs — said: 'to a certain extent, it's not really my job to make a kind of formal assessment about what the risk is. I mean I won't argue with police or a magistrate about what's appropriate and why it's appropriate'. Interviewees also agreed that magistrates do not have 'an inbuilt system ... to do their own independent screening and risk assessments' (Lawyer 1). Support Workers 1 and 8 both indicated that the 'the magistrate doesn't get to see that DVSAT rating, and it doesn't have any impact, really, on the magistrate's decision' (Support Worker 8). In these settings, Support Worker 1's view was that magistrates 'are attuned to what would be high risk factors, themselves' but 'The DVSAT is not given up to them'.

Magistrates' general lack of familiarity with the DVSAT was demonstrated in the interviews, where only two magistrates discussed the DVSAT at all,<sup>3</sup> and only after being directly asked about it, whereas some lawyers, and all court support worker interviewees, raised it spontaneously

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<sup>3</sup> Magistrates 6 and 8.

and referred to it often. This is unsurprising, given magistrates are not expected to administer the DVSAT in their judicial role. Some magistrates did suggest they were sometimes independently alert to DFV risks during proceedings when reviewing the grounds of an ADVO application however. For example, some magistrates described instances where they exercised discretion or initiative in identifying additional risks than those presented to them by police, such as Magistrate 3 who noted that ‘sometimes the prosecution are a little bit weak on what they expect and we make orders they don't want because we've got our own concerns’. However, magistrate interviewees overall appeared to generally defer to police in regard to views of risk, assuming that they had specialist knowledge of DFV risks that will have informed the ADVO application. For example, Magistrate 10 assumed that risks were ‘assessed by specialised police officers and by the prosecutors before it comes to court’.

In the absence of a formal assessment tool or guiding conceptual framework under the *Crimes (Domestic and Personal Violence) Act 2007 (NSW) ('ADVO Act')*, magistrate interviewees tended to describe their decision-making practices about ‘risk’ in relation to their broader judicial expertise. For example, several magistrates referred to their professional experience in applying analogous legal frameworks governing ‘risk’ in criminal proceedings such as bail and sentencing:

It's a different test, but we do [risk assessment] all the time. We do it in bail. That's a classic. What is the unacceptable risk of the commission of further offences or failing to appear? And even ... sentencing, [which] has a number of different things, but one of them is the addressing the risk of recidivism ... [or] prospects of rehabilitation .... How likely are they to do it again. (Magistrate 11)

We all view [risk] through [our own] lens and have to make an assessment ... We do that on a daily basis. We do it in bail, in terms of viewing, and making an assessment about where that risk is, and where it's higher. (Magistrate 8)

In these discussions, magistrates distinguished their considerations from those of police or WDVCS workers who use formal DFV risk assessment tools. Magistrate 6 explained, for example, that magistrates have a role in assessing risk when deciding on appropriate ADVO conditions, but not in ‘doing’ a DVSAT risk assessment, which is the role of police:

It's like making a bail decision, you don't have a crystal ball. You weigh up the risk. You look at the facts, you look at the record, and then you make a determination [about what conditions are necessary] ... We're not [doing risk assessments]. [Police] put [the information] in [to the tool] and they get an assessment back, and that's what they do.

The distinction made by numerous magistrates between using a formal assessment tool and more generally assessing the facts in applying a legislative test, reiterates the findings in **Chapter 5** about different conceptualisations of ‘risk’ and ‘risk assessment’ court-involved actors may adopt in the absence of a shared conceptual framework under the *ADVO Act*. This approach, evident across multiple magistrate interviews was distilled by Lawyer 3, who observed that:

I don’t think that [magistrates would] ever implement [a formal risk assessment tool]. I don’t think that they’d see that as their role to implement them. They would see their role as to look at the law and evaluate evidence as to whether it satisfies the legislative requirements for an offence or for an AVO.

Magistrate 6 also went on to emphasise that magistrates are constrained by a variety of limitations imposed by the ADVO landscape outlined in **Chapter 4**, which restricts their capacity to apply structured professional judgement in their considerations:

I don't know if there's a better way for us to assess the risk because there's no expert evidence before us. All we have is what I said before, the statements, the evidence, record, if we come down to it. Sometimes, we don’t even have that. So, there is no other assessment [or] tools that we’ve got but our own instincts.

The last comment raises an interesting question about what ‘instincts’ influence magistrates’ assessments of risk in the absence of a structured professional judgement approach to assessing risk. Indeed, the legal principles underpinning bail and sentencing risk analyses are not necessarily equivalent to assessing DFV risks for the purposes of ADVOs. As the Royal Commission into Family Violence (Victoria) (RCFV) noted in 2016, judicial consideration of risk and safety for DFV is distinct from courts’ roles in other civil and criminal proceedings, because in DFV matters ‘They have to make decisions about the extent of ongoing risk, which may profoundly affect the victim’s future safety’.<sup>4</sup> Further, as has been examined in other studies, judicial officers may be influenced by a range of factors in their decision making.<sup>5</sup> For example, magistrates in this study indicated they were informed by:

Judicial commission conferences and legal seminars, [and informing themselves] of the literature and the best practice thinking [regarding DFV]. (Magistrate 2)

Your own life experience. (Magistrate 9)

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<sup>4</sup> State of Victoria, *Royal Commission Into Family Violence Volume III: Report and Recommendations* (Parliamentary Paper No 132 (2014–16), March 2016) 157.

<sup>5</sup> See **Section 2.2.2**.

Our own personal experience in life, in terms of what we've all been exposed to, or had others around us exposed to. (Magistrate 8)

Of course, this analysis of magistrates' views regarding the relevance to ADVO proceedings of formal DFV risk assessment tools and frameworks, needs to be situated in the context of constraints imposed on judicial officers' decision-making practices, by virtue of judicial values of independence and impartiality,<sup>6</sup> and legislative provisions regarding the evidence and the matters they may take into account in their decision making.<sup>7</sup> However, it is also clear that the current settings constrain magistrates' ability to adequately establish risk. Magistrate 8 highlighted the limitations imposed on their role in depth, which are worth quoting at length:

A magistrate is expected to be able to assess risk based on these unique and individual relationships, on what they see in just a moment in time ... I can only make decisions based on what's before me. And I think the quality of what's before me and the thoroughness of what's before me, which allows me to assess risk at the time, happens way before it hits court. It's about what's contained in the application. It's about the conversations, the domestic violence liaison officer — if the court's fortunate enough to have — is able to have with the person in need of protection [(PINOP)]. How probing that is? How supportive that is? Do we actually know what's going on here? So ... the risk is assessed based on what's in front of the court at the time. But there are many factors that go into whether or not that's going to be adequate, and whether the court's even in the position to know all those nuances about that relationship. So, there's limits. Significant limitations.

Similarly, Magistrate 7 said 'I'm going to be looking into the future trying to crystal ball what might happen in this family unit ... It's hardly sufficient, is it? And yet, that's the process. That's the process'.

The lack of defined conceptual framework for 'risk' discussed in **Chapter 5** results in magistrates adopting a wider range of approaches, which may also be a contributing factor to inconsistent experiences for victims/survivors' and other court-involved actors in navigating the ADVO process. For instance, Support Worker 1 explained their perspective of what is actually taken into account in any individual matter 'depends on the magistrate ... Sometimes we just can't tell what a particular magistrate is taking into account ... Some magistrates are very strict and severe about things that they see as high risk, and others might not see as high risk'. Similarly, Support Worker 8 noted that determining what guided magistrates' decisions about making an order can be 'a

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<sup>6</sup> See, eg, Council of Chief Justices, *Guide to Judicial Conduct* (3<sup>rd</sup> ed, AIJA, December 2023) <[https://ajja.org.au/wp-content/uploads/2024/04/Judicial-Conduct-guide\\_revised-Dec-2023-formatting-edits-applied.pdf](https://ajja.org.au/wp-content/uploads/2024/04/Judicial-Conduct-guide_revised-Dec-2023-formatting-edits-applied.pdf)> 5.

<sup>7</sup> See **Chapter 4**.

can of worms’, particularly when ‘what you find at court is quite often you have a different magistrate every time’ (Lawyer 3). These inconsistencies in personnel and individual magistrates’ approaches have an impact on lawyers and support workers’ advocacy and support for clients in ADVO matters. As Lawyer 4 noted:

Part of our legal advice feeds into our knowledge of those magistrates and how they assess these cases. And having that change each week and one magistrate is different to the other is very difficult for us. And that really could change our advice as to whether we think someone should try and settle or whether we think we should have a crack and run a case or something. So, it really does make an impact.

In sum, magistrates and lawyers’ lack of formalised screening processes and consistent assessment models or approaches to risk stood in contrast to WDVCS and police. The siloed and inconsistent practices observed across professions and individuals led some interviewees to suggest adopting a more structured approach to risk that extends to all court-involved actors could assist in more consistent considerations and communications about risk occurring throughout the ADVO process.

### 6.3. Adopting Court-wide Structured Approaches to Risk

Interviewees indicated that the lack of routinised and structured screening and assessing of DFV risks throughout the ADVO process, means court-involved actors have ‘no shared language’ of risk when communicating with each other (Lawyer 1). As Lawyer 1 said ‘at the moment the [ADVO] system does not incorporate the screening and risk assessment process in it, other than at the police front end and then the WDVCS once they get those clients coming to them’. As a result, routine screening and standardised assessments of DFV risk to inform ADVOs currently heavily rely on victims/survivors’ meaningful engagement with police and/or WDVCS workers, usually prior to court, which, as some interviewees noted, does not always occur.

#### 6.3.1. Opportunities for Improvement

In discussing the variable practices of court-involved actors’ screening and assessing DFV risks in the ADVO process, Lawyer 2 expressed strong support for a multi-agency risk assessment and management framework encompassing all ADVO actors, because it ‘shouldn’t just be one area, it shouldn’t just be criminal law or quasi criminal law that’s looking at risk assessment. It needs to be everyone who’s engaging with victim-survivors and perpetrators who are familiar with this’.

Advocating for the adoption of more structured approaches to risk across the court process, Lawyer 2 emphasised that:

Not everyone needs to necessarily be the absolute expert in this. Obviously, there's a role for specialist ... services ... But everyone should have some basic knowledge, so they know some basic things to do and then referral pathways of whom they should refer to, to do the further assessments.

Likewise, Lawyer 3's view was that:

[Courts] should be considering risk all the way along. The whole idea of an AVO is to minimise risk to the protected person. So, I don't believe that the assessment of risk should sit with one person only or only one stage of the thing. Really, that should be the foremost principle of looking at AVOs all the way through. From the start of police getting a report or attending an incident, right through to the court. So, in an ideal world that's the overarching thing that everybody is looking at.

Therefore, some interviewees suggested that there being a more structured approach to risk across the court process would offer a way to improve the consistency of ADVO outcomes, and the extent to which ADVOs are informed by appropriate considerations of DFV risks. These benefits were especially stressed by WDVCS interviewees when reflecting on the benefits that have flowed from the introduction of the DVSAT and *Safer Pathway Program* arrangements, including improving their communications about risk with police:

The DVSAT has given [the police] some structure in how to assess risk, and that's across the board that's everyone's using, so it's a much, much better way of doing that [than before the DVSAT].  
(Support Worker 1)

I think [the introduction of the DVSAT] changed things. And that then became a standardised way that we all identify risk and that we can communicate with police and other services about risk and safety. I think that changed the game ... because now we understand how they rate risk and safety and how we rate risk and safety, and I think that's easier to communicate. (Support Worker 3)

Embedding a more structured risk screening, assessment and management approach across the ADVO court process, and shared use of standardised assessment tools, therefore appears to offer an important avenue to explore in seeking to improve the consistency of risk-based practices and ADVO outcomes. This was recognised in the NSW *DVDRT Report 2019–2021*, which suggested a contributing factor to differing risk assessments by police and court support workers at the time, may be due to the different versions of the DVSAT used by each were not aligned, and therefore recommended 'alignment between the two tools is essential to ensuring that police and other services have a shared language and understanding of victim risk assessment'.<sup>8</sup> However,

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<sup>8</sup> NSW Domestic Violence Death Review Team, *Report 2019–2021* (NSW Government, 2022) <[https://coroners.nsw.gov.au/documents/reports/2019-2021\\_DVDRT\\_Report.pdf](https://coroners.nsw.gov.au/documents/reports/2019-2021_DVDRT_Report.pdf)> 215.

importantly, interviewees also identified several distinct challenges in adopting a more structured or standardised approach to risk across the ADVO process.

### 6.3.2. Challenges and Limitations

Interviewees described several complex and layered challenges that inhibit the potential benefits structured risk-based approaches may offer to the ADVO system, including:

- issues with the quality and administration of the primary assessment tool used in NSW, the DVSAT;
- the fact that adopting the same structured approach or using the same assessment tool does not assure court-involved actors will reach the same conclusions about risk;
- constraints on conducting ongoing, responsive risk assessments in the ADVO process;
- the dominant role of police, and what happens when their views on risk differ from victims/survivors' or other court-involved actors' views or preferences;
- difficulties where victims/survivors do not engage with risk assessments and/or the ADVO process; and
- inherent limitations in being able to predict risk and in what a legal response can deliver in terms of safety and protection.

#### *i. Quality of the Domestic Violence Safety Assessment Tool*

In this study, the significance of the DVSAT to WDVCS workers' assessments was evident in the fact that all six WDVCS interviewees explicitly and extensively referred to the DVSAT unprompted, and discussed how the risk factors detailed in it inform their professional judgement. Support Worker 1 said 'obviously, whatever comes up on the DVSAT is going to indicate whether it's serious threat or threat risk'. However, interviewees also raised concerns about the limitations of the current version of the DVSAT<sup>9</sup> in supporting accurate risk assessments being undertaken by police and WDVCS workers.

As covered in **Chapter 2**, assessment tools are not scientific predictors of risk, and their quality and effectiveness in accurately identifying DFV risks is subject to many limitations and critique. There is no consensus in the literature on which, if any, DFV risk assessment tools are most effective in supporting a structured professional judgement approach to risk assessment. Specific

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<sup>9</sup> Note that at the time of the study, police and WDVCS workers used slightly different versions of the tool, with different emphases. WDVCS workers used a version by Legal Aid, which 'is concerned with both the level and type of threat to a victim of DFV's safety, as they seek to both prioritise and offer support appropriate to the victims situation, in comparison to the Police DVSAT that is more concerned with the level of threat to a victim of DFV's safety, in order to prioritise a response': ARTD, *Safer Pathway Evaluation Final Report* (NSW Government, February 2019) 56. Both tools used similar risk indicators however, and the same general approach to combining a review of those risk indicators with the exercise of professional judgement.

to this thesis, the DVSA in use at the time of the study has received multiple poor evaluations.<sup>10</sup> These evaluations have found that while risk ‘indicators [included in the tool] have been selected following a thorough review of available Australian and international evidence, including research regarding common factors in domestic violence homicides’,<sup>11</sup> the tool itself has not been empirically tested<sup>12</sup> or actuarially validated.<sup>13</sup> A 2018 Bureau of Crime Statistics and Research (NSW) (BOCSAR) evaluation of the DVSA’s predictive accuracy ‘in determining a victim’s risk of intimate partner repeat victimisation’<sup>14</sup> found it was ‘a poor predictor of intimate partner repeat victimisation within 12 months, as measured by incidents reported to the police’.<sup>15</sup> The evaluation team noted that the measures they used in the study to establish repeat victimisation may not match ‘the harm the DVSA was developed to assess (e.g., in terms of severity, frequency, or timing)’.<sup>16</sup> For example, ‘Risk factors for domestic homicide ... may differ to risk factors for repeat victimisation, especially repeat victimisation relating to non-criminal incidents reported to police’,<sup>17</sup> highlighting limitations identified by Newman<sup>18</sup> and Ganley<sup>19</sup> about the dependence of assessment tools on the samples and definitions of ‘risk’ that inform their evidence base.

A subsequent study by Leung and Trimboli at BOCSAR in 2022 compared the DVSA to alternative versions of assessment tools informed by Australia’s National Research Organisation for Women’s Safety’s (ANROWS) National Risk Assessment Principles (NRAPs).<sup>20</sup> They found the tool developed by the evaluators had better predictive accuracy than the DVSA.<sup>21</sup> Issues with the design and administration of the DVSA were also identified by an independent consultant, ARTD Consulting in 2019,<sup>22</sup> and the NSW Domestic Violence Death Review Team (DVRT).<sup>23</sup> Additionally, although police and WDVAS workers are expected to administer the DVSA ‘in

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<sup>10</sup> Note that during the course of this study, the DVSA was undergoing a redesign, which had not been released or implemented at the time of writing. As the original version of the DVSA was in use at the time of this study, that version is summarised here.

<sup>11</sup> NSW Government, *Domestic Violence Safety Assessment Tool Guide* (NSW Government, June 2015) <<https://www.legalaid.nsw.gov.au/content/dam/legalaidnsw/documents/pdf/for-lawyers/professional-development/lawyer-education-series/domestic-and-family-violence-essentials/Domestic%20Violence%20Safety%20Assessment%20Tool%20Guide.pdf>> 4.

<sup>12</sup> Felix Leung and Lily Trimboli, ‘Improving Police Risk Assessment of Intimate Partner Violence’ (2022) 244 *Crime and Justice Bulletin* (BOCSAR): *Contemporary Issues in Crime and Justice* 1, 20.

<sup>13</sup> ARTD (n 9) 47.

<sup>14</sup> Clare Ringland, ‘The Domestic Violence Safety Assessment Tool (DVSA) and Intimate Partner Repeat Victimisation’ (2018) 213 *Crime and Justice Bulletin* (BOCSAR): *Contemporary Issues in Crime and Justice* 1, 2.

<sup>15</sup> *Ibid* 14.

<sup>16</sup> *Ibid*.

<sup>17</sup> *Ibid*.

<sup>18</sup> Chris Newman, *Expert Domestic Violence Risk Assessments in the Family Courts* (Commissioned by Respect (UK)) 6.

<sup>19</sup> Anne L Ganley, ‘Domestic Violence: The What, Why, and Who, as Relevant to Criminal and Civil Court Domestic Violence Cases’ in *DV Manual for Judges* (Washington State Administrative Office of the Courts, 2006) [2-1], [2-9]–[2-10].

<sup>20</sup> Leung and Trimboli (n 12).

<sup>21</sup> *Ibid*.

<sup>22</sup> ARTD (n 9).

<sup>23</sup> NSW Domestic Violence Death Review Team (n 8).

both intimate and non-intimate relationships',<sup>24</sup> the DVSA's questions are framed around intimate partner relationships only. Consequently, police and other workers are directed to 'use their professional judgement about the appropriateness of individual questions' in Part A if they are dealing with a non-intimate partner situation,<sup>25</sup> which leaves evident gaps in determining risk in those contexts. Many interviewees acknowledged these poor evaluations of the DVSA, such as Lawyer 2 who noted 'there's a range of reviews that have already taken place about the DVSA which indicates it needs a lot of improvement'. As a result of these evaluations, the NSW Police and Legal Aid undertook to redesign the DVSA, but these redesign tools had not been released at the time of writing.<sup>26</sup>

ii. *Administration of the Domestic Violence Safety Assessment Tool*

Extending on concerns about the underlying quality of the DVSA, interviewees in this study reinforced the inherent subjectivity in administering assessment tools, even where a structured approach and standardised tool may be used by multiple professionals. For example, despite using the same assessment tool as police (albeit adjusted for different professional contexts), Support Worker 6 gave an example of how differing judgements may still be formed:

Often, we'll see that the police have done a DVSA and it'll be maybe [assessed as a score of] six [on the threat assessment scale], and then we'll do it and it could be [a score of] 19 ... we've actually determined she's disclosed sexual assault, and strangulation, and all sorts of things.

Support Worker 4 in this study was more critical of the general quality of police risk assessments, expressing frustration based on their own experiences of 'forever identifying more risk than what actually is put before the court, because we're having those conversations with these women'. Lawyer 1, in discussing their experiences of representing victims/survivors misidentified by police as the primary aggressor, also described encountering inadequate identification and screening of risk by police that meant their clients 'end up at risk of becoming criminalised

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<sup>24</sup> Winifred Agnew-Pauley and Suzanne Poynton, *The Domestic Violence Safety Action Tool (DVSA): Results from the First 12 Months of Implementation* (Issue Paper No 128, NSW Bureau of Crime Statistics and Research, 25 July 2017) <<https://apo.org.au/node/100231>> 2.

<sup>25</sup> NSW Government (n 11) 8; Lily Trimboli, 'Outcome Evaluation of NSW's Safer Pathway Program: Victims' Experiences' (2017) 202 *Crime and Justice Bulletin (BOCSAR): Contemporary Issues in Crime and Justice* 1, 4.

<sup>26</sup> According to NSW Domestic Violence Death Review Team the redesigned tools were scheduled to be released in late 2022 (NSW Domestic Violence Death Review Team (n 8) 221), but was not publicly available at the time of writing. The 2019–2021 DVDRT report has outlined the approach to the redesigns indicated by Legal Aid (in relation to the non-police version) and NSW Police (in relation to the police version of the tool). The Legal Aid version will introduce 'two distinct versions of the tool, one for intimate partner violence [(IPV)] and another for relative/kin violence' (p. 216). Further, it will include a question about the victim/survivor's own assessment of their risk, which is consistent with the ANROWS NRAPs (p. 216). In comparison, NSW Police have signalled the redesign of their version of the tool will focus on improving the predictive accuracy of the actuarial component of their tool, and streamlining the tool to make it more efficient to use operationally (p. 217–218). They have signalled they are doing this by undertaking 'data analysis of victim and offender characteristics and sentencing history across police-reported domestic violence incidents' to identify 'key risk indicators for inclusion' in the tool, and using technology, including artificial intelligence and auto-filled data to reduce the onerousness on police and victims in completing an assessment at the scene of an incident (p. 218).

women because there hasn't been a proper screening and risk assessment done at that front end, at the incident itself'. These criticisms of the administration of the DVSAT reflect similar issues identified by the DVDRT in its case reviews of domestic violence deaths in the *2019–2021 DVDRT report*, where the DVDRT found that 'the administration of the DVSAT' by police has been found to be 'problematic and inconsistent'.<sup>27</sup> Another case reviewed by the DVDRT illustrated issues with a WDVAS' administration of the tool.<sup>28</sup> The issues the DVDRT identified in these cases included assessors not asking all the questions from the Part A checklist and simply not completing it or inaccurately completing it; and limited understanding and application of the section of the tool relating to professional judgement.<sup>29</sup> The Report identified 'limitations and deficiencies with respect to risk assessment and safety planning' by responders 'in almost one-fifth (n=24 out of 122) of the Team's recommendations'.<sup>30</sup>

Some interviewees suggested the different judgements of risk police and court support workers may arrive at, despite using similar tools, may 'come down to experience' (Support Worker 6) and the inherent subjectivity of assessing risk:

[We use] the same tools that the police use to determine what appropriate conditions will be in place. But alongside that, there's either subjectivity in terms of inexperience, and there's subjectivity in terms of having an intuition or maybe just having that experience to identify where it may not be clearly apparent, but you just get a sense that there's a higher risk.

Support Worker 3 also suggested WDVAS and police have different focuses, influencing what judgements they may form:

We're a lot more holistic in what we consider 'risk and safety' issues. Police is protection, and they need evidence and grounds to be able to initiate AVOs. So, [where there's] an AVO is initiated, I think there's just a different way that they think that it should be done and what we think should be done. I've had women who, literally, get 100 phone calls, and she considers that intimidation. Maybe a police officer may not consider that intimidation.

Interviewees' observations about these problems with the design and administration of the DVSAT, in combination with previous evaluations findings, reinforce the need for adequate training and competencies for risk assessors identified in the literature,<sup>31</sup> and the need to

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<sup>27</sup> NSW Domestic Violence Death Review Team (n 8) 218.

<sup>28</sup> *Ibid* 219.

<sup>29</sup> *Ibid* 218–219.

<sup>30</sup> *Ibid* 214.

<sup>31</sup> See Jude McCulloch et al, *Review of the Family Violence Risk Assessment and Risk Management Framework (CRAF)* (Final Report, Prepared for the Department of Health and Human Services by the School of Social Sciences, Focus Program on Gender and Family Violence: New Frameworks in Prevention, Monash University, 2016) 148; P Randall Kropp, 'Intimate Partner Violence Risk Assessment and Management' (2008) 23(2) *Violence and Victims* 202, 212–213.

recognise the significance of implementation and training,<sup>32</sup> and the ‘officer effect’ on the efficacy of risk assessments.<sup>33</sup> Training, experience and expertise in understanding DFV and ‘safety’ from the perspective of victims/survivors are thus evidently important components to ensure the administration of standardised assessment tools result in safer outcomes. In sum, simply relying on risk considerations formed based on the use of a standardised risk assessment tool into the NSW ADVO court process is not sufficient to ensure ADVOs will enhance victims/survivors’ safety: both the quality and administration of any such approaches will be crucial to the effective assessment of risk in these contexts.

*iii. Limited capacity to conduct ongoing, responsive assessments*

The combination of multiple poor evaluation findings regarding the quality and administration of the DVSAT raises concerns about the adequacy and appropriateness of certain court-involved actors’ risk judgements developed using the DVSAT. This may go on to be determinative of the considerations of risk that occur throughout the ADVO process — as they often are, due to the limited capacity for additional assessments to inform the court. Standards of good practice establish the need to ensure ‘risk assessment is conducted continuously so that risk management and safety strategies can be adjusted over time as necessary to respond to changing experiences and contexts of violence’.<sup>34</sup> Numerous interviewees reflected on the critical importance of conducting ongoing risk assessments and being able to adjust ADVOs responsively to evolving and dynamic DFV risks. Support Worker 6 explained: ‘with risk assessment, it’s an ongoing thing. You don’t just do it and then just go, “okay, that’s where it’s at”’. Ongoing risk assessment is important, because not all relevant risk information may have been elicited or disclosed at the time of an initial assessment. For example, according to Support Worker 4, current *Safer Pathway Program* arrangements mean that ‘[it’s] supposed to be that police have done their initial [screening and assessment with the DVSAT]. And then [WDVCAS workers] would do that follow on [assessment]’. However, their view was that ‘not always are the police able to complete that [initial assessment] for many reasons. And also sometimes [the women] won’t answer. So, sometimes we may then redo that DVSAT, and we will gather more information, and look at the picture a bit more broadly’. Similarly, Lawyer 3 said:

You need people to be actually doing risk assessment all the way through. I think the initial attending officers do a risk assessment but there’s no ongoing risk assessment unless the [PINOP]

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<sup>32</sup> NSW Domestic Violence Death Review Team (n 8) 218–220.

<sup>33</sup> Andy Myhill, Katrin Hohl and Kelly Johnson, ‘The “Officer Effect” in Risk Assessment for Domestic Abuse: Findings from a Mixed Methods Study in England and Wales’ (2023) 20(3) *European Journal of Criminology* 856.

<sup>34</sup> Corina Backhouse and Cherie Toivonen, *National Risk Assessment Principles for Domestic and Family Violence: Companion Resource* (ANROWS Insights 09/2018, ANROWS, 2018) 24.

says, “well, actually this is how it happened”. They don’t always disclose things up front or police don’t give them sufficient opportunity to disclose things in the first interview. And so many people don’t tell their whole story the first time you speak to them.

Advocates’ engagement with victims/survivors evidently plays an important role in ensuring comprehensive risk considerations occur in the ADVO process. For example, WDVCAS workers explained how their specialist training and engagement with victims/survivors enabled them to identify and elicit more relevant risk information than police on many occasions. Support Worker 1 used an example of how they elaborate for their clients what a risk factor such as ‘weapons’ means on the DVSAT, which helps to elicit further risk-relevant information:

Whether any weapons have been used [is] a DVSAT question, but sometimes women don’t realise that when police ask that, they're not asking “is it just a gun a knife” or something. It [means] “was something else used?”, [that] kind of thing. And we elaborate on that when we do the DVSAT.

The importance of allowing sufficient time and multiple opportunities for further information to be elicited from victims/survivors was also emphasised by Support Worker 6, who explained ‘The woman might be extremely distressed and unable to respond to the questions at the time’ of an initial police assessment. Support Worker 1 elaborated:

Women, when they're in the midst of a DV incident, it might be late at night or it might be, I don't know ... the defendant might be in the room ... she may have other reasons why she didn't want to disclose things to police, sexual assault, or something quite intimate, etc. Or she just doesn't trust police ... So, we’ll run through that DVSAT. And sometimes it will come out as a higher risk than what police have allocated.

Similarly, Support Worker 8 described the crucial information that may be obtained from additional assessments undertaken by support workers, which can then be communicated to police to inform the ADVO application:

If there’s other things that [the woman] has disclosed while completing the DVSAT [with a WDVCAS worker], then we would clarify that with police and let police know that we’ve actually obtained more information that she hasn’t provided to police. And then, with her consent, we share that with the police. And then we’ll talk about whether or not we need to readjust the AVO or the risk rating that police have initially given.

The importance of ongoing risk assessments and ensuring opportunities for new risk information to inform the ADVO application in both the lead up to and at court was reiterated by multiple support workers and lawyers. Lawyer 1 articulated the implications of having multiple court-

involved actors involved in conducting ongoing assessments, or not, on ADVO outcomes and is worth quoting at length:

Risk is not a static thing ... The AVO might have been ... about an incident when they were in this intact relationship and let's say it's a fairly standard response of the mandatory orders only. But in fact [now] what she needs is much more than that because ... the relationship's over, and risk increases with that [because he's losing all kinds of power and control that he's had] ... [That need for risk to be constantly assessed] isn't necessarily taken into account as that matter progresses through the AVO proceedings and the charge matter ... So unless you've got a ... caseworker doing that [ongoing assessment] and that the worker is really engaged with the client and that the client feels safe and able to do that, then I think there's a very real risk that that information is never going to get before the court ... Because it's still looking at that incident.

Contrary to interviewees' widespread recognition of the critical importance of being able to adjust ADVOs to evolving risks however, there appears to be limited capacity for this to actually occur in the current system. Lawyers 3 and 4 quoted in **Chapter 4** described their experiences where 'we've seen at court where the client might have made further disclosures about very serious acts of violence ... The [Domestic Violence Liaison Officers (DVLOs)] don't and can't do anything at that point' (Lawyer 4), which makes it difficult 'to actually get the message through to actually get something done and that application to be made and then the magistrate to actually listen to, well, they're asking for some expanded protections' (Lawyer 3).

Some magistrates also shared their perspectives that the nature of the ADVO process inherently limits the court's capacity to respond to evolving risks. For example, Magistrate 8 explained that the court can only assess risk 'based on what's in front of the court at the time'. Similarly, when asked whether they thought effective risk considerations could sit comfortably with the ADVO process, Magistrate 5 responded: 'No, not really. Because I think the ADVO process involves you making assessment of that risk at the time on the material that you have available to you at the time. And the risk might change tomorrow'. Magistrate 3 described the court as having limited mechanisms to monitor risks, providing examples from their own experiences:

where in hindsight, after you've made the orders which you made based on a certain perception of the risk, you realise of course the order you made was nowhere near what it should have been. Because there was an actual risk that you didn't identify that's much more serious [which you find out about because] they come back to court charged with further offences.

Magistrate 3's observations that they only find out that an order may not have been sufficient if the defendant comes back to court later, highlighted additional limitations that currently exist in monitoring the efficacy of orders in relation to identified risks. To address the limited means to

monitor ADVOs available to the court, some interviewees proposed introducing mechanisms such as a 'report back' function similar to that currently operating in the Children's Court as part of its legislated case management powers in relation to child welfare proceedings (Magistrate 5). This 'report back' function would allow the court 'to receive reports after you've made the decision about what has happened' (Magistrate 5). Magistrate 5 acknowledged introducing this kind of case management would increase the workload for courts, but explained that:

If you have an agency that's looking over the situation after the sentence is passed or after the order is made to make sure that things are happening in accordance with the requirements of the magistrate, then you can have an evolving risk profile. And it comes back to the court, the court can review the situation.

These are interesting ideas for further exploration. In the meantime, without these in-built mechanisms for the court to review cases, and in the absence of routine screening and assessment of risk as an embedded feature of the ADVO process, it is evident that adequate assessments of risk currently depend on victims/survivors being engaged with *both* police and WDVCS or legal services that are DFV-informed and skilled risk assessors, prior to the ADVO court process. Further, lawyer and support worker interviewees highlighted limitations in the extent to which they can effectively undertake this role, due to barriers they encounter in communicating different views of risk — whether their own, or victims/survivors' self-assessments — to the court when they differ from police. These limitations largely result from the dominant role of police in the ADVO process, as a consequence of police as applicants in majority of ADVO matters identified in **Chapter 4**.

*iv. Dominant role of police*

As discussed above, it was evident in this study that court support workers and lawyers play a crucial role in conducting additional assessments and obtaining victims/survivors' views of risk and preferences about ADVOs. However, interviewees also emphasised that the dominant role of police in the ADVO process means that, even where victims/survivors may be engaged with support workers and advocates, police continue to operate as pivotal gatekeepers in determining what identified risks and consequent conditions will be sought in a police ADVO application, and to what extent conflicting views and preferences expressed by victims/survivors or other professionals will inform the court.<sup>35</sup> For example, Lawyer 7 explained that, in their experience,

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<sup>35</sup> As a reminder, from **Chapter 4**: This gatekeeping role of police occurs because in police applications they are the 'applicant' for the purposes of the ADVO proceedings. WDVCS workers and lawyers providing legal services to the protected person therefore do not usually make submissions directly to the court, though they may be heavily involved in liaising between police and the protected person during negotiations with the defendant to obtain consent orders.

where the victim/survivor wanted different conditions to those police were applying for, ‘The conversations that [women] would try to have with police around this stuff would just be very difficult to have and would not get them far’. They elaborated:

What often doesn’t get taken into consideration is the view of the PINOP ... often it doesn’t really seem as though a PINOP is viewed as able to assess their level of risk accurately, I suppose. And deference is made to other factors quite often [such as] history, unproven allegations, the views of police officers or domestic violence liaison officers. (Lawyer 7)

Lawyer 7’s experiences are corroborated by findings from ARTD’s evaluation of the *Safer Pathway Program* in 2019, which found that in administering the police version of the DVSAAT:

Police are consistently completing Part B [of the tool, relating to professional judgement] by making summaries of the available evidence rather than asking direct questions of the victim of DFV. This means that Part B Items 1 and 2, which relate to the victim of DFVs’ current level of fear and their concern, are not reflecting victim of DFV self-assessment. It is common for police to use other evidence, such as body language, demeanour and WebCOPS history, in conjunction with the victim of DFV’s statements about their fears and concerns collected at the incident.<sup>36</sup>

Moreover, while WDVCS workers have a formalised role in assessing risks under the *Safer Pathway Program* and will liaise with police where their assessments may differ, as previously discussed, it was evident in this study that strong working relationships and police views are determinative in whether those assessments may ultimately inform a police-led ADVO application. For example, the following quote from a WDVCS worker explaining their advocacy with police to upgrade or downgrade threat levels based on the DVSAAT — and consequently adjust ADVO conditions — illustrates the extent to which their differing judgements on risk were only influential on the ADVO outcome when accepted by police:

If she tells us something that police haven't been told, **and they agree**, “oh, yes, **it’s serious threat**”, then they **may** seek to add orders to an already existing provisional AVO. Yes, **if they think that the risk is severe enough** and they haven't taken that into account when they've taken out an AVO on the day. (Support Worker 1) [emphasis added]

According to interviewees, the success of court-involved actors’ advocacy in persuading police to adjust conditions and accept differing views of risk is often highly dependent on ‘relationships that we’ve built up with those DVLOs and different police, etc., over the years that we feel there is a mutual trust between us’ (Support Worker 1) and there being a ‘certain amount of trust that, as a lawyer, you’re not bugging it on’ (Lawyer 3). Support Worker 6 stated ‘the relationships [with

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<sup>36</sup> ARTD (n 9) 52.

police] are everything, the relationships that are established and the trust that's established ... you're more likely to take on board the concerns of another worker because you've established that level of trust, and respect, and that sort of thing'. Indeed, Support Worker 3 explained that the fact their service had 'developed such great relationships with the [police] DVO over the years' means that 'sometimes ... we can just go straight to the [police] prosecutor, give them that instruction and they understand what that means. And that's all relationship and partnership building, there's a lot of trust that they have in us, and we have in them'.

The situation described by these court support workers emphasises both the pivotal gatekeeper role played by police in risk considerations within the AVDO process, and the consequent importance of victims/survivors being engaged with support services such as WDVCS and legal services that have strong working relationships with police (Lawyer 4). Support workers quoted above clearly demonstrated that being able to access advocacy by workers with these strong working relationships with police can assist victims/survivors to ensure their own identified risks are appropriately incorporated into ADVO police applications. However, Lawyer 1 rightly noted that '[it] shouldn't be that that [a working relationship] is determinative of the proper justice response for a person in need of protection' and 'if the AVO proceedings brought ... a better framework of screening and risk assessment, you wouldn't need to necessarily rely on those relationships'.

Others indicated that the pivotal gatekeeping role of police has substantial implications for private applicants, too. For example, Lawyer 8 expressed challenges with obtaining successful ADVO outcomes on private applications 'where the police have decided that for some reason, they're not going to bring that application, they don't think that the woman is a worthy applicant and they're not going to bring an application on her behalf'. The influence of police in *not* applying for an ADVO on the court's considerations of risk in private applications was illustrated by Magistrate 11, who expressed the view that 'the least serious [matters are], generally, the private ones because that says to me that the cops won't bring in the private AVO, or won't bring an AVO, that means they must have pretty little faith in the complaint'. These assumptions may create problematic implications for matters where victims/survivors' goals, priorities and experiences of 'safety' do not align with those of police, as detailed in **Chapter 2**.

Interviewees in this study also suggested that police approaches to ADVOs in relation to risk and safety may be less holistic than other DFV-informed professionals and do not always adequately centre victims/survivors' views — often as the result of strict police operational procedures and policies. Lawyer 7 described communications they had with some officers in police leadership

who were 'very clear that their focus is "Our job is to save lives, our job is to make sure that domestic homicides don't occur", and those sorts of things', and therefore adopt a policy of applying for strict conditions on ADVOs. Magistrate 6 suggested 'Police have gone from what used to be in the 50s and 60s, 70s, "domestic violence, we don't care about that", to "oh my God, we have to cover our arses, if one is, potentially, going to murder their spouse"'. Some of these observations of police policies from interviewees, such as Magistrate 6, suggest that risk aversity and professional risk may be one factor influencing police approaches, although there was insufficient data to examine this in detail, as discussed in **Chapter 5**.

Regardless of the reasons for these police approaches, however, Lawyer 7 explained that preventing homicides is 'obviously, is everyone's fundamental goal outcome' but there is also 'a reality of how you apply that matrix to dealing with these situations of domestic violence'. Lawyer 3 explained that 'Police guidelines are, "we get a report, we take out an AVO". So, of course, we get people ringing up and going, "I didn't want an AVO, that'll make it worse"'. They went on to say, later in the interview, that police applying these strict policies may result in ADVOs being taken out that are inconsistent with victims/survivors' own views on risk and what they need from an ADVO in their individual circumstances 'often the way it works in practice is that the officer responsible for the taking out of the AVO thinks that, well forms a view that, despite the attitude of the complainant, that they should still ask for these orders' (Lawyer 3). Support Worker 3 noted this was a particular issue when police make police provisional orders<sup>37</sup> and there are long delays before the court determines a final order, which happened regularly during COVID:

Women found that particularly hard because they would be left with a provisional AVO in place, enforceable, with very strict conditions that don't suit their circumstances. Or conditions that are not restrictive, and that's not what they want, they want more protection.

The potentially adverse implications of police proceeding with ADVOs that differ from victims/survivors' own priorities and safety goals were illustrated by several interviewees. For example, Support Worker 4's view was that:

Usually [the] first initial AVO is layered with a lot of different exclusions. When it gets to court generally we see the victim, being the woman, usually doesn't want that many layers. So, that can be I guess the risk factor to her ... that's probably sometimes a bit of a disadvantage when you've got particularly things like no contact orders, where that puts I guess a woman's housing at risk.

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<sup>37</sup> Which victims do not have standing to apply to vary — see **Section 4.4.3**.

Similarly, Magistrate 12 observed that:

Sometimes if you leave very strict conditions in, it causes financial hardship, other hardship to the victim, who can no longer be supported by the alleged abuser. And what one often hears is they want [the defendant's] support with the children, looking after the children. So, whatever's happened, they still want the defendant to be able to come to the house and help out with the children.

The level of discretion police should have in applying for ADVOs is a contested area, with 'good public policy grounds' (Magistrate 9) for limiting discretion. However, these findings of rigid police approaches combined with the protected person's limited standing to be heard and their rights of appearance in police applications, discussed in **Chapter 4**, are problematic in relation to risk considerations, noting that good practice emphasises safety planning 'should be led by or developed in partnership with the victim'.<sup>38</sup> And, as detailed in **Chapter 2**, victims/survivors' experiences of 'safety' may look very different for different women. As Lawyer 7 articulated:

To be honest, 99.9% of clients aren't interested in putting themselves in a situation where they just open themselves up to be abused ... without feeling like they've got some protection in place. But ... we tend to find when something does happen, in terms of an intervention, for example, police come and attend [an incident], an AVO is issued, [the victim/survivor is] then very rarely going "I don't want this [AVO]" ... The overwhelming majority aren't going "this didn't happen, it's all just made up, it's all just untrue". [Victims/survivors] very much acknowledge and [are] open about that, and, also, wanting some protection, but just in a space that works for them. And that's where we see the real fall-down for them.

Magistrates also provided a judicial perspective that conflicting views between police and victims/survivors on ADVO conditions make it difficult for the court to determine what conditions will be appropriate to manage risks:

because you'll have somebody there in court saying, "oh, I don't want the order, I don't really fear him anymore", and you've got the police pushing for all these very onerous conditions. And of course, there's a risk either way ... If you remove the conditions, and then something happens to the victim, well, you know ... it's very difficult to balance those competing arguments about how strict or otherwise the order should be. (Magistrate 12)

In these circumstances, lawyers and support workers noted that victims/survivors' access to effective independent advocacy can be critical for victims/survivors, because advocates can 'facilitate those conversations between the protected person and the police. To try and find that

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<sup>38</sup> Backhouse and Toivonen (n 34) 25.

balance between an AVO that police are comfortable keeps them safe and one that tries to let them attend to the world life challenges of the day-to-day' (Lawyer 7). Independent court support workers and legal services for victims/survivors are therefore crucial in the current operation of the ADVO system, both because of the facilitative role they can play in communicating victims/survivors' views to police, and because victims/survivors' legal and support services tended to adopt a more client-centred approach to respecting victims/survivors' agency in their practices. For example, Lawyer 7 explained:

I very much see our job as not being the place of judging that and making our own assessment of well, hang on, is that really wise, or safe, or whatever. It's about explaining to clients what the AVO is there for, why the police have taken it out, those sorts of things. And letting the client assess those things.

Yet where victims/survivors do not have access to this advocacy, or the advocacy is unable to influence police positions (for example, because of a lack of established working relationships), victims/survivors' self-assessments of risk may not ultimately inform the ADVO made. It can also have broader adverse impacts in disempowering victims/survivors in ways that contribute to their disengagement from the ADVO process altogether, in turn limiting the efficacy of orders in mitigating DFV risks and enhancing victims/survivors' safety.

*v. Victims/survivors' disengagement and disempowering experiences*

Interviewees indicated that a particular challenge in considering and addressing risks via the ADVO process is presented when victims/survivors disengage from the process. Interviewees strongly suggested a contributing factor to this disengagement is disempowering experiences victims/survivors may encounter throughout the ADVO process. For example, magistrate and lawyer interviewees highlighted how police pursuing strict policy approaches to ADVOs that conflict with victims/survivors' preferences, as discussed above, may have adverse effects in terms of victims/survivors' continuing engagement in the ADVO process:

The problem is in [police] taking that [rigid] approach, what it does is gives everybody, including the complainant, a bad view, and a negative view of the legal system ... Next time something happens, they don't report the case ... I suspect, from a complainant's point of view, it's very disempowering. (Magistrate 6)

[What's] it's clear from ... us acting on the side of the protected person, is that that is a consistent feeling and theme that they experience [of] ... disempowerment and ... just shut out of the process ... [and] they're a piece to the puzzle. And that's the extent of their inclusion with working through the court system. (Lawyer 7)

Interviewees were clear that disempowering experiences of the process can lead to victims/survivors' disengagement, which in turn have negative implications for the efficacy of ADVOs in managing risk and enhancing safety. For example, two magistrates reflected that:

If we treat [the victim] like a criminal by issuing warrants for their arrest if they don't show up [to give evidence at court], or tell them off for not showing up, they're not going to avail themselves of these systems that are designed to protect them ... I always constantly worry about that tension of re-traumatising the victim. And they're traumatised enough. (Magistrate 6)

[If the] community loses confidence in that system, the individual loses confidence in that system, that risk goes up because they're not going to call or they're not going to seek it out on the next occasion because of their experience. (Magistrate 8)

Lawyer 7 went on to explain disempowering experiences can be particularly acute for those victims/survivors whose views have consistently been marginalised and disregarded in society more generally, such as First Nations peoples:

About 40% of our clients identify as Aboriginal. You build in those layers, then, of complexity around historical treatment by governments of Aboriginal people. And this is just another systemic abuse of that power and that process. This is me paraphrasing what we've been told [by clients]: [its] just another layer of that occurring in modern-day life of now we've got the police doing this to us. They're not even interested in listening to my story, understanding our culture, and how the family dynamic works in our mob, and all that stuff. Again, [it] just adds to that disempowerment and that distrust.

Other interviews recognised that victims/survivors may also not want to engage with the ADVO process for a variety of other reasons. Indeed, as established in **Chapter 2**, not all victims/survivors experience 'safety' in the legal system, and not all victims/survivors share the same goals for protection orders (POs) due to the dynamics of violence, mistrust of policing and legal responses, and/or having priorities beyond obtaining a legal intervention in response to their help-seeking.<sup>39</sup> Many of these issues were reiterated by interviewees. For example, Support Worker 7 reflected that victims/survivors may not show up to court:

[because they are] scared of repercussions, like scared of what's going to happen if you do come forward [and report DFV] and scared of what's going to happen if you don't. I guess, as well, in personal experiences as well you don't want to screw up somebody else's life. I think some people have that perspective that it's not about what you're going through it's about the repercussions and what you actually have to go through to get that across the line. But I also think a genuine

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<sup>39</sup> See **Section 2.3.4**.

distrust for police. And a genuine distrust for the justice system ... I think there's a lot of contributing factors to that.

While recognising the justifiable reasons victims/survivors may not engage with the ADVO process, interviewees discussed how this disengagement can create dilemmas for court-involved actors in assessing and managing risk for the purposes of an ADVO. Support Worker 7 observed that, where victims/survivors do not attend court 'the AVO gets thrown out, because there's no [case] ... He goes as the defendant, she doesn't turn up. It's a catch-22. A willing victim assists greatly, the willingness to want to have the AVO in place and be assisted'. Magistrate 5 explained this situation from the judicial perspective, that where the victim does not turn up to court:

you as the magistrate are left with the issue, do you issue a warrant to get her to come to court? She's already a victim of domestic violence and then you ask yourself, or the police ask you to issue a warrant to bring her to court to give the evidence. I think that's not something one should do readily.

That magistrate went on to speak positively about innovations such as recorded Domestic Violence Evidence in Chief (DVECs) providing a mechanism for presenting evidence to the court even in the absence of the protected person's appearance at court because:

[with] the DVEC, she's asked the question then and there, she's rung the police ... police have come, and they dragged him out. And then they say "what's been going on here?" and they record it. So, they've got her version of what happened to her on tape, and they can use that in court as her evidence against him. And even if she doesn't turn up you can still use it in court.

However, support worker and lawyer interviews explained why many women may simply not want an ADVO or view police-led applications as a helpful intervention in relation to risk and safety. As Lawyer 5 noted:

The piece of paper by itself doesn't really address anything. Unless there's more constructive things that are done about offender behaviour, the only thing that a piece of paper that prohibits him from doing a whole list of things, is probably going to quite often aggravate the situation. There's a lot of women who know that and are concerned about that and don't want to see police intervention because they say this is only going to make it worse.

Interviewees also conveyed the challenges in determining 'risk' in the context of the dynamics of DFV and victims/survivors' help-seeking. Support Worker 3 observed:

Women ... might call the police for assistance, but then say "I never asked for an AVO, that's not what I wanted". But the police attend, and they think that it's appropriate that there is an AVO for her protection. And then she's angry that they've come and did this without her permission.

That she just wanted some assistance, and she didn't want an AVO at all. And then I think, sometimes, the other party gets in the ear of the client, and manipulates her to change orders as well, I think that happens a bit too.

Many magistrates were equally aware of these dilemmas in their ADVO decision making and expressed dilemmas they grappled with about the potentially traumatising and disempowering impacts of making ADVOS that did not align with victims/survivors' own preferences or views. Magistrate 6 evocatively explained these dilemmas in reference to the complex dynamics of DFV, and is worth quoting at length:

You try and tailor [conditions], but then again, also, you've got complainants who don't want the orders, they don't want [the defendant] excluded from the house. They want to continue the relationship. Their relationship is based on violence, and are we supposed to be dictating how they live? I have a real problem with that. I would like to think most complainants, primarily women, are in the best position to assess their own risk and know what they want. Who are we, as a court, to disempower them in that way? To say "no, no, we know better than what you really do". They may not be ready to leave yet. Maybe they just want to know that the courts are there in the event, so they will come back.

This magistrate elaborated that:

All the research tends to show that it can take someone in an abusive relationship up to seven, eight, nine goes to actually leave. Now, are we actually making it harder for them by disempowering them in this whole process? That is how the court process is currently set up ... I think we need a system where the complainant should be more empowered. Often, it's run against their will ... whatever happens to it, the next time something happens, they don't report the case.

Lawyer 7 captured how these processes impact on victims/survivors' experiences of the ADVO process, explaining many victims/survivors' experiences are that there is 'just this real discrepancy between a legal process of "this is what we're doing to protect you", and my real world of "this is my day-to-day life"'. Lawyer 7 went on to explain at length that women experiencing DFV 'often have very complex issues going on in their life ... support services, in terms of their personal life [are] often limited or disjointed or non-existent ... And so, they rely on the father ... to provide that support'. These reflections relate back again to the broader safety needs and priorities victims/survivors may have, beyond purely obtaining a legal intervention in the form of an ADVO, and reinforces the need for an expansive understanding of, and holistic approach to, enhancing safety, as argued in **Chapter 2**. The reflections of Lawyer 7 and Magistrate 6 also emphasise that the process is as important as the outcome in relation to

ADVOs, as positive experiences of the system can contribute to effective engagement and a sense of procedural justice for victims/survivors.<sup>40</sup> For example, Lawyer 7 explained in relation to police engagement with victims/survivors, even where police have to apply rigid policies:

How you communicate [with victims/survivors] and how you deal with things really influences the way an outcome occurs and the way that people feel that they've been managed and dealt with through that process ... it may not shift the outcome that they land on. But if ... people feel heard and they feel valued, as part of all [of the process], and then they still get a decision which is, "look, for these reasons we don't think it's appropriate to change the conditions", they're going to feel very differently about that outcome, as opposed to the way it happens now.

Similarly, Magistrate 8 emphasised that:

This is not just about the endgame, which is the decision about [the] AVO. This is also about the process for a person in need of protection feeling empowered, feeling safe, and feeling heard, by both the police, the court system, and anyone else that seeks to listen. Such as they feel as though there is a system that provides protection that they have confidence in.

In describing better ways in which to engage with victims/survivors when assessing risk and throughout the ADVO process, some interviewees described adopting personal practices where they give primacy to victims/survivors' views, even where their professional assessments of risk may differ. For instance, Lawyer 6 said that they 'personally kind of value individual autonomy and the right of people to make decisions about their own lives' (Lawyer 6). Similarly, Lawyer 3 explained:

We usually say to [clients], look, you know them [the defendant] best. And if a person in need of protection says, "no, actually I think the AVO will make it worse" ... you have to respect that ... In the end they're the best people to determine what makes them safe or not safe.

Despite the emphasis these interviewees placed on victims/survivors' autonomy and choice in their individual practices however, it was clear from this study that, overall, victims/survivors tend to be 'once removed from the process. And that is difficult because it does take a lot of control out of the victim's hands' (Magistrate 6).

Indeed, a number of magistrates expressed feeling conflicted about what principles should underly approaches to ADVOs in relationship to victims/survivors' autonomy and agency. For instance, some magistrates expressed dilemmas about the 'vexed area' of when and whether

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<sup>40</sup> Silke Meyer and Harley Williamson, 'General and Specific Perceptions of Procedural Justice: Factors Associated with Perceptions of Police and Court Responses to Domestic and Family Violence' (2020) 53(3) *Australian & New Zealand Journal of Criminology* 333.

there should 'be state intervention in human relationships' (Magistrate 9) and/or whether 'the courts should take a paternalistic role' (Magistrate 1) in relation to ADVO matters. Similarly, Magistrate 8 said: 'I think there's that real conflict between the potential overstep of the law in making orders around the adults'. Magistrate 8 went on further to reflect that:

There is a real risk with authorities and bureaucracy, taking that power out of [the victims/survivors'] hands and saying, "this isn't about you anymore. This is about protecting you even if you don't want protection. I'm going to make an order that you are not going like. But yet, if you're in trouble in the future, trust us. Come back to us and tell us what's going on, because we're here to help you and we'll listen to you" ... I'm conscious of all of those power struggles ... I am conscious of those things when making that order.

Magistrate 6 similarly expressed concern about how paternalistic approaches by the court limit victims/survivors' agency and empowerment, questioning 'who are we, as a court, to disempower them in that way? To say "no, no, we know better than what you really do". They may not be ready to leave yet. Maybe they just want to know that the courts are there in the event, so they will come back'.

Considerations about the (limited) role and engagement of victims/survivors in the ADVO system, in combination with the other challenges and limitations outlined in this chapter, indicate a more holistic examination of the current design and operation of risk-based approaches in NSW and the ADVO in relation to victims/survivors' agency and autonomy is required, in order to establish what 'risk' considerations could usefully be embedded into the ADVO process in a way that will result in *safer* and more *empowering* outcomes for victims/survivors, not merely more *consistent* ones.

## 6.4. Chapter Conclusion

In conclusion, the findings in this chapter indicate that current risk-based practices in the ADVO system are inconsistent, variable and siloed. Certain professions — namely WDVCS workers and police — currently bring more routine and structured approaches to risk assessment, largely due to their parallel responsibilities under *Safer Pathway Program* governance structures. In contrast, lawyers and magistrates are largely applying their own unstructured professional judgement to assessing risk (with some exceptions). Therefore, routinised risk screening and assessment currently relies almost solely on the protected person being engaged with WDVCS workers or police prior to the ADVO being listed at court, and those actors eliciting all relevant risk information at that time, which does not and cannot always occur.

Based on these inconsistent, variable and siloed practices regarding risk considerations, some interviewees supported the adoption of a more structured approach to risk across the court process to support a shared language for court-involved actors to communicate about risk and improve consistent considerations throughout the ADVO process. However, several distinct challenges in embedding more structured approaches to risk into the ADVO court process were identified. These include issues with the quality and administration of the DVSAT, which has been evaluated poorly by multiple evaluators,<sup>41</sup> and the fact that shared use of a standardised tool does not assure various professionals form the same judgements of risk. WDVCS interviewees, in particular, described regularly encountering differing views of risk by police, despite both services using similar versions of the DVSAT (albeit adapted to their different professional contexts).

Certain features of the ADVO system also constrain court-involved actors' ability to re-assess risk on an ongoing basis and be responsive to the dynamic and evolving circumstances that characterise DFV matters. Many of these issues are amplified by the dominant role of police in the ADVO process, due to most ADVOs being made by police application and the lack of embedded opportunities for the victim/survivor's views to be heard directly by the court, as identified in **Chapter 4**, which creates challenges when police views of risk conflict with those of other professionals or the victim/survivor. The dominant role of police through the ADVO process is also indicative of a broader theme identified by interviewees in the disempowerment many victims/survivors experience throughout the ADVO process, contributing to their disengagement and consequently undermining the efficacy of orders and creating additional challenges for courts to adequately determine risk and craft appropriate ADVOs to manage those risks.

These are difficult and complex challenges and limitations to overcome, and in identifying them I am conscious that 'risk-based approaches' inherently raise 'complex questions about the explanations and approaches that are conventionally applied' in response to DFV.<sup>42</sup> My conclusions in this chapter therefore do not attempt to 'adjudicate'<sup>43</sup> 'good practices' for undertaking risk assessment in the ADVO process. Rather the findings in this chapter should be interpreted as identifying key dilemmas that arise for court-involved actors when attempting to consider and act on 'risk considerations' in the ADVO context.<sup>44</sup> Indeed, an undercurrent through all my interviews is recognition that many individual court-involved actors are clearly and actively

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<sup>41</sup> Leung and Trimboli (n 12); ARTD (n 9); Ringland (n 14).

<sup>42</sup> Kate Seymour, Sarah Wendt and Kristin Natalier, *Responding to Domestic Violence: Difficult Conversations* (Routledge, 1<sup>st</sup> Ed, 2023) 2.

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.* 1.

trying to make risk-informed decisions in their work, but are undermined by institutional constraints, a lack of shared conceptual framework, and siloed practices that underly the current operation of risk-based approaches in NSW and the broader landscape of the ADVO system. In sum, the findings in this chapter, in combination with **Chapters 4** and **5**, provide evidence that court-involved actors' risk-based practices in the ADVO setting currently largely depend on the personal commitment and initiative of individual court-involved actors and may be better enabled by the adoption of a more structured approach across the court process. These implications are discussed in further detail, next.

# Chapter 7: Discussion and Implications

## 7.1. Introduction

The preceding three chapters reported detailed findings in relation to the following research questions:

**RQ1:** To what extent do relevant civil procedures enable ‘risk of domestic and family violence (DFV)’ to be considered by key court-involved actors in the making of Apprehended Domestic Violence Orders (ADVOs) in New South Wales (NSW)? (**Chapter 4**)

**RQ2:** How do key court-involved actors conceptualise ‘risk of DFV’ in NSW? (**Chapter 5**)

**RQ3:** What formal and informal practices do key court-involved actors engage in to consider ‘risk of DFV’ in the making of ADVOs in NSW? (**Chapter 6**)

Here, I synthesise these findings and posit three implications that arise regarding the assessment and management of ‘risk of DFV’ in the making of ADVOs to answer **RQ4**.

Firstly, I argue that there is a clear need for a more structured approach to ‘risk’ in the ADVO process. The current lack of conceptual framework provided by the legislation, ambiguities in individual court-involved actors’ conceptualisations of risk and the court’s role in assessing it, and inconsistent and siloed risk-based practices all point to the need for a structured approach, underpinned by a clear conceptual framework, to be developed for the ADVO system. This is based on findings from **Chapters 5** and **6**, which strongly indicate that clearly defining ‘risk’ and court-involved actors’ respective roles and responsibilities in considering DFV risks for the purposes of ADVOs would assist in developing a shared approach between court-involved actors, and clarify currently ambiguous roles and expectations.

Secondly, it is critical that opportunities for victims/survivors’ input are embedded into all risk considerations that may occur throughout the ADVO process. The literature makes clear that victims/survivors may have differing experiences of safety and incorporating victims/survivors’ views of risk is crucial. Yet it is apparent from **Chapters 4** and **6** that victims/survivors’ input is currently not as central as it should be in the current NSW ADVO process. This is due to several interrelated factors, including, most influentially, the pivotal gatekeeping role police play throughout the ADVO process. Ensuring opportunities for victims/survivors’ input throughout every stage of the ADVO process would therefore improve the quality of court-involved actors’

risk considerations, and, consequently, the appropriate tailoring of ADVOs to victims/survivors' individual circumstances and safety needs.

Thirdly, while risk-based approaches offer important benefits to enhance the efficacy of ADVOs, significant challenges and limitations are apparent from the findings in **Chapters 4 to 6** that will undermine the adoption of a more structured approach in the ADVO setting. These include inherent issues with risk-based approaches identified in the literature, such as the conceptual ambiguity of 'risk' and inherent subjectivity in assessing risk (even where shared tools are used), and specific issues in NSW with the quality and administration of the primary risk assessment tool, the Domestic Violence Safety Assessment Tool (DVSAT). The study findings also indicate unique challenges arise as a product of the current ADVO landscape, including its adversarial jurisdiction, evidentiary and legal procedural requirements, the court's constrained capacity to ensure ongoing and responsive risk assessment and management, and the dominant role of police. These constraints limit the capacity of the court to engage in assessing DFV risks in accordance with the 'good practice' principles of DFV risk assessment and management that have been established in the literature. These are inherent barriers to effectively undertaking good practice DFV risk considerations and consequently raise more profound questions about the expected role and scope of ADVOs — and court-involved actors — in relation to risk, and how best to structure risk-based approaches in this specific setting.

## 7.1. Adopting a Structured Risk-Based Approach to Apprehended Domestic Violence Orders

The findings in **Chapters 4 and 6** illustrate there are clear opportunities for DFV risks to be considered in the ADVO process, and that a variety of risk considerations are currently being undertaken by some court-involved actors at various stages in ADVO proceedings. However, it is clear from **Chapter 4** that in the NSW ADVO landscape these opportunities occur by default, rather than by design.<sup>1</sup> Such opportunities are heavily dependent on multiple varying and interacting features of the legal system that occur inconsistently depending on broader environmental contexts (such as court-involved actors having sufficient time and resourcing), and on the localised practices and individual expertise of the professionals involved. It is clear from **Chapter 5** that, within this ADVO landscape, court-involved actors bring a range of understandings of 'risk', 'assessment' and various court-involved actors' roles in undertaking such considerations, which undermines their ability to communicate with each other about risk.

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<sup>1</sup> Family Violence Death Review Committee, *Fifth Report: January 2014 to December 2015* (Family Violence Death Review Committee, New Zealand, 2016) <[FVDRC-5th-report-Feb-2016-v2.pdf](#)> 14.

Additionally, **Chapter 6** illustrates that, as a result, current DFV risk-based practices are inconsistent, variable and siloed. Practices differ widely between professionals, with police and court support workers tending to undertake routine and structured approaches informed by *Safer Pathway Program* protocols and practices because they are required to do so, including applying the DVSAT, while lawyers and magistrates tend to apply unstructured professional judgement that is not informed by formal assessment tools. These differing practices by the myriad diverse professionals involved in the ADVO system means that screening and assessment of risk, and the good practice application of structured professional judgement to assessing that risk, as advocated in research and literature, relies heavily on victims/survivors' engagement with police and/or Women's Domestic Violence Court Advocacy Services (WDVCAS) workers, usually prior to court, and those court-involved actors' accurate assessment of risk, which does not and cannot always occur. Exacerbating these variable risk-based practices are the individual and localised practices of court-involved actors across Local Courts in NSW generally, detailed in **Chapter 4**, alongside the widely varying understandings and conceptualisations of 'risk of DFV' and 'assessment' that may underpin individuals' considerations of risk in the absence of a clear legislative framework on 'risk', as demonstrated in **Chapter 5**.

In light of these findings, it is apparent that the ADVO process 'does not incorporate the screening and risk assessment process in it, other than at the police front end and then the WDVCAS once they get those clients coming to them' (Lawyer 1). This reliance on victims/survivors' engagement with police and the WDVCAS for routine screening and assessment to occur is problematic, noting the variable administration of risk assessments these services may undertake<sup>2</sup> and that not all victims/survivors may want to engage with police when seeking protection in the form of an ADVO, or experience safety doing so, as highlighted in **Chapter 2**. The pivotal gatekeeping role of police throughout most stages of the ADVO process also means that the success of other court-involved actors' advocacy for police to consider differing views about risk and/or preferences for ADVOs depends heavily on their individual working relationships with police. Although many advocates do an exemplar job in their advocacy in this respect, it is also clear that 'if the AVO proceedings brought ... a better framework of screening and risk assessment, you wouldn't need to necessarily rely on [individual working] relationships' to obtain a 'proper justice response for a person in need of protection [(PINOP)]' (Lawyer 1).

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<sup>2</sup> NSW Domestic Violence Death Review Team, *Report 2019–2021* (NSW Government, 2022) <[https://coroners.nsw.gov.au/documents/reports/2019-2021\\_DVDRT\\_Report.pdf](https://coroners.nsw.gov.au/documents/reports/2019-2021_DVDRT_Report.pdf)> 218–220.

Further, the findings in **Chapter 6** illustrate that screening and assessment ‘at the front end’ may not always occur, nor elicit all relevant risk information or capture the risks that may have evolved or changed by the time an ADVO is dealt with by the court. These circumstances indicate that ‘everyone who’s engaging with victim-survivors and perpetrators ... [need] to be familiar with’ identifying, assessing and managing DFV risks (Lawyer 2). While police and WDVCAS may be familiar with DFV risk assessment practices under the structured framework they operate within under *Safer Pathway Program*, and via use of the DVSAT, other court-involved actors, such as lawyers and magistrates, are not governed by these frameworks and tend to engage in unstructured professional judgement when considering risk. This means that the court’s considerations of ‘risk’ and consequent decisions made about ADVOs may heavily depend on the individual understandings of, and approaches to, risk that inform these court-involved actors’ considerations.

The variable influence of different factors on court decision making and outcomes for protection orders (POs) have been repeatedly identified across multiple studies on PO efficacy,<sup>3</sup> with the lack of clear frameworks for judicial officers to interpret PO applications identified as a factor in variable PO outcomes.<sup>4</sup> Wakefield and Taylor’s study in 2015 of judicial education in Australia found inconsistencies in judicial officers’ approaches to risk factors such as controlling behaviours, and suggested judicial training should address risk assessments.<sup>5</sup> In 2016, the Victorian Royal Commission into Family Violence (RCFV) concluded there was a need for improved risk assessment processes in court procedures, including regarding coordinating and managing DFV lists.<sup>6</sup> Findings in this study offer some explanation for these previously documented inconsistent approaches by judicial decision makers, and inconsistent PO outcomes and experiences of PO processes for victims/survivors, in the NSW context. Therefore, the inconsistencies in current approaches suggest a need for a shared, structured approach to risk by *all* court-involved actors, as some interviewees supported in **Chapter 6**.

Crucially, any structured approach needs to be underpinned by a clear conceptual framework of ‘DFV risks’ for the purpose of ADVOs. This study shows that, in the absence of a clear conceptual framework of ‘risk’ provided by the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)* (‘ADVO Act’), ‘everyone in the process brings an element of subjective assessment of risk. And

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<sup>3</sup> See **Section 2.2.2**.

<sup>4</sup> Alesha Durfee, ‘Victim Narratives, Legal Representation, and Domestic Violence Civil Protection Orders’ (2009) 4(1) *Feminist Criminology* 7, 11.

<sup>5</sup> Shellee Wakefield and Annabel Taylor, *Judicial Education for Domestic and Family Violence: State of Knowledge Paper* (ANROWS Landscapes No 02/2015, ANROWS, 2015) 6.

<sup>6</sup> State of Victoria, *Royal Commission Into Family Violence Volume III: Report and Recommendations* (Parliamentary Paper No 132 (2014–16) March 2016) 166.

also through the lens of what their role is in that proceedings' (Magistrate 8). In the absence of a clear legislative definition or consistent understanding of DFV risks, interviewees illustrated conflicting views of risk between diverse professionals and the victims/survivor were common, and communicating about differing views of risk 'would just be very difficult ... and would not get them far' (Lawyer 7). The general positivity of Support Worker interviewees about how the DVSA and *Safer Pathway Program* have 'changed the game' (Support Worker 3) by improving their communications with police reinforces the potential benefits of standardised tools and shared risk-based approaches identified in other literature. For example, because standardised tools and approaches improve the 'consistency and visibility in risk judgements'<sup>7</sup> and allow practitioners 'to respond and manage the safety of adults and children exposed to violence appropriately and consistently'.<sup>8</sup>

These findings add to a small number of overseas studies discussed in **Chapter 2**, which have recommended the introduction and/or use of more structured approaches to risk by various court-involved actors in the PO process. To recap, in the US, Nichols-Hadeed et al argued that standardised use of an assessment tool during intake interviews with applicants at court could improve PO outcomes, by ensuring risk informs petitions to the court.<sup>9</sup> In Sweden, Strand, Fröberg and Storey argued that 'Prosecutors' work on restraining orders would improve if they could find a better way to communicate about risk for violence with the police',<sup>10</sup> via structured risk assessments rather than prosecutors' sole reliance on their own unstructured professional judgements.<sup>11</sup> Weisberg similarly argues that evidence from assessment tools 'is especially useful to inform decision makers about the best methods of ensuring victims' safety as well as processing offenders in the justice system'.<sup>12</sup> In Victoria, the Centre for Innovative Justice recommended that jurisprudence on Victorian Family Violence Intervention Orders (FVIOs) should be reviewed to '[clarify] that risk assessment is the primary consideration relevant to submissions and judicial decision-making in relation to duration of FVIOs' and 'decisions to extend an FVIO, including a FVIO imposed by consent, are based on assessment of ongoing risk'.<sup>13</sup>

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<sup>7</sup> P Randall Kropp, 'Intimate Partner Violence Risk Assessment and Management' (2008) 23(2) *Violence and Victims* 202, 207.

<sup>8</sup> Cherie Toivonen and Corina Backhouse, *National Risk Assessment Principles for Domestic and Family Violence* (ANROWS Insights 07/2018, ANROWS, 2018) 4.

<sup>9</sup> Corey Nichols-Hadeed et al, 'Assessing Danger: What Judges Need to Know' (2012) 50(1) *Family Court Review* 150.

<sup>10</sup> Susanne JM Strand, Sofi Fröberg and Jennifer E Storey, 'Protecting Victims of Intimate Partner Violence: Swedish Prosecutors' Experiences of Decision-Making Regarding Restraining Orders' (2018) 19(2) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 170, 182.

<sup>11</sup> *Ibid.*

<sup>12</sup> D Kelly Weisberg, 'Lethality Assessment: An Impressive Development in Domestic Violence Law in the Past 30 Years' (2019) 30(2) *Hastings Women's Law Journal* 211, 238.

<sup>13</sup> Elena Campbell et al, *More than Just a Piece of Paper: Getting Protection Orders Made in a Safe and Supported Way: Responding to Recommendation 77 of the Royal Commission into Family Violence* (Centre for Innovative Justice, RMIT University, February 2021) 12.

The findings from **Chapters 4 to 6** suggest similar recommendations should be considered in the NSW ADVO process.

Importantly however, any such tools or risk-based approaches must be informed by shared conceptualisations of DFV, and understandings of the dynamics and experiences of violence, in order to be effective in accurately identifying, and appropriately responding to, DFV risks. As demonstrated in **Chapter 6**, just because WDVCS workers and police use a standardised tool and operate within the same *Safer Pathway Program* framework, this does not assure shared views of risk or approaches to DFV inform consequent risk management actions in the form of ADVOs. Instead, several interviewees indicated that different court-involved actors have ‘different views on what is violence ... And there’s a lot of downplaying of women’s experiences of violence and their expressed fears of risk and safety’ throughout the court process (Lawyer 1). Differing understandings of violence were clearly exacerbated by the lack of definition of DFV in the *ADVO Act* at the time of the study. Diverse professions, and individuals’ understandings of ‘risk’ and ‘DFV’, may, therefore differ widely, as detailed in **Chapter 5**, even where a standardised tool or shared framework is adopted.

In sum, the findings from **Chapters 4 to 6** about the lack of shared understandings of risk and diverse practices among court-involved actors illustrate that a shared, structured approach to risk in the ADVO process, underpinned by an appropriate and clear conceptual framework of ‘DFV’ and ‘risk’, would support more consistent decision making and outcomes for ADVOs across NSW Local Courts. A critical component to adopting such an approach, however, is embedding opportunities for victims/survivors’ input on risk and ADVO decision making throughout all stages of the ADVO process.

## 7.2. Embedding Opportunities for Victims/Survivors’ Input

There is widespread agreement across the DFV risk literature that DFV victims/survivors’ own views of risk should inform all stages of identification, assessment, and management.<sup>14</sup> Similarly, PO literature establishes that ensuring victims/survivors’ input in decision making is also important as victims/survivors may have differing goals for POs,<sup>15</sup> and these goals will determine if and how they engage with the PO process, and what preferences they may have for ‘tailor[ing] POs toward their own priorities’.<sup>16</sup> Yet in this study, underpinning many of the critiques of the

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<sup>14</sup> Corina Backhouse and Cherie Toivonen, *National Risk Assessment Principles for Domestic and Family Violence: Companion Resource* (ANROWS Insights 09/2018, ANROWS, 2018) 22–23.

<sup>15</sup> Lauren Bennett Cattaneo, Jessica Grossmann and Aliya R Chapman, ‘The Goals of IPV Survivors Receiving Orders of Protection: An Application of the Empowerment Process Model’ (2016) 31(17) *Journal of Interpersonal Violence* 2889.

<sup>16</sup> *Ibid* 2891.

efficacy of ADVOs and risk-based practices raised by interviewees was the extent to which victims/survivors are perceived to be 'once removed from the process' (Magistrate 6), and the fact that 'often it doesn't really seem as though a PINOP is viewed as able to assess their level of risk accurately ... And deference is made to other factors quite often' (Lawyer 6).

Concerns about victims/survivors' lack of input in the ADVO process were reported in **Chapter 4**, and included the lack of formal assurances of victims/survivors' right to be heard in ADVO proceedings, particularly where police are making the ADVO application and have a dominant and pivotal gatekeeping role at most stages of the ADVO process. Disempowering experiences were also documented in the findings in **Chapter 6**, including where victims/survivors' views of risk and preferences for ADVOs conflict with police, police views tend to take precedence, because of their dominant role (**Chapter 6**). The latter findings align with Meyer and Reeves' findings from focus groups with police in Queensland in 2019–2020. They found that while 'victim survivors are generally supportive of police issuing ... and pursuing' POs,<sup>17</sup> where their preferences differ, police 'are ultimately guided by evidence and perceptions of risk of subsequent harm' and 'that while there is some room for negotiations, the minimum level of protection perceived necessary by police will eventually be pursued in court'.<sup>18</sup> Some interviewees in this study emphasised police approaches that de-centre victims/survivors are 'certainly never done with intentions of, for example, from the police's perspective of ... trying to do anything that cuts out a protected person, or anything like that' (Lawyer 7), but rather a cumulative result of factors such as police policies emphasising strict approaches to ADVOs (**Chapters 4 and 6**), victims/survivors' lack of a right to be heard in the court process, and the culture of consent orders (**Chapter 4**), which combine to substantially limit the information and range of views that will be available to the court in its decision making.

Many lawyer and support workers reported the role they often play throughout the process is 'to put forward the client's wishes, so that they do have, or feel they have, a voice in that whole process, even though it may not be always what they want' (Support Worker 1). As illustrated in **Chapter 6**, advocates' ability to successfully advocate for their clients' preferences appear to strongly hinge on whether those individual court-involved actors have good working relationships with police; as Support Worker 6 said, 'The relationships are everything, the relationships that are established and the trust that's established'. The role of DFV-informed services with good working relationships with police are therefore critically important in

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<sup>17</sup> Silke Meyer and Ellen Reeves, 'Policies, Procedures and Risk Aversity: Police Decision-Making in Domestic Violence Matters in an Australian Jurisdiction' (2021) 31(10) *Policing & Society* 1168, 1775.

<sup>18</sup> *Ibid* 1775–1166.

supporting victims/survivors' views and preferences to be heard throughout the ADVO process. Reliance on these settings is problematic because, as Lawyer 1, quoted in **Chapter 6** said:

[It] shouldn't be that that [good working relationships are] determinative of the proper justice response for a person in need of protection' and 'if the AVO proceedings brought ... a better framework of screening and risk assessment, you wouldn't need to necessarily rely on those relationships.

It is also important to recognise that victims/survivors' views of risk may not align with those advocates or services either, as reported in **Chapter 5**. Walklate and Mythen argue that even though professionals may be committed to advocating for victims/survivors' safety 'the practice of risk assessment valorizes the professional's knowledge as much as it valorizes the tools available to the professional. Both contribute to the decision-making process and inform the nature of the response'.<sup>19</sup> Consequently, 'While clearly the relationship with those 'at risk' constitutes part of [professionals'] decision-making process ... the question remains as to the extent [the] voices [of those 'at risk'], and their assessment of risk, feature'<sup>20</sup> within the broader framework of DFV risk assessment. In considering the need to adopt a structured approach to risk in the NSW ADVO process, this raises questions about whose views will be prioritised in these assessments. For example, Fitz-Gibbon et al's 2019 Australian study that interviewed judicial officers about their views of perpetrator interventions found that improving safety outcomes for victims/survivors was a key consideration for their decision making to use perpetrator interventions such as men's behaviour change programs and POs.<sup>21</sup> However, they also 'noted that victims'/survivors' views about interventions often differed from those of legal practitioners and/or judicial officers',<sup>22</sup> and interviewed judges held differing views about how influential victims/survivors' preferences should be in their decisions to order an intervention.<sup>23</sup> Equally concerning is the ARTD's findings that police are not always adequately incorporating victims/survivors' self-assessments of risk when administering the DVSA.<sup>24</sup>

Many interviewees in this study reflected on the issues created by victims/survivors' views not being centred, as reported in **Chapter 6**, and suggested they actively valued victims/survivors'

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<sup>19</sup> Sandra Walklate and Gabe Mythen, 'Beyond Risk Theory: Experiential Knowledge and "Knowing Otherwise"' (2011) 11(2) *Criminology & Criminal Justice* 99, 108.

<sup>20</sup> Walklate and Mythen (n 19) 108.

<sup>21</sup> Kate Fitz-Gibbon et al, *The Views of Australian Judicial Officers on Domestic and Family Violence Perpetrator Interventions* (Research Report No Issue 13, ANROWS, 2020) 38.

<sup>22</sup> *Ibid* 39.

<sup>23</sup> *Ibid* 42.

<sup>24</sup> ARTD, *Safer Pathway Evaluation Final Report* (NSW Government, February 2019) 52.

autonomy and own views in their considerations.<sup>25</sup> For instance, as quoted in **Chapter 6**, Magistrate 6 commented that they viewed women to be in the ‘best position to assess their own risk and know what they want’, and Lawyer 6 emphasised ‘the right of people to make decisions about their own lives’ (Lawyer 6). The individual commitment of these participants to ensuring victims/survivors ‘[feel] empowered, [feel] safe, and [feel] heard, by both the police, the court system, and anyone else that seeks to listen’ (Magistrate 8) were clearly influential on these individual court-involved actors’ broader approaches and risk-based practices throughout the court process. However, without a formalised, structured approach that embeds opportunities for victims/survivors’ involvement in the ADVO process (to the degree they wish to be involved), it is evident that on a system-level ‘it comes down to, I think, the loudest, strongest voice, rather than perhaps having that proper lens of risk and safety overlaying the proceedings’ (Lawyer 1). Similarly, as quoted in **Chapter 6**, Lawyer 7 observed there is currently ‘just this real discrepancy between a legal process of “this is what we’re doing to protect you”, and [the victim/survivor’s] real world of “this is my day-to-day life”’.

Findings in **Chapter 6** illustrated that many participants observed victims/survivors often feel disempowered and unheard in the ADVO process as a consequence. They described victims/survivors being treated throughout the ADVO process as a witness whose ‘sole function is to turn up to court’ (Lawyer 7), and that ‘Not in all cases are PINOPs views sought and not in all cases are PINOPs views about what they want to see in an order put before the court’ (Lawyer 5). As Magistrate 6 put it, ‘from a complainant’s point of view, it’s very disempowering’. This disempowerment can be particularly acute for multiply marginalised people, as Lawyer 7 quoted in **Chapter 6** emphasised when explaining that the ‘complexity around historical treatment by governments of Aboriginal people’ means that those clients can experience these decisions being made contrary to their wishes as:

just another layer of [systemic abuse of power and process] occurring in modern-day life of now we’ve got the police doing this us. They’re not even interested in listening to my story, understanding our culture, and how the family dynamic works in our mob, and all that stuff. Again, [it] just adds to that disempowerment and that distrust’.

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<sup>25</sup> An additional tension that may arise here are the potential adverse effects of following victim/survivor preferences for no intervention on subsequent requests for help, and police and/or court perceptions of victim/survivors’ (un)willingness to proceed beyond initial reports. There was not sufficient data in this project to explore this issue in depth, and it presents an important consideration for further research.

Some of these observations and critiques echo previous studies findings of ‘structural and systemic barriers to [victims/survivors’] participation’ in the legal system generally,<sup>26</sup> and in relation to DFV policing approaches to victims/survivors’ preferences and POs specifically.<sup>27</sup> For example, the Victorian Victims of Crime Commissioner found that some victims/survivors surveyed in their study ‘did not feel like active participants during the intervention order process’.<sup>28</sup> Adopting an expansive understanding of safety, as argued in **Chapter 2**, requires recognising ‘that safety has multiple dimensions, involving not only the safety from an offender, but from being shamed and from others assuming control’.<sup>29</sup> The findings in this thesis also raise important questions about the extent to which key court-involved actors’ and institutional priorities and goals align with victims/survivors’ in the ADVO process, ‘whose knowledge counts in the risk assessment process’ when they conflict,<sup>30</sup> and what implications this may have for victims/survivors’ experiences of safety. As Walklate and Mythen argue, professionals’ judgements of risk — even where informed by forensic measures — are likely shaped by ‘a whole range of different kinds of knowing’ that ‘are constructed within a logic of norms and values that are felt’.<sup>31</sup>

Ensuring that victims/survivors’ input is not only heard, but valued, at all stages of the ADVO process and in any considerations of risk, is therefore important. Indeed, lawyer and support worker interviewees made clear it is crucial that victims/survivors’ views inform the making of ADVOs, because those goals and priorities often have broader impacts for victims/survivors’ safety (understood holistically). For example, strict ADVO conditions can put ‘a woman’s housing at risk’ (Support Worker 4), and cause ‘financial hardship, other hardship to the victim’ (Magistrate 12), due to the ‘often ... very complex issues going on in their life ... [and] varying levels of disadvantage and social marginalisation’ (Lawyer 7). Understanding these impacts can be very consequential for the efficacy of ADVOs’ enforcement, as discussed in **Chapter 6**, as victims/survivors are less likely to report a breach or come back to the legal system for assistance in the future if they did not want the ADVO conditions put in place.<sup>32</sup> Further, other studies indicate ‘that from a victim’s perspective, safety is key in their decisions regarding “staying in” or

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<sup>26</sup> See, eg, Victims of Crime Commissioner, *Silenced and Sidelined: Systemic Inquiry into Victim Participation in the Justice System* (Victims of Crime Commissioner, 2023) <[https://victimsofcrimecommissioner.vic.gov.au/media/lpufjx5h/silenced-and-sidelined\\_systemic-inquiry-into-victim-participation.pdf](https://victimsofcrimecommissioner.vic.gov.au/media/lpufjx5h/silenced-and-sidelined_systemic-inquiry-into-victim-participation.pdf)> 466.

<sup>27</sup> Meyer and Reeves (n 17) 1175–1177.

<sup>28</sup> Victims of Crime Commissioner (n 26) 287.

<sup>29</sup> Joanne M Spangaro, Anthony B Zwi and Roslyn G Poulos, “Persist. Persist.”: A Qualitative Study of Women’s Decisions to Disclose and Their Perceptions of the Impact of Routine Screening for Intimate Partner Violence’ (2011) 1(2) *Psychology of Violence* 150, 158.

<sup>30</sup> Walklate and Mythen (n 19) 107.

<sup>31</sup> *Ibid* 108.

<sup>32</sup> M Kristen Hefner et al, ‘Mediating Justice: Women’s Perceptions of Fairness in the Civil Protection Order Process’ (2021) 36(7–8) *Journal of Interpersonal Violence* 3331, 3333.

“dropping out” of the judicial system’.<sup>33</sup> Therefore, as Lawyer 7 so aptly put it, ‘how you communicate [with victims/survivors] and how you deal with things really influences the way an outcome occurs’.

In arguing for greater emphasis on victims/survivors’ input here, I emphasise the importance of embedding *opportunities* for this to occur in the ADVO process. This is in recognition that not all victims/survivors will want an ADVO, or to engage in the ADVO process; and that there may be practical challenges in engaging victims/survivors in risk assessment processes<sup>34</sup> and/or victims/survivors may minimise their experiences or underestimate risks when engaging with court-involved actors’ risk assessments.<sup>35</sup> These challenges may be particularly acute in the ADVO process, in which the court and individual court-involved actors already operate with considerable time and resource constraints to undertake sufficient risk considerations, as detailed in **Chapter 4**. However, understanding safety expansively, and recognising the importance of victims/survivors’ empowerment throughout both risk assessment and ADVO processes, fundamentally requires embedding more opportunities for victims/survivors’ input in the process than is currently occurring. As Magistrate 8 quoted in **Chapter 6** said:

This is not just about the endgame, which is the decision about AVO. This is also about the process for a person in need of protection feeling empowered, feeling safe, and feeling heard, by both the police, the court system, and anyone else that seeks to listen. Such as they feel as though there is a system that provides protection that they have confidence in.

These findings reflect Backhouse and Toivonen’s emphasis that:

Victim-survivors’ risks and needs are best addressed through collaborative approaches that empower them to rebuild their lives, and that are based on the principle that victim-survivors are the experts of their experiences and that when appropriately supported by professionals and robust risk assessment processes, are best placed to lead the development of plans aimed at securing their long-term safety and wellbeing.<sup>36</sup>

In sum, adopting a structured approach to risk, underpinned by a clear conceptual framework of DFV risks and embedded opportunities for victims/survivors’ input to inform all stages of the ADVO process, is clearly required in order to improve the efficacy of the ADVO process in NSW in enhancing victims/survivors’ safety — not merely in ensuring more consistent ADVO outcomes. Consideration also needs to be given, however, to unique challenges and limitations

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<sup>33</sup> Kate Blackburn and Sofia Graca, ‘A Critical Reflection on the Use and Effectiveness of DVPNs and DVPOs’ (2021) 22(1) *Police Practice & Research* 23, 32.

<sup>34</sup> Kropp (n 7) 212.

<sup>35</sup> Backhouse and Toivonen (n 14) 23; Kropp (n 7) 212.

<sup>36</sup> Backhouse and Toivonen (n 14) 10.

that may arise in attempting to design and implement a consistent, structured approach to risk in the distinct settings of the NSW ADVO system.

### 7.3. Unique Challenges in the New South Wales Apprehended Domestic Violence Order System

The findings from **Chapters 4 to 6** strongly suggest that adopting a structured approach to risk in the ADVO process would support more consistent decision making and outcomes in a system that is currently characterised by siloed, localised and inconsistent understandings and practices in assessing 'risk'. However, the findings of **Chapter 4** also raise important issues about inherent constraints and unique challenges — legislative, procedural and practical — that exist in the distinct NSW ADVO court context in implementing any such approach. These constraints include the ADVO system's adversarial jurisdiction, evidentiary and legal procedural constraints, the court's constrained capacity to ensure ongoing and responsive risk assessment and management, and the dominant role of police. Recollecting Magistrate 8's comment that the ADVO process 'is not a sit-down, have a conversation, and let's all come talk on an understanding about how we protect this person ... this is an adversarial process', it is evident that the current nature of the ADVO system actively limits the implementation of good practice principles of DFV risk-based approaches, including collaborative safety planning and iterative, ongoing risk screening and assessment. Indeed, many interviewees were proponents of the benefits of adopting good practice risk-based approaches, including emphasising the importance of victims/survivors' self-assessments, sector-wide integration, coordination and collaboration, and ongoing/responsive assessments. Yet many were also sceptical that these features of good practice were compatible with the adversarial ADVO system and core principles and practices of the legal and judicial professions, meaning they were pessimistic that flexible risk-based approaches can 'be done in the system that we currently have' (Magistrate 8). The tensions between 'ideal scenarios' (Lawyer 7), and what is actually possible within the ADVO landscape, were recurrent themes throughout the study's findings.

Some interviewees suggested the distinct constraints created by the current ADVO landscape could be addressed by providing clear legislative direction or judicial guidance as to the consideration of risk in the *ADVO Act*. This is currently lacking. Some national resources are available to assist judicial decision makers to become informed about 'risk', including the *National DFV Bench Book*, which offers contextual background on factors affecting risk.<sup>37</sup>

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<sup>37</sup> Heather Douglas, *National Domestic and Family Violence Bench Book* (The Australasian Institute of Judicial Administration, 2024) <<https://dfvbenchbook.aija.org.au/contents>> [4.2]. Also see [7.3] on 'Information sharing', and [5] on 'Fair hearing and safety'.

However, the current NSW *Local Court Bench Book* does not include any guidance about risk considerations for the purposes of ADVOs, except when making orders of indefinite duration.<sup>38</sup> Contrast, for example, the views of Victorian magistrates in the Centre for Innovative Justice’s report, who identified risk as a relevant consideration in their FVIO decision making because it was explicitly required under the FVIO Act.<sup>39</sup>

Others in this study had more fundamental reservations about the appropriateness of incorporating risk-based practices in a legal context, similar to those expressed in other international studies such as Kropp<sup>40</sup> and Strand, Fröberg and Storey,<sup>41</sup> discussed in **Chapter 2**. For example, views were expressed in **Chapter 6** about whether ‘[magistrates would] ever implement [a formal risk assessment tool] ... [or] see that as their role to implement them’ (Lawyer 3). In a review of the intimate partner violence (IPV) risk assessment literature in the US, Kropp speculated legal practitioners may be hesitant about using actuarial tools if they perceive those tools limit legal practitioners to ‘considering only one “test” of risk while ignoring legal, ethical, and professional requirements to consider all available information from all perspectives’.<sup>42</sup> Strand, Fröberg and Storey’s study found Swedish prosecutors held similar concerns about the use of tools potentially undermining legal professionals’ objectivity.<sup>43</sup> The NSW Government’s *Companion Guide to the DVSAT* appears to reflect some of these concerns by including guidance on the ‘Use of the DVSAT in court proceedings’.<sup>44</sup> Other jurisdictions do offer models, however, of greater embedding of risk-based considerations into court processes that do not involve judicial officers having a role in administering, or being provided with results from, formal risk assessment tools. For example, the Victorian FVIO system has introduced applicant and respondent workers to Magistrates Courts in Victoria in order to undertake risk assessments as part of their roles in the court process,<sup>45</sup> and the Family Court’s Lighthouse Project includes risk assessments being conducted to assist in case management but is not given

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<sup>38</sup> *Local Court Bench Book* (Judicial Commission of NSW, 2024) <[https://www.judcom.nsw.gov.au/publications/benchbks/local/apprehended\\_violence\\_orders.htm](https://www.judcom.nsw.gov.au/publications/benchbks/local/apprehended_violence_orders.htm)> [22–120] ‘Making orders’. C.f. Judicial College of Victoria, *Family Violence Bench Book* (Judicial College of Victoria, 2025) <<https://judicialcollege.vic.edu.au/resources/family-violence>>.

<sup>39</sup> Campbell et al (n 13) 31. See also Judicial College of Victoria (n 38), which provides guidance to judiciary on ‘assessing risk’.

<sup>40</sup> Kropp (n 7) 206.

<sup>41</sup> Strand, Fröberg and Storey (n 10) 181–182.

<sup>42</sup> Kropp (n 7) 206.

<sup>43</sup> Strand, Fröberg and Storey (n 10) 182.

<sup>44</sup> NSW Government, *Domestic Violence Safety Assessment Tool Guide* (NSW Government, June 2015) <<https://www.legalaid.nsw.gov.au/content/dam/legalaidnsw/documents/pdf/for-lawyers/professional-development/lawyer-education-series/domestic-and-family-violence-essentials/Domestic%20Violence%20Safety%20Assessment%20Tool%20Guide.pdf>> 12. However, no interviewees discussed this section of the guide or these scenarios occurring.

<sup>45</sup> Family Violence Implementation Monitor, *Monitoring Victoria’s Family Violence Reforms Service Response for Perpetrators and People Using Violence within the Family* (Victorian Government, January 2023) <<https://www.fvim.vic.gov.au/sites/default/files/2023-01/Service-response-for-perpetrators-and-people-who-use-violence-within-the-family-24-January-2023-1745hrs.pdf>> 17.

to the court itself.<sup>46</sup> These models offer different examples of potential approaches to embed more structure to the highly individualised risk considerations that are currently occurring in the ADVO process. However, there are no studies establishing the most appropriate frameworks for risk-based approaches to be adopted into PO processes, taking into account the specific and unique challenges that will arise in embedding these approaches in PO processes, suggesting further research is required in relation to this specific setting.

This thesis also highlights inherent limitations with risk-based approaches generally. Issues with the quality and administration of the primary standardised assessment tool used in NSW, the DVSAT, for example, suggest the need for adequate training and qualifications for those who undertake risk assessments, identified in previous studies.<sup>47</sup> However, even where a clear framework and good practice principles and evidence-based tools are consistently and skilfully applied, the findings in **Chapter 6** demonstrate that assessments will always ‘inevitably, have an element of subjectivity to them’<sup>48</sup> and that formal assessment tools or structured approaches also do not provide scientific predictions of risk. Walklate has identified the ‘conflation of prevention with prediction’, is one of ‘the deep-rooted problems with risk and risk assessment practices themselves’.<sup>49</sup> This was recognised by some interviewees in this study too, who suggested assessing risk involves ‘trying to crystal ball what might happen’ (Magistrate 7).

The inability to predict risk is an inherent limitation in any risk-based approaches, and any approaches to risk in the ADVO process should therefore be wary of perpetuating the ‘aura of scientific legitimacy’<sup>50</sup> of risk assessments that has been raised in the literature. As Walklate and Mythen note, quoted in **Chapter 2**, ‘the impossibility of determining future behaviour ... raises questions about not only how risk assessments are actually made but also about whose knowledge counts in that risk assessment process’.<sup>51</sup> This reflection is particularly apt in this study, in light of the issues I have identified about the dominant role of police in the current ADVO process and risk considerations. Adopting more structured approaches to risk will mitigate, but not necessarily resolve, inconsistencies and subjectivities in the decisions, considerations and ultimate outcomes of ADVOs, and questions remain as to how such approaches may be operationalised and implemented in practice. As Walklate and Mythen

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<sup>46</sup> Federal Circuit and Family Court of Australia, ‘Lighthouse Information Sheet for Parties — Risk Screening’, *Family Law* <<https://www.fcfcfa.gov.au/fl/pubs/lhp-info-parties>>.

<sup>47</sup> Kropp (n 7) 212–213.

<sup>48</sup> Maria Ansbro, ‘The Nuts and Bolts of Risk Assessment: When the Clinical and Actuarial Conflict’ (2010) 49(3) *The Howard Journal of Criminal Justice* 252, 260.

<sup>49</sup> Sandra Walklate, ‘Criminology, Gender and Risk: The Dilemmas of Northern Theorising for Southern Responses to Intimate Partner Violence’ (2018) 7(1) *International Journal for Crime, Justice and Social Democracy* 1, 4.

<sup>50</sup> Chris Newman, *Expert Domestic Violence Risk Assessments in the Family Courts* (Commissioned by Respect (UK)) 5.

<sup>51</sup> Walklate and Mythen (n 19) 107.

argue: ‘risk assessment tools have their uses ... However, the constraints imposed on these uses by the concept of risk itself need to be considered’.<sup>52</sup> Noting the differing conceptualisations and practices regarding ‘risk’ identified in this study, future work on DFV risk considerations within the ADVO process needs to establish ‘a more explicit and clear rationale as to what is being assessed, and why, in order to progress the “science” behind assessment as well as to more effectively support the practitioners who assess risk as part of their professional practice’.<sup>53</sup>

It is also important that the development and design of such a framework proper considers the institutional resourcing provided to courts and professionals in implementing these approaches. The Centre for Innovative Justice questioned, in its Victorian study of FVIOs, whether expecting the court to simply do ‘more of the same in the face of [overwhelming] demand is likely to achieve safer outcomes’.<sup>54</sup> Instead, it ‘recommended’ a streamed response to FVIOs which first enables earlier engagement with crucial legal and support services; and which then directs matters through a stream which is best suited to their relevant risk level and needs’. It also suggested ‘that the court response to family violence ... needs to shift from a demand driven objective of simply “getting the order made” to “getting the right order made, in the right way”’.<sup>55</sup> Determining what form of structured approach to risk should be adopted in the NSW ADVO system therefore requires a comprehensive examination of the complex legal, practical and resourcing factors that influence the ADVO system’s settings. For an examination of these factors to be comprehensive and meaningful, input by multiple stakeholders across multiple services is required, including from victims/survivors themselves, about what and how good practice DFV risk-based approaches can best be incorporated into the ADVO system in light of the findings in this thesis.

An examination also needs to account for ongoing and systemic issues in the ADVO system, and across the DFV service delivery system, that may influence whether and how risk considerations would occur in practice. For example, numerous studies have identified ongoing issues in the legal system in which POs are administered, including incident-focused approaches,<sup>56</sup> practical ‘constraints of the court environment’,<sup>57</sup> the “internal” legal culture of the judges, lawyers, and

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<sup>52</sup> Walklate and Mythen (n 19) 110.

<sup>53</sup> Juan Jose Medina Ariza, Amanda Robinson and Andy Myhill, ‘Cheaper, Faster, Better: Expectations and Achievements in Police Risk Assessment of Domestic Abuse’ (2016) 10(4) *Policing* 341, 343.

<sup>54</sup> Campbell et al (n 13) 111.

<sup>55</sup> *Ibid.*

<sup>56</sup> Jane Wangmann, ‘Incidents v. Context: How Does the NSW Protection Order System Understand Intimate Partner Violence?’ (2012) 34 *Sydney Law Review* 695; Heather Douglas, ‘Domestic Violence Protection Orders and Their Role in Ensuring Personal Security’ in Kate Fitz-Gibbon et al (eds), *Intimate Partner Violence, Risk and Security: Securing Women’s Lives in a Global World* (Routledge, 1<sup>st</sup> ed, 2018) 229; Robin Fitzgerald and Heather Douglas, ‘The Whole Story: The Dilemma of the Domestic Violence Protection Order Narrative’ (2020) 60(1) *The British Journal of Criminology* 180, 183.

<sup>57</sup> Fitzgerald and Douglas (n 56) 181.

other legal actors who are called upon to put new legislation into effect',<sup>58</sup> and inadequate understandings of coercive control.<sup>59</sup> Feminist scholars have long-identified pervasive implementation problems of feminist reforms in civil legal systems, where well-intended and feminist-informed legislative reforms fail to improve outcomes due to resistant legal cultures that govern how decision makers put such laws into practice.<sup>60</sup> Simply imposing a framework for considering risk is not sufficient; implementation and understanding the culture and operation of the ADVO setting in which such a framework will operate is also critical. Indeed, as Wilson et al observe:

The challenge in resolving family violence is the diversity of stakeholders, their relatively siloed ways of working, and the differing language and approaches they take ... It also requires changing the attitudes and behaviours of those working with victims and perpetrators of this socially complex problem. Integration at a macro (system) and micro (person's safety strategy) level cannot occur without a reconfiguration and realignment of the concepts which underpin our ways of working.<sup>61</sup>

Reflecting on the potential opportunities, benefits, challenges and limitations in embedding a more structured approach to risk in the ADVO process may therefore also require a more fundamental rethink of the expectations, design and operation of the ADVO system. As Lawyer 4 observed 'There's a lot of other practical things that you can do' to meaningfully enhance victims/survivors' safety but that, 'from a legal sense [an AVO] is probably the best mechanism that we have at the moment to try and mitigate that risk. Even though it is fraught with problems'. Multiple interviewees expressed similar views, in simultaneously recognising ADVOs as the primary legal tool available to enhance safety while acknowledging the inherent limitations in being able to effectively do so via a legal response. Determining what a workable, structured approach to risk looks like in the specific ADVO context is therefore a crucial area for further research.

## 7.4. Chapter Conclusion

In conclusion, I posit three key implications emerging from my study's findings for the assessment and management of 'risk of DFV' for the purposes of ADVOs in NSW. Firstly, the

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<sup>58</sup> Rosemary Hunter, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (Cambria Press, 2008) 6.

<sup>59</sup> Douglas (n 56) 229.

<sup>60</sup> Hunter (n 58); Wangmann, Jane, 'Coercive Control as the Context for Intimate Partner Violence: The Challenge for the Legal System' in Marilyn McMahon and Paul McGorery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer Singapore, 2020) 219.

<sup>61</sup> Denise Wilson et al, 'Becoming Better Helpers: Rethinking Language to Move beyond Simplistic Responses to Women Experiencing Intimate Partner Violence' (2015) 11(1) *Policy Quarterly* 25, 30.

current lack of conceptual framework provided by the legislation, ambiguities in individual court-involved actors' conceptualisations of risk and the court's role in assessing it, and inconsistent and siloed risk-based practices all point towards the need for a structured approach to assessing DFV risks, underpinned by a clear conceptual framework, to be adopted in the ADVO process. Embedding a structured approach to risk for the purposes of ADVOs, underpinned by a clear conceptual framework of what 'DFV risk' means, would assist court-involved actors to develop a shared language of risk, and clarify roles and expectations of their risk considerations throughout the ADVO process.

Secondly, as part of this structured approach, it is crucial that opportunities for victims/survivors' input on risk and ADVO considerations are embedded throughout the ADVO process. Several factors currently interact to minimise victims/survivors' input into the current NSW ADVO process, particularly because of the dominant and pivotal gatekeeping role of police throughout most stages of the process. Based on this study's findings, ensuring opportunities for victims/survivors' input would improve risk considerations currently being undertaken, and, consequently, the appropriate tailoring of ADVOs to victims/survivors' individual circumstances and safety needs.

Lastly, in arguing for the important benefits adoption of a court-wide, structured approach to risk would offer in enhancing consistent decision making and ADVO outcomes, the findings in this study also demonstrate that several significant challenges and limitations exist in attempting to do so. These challenges include issues with the conceptual ambiguity of 'risk' and inherent subjectivity in assessing risk (even where shared tools are used), identified in other literature. Specific issues also arise in NSW with the quality and administration of the primary risk assessment tool, the DVSAT. Further, this study demonstrates that unique challenges also arise in incorporating structured risk-based approaches into legal settings, such as the ADVO system. Many of these challenges and constraints are a product of the broader ADVO landscape, which currently limits the capacity of the court to engage in assessing DFV risks in accordance with good practice principles of DFV risk-based frameworks. The expected role and scope of ADVOs in relation to risk, and how best to structure risk-based approaches in this specific setting, therefore remains an important question for further examination.

In sum, if the ADVO process is expected to offer a means of enhancing victims/survivors' safety, clarity needs to be given to the role, purpose and intent of ADVOs in relation to addressing DFV risks, and the role of courts and court-involved actors in achieving those aims. Many of these conflicts and limitations relate to broader questions raised in the literature about what and how

risk-based approaches, and PO more broadly, are envisioned to enhance victims/survivors' safety. Distilling and addressing these tensions is necessary in order to answer how ADVO procedures and practices can best be improved to enable 'risk of DFV' to be considered by key court-involved actors in the making of ADVOs (**RQ5**).

## Chapter 8: Conclusion

This study has examined how risk considerations inform the making of Apprehended Domestic Violence Orders (ADVOs) in New South Wales (NSW), and what this means for enhancing victims/survivors' safety. In the previous chapter I summarised the main findings from this study about whether and how court-involved actors consider risk in the current ADVO landscape, and the implications of these findings for domestic and family violence (DFV) risk assessment and management in NSW. In this final chapter, I underline the significance of this study and the original contributions it makes to the field. I conclude with directions for future research.

### 8.1. Significance of the Study

This study's examination of how risk is considered in the making of ADVOs in NSW provides new insights into enhancing the efficacy of a heavily relied upon legal intervention for DFV aimed at protecting victims/survivors from future violence.<sup>1</sup> The importance of crafting effective responses to DFV, such as ADVOs, cannot be understated. DFV is a pervasive and prevalent issue in Australia, causing myriad and far-reaching harms for victims/survivors and their families. These include not only serious injury and death, but also long-lasting adverse health, wellbeing and social impacts that warrant redress. Current NSW and Australian policy foci recognise, therefore, that 'safety is the first priority in any response to domestic, family and sexual violence'<sup>2</sup> and have implemented a variety of legal and non-legal responses in an attempt to reduce and eliminate DFV, with varying success. As a longstanding, primary legal intervention to DFV, ADVOs are widely emphasised in safety planning and responses to DFV in NSW. Yet there is little research on the effectiveness of ADVOs in NSW and there remains mixed evidence about the effectiveness of protection orders (POs) more generally in mitigating risk of DFV and enhancing victims/survivors' safety.<sup>3</sup> Better understanding the factors influencing the efficacy of ADVOs in enhancing victims/survivors' safety is therefore of significant import, in recognition

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<sup>1</sup> Heather Douglas, 'Domestic Violence Protection Orders and Their Role in Ensuring Personal Security' in Kate Fitz-Gibbon et al (eds), *Intimate Partner Violence, Risk and Security: Securing Women's Lives in a Global World* (Routledge, 1<sup>st</sup> ed, 2018) 216; Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC), *Family Violence — A National Legal Response* (ALRC and NSWLRC, 2010) [4.23].

<sup>2</sup> Cherie Toivonen and Corina Backhouse, *National Risk Assessment Principles for Domestic and Family Violence* (ANROWS Insights 07/2018, ANROWS, 2018) 5.

<sup>3</sup> Reinie Cordier et al, 'The Effectiveness of Protection Orders in Reducing Recidivism in Domestic Violence: A Systematic Review and Meta-Analysis' (2019) 22(4) *Trauma, Violence, and Abuse* 804; Christopher T Benitez, Dale E McNeil and Renee L Binder, 'Do Protection Orders Protect?' (2010) 38(3) *Journal of the American Academy of Psychiatry and the Law* 376, 385.

that the ‘the consequences of ineffective responses can be frustrating, disempowering and potentially lead to lethal consequences’.<sup>4</sup>

Extant national and international literature documents inconsistency in PO outcomes and variable considerations undertaken in court-involved actors’ decision making,<sup>5</sup> and conditions on orders do not always align with victims/survivors’ diverse goals,<sup>6</sup> realities of violence<sup>7</sup> or holistic experiences of safety.<sup>8</sup> ADVO applications in NSW are also overwhelmingly police-led, further undermining the oft-perceived benefits of POs identified in international literature of providing victims/survivors with an avenue to seek legal protection independently of criminal or policing responses.

Recognition of the need to improve decision-making processes and outcomes for POs has led some international researchers to suggest it may be beneficial for court-involved actors to be better informed by risk information.<sup>9</sup> Such suggestions reflect the increasing focus on risk in DFV responses more generally in Australia and internationally, in recognition of the perceived benefits risk-based approaches offer in responding effectively to DFV. These benefits include: providing a shared language for diverse professionals to communicate with each other; assisting institutions in prioritising and targeting finite resources where they are most needed; and enabling more tailored and consistent DFV interventions to victims/survivors’ individual circumstances.<sup>10</sup> These benefits are particularly apparent when formal, multi-agency risk-based frameworks are adopted, in order to provide structured, common multi-agency approaches to

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<sup>4</sup> Annabel Taylor et al, *Domestic and Family Violence Protection Orders in Australia: An Investigation of Information Sharing and Enforcement: State of Knowledge Paper* (ANROWS Landscapes 16/2015, ANROWS, 2015) <[https://anrows-2019.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2019/02/19024752/16\\_4.1-Legal-WEB\\_FINAL\\_0-1.pdf](https://anrows-2019.s3.ap-southeast-2.amazonaws.com/wp-content/uploads/2019/02/19024752/16_4.1-Legal-WEB_FINAL_0-1.pdf)> 44.

<sup>5</sup> E.g. Karol Lucken, Jeffrey W Rosky and Cory Watkins, ‘She Said, He Said, Judge Said: Analyzing Judicial Decision Making in Civil Protection Order Hearings’ (2015) 30(12) *Journal of Interpersonal Violence* 2038, 2062; Christine Agnew-Brune et al, ‘Domestic Violence Protective Orders: A Qualitative Examination of Judges’ Decision-Making Processes’ (2017) 32(13) *Journal of Interpersonal Violence* 1899, 1934; Patricia Easteal, Lorana Bartels and Reeva Mittal, ‘The Importance of Understanding the Victims’ “Reality” of Domestic Violence’ (2019) 44(1) *Alternative Law Journal* 11, 13.

<sup>6</sup> Lauren Bennett Cattaneo, Jessica Grossmann and Aliya R Chapman, ‘The Goals of IPV Survivors Receiving Orders of Protection: An Application of the Empowerment Process Model’ (2016) 31(17) *Journal of Interpersonal Violence* 2889; Jill Theresa Messing et al, ‘“Not Bullet Proof”: The Complex Choice Not to Seek a Civil Protection Order for Intimate Partner Violence’ (2021) 27(2) *International Review of Victimology* 173.

<sup>7</sup> Easteal, Bartels and Mittal (n 5).

<sup>8</sup> Joanne M Spangaro, Anthony B Zwi and Roslyn G Poulos, ‘“Persist. Persist.”: A Qualitative Study of Women’s Decisions to Disclose and Their Perceptions of the Impact of Routine Screening for Intimate Partner Violence’ (2011) 1(2) *Psychology of Violence* 150, 158.

<sup>9</sup> E.g. Corey Nichols-Hadeed et al, ‘Assessing Danger: What Judges Need to Know’ (2012) 50(1) *Family Court Review* 150; Susanne JM Strand, Sofi Fröberg and Jennifer E Storey, ‘Protecting Victims of Intimate Partner Violence: Swedish Prosecutors’ Experiences of Decision-Making Regarding Restraining Orders’ (2018) 19(2) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 170.

<sup>10</sup> Jude McCulloch et al, *Review of the Family Violence Risk Assessment and Risk Management Framework (CRAF)* (Final Report, Prepared for the Department of Health and Human Services by the School of Social Sciences, Focus Program on Gender and Family Violence: New Frameworks in Prevention, Monash University, 2016) 35; Juan Jose Medina Ariza, Amanda Robinson and Andy Myhill, ‘Cheaper, Faster, Better: Expectations and Achievements in Police Risk Assessment of Domestic Abuse’ (2016) 10(4) *Policing* 341, 341; P Randall Kropp, ‘Intimate Partner Violence Risk Assessment and Management’ (2008) 23(2) *Violence and Victims* 202, 207.

assist in the integration and coordination of service delivery and responses.<sup>11</sup> The increasing primacy of risk-based approaches to DFV in both government policy and professional practice, along with the ‘future-focus’ of POs in preventing future DFV, suggest risk considerations are an important and relevant consideration for courts dealing with PO matters. However, there is surprisingly scant research examining whether, when and how risk considerations may or may not inform court-involved actors’ decision making about POs, and what this means for enhancing victims/survivors’ safety, particularly in Australian jurisdictions such as NSW. Understanding whether and how ADVOs in NSW can be best used to reduce DFV and enhance victims/survivors’ safety is therefore an under-examined, yet crucially important feature to examine in NSW DFV responses.

With this aim in mind, in this study I have explored the extent to which current legal frameworks, conceptualisations and practices of court-involved actors in NSW enable or constrain considerations of DFV risk to occur in relation to ADVOs. I have done so based on interviews I conducted with 28 key court-involved actors involved in the NSW ADVO process. The respondents included 12 magistrates, eight lawyers and eight court support workers, providing invaluable expert insights on these topics. My aim in speaking to these pivotal court-involved actors was to better understand factors that may enable or hinder the efficacy of ADVOs in NSW, from those with technical knowledge and expertise of this complex socio-legal area. I have drawn on a critical theoretical framework informed by components of constructivist grounded theory, structural intersectionality, feminist legal theory and risk society scholarship, in recognition of important critiques and limitations of risk-based approaches to DFV that have also been raised in the literature, and to ensure my analysis of interview data was informed by an expansive understanding of ‘safety’. This has included three sensitising concepts that have implicitly informed my data analysis, including:

1. an ontological emphasis on understanding meanings of ‘risk’ and other relevant concepts as constructed by relevant ADVO actors, which shapes their actions;
2. resisting framing understandings of ‘risk’, ‘safety’ or experiences and dynamics of DFV as universal, as this fails to account for the individuals’ lived realities; and
3. foregrounding the role of structures, systems and processes in analysing the way in which ADVOs operate to enable, or constrain, effective responses to DFV.

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<sup>11</sup> Corina Backhouse and Cherie Toivonen, *National Risk Assessment Principles for Domestic and Family Violence: Companion Resource* (ANROWS Insights 09/2018, ANROWS, 2018) 9; Jude McCulloch et al (n 10).

In applying this research methodology, my findings deliver several substantial contributions to the field that advance our understandings of how ADVOs (and the court-involved actors involved in making them) can better respond to the pervasive issue of DFV.

## 8.2. Original Contributions of the Study

This study makes several important, original contributions to the field. These include contributions specific to NSW, and with significance for the national and international body of knowledge on the efficacy of POs as a key legal response to DFV.

In relation to the existing literature on POs, my findings add new knowledge to the factors influencing the effectiveness of ADVOs, particularly in relation to improving consistent processes and outcomes. The central finding of this study is that adopting a structured approach to risk considerations in the ADVO court process would support more consistent decision making by the diverse professionals involved in the ADVO process in NSW. This finding is consistent with those of existing DFV risk literature that risk-based approaches support more consistency in DFV responses.<sup>12</sup> Findings in this thesis demonstrate that these benefits extend to POs as a key legal response, which has not been previously identified in Australian research and only explored in depth in a very limited number of international studies.<sup>13</sup> For example, a key theme throughout this study is the inconsistent experiences and outcomes of the ADVO process victims/survivors currently encounter as a result of variable approaches to, and understandings of, 'risk' by different ADVO court-involved actors (**Chapter 6**).

Inconsistent and siloed risk-based practices are occurring in the ADVO system due to the mixture of some court-involved actors (police and court support workers) routinely screening and assessing risk using a standardised assessment tool (the DVSAT), while others (magistrates and lawyers) are largely applying their own unstructured professional judgement (**Chapter 6**). Further, individual court-involved actors — whether applying structured approaches or not — are currently bringing varying understandings of 'risk' and the role of the court in relation to assessing and managing it, to their considerations (**Chapter 5**). These varying understandings inhibit court-involved actors' communications with each other about risk, suggesting an additional explanation for the prevalence of inconsistent outcomes in PO processes. While these benefits of risk assessment frameworks have been identified more generally, they have not previously been studied in depth in relation to ADVOs.

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<sup>12</sup> Toivonen and Backhouse (n 2) 4.

<sup>13</sup> See, eg, Nichols-Hadeed et al (n 9); Strand, Fröberg and Storey (n 9).

These insights are also an important addition to the international PO literature, which has primarily focused on studying the influence of discrete factors and/or the decision making of single professional roles such as the judiciary,<sup>14</sup> rather than on interrelated factors influencing multiple interacting actors' practices. In contrast, my thesis provides insights into the entwined legislative, procedural and practical factors that shape court-involved actors' decision making, practices and interactions. The study findings highlight the deeper ambiguities created by the lack of conceptual framework in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ('ADVO Act'), which undermines the possibility of shared understandings of 'risk', 'DFV' and the role of courts and ADVOs. The ad hoc and subjective nature of risk considerations by court-involved actors identified in this study creates an ADVO system that is inconsistent, unpredictable and deeply vulnerable to the individual biases, attitudes and understandings of individual magistrates, police and other court-involved actors, as established in previous literature.<sup>15</sup> Considering 'It is not uncommon for women who use the legal system as part of their response to DFV to be engaged with several different legal remedies' these findings further underline 'the need for legal responses to DFV to be consistent and to apply similar understandings of DFV within the context in which they operate'.<sup>16</sup> Improving consistency in decision making, processes and PO outcomes is therefore an important benefit that the adoption of a structured approach to risk into the ADVO process can offer.

My research therefore contributes significant new insights in finding that adopting a structured risk-based approach into the ADVO court process, underpinned by a clear conceptual framework for 'risk', can facilitate more 'effective means of communication between service providers'<sup>17</sup> and 'consistency and visibility in risk judgements' in ADVO decision making.<sup>18</sup> This includes the study's findings of the pressing need to clearly define the roles and responsibilities of different court-involved actors in terms of screening, assessing and managing risk, so that considerations of risk do not 'sit with one person only or only one stage', and operate as the 'foremost principle of looking at ADVOs all the way through' the court process (Lawyer 3). This is an important contribution to the literature's understanding of how we can better enable DFV professionals 'to respond and manage the safety of adults and children exposed to violence appropriately and

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<sup>14</sup> See, eg, Agnew-Brune et al (n 5); Ruth E Fleury-Steiner, Susan L Miller and Ava Carcieri, 'Calling the Shots: How Family Courts Address the Firearms Ban in Protection Orders' (2017) 23(9) *Violence Against Women* 1140; Julie M Kafka et al, 'Judging Domestic Violence From the Bench: A Narrative Analysis of Judicial Anecdotes About Domestic Violence Protective Order Cases' (2019) 29(8) *Qualitative Health Research* 1132.

<sup>15</sup> See e.g. Agnew-Brune et al (n5); Lucken, Rosky and Watkins (n5); Eastal, Bartels and Mittal (n5).

<sup>16</sup> Douglas (n 1) 229.

<sup>17</sup> Jude McCulloch et al (n 10) 35.

<sup>18</sup> Kropp (n 10) 207.

consistently<sup>19</sup> via POs, which have mixed efficacy in mitigating risk and protecting victims/survivors from ongoing DFV.<sup>20</sup>

These conclusions echo those of a small number of overseas studies that have previously suggested the routinised use of risk assessment tools or other mechanisms to improve risk considerations at certain points in the PO process,<sup>21</sup> illustrating these international findings have some transferability to the NSW ADVO process. This thesis also builds on the conclusions of those studies by demonstrating that embedding opportunities for victims/survivors' input into all stages of decision making in the ADVO process is a critical component of any such risk-based approach in NSW. My findings add novel insights into the adverse impacts of the lack of input by victims/survivors' into ADVO decision making in NSW. This is an important finding for the Australian context, where POs are primarily police-led — unlike in the US where the majority of PO research has been conducted. As clearly illustrated in previous DFV risk literature, and reiterated by interviewees in this research, victims/survivors' input is crucial to support the appropriate identification, assessment and management of DFV risks and to craft appropriately tailored orders. This is an important additional finding, as *consistency* in decision making and outcomes is not the only factor influencing the effectiveness of POs; accurate risk assessments informed by victims/survivors' views of risk and safety needs are also required.<sup>22</sup>

Similarly, the PO literature establishes that victims/survivors may have differing experiences of DFV and of structural inequities that will shape their experiences of violence and what they may seek from a PO.<sup>23</sup> In contradiction to these well-established principles in the literature, my study has found that that victims/survivors' views on risk and preferences for ADVO conditions are not always sought or centred in the ADVO process in NSW, for several reasons. Most notably, this occurs due to the dominant and gatekeeping role of police — and consequently, their views of risk — at all stages of the ADVO process, combined with the limited capacity of the court to ensure ongoing, responsive risk assessment and management throughout the court process.

My research also adds to empirical and theoretical work on 'risk', by demonstrating important nuance underlying the potential benefits and challenges of adopting risk-based approaches to DFV; and inherent limitations and unique challenges in incorporating such approaches into PO legal processes. Specifically, my findings illustrate that the use of standardised tools such as the

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<sup>19</sup> Toivonen and Backhouse (n 2) 4.

<sup>20</sup> Cordier et al (n 3); Benitez, McNeil and Binder (n 3) 385.

<sup>21</sup> Nichols-Hadeed et al (n 9); Strand, Fröberg and Storey (n 9); D Kelly Weisberg, 'Lethality Assessment: An Impressive Development in Domestic Violence Law in the Past 30 Years' (2019) 30(2) *Hastings Women's Law Journal* 211.

<sup>22</sup> Toivonen and Backhouse (n 2) 6.

<sup>23</sup> John Costello and Alesha Durfee, 'Survivor-Defined Advocacy in the Civil Protection Order Process' (2020) 15(3) *Feminist Criminology* 299; Messing et al (n 6); Easteal, Bartels and Mittal (n 5).

DVSAT by police and WDVCS workers do not ensure these court-involved actors form shared views of risk because of their differing roles (**Chapter 4**), underlying understandings of DFV and risk (**Chapter 5**), and capacity to engage with victims/survivors and elicit risk and safety information (**Chapter 6**). Additionally, there are established issues with the quality and administration of these tools, and interviewees in this study were clear that even where these court-involved actors are administering a standardised tool, orders may be made that do not reflect victims/survivors' lived realities, producing adverse impacts on the efficacy of the orders made. These findings illustrate subtle complexities in the benefits and limitations offered by risk-based approaches to DFV.

Adopting a structured risk-based approach that applies to all court-involved actors in the ADVO process offers potential benefits in improving the *consistency* of ADVO decision making and outcomes, but also requires critical analysis of how such a framework is conceptualised and operationalised in practice. These are the factors that will determine whether such an approach meaningfully contributes to *safer* — not just more *consistent* — outcomes for victims/survivors. These are important insights in light of the increasingly central focus on 'risk' across the DFV field, as they require more nuanced understandings of the potential benefits and challenges in implementing risk-based approaches in practice. For example, in relation to conceptualising 'risk', this study reinforces and extends upon various scholars' critiques of the concept of 'risk', and rationales for applying it to DFV contexts, as ambiguous and ill-defined.<sup>24</sup> It highlights the need to ensure that all court-involved actors' conceptualisations of both 'risk' and 'DFV' are informed by holistic understandings reflecting victims/survivors' individual lived realities, safety needs and priorities. The study therefore emphasises the need to underpin any structured approach to risk with a clear conceptual framework of 'risk' — currently lacking in the ADVO process — and for such a framework to be informed by sophisticated understandings of DFV and expansive understandings of 'safety' that account for victims/survivors' holistic experiences and needs. Without embedding these features, any structured risk framework may result in more *uniform* and systematised decision making and processes, that do not necessarily result in consistently *safer* outcomes.

The study also contributes novel insights into the inherent limitations and unique challenges in adopting a risk-based framework into a legal court context such as the ADVO process, which operates within distinct legal, practical and environmental restrictions in NSW. These include specific constraints created by the current ADVO landscape on the capacity of court-involved

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<sup>24</sup> See, eg, Ariza, Robinson and Myhill (n 10) 343; Jude McCulloch et al (n 10) 35.

actors to effectively consider risk (**Chapter 4**), such as its adversarial jurisdiction that ‘was not designed with family violence in mind’,<sup>25</sup> evidentiary rules, a prevalent culture of consent orders (where there is minimal involvement of the court in decision making), high workloads, and endemic time and resourcing constraints. These constraints revealed in my research show that there are fundamental limitations to what can realistically be achieved in the current, distinct court context in NSW. These have not been documented in the small body of overseas studies arguing, for example, that routinised use of risk assessment tools support improved court-involved actors decision making for POs.<sup>26</sup> Indeed, while some interviewees in this study viewed DFV risk assessment and management frameworks as offering important benefits to enhancing victims/survivors’ safety, many expressed pessimism about implementing such approaches because of the potentially irreconcilable differences between the aims and operation of the adversarial legal proceedings in which ADVOs are administered, and those of collaborative, victim-centred, and safety- and risk-informed approaches advocated by the DFV research field and sector. Resolving these tensions and constraints is therefore crucial to understanding the efficacy of POs in intervening in DFV, as differing understandings of these issues directly inform court-involved actors’ conceptualisations of ‘risk’ and the role of court-involved actors in assessing and managing it, and the risk-based practices they consequently adopt — as this study has demonstrated.

### 8.3. Directions for Future Research

The complex factors highlighted by this thesis as affecting the operation of a structured approach to risk in the ADVO process indicates the need for further research to determine a workable risk-based approach, with a clear conceptual framework, for the unique legal setting of the NSW ADVO process. Much of the work done here in mapping where risk-based practices are occurring, by whom and how, provides substantial groundwork to inform consultations and/or additional research in the area. Further extensive consultation and research is required with diverse stakeholders from courts, legal practice and the broader DFV sector, about how best to craft a suitable risk-based approach that accounts for specific challenges and limitations identified in this thesis. A priority for this consultation should be seeking the perspectives of NSW Police about their approaches to risk, noting a key limitation of this research is the absence of police views, given the pivotal role they play in every stage of the ADVO process. This limitation was

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<sup>25</sup> Family Violence Death Review Committee, *Fifth Report: January 2014 to December 2015* (Family Violence Death Review Committee, New Zealand, 2016) <FVDRC-5th-report-Feb-2016-v2.pdf> 19.

<sup>26</sup> Nichols-Hadeed et al (n 9); Strand, Fröberg and Storey (n 9).

unavoidable in this study given NSW Police did not agree to participate. Seeking their perspectives is therefore a clear direction for further research.

So too is seeking victims/survivors' views on how best to embed opportunities for their input in these processes, so the ADVO system can be meaningfully informed by 'an understanding of what survivors hope to gain from the process, in addition to evaluating the outcomes for which POs were designed'.<sup>27</sup> Victims/survivors' input is particularly important in recognition of the fact that victims/survivors' experiences of safety have 'multiple dimensions, involving not only the safety from an offender, but from being shamed and from others assuming control'.<sup>28</sup> Recognising the complex meanings of 'safety' for different women, and the ways in which existing systems and structures underpinning responses to DFV may shape these experiences, current feminist scholars have 'called for a return to the [feminist] movement's early emphasis on survivor-centered outcomes ... foregrounding the unique experiences and needs of survivors in the effort to maximize the effectiveness of interventions'.<sup>29</sup> This is true in the ADVO context, and for any risk-based approaches. As this study was focused on obtaining expert knowledge about the legislative, processes and practices occurring in the ADVO process, it focused on gaining in-depth information from those professionals about current practices. Further research directly involving victims/survivors themselves is therefore necessary to explore the ways in which their experiences, needs and priorities can be foregrounded in the ADVO system and in any structured approach to risk that may be adopted. The recent pilot of specialist DFV court lists in NSW may offer useful insights in this respect, noting that the pilot has specific objectives in relation to improving the court experience for victims/survivors and implementing trauma-informed practices,<sup>30</sup> and includes specific guidance for magistrates in regards to giving 'complainants as much agency and choice as possible' and 'monitor[ing] whether the complainant ... understands the court process and feels included'.<sup>31</sup>

Monitoring and evaluating the impacts of recent and upcoming reforms on NSW court-involved actors' understandings of, and approaches to, 'risk' is also an important direction for future research. The questions this thesis raises about how 'risk' is conceptualised and operationalised in practice will have continuing relevance in NSW in the coming years, as it embarks on several important reforms outlined in **Chapter 1**. In particular, it is yet to be announced to which court-

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<sup>27</sup> Cattaneo, Grossmann and Chapman (n 6) 2893.

<sup>28</sup> Spangaro, Zwi and Poulos (n 8) 158.

<sup>29</sup> Cattaneo, Grossmann and Chapman (n 6) 2893.

<sup>30</sup> *Local Court of New South Wales Specialist Family Violence List Pilot Practice Note 2023* (NSW) [3.1 (a)] and [3.2 (b)].

<sup>31</sup> *Local Court of New South Wales Specialist Family Violence List Pilot Practice Note 2023* (NSW) [4.3 (d) and (e)].

involved actors the common risk assessment framework currently under-development<sup>32</sup> will apply, and what modifications may be made to the revised DVSAT. It is also unknown what the impact of other relevant reforms in NSW will have on understandings of DFV and ‘risk’ — particularly the criminalisation of coercive control and insertion of a definition of ‘domestic abuse’ into the *ADVO Act*. If the proposed common risk assessment framework is intended to extend to all court-involved actors, the underlying environment of the *ADVO* court process mapped out in this study will be of significant relevance to the implementation of any such reforms. A range of other strategies may also assist in improving these understandings, including specialisation of courts and/or various professionals, and broader training and education on the dynamics of DFV and experiences of trauma, which require further exploration. The findings in this thesis therefore make a substantial contribution, not only to the broader PO and risk literature, but also to policy makers and researchers concerned with current and potential future reforms in the specific context of NSW. They do so by capturing both a point in time in DFV law and policy in NSW that shapes risk considerations in the *ADVO* process, and a bigger picture of how deeply embedded structural factors will influence the successful implementation of any such reforms and continue to shape the effectiveness of the *ADVO* system in responding to DFV into the future.

Undertaking further work to design an appropriate risk-based approach for the *ADVO* system therefore also requires resolving persistent underlying questions about POs, including how we define ‘effectiveness’ and what we envision as the role, purpose and intent of POs in responding to DFV. These more profound questions were a recurring theme for participants in this research, suggesting the need to establish clearer expectations about what *ADVO*s as a single civil legal response can realistically achieve in keeping victims/survivors safe from harm.<sup>33</sup> As Durfee and Goodmark emphasise, ‘not all the resources survivors need are available through POs’,<sup>34</sup> and Benitez, McNeil and Binder note ‘protection orders are only one component of any effective threat-management strategy’.<sup>35</sup> Further, the New Zealand Family Violence Death Review Committee notes:

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<sup>32</sup> Kate Newton, ‘New Domestic Violence Framework to Improve NSW First Responder Skills’, *UNSW Newsroom* (UNSW, online, 5 March 2024) <<https://www.unsw.edu.au/newsroom/news/2024/03/domestic-and-family-violence--new-framework-to-improve-first-res>>.

<sup>33</sup> Alesha Durfee and Leigh Goodmark, ‘Re-Envisioning Protective Orders for Domestic Violence’ in Ruth E. Fleury-Steiner, M. Kristen Hefner and Susan L. Miller (eds), *Civil Court Responses to Intimate Partner Violence and Abuse* (Cognella, 2020) 63, 76.

<sup>34</sup> Durfee and Goodmark (n 33) 70.

<sup>35</sup> Benitez, McNeil and Binder (n 3) 385.

The over-reliance on protection orders ... is evidence of the weakness of the current multi-agency family violence response system for high-risk cases ... and applying for a protection order can only ever be part of a safety plan; these measures should not be the safety plan.<sup>36</sup>

Attending to the reasons ADVOs are so heavily relied on NSW, and what they are expected to achieve, therefore requires further research into issues periodically raised in the PO literature around how we define 'effectiveness' in relation to ADVOs,<sup>37</sup> and what we envision their role, purpose and intent is in responding to DFV. Some, such as Durfee and Goodmark, have started to explore these questions in the US context.<sup>38</sup>

These are pressing areas for inquiry as many of the constraints and issues that this study identifies as existing in the NSW ADVO system are not easily resolved by simply imposing a common framework of risk into current settings. They may require a more 'deliberate shift' in 'discourse about [POs] to convey realistic expectations about they can do and cannot do' and a reform of the ADVO system at a structural level 'to provide the types of resources and services survivors need'.<sup>39</sup> If safety is to be a primary goal of responses to DFV as national and state-based government commitments indicate, and risk-based approaches are to offer a way to meaningfully support this goal, then there is a need for a more fundamental clarification of the role and expectations of ADVOs in addressing DFV. Without addressing these underlying tensions and conceptual ambiguities in the existing ADVO system, it is likely that even if a structured approach to risk is adopted, the process will continue to be characterised by inconsistent, and sometimes inadequate and harmful, outcomes that have been repeatedly identified in prior studies on POs, simply within in a different framework of risk. These are issues that pose persistent and profound dilemmas in the PO literature. Therefore, they require further exploration with multiple stakeholders both within and beyond the court system.

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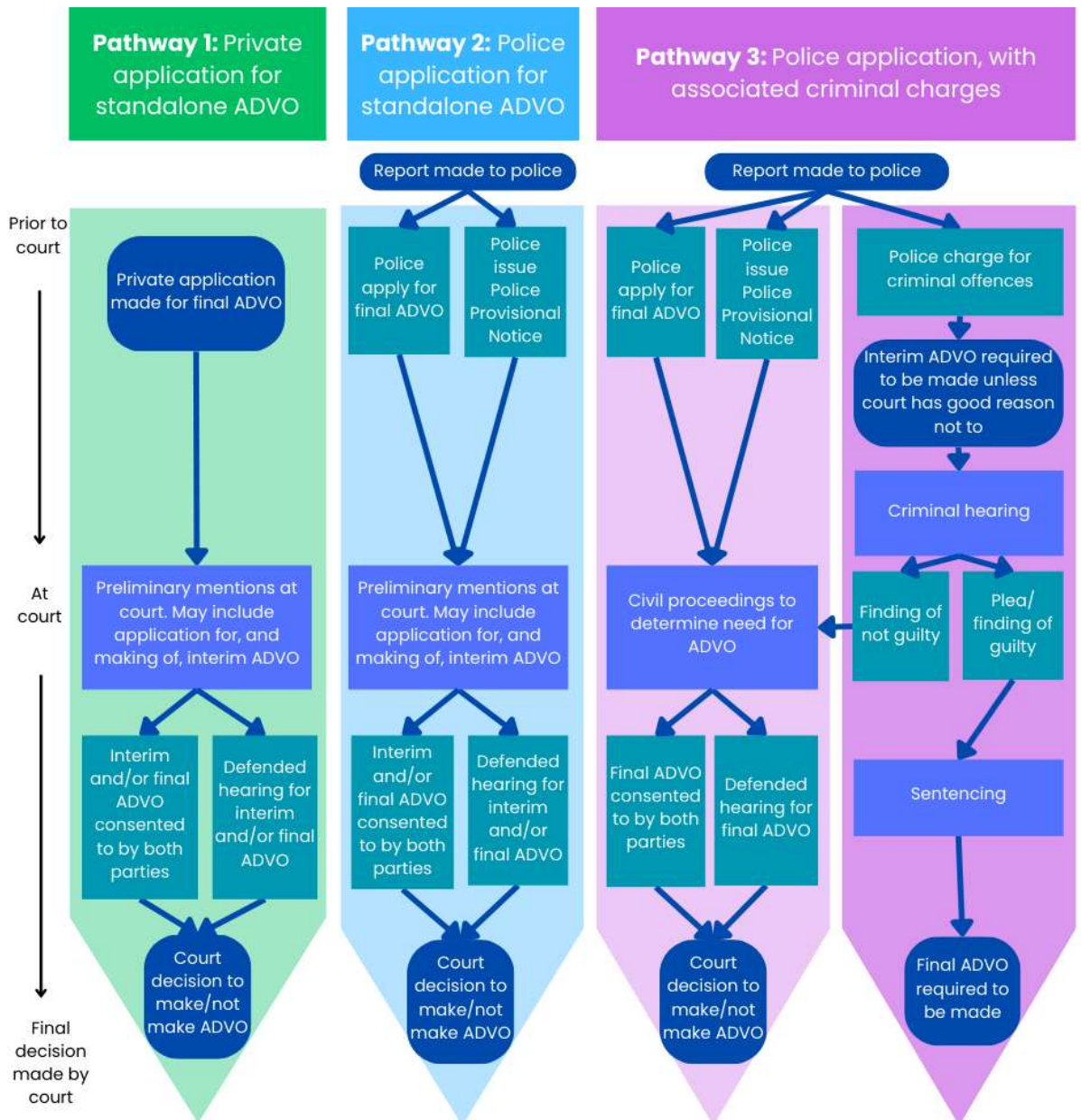
<sup>36</sup> Family Violence Death Review Committee, *Fourth Annual Report: January 2013 to December 2013* (Family Violence Death Review Committee, New Zealand, 2014) <<https://www.hqsc.govt.nz/assets/Our-work/Mortality-review-committee/FVDRC/Publications-resources/FVDRC-4th-report-June-2014.pdf>> 83.

<sup>37</sup> Cordier et al (n 3) 822.

<sup>38</sup> Durfee and Goodmark (n 33) 63.

<sup>39</sup> Durfee and Goodmark (n 33) 76.

# Appendix: Overview of Apprehended Domestic Violence Order Court Processes



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