

Co-ordination Action on Human Rights Violations

The justice system as an arena for the protection of human rights for women and children experiencing violence and abuse

Final Report

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February 2006

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This report was prepared within the Co-ordination Action on Human Rights Violations (CAHRV) and funded through the European Commission, 6th Framework Programme, Project No. 506348.

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1. Introduction and Background

1.1 Co-ordination Action on Human Rights Violations overview

The Co-ordination Action on Human Rights Violations (CAHRV) addresses human rights violations in the context of interpersonal relationships. CAHRV is a broad-based collaboration between research institutions, policy networks, and individual researchers, funded through the European Commission's 6th Framework Programme. Major goals of the action are to integrate parallel research discourses on violence; unify the theoretical and empirical basis for policy; stimulate new, interdisciplinary and transnational research; and support practitioners, policy-makers, and scientists by facilitating the dissemination of knowledge and expertise. CAHRV focuses on all forms of interpersonal violence, centres them conceptually and strategically within a human rights discourse, and aims to integrate relevant strands of research.

Within this project, an initiative on '*intervening with gender-based human rights violations*' aimed to develop a systematic overview of research on the successes and failures of legal and policy systems to address interpersonal violence, to explore the role of civic participation in addressing gendered violence and compile information on the intersections between criminal, civil and family law in response to gender-based violence.

This report is a research synopsis on the justice system as an arena for the protection of human rights of women and children. The focus was on the law provided for protection from interpersonal violence with a specific focus on its intersections with criminal and family law.

1.2 The Human Rights Framework

CAHRV is situated within a human rights framework. A focus on the violation of human rights highlights the contradictions between the traditional boundaries of legal frameworks, adults and children, protection from violence and immigration, family, civil and criminal law.

On the basis of Articles 1, 3 and 5 of the *Universal Declaration of Human Rights*, any form of violence against women which can be construed as a threat to their life, liberty or security of person or which constitutes torture or cruel, inhuman or degrading treatment is not in keeping with the Universal Declaration. More concretely this means that physical, sexual and psychological violence against women and children, including threats of such acts, coercion or arbitrary deprivation of liberty, constitute a breach of their right to life, safety, freedom, dignity and physical and emotional integrity.¹

Over the last two decades a paradigm shift has taken place in that violence within the family is no longer regarded as a private problem, but also as a social (safety) problem. It is viewed as a structural phenomenon that is symptomatic of the structural inequality of men and women in society; violence against women is defined as a form of discrimination which severely restricts the rights and fundamental freedoms of women to live on equal terms with men.²

Violence against women is now embedded within the human rights framework and seen as a human rights violation. In particular the *Convention on the Elimination of all forms of Discrimination against Women (CEDAW 1979)* and the *Convention on the Rights of the Child*

¹ The human rights at risk of violation are: the right to life; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right to liberty and security of person; the right to equal protection under the law; the right to equality in the family and the right to the highest standard attainable of physical and mental health (Boerefijn, 2005).

² The Committee on the Elimination of Discrimination against Women (hereafter referred to as CEDAW), which is the body charged with supervising compliance with the Women's Convention, states that violence against women is a form of discrimination. An authoritative elaboration of this view can be found in CEDAW General Recommendation No. 19 *Violence Against Women*, adopted on 30 January 1992. In: A/47/38, Ch. I

(1989) seek to preserve the rights of women and girls at all levels. *CEDAW General Recommendations 19 (1992)* clarifies that discrimination includes violence against women, and states that: “(a) States parties should take appropriate and effective measures to overcome all forms of gender-based violence, whether by public or private act; (b) States parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of judicial and law enforcement officers and other public officials is essential for the effective implementation of the Convention” (para 24)

Links between human rights and violence against women are further developed in the *UN Declaration against Violence Against Women (1993)*. Since the Ministerial Conference of Rome in 1993, the Council of Europe has explicitly recognised that the elimination of violence against women is central to democracy, human rights and the rule of law. The elimination of all forms of violence against women was also a major focus of the 1995 United Nations World Conference on Women in Beijing. The final document, *the Platform for Action*, details a number of measures against violence against women which the Member States pledged to implement.

In 1999 CEDAW was supplemented by an individual complaints procedure strengthening the convention by allowing women whose rights have been infringed to lodge an individual complaint with the United Nations. In January 2005 the CEDAW Committee published its first decision in a case brought to the attention of the committee by a Hungarian woman who had been subjected to violence by her husband for many years without receiving adequate social and legal support by the state authorities. The CEDAW committee decided that the Hungarian state had failed to fulfil its obligation under the CEDAW convention and obliged the state to take immediate steps to protect and support the woman. This is a landmark decision determining that state parties under CEDAW are responsible for protecting women from all forms of violence and that they are held accountable for violating women’s human rights.

1.3 The report

This report summarises and synthesises six separate country reports which were produced by the Austria, Germany, the Netherlands, Poland, Sweden and the United Kingdom³. A contribution has also been made by Switzerland.

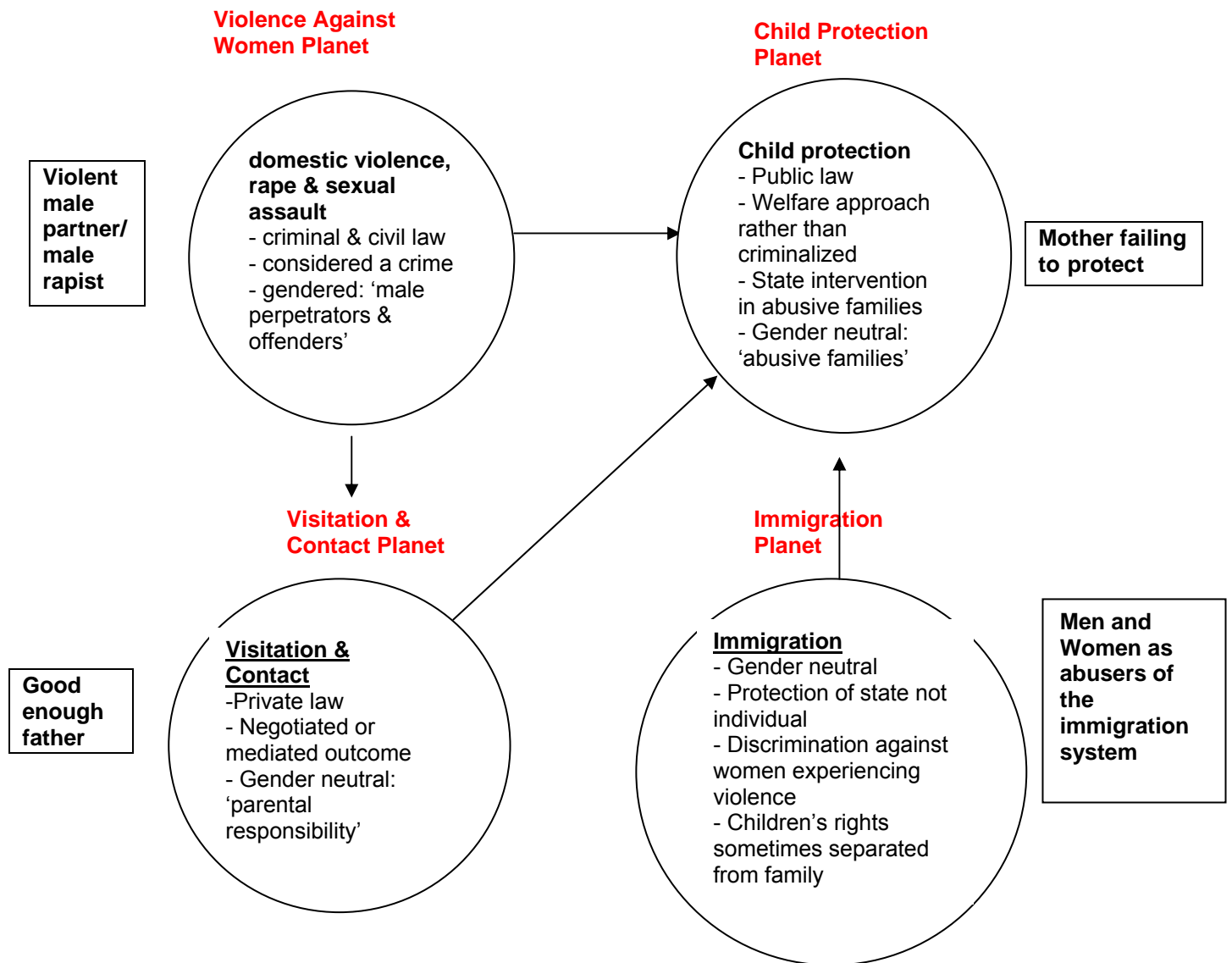
The report explores the issues concerning different European legal approaches to counter violence against women and children with a focus on areas such as domestic violence, stalking, rape and sexual assault, and child abuse as it intersects with issues of violence against women. In addition, it creates a research synopsis highlighting key findings from evaluated projects in selected countries where available.

Due to the challenges of representing international treaties and conventions as well as the complex legal structures within the six countries under review, the focus of this report is on specific barriers in accessing protection and justice, unique and progressive legal solutions and research evidence to support this. It is only through evaluative research that we are able to develop understanding of women’s experiences of criminal justice implementation in practice. Due to the fact that some countries have a broader body of research evidence than others, some countries are more strongly represented in this report than others.

³ While each country has produced an individual report including a detailed overview of the written law and structures in place for implementation, it is not possible for this detail to also be effectively summarised here. For more information please contact the lead authors of this report.

1.3 The four planets - framing the report

A model of 'three planets'⁴ has been developed by Professor Marianne Hester, University of Bristol, to explain the relationships and contradictions between different aspects of policy on violence against women and children. Underpinning the model is the observation that the different 'planets' of violence against women, child protection and visitation/ child contact have their own separate cultures and professionals, with different laws, policies, practices and discourses being apparent. It is these different cultural and institutional practices that create difficulties in linking the work on the different 'planets', leading to often contradictory outcomes and lack of safety-oriented practice. This model has been extended in this report to take into account the specific issues faced by immigrant women, and is thus presented as a 'four planet' model - summarised in the diagram below.



⁴ Hester, M. (2004) Future Trends and Developments – Violence Against Women in Europe and East Asia, *Violence Against Women* 10 (12). The original 'three planet' model was developed to examine links between policy and practice on domestic violence, child protection and child contact. The model can similarly be used where violence against women is substituted for domestic violence – as has been done here – because a main discourse is still that of the male perpetrator.

The 'four planet' model will be used as a framework to discuss the issues of the report, helping to highlight the fact that across Europe, different areas of protection, criminal justice, child contact and immigration have frequently been separated, working in conflict or in opposition to each other. Currently, there are many contradictions within European legal systems between and within laws and implementation of these laws relating to domestic violence, child protection, child contact and immigration. Any intersections in which 'planets' come into each others orbit will also be highlighted.

2. The justice system in relation to protection from interpersonal violence for women and children

In each of the selected countries developments have occurred in relation to protection for women (and sometimes children) living with intimate partner violence. Legislation varies according to the different judicial history in each country and the role of the police and civil courts. This legislation and its implementation is usually (with some exceptions in relation to breaches of orders) separate from legislation which involves criminal prosecution. Its role is to prevent future acts of violence rather than to prosecute for acts of violence which have already occurred.

2.1 Police evictions, barring and go-orders

2.1.1 Overview

Several European countries, particularly the Germanic countries of Austria, Switzerland, Germany and more recently Poland have developed legislation which allows the police to take positive action at the domestic violence incident to exclude the perpetrator of violence from the home.⁵ The exclusion of the perpetrator from the home, rather than the victim (usually women) and children being forced to flee for their own safety is undoubtedly a progressive step in relation to the protection of the victim's human rights. It radically shifts the priority from the protection of male property rights to the protection of the physical integrity of women and children (Seith, 2004; Lünemann, 2005).

The policy is exemplified by Austria (*Protection against Domestic Violence Act, 1996*). Under this Act, if a perpetrator threatens or injures a person living in the same household, the police have to evict the perpetrator from the common home and its immediate surroundings and bar him from re-entering it – even if he is the owner of the house or apartment. Such an order has to be imposed if a dangerous attack on life, health or freedom is imminent.

In each country there are differences which point to a range of innovations in the following areas:

- length of exclusion,
- the extent to which the state allows victims to influence the interventions which occur
- variations in implementation of legislation
- whether counselling and advocacy is resourced as part of the legislation,
- the intersection of police, civil and criminal justice

2.1.2 Length of exclusion

Countries across Europe have different periods of exclusion. In some cases this is a set time frame, in other countries such as Poland under new legislation (*Law on Counteracting Family Violence, 2005*) it is decided on a case by case basis by the court.

In Austria a barring order is valid for ten days and it is controlled by the police during the first three days. The perpetrator has to hand over his keys to the police; if he wants to pick up belongings, he has to be accompanied by the police. Fines are given if a perpetrator returns to the house while the barring order is in place, backed up by arrest if he refuses to leave (if the victim has allowed the offender to come back home, she can be fined, too).

Similarly, in 14 out of 16 federal states in Germany and several cantons in Switzerland go-orders have been created as a specific power under police law. The Acts differ depending on the state or canton, though all legislation in the German states entitles the police to ban the perpetrator from

⁵ A similar approach is currently also developing in some of the Nordic countries, e.g. Sweden, see further below and the country report for Sweden

the residence for 10-14 days to prevent future violations of rights like life, freedom and physical integrity. The go-order can cover the house of the victim as well as the surroundings.

The length of exclusion is a key issue which differentiates this strategy from actions under different legislation both in Germany and elsewhere in Europe where holding an offender in police custody can usually only occur for very limited periods of time. This does not give the survivor and her children sufficient time to seek help from intervention services and legal protection prior to the return of the offender.

2.1.3 State 'enforcement' versus 'victim self-determination'

A significant issue for each country in the development of their legislation and one which feminist advocates have struggled with, has been the extent to which the State intervenes to protect the victim (usually woman) and children and can override their stated wishes and feelings or proactively acts to bring in support and information services.

In Austria there is a two stage process. In the first instance, the victim cannot influence the imposition of a barring order or go-order. This makes it clear that the state is responsible for safety in private lives and that it is argued that this is based on the awareness of the problematic situation of victims who are put under pressure from the offender. The second stage of the process involves the woman taking action on her own behalf. After a barring order has been imposed, the victim can apply for an interim injunction at the Civil Court (Family Court) within ten days. If such an application is submitted, the barring order is automatically prolonged to 20 days.

The first Austrian evaluation showed that some women who were interviewed opposed barring orders, because they wanted to stay with their partners and thought this measure was too strict. Others felt the barring order was important in developing personal understanding that they should separate from their partners. Some women told researchers that the perpetrators had been shocked by their own behaviour and that their relationship had changed for the better. Some of the offenders did not understand that they had done something wrong, others felt sorry about their behaviour and knew that they had to change if they did not want to lose their partners (Haller, 2000).

The follow-up evaluation found that the reaction of some interviewees towards eviction and barring orders changed in the course of time. While in the beginning they had opposed these measures (especially when they did not want to give up their partners, but their partners left them), they admitted in the follow-up interviews how helpful the new legislation had been. Meanwhile they had managed the separation emotionally and said that without the help from the police they would never have decided to separate. Their response highlights the importance of the police taking these victims seriously and taking decisive action at the incident (Haller, 2005).

In Germany, there is an on-going discussion about how the wishes of the victim should be part of the police decision to take action against the offender. In most of the states police guidelines suggest that the imposition of a barring or go-order cannot be influenced by the victim. Currently, it is handled in different ways depending on the interpretation of the law by the police. After the victim applies for an application for an injunction at the Civil or Family Court, the police are authorized to extend the go-order for another 10–14 days.

The breaching of go-orders through the perpetrator returning to the residence is an on-going problem. In Germany no specific research on this dimension has been undertaken so far. In some federal states the law bound the police to issue a go-order at least once. In most cases where victims asked for the ending of the go-order, the perpetrator gained permission to return to or to stay at his residence. However, police have the discretion to continue the go-order if they believe that the victim is being threatened or pressured to allow the perpetrator to return though there are problems for the police in distinguishing between a forced and a voluntary statement of the victim.

Referring to this gap in police intervention, a discussion has started on the need of an early intervention policy in cases of domestic violence.

One of the issues commented upon in the Austrian evaluation and confirmed in initial reports from Germany are that the protection of the state is easier to access on the first incident. In Austria some women reported that the police had refused to intervene in repeat cases of violence. The police officers told women that they felt further interventions were useless as the women had not separated from the perpetrator after earlier interventions.

2.1.4 Variations in implementation

An issue highlighted by the Austrian evaluations is the prevalence of regional variations in implementation: the urban police are much more “active” than the rural police in issuing barring orders. In 1998 each of them imposed approximately 1,300 eviction and barring orders – but the urban police are responsible for only one third of the Austrian population, while the rural police are in charge of two thirds. Since 2002 the gap has widened further with more than 60 percent of eviction and barring orders imposed by the urban police (Haller, 2000; Haller, 2005).

Prior to the *Protection against Domestic Violence Act, 1996* the instrument most frequently used to respond to domestic disputes was that of “dispute settlement” and in many areas this still remains the case. The idea behind the wish to “mediate” between victim and perpetrator was that violence in a personal relationship was regarded as a “private matter”, and therefore the state and its authorities were not supposed to interfere. The instrument of dispute settlement is still available to police officers, along with eviction and barring orders. Since 2000 dispute settlements have decreased continuously, but they are still more frequently used than eviction and barring orders. It is striking that dispute settlement is still the method of choice used by the rural police reacting to family conflicts because of their reluctance to “interfere” in family affairs.

Table 1: Eviction and barring orders vs. “dispute settlements”

	2000	2001	2002	2003	2004
ev./barr. orders	3.354	3.283	3.944	4.180	4.764
dispute settlements	7.638	7.517	7.391	6.558	6.195

According to an analysis of more than 1,000 police files (in the years 1997-98), dispute settlement was used in 52 percent of all cases, eviction and barring orders (mostly combined with charges) in 43 percent of cases and only a charge, without eviction and barring orders, was made in 5 percent of cases (most of them because of bodily injuries).

In Austrian evaluative research it was found that when offenders only faced a dispute settlement, rather than a barring order some victims were critical because it was felt that the police intervention had made their partners even stronger, reinforcing the notion that nobody would stop their violence.

2.1.5 The role of counselling and advocacy

The significance of intervention and support is being realised in some countries. One point of difference is the extent to which proactive contact is made with victims of violence as opposed to a reliance on women voluntarily accessing support and intervention themselves. Generally it was found that support in the form of counselling or advocacy significantly improved both access and outcomes achieved through the criminal justice system.

In Germany, Austria, Switzerland, the Netherlands and Poland intervention centres or victim support centres have been established. The Swiss Victims Support Law (1993) provides a progressive example of legislation which enshrines a right to support (medical, social and material), legal advice and advocacy for victims and ensured the opening of 65 centres open on a 24 hour basis. In Switzerland this service applies to victims of crime more generally, women

subjected to domestic violence and other forms of violence against women are heavy users of these centres, some of which provide a gender-specific service. In Austria intervention centres are provided specifically for survivors of domestic violence. In the Netherlands victims are supported through Victim Support Centres, where specialist domestic violence support is offered.

Under the *Protection against Domestic Violence Act, 1996*, Austria established intervention centres run by non-governmental organisations but funded by the Federal Ministries of the Interior and of Social Affairs. Their main tasks are to take care of people subject to violence and to network with all the institutions involved in violence protection. The police have a mandatory duty to notify the intervention centre of the victims personal data and make a referral following every eviction and barring order. The centre proactively contacts the victims and offers support to them (development of crisis plans, safety programmes etc.). Women interviewed as part of a recent evaluative study (Haller 2005) were positive about intervention centres' work as well as the support they got in the women's shelters. It was important for them to access information on the legal situation as well as an emotional back-up and they reported that the support of the intervention centres was found to be essential for managing the separation process.

In Germany, modelled on the Austrian concept, intervention centres have been established in most of the federal states. Due to differences in data protection policy and individual police interpretations of legislation, policy on referral varies between states – some states require the woman's permission for referral, in other states it is automatic. In states and cities where there is no intervention centre, a broad variety of proactive counselling and support services have developed. Recent evaluative studies of the work of intervention centres in two federal states confirmed the Austrian results that women are positive about proactive counselling, legal and emotional support (WiBIG 2004a; Löbmann/Herbers 2004).

In Poland the new *Law on Counteracting Domestic Violence 2005* states that victims of domestic violence have to be supported through medical, psychological, legal, and counselling intervention. The law indicates local governments and county administrations are responsible for organizing crisis interventions and support centres for victims, though practice is yet to be developed and evaluated.

2.2 Protection Orders

In other European countries, there have been developments in protection order legislation, but not increased powers of police use of barring orders as seen in the Germanic countries. There are two main types of orders/injunctions available in the countries participating in the study: occupation orders, which regulate the occupation of the family home and non-molestation or restraining orders for protection from all forms of violence and abuse. Non-molestation orders allow the courts to make orders prohibiting a person (the respondent) from molesting another person associated with him or any relevant child and frequently, though not always, bar contact within specified areas. Sometimes they may simply prohibit violence and abuse within the same home, allowing for the power to arrest should further violence occur. An occupation order regulates the parties' occupation of their present, former or intended home and may take a number of forms, including for example enforcing the applicant's right to remain in the house or restricting the respondent's right to occupy the house. In some jurisdictions non-molestation orders are taken out in conjunction with occupation orders.

A particular challenge in comparing interventions across Europe is the different legal processes through which protection orders are secured. In many countries this occurs through the civil court process. However, in the Swedish jurisdiction the law on non-visitation or restraining orders is part of the *procedural law* and thus more closely linked to the criminal law process than civil law options. In Sweden, the application for a restraining order is made to the police and the decision to grant or deny a restraining order is then made by the public prosecutor. With the latest amendment to the law that came into force in September 2003 it became possible to award a restraining order

in the shared home. However, in spite of these positive developments, there seem to be problems in achieving protection. In the latest three-year period, the police has received approximately 6,600 applications for restraining orders annually and about 70% of these concerned women seeking protection from a man with whom she has or had a relationship. In approximately half of the cases a restraining order was granted (Edlund and Svanberg 2003. Cf. BRÅ 1995, Sahlin 1997). Evaluators argue that the level of evidence required by prosecutors is contrary to the intentions of the original legislation. Furthermore, evaluation shows that women did not feel they were significantly safer as a result of the restraining order (see further below).

Evaluation of the use and impact of these orders has been limited; though in each of the countries involved recent developments had occurred in relation to strengthening legislation, advocacy and support for survivors to take action. Participants highlighted that there were differences between legislation as written and effective implementation.

Protection orders show a range of similarities and differences across the countries involved in this study, which highlight the ways in which protection can be strengthened to more effectively support the human rights of survivors of interpersonal violence. These include issues such as the:

- level of evidence required to gain an order
- relationship criteria for access to an order
- cost of the order
- extent of advocacy and support for survivors to take out orders
- level of police action on breaches of the order
- punishment for breaches of the order
- length of time for which orders are given
- relationship of civil orders to criminal prosecution
- range of courts and legislation through which orders are available.

2.2.1 The level of evidence required to secure an order

A comparative feature across Europe relates to the level of evidence required to gain a protection order.

In the UK, evidence is required on the balance of probabilities that violence has occurred and is thus a lower level requirement than the criminal justice standard of 'beyond reasonable doubt'. In the selected countries involved, gaining an order is not guaranteed. In the UK, an evaluation in one jurisdiction provides some evidence about the difficulties of gaining an order. This evaluation showed that 136 women applied for an order and 81 (60%) were known to have been granted. A higher rate occurred in another area where advocacy workers were specifically trained in relation to civil remedies; 15 orders were applied for and 12 were granted by the courts (Hester and Westmarland, 2005).

In Germany the victim is able to apply for an interim injunction or a "regular" injunction. The interim injunction should be provided quickly and is required on the balance of probabilities that violence has occurred. The regular injunction is based on a solid proof. Recent evaluative research based on 2418 civil and family court files showed that 76% of the victims applied for an interim injunction. In 6% of all cases the application was dismissed and 22% granted; 29% were closed with a settlement, 23% of the victims withdrew their application. The evaluation demonstrated that the quality of evidence has improved since the implementation of the new legislation (Rupp 2005).

2.2.2 The relationship criteria for access to an order

In most countries protection orders were originally only available for survivors who were married. Criteria have progressively been extended to provide more inclusive protection.

In Germany, as in Poland, the *Protection against Violence Act* has established an occupation order for persons who have shared a household on a long-term basis. An occupation order is now

provided for unmarried couples. In Germany this also extends to same-sex couples. In addition, non-molestation orders are available with no relationship criteria.

In the UK restraining orders under the *Protection From Harassment Act (1997)* are helpful where there is stranger or acquaintance stalking. In the UK, the *Domestic Violence, Crime and Victims Act (2004)* has extended the availability of non-molestation and occupation orders to couples who do not live together and to same-sex couples who are living together (previously this was only available to heterosexual non-cohabiting couples who had at some time lived together, were formally engaged or joint parents of a child).

In other jurisdictions there are orders which are specific to the divorce context, for example, in Swedish civil law (Code on Marriage) a mutual restraining order is available in the context of divorce. Similarly, in the Netherlands, during divorce proceedings the shared home can be temporarily assigned to one of the partners.

Complications occur for survivors seeking protection when legislation excludes certain intimate relationships, specifies different court jurisdictions dependent upon either the relationship or the length of time since the relationship ended. All countries in this study raised these issues as barriers in accessing protection.

2.2.3 Cost of gaining an order

Access to orders is either facilitated or limited by the cost of securing legal protection.

In the UK, a barrier to women gaining orders is cost. Legal aid provided through the Legal Services Commission is difficult for most women in employment and the cost of gaining an order is prohibitively high (more than £1,500 through a solicitor). Thus, in spite of strengthened legislation in the UK, there has actually been a decrease in the number of women accessing these orders: 21,818 non-molestation orders were granted in 2003 while 26,029 orders were granted in 2000, and 32,781 in 1993. The number of occupation orders is relatively low compared with non-molestation orders. Under new legislation, *The Domestic Violence, Crime and Victims Act (2004)*, a power of arrest will be automatic and will not be part of an application.

Given the cost of taking out an order, developments which allow judges and magistrates to make orders at the end of proceedings under the stalking legislation (*Protection from Harassment Act, 1997*), criminal justice proceedings (*The Domestic Violence, Crime and Victims Act (2004)*), or child contact proceedings are progressive though under-utilised powers.

The barring/go-orders have the clear advantage that immediate protection is being offered which is free of cost to the victim.

2.2.4 Advocacy and support for survivors

There is some evidence to suggest that women are more likely to access protection orders when they are referred to advocacy and support services. In Germany victims can apply for protection individually, or request additional support from an advocate or officer of justice. Recent evaluative research based on 2418 civil and family court files in Germany showed that many cases were closed with a settlement or withdrawal of the application. Only 28 % of the cases were closed with a decision of the court. In 6% of all cases the application was dismissed and 22% granted. 29% were closed with a settlement, 23% of the victims withdrew their application. Only 60 % of the applications for the quicker judicial procedure of an interim injunction were granted. The other court trials were conducted as principal proceedings.

The research found that women who were not supported by advocacy services or by a lawyer tended to withdraw their application more often. On the other hand, women who were supported by a lawyer agreed to a settlement in court more often (Rupp 2005). The rates of dismissals were not linked with the existence or form of support.

Research on protection orders (173 files) in Lower Saxony (federal state of Germany) showed another picture. A total of 76 % of cases were decided by the court, and only a small number were dismissed. Thus, a much lower rate of withdrawals or settlements were found than on the federal level. In 91% of the cases the court procedure was an interim injunction. It took the court on average two days to make a decision and to grant or deny a protection order (Löbmann, Herbers 2004). Lower Saxony has a relatively long tradition of cooperation structures and has established specific counselling agencies working on a proactive basis since 2002. This suggests that women who are informed and supported are better able to go through a court trial and that effective cooperation structures can make the judicial system significantly more effective.

Interviews with survivors in the Austrian evaluation suggested that the referral to advocacy and information services was seen as essential to securing on-going protection and help with separation (Haller, 2000; 2005).

In the UK research (Hester and Westmarland, 2005) found that women were more likely to appear in court to give evidence when accompanied and supported. This increased guilty pleas. In addition, advocacy involving legal and other support enabled women to support prosecutions.

2.2.5 Police action on breaches of the order and effectiveness of orders

Effectiveness of orders is determined by the extent to which police and the judiciary will act on breaches of orders. The data in relation to women's sense of safety varies.

In Sweden, in depth interviews with women show that a restraining order can be experienced as supportive and validating by abused women, but women did not feel they were significantly safer as a result of the restraining order. They often experience violations of restraining orders and other crimes during the period covered by the order. Furthermore, women perceive a lack of continuity and failure from the justice system to respond to violations of restraining orders. The authors of the evaluation argue that restraining orders may have a deterrent effect on a small group of men who have not previously participated in crime. However, they also state that the police and public prosecutors focus on the serious cases (where the order may have little effect). Of Sweden's 21 police authorities, only 7 had procedures for follow up of restraining orders.

Two specialist domestic violence projects in the UK indicated that the close involvement of the police in the project ensured a more pro-active police response to breaches (Hester and Westmarland, 2005). Furthermore, the UK study by Humphreys and Thiara (2002) confirmed the Swedish finding that non-molestation orders were not effective on the most serious offenders: 25% of those who used orders found them of no help; the abuse continued and police or the courts were unhelpful in acting upon breaches.

New legislation (*Domestic Violence Crime and Victims Act 2004*) in the UK has been designed to increase the penalties for breaches of non-molestation orders. A breach of a civil non-molestation order will become a criminal offence which is punishable by imprisonment of up to five years and/or a fine. Until now, a breach of these orders has only been punishable as a civil contempt of court. Whether this change will benefit women or not will be dependent upon its implementation, particularly as the level of proof required for the breach will now be higher (beyond reasonable doubt rather than on the balance of probabilities).

Information from the Netherlands suggests that the weakness of penalties associated with disobeying a restraining order which is not a criminal offence has meant that judges cannot enforce compliance with such an order (Römkens and Mastenbroek, 1999).

2.3 Conclusions

In conclusion, protection orders have a significant role to play in the protection of survivors of stranger/acquaintance stalking and domestic violence, and developments across Europe provide

models for progressive practice. However, while legislation on paper is important, the effectiveness of protection relies on access and implementation. These are the issues which ultimately decide the extent to which legal processes facilitate or create barriers to protection.

3. The justice system in relation to the issues of criminal prosecution in cases of violence against women

This section summarises key themes including specific criminal legislation, attrition, low conviction rates, failures to link protective and criminal legislation and diversion. Barriers to access as well as innovative practice designed to ensure safety and security are explored.

It is important to note that there has been far less development of policy, practice and resources in the rape and sexual assault area relative to the developments in domestic violence, highlighting an inconsistency across the countries of Europe to the issues of violence against women (Hagemann-White, 2001).

3.1 Specific criminal legislation

The existence of specific criminal acts of domestic violence, rape or sexual assault does not necessarily result in more effective legal intervention for women. However, specific cases of violence against women (including stalking) can be difficult to track through the criminal justice system if a specific criminal offence is not established.

A number of countries have no specific criminal legislation dealing with violence against women. For example, the German criminal code does not obtain specific articles referring to domestic violence. Violent behaviour against women is punished by general articles, for example murder, bodily harm, coercion and insult except for sexual assault which is punished by a specific article that covers sexual coercion and rape. However, most of the public prosecution services have specialised units in which cases of sexual assault and violence against children are dealt with. The number of units focussing on domestic violence are slowly increasing. Similarly, in the U.K and Netherlands there is no criminal act of 'domestic violence'. Domestic violence is covered by general provisions of criminal law, like common assault, causing grievous bodily harm, manslaughter, murder, rape, sexual assault and stalking.

Even where specific legislation is in existence, the definitions of particular acts can limit access to justice. For example, a primary issue in gaining justice for women who have experienced rape and sexual assault lies in the legislative definitions of rape. Despite the fact that rape and sexual assault are most frequently committed by known men, with the UK British Crime Survey showing 45% of cases being a husband or partner and 9% of cases being an acquaintance (Walby and Allen, 2004), it has only been latterly that rape within marriage has been recognised in law (Austria 1989; UK 1991; Switzerland 1991, though not until 2003 did it become a state offence with the abolition of the 'husband privilege'; Netherlands, 1992; Germany, 1997;). Eleven countries in Europe have now removed the rape in marriage exemption (Regan and Kelly, 2003).

Again, even where legislation is in place, access to justice is circumscribed by the evidence required to prove that rape and sexual assault has occurred. Countries differ in their legal requirements. Under the new *Sexual Offences Act, 2003* (SOA) in the UK it continues to be the case that the prosecution must prove the absence of consent (rather than requiring the defence to prove consent). However, this Act does differentiate between six categories where consent is presumed to be absent, unless there is sufficient evidence to the contrary that the defendant reasonably believed that the victim consented, and two categories where consent is conclusively presumed to be absent. The achievements of the SOA, 1993 are: the retention of rape as a gendered offence for perpetrators; the need for an 'honest' and 'reasonable' belief in consent; and a complete revision of the meaning of true consent. In the Netherlands there have been similar developments around consent and the need for a perpetrator's 'reasonable belief' of victim consent. However, rape within marriage and intimate relationships continues to battle under the presupposition that sex within marriage is not rape (Zeegers and Lunnemann, 2005). Investigative systems for rape under Swedish law emphasise the issue of force rather than the absence of consent. However, recent changes mean that the level of force required for the crime of rape to be

recognised has been decreased; that group rape is in itself to be considered a severe form of rape; that sexual abuse of children below the age of 15 is considered rape (see *Penal Code, Chapter 6, Section 1*).

Countries including Poland and Sweden have established specific criminal legislation dealing with violence against women. The Polish Criminal Code specifically addresses domestic violence cases. *Article 207, point 1* states that perpetrators of domestic violence may be imprisoned for between three months and five years. This may be raised to up to ten years if particular cruelty is used, or up to twelve years if the victim attempts suicide (*art.207, point 2*). While the definition of domestic violence is broad, in practice, the *Law on Counteracting Family Violence (2005)* is used only where there is serious injury.

In Sweden, the first step was taken in 1982 when violence in the private sphere became a crime subject to public prosecution. Other important Swedish reforms have been: a new, broadened section on rape in 1984 making rape in marriage subject to public prosecution (it was made a crime in 1965); the right to a special legal representative (*målsägandebiträde*) for victims of certain crimes such as, for example, rape; and the law on non-visitation, or restraining orders (*besöksförbud*), which both came into force in 1988.

The most recent major change in Swedish policy and law is a whole reform package known as the “*Women’s Peace*” reform. This is a positive example of legislation which integrates responses to a range of violence against women.⁶ This package consists of a new crime and broader measures such as the criminalisation of the purchase of sexual services (criminalising the buyers but not the sellers in prostitution), and central and regional authorities’ responsibility for training and development of good practice. Current Swedish legislation explicitly defines violence in heterosexual intimate relations as a gendered phenomenon, as men’s violence against women. Furthermore, men’s violence against women is presumed to be an extreme expression of a more general inequality between men and women in contemporary Sweden (*SOU 1995:60; Prop. 1997/98:55; SOU 2002:71, 111*). This gender perspective is marked with, among other things, a new crime with a gender specific name: *Gross Violation of a Woman’s Integrity*.

The crime exists in a gender neutral version, applicable to violence in, for example, lesbian or gay relationships, or relationships between parents and children, and in a gendered version. This crime is unique in Swedish law for a number of reasons (Nordborg 2004). Firstly, this is the first time violence in close relationships is perceived as more serious than violence in other relationships. Secondly, it is based upon an understanding of violence as a complex set of different forms of victimisation and a process developing over time, and it applies to several areas in the penal code: *Crimes against Life and Health (Chapter 3); Crimes against Liberty and Peace (Chapter 4) and Sexual Crimes (Chapter 6)*. Thirdly, the crime is based upon women’s experiences. It is the victimisation within close relationships that forms the point of reference for this new crime, and this kind of victimisation is presumed to be more typical for women than for men. Furthermore, the Penal Code normally focuses upon specific acts, however the new crime was constructed to mirror women’s experiences of violence in close relationships: repeated acts aiming at harming the woman’s integrity and self-esteem are defined as a crime in itself. Fourthly, this legal reform puts the serious consequences of threats in focus. Traditionally, the law is mainly concerned with physical violence, but the women’s peace reform also puts an emphasis on psychological violence.

Implementing this new legislation has proved complex in practice. Though the legislation came into force in July 1998 an early case in the Supreme Court (March 1999) questioned the level of proof needed for the different acts to be considered as forming part of a pattern of repeated violation of a woman’s integrity. In June 1999 an amendment was suggested making it clear that it

⁶ SOU 1995:60, Prop. 1997/98:55. The name is a reference to a Medieval Swedish law protecting women as the property of some men – fathers and husbands – against violations from other men, i.e. protecting the integrity of men. Needless to say, the contemporary version of “women’s peace” concerns the protection of women’s own personal integrity.

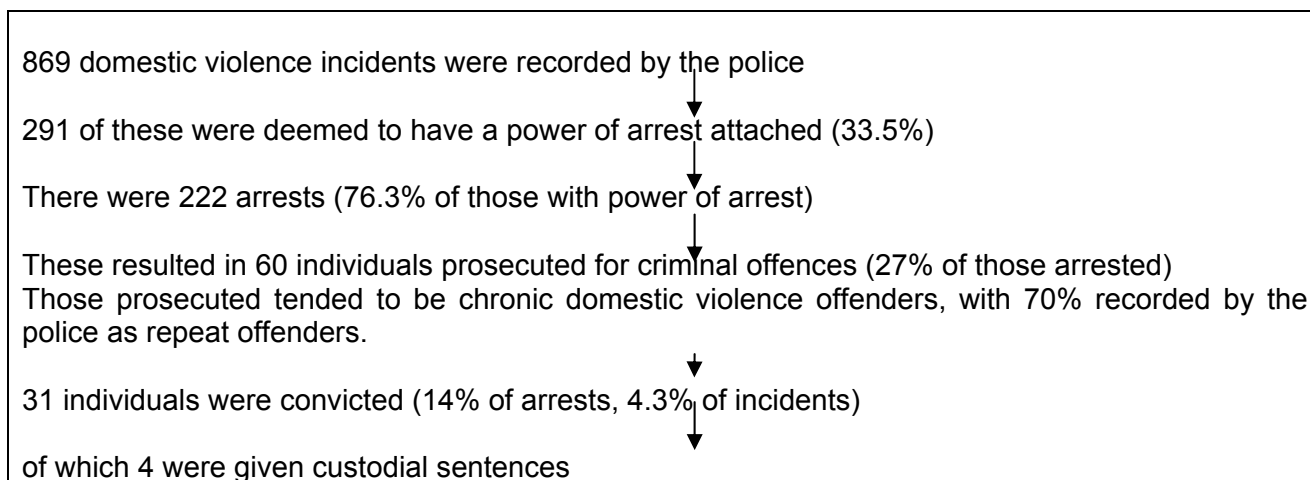
should be enough that each of the prosecuted acts had formed a part of the repeated violation of the victim's integrity. Formally, additional proof of violation – beyond the prosecuted acts – is not necessary for a verdict (*Prop. 1998/99:145*). The amendment came into force 1 January 2000.

After this set-back, it has taken some time for Swedish prosecutors to utilise the law. A review of the period 1 July 1998 to 31 December 2000 made by the Swedish National Council for Crime Prevention (Brottsförebyggande Rådet/BRÅ) showed that after the Supreme Court verdict, the number of reports to the police of gross violation of a woman's integrity decreased by 50 percent (Soukkan 2000). In the period March 1999 to the end of 2000 only about ten men were convicted for this crime. It is also worth noticing that only approximately 10 percent of the reports to the police on gross violation of a woman's integrity were prosecuted, while approximately half of the reports to the police on "ordinary" physical assault were prosecuted. Another case did not reach the Supreme Court until May 2003. This new verdict made it clear that violence does not have to be physically very severe for a man to be convicted of gross violation of a woman's integrity (Nordborg 2004).

3.2 Attrition

Attrition is perhaps the key concern when exploring the efficacy of a legal framework in addressing violence against women, including rape and sexual assault. All countries in this study demonstrate high levels of attrition across all forms of violence against women.

For example, while domestic violence accounts for 25% of all reported and recorded⁷ violent crime in the UK, there is significant under-reporting. Of those incidents reported, only a relatively small proportion result in criminal proceedings and fewer still lead to criminal convictions. Often this is due to poor investigation leading to a lack of corroborative evidence which leads to over-reliance on the victim's statement and willingness to pursue the complaint. If the victim withdraws or does not wish to participate in the prosecution, the CPS often decides the case is unlikely to succeed and drops the case. A typical example of attrition is provided by a study in the North of England (Hester et al, 2003) which showed the following data:



Similarly, in Austria major shortcomings are still evident within Criminal Courts. A high percentage of proceedings instituted because of domestic violence are quickly dismissed, not only because victims of violence refuse to give evidence and to authorise criminal prosecution⁸, but also because the assault is not deemed punishable (although there is mandatory prosecution in Austria). Violence in the private sphere is still perceived as a privileged offence. Another aspect still neglected under formal penal law is the upgrading of victims' rights. Research evaluating files from

⁷ HMCPSI / HMIC thematic review found an under-recording rate of 50% by the police of domestic violence crimes

⁸ An authorisation is essential to the prosecution of threats made against family members and nobody is obliged to testify against family members.

the State Prosecutor's Offices in Vienna and Salzburg (Haller, 2005) during 2001 revealed that about half of the legal proceedings following bodily injuries were abated, partly because they were not regarded as punishable (when for example the couple had reconciled). In Poland where there are over 100 000 domestic violence cases registered by the police, less than 20% result in legal consequences provided for within the written law.

In Germany, the WiBIG study of preliminary proceedings in two different prosecution services has shown that the majority of domestic violence cases were dismissed. In 95 % (347) and 81 % (488) of cases no court action was brought against the accused. A case dismissed in this way has no legal consequences for the accused. In this study the connection between the decision of the victims to be involved in the criminal proceedings and the outcome of the cases has proven significant. As a rule, the course the cases take follows the wishes of the victims (WiBIG 2004b). A standard procedure in the public prosecution services has been to refer cases of domestic violence to private prosecution effectively acknowledging to the victim a lack of public interest in prosecution.

Similarly, with rape and sexual assault, it is the implementation of the law which throws into stark relief the innumerable ways in which women's human rights to protection and support in the aftermath of violence and abuse are violated. European studies of rape through a survey of Justice Ministries in all European Union member states and the aspirant states of Norway and Switzerland (Regan and Kelly, 2003; Kelly and Regan, 2001) while showing the variation in patterns of attrition across Europe, also draw attention to the generally inadequate response to this form of violence against women within the justice system.

The construction of rape through traditional definitions of 'what counts as rape' by police, prosecutors and judges is evidenced through the attrition data below and underscores the continuing dominance of a conservative notion of both a 'real victim' and 'a real rape', with the behaviour of the victim continuing to be a central part of the assessment of whether a crime of rape has been committed (Andersson, 20001; 2004; Sutorius, 1999).

England, Wales, Finland, Ireland, Scotland and Sweden share a pattern of increasing attrition for rape, with increased reporting and declining conviction rates over decades. Not all countries increased their reporting rates, though a shift in the reporting data between 2001 and 2003 suggests that a trend to higher reporting is now occurring across all countries, though this trend would need to be recorded over a greater period of time to be confirmed. Other themes in relation to rape include:

- * Prosecution rates vary markedly across Europe from over 50% to 10%.
- * European countries with adversarial legal systems report the highest rates of attrition, though Sweden is also in the group with under 10% conviction rates.
- * German speaking countries have conviction rates of between 22-25% which compare favourably with countries such as the UK and Sweden with below 10%.
- * No country has shown an increase in convictions that exceeded the increase in reporting (Regan and Kelly, 2003. p. 11).

Clear patterns emerge in the points of attrition. The detailed UK study by Kelly et al (2005) shows where these points lie in the UK and aspects of these are replicated to a greater or lesser extent in the selected countries in the study⁹. The UK study showed the significant role played by the police in 'no criming' cases (25% of reported cases) providing evidence that police perceptions of the 'rape' remain crucial. The vast majority of cases did not proceed beyond the investigative stage, and the conviction rate for all reported cases was eight per cent. Nine per cent of reported cases were designated false, with a high proportion of these involving 16-25-year-olds. Interviews with police showed that they believed there were higher rates of false reporting than recorded in the study, indicative of an underlying belief by many police that 'women lie about rape'.

⁹ This section summarises their findings supported by evidence from other studies.

Evidential issues accounted for over a third of rape cases lost at the investigative stage. In a substantial number of cases in this category the decision not to proceed was linked to victim credibility. Women with mental health problems, learning difficulties, or behaviour which is considered 'risk taking' are less likely to proceed to prosecution (Harris and Grace, 1999). Cases against husbands also show low rates of prosecution. Consultation between police and the prosecution service rarely led to enhanced case-building – a process which has been actively developed in the US.

Victims who declined to complete the initial investigative process and victim withdrawals accounted for over a third of cases lost at the police stage. Key factors in not completing the initial process were being disbelieved and fear of the criminal justice service. Police officers and service user participants also suggested that fear of court was linked to withdrawal. Police and prosecution in many cases emphasise the discrediting features of a case rather than working on building the evidence.

In the UK study, only 14 per cent of cases reached the trial stage, with a proportion of these not proceeding due to late withdrawal or discontinuance at court. Around half of all convictions were the result of guilty pleas, and where a full trial took place, an acquittal was the more likely outcome. Rates of acquittal were twice as high in cases involving adults as those involving under-16s.

Data from service user questionnaires and interviews showed that there are specific elements that would improve responses to reported rape. These include: the availability of female practitioners; a culture of belief, support and respect; access to clear information at appropriate points in the process; being kept informed about case progress; and courtroom advocacy that does justice to the complainant's account.

While this study was specific to the UK where there is a relatively high recording rate and low conviction rate, the generally low rates of prosecution and convictions across the countries of Europe suggest that aspects of this detailed case tracking research resonate with patterns in the criminal justice intervention for rape across Europe.

The poor quality of the rape data from countries across Europe was highlighted in the two studies by Kelly and Regan (2001) and Regan and Kelly (2003). Only a minority of countries could provide data on the number of rape cases reported, prosecutions and conviction rates (several analyses on this data in Poland are presented by Gruszczyńska, Kulma, Marczewski & Siemaszko, 1999-2000). Detailed case tracking of cases is complicated and inaccurate when data recording systems are poor (Seith, 2004; Kelly et al, 2005). The problem is compounded by differing definitions, variations in samples and methods for recording sexual violence (Hagemann-White, 2001). In each of the countries there are problems gaining data which is disaggregated by gender, age, relationship of victim and perpetrator – a problem which is true not only in the area of rape and sexual assault, but across other areas of violence against women (Seith, 2004). The result of the poor data recording is that problems of sexual violence and other forms of violence against women become invisible, lost from political view and consequently under-resourced in providing an adequate response.

3.3 Diversion

In some countries diversionary measures are used as a way of bypassing the criminal justice system altogether. For example in January 2000, the Austrian Code of Criminal Procedure was amended introducing diversion measures. These measures including probation, and victim-offender mediation have partially replaced formal criminal proceedings if, for example, the offender is not accused of a serious crime. About one third of subsequent legal proceedings for bodily injuries ended with a diversion measure: victim-offender mediation being used more often in Salzburg than in Vienna, whereas in Vienna fines were imposed more frequently. The efficacy of such measures is strongly questioned by many agencies, including the network of intervention centres within Austria.

In the Netherlands, the Prosecution Service can opt not to prosecute if the suspect agrees to complete a perpetrator programme. In this way the Criminal Justice System is used as a means of enforcing non-criminal interventions.

3.4 Aggravated offences

In contrast to those countries where domestic violence is treated more leniently than other crimes, in the Netherlands *Beating one's wife, husband, parent or child* (art. 304 CP) constitutes an aggravated circumstance within the context of common assault or grievous bodily harm (art. 304 CP). The punishment can be raised by one third of the maximum penalty in cases where the victim is the wife, husband, parent or child of the perpetrator. A forthcoming change of Dutch law concerns the reformulation of what counts as aggravated circumstances in case of common assault or grievous bodily harm. The proposal is to add 'partner (in life)' to the categories that are already mentioned together with an upgrading of the maximum penalty of common assault. Together with the upgrading of the maximum penalty for common assault, this change will give police and prosecution more power to act in cases of domestic violence. It will make it easier for the police to provide protection to the victims of domestic violence because it will make domestic violence into a crime allowing for pre-trial detention. However, this opportunity has been available since 2005 as common assault allows for pre-trial detention even without the aggravated circumstance (see also Swedish legislation, section 3.3).

3.5 Stalking as a crime

Several European countries, including the UK and the Netherlands, have now developed legislation on stalking. This has proved particularly useful in cases of domestic violence, recognising the harm caused by an ongoing pattern of behaviour, within which individual acts may not constitute criminal behaviour under other legislation. It also means that protection is extended to women suffering violence and abuse outside an intimate relationship.

In the UK, the police can arrest without warrant anyone whom they suspect of committing either of these offences and the separate incidents do not have to be the same kind each time. While individual incidents could also be prosecuted under other existing legislation (for example as public order, or criminal damage offences) they also constitute an offence under *s.2 of the 'Protection from Harassment Act 1997'*. The advantage of prosecuting for the offence of harassment is that it allows the court to hear the entire catalogue of incidents, the evidence for which may be weak individually but strong collectively. This for the first time allowed for the legal conceptualisation of domestic violence as a pattern of ongoing abuse as opposed to a series of unconnected incidents.

In the Netherlands legislation on stalking has been criminal law since 2000 (*art. 285b CP*). Stalking consists of a course of conduct that involves a broad range of harassing, intimidating and threatening behaviour directed at a victim. Stalking is most often perpetrated against a current or former intimate partner (Smeenk and Malsch, 2005). The provision of stalking is important for women because the definition of stalking allows acts of violence to be dealt with collectively instead of individually; the infringements on her personal integrity taken in isolation can be a nuisance, but as a pattern of behaviour it can amount to systematic intimidation and severe harassment.

3.6 Role of advocacy

As mentioned in Chapter 2 above, advocacy within domestic violence services often incorporates both help with accessing the criminal justice system and other agencies, as well as a wider range of support on issues such as housing, benefits, health and emotional support. While the provision of advocates often falls outside of statutory agencies, it is still highly relevant to women's experiences of the criminal justice system.

Recent research in the UK (Hester and Westmarland, 2005) has demonstrated that advocacy is an essential and effective means of supporting women experiencing domestic violence throughout the criminal justice system and helping to prevent attrition. This study found that the support of an advocate led to: an increase in the number of women reporting domestic violence to the police; an

increase in arrest rates and project referrals; greater support for prosecutions; more women appearing in court to give evidence and improved court outcomes. In addition, legal advice and support focusing specifically on black and other minority ethnic women, including workers with minority language skills, increased their engagement with the criminal justice system.

In the Netherlands, evaluation suggests that specialised advocacy has a positive outcome on the legal outcomes for victims of sexual offences and that victims of domestic violence felt more satisfied with the legal proceedings (Goderie et al, 2001).

Similarly, recent evidence demonstrates that support for victims of rape is critical if they are to report and to continue to proceed through the criminal justice system. A study of Sexual Assault Referral Centres (Kelly et al 2005), agencies which provide support to victims of rape and sexual assault regardless of whether a report is made to the police, revealed that three-quarters of the sample did report to the police, although this was more likely with younger complainants. High reporting levels were also evident among those with disabilities and those involved in prostitution. Cases involving known perpetrators were least likely to be reported. The majority of reports to the police were made within 24 hours.

Other studies indicate that where women have no support reporting is low with estimates between 1 in 4 to 1 in 20 (Seith, 2004). Potentially, some of the higher prosecution rates reported in Germany, Switzerland and Austria may relate to the stable state funding for intervention centres which support victims of violence. In Switzerland and Austria this is a legally sanctioned requirement with Switzerland supporting victims through the *Swiss Victim Support Law (1993)*.

3.7 Specialist Domestic Violence Courts and Fast Track Systems

The UK has been at the forefront of developing specialist domestic violence courts and fast track systems for domestic violence cases. As yet, there is no statutory grounding for these courts and therefore they are developed by groups of agencies choosing to work together. An opportunity has also been missed to develop these services for a range of violence against women, including rape and sexual assault, rather than simply focussing on domestic violence.

In 2004 a number of these were evaluated. The resulting report (Cook et al, 2004) evaluated the five models at magistrates' courts. Some features which were found within most of these models and contributed to their success included: a focus on criminal matters heard in Magistrates' Courts; dealing largely with pre-trial hearings, not trials; using Pre-Trial Review to enable efficient progression of cases; systems to identify or flag domestic violence cases, leading to the clustering or fast tracking of all domestic violence cases; provision of advocacy support and / or police domestic violence officers at court to offer information and support to victims and to advise the court; and training for all staff involved in domestic violence cases.

While no comprehensive research comparing the specialist and non-specialist courts has as yet been carried out within England and Wales, the existing studies indicate positive benefits of Specialist Domestic Violence Courts (SDVC) and Fast Track Systems (FTS) including: the use of a multi-agency framework designed to meet the specific needs of domestic violence victims; improved support and advocacy for victims; enhanced information sharing; greater victim participation and satisfaction; reduction in charging alterations and reductions; shorter legal processes; and some improvements in bail decisions. While attrition and victim withdrawals have continued to be an issue within SDVC and FTS, research conducted by HALT (HALT, 2004) suggests that fewer women will retract if they are provided with effective support and information.

However, there have also been significant failings within the specialist systems: links with civil courts remained weak across the new specialist courts; very little use is being made of effective evidence gathering which could support or replace victim statements; sentencing varies, most offenders receive fines, financial penalties or bindover orders; consultation with victims about pleas and bindovers rarely takes place; very little data on ethnicity, disability and same-sex relationships was collected; access to translation and interpreting services or information specific to e.g. lesbian,

bisexual, gay or transgender people is limited; training and monitoring is patchy; facilities for victims within the court building are limited.

Significant procedural reforms in the prosecution of rape cases have also introduced support for victims in many countries across Europe. These include: video or other forms of technical equipment which allow the witness to be interviewed outside the court room; introduction of screens in court or the removal of unnecessary persons such as the alleged offender when the witness is giving evidence; anonymity of victim/witnesses; removal of the right of the accused to cross examine the victim; rights to legal assistance before and representation during court cases; allowing NGOs to be party to the case (Regan and Kelly, 2003).

3.8 Conclusions

It is clear that current legal systems and structures across Europe are currently providing an often patchy and imperfect service to women and children experiencing domestic violence, rape and sexual assault. High rates of attrition, low conviction rates, failures to link civil and criminal systems, reliance on diversionary measures, a lack of specific criminal legislation and the problems of the attitudes and assumptions of criminal justice system staff all undermine the effectiveness of legal interventions.

However, important attempts are being made to address these issues and work towards providing a system which is better able to provide safety and security for women and children experiencing violence. While it is important to remember that the criminal justice system is only one of the options which women and children should have access to, it is nonetheless useful to focus on potential solutions such as acknowledging the seriousness of such abuse through the use of aggravated offences, specific criminal provision, more effective links between the civil and criminal legal structures, focussed provision such as specialised courts and more effective support in navigating the complex legal systems.

4. Links between protective legislation and criminal legislation

Many countries reported a general failure to link protective action in the form of barring orders, restraining orders and non-molestation orders with criminal legal systems. Additional contradictions were found in the intersections with child protection and immigration legislation.

In Austria the Protection from Domestic Violence Act does not make any reference to the role of the criminal judiciary. Therefore, as the evaluation (Haller, 2000) showed, some judges believed that the new legal provisions did not concern them and failed to understand that they had an important role to play in taking domestic violence seriously. In addition, while initial action (the barring order) is taken under police law, the women's self-determination is then recognised through her actions in taking out an injunction through the Civil Courts. The Court requires evidence of acts of violence. Although after barring orders a high number of interim injunctions are allowed, there is no "guarantee" that this will occur. On the other hand a barring order is not required for an interim injunction – both instruments are legally independent – but increases the chance of an allowance. If the offender violates the order forbidding contact or enters a protected area, the police will remove him again. Protection from violence is being very effectively provided by the civil judiciary if there has also been a barring order, but there are no data concerning the allowance rates of interim injunctions without a foregoing barring order.

In the UK, victims of domestic violence usually proceed with either a criminal route or a civil protection order. Bail conditions are used to protect victims during criminal proceedings, not a protection order. The problem with bail conditions is that they may be varied without notifying the victim although other mechanisms (Witness Care Units and the Victim Code of Conduct) have recently been created to address this.

In the Netherlands, a barrier to the implementation of a barring order has been the fact that there is an expectation that police will arrest a perpetrator and that a barring order could therefore only operate where a criminal offence has *not* been committed. This highlights the problems which arise when criminal and civil proceedings are seen as incompatible rather than complementary. The issues raised in the Netherlands in a current consultation about barring orders provide the bridge between those countries which have introduced barring/ go-orders and those where civil injunctions remain the primary form of protection. Currently, legislation for an eviction/barring process in the Netherlands is strongly supported by the police and women's NGO sector. However, prosecutors and judges are opposed to the introduction of a barring order as it is seen as a very high level breach of the right to residence, personal freedom and support for the family. They also prefer the use of civil legislation which requires the woman to take pro-active action to exclude the perpetrator, rather than the police taking this action. As with the UK, police are also given the power to arrest (and even detain in custody for a short period of time) using criminal legislation, but have few precedents in relation to civil law or specific police powers which do not fall within the criminal justice jurisdiction, which would allow evictions or barring. The Netherlands are not alone in struggling with these issues and they do highlight the extent to which the Germanic countries have overcome these significant barriers created by both cultural attitudes and legislation.

In order to overcome the problems created by these separations of legal systems, some countries are exploring ways to bring greater cohesion to the systems.

For example, in the UK the *Domestic Violence, Crime and Victims Act, 2004* makes the breach of a protection order a criminal offence and not the civil offence of 'contempt of court' (enacted March 31st 2005). This Act also extends the availability of restraining orders under the *Protection from Harassment Act (1997)*. This will allow a court to place a restraining order on a defendant even when they are acquitted of a criminal offence, in order to protect their victim. This innovative order aims to protect victims by allowing the use of evidence before the criminal court that would normally only be admissible in civil courts. The maximum penalty for breaking such orders is five years imprisonment. In addition, the *'Protection from Harassment Act 1997'* includes measures for

protection under both the criminal and civil law, and also provides a link between criminal and civil law. The provisions include two criminal offences: the offence of criminal harassment and a more serious offence involving fear of violence. If convicted of either of these offences, there is an additional measure for protection: a restraining order can also be granted by the court, prohibiting the offender from further similar conduct. However, this power has been under-utilised with one study showing that in only half the cases where a conviction was given were restraining orders issued by the judge (Budd et al, 2000).

In Poland, links can be found in the draft of the new law protecting against domestic violence. This introduces changes in the Penal Code and the Family and Guardianship Code as well as the Code of Criminal Procedure, and the Act of Law on Social Assistance.

In Germany the *Protection against Violence Act* (2002) made the breach of a non-molestation order a criminal offence. The maximum penalty is one year imprisonment. Evaluative research showed that there have not been many criminal proceedings. An analysis of 82 files showed that most of the victims who report the breach of a non-molestation order to the police are separated and no longer live with the perpetrator. Two thirds of the files were dismissed by the public prosecution services (Rupp 2005). Orders under the "*Protection from Violence Act*" are legally independent from the police go-order. The legislation allows the victim to apply for an injunction without the police issuing a go-order beforehand. In addition, the perpetrator can be issued with a go-order without the victim having to go to court afterwards. This legislation was placed within the civil code to strengthen the survivor's influence over decisions. One of the arguments from feminist activists at the time was that the criminal code puts the victim in a weak and inflexible position as only witness for the state. Within civil proceedings, victims of violence should get the opportunity to shape the legal proceedings with reference to their needs; however, this is clearly through gaining protection rather than justice.

The separation of the civil and criminal legal systems is enduring and complex. The steps taken to try to improve cohesion and communication across the two areas are an important beginning, but the current lack of holistic thinking across several areas of law including immigration and child protection remains an area of significant concern.

5. The intersections and legislation in relation to child protection

In each of the selected countries of Europe recognition is being given to harm which children may experience through being subjected to violence and abuse. In places such as Poland the situation is complex with some reports¹⁰ maintaining that there is no legal definition of child abuse in Poland. However, the Constitution guarantees personal inviolability and prohibits cruel or degrading treatment and obligates the parents to respect the freedom of conscience of the child and his beliefs alongside specific provisions within the Penal Code. New legislation is addressing the issue.

The *1989 UN Convention on the Rights of the Child Article 19* specifically addresses child abuse and makes recommendations for countries to take a wide ranging approach including prevention, identification, investigation and intervention services. For the purposes of this project, the legal processes which protect children who are subjected to living with domestic violence are of particular interest as this lens focuses on the intersections between violence against women and children. Examples from three countries are taken to exemplify both barriers and progressive developments in this area. A number of themes emerge which determine the extent to which the protection needs of women and children are met. These include:

- The extent and the means through which the potential significant harm to children living with domestic violence is recognised in law and procedures for child protection workers
- The extent to which support and protection of women is considered to be an integral part of support and protection for children where there has been domestic violence.
- The extent to which the man is held responsible for the abuse of children in this situation and the means through which this is integrated with the criminal justice system
- The intersection with issues of forced marriage which require a robust investigatory response from police and child protection workers rather than a mediation approach which is often preferred in child protection practice.

5.1 Recognition that children are harmed by living with domestic violence

All selected countries in the study recognised that children living with domestic violence were at risk of harm. However, particular countries were more explicit in their response than others. Countries such as Poland have now recognised the human rights issues for both women and children and new laws have been introduced. However, policy and practice are still in the early stages of development (Płatek, 2003). The law in Poland allows a child themselves, if he/she has attained 13 years of age, or a public prosecutor, or an organisation defending the rights of the child to appeal to a court for the restriction of parental authority, if they believe that the parents' methods of upbringing are harmful. However, in spite of the availability of this provision which could potentially recognise the harm of living with domestic violence, it is not used in practice. Cases of the extreme abuse of parental authority through battery, deprivation of food, sexual exploitation are those which come before the courts.

In Austria, Youth Welfare Authorities recognise both the direct and indirect harm to children living with domestic violence and this can be the basis for legal intervention on the child's behalf through an interim injunction. There is also growing recognition in the Netherlands particularly seen in greater police attention not only to women but also to their children. However, the legal system in the Netherlands with different rules for criminal law, family law and tort law means that there is little legislative coherence in relation to children living with domestic violence.

In the UK, there has recently been clarity provided through legal recognition that children may be harmed by living with domestic violence. This has been provided through an amendment to the definition of harm in the Children Act, 1989 which now includes 'impairment suffered from seeing or

¹⁰ Presented in the V Periodical Report on the Republic of Poland on the Implementation of the Provisions of the international Covenant on Civil and Political rights for the period from January 1995 until 1 October 2003 by Human Rights Foundation

hearing the ill treatment of another' (*Adoption and Children Act 2002*). The ability to exclude the perpetrator of violence is allowed under very limited circumstances (*s 38A [2] Children Act, 1989*) where there is an interim care order or emergency protection order in place and even then, only when the informed consent of the mother or child's carer has been gained. It is therefore not a widely used power.

The extent to which domestic violence in practice is recognised as a potential or actual cause of significant harm to children is difficult to assess without comprehensive evaluations. Data provided by UK statutory agencies suggest that the issue is gaining recognition in the work of child protection workers. A typical local area showed 3321 case files open to statutory children and families' workers during a one week period. In 41% of cases domestic violence was reported as present. The significance of domestic violence increased with the seriousness of concerns with 66% of cases on the child protection register featuring domestic violence (Sloan, 2003).

In Sweden, the attempts to promote "women's peace" have been followed by an increased focus on the situation for children living with men's violence against women (e.g. SOU 1995:60; SOU 2001:72). A recent amendment to the Penal Code (Chapter 29, Section 2) means that it is an aggravating circumstance, and a reason for a harsher punishment, if a crime has been intended to harm the safety of a child and the child's trust in a person that the s/he has a close relationship to (see Prop. 2002/03:53). Furthermore, a recently published paper by the Minister of Justice on "children in the shadow of crime" aims at increased protection and support to children at risk, including children who witness crimes against a person with whom they have a close relationship (Ds. 2004:56). In line with the intentions stated in the paper from the Minister of Justice, in May 2005, a district court (Tingsrätt) in Huddinge south of Stockholm convicted a father of the crime 'gross violation of integrity' for repeatedly making his children witnesses to violence against their mother. Unfortunately, the verdict was later overruled by the court of appeal.

5.2 Support provided for both women and children affected by domestic violence

A significant theme across countries was the ambivalence which women living with domestic violence experienced in relation to statutory services and the extent to which the protection of children was linked to the protection for women.

In Austria there are potentially strong links between protection of women and protection of children. When there are children living with domestic violence, not only are intervention centres notified but also the youth welfare authorities once eviction and barring orders have been imposed. This indicates a potentially helpful linking of the protection of children and protection of women. Youth welfare agencies can also take out an interim injunction on behalf of a child in their role as children's guardian.

However, evaluations showed that the protection of children does not work as well as the protection of women. Firstly, police reports focused primarily on the situation and condition of the endangered woman, largely ignoring that of the children which remained as a "blind spot" in the reports (though referral to youth authorities may have compensated for the lack of initial attention by the police). Secondly, the youth welfare officers welcomed the new provisions of the *Protection Against Domestic Violence Act*, because barring orders protected children in imminent danger, thus extending the available time frame for the agencies' reaction and reducing the number of cases when children had to be taken into care. But on the other hand, the youth welfare offices have made only minimal use of their power to take interim injunctions. In between May 1997 and December 2004 only 124 such applications had been filed in all of Austria. Interviews with representatives of youth welfare offices showed, that they were not interested in interim injunctions against the mother's will because then the safety of the child could not be guaranteed, though this was not the only issue accounting for the under-utilisation of this power.

Responses from youth welfare workers raised dilemmas about their work. They reportedly recognised that mothers subjected to violence were victims, while, at the same time, they still believed they needed to hold them responsible for the safety and well-being of their children. This led to situations in which women were additionally challenged instead of supported. A case in point

would be the threat of the children being removed, should the woman re-admit the evicted partner to the home, which exposes the victim of violence to massive pressure from both the perpetrator and the youth welfare office. This attitude from the youth welfare authorities is criticised by the intervention centres.

In the UK, research and evaluations show consistently that women have an ambivalent relationship with statutory social workers. As in the Austrian evaluation, the most consistent fear is that children will be taken into care (Humphreys and Thiara, 2002; McGee, 2000; Abrahams, 1994). From one third (McGee, 2000) to one half of women in contact with social services (Humphreys and Thiara, 2002; Abrahams, 1994) report positive experiences of support. Adverse experiences which are consistently mentioned include: holding the woman responsible for her 'failure to protect' often without providing adequate support for her needs as a victim of abuse; failure to engage with the man's violent behaviour; and failing to provide adequate support for children when requested by mothers living with domestic violence.

In Sweden, a step towards integration of child protection and the protection of woman has occurred through the expectation within the "women's peace" reform package sanctioned through an amendment to the Social Services Act which explicitly states that the social service agencies have a responsibility to support abused women (see Prop. 1997/98:55). Later this section of the law has been expanded to include all crime victims (see Social Services Act, Chapter 5, Section 11; Prop. 2000/01:79). It currently states that social services should especially consider that women who have been subjected to violence and want to change their life situation have special needs. This clarification of the role of social services to support women as well as their children is one which has been given 'lip service' in countries such as the UK, but where the emphasis on the 'paramourcy of the child' and relatively poor resource base often means that a worker to support the woman as well as the child is not available in practice.

5.3 Extent to which the perpetrator is held responsible for the violence

The ambivalence of women living with domestic violence towards child protection authorities is a reflection of their fear that they will be held responsible for their 'failure to protect', rather than the perpetrator being held responsible for his violence in ways which assist in the protection of both survivors and their children.

There are few examples of work which actively addresses this issue within the child protection arena.

The Swedish criminal law case discussed above is interesting insofar as it focuses upon the perpetrator's action rather than the child's mother in relation to child protection. An innovation within another Scandinavian country has been developed in a domestic violence perpetrator programme in Oslo where men attend groups which address their responsibilities as fathers and the effect of their violence and abuse on their children (Raikil, 2005).

The Austrian example is again interesting, as the legal potential to take action directed at the perpetrator through an interim injunction taken by child protection authorities is a provision (while underutilised) which nevertheless may point a way forward. The provision applies both to cases of direct and indirect violence against the child, provided that the mother as the child's statutory representative has not filed an application herself.

Practice varies in the UK. A significant level of policy development has occurred and most local authorities now have policies and protocols which address the issues of child protection and domestic violence. Work is highly dependent upon effective inter-agency co-operation and this is extremely varied. While police are now referring children affected by domestic violence to statutory child care authorities, this measure is ineffective unless there are clear processes through which these referrals are managed and agreed between agencies. This is frequently not occurring (Humphreys and Stanley, 2005). An innovative project has been developed in London whereby a specialist domestic violence perpetrator programme provides two statutory child care agencies with specialist risk and safety assessments of perpetrators when children living with domestic violence

have been referred to the statutory child care agency. The project actively addresses the issue of the responsibility of the perpetrator and ensures that he doesn't become invisible within the child protection process. Interestingly, a review of this innovative project found that the service was significantly under-utilised by the local child care authorities, though where it was being used there were high levels of satisfaction from the professionals involved (Radford et al, 2005).

Across the selected countries, while there was reported increases in police referral to the statutory child care agencies, there was little evidence of active collaboration between child protection services and the police. For example, there was little evidence that the active pursuit of criminal offences against the perpetrator was seen as an important aspect of child protection and the appropriate police response within a multi-agency child protection forum.

5.4 Forced marriage

A significant area of intersection between child protection and domestic violence lies in the area of forced marriage. In the UK in 2003-2004 there were 250 reported forced marriage cases of which 50 per cent were children under 16. These reported figures are clearly the 'tip of the iceberg' with Southall Black Sisters in London alone reporting 200 enquiries per year (Southall Black Sisters 2001). When the number of under 16 year olds in the reported figures are considered, the intersection of this issue as one of both child abuse and domestic violence becomes clear.

The seriousness of the issue is highlighted by the number of runaways among young Asian women: these tend to cluster around the age of 16 when many may feel compelled to marry (Bhugra, Desai and Baldwin 1999). The number of attempted suicides by teenage Asian girls is also associated with forced marriages and Yazdani (1998) found that this issue was raised by a number of the young women in her study. To date, the response of child protection workers to these issues has often been seen to be inadequate, overplaying the role of mediation and underplaying the level of risk and violation of the young women's rights to protection (Southall Black Sisters 2001). Mediation is particularly inappropriate when the vast majority of families deny that the marriage is forced, directly contradicting the victim's report and the fears which led them to seek help in the first instance (Khatkar 2002). A consultation is currently being undertaken to discuss whether and how to criminalise those involved in setting up forced marriages.

5.5 Conclusions

In summary, a number of issues in relation to child protection arise which have implications for both the protection of women and children particularly where there has been domestic violence. Little evidence was given of the active links between child protection and the criminal prosecution of offenders for acts of domestic violence. Stalking legislation was rarely invoked as a central intervention for the protection of children as well as women. The notion that child protection authorities actively call on the police to pursue criminal cases and work to build the evidence to support prosecution was notable for its absence.

Returning to the key themes highlighted at the beginning of this section, clearly child protection responses to domestic violence which also include active support and protection for the child's mother; legislative powers and the development of practice which focuses on the perpetrator's abuse, rather than the women's so called 'failure to protect'; and practice which addresses the intersections with issues such as forced marriage, point the way forward to a more 'joined up' response to violence against women and children.

6. Child contact and the links with domestic violence and abuse

The arena in which the most contradictions arise in relation to the protection of women and children from violence and abuse is arrangements for children following divorce. In this document this will be referred to as contact and residence arrangements, though it is recognised that each country uses different terminology (custody, access, visitation). The *UN Convention on the Rights of the Child* recognises that children need to be protected from abuse and neglect (Article 19), and that their lives need to be safeguarded (Article 6) – both situations in which exposure to child abuse and to living with domestic violence including post-separation violence should ensure that child contact arrangements take this into account. However, the best interests of the child (Article 3) and the State's duty to respect the rights and responsibilities of parents and the wider family to provide guidance appropriate to the child's evolving capacities (Article 5) and the right to maintain contact with both parents (Article 9) create ambiguities when the Convention fails to write into its charter the problems which occur where there has been serious abuse and violence of one parent by another and where one article in the Convention potentially contradicts another¹¹. This area appears to be 'out of orbit' with civil and criminal justice developments where examples of good practice in legislation and its implementation can be identified in most countries.

The extent to which violence and abuse against both women and children (and some men) is recognised and taken into account in both legislation and practice when deciding the post-separation arrangements for children is the principle issue for exploration.

In Poland currently domestic violence is not viewed as sufficient grounds for divorce, although a new law creating protection from violence will change this situation in the future. Currently, divorce in Poland requires that there is a positive prerequisite for divorce – namely the irretrievable and complete disintegration of matrimonial life. However, even then divorce will not be granted if: as a consequence it is detrimental to the welfare of the children of the spouses; granting the divorce would be contrary to the principles of social intercourse; it has been requested by the spouse who is the sole guilty party; the other spouse refuses to consent (*Article 56 Family and Guardianship Code*) (Mańczyński & Sokołowski, 2002). The new law protecting against violence will consider domestic violence as a positive prerequisite for divorce.

In each country the following problems emerge in relation to child contact which create barriers to accessing protection and justice for women and children living with domestic violence:

- Contact and residence arrangements built on a presumption of shared parental responsibility or shared custody
- High levels of pressure for joint agreements for child contact
- Issues of safety over-ridden by the presumption that all contact is in the child's best interests
- Lack of procedures for identifying issues of violence and abuse
- Lack of co-ordination between courts and child protection agencies

6.1 Presumption of shared contact or shared parental responsibility

Legal presumptions which assume high levels of co-operation by parents in relation to their children deny the damaging levels of fear and abuse which have occurred where there has been domestic violence and which may continue to occur post-separation.

The situation in Sweden exemplifies many of the problems in this arena and is supported by research evaluations (Socialstyrelsen 2004, Barnombudsmannen 2005). These studies show clearly that the courts do not see the issue of custody linked to the well-being of the child.¹²

¹¹ See Kelly, L. and Mullender, A. (2001) 'Complexities and contradictions: Living with domestic violence and the UN Convention on the Rights of the Child', *International Journal of Children's Rights*, 8, 229-241 for further discussion on this complex issue.

¹² Some of the negative consequences of joint custody in these cases are directly linked to the construction of custody in Swedish law. It is, for example, virtually impossible for a parent to let the child go through any

Policy and law presupposes shared parenting and a high degree of parental co-operation post-separation/divorce. Mothers and fathers are expected to be able to share custody and face-to-face contact is generally presumed to be 'in the best interests of the child' (see *Föräldrabalken [Parental Code], Chapter 6*). Joint custody is perceived to be of such an importance that with the latest changes to the law (April 1998) it is possible for the courts to award joint custody against the will of one parent (*Parental Code, Chapter 6, Section 5*) even where there are issues of domestic violence. The review by the central government's Children's Ombudsman shows that in cases where violence is mentioned in the court order, joint custody is ordered against the wish of one parent in 49% of the cases (Barnombudsmannen 2005, p. 35). This number can be compared with the number of orders of joint custody against the wish of one parent in cases where violence is not mentioned: 40%. Relatively speaking, Swedish district courts currently order joint custody more often in cases where violence is mentioned, compared to the cases where violence is not mentioned. It should also be noted that in cases where the father previously has been convicted for a crime against the mother, the district courts award joint custody in 38% of the cases (p. 31).

In the UK, the *Children Act, 1989* there is not the presumption of 'reasonable contact' (often known as shared parenting) though there are currently strong attempts by fathers' lobby groups in the UK to build this into the *Children and Adoption Bill* currently before parliament. There is however a legal presumption of parental responsibility by both parents which is not extinguished by the divorce process and where there are strong precedents established through case law that all contact is in the best interests of the child *Re O(Contact: Imposition of conditions) [1995]*.

6.2 High levels of pressure for out of court agreements

An issue of extreme difficulty where there is domestic violence is created through the pressure for out of court agreements about child contact. By definition, domestic violence presumes a power imbalance. Negotiations which minimise the unequal power, the lack of safety and the high level of risk to both women and children affected by domestic violence are problematic in countries where most child contact is agreed out of court. In both the UK and Sweden measures have been introduced to encourage (pressure) mothers and fathers to make out of court agreements.

In Sweden, since 1991 the social services (local government) have been obliged to offer mediation or 'co-operation talks' for parents who are not living together but want to solve conflicts regarding their children (see *Socialtjänstlagen [Social Services Act], Chapter 5, Section 3*). Co-operation talks can also be mandated by the court in a legal dispute regarding custody, contact or residence (*Parental Code, Chapter 6, Section 18*). Since 1998 it is possible for parents to make formal contracts regarding custody, contact or residence at the Social Services office. The policy in this field is based primarily upon the notion of the child's right to a close contact with both (biological/adoption) parents.¹³ The interventions through social services show little attention to violence and abuse and abused women interviewed reported that the encounters with the social service professionals conducting the court-mandated investigations can be experienced as very difficult and disempowering (Eriksson 2003).

In the UK, a recent inspection report of family courts and family court services identified that the 'agreement seeking focus' meant that a 'safeguarding approach' to children was undermined and insufficient attention was given to the issues of domestic violence. Very significant pressure was placed on parents to reach out of court agreements over-riding the issues of safety (HMICA, 2005). This view was expressed by court officers as well as women experiencing domestic violence.

form of counselling or treatment against the will of the other parent, if the parents have joint custody. This means that a violent father, under the current Parental Code, can undermine any attempt from the mother to provide the children with counselling which deals with the emotional effects of his violence (Eriksson and Hester 2001).

¹³ It is worth noticing that rights and obligations that used to be ascribed to biological parents – which were independent of the actual care or contact with the child - are today rights and obligations of custodians only (Schiratzki 1997, 344).

In Sweden, penalties have also been introduced if the court ordered contact is not 'enabled', and there is currently a Bill before parliament in the UK which will create stronger measures to enforce contact. In both countries, the resident parent may be fined and ultimately the contact order may be enforced. However, if the residential parent or the child wants the child to have contact with an unwilling 'contact' parent, there are no legal possibilities (such as fines) open at all; "contact refusing" parents are surrounded by a 'law-less space' in Swedish law (Nordborg 1997) and UK law (Masson and Humphreys, 2005).

6.3 Issues of safety over-ridden

In most countries statements are made that contact should be 'in the best interests of the child'.

In Sweden the courts are obliged to consider the risk of abuse, kidnapping or other forms of harm to the child (Parental Code, Chapter 6, Section 2a:2). Formally, it is not necessary to prove "beyond reasonable doubt" that a child will be harmed by the contact, custody or residence arrangements; it should be enough that "there are concrete circumstances indicating risk" (LU 1992/93:22, 22). Cases concerning child custody, contact or residence should, in other words, be treated differently from criminal law cases (Nordborg 2005). However, there is little evidence of this in practice. The Children's Ombudsman's study shows that an assessment of risk for the child is lacking in 71% of the court orders in cases with violence. In the cases where a parent has been convicted of a crime an assessment of risk is lacking in 57% of the orders (p. 42). In the context of court practice, it can be added that a previous study of verdicts by the courts of appeal shows that not even a previous sentence for physical assault (of the mother) guarantees that single custody is perceived as being the best solution for the child (Boqvist and Barnombudsmannen 2002). Not in any of the cases investigated had the courts of appeal considered the alleged violence, threats or sexual abuse (against the mother and/or the child) as being substantiated. However, it is also clear that the courts had not made any investigations of their own: they have just dismissed the information received.

Further evidence shows that the practices of the district courts in conflicts concerning custody violence "between the parents" is not considered relevant unless it has been substantiated through a court verdict and has started before the separation. Furthermore, it is not considered whether the child has witnessed or heard the abuse (Rejmer 2003).

In the preparatory works to the latest changes to the law, it was mentioned that there are cases where the general principles of joint custody and unsupervised face-to-face contact do not apply, and the parliamentary law committee states that in cases of violence from one parent against the other joint custody should normally be out of the question (LU 1992/93:22). However, very little attention has been given to these "exceptional" cases and until now there have been no specific guidelines for the handling of the cases where, for example, men's violence against women is a problem (Eriksson and Hester 2001). Consequently the awareness of safety in relation to issues of residence and contact appears to be low. For example, when the court order also concerns contact and the mother has stated that she has been subjected to violence by the father, unsupervised contact between child and father is ordered in 47% of the cases, and supervised contact is ordered in 31% of the cases (p. 40). In 10% of the cases no contact is ordered, and in the remaining cases the child ends up living with the father and has unsupervised or supervised contact with the mother (Barnombudsmannen, 2005).

In the UK, while on paper there have been judgements, policies and procedures developed which should address the issue of domestic violence, in practice there is little evidence of progress. The figures for 'no contact' are even lower than in Sweden and indicate that it is only in cases of the most extreme and blatant risks that no contact would be considered. In 2003, 67,000 applications were made for contact under Section 8 of the Children Act (1989) (Department of Constitutional Affairs, 2004). Only 601 cases were refused – a figure of less than 1% of all applications.

Further evidence from a case file analysis of 300 cases of applications before the courts shows that in 61% of cases there were allegations of domestic violence. The threshold for proving that violence occurred is high and only in one third of cases was the allegation proved. In the vast

majority of cases, fathers were granted contact with their children regardless of their violent and abusive behaviour. While 58% of men had some contact when they came into the court arena, this had risen to 94% by the end of the legal proceedings, though 5 percent was indirect contact (National Association of Probation Officers, 2002).

New guidelines have now been issued in the UK to guide the risk and safety assessments for children by court officers (CAFCASS, 2005). However, they are yet to be implemented and occur against a climate of major cut backs which will ensure that the number of assessments and reports undertaken by the family court officers is to be reduced. Currently there are grave concerns expressed by women's services and children's charities about the draft Children (Contact and Adoption) Bill which at this stage places much greater emphasis on enforcement of contact rather than safety in child contact. There is a heavy emphasis on mediation which is largely inappropriate where there is domestic violence. Risk and safety assessment policies are not mentioned in the legislation and there are therefore concerns that contact will be enforced where domestic violence and child abuse have been, or remain issues.

6.4 Lack of co-ordination between different courts and child protection services

The lack of intersection between legislative measures in different court jurisdictions is a problem identified by several countries.

The situation is aptly illustrated in Germany where the law does not make a connection between decisions on child contact/residence and decisions on injunctions. In practice this means that if one judge decides on both aspects he or she is not bound by law to coordinate the measures to be issued. Similarly, in the UK, women identified that non-molestation orders granted in one court were undermined by child contact decisions (Humphreys and Thiara, 2002) and that a common way of changing bail conditions was through offenders demanding child contact (Hester et al., 2003; Hester, 2006). While in the UK, the Children Act, 1989 attempted to provide a unified framework for children's welfare which would include children in divorce proceedings as well as public law where there were concerns about child abuse, in practice, the two areas of child protection and child contact remain very separate with different judgements, decision-making and attitudes underpinning the two areas.

In Sweden, a further complication lies in the lack of co-ordination between the courts which order supervised contact and the local governments' social services who are responsible for the supervision of contact. According to the current report from the regional governments' inspections of the social services, there are problems in the implementation of the court orders due to unclear guidance for the handling of these cases within the social services (Socialstyrelsen and Länsstyrelserna 2004, 70). This problem is discussed by the latest parliamentary committee reviewing the law, who suggests changed guidelines demanding that the courts consult the social services prior to awarding supervised contact (SOU 2005:43). However, it is also stated that the social services should be considered as supporting contact, not supervising it to prevent risk. If face to face contact cannot be organised without risk for the child, indirect contact, or no contact are stated as better options. According to the committee, contact is the right of the child, not a parent, and the point of departure must be that children have an absolute right not to be subjected to any kind of violence, abuse or other disrespectful treatment from parents (including corporeal punishment which has been banned in Sweden since 1979). The different presumptions in each arena create points of tension and variable practice.

6.5 Concluding Comment

Interviews with abused mothers across both the UK and Sweden show that they may find themselves in a no-win situation in relation to custody, contact or residence: as custodians they are responsible for the child's well-being and for protection, but they find it very difficult to protect the child from the violent father (Eriksson 2003; Mellberg 2002). Furthermore women also report that contact or custody arrangements can enable the violent man/father to continue to be violent (see also Rosengren 1998). It is also worth noticing that a ten-year follow-up of a previous survey of abused women's encounters with the Swedish welfare system shows that the issue of legal conflicts regarding children has emerged as a new problem in the 1990s (Eduards and Elman

1990; Elman 2001). In this respect, the situation of abused women who also are mothers seems to have become worse in the last decade.

In several countries work in the criminal justice arena in relation to violence against women is not being matched by work in the family court arena. Thus, in Sweden, while the work of the Committee on Violence Against Women provides a feminist perspective on violence in heterosexual relationships in Swedish policy, the Committee has concentrated on criminal law and support for women where domestic violence is raised as a child protection issue. Little consideration has been given to child contact and residence and no recommendations have been made. Consequently, a number of issues associated with the legal rights and duties of violent men who are also parents have not been dealt with at all (cf. SOU 2002:71). A similar situation exists within the UK.

In both the UK and Sweden there have been recent official criticisms of the lack of safety orientation in relation to child contact (2002 Parliamentary Committee on Custody SOU 2005:43; HIMICA 2005). Guidelines for the assessment of the probability of violence, as well as for risk assessment have been recently put forward in both countries.

In spite of these positive shifts, the barriers to protection for women and children within the divorce arena remain very high. The constraints outlined in this section mean that there often appears to be little overlap between developments in the criminal law and orders to create protection for women and children, and the way in which these issues are addressed in relation to child contact.

7. Immigration legislation and the position of immigrant women experiencing domestic violence in accessing legal support

Access to legal protection for women experiencing domestic violence is dependent upon their legal status within the country they are resident in. Legal rights vary and are dependent upon status as refugees, asylum seekers, marriage to a partner with residency, employment permits etc. However, though the formal research data is extremely limited on immigrant women's access to legal support across the countries involved in this study, it is clear that they currently experience greater exclusion and vastly reduced access to legal solutions for violence when compared to women with secure residency.

7.1 Barriers to accessing legal support and intervention

7.1.1 Financial

It is clear that financial insecurity and limited options significantly reduce women with insecure immigration status's ability to access legal support. For example, in Austria third country nationals who come to the country to join a husband are not allowed to work during the first four years of their stay in Austria. Therefore they depend economically on their husbands and cannot separate from them (Haller, 2005).

In the UK immigrant women who enter the country to join a husband / partner are subject to a two-year probationary period during which they do not have recourse to public funds and must be able to support themselves and provide accommodation without claiming certain benefits. This means that women who have recently emigrated to join a resident partner are totally dependent on their sponsor, usually the settled partner. It is therefore almost impossible for women to leave as they can not access on-going protection, housing or welfare benefits. In addition, under *Section 9 of the Asylum and Immigration Act, 2004* which began implementation in January, 2005, all financial support and accommodation provided under the National Asylum Support Service is withdrawn if an application for asylum is not successful. This also applies to those who come to the UK to join a British partner who subsequently wish to separate, for example if they experience domestic violence.

7.1.2 Language

Evidence from an Austrian study (Haller, 2005) revealed that immigrant women are often unable to contact the police because they often do not speak German well enough to contact authorities. In this context, many women seek refuge in women's shelters (where migrants are over-represented) instead of calling the police.

Evidence from a German study showed that migrant women more often applied for a protection order at the family court than non-migrant women (Rupp 2005).

7.1.3 Fear of police

Evidence from an Austrian study (Haller, 2005) demonstrated that immigrant women are often prevented from contacting the police due to fear (either because of bad experiences in their home countries or because of their legal status).

Similar problems have been documented in the Nordic countries, including Sweden (Madsen et al 2005).

7.1.4 Dependence on partner for legal status

In most countries women entering a country to join a resident partner are dependent upon this partner for their own legal status. For example, in Austria many migrant women enter the country in the course of so-called 'family reunification'. Their right of residence depends on the husbands'

right. In cases of divorce, or if the husband loses his right of residency (e.g. because of a criminal conviction) other family members also lose their residency.

Within the UK immigration rules require that women who enter the UK as the spouse or unmarried partner of a settled UK resident, under the Nationality Immigration and Asylum Act 2002 must complete a two year probationary period before an application for indefinite leave to remain in the country can be made. This impacts negatively upon women and children experiencing domestic violence because it gives the settled partner an opportunity to exploit their insecure status by threatening deportation, fear of returning to country of origin and the fact that if the settled partner breaches immigration procedures the whole family is held collectively liable and may be punished with deportation.

In addition, women who enter the UK to join a resident partner are dependent on the support of this partner for their application to secure indefinite leave to remain. The resident partner therefore holds the power to withhold application. Women are often prevented from accessing support or information about their immigration rights or position. They may therefore not be in a position to complete the process to secure their permanent residency. If these women become over-stayers, they are at risk of deportation, unless they can claim asylum under the Human Rights Act. However, this requires them to provide evidence of the gender-based persecution they would face if they returned to their country of origin.

In addition, women who enter or remained in the UK on the basis of their marriage/relationship, but who fail to apply to remain before the expiry of their visa ('overstayers') are not protected by the domestic violence rule. Neither are other categories of women subject to immigration control who may also experience domestic violence in the UK.

7.1.5 Removal of children

Many immigrant women are prevented from accessing legal support when experiencing domestic violence due to a fear that their children will be removed. For example, in the UK recent legislation allows local authorities to take children into care if their mothers or fathers become over-stayers and have no means of support. While Local Authorities do have a statutory power (*s.17 of Children Act 1989*) to provide for children who are born within the two-year probation, this is open to interpretation and different Authorities act upon this in different ways, some providing co-existing support for mothers, others taking children into care. These children are outside the protective mechanisms of the *Children Act, 1989*. It would appear to be in direct contradiction of their 'right to family life' under the *Human Rights Act*.

7.2 Innovative practice in ensuring safety and security of immigrant women

7.2.1 Achieving residency / permanent right to remain independent of partner

Most European countries stipulate that residency granted on the grounds of marriage or co-habitation remains dependent upon the maintenance of this relationship for a defined period of time.

In Sweden for example, people granted residency and work permits on the grounds of marriage or co-habitation must be resident in the country for two years before the immigrating person can achieve independent permanent leave to remain. However, since July 2000, exceptions to this rule may be granted before the two years have passed if a relationship has ended due to violence or other serious violations of freedom or integrity. However, it should be noted that the right to remain depends on the type of violence, extent and situation: "minor" violations are not considered sufficient reason to stay (*Prop. 1999/2000:43, p. 53f*).

A review of practice (Migrationsverket 2003) based upon estimated figures, has been carried out on the possibility of gaining a residence permit if a relationship ends (due to violence) prior to the two years normally required. This revealed that the Migration Board assessed more than 10, 000 applications every year for extended permission to stay and only a small number of cases concern relationships that have ended prior to the two years required. Extended permission is denied only

in approximately 1% of the cases. The number of extended residence permits that have been granted in cases where the relationship has ended because of violence is estimated to be 60-70 cases. In some of these cases there might have been other reasons as well (such as a risk of social ostracism of a separated or divorced woman). The statistics do not show the number of appeals, but a closer review of 37 cases show that in 24 cases a residence permit was denied after the appeal. The most common reasons for a residence permit being denied in spite of the fact that the relationship ended because of violence are: the evidence is not strong enough (Madsen et al 2005, 57), the violence is not serious enough or the relationship has been too brief. Furthermore, intimidation, psychological abuse and restrictions on the woman's freedom of movement and right to self-determination are not considered on a par with physical violence. One interpretation of these findings is that the "holistic" approach to men's violence against women and associated emphasis on psychological violence that currently is developing within criminal law has so far not been as evident in the context of immigration.

Another example can be found in the UK. In 1999 the Home Office introduced a 'spouses concession outside the immigration rules for victims of domestic violence'. This can provide exemption from immigration rules for women who experience domestic violence within their probationary period of stay in the UK and means they may be given leave to remain in the UK independently of their partner. In order to secure this they need to provide 'satisfactory evidence' of domestic violence including one of the following: an injunction, non-molestation order or protection order, court conviction or police caution issued against the partner.

This concession was incorporated into the 2002 Immigration Rules and has come to be known as the "domestic violence rule". The type of evidence of domestic violence required to qualify under the rule was also extended to include at least two of the following: a medical report or GP's letter confirming injury, a court undertaking that the perpetrator will not approach the victim, a police report confirming attendance at the home, a letter from Social Services confirming involvement or a letter of support from a women's refuge.

However, while this is an improvement, many women do not know of their rights under this rule, or of any agencies who could provide advice or support. In particular, many women avoid accessing the criminal justice system and statutory services due to fear of deportation or reprisals from their family. In addition, lack of access to public funds mean that women often have little or no access to places of safety such as refuges while criminal or civil proceedings are initiated or medical care is sought.

It can be argued that in its present form, the domestic violence rule and the no recourse to public funds rule appear to have the effect of breaching the fundamental human rights of women with insecure immigration status as set out in a number of the international treaties that the UK is a signatory to, including the Convention on the Elimination of All Forms of Discrimination Against Women and the European Convention of Human Rights incorporated into the Human Rights Act 1998.

7.2.2 Screening of resident partner in advance of marriage

Recent reforms in Sweden allow for a protective screening process. When a person applies for a residence and work permit on the basis of marriage or cohabitation the *Swedish Aliens Act (Utlänningslagen 1989:529)* states that such a permit requires that the relationship is serious and that there are no special circumstances indicating that a permit should not be granted. One 'special circumstance' is a risk of violence from the spouse or partner in Sweden. This mainly applies to cases where there is a significant risk and the Swedish spouse/partner has, for example, been convicted of violent and/or sexual crimes (*see Prop. 1999/2000:43*). In a recent report published in February 2005 (SOU 2005:14) it is suggested that in the context of applications for a residence and work permit on the basis of marriage or cohabitation, it should become possible to systematically conduct background checks of the Swedish spouse/partner in the police registers for convictions and suspected offences respectively, including crimes related to child pornography.

The review of practice (Migrationsverket 2003) mentioned above, on the possibility of denying a residence permit due to a risk of violence showed that in the period July 2000 to July 2003 the Migration Board assessed at least 30 000 first time applications for a residence permit. In approximately 50 cases a permit was denied due to a risk of violence. The statistics do not show the number of appeals, but a closer review of 27 cases of appeal show that in 16 of those cases the permit was still denied due to serious and recent violence by the Swedish partner.

7.3 Concluding comments

As earlier sections of this report have demonstrated, access to legal protection for all women experiencing violence and abuse is patchy and limited. Despite minimal data across Europe, it is clear that immigrant women experience greater exclusion and hugely reduced access to legal solutions for violence. As illustrated in the four planets model at the beginning of this report, many of these women inhabit an effectively lawless space, denied access to legal solutions due to the insecurity of their residence status.

Barriers such as limited resources, lack of interpreting services, fear of the police or of the removal of children and dependence on partners for legal status all prevent women from accessing support and justice when they experience violence or abuse. A few isolated examples of good practice including the possibility of achieving residency independent of a partner, as in the UK and Sweden, and the screening of resident partners for previous convictions for violence, as in Sweden, demonstrate the potential to make a meaningful difference to women's options for safety and justice.

8. Conclusions and Final Comment

This report highlights that in the selected European countries used as examples, the law is both a facilitator and a barrier to justice and protection for women and children suffering violence and abuse. A number of issues emerge as relevant to countering the violation of human rights through interpersonal violence and abuse.

The 'four planet' model outlined at the beginning of this report is much in evidence particularly where children are involved. It can be seen that separation of different aspects of the law and policy into different 'planets' with contradictory values, attitudes and practices is profoundly unhelpful. Examples lie in the way in which child protection authorities (on the child protection planet) may expect a woman living with a violent partner to separate as a means of protecting herself and her children. She is then required by the family courts or other authorities (on the visitation and contact planet) to provide joint custody and unsupervised contact to the same violent man. Equally problematic can be the over-riding of injunctions and non-molestation orders made in one court (on the violence against woman planet) by contact orders made in another court (on the visitation and contact planet). The charging of men with offences related to violence and abuse within the criminal courts (on the violence against woman planet) and then ignoring such charges and convictions when child contact is being negotiated (on the visitation and contact planet). Further problems occur when it is not recognised that one of the most effective forms of child protection where there is domestic violence is the criminal prosecution of the offender. Progress in the future lies in bringing the planets into alignment so that attitudes, legislation and support for violence against women and children are harmonised rather than contradictory.

Obstacles and challenges:

- The lack of 'cross-over' between criminal, civil and police law means that protective action is too often a replacement for criminal justice and undermines the human rights agenda for women and children living with different forms of violence and abuse.
- The depressingly high rate of attrition and low conviction rate in criminal cases of rape, domestic violence and stalking creates barriers to justice for women.
- Poor official data in relation to all forms of violence against women – rape, stalking, domestic violence, forced marriage – means that: it is difficult to track cases across the criminal justice system; it is difficult to assess whether any improvements in reporting and prosecution have occurred; and violence against women becomes invisible within the police and judicial system.
- A continued over-reliance on mediation, dispute resolution and diversionary programmes inappropriately replaces criminal justice and protective action responses.
- Child protection systems fail to recognise that where there is domestic violence, the most effective form of child protection is proactive and assertive action taken against offenders by police and the courts.
- The restricted legal rights for women with uncertain immigration status increase their vulnerability to violence and abuse. In countries like Austria and the UK substantial time restrictions (4 years and 2 years respectively) in which women are expected to be supported by their husbands increase the dangerousness of their situation where there is violence and abuse.
- Child contact proceedings which undermine and minimise the seriousness of acts of violence against women and children. Violent fathers should not be assumed to be good enough fathers.

Recommendations:

- The ability of the police to take action at the scene of a domestic violence incident to exclude the offender from the house for 10 days or more through barring/go-orders is progressive practice in evidence in Austria, Germany and some cantons of Switzerland. It signifies a shift from protecting male property rights to protecting the physical safety of women and children.
- Improvement is needed in the cross over between criminal, civil and police law. For example, small steps such as the issuing of protection orders at the completion of criminal proceedings (UK) and the ability of youth welfare authorities to take out protective injunctions on behalf of a child represent current progressive practice (Austria).
- Data which is able to be disaggregated by gender, age and relationship of victim to perpetrator is necessary if both the crime and the gendered aspects of interpersonal violence are not to be lost.
- Procedural reforms to protect vulnerable witnesses during proceedings which involve violence against women, for example, rape, stalking and assault offences associated with domestic violence.
- Legislation which recognises a 'course of conduct' rather than individual incidents as grounds for criminal prosecution as evidenced in legislation on stalking and the 'Gross violation of women's integrity' in Sweden.
- Legislation which recognises that violence within an intimate relationship is an aggravating factor.
- Developments within rape and sexual assault offences which rely on proving absence of consent rather than 'reasonable force'.
- The provision of intervention, counselling, support and advocacy services which provide an holistic approach to women experiencing violence and abuse. This includes support for appropriate legal action which has shown both increased access and better outcomes within the criminal justice system.
- Proactive intervention which allows women to be contacted by services following a violent incident and thus recognises the disempowering effect of abuse. This has been evaluated positively in both the UK and Austria.
- Increased access to safety and justice is needed for women with insecure immigration status who are experiencing violence and abuse, through measures such as the acceptance of a wider range of evidence to support women's experience of abuse. This can provide the option of an exemption to normal immigration legislation. Another example is the Swedish policy which demands that men marrying women from other countries are vetted for any previous history of violence and abuse.
- Non-molestation orders/injunctions have been developed in different countries and provide examples of ways in which protection can be enhanced. These include:
 - i) Provision of the order on the 'balance of probabilities' with recognition that abuse which occurs in secret may have few witnesses and little evidence.
 - ii) Legal aid to support women in pursuing non-molestation orders/injunctions such that access to protection is not determined by financial resources
 - iii) Wide definitions of the relationship criteria for gaining an order so that women subjected to a range of interpersonal abuse are protected.
 - iv) Support provided through advocacy and intervention centres for women applying for orders
 - v) Consistent levels of proactive action by police when orders are breached.
 - vi) Sufficient penalties provided by the courts for orders to provide protection.

- vii) Non-molestation orders and occupation orders provided for a sufficient length of time to make them worthwhile for women to pursue as a form of protection (one year orders should be the norm not the exception).
 - viii) Civil orders should be available as a form of protection during and after criminal proceedings, rather than the routes being mutually exclusive. Judges and magistrates across different jurisdictions should have powers to make non-molestation orders so that women are not 'shuffled' between courts when appropriate protection is needed.
- Recognition within legislation that domestic violence constitutes a form of child abuse.
 - Guidance and resources as exemplified in Sweden, which makes explicit that support for women is an expectation of the child protection authorities where there has been domestic violence.
 - Legislation, policy and practice which assert the child and woman's right to safety within child contact proceedings. This will include forms of prohibition on violent men seeking contact, residency and shared parental responsibility within divorce and separation proceedings.
 - Assertive legal action on forced marriage which also recognises its link to child abuse through the number of under 16 year old girls and boys involved. This may mean the provision of specific criminal legislation, or recognition through action under existing criminal legislation on kidnap, abduction, rape and assault, child abuse. It will also involve significant community prevention initiatives.

This report shows there are serious limitations to the law as an instrument which can provide protection, justice and support for women and children suffering violence and abuse. However, when one considers the 'law-less' space for many immigrant women, or where there is no legislation to cover acts of violence and abuse (e.g. when rape in marriage is not recognised, countries without stalking legislation) then the necessity of law reform and active pursuit of effective implementation comes into sharp relief. Active work to bring different arenas of the law and its implementation together in a concerted violence against women and children strategy should provide the way forward across the different countries of Europe.

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