

Scottish Government Consultation on Protective Orders for People at Risk of Domestic Abuse

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SCOTTISH GOVERNMENT CONSULTATION ON PROTECTIVE ORDERS FOR PEOPLE AT RISK OF DOMESTIC ABUSE

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FOREWORD BY THE CABINET SECRETARY FOR JUSTICE



Domestic abuse is an appalling experience that can shatter the lives of families, damage health and well-being and restrict freedom to live a safe and fulfilling life.

Earlier this year, the Scottish Parliament passed the Domestic Abuse (Scotland) Act 2018 which creates a new specific offence of domestic abuse, covering physical abuse but also other forms of psychological abuse and coercive and controlling behaviour, bringing clarity for victims so they can see explicitly that what their partner or ex-partner has done to them is wrong and helping ensure perpetrators can be held to account under the criminal law.

This forms part of wider action by the justice system to tackle domestic abuse. Police Scotland have established a National Domestic Abuse Taskforce to target the most prolific perpetrators, and their Disclosure Scheme for Domestic Abuse has helped safeguard those who have been suffering from, or at risk of, domestic abuse. The Crown Office have a dedicated National Prosecutor for Domestic Abuse and the Scottish Government has committed to expanding the innovative Caledonian System domestic abuse programme to 6 new local authority areas, which will enable more male perpetrators of domestic abuse to receive specific rehabilitation services tailored to their offending behaviour

Research by Scottish Women's Aid on homelessness and domestic abuse highlights that it is a significant cause of homelessness in Scotland. It was also noted during the passage of the Domestic Abuse Bill through Parliament that it can be very difficult for those suffering or at risk of suffering from domestic abuse, the majority of whom are women often with caring responsibilities for children, to remain in their own home when attempting to leave an abusive partner.

That is why in our Programme for Government in September, we committed to consult on the creation of new protective orders in this area and on whether any changes are needed to the existing provisions on exclusion orders. This consultation meets that commitment.

The new protective orders could be used to keep those at risk of domestic abuse safe by giving the police and courts powers to remove suspected perpetrators from their homes

In contrast with existing civil measures such as interdicts and exclusion orders, the new protective orders we are consulting on would mean the person at risk is not required to make the application to the court themselves for one of these protective orders. This may be key to ensuring the safety of a person at risk where the effect of abuse is such that they are not in a position to initiate civil proceedings to remove the person putting them at risk from their home, because, for example, they are being controlled to such an extent that they could not initiate a court action. It would provide them with time to seek advice on their longer-term housing options and reduce the risk that they have to become homeless to escape the perpetrator.

The consultation seeks views on a number of policy issues concerning how such new protective orders would work if introduced in Scotland and whether any changes are needed to exclusion orders. We are particularly interested to hear your views on how the new protective orders can best be implemented in a way that ensures they are an effective tool to protect people at risk of domestic abuse.

I encourage all those with an interest to take the time to consider and offer your views on the proposals contained in this paper.

A handwritten signature in black ink, appearing to read 'H. Yousaf', with a long vertical stroke extending downwards from the end of the signature.

Humza Yousaf MSP
Cabinet Secretary for Justice

PART ONE: MEASURES TO PROTECT THOSE AT RISK OF DOMESTIC ABUSE

Introduction

1.1 In February 2018, the Scottish Parliament passed the Domestic Abuse (Scotland) Act 2018, which will, when it comes into force in 2019, provide for a specific statutory offence of domestic abuse. The offence will cover all the types of behaviour that can constitute domestic abuse. Crucially, this includes psychological harm as well as physical harm. While physical harm can be prosecuted using, for example, common law assault and overt threats can be prosecuted using, for example, the statutory offence of threatening or abusive behaviour, psychological harm can be very challenging to prosecute using existing laws. The introduction of this new offence will help address this gap in the criminal law.

1.2 During the passage of the Domestic Abuse Bill, in response to the call for evidence at Stage 1, a number of third sector respondents raised concerns that there is a gap in protection available to victims of domestic abuse. A person wishing to obtain immediate or long-term protection, particularly in relation to keeping a perpetrator away from their home, can only obtain such protection if the perpetrator enters the criminal justice system or if the victim takes out a civil order against the perpetrator.

1.3 In their Stage 1 report¹, the Scottish Parliament's Justice Committee welcomed the then Cabinet Secretary's undertaking to engage further with third sector organisations on proposed "emergency barring orders" (EBOs), which would ban a perpetrator of abuse from the home of the victim for as long as is considered necessary to secure the victim's safety and indicated that they would take evidence on this issue at Stage 2.

1.4 As part of their consideration of the Bill, the Justice Committee held an evidence session² on these issues in October 2017, taking evidence from Police Scotland, Scottish Women's Aid, the Law Society of Scotland, and Professor Mandy Burton.

1.5 Following that evidence session, the then Cabinet Secretary for Justice wrote to the Justice Committee in November 2017, setting out how the Scottish Government intends to consider these issues. In that letter, he stated that a consultation would be published in 2018 and that it would seek views on questions about how policy to provide for relevant powers to protect those at risk of domestic abuse might be developed.

¹ <https://digitalpublications.parliament.scot/Committees/Report/J/2017/9/21/Stage-1-Report-on-the-Domestic-Abuse--Scotland--Bill>

² <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11165>

Background

What are barring orders?

1.6 Barring orders are an immediate, short-term order which remove a suspected perpetrator³ of abuse from the home of a person at risk of abuse. They may also prohibit that person from contacting the person at risk⁴.

1.7 They are intended to provide protection to a person at risk of abuse in the immediate term. In the longer term, the person at risk may consider seeking a civil protective order, such as a non-harassment order or an exclusion order. Where, following investigation, the police determine there is sufficient evidence to charge the suspected perpetrator with a criminal offence, the disposal upon conviction for a criminal offence may include as part of any disposal measures to put more long-term protection in place for the person at risk.

1.8 Evidence from other jurisdictions indicates that these short-term protective orders are most effective when they are accompanied by facilitation of access to support services for the person at risk, to advise them on the options they have for ensuring they are protected in the medium to longer term.

International and domestic obligations on domestic abuse

1.9 Measures to enable the police, the courts and/or other authorities to remove a suspected perpetrator of domestic abuse from the person at risk's home are required under the Council of Europe Convention on Action Against Violence Against Women and Domestic Abuse ("the Istanbul Convention"). Article 52 of the Istanbul Convention requires states party to the convention to have in place:

"...measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk."

1.10 A paper published by the Council of Europe in June 2017, *Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Convention*⁵ noted that (emphasis added):

"A distinct advantage of Emergency Barring Orders (EBOs) is that they are less restrictive on the rights and freedoms of those upon whom they are imposed than alternative means of protection for victims, such as arrest and

³ For consistency, except where context requires otherwise, the person against whom an order is sought or imposed is referred to as the 'suspected perpetrator'.

⁴ For consistency, except where context requires otherwise, the person whom an order is intended to provide protection to is referred to as the 'person at risk'.

⁵ <https://rm.coe.int/convention-istanbul-article-52/168073e0e7>

*detention...EBOs, as required by the Istanbul Convention, are protective measures that require a 'paradigm shift' in understanding interventions to protect victims from domestic violence. **Rather than asking victims to seek a place of safety from the violence, it shifts the burden to the perpetrator, who is ordered to leave the residence of the victim or person at risk and not to contact her or him**".*

1.11 Articles 2 and 3 of the European Convention on Human Rights (ECHR) protect the right to life and prohibit torture or inhuman or degrading treatment or punishment. In previous cases, the European Court has ruled⁶ that states have a duty to take reasonable steps to protect individuals whose life or well-being is at risk as a consequence of domestic abuse. As such, there is an overarching duty under the ECHR for states to put in place mechanisms to protect the life and well-being of a person who is at risk of domestic abuse.

Current criminal and civil protective powers and remedies in Scotland

Police and court powers

1.12 In the context of a criminal investigation, there are a number of existing powers that the police and courts can use to remove a suspected perpetrator of domestic abuse from the home of a person at risk.

1.13 Where a suspected perpetrator of domestic abuse has been charged with a criminal offence, the police can release them on what is known as an 'undertaking' prior to a bail hearing. An undertaking is in place until the accused person first appears in court and such undertakings can include a condition imposed by the police that may require the accused person not to approach the complainer and/or not to return to their shared place of residence.

1.14 Equally, once an accused person appears in court (either immediately after being charged, or following release on undertakings), the court can remand a suspect in custody prior to trial. There is a statutory presumption in favour of granting bail to an accused person, but this may be over-ridden where certain criteria are met, including, for example, where the court has reason to believe that the individual may interfere with witnesses or there are reasonable grounds to believe the accused person would commit further offences before their trial.

1.15 It is worth noting that provisions in the Domestic Abuse (Scotland) Act 2018 will, when they come into effect, add domestic abuse offences⁷ to the list of offences where, if the accused has previously been convicted on indictment and is charged on

⁶ https://www.echr.coe.int/Documents/FS_Domestic_violence_ENG.pdf

⁷ These are offences charged at section 1 of the Domestic Abuse (Scotland) Act 2018, or offences where the aggravation at section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 has been charged/proven.

indictment with a further offence, there is a presumption against bail, with it being granted only in exceptional circumstances.

1.16 Where a court decides to release a suspect on bail, the court will impose standard bail conditions and can, in addition, add special bail conditions. These special bail conditions could require that the accused person does not attempt to approach or contact the complainer, or return to a place of residence that they share with the complainer.

Civil remedies

1.17 There are a number of civil remedies available to a person who is at risk of domestic abuse. For example, in certain circumstances, it is possible for a person at risk to apply to a court for a civil order (an 'exclusion order') to exclude the perpetrator from a shared home. Paragraphs 2.1-2.51 of this consultation discuss whether changes should be made to the legislation concerning exclusion orders.

1.18 It is also possible for a person at risk of domestic abuse to apply for an interdict or for a non-harassment order (NHO). An interdict or NHO can include conditions such as prohibiting the subject of the order from phoning, texting or otherwise attempting to contact the person who has taken out the order, approaching or following them, or loitering outside their home or place of work.

Imposition of measures to protect a person at risk of domestic abuse in other jurisdictions

1.19 Powers to protect persons at risk of domestic abuse without the need for the suspected perpetrator to enter the criminal justice system, or for the person at risk to apply for a civil order, have been introduced in a number of jurisdictions across Europe. They are sometimes referred to as "emergency barring orders."

1.20 In jurisdictions which have implemented powers to bar a suspected perpetrator from returning to a home that they share with the person at risk, there are essentially two different approaches taken to how these operate.

1.21 Some jurisdictions, such as the Netherlands, Austria and England and Wales, allow an 'administrative order' to be made by the 'competent authority' (usually the police, though in some jurisdictions, it is the local authority/mayorality) which takes immediate effect without first being approved by a court. This order usually runs for a short period of time during which the competent authority can apply to the court to put an order in place for a longer period of time. In England and Wales, such orders are referred to as "Domestic Violence Protection Notices" and "Domestic Violence Prevention Orders" and are provided for in the Crime and Security Act 2010.

1.22 In other jurisdictions, including Bulgaria and Spain⁸, an order requiring a suspected domestic abuser to vacate a home shared with the person at risk requires to be made by a court before it takes effect.

Implementing Protective Orders in Scotland

Power to impose an immediate administrative order

1.23 As noted above, a number of jurisdictions which have introduced protective orders to remove a suspected perpetrator from the person at risk's home have provided a mechanism whereby the competent authority can make an 'administrative' order which puts in place measures to protect a person at risk of domestic abuse immediately, without first having to be approved by a court.

1.24 A paper published by the Council of Europe noted that "*The Istanbul Convention leaves it to the discretion of states parties to decide whether they allocate the task of issuing EBOs to the police, the court, or some other authority, and whether the procedure has an administrative, criminal or civil nature.*" However, the paper goes on to observe of jurisdictions where an order can only take effect after it has been approved by a court that "*In the absence of administrative EBOs, this solution presents several disadvantages. The protection can hardly be provided immediately, unless courts are accessible around the clock, which is rarely the case.*"

1.25 In England and Wales, sections 24-33 of the Crime and Security Act 2010 provide police forces with a power to issue a suspected perpetrator with a Domestic Violence Prevention Notice (DVPN) when attending to a domestic abuse incident. A DVPN is issued by the police and runs for a period of 48 hours, effective from the time of issue. This order may prohibit the suspected perpetrator from returning to the home of the person at risk, or from making contact or otherwise harassing or abusing, the person at risk.

1.26 While there are some jurisdictions, such as the Netherlands, where the formal power to make an administrative order to protect a person at risk of domestic abuse rests with the municipal authorities, we understand that in such circumstances, the municipal authority would usually act on the advice of the police. In view of the police's role in responding to incidents of domestic abuse, the Scottish Government's initial view is that any power to make an administrative order should rest with the police, rather than another body.

⁸ According to <https://rm.coe.int/convention-istanbul-article-52/168073e0e7>, In Spain, Madrid has two gender-based violence courts which are capable of operating 24 hours a day. It is not clear if this is the case in all areas of the country.

Question 1: Do you think the police should have the power to bar a person from a home that they share with a person at risk of domestic abuse for a period of time and prohibit them from contacting that person, without the need to obtain court approval?

If you wish, please give reasons for your answer.

Length of time for which an administrative order should run

1.27 In England and Wales, an application by police to a magistrates' court for a Domestic Violence Prevention Order (DVPO) must be heard within 48 hours or else the DVPO ceases to have effect.

1.28 It is understood that there has been some concern expressed⁹ that the 48 hour period for which an initial, police-issued DVPO runs in England and Wales is too short and does not provide the police and support agencies with sufficient time to prepare an application to a court. In this regard, it is worth noting that in the Netherlands, a municipality-issued administrative order can run for an initial period of 10 days, which can be extended for up to 28 days and in Austria, a police-issued administrative order can run for 2 weeks with the possibility of prolonging to four weeks if the person at risk applies for a civil court protection order.

1.29 It has been suggested that the short period for which these administrative orders are able to run has resulted in police in England and Wales being reluctant to make use of them and that extending this period to a longer period such as, say, 7 days or 14 days would improve their effectiveness.

1.30 Set against this, there is a need to consider how long it is reasonable to bar a suspected perpetrator whom the police suspect may pose a risk, but who has not been charged with any criminal offence, from their own home, without that order being considered and approved by a court.

1.31 Such an order may constitute an interference in the right of the suspected perpetrator to a private and family life under Article 8 of the ECHR. Any interference in that right must be "in accordance with law" and "necessary in a democratic society". In considering whether such interference is necessary and proportionate, the extent to which it is required to secure the article 2 and 3 rights of the person at risk would have to be considered.

Question 2: If the police are given a power to put in place measures to protect a person at risk of domestic abuse for a period of time, we would welcome views on how long that period should be.

If you wish, please give reasons for your answer.

⁹ See for example the evaluation of the pilot scheme for DVPOs/DVPOs in England and Wales, which recommended extending the period before which a DVPO requires to be confirmed by the courts from 48 hours to 4-7 days:

Power for Courts to impose Protective Barring Order

1.32 As noted above, if powers are given to the police to impose an immediate measure to protect someone at risk of domestic abuse, it is considered important that a court is involved in considering whether protective measures should remain in place. Equally, if you consider that the police should not be given powers to impose an order to protect a person at risk without the approval of a court, then it is still considered important that the courts are given powers to impose measures to protect those at risk of domestic abuse by barring a suspected perpetrator from their home for a period of time.

1.33 There are some issues to consider in respect of the length of time that the protective order imposed by the court can last. As noted earlier in the consultation, equivalent provisions in other jurisdictions are considered a short-term emergency measure to protect a person at risk in the immediate term. The intention is that this provides time for the person at risk to take steps to secure their safety in the longer term. This might include, for example, that person taking out a civil order such as an exclusion order. Alternatively, if the suspected perpetrator becomes subject to criminal proceedings, bail conditions can be put in place at the discretion of the court which can include measures to protect the person at risk.

1.34 In England and Wales, where a magistrates court grants a DVPO, and in Austria, where the victim applies for a civil injunction, such an order can currently run for up to 28 days, though the UK Government have recently consulted on whether courts' powers should be expanded so that such orders can run until such time as a further court order is made¹⁰. In Spain, preliminary measures are usually provided for 30 days. After that the measures can be prolonged at the request of the victim. In Bulgaria emergency protective measures can be issued for a period ranging from one month to one and a half years.

Question 3: Do you agree that the courts should be given powers to make an order to protect a person at risk of domestic abuse by prohibiting the person posing the risk from returning to the person at risk's home while the order is in force?

If you wish, please give reasons for your answer.

Question 4: If the courts are given a new power to impose measures to protect a person at risk of domestic abuse, we would welcome views on whether there should be a maximum period of time beyond which such measures would not apply and, if so, what that period should be.

¹⁰ See https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf

If you wish, please give reasons for your answer.

Who should be able to apply to the courts for a protective order?

1.35 Existing civil protective orders, such as interdicts, NHOs and exclusion orders, are applied for by the person seeking protection through the civil courts. An important element of the proposal that courts should be able to impose measures to protect a person at risk of domestic abuse is that the person at risk is not required to make the application to the court themselves. This reflects the fact that a person experiencing domestic abuse may lack the resources, financial or otherwise, to make a court application, or may be subject to coercive and controlling behaviour to such an extent that they would find it very difficult to do so.

1.36 In England and Wales, the police apply to the courts for a DVPO on behalf of the person at risk. However, the UK Government recently consulted¹¹ on proposals to widen the range of people who can apply to the court for such an order. They have sought views on whether the person at risk, family members of the person at risk, local authority social care professionals, and specialist third sector support services, should also be able to apply to the court for a protective order. They also sought views on whether the criminal courts should be able to impose such an order following the conviction or acquittal of an accused person.

1.37 In their consultation document, the UK Government note that this would mean that Domestic Abuse Protection Orders could be made in family, civil and criminal courts. By enabling these orders to be made across all jurisdictions they intend to provide flexibility and improve how the different jurisdictions can respond to domestic abuse.

1.38 There may be advantages to allowing a range of relevant people and bodies to make an application to the court for a protective order. This could be particularly important where a person at risk is, for whatever reason, reluctant to involve the police. In contrast with an emergency administrative order, the court can act as a gate-keeper so as to ensure that an order is not made in circumstances where it is inappropriate to do so.

1.39 However, it is possible that allowing a person at risk or their family members to apply for such an order (rather than having the police act as a 'gatekeeper') could increase the risk that perpetrators of domestic abuse could themselves seek to use this process to remove a victim of domestic abuse from a shared home. If, as the UK Government are proposing in England and Wales, the right to apply for such an order is to be given to family members of the person at risk, we consider that it would be important to ensure that there is a means by which the person at risk's own views can be taken into account by the court when deciding whether to make an order.

¹¹ <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/>

Question 5: We would welcome views on which bodies and/or people should be able to make an application to a court to impose measures to protect a person at risk of domestic abuse.

If you wish, please give reasons for your answer.

Question 6: Do you think a criminal court should be able to impose measures to protect a person at risk of domestic abuse that would bar a perpetrator from a shared home for a period of time, when sentencing the offender.

If you wish, please give reasons for your answer.

Question 7: Where an application is made to the court for measures to protect a person at risk of domestic abuse by someone other than the person at risk, should the consent of the person who may be at risk be required for such an order to be made?

If you wish, please give reasons for your answer.

Who should be covered by a protective order?

1.40 The definition of domestic abuse used by Police Scotland and the Crown office and Procurator Fiscal Service for the purpose of investigating and prosecuting such conduct is¹²:

“Any form of physical, verbal, sexual, psychological or financial abuse which might amount to criminal conduct and which takes place within the context of a relationship.

The relationship will be between partners (married, cohabiting, civil partnership or otherwise) or ex-partners. The abuse can be committed in the home or elsewhere including online.”

1.41 As such, domestic abuse is defined as relating to abuse by a partner or ex-partner. This definition is not the exact definition found within the criminal law in relation to domestic abuse. However, the criminal offence of domestic abuse at section 1 of the Domestic Abuse (Scotland) Act 2018 and statutory aggravation at section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 also apply where the perpetrator and victim are either partners or ex-partners.

1.42 This approach reflects the fact that abuse of partners and ex-partners has a particular dynamic that differs from violence or abuse that occurs generally and may occur within a family between, for example, siblings or parents and adult children. There was a concern that extending the legislation to cover other familial

¹² See <http://www.scotland.police.uk/keep-safe/advice-for-victims-of-crime/domestic-abuse/what-is-domestic-abuse/>

relationships could lead to a dilution and diminution of the understanding of and response to domestic abuse.

1.43 Different approaches have been taken in different jurisdictions as to who can be protected by a system which provides protection to those at risk of abuse by preventing the suspected perpetrator from returning to the person at risk's home. These approaches have tended to reflect the different ways in which domestic abuse is defined in different jurisdictions.

1.44 For example, in England and Wales, DVPNs and DVPOs can be served on anyone who is an 'associated person' within the meaning of section 62 of the Family Law Act 1996. This includes partners and ex-partners, but also other family members and people who are members of the same household, other than because one is the other's employee, tenant, lodger or boarder.

1.45 In the Netherlands, a barring order can be issued to protect a person living in the same household as the subject of the order, and it is not a requirement that they are partners or ex-partners, and an order cannot be made to protect a non-resident partner or ex-partner.

1.46 In Austria, a barring order can be issued to provide protection to any person at risk of immediate danger. There is no requirement that the person at risk and person posing the risk are or have been in a relationship, or that they live together. As such, orders can be used to provide protection to suspected victims of stalking, to persons at risk from an acquaintance or family member, or to someone living in a house in multiple occupation who is at risk of violence from someone they are living with.

1.47 However, restricting the circumstances in which such protective orders can be made to partners and ex-partners would have the advantage of locating these powers within the justice system's understanding of domestic abuse. It would also enable the criteria to be used by the police and courts in assessing risk and deciding whether to make such an order to be tailored so as to reflect the kind of coercive and controlling behaviours that can indicate serious risk in cases involving partner abuse.

Question 8: We would welcome views as to which persons should be capable of being made subject to measures to protect a person at risk of domestic abuse. Should such protection be limited to providing protection from abuse by a partner or ex-partner. If not, what other relationships or circumstances should be covered by such provisions?

If you wish, please give reasons for your answer.

What test should the police and courts use in deciding whether to make an order?

1.48 A key aspect of the introduction of new protective measures is the test that is to be applied by the courts or police in deciding whether to make an order to put such measures in place in any given case.

1.49 Different jurisdictions have taken different approaches to this. For example, in England and Wales, the police and courts can make a DVPN or DVPO against a person where there are reasonable grounds for believing that the person against whom the order is sought:

- has either used violence or threatened violence against the person to be protected; and
- that an order is required to protect that person from violence.

1.50 The UK Government recently consulted on proposals which would expand the circumstances in which such an order could be made so that it is linked to their proposed statutory definition of domestic abuse¹³, thereby extending its application to cases involving abuse other than violence or the threat of violence.

1.51 In Austria, a barring order can be made where the police believe that there is an imminent danger to the life, health or freedom of the person at risk. In Bulgaria, an order can be in cases of domestic violence defined as “any act or attempted act of physical, mental or sexual violence, as well as the forcible restriction of individual freedom or privacy”. The violence must have occurred within one month before the application for a protection order.

1.52 In the Netherlands, the police can make an emergency order to protect a person “at serious and imminent risk” as a result of a standard risk assessment instrument used by a police officer. In Spain, a court can make a protective order where they conclude there is an objective risk to the life, physical sexual or moral integrity of the person at risk.

1.53 The new criminal offence of domestic abuse at section 1 of the Domestic Abuse (Scotland) Act 2018 explicitly recognises the range of behaviours that can constitute domestic abuse, including behaviours amounting to coercive and controlling behaviour and psychological abuse. It criminalises a person who engages in a course of abusive behaviour which:

- is likely to cause the victim to suffer physical or psychological harm; where
- the perpetrator either intends to cause such harm, or else is reckless as to whether such harm is likely to result from their course of behaviour

1.54 The offence in the 2018 Act provides a non-exhaustive, illustrative definition of what constitutes “abusive behaviour”. It includes behaviour which is “violent,

¹³ See pages 11-13 of https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf

threatening or intimidating” and behaviour which has its purpose, or is likely to have any of the following effects on the victim:

- Making the victim dependent on or subordinate to the perpetrator;
- Isolating the victim from friends, relatives or other sources of support;
- Controlling, regulating or monitoring the victim’s day-to-day activities;
- Depriving the victim of, or restricting the victim’s freedom of action; or
- Frightening, humiliating, degrading or punishing the victim.

1.55 There may be scope to adapt the definition of ‘domestic abuse’ in this offence to provide a test to be used by the police and courts to determine whether measures to protect people at risk of domestic abuse are necessary.

1.56 However, the domestic abuse offence in the 2018 offence was designed to be applied by a criminal court, where evidence of what happened requires to be corroborated and is tested to the criminal standard of proof.

1.57 In this regard, it is worth considering the tests used in existing provisions which enable certain other protective orders to be made. A Risk of Sexual Harm Order under the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005 can be imposed where the court is satisfied that the accused has done certain acts, irrespective of whether they have resulted in a criminal conviction and the order is necessary to protect a child or children generally from harm.

1.58 Another relevant order-making power is the court’s power to make a Banning Order under the Adult Support and Protection (Scotland) Act 2007. This order provides protection to “adults at risk” who by reason of disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected. It provides that an order can be made if the adult at risk “is being, or is likely to be, seriously harmed by another person.”

1.59 We would welcome views as to what would be an appropriate test that can be used to determine whether a protective order should be made for a person at risk of domestic abuse.

Question 9: We would welcome views on what you think the test should be for deciding whether to impose measures to protect a person at risk of domestic abuse. In particular, do you think it should be a requirement that the person against whom the order is sought must have used or threatened violence against the person to be protected by the order, or do you think a wider test covering our modern understanding of what constitutes domestic abuse (i.e. behaviour likely to cause psychological, as well as physical, harm) should be used?

If you wish, please give reasons for your answer.

The conditions that can be imposed as part of measures to protect those at risk of domestic abuse

1.60 The primary purpose of the measures to protect a person at risk is to remove a suspected perpetrator from the home of the person at risk for a period of time and prohibit them from returning to, entering or approaching the home. The power to impose conditions similar to those in the Matrimonial Homes (Family Protection) (Scotland) Act 1981, which prohibit a person from damaging the property or from removing the property or personal effects of the person at risk would supplement this.

1.61 However, in order to ensure that the person at risk is protected, it is considered important that such an order can also be used to prohibit the subject of the order from approaching or contacting the person at risk outside of their home, for example at their place of work, study or at their friends or relatives' homes.

1.62 It is currently the case that conditions of this kind can be imposed where a person applies for an interdict or a Non-Harassment Order. Where the police or courts consider that measures are necessary to protect a person from the risk of domestic abuse, the person at risk should not have to go through a separate court process in order to prevent the subject of the measures from making contact with them or harassing them away from their home.

1.63 With this in mind, it would seem appropriate that the measures to protect a person at risk of domestic abuse should be capable of being used to bar a suspected perpetrator from contacting the person to be protected by the order, or to require the person not to approach certain specified locations (such as the person at risk's place of work, or relatives' homes).

Question 10: We would welcome views as to whether, as well as prohibiting the subject of the order from entering the person at risk's home, it should also be possible to impose conditions on the subject of the order to prevent them from contacting or approaching the person at risk, or prohibiting them from entering other specified locations (such as the person at risk's place of work or relatives' homes).

If you wish, please give reasons for your answer.

1.64 It is the case that those who pose a risk of domestic abuse will often direct behaviour at others such as children of the person at risk in order to exert control and to further their abuse. This is just one of the ways in which children are victims of domestic abuse.

1.65 The Domestic Abuse (Scotland) Act 2018 strengthened powers for courts to impose Non-Harassment Orders in domestic abuse criminal cases so as to enable

provision to apply in favour of a child usually residing with the victim or perpetrator (or both, where they live at the same address) as well as the person directly against whom the domestic abuse has been perpetrated.

1.66 It is considered there is a case for enabling the police and courts to be able to impose conditions to protect any children under the age of 18 who live with the person at risk, both to reduce the risk that the suspected perpetrator will target behaviour at children to further the abuse, and to ensure that those children are themselves protected.

Question 11: Do you agree that, as well as enabling measures to be imposed to protect the person at risk, it should also be open to the police and courts to impose conditions requiring the subject of the order not to approach or contact any children living with the person at risk?

Sanction for breach of conditions imposed as part of measures to protect a person at risk of domestic abuse

1.67 Different jurisdictions that have legislated for measures to protect those at risk of domestic abuse have taken different approaches to the penalty for breaching such measures.

1.68 In England and Wales, breach of a DVPO or DVPN is a civil matter. A person who breaches a civil order can be found in contempt of court, which can result in a fine or imprisonment, though in their 2018 consultation, the UK Government seek views on proposals to criminalise breach of a DAPO (the proposed replacement for a DVPO).

1.69 In Austria, breach of an Emergency Barring Order results in an administrative fine of up to 500 euros and repeated breaches can lead to arrest.

1.70 In Spain, the Netherland and Bulgaria, breach is a criminal offence.

1.71 In Scotland, there are well-established precedents for breach of a civil court order being a criminal offence (e.g. anti-social behaviour orders, sexual risk orders, human trafficking orders etc.).

1.72 It is less common for a criminal offence to be committed as a result of failure to obey an administrative order issued without any court process. However, there are examples concerning 'emergency' orders issued by the police prior to their being confirmed by a court which may be of relevance. For example, breach of a closure notice issued by the police under section 26 of the Antisocial Behaviour (Scotland) Act 2004 is a criminal offence, as is breach of an 'emergency closure order' issued by the police on a licensed premises under section 97(2) of the Licensing (Scotland) Act 2005.

1.73 On the one hand, requiring breach to be proven to a criminal standard of proof for action to be taken against the subject of the order may in some circumstances make it more difficult to take action. However on the other hand, the possibility of a criminal conviction for breaching the terms of measures imposed to protect a person at risk is likely to provide a substantially greater deterrent and, as such, may help to ensure that those made subject to an order comply with it. Equally, if breach of an order is an offence, police would have powers, such as being able to enter a property when an offence has been suspected, that otherwise may not be available. This may provide reassurance to those being protected by such measures that enforcement will be a key element of the operation of the orders.

1.74 The similarities between measures to protect those at risk of domestic abuse and non-harassment orders has been noted above. Breach of a non-harassment order is a criminal offence punishable by a prison sentence of up to 5 years in custody.

Question 12: We would welcome views on whether it should be a criminal offence to breach measures put in place to protect a person at risk of domestic abuse.

If you wish, please give reasons for your answer.

Question 13: If you think breach of such measures should be a criminal offence, we would welcome views on what you think the maximum penalty should be.

If you wish, please give reasons for your answer.

Support for those at risk of domestic abuse

1.75 Measures to protect those at risk of domestic abuse are intended as a direct intervention to ensure the safety of a person considered to be at risk of harm.

1.76 In order to ensure their safety in the long term, a person may need to consider whether to take steps such as, for example, seeking an exclusion order under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 or the Civil Partnership Act 2004, an interdict, a Non-Harassment Order or other measures that may best suit their particular circumstances.

1.77 In order to enable persons at risk to make an informed decision regarding the most appropriate course of action, it is important that they have access to advice from services specialising in supporting those who have experienced domestic abuse. In many countries that have legislated in this area, the police officer progressing consideration of measures to protect a person at risk of domestic abuse will also act as a point of contact between that person and an agency offering support and assistance.

1.78 There are existing referral mechanisms in place between Police Scotland and domestic abuse advocacy services which may provide a model for how people can be directed to appropriate support.

Question 14: We would welcome views on whether there should be a statutory duty on the police, when making an application to the courts, or putting in place protective measures, to refer a person at risk to support services and, if so, how this should operate

If you wish, please give reasons for your answer.

1.79 A person who is barred from their home by the imposition of protective measures may become homeless as a result of this action by the state, in circumstances where it has not been proven beyond reasonable doubt that they did the things that have been alleged or posed the risks that have been alleged. We are considering whether it may be appropriate, and indeed necessary for human rights reasons, to offer that person some level of support regarding their housing position.

Question 15: Do you have any other comments you wish to make regarding the introduction of protective orders for people at risk of domestic abuse?

PART TWO - EXCLUSION ORDERS

2.1 This part of the consultation covers exclusion orders. The purpose of this part of the consultation is to outline the existing law on exclusion orders and to seek views on whether any changes are needed to make exclusion orders more effective.

2.2 Exclusion orders are civil orders. A person can apply to court for an exclusion order which can suspend the rights of a person's spouse, civil partner or, in certain circumstances, cohabitant from living in the family home. Neither the applicant nor the other party have to be living in the property at the time the application for an exclusion order is made.

2.3 There is provision in section 4 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 ("the 1981 Act") on exclusion orders for spouses. Section 5 of the 1981 Act makes provision on the duration of exclusion orders. The terms of sections 4 and 5 of the 1981 Act are outlined in Annex A.

2.4 Sections 104 and 105 of the Civil Partnership Act 2004 ("the 2004 Act") make provision on exclusion orders for civil partners. Sections 104 and 105 of the 2004 Act are in very similar terms to sections 4 and 5 of the 1981 Act.

2.5 There is discussion on cohabitants and exclusion orders in paragraphs 2.29-2.45 below.

2.6 An exclusion order can be granted by the court if it appears to the court that the making of the order is necessary for the protection of the applicant or any child of the family from any conduct or threatened or reasonably apprehended conduct of the other party which is or would be injurious to the physical or mental health of the applicant or child. (See section 4(2) of the 1981 Act and section 104(2) of the 2004 Act. These provisions are subject to section 4(3) of the 1981 Act and section 104(3) of the 2004 Act. Potential changes to section 4(3) and section 104(3) are discussed in paragraphs 2.20-2.24 of this consultation.)

When an exclusion order is granted the court must, on application by the person seeking the order:

- grant a warrant for the summary ejection of the other party from the family home;
- grant an interdict prohibiting the other party from entering the matrimonial home without the express permission of the applicant;
- grant an interdict prohibiting the removal by the other party, except with the written consent of the applicant or by a further order of the court, of any furniture and furnishings in the family home;

unless, in relation to the first or third points above, the other party satisfies the court that it is unnecessary for it to grant such a remedy (Section 4(4) of the 1981 Act and section 104(4) of the 2004 Act). In making an exclusion order the court may—

- grant an interdict prohibiting the other party from entering or remaining in a specified area in the vicinity of the matrimonial home;
- where the warrant for the summary ejection of the other party has been granted in his or her absence, give directions as to the preservation of the other party's goods and effects which remain in the family home (Section 4(5) of the 1981 Act and section 104(5) of the 2004 Act).

2.7 A person who is applying for, or who has obtained, an interdict for the purpose of protection against abuse may apply to the courts for a power of arrest to be attached to the interdict. Where the interdict is a matrimonial interdict or a relevant interdict (under section 113 of the 2004 Act) which is ancillary to an exclusion order (or an interim order), the court must attach a power of arrest to the interdict (section 1 of the Protection from Abuse (Scotland) Act 2001.)

2.8 Under the Domestic Abuse (Scotland) Act 2011, it is a criminal offence to breach an interdict where there has been a determination (which is still in force) by the court that it is a domestic abuse interdict and there is power of arrest (which is still in force) attached to the interdict. Making the breach of a domestic abuse interdict a criminal offence was one of the issues discussed in the 2010 research referred to in the next paragraph.

Research on exclusion orders

2.9 There has been research and literature reviews on exclusion orders and research which mentions exclusion orders in a wider context. In putting forward proposals in this consultation in relation to exclusion orders, the Scottish Government has taken account of research and literature reviews. Research and literature reviews the Scottish Government is aware of is:

- AA Jackson, M Robertson and P Robson (1988) – The Operation of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 – Scottish Home and Health Department.
- Avizandum Consultants and AAJ Associates (2010). The use and effectiveness of exclusion orders under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 – Scottish Women's Aid¹⁴.

¹⁴ The 2010 research is at: <http://womensaid.scot/wp-content/uploads/2017/07/ExclusionOrderReport.pdf>

- Scottish Centre for Crime and Justice Research (2014). Violence against women: effective interventions and practices with perpetrators. A literature review¹⁵.
- Fife Domestic Abuse and Sexual Abuse Partnership (2015). Change, Justice, Fairness: “Why should we have to move everywhere and everything because of him?”. Scottish Women’s Aid¹⁶.

2.10 The 1981 Act has its origins in report number 60 by the Scottish Law Commission in 1980 on Occupancy Rights in the Matrimonial Home and Domestic Violence¹⁷.

Practice in relation to exclusion orders

2.11 The number of exclusion orders being applied for and granted is low.

2.12 Some of the previous research and literature reviews, whilst noting that improvements could be made in relation to exclusion orders, also noted that there could be other reasons why people do not apply for exclusion orders such as bail conditions being in place in some cases.

2.13 On when exclusion orders are used in practice, the 2010 research noted (in paragraph 4.2) that:

“ In our sample, exclusion orders were not primarily sought as a method of removing an abuser from a shared home but sought as a means of keeping the abuser away after he had already left the home. In 23 (of 34) cases it was clear that the defender had already left the home; some had left because special bail conditions prevented return (4), some had separated in the recent past and a very few had lengthy separations.”

2.14 There are no Scottish Courts and Tribunals Service statistics on the length of time it takes to deal with an application to court for an exclusion order. However, there are some statistics from the Scottish Legal Aid Board. These are at Annex B.

¹⁵ The 2014 literature review is at: <http://www.sccjr.ac.uk/wp-content/uploads/2014/06/VAW-Literature-Review-SCCJR-Report-No-05-20141.pdf> (pages 23 to 25)

¹⁶ The 2015 research is at: <http://womensaid.scot/wp-content/uploads/2017/07/Change-Justice-Fairness.pdf> Please see in particular the second recommendation on page 61. This is relevant to the discussion in this consultation paper on the potential introduction of Emergency Barring Orders in Scotland].

¹⁷ The Scottish Law Commission 1980 report is at <https://www.scotlawcom.gov.uk/files/4212/8014/9994/rep60.pdf>

Court fees

2.15 The Scottish Government has recently made Scottish Statutory Instruments (SSIs) for court fees. These SSIs remove court fees in relation to applications for exclusion orders (and in relation to interdicts to protect against domestic abuse).

Potential changes in relation to exclusion orders

General

2.16 There are a number of potential changes in relation to exclusion orders where the Scottish Government would be grateful for your views.

Awareness

2.17 The 2010 research said in paragraph 7.4.1 that “there is a dearth of good, clear information and advice on civil remedies, particularly exclusion orders”. The Scottish Government’s current consultation on part 1 of the Children (Scotland) Act 1995 also noted the need for more public-facing information to be provided for those considering raising a family action in the courts and for children and young people affected by these cases.

2.18 In addition, previous research and literature reviews suggested that it might be helpful for local authority professionals (e.g. housing officers and social workers), the police and solicitors to be given more information about exclusion orders, so that they in turn can provide advice to those who may find an exclusion order helpful. Therefore, the Scottish Government would intend to produce both public facing and professional facing information on exclusion orders.

Question 16: Should the Scottish Government produce both public facing and professional facing information on exclusion orders?

If you wish, please give reasons for your answer.

Legal aid

2.19 The Scottish Government has carefully considered whether “free” legal aid (i.e. without applying the usual means test) should be given to those seeking an exclusion order. The Scottish Government is against taking this step as:

- There would be increased expenditure for the hard-pressed legal aid budget.
- Exclusion orders could be an ancillary crave to a wider family action. Free legal aid in relation to exclusion orders could lead to free legal aid for the wider family action too. This would be a major expense to the legal aid budget, given the number of family actions in court.

- If free legal aid should be given to those seeking exclusion orders, it is likely that, to ensure equality of arms, free legal aid would have to be given to those seeking to oppose the granting of an exclusion order.

Section 4(3) of the 1981 Act and section 104(3) of the 2004 Act

2.20 Section 4(3) of the 1981 Act and section 104(3) of the 2004 Act make provision on when the court is not to make an exclusion order.

Under these provisions, the court is not to make an exclusion order if it appears to it that to do so would be unjustifiable or unreasonable:

- (a). Having regard to all the circumstances including matters specified in paragraphs (a) to (e) of section 3(3) of the 1981 Act and section 103(3) of the 2004 Act. These factors relate to the conduct of the parties; the needs and financial resources of the parties; the needs of any child of the family; the extent to which the home is used in connection with a trade, business or profession of either party; and whether the entitled party is offering to make available to the non-entitled party any suitable alternative accommodation; and
- (b) Where the family home is, or is part of, any agricultural holding or is a home arising from employment the court must have regard to any requirement about parties residing in the family home and the likely consequences of excluding one of them. On this, the Scottish Government would note that where an agricultural holding or employment involves the care of livestock or other animals and where an exclusion order may impact on their care, alternative arrangements for the care of the animals must be put in place. Failure to ensure animal welfare could be an offence under the Animal Health and Welfare (Scotland) Act 2006.

2.21 The 1988 research recommended that section 4(3)(a) of the 1981 Act be repealed but that section 4(3)(b) on tied dwellings be retained.

2.22 The Scottish Government notes the following points on section 4(3)(a) of the 1981 Act and section 104(3)(a) of the 2004 Act :-

- The origins of section 4(3)(a) are discussed in paragraphs 4.3 to 4.11 of the Scottish Law Commission report which led to the 1981 Act¹⁸.
- The factors in section 3(3) of the 1981 Act and section 103(3) of the 2004 Act for the court to consider are varied in nature and relate to conduct; financial needs and resources of the parties; the needs of the child; whether the home is used for business purposes and the availability of alternative accommodation. It would be possible to retain some of these factors and not others.

¹⁸ The Commission report is at <https://www.scotlawcom.gov.uk/files/4212/8014/9994/rep60.pdf>

- The research in this area is now quite old.

2.23 The Scottish Government's initial views are:

- In general terms, an exclusion order should be made if the court considers it is reasonable and justified to do so and making the order is necessary for the protection of the applicant or any child of the family from any conduct or threatened or reasonably apprehended conduct;
- When considering whether or not to make an exclusion order, the court should take into account the needs of any child of the family;
- When considering whether or not to make an exclusion order, the court should take into account whether there would be any adverse implications for the applicant or any child of the family which would make it preferable not to make the proposed order
- There are arguments for retaining section 4(3)(b) of the 1981 Act and section 104(3)(b) of the 2004 Act, on tied housing (paragraph 2.24 below goes into more details.)
- There may be an argument for further work and analysis in this area.

2.24 On section 4(3)(b) of the 1981 Act and section 104(3)(b) of the 2004 Act, the Scottish Government considers there are specific factors in relation to agriculture tenancies which need to be considered when the court is deciding whether or not to make an exclusion order:

- an exclusion order could be detrimental to the daily management of a family farming business if that person was denied access to the agricultural holding. This could in turn raise financial hardship issues for the remaining family members, as an exclusion could have an impact on the amount of capital/income the family farming business generates; and
- where the agricultural tenancy involves the care of livestock, careful consideration should be given as to whether an exclusion order may impact on their care and, if so, whether alternative arrangements can be put in place to ensure their welfare. Failure to ensure animal welfare could be an offence under the Animal Health and Welfare (Scotland) Act 2006.

Question 17: Should any changes be made to section 4(3) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and section 104(3) of the Civil Partnership Act 2004?

If you wish, please give reasons for your answer.

Interdicts when an exclusion order is granted –wider powers needed?

2.25 Section 4(5)(a) of the 1981 Act provides that:

“ In making an exclusion order the court may—

(a) grant an interdict prohibiting the non-applicant spouse from entering or remaining in a specified area in the vicinity of the matrimonial home”

Section 104(5)(a) of the 2004 Act is in similar terms.

2.26 The applicant may need as well an interdict which prohibits the person causing the risk from:

- entering a place where the protected person or any child of the family regularly visits;
- entering a place where the protected person works;
- contacting the protected person or any child of the family;
- approaching the protected person or any child of the family closer than a specified distance.

2.27 This would also seem to be in line with Article 52 of the Istanbul Convention on preventing and combating violence against women and domestic violence.

2.28 However, it is already possible to obtain an interdict (or a civil non-harassment order) which has the effects outlined in paragraph 2.26 above. Therefore, there is an argument that changes to section 4(5)(a) of the 1981 Act and section 104(5)(a) of the 2004 Act are unnecessary.

Question 18: Should the law be amended to give the court wider powers on granting interdicts when the court is granting an exclusion order?

If you wish, please give reasons for your answer.

Cohabitants

2.29 The 1981 Act and the 2004 Act make provision so spouses and civil partners without title to the matrimonial or family home gain occupancy rights. A spouse or civil partner without title to the home does not need to go to court to gain occupancy rights.

2.30 Under section 18 of the 1981 Act, a cohabitant (whether in an mixed sex or same sex relationship) without title to the home may go to court to obtain occupancy rights, for a 6 month (renewable) period.

2.31 A cohabitant suffering domestic abuse who has occupancy rights (whether because they have applied to the court for occupancy rights as outlined in paragraph 2.30 above or because the cohabitant is entitled to occupy the family home generally) can apply for an exclusion order to remove the abuser from the family home.

2.32 However, when a cohabitant suffering domestic abuse does not have occupancy rights, that person cannot obtain such an exclusion order.

2.33 Section 18(3) makes modifications to the 1981 Act so that it can work, in appropriate cases, for cohabitants.

2.34 Under section 18(4) of the 1981 Act, when an exclusion order is granted by the court to a cohabitant, it ceases to have effect:

- if one of the cohabitants is “non-entitled” (i.e. does not generally have occupancy rights but has been granted them by the court for a period, as outlined in paragraph 35 above), for a period specified in the exclusion order which cannot exceed the period(s) of occupancy rights granted by the court in line with the procedure as outlined in paragraph 35 above;
- if both or the cohabitants are entitled, or permitted by a third party, to occupy the home upon the court granting a further order.

Whether cohabitants without title should be given same occupancy rights as spouses and civil partners without title

2.35 One question arising is whether cohabitants without title to the family home should be given the same occupancy rights as spouses and civil partners without title.

2.36 This would involve making provision similar to section 1 of the 1981 Act and section 101 of the 2004 Act. Under this, non-entitled cohabitants would be given the same occupancy rights to the family home as non-entitled spouses and civil partners.

Risk of giving occupancy rights to abusers?

2.37 There may be a practical reason for not giving cohabitants without title the same occupancy rights as spouses and civil partners without title.

2.38 A person may have entered into a relationship but may have concerns about their new partner potentially being abusive. In such circumstances, the person with concerns may be prepared to cohabit with their new partner but may not wish to get married, or enter into a civil partnership, unless and until satisfied that the new partner is not abusive. If occupancy rights were granted to cohabitants without title, it is perhaps possible that abusive partners could be granted these rights.

2.39 The 2010 research noted, in paragraph 6.4, that:

“ Eight women did not require an exclusion order because they had been the sole tenant or owner and had not been married to the abuser.”

Definition of cohabitation

2.40 If cohabitants without title were given the same occupancy rights as spouses and civil partners without title we would need to define what is meant by cohabitation. There is already a definition in section 18(2) of the 1981 Act.

2.41 This provides that when considering an application for occupancy rights for a period (the procedure outlined in paragraph 2.30 above), in determining whether two people are a cohabiting couple the court must have regard to all the circumstances of the case including the time for which it appears they have been living together and whether there is any child of whom they are the parents or who they have treated as a child of theirs.

2.42 This definition is slightly different to the definition of cohabitant used in section 25 of the Family Law (Scotland) Act 2006 for the provisions of the 2006 Act on rights in certain household goods; rights in certain money and property; financial provision where cohabitation ends otherwise than by death and application to court by survivor for provision on intestacy. The definition of cohabitant in section 25(1) is a couple who are (or were) living together as if they were spouses¹⁹.

2.43 Section 25(2) then provides that in determining for the purposes of any of sections 26 to 29 of the 2006 Act whether a person is a cohabitant, the court must have regard to:

- the length of the period during which the two people have been living together (or lived together);
- the nature of their relationship during that period;
- the nature and extent of any financial arrangements subsisting, or which subsisted, during that period.

2.44 It may be appropriate to amend the definition of a cohabiting couple in section 18(2) of the 1981 Act so that it refers to, for example:

- a couple living together as if married;
- the length of the period during which the couple have been living together.

2.45 Clearly, it is paramount for exclusion orders to protect children. However, it does not seem necessary to define cohabitants by reference to any children they may or may not have.

¹⁹ Section 4 of the Marriage and Civil Partnership (Scotland) Act 2014 made provision so that references to couples living together as if husband and wife extend to same sex spouses too and references to people living together as if civil partners cease to have effect. This reflects the introduction of same sex marriage by the 2014 Act.

Question 19: Should cohabitants without title to the family home be given the same occupancy rights as spouses and civil partners without title?

If you wish, please give reasons for your answer.

Any other changes on exclusion orders?

2.46 Consultees may also have other suggestions for potential changes in relation to exclusion orders.

Question 20: Do you have any other suggestions for changes in relation to exclusion orders?

If yes, please outline these suggested changes.

Domestic Violence Protection Orders – recognition in Scotland

2.47 In England and Wales, Domestic Violence Protection Orders (DVPOs) can be issued by Magistrates' Courts, on an application by the Police, to temporarily remove a person causing risk from the family home and to stop that person from contacting the person at risk.

2.48 As DVPOs are issued by Magistrates' Courts, they are not enforceable in Scotland given the terms of section 18(3)(a) of the Civil Jurisdiction and Judgments Act 1982. The Scottish Government intends to amend the 1982 Act, when a legislative opportunity arises, so that DVPOs can be enforced in Scotland. Given the short duration of DVPOs, this may not be much of a practical issue.

2.49 However, as indicated above, the Scottish Government is aware of a consultation by the UK Government which proposes, amongst other points, that DVPOs south of the border be replaced by wide-ranging Domestic Abuse Protection Orders. These could be made in family, civil and criminal courts.

2.50 Therefore, before amending section 18(3)(a) of the 1982 Act, the Scottish Government would intend to discuss further with the UK Government what orders are made in Magistrates' Courts which might need to be enforced in Scotland.

Question 21: Do you have any comments on the Scottish Government's intention to amend section 18(3)(a) of the Civil Jurisdiction and Judgments Act 1982 so that orders made by Magistrates' Courts can be enforced in Scotland?

Longer-term review of civil protection orders to protect against domestic abuse

2.51 More generally, the Scottish Government is aware of the potential need to review civil protection orders to protect against domestic abuse, such as interdicts, to ensure that they are effective. In any such review, a number of factors would need to be considered:

- Measures must be effective.
- Measures must be clear. The name of a measure is markedly less important than what it does.
- The address of the person at risk should not be disclosed.
- Effective remedies (e.g. criminal offences) for breach of a measure are needed.
- It is generally helpful to have a power of arrest attached to a measure.
- There may be scope to simplify, clarify and improve the legislation in this area.

Any review would take some time and there would need to be close consultation with key stakeholders.

Question 22: Do you have any comments on factors to take into account in any longer-term review of civil protection orders to protect against domestic abuse?

PART THREE: ADDITIONAL QUESTIONS ON ISSUES CONCERNING EQUAL OPPORTUNITIES, FINANCIAL IMPLICATIONS AND OTHER IMPACTS

Equal Opportunities

Question 23: Do you consider that any of the reforms proposed in this paper will have a particular impact - positive or negative - on a particular equality group (e.g. gender, race, disability, sexual orientation)

Question 24: Are there any other issues relating to equality which you wish to raise in relation to the reforms proposed in this paper?

Financial implications

Question 25: Do you have any comments or information on the likely financial implications of the introduction of protective orders for the Scottish Government (Police Scotland, Scottish Courts and Tribunals Service, Scottish Prison Service, COPFS), local government or for other bodies, individuals and businesses?

Other impacts

Question 26: Do you consider that the any of the proposals would have an impact on island communities, human rights, local government or sustainable development?

Question 27: Do you have any other comments about the content of this paper?

PART FOUR: RESPONDING TO THE CONSULTATION

Please respond to this consultation by **Friday 29 March 2019**.

You can view and respond to this consultation online at:

<https://consult.gov.scot/criminal-justice/risk-of-domestic-abuse>.

You can save and return to your responses while the consultation is still open.

Please ensure that consultation responses are submitted before the closing date of 29 March 2019 .

If you are unable to respond online, please complete the Respondent Information Form (see “Handling your Response” below to:

Criminal Law and Practice Team
Scottish Government
GW.14
St Andrews House
Edinburgh
EH1 3DG

Or by e-mail to domesticabuseconsultation@gov.scot

Questions are raised throughout this consultation but they can all be found and answered in the questionnaire at Annex D to this consultation paper.

Handling your response

If you respond using the Scottish Government’s consultation platform, Citizen Space (<http://consult.scotland.gov.uk>), you will be automatically directed to the Respondent Information Form. Please use this to indicate how you wish your response to be handled and, in particular, whether you are happy for your response to be published.

If you are unable to respond via Citizen Space, Please complete and return the Respondent Information Form attached to the end of this document as this will ensure that we treat your response appropriately. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the [Freedom of Information \(Scotland\) Act 2002](#) and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.scotland.gov.uk> in the Scottish Government Library. You can make arrangements to view responses by contacting the Scottish Government Library on 0131 244 4552. If you use Citizen Space to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so.

Comments about the consultation process

If you have any comments about how this consultation exercise has been conducted, please send them to domesticabuseconsultation@gov.scot

Scottish Government consultation process

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses.

Consultation is an essential part the policy making process. It gives us the opportunity to get your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.scotland.gov.uk>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (<http://ideas.scotland.gov.uk>).

After a consultation is closed we publish all responses where we have been given permission to do so.

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence.

We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

ANNEX A: TEXT OF SECTIONS 4 AND 5 OF THE MATRIMONIAL HOMES (FAMILY PROTECTION) (SCOTLAND) ACT 1981

4 Exclusion orders.

(1) Where there is an entitled and non-entitled spouse, or where both spouses are entitled, or permitted by a third party, to occupy a matrimonial home, either spouse whether or not that spouse is in occupation at the time of the application may apply to the court for an order (in this Act referred to as “an exclusion order”) suspending the occupancy rights of the other spouse (“the non-applicant spouse”) in a matrimonial home.

(2) Subject to subsection (3) below, the court shall make an exclusion order if it appears to the court that the making of the order is necessary for the protection of the applicant or any child of the family from any conduct or threatened or reasonably apprehended conduct of the non-applicant spouse which is or would be injurious to the physical or mental health of the applicant or child.

(3) The court shall not make an exclusion order if it appears to the court that the making of the order would be unjustified or unreasonable—

(a) having regard to all the circumstances of the case including the matters specified in paragraphs (a) to (e) of section 3(3) of this Act; and

(b) where the matrimonial home—

(i) is or is part of an agricultural holding within the meaning of section 1 of the Agricultural Holdings (Scotland) Act 1949; or

(ii) is let, or is a home in respect of which possession is given, to the non-applicant spouse or to both spouses by an employer as an incident of employment,

subject to a requirement that the non-applicant spouse or, as the case may be, both spouses must reside in the matrimonial home, having regard to that requirement and the likely consequences of the exclusion of the non-applicant spouse from the matrimonial home.

(4) In making an exclusion order the court shall, on the application of the applicant spouse,—

(a) grant a warrant for the summary ejection of the non-applicant spouse from the matrimonial home;

(b) grant an interdict prohibiting the non-applicant spouse from entering the matrimonial home without the express permission of the applicant;

(c) grant an interdict prohibiting the removal by the non-applicant spouse, except with the written consent of the applicant or by a further order of the court, of any furniture and plenishings in the matrimonial home;

.

unless, in relation to paragraph (a) or (c) above, the non-applicant spouse satisfies the court that it is unnecessary for it to grant such a remedy.

(5) In making an exclusion order the court may—

(a) grant an interdict prohibiting the non-applicant spouse from entering or remaining in a specified area in the vicinity of the matrimonial home;

(b) where the warrant for the summary ejection of the non-applicant spouse has been granted in his or her absence, give directions as to the preservation of the non-applicant spouse's goods and effects which remain in the matrimonial home;

(c) on the application of either spouse, make the exclusion order or the warrant or interdict mentioned in paragraph (a), (b) or (c) of subsection (4) above or paragraph (a) of this subsection subject to such terms and conditions as the court may prescribe;

(d) on application as aforesaid, make such other order as it may consider necessary for the proper enforcement of an order made under subsection (4) above or paragraph (a), (b) or (c) of this subsection.

(6) Pending the making of an exclusion order, the court may, on the application of the applicant spouse, make an interim order suspending the occupancy rights of the non-applicant spouse in the matrimonial home to which the application for the exclusion order relates; and subsections (4) and (5) above shall apply to such interim order as they apply to an exclusion order:

Provided that an interim order may be made only if the non-applicant spouse has been afforded an opportunity of being heard by or represented before the court.

(7) Without prejudice to subsections (1) and (6) above, where both spouses are entitled, or permitted by a third party, to occupy a matrimonial home, it shall be incompetent for one spouse to bring an action of ejection from the matrimonial home against the other spouse.

5 Duration of orders under ss. 3 and 4.

(1) The court may, on the application of either spouse, vary or recall any order made by it under section 3 or 4 of this Act, but, subject to subsection (2) below, any such order shall, unless previously so varied or recalled, cease to have effect—

(a) on the termination of the marriage; or

(b) subject to section 6(1) of this Act, where there is an entitled and non-entitled spouse, on the entitled spouse ceasing to be an entitled spouse in respect of the matrimonial home to which the order relates; or

(c) where both spouses are entitled, or permitted by a third party, to occupy the matrimonial home, on both spouses ceasing to be so entitled or permitted.

(2) Without prejudice to the generality of subsection (1) above, an order under section 3(3) or (4) of this Act which grants the possession or use of furniture and plenishings shall cease to have effect if the furniture and plenishings cease to be permitted by a third party to be retained in the matrimonial home.

Notes

1. An “entitled spouse” for the purposes of the 1981 Act is a spouse that is entitled, or permitted by a third party, to occupy a matrimonial home and a “non-entitled spouse” is a spouse that is not so entitled or permitted. Section 1 of the 1981 Act refers.
2. Sections 104 and 105 of the Civil Partnership Act 2004 make provision on exclusion orders for civil partners. Sections 104 and 105 of the 2004 Act are along very similar lines to sections 4 and 5 of the 1981 Act.
3. The 1981 Act makes provision on exclusion orders for cohabitants. This is discussed at paragraphs 2.29-2.45 of the main body of the consultation paper.
4. Sections 76 to 80 of the Children (Scotland) Act 1995 make provision on exclusion orders to protect a child. This consultation does not specifically discuss exclusion orders to protect a child. However, if any changes are made to the 1981 Act and the 2004 Acts following this consultation, the Scottish Government will consider if any similar changes are required to the provisions of sections 76 to 80 of the 1995 Act.

ANNEX B: TIME TAKEN TO DEAL WITH APPLICATION TO COURT FOR AN EXCLUSION ORDER: STATISTICS FROM SCOTTISH LEGAL AID BOARD

The data below covers the last three years. The dates are from date of grant of legal aid to date of final account so the actual time in court is likely to be slightly less than shown.

The start date used is the earliest of

- when work began where special urgency cover was used which doesn't need the Board's prior approval;
- when the Board granted special urgency cover if the work was of a kind needing their prior approval;
- the date legal aid was fully granted where no special urgency work was involved

The first table shows 65 cases split between Pursuer & Defender with 50 pursuers and 15 defenders.

The second table shows the duration split between cases where full legal aid has been used and where only special urgency work was done.

The third table covers pursuers who had a full grant of legal aid

	Defender	Pursuer	Total
Applications	15	50	65
Percentage	23%	77%	100%
Average Case Length (months)	16	15	15

	Full Grant	Special Urgency Cover Only	Total
Applications	52	13	65
Percentage	80%	20%	100%
Average Case Length (months)	18	5	15

	Number of Applications	Percentage	Average Case Length (months)
Up to 6 months	6	15%	4
6 to 12 months	11	27%	9
12 to 18 months	11	27%	15
18 to 24 months	6	15%	21
over 24 months	7	17%	43
Total	41	100%	17

Annex C: Handling of Personal data

The data protection legislation is changing. The Data Protection Act 2018 gives you greater powers to protect your own privacy, and place greater responsibility on those processing your data for any purpose. The following is to explain your rights and give you the information you will be entitled to under the new legislation. Please note that this section only refers to your personal data (your name, address and anything that could be used to identify you personally) not the content of your response to the consultation.

The identity of the data controller and contact details of our Data Protection Officer

The Scottish Government is the data controller. The Data Protection Officer for the Scottish Government can be contacted at dataprotectionofficer@gov.scot

Why we are collecting the data

Your personal data is being collected as an essential part of the consultation process, so that we can contact you regarding your response and for statistical purposes. We may also use it to contact you about related matters.

Legal basis for processing the data

Part 2 of the Data Protection Act provides that as a government department, the Scottish Government may process personal data as necessary for the effective performance of a task carried out in the public interest e.g. a consultation.

With whom we will be sharing the data

We will not be sharing personal data outside of the Scottish Government.

Your rights, e.g. access, rectification, erasure

The data we are collecting is your personal data, and you have considerable say over what happens to it. You have the right:

- a) To see what data we have about you
- b) To ask us to stop using your data, but keep it on record
- c) To have all or some of your data deleted or corrected
- d) To lodge a complaint with the independent Information Commissioner (ICO) if you think we are not handling your data fairly or in accordance with the law. You can contact the ICO at <https://ico.org.uk/>, or telephone 0303 123 1113.

Scottish Government will not send your personal data outwith the European Economic Area. This data will not be used for any automated decision making. This data will be stored in a secure government IT system.



CONSULTATION ON PROTECTIVE ORDERS FOR PEOPLE AT RISK OF DOMESTIC ABUSE

RESPONDENT INFORMATION FORM

Please Note this form **must** be completed and returned with your response.

To find out how we handle your personal data, please see our privacy policy:
<https://beta.gov.scot/privacy/>

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (without name)
 Do not publish response

Information for organisations:

The option 'Publish response only (without name)' is available for individual respondents only. If this option is selected, the organisation name will still be published.

If you choose the option 'Do not publish response', your organisation name may still be listed as having responded to the consultation in, for example, the analysis report.

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

Questionnaire

Respondents should take into consideration the information provided in this document alongside any other knowledge or personal experiences that could be relevant. All opinions are welcome.

We ask that you try to answer all the questions in each section. However, if you are unable to any question then please feel free to move on to the next question.

There is a comments box below each question to allows you to set out your reasoning and to provide general comments.

PART ONE: MEASURES TO PROTECT THOSE AT RISK OF DOMESTIC ABUSE

Question 1: Do you think the police should have the power to bar a person from a home that they share with a person at risk of domestic abuse for a period of time and prohibit them from contacting that person, without the need to obtain court approval?

- Yes
- No
- Don't Know

If you wish, please give reasons for your answer.

Comments

Question 2: If the police are given a power to put in place measures to protect a person at risk of domestic abuse for a period of time, we would welcome views on how long that period should be.

Comments

Question 3: Do you agree that the courts should be given powers to make an order to protect a person at risk of domestic abuse by prohibiting the person posing the risk from returning to the person at risk's home while the order is in force?

- Yes
- No
- Don't Know

If you wish, please give reasons for your answer.

Question 4: If the courts are given a new power to impose measures to protect a person at risk of domestic abuse, we would welcome views on whether there should be a maximum period of time beyond which such measures would not apply and, if so, what that period should be.

Comments

Question 5: We would welcome views on which bodies and/or people should be able to make an application to a court to impose measures to protect a person at risk of domestic abuse.

Comments

Question 6: Do you think a criminal court should be able to impose measures to protect a person at risk of domestic abuse that would bar a perpetrator from a shared home for a period of time, when sentencing the offender.

- Yes
- No
- Don't know

If you wish, please give reasons for your answer.

Question 7: Where an application is made to the court for measures to protect a person at risk of domestic abuse by someone other than the person at risk, should the consent of the person who may be at risk be required for such an order to be made?

- Yes
- No
- Don't know

If you wish, please give reasons for your answer.

Question 8: We would welcome views as to which persons should be capable of being made subject to measures to protect a person at risk of domestic abuse. Should such protection be limited to providing protection from abuse by a partner or ex-partner. If not, what other relationships or circumstances should be covered by such provisions?

Yes

No

Don't known

If you wish, please reason for your comments

Question 9: We would welcome views on what you think the test should be for deciding whether to impose measures to protect a person at risk of domestic abuse. In particular, do you think it should be a requirement that the person against whom the order is sought must have used or threatened violence against the person to be protected by the order, or do you think a wider test covering our modern understanding of what constitutes domestic abuse (i.e. behaviour likely to cause psychological, as well as physical, harm) should be used?

Comments

Question 10: We would welcome views as to whether, as well as prohibiting the subject of the order from entering the person at risk's home, it should also be possible to impose conditions on the subject of the order to prevent them from contacting or approaching the person at risk, or prohibiting them from entering other specified locations (such as the person at risk's place of work or relatives' homes).

Comments

Question 11: Do you agree that, as well as enabling measures to be imposed to protect the person at risk, it should also be open to the police and courts to impose conditions requiring the subject of the order not to approach or contact any children living with the person at risk?

Yes

No

Don't Know

If you wish, please give comments

Question 12: We would welcome views on whether it should be a criminal offence to breach measures put in place to protect a person at risk of domestic abuse.

- Yes
- No
- Don't know

If you wish, please give reasons for your answer.

Question 13: If you think breach of such measures should be a criminal offence, we would welcome views on what you think the maximum penalty should be.

Comments

Question 14: We would welcome views on whether there should be a statutory duty on the police, when making an application to the courts, or putting in place protective measures, to refer a person at risk to support services and, if so, how this should operate

Comments

Question 15: Do you have any other comments you wish to make regarding the introduction of protective orders for people at risk of domestic abuse?

Comments

Part 2 – Exclusion Orders

Question 16: Should the Scottish Government produce both public facing and professional facing information on exclusion orders?

- Yes
- No
- Don't know

If you wish, please give reasons for your answer.

Question 17: Should any changes be made to section 4(3) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and section 104(3) of the Civil Partnership Act 2004?

- Yes
- No
- Don't know

If you wish, please give reasons for your answer.

Question 18: Should the law be amended to give the court wider powers on granting interdicts when the court is granting an exclusion order?

- Yes
- No
- Don't know

If you wish, please give reasons for your answer.

Question 19: Should cohabitants without title to the family home be given the same occupancy rights as spouses and civil partners without title?

- Yes
- No
- Don't know

If you wish, please give reasons for your answer.

Question 20: Do you have any other suggestions for changes in relation to exclusion orders?

- Yes
- No
- Don't know

If yes, please outline these suggested changes.

Question 21: Do you have any comments on the Scottish Government's intention to amend section 18(3)(a) of the Civil Jurisdiction and Judgments Act 1982 so that orders made by Magistrates' Courts can be enforced in Scotland?

- Yes
- No
- Don't know

If yes, please outline these comments

Question 22: Do you have any comments on factors to take into account in any longer-term review of civil protection orders to protect against domestic abuse?

- Yes
- No
- Don't know

If yes, please outline these comments

Equal Opportunities

Question 23: Do you consider that any of the reforms proposed in this paper will have a particular impact - positive or negative - on a particular equality group (e.g. gender, race, disability, sexual orientation)

- Yes
- No
- Don't know

If you wish, please give reasons for your answer

Question 24: Are there any other issues relating to equality which you wish to raise in relation to the reforms proposed in this paper?

Comments

FINANCIAL IMPLICATIONS

Question 25: Do you have any comments or information on the likely financial implications of the introduction of protective orders for the Scottish Government (Police Scotland, Scottish Courts and Tribunals Service, Scottish Prison Service, COPFS), local government or for other bodies, individuals and businesses?

Comments

OTHER IMPACTS

Question 26: Do you consider that the any of the proposals would have an impact on island communities, human rights, local government or sustainable development?

Comments

Question 27: Do you have any other comments about the content of this paper?

Comments



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