

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

## **Part One – Measures to Protect Those at Risk Of Domestic Abuse**

- 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?**

The Glasgow Bar Association view is that they should, but only for a limited period of time such as the 48-hour period set in England and Wales. If the Police required to obtain court approval first, this could delay matters which would defeat the purpose of what is effectively an immediate emergency order. The approach taken in England and Wales requires such an application to be made to court within 48 hours or else the order ceases to have effect – this would ensure the Police have the power to act immediately and thereafter have additional time to obtain court approval.

Concerns were expressed in England and Wales, however, that the 48-hour period is too short to allow the Police and support agencies to prepare an application. This resulted in Police being reluctant to use them in England and Wales therefore if Scotland were to implement a similar order, to prevent a reluctance by Police to implement any such orders then extending this for a period longer than 48 hours would most likely improve the effectiveness of the orders.

To ensure the human rights of a suspected perpetrator are appropriately considered, the level of authority for Police decisions could be raised to allow senior officer oversight before imposing immediate measures. In England and Wales, it was perceived that compliance with the Human Rights Act 1998 would be assisted if the police issued an initial order – known as a Domestic Violence Protection Notice (DVPN) and it was thereafter the decision of the courts to then issue a Domestic Violence Protection Order (DVPO).

- 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?**

The power given to Police to put in place measures to protect a person at risk could last in the region of 7-10 days before they require to obtain court approval. Concerns from England and Wales are that the 48-hour period is too short which resulted in a reluctance by the police to use these orders. This would allow the necessary additional time to prepare an application to the court.

Thereafter, the courts could be given power to impose measures to protect those at risk from domestic violence by barring a suspected perpetrator from their home for a period of time. The purpose of this is to provide the person at risk with additional time to secure their safety and make an application for an

exclusion order/interdict. There is no consensus on how long this should be however a period in the region of 14 - 28 days has been suggested. A recent UK Government consultation considered expanding the court powers so that such orders could run until such civil orders are made<sup>1</sup>. A minimum period of 14 days and up to 28 days, with the power to extend would allow ample time for such civil orders to be made. Consideration would need to be given to the delays that can occur in making such applications such as the person at risk obtaining legal aid, therefore it would be important to consider expanding the power of the court beyond any set period to allow consideration of such matters in cases where it is necessary.

**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?**

Without such power the person posing the risk could return to the home of the person at risk which would not provide adequate protection to that person. Of course, the person posing the risk could attempt to return to the home while the order is in force anyway. If such a breach becomes a criminal offence, electronic monitoring could be considered as a condition of any order imposed by the court. This was considered in the UK Government's Consultation on Transforming the Response to Domestic Abuse<sup>2</sup>. This would monitor compliance with conditions of an order, whilst also ensuring that statutory safeguards were in place to ensure such monitoring was only used where necessary and proportionate.

**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 should not apply and, if so, what that period should be?**

The Glasgow Bar Association believes that the court should be given a discretion in this regard. The imposition of a maximum period with no discretion/power to extend would defeat the purpose of such an order if it failed to apply after a certain period of time where no other protective measures are in place. A period of up to 28 days with measures to allow this period to be prolonged at the request of the person at risk would be sensible.

Each case would, however, need to be considered on the individual facts and circumstances. Consideration would need to be given to situations in which the person at risk changed their mind about seeking an alternative civil order. In such a situation any measures imposed would need to cease to apply at some point and the 28 days should provide ample time for the person at risk to

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<sup>1</sup> [https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting\\_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf](https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf)

<sup>2</sup> Ibid, page 39

initiative civil proceedings and request additional time or decide they did not wish to pursue the any civil orders. This is common in cases where persons posing risk are charged and released on bail with conditions not to approach/contact the complainer, and the complainer changes their mind and wishes for the case to be dropped or bail conditions relaxed. Not all persons at risk will wish to pursuer civil orders for a variety of reasons.

**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**

A person at risk, family members and local authority professionals should also be given the opportunity to apply to court for a protective order which would provide flexibility. Where a person at risk is reluctant to involve the police, this would be beneficial, and the court could act as the gate-keeper to ensure such an application is appropriate and proportionate. It would be important to ensure in such circumstances, however, that the views of the person at risk are taken into consideration by the court when considering such an order.

**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?**

Section 234A of the Criminal Procedure (Scotland) Act 1995 already provides that a court may impose a non-harassment order “if it is satisfied on a balance of probabilities that it is appropriate to do so in order to protect the victim from harassment (or further harassment)”. This application is made by the Crown who need to have the relevant information to provide the court to allow consideration to be given to granting this order. These orders are made for a specific period of time.

**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?**

The Glasgow Bar Association believe that it would be essential, at the very least, for the views of the person at risk to be taken before any order is made, if they are not the applicant. It is widely accepted that sometimes victims of domestic abuse are fearful of reporting the abuse and can be reluctant to make an application to the court for protective orders for many reasons. For this reason allowing other parties to apply for orders could be a useful step forward but sufficient safeguards should be put in place to ensure that orders are only granted where appropriate and where there is sufficient information before the court about the views of the person at risk.

**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?**

The Glasgow Bar Association is of the view that protective orders should be limited to providing protection from partners and ex partners rather than being extended to other family members. Domestic abuse is widely understood to encompass violence and abusive behaviour which happens in the context of an ongoing Relationship or between former partners. S(1) of the Domestic Abuse (Scotland) Act 2018 and the statutory aggravation at S(1) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 apply where the parties are partners or former partners. It is the Glasgow Bar Association's view that a clear approach where protective orders apply only to partners and ex partners would be consistent with the legislation and would provide a clear Framework for solicitors, the judiciary and the police to operate in

We recognise that the same system in England and Wales with DVPNs and DVPOs covers other family members and people who are members of the same household but do not agree that this should be the case in Scotland. There are suitable remedies available for other family members.

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?**

- a The Domestic Abuse (Scotland) Act makes clear that non violent behaviour such as coercive control is now recognised as being a form of domestic abuse. It enshrines the fact that domestic abuse takes many forms including isolating victim or degrading them. There is no physical violence involved or threats of violence involved. It would be entirely incompatible if any test used when deciding to impose protective measures required there to be. Any test would need to address whether such orders were necessary and proportionate and should allow the opportunity for both the victim and perpetrator to make representations.

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).**

The view of the Glasgow Bar Association is that it would be appropriate for orders to be granted to prohibit a person from entering other locations. These locations could include immediate family members' homes or a person's place of work.

- 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?**

It is widely recognised that domestic abuse has a significant impact on children who experience this. The Domestic Abuse (Scotland) Act 2018 makes provision for Non Harassment Orders made in criminal cases to now cover children as well as the adult victim of domestic abuse. It is not clear how these criminal Non Harassment Orders will affect cases where there are perhaps civil proceedings involving arrangements for the child to have contact with the parent who has been convicted of a domestic offence. Further consultation is required in this area but it may be that if the court is satisfied that such an order in respect of the child is necessary then it should be open to the court to impose one.

- 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.**

The Glasgow Bar Association believe this would be a positive idea and would offer extra protection for a person at risk of domestic abuse. If it is a criminal offence to breach the measures put in place, then they may be taken more seriously. It would provide reassurance to the person who is at risk of domestic abuse as they would feel their situation is being taken seriously by being offered this increased protection. It would also act as a more significant deterrent against breaches of the orders.

- 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.**

Any penalties should be in line with Sheriff Court Summary Procedure. Consideration of the type of breach and whether there are repeated breaches would determine which penalty will be appropriate.

- 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.**

It is important that those who are at risk of domestic abuse have the guidance and support available to them. Depending on their position they may not be aware of the support services available or may be unaware of how to approach them. Police Scotland currently work with COPFS on a Joint Protocol. It is stated the police will treat all incidents of domestic abuse as high priority and state that any incident reported is to be met with an immediate response from officers. Their initial priority is the safety and well-being of the person and their family. It is further noted that Officers will provide the person with information about the available support agencies and will make onward referrals to specialist services where appropriate and with the explicit consent of the person. Police officers should continue to be given further training in relation to domestic abuse and referring people to the support services. The support services are likely to require further funding to enable them to be able to offer to support all those referred to them by Police Scotland. The Glasgow Bar Association do not believe this requires to be made a statutory duty.

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

No

## **PART TWO-EXCLUSION ORDERS**

- 16. Should the Scottish Government produce both public facing and professional facing information on exclusion orders?**

The Glasgow Bar Association would support the Scottish Government producing both public facing and professional facing information on exclusion

orders. From the figures showing the number of actions seeking exclusion orders, it appears evident that the measure is sought in a very small number of cases. This may well be due to the public, legal professionals, police, social workers and others having limited knowledge of exclusion orders, how they are obtained and the impact they can have. A clearer understanding of the effects of such orders and the process of obtaining them is likely to increase their use and effectiveness.

**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?**

The Glasgow Bar Association is of the view that consideration should be given to reframing S4(3) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and section 104(3) of the Civil Partnership Act 2004. These sections could be amended to remove the ability of other considerations to override the need to protect the potential victim of domestic abuse. Some of the factors listed in these sections would remain relevant such as the needs of any child involved but a reframing of the sections would ensure these acts properly reflect the changes in society since, in particular, the 1981 Act was introduced. This would allow the legislation to reflect the importance, now widely recognised, of protecting those who may be the victims of domestic abuse.

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

There is already provision for an interdict to be granted when an exclusion order is made by the court and under S(1) of the Protection from Abuse (Scotland) Act 2001, a Power of Arrest must be attached to a matrimonial interdict or a relevant interdict under S113 of the 2004 Act. The Glasgow Bar Association's view is that there is currently adequate provision allowing the court to grant effective interdicts when considering granting an exclusion order.

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

The Glasgow Bar Association believe further consultation is required in regard to the question of whether cohabitants without title to the family home be given the same occupancy rights as spouses and civil partners without title. There are currently different definitions of a cohabitee contained within S(18)(2) of the 1981 Act and S25 of the Family Law (Scotland) Act 2006. It

may be appropriate for consideration to be given to amending the definition in the 1981 Act. Further consultation may be required in relation to the appropriate time period required before a non entitled cohabitant obtains rights. There is a risk that such provision may provide an abuser with occupancy rights to the victim's property and this would be an unwelcome byproduct of changing the current position.

**20. Do you have any other suggestions for changes in relation to exclusion orders?**

One of the main concerns around exclusion orders as they currently stand is their effectiveness and the effectiveness of remedies when the order is breached. There appears still to be a feeling among the public and some professionals that civil remedies such as exclusion orders are 'a piece of paper' and do not carry the same weight as criminal orders such as special conditions of bail barring an alleged abuser from a property. It would be helpful if the police and other agencies providing support to victims of domestic abuse had a better awareness of the civil remedies available to people and the consequences of these orders being breached.

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

The Glasgow Bar Association has no comment to make in respect of this 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?**

Problems with the current provision for civil orders to protect victims of domestic abuse centre on how effective these remedies actually are in practice and how easy or otherwise they are to enforce once granted. It may be appropriate in terms of a longer term review for consideration to be given to streamlining the procedure both for obtaining and enforcing the orders. This may assist in ensuring that both the public and professionals have a clearer understanding of the remedies available and how to apply for them.

**Questions 23-27.** The Glasgow Bar Association has no comment to make in respect of these questions.