

Scottish Women's Rights Centre

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

05 April 2019

Overview

The Scottish Women's Rights Centre (SWRC) is a unique collaborative project that provides free legal information, advice and representation to women affected by violence and abuse. The SWRC exists because of abuses of power and because a gap persists between women's experience of violence and abuse and their access to justice. The SWRC strives to fill these gaps by working with specialist solicitors and experienced advocacy workers. Informed by our direct work with victims/survivors of violence and abuse, we seek to influence national policy, research and training to improve processes and systems, and ultimately to improve the outcomes for women who have experienced gender-based violence (GBV).

We recognise that people of any gender can be affected by abuse and violence (including sexual violence). However, statistics show that these crimes are more often committed by men against women. Also, as the SWRC specifically supports women aged 16 and over, when we talk about victims/survivors in this response we will generally refer to women. Despite this, we are aware – and do acknowledge – any person can be subjected to these crimes.

We support the strengthening of measures to protect victims/survivors of domestic abuse and recommend that the focus of reforms in this regard should be on the following:

- Shifting the burden from the victim/survivor to seek protective orders (including financial);
- Allowing for orders to be put in place quickly and further measures to be obtained thereafter;
- Moving towards a system whereby criminal and civil processes and orders complement each other, rather than conflict. A single process which puts the needs of victims/survivors at the centre and offers a cohesive response will be more effective and potentially cost-saving.

The state has a positive obligation to protect people from violence and change is welcome. We note that various reforms in relation to family law are being considered in Scotland at present and we have recommended¹ that a wholesale review of the

¹ Within our consultation response on reforming Part 1 of the *Children (Scotland) Act 1995*, <https://www.scottishwomensrightscentre.org.uk/resources/Final-Draft-Children-Scotland-Act-for-web2.pdf>

system is required. Accordingly, care should be taken to ensure these reforms are undertaken in a consistent and comprehensive manner.

Any reforms should be in line with the Council of Europe Convention on preventing and combating violence against women and domestic violence (“the Istanbul Convention”), specifically Articles 52 and 53, and the Council of Europe paper, *Emergency Barring Orders in Situations of Domestic Violence: Article 52 of the Convention*.² We note that the Convention provides that there should be a gender sensitive and gendered understanding of violence and comprehensive and co-ordinated policies.

There are many reasons people who are experiencing domestic abuse and at risk of harm may not seek protective orders, including barriers such as cost; stress and trauma (particularly in the immediate aftermath of an abusive incident) and the impact of this on their ability to assess their options and make decisions. There are particular complexities involved in domestic abuse which, from what we hear from women, can lead victims/survivors to not always disclose the extent of the abuse and/or risk, at times minimise the extent or nature of the abuse or risk; or not speak up/seek help due to fear (amongst other things). From what women tell us, this (in some cases) includes fear of the dangerous position seeking an order could put them in – if they do so and are unsuccessful they are potentially placed at further risk of harm from their partner or ex-partner for having sought it in the first place.³ Accordingly there is a need for the burden to shift from the person at risk seeking orders themselves. However, this needs to be balanced with individuals’ rights to make decisions which should only be interfered with in limited circumstances.

There are existing statutory frameworks which are relevant to these proposals and with which there will be overlap. The reforms should align with these frameworks and the systems currently in place and enhance the protections available. There is a need for a smooth system for obtaining protective orders, across the criminal and civil systems, which should complement each other. Key to this is the need for an improved understanding of the dynamics of domestic abuse to enable the police, courts and statutory services to better identify the risks of danger.

Where women need access to free legal advice the national helplines run by the SWRC are currently operational 3 days a week, soon increasing to 4.

² Council of Europe, June 2017 (“Council of Europe paper on Emergency Barring Orders”)

³ See also 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 Aid <http://womensaid.scot/wp-content/uploads/2017/07/ExclusionOrderReport.pdf> and 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 Aid, <http://womensaid.scot/wp-content/uploads/2017/07/Change-Justice-Fairness.pdf>

Section 1: Protective Orders

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

We support the introduction of Emergency Barring Orders (“EBOs”). We note the following by way of background:

Article 52 of the Istanbul Convention requires EBOs to be available “in situations of immediate danger”, irrespective of the actual commission or conviction of offences covered by the national criminal code. As recorded in the Explanatory Report of the Istanbul Convention, the term “immediate danger” refers to any situations of domestic violence in which harm is imminent or has already materialised and is likely to happen again (paragraph 265). This implies that a person has the right to be protected from violence if she/he has not been victimised yet.⁴

We agree that the police are best placed to issue these administrative orders as they have the necessary skills, training, expertise and experience to assess risk and make such decisions, and the ability to respond immediately (which is necessary for EBOs to be effective as emergency measures). The police routinely make decisions with significant implications on the liberty of individuals and for the protection of members of the public.

However, we note the following:-

- The police would need to be adequately resourced to be able to respond effectively and immediately and to enforce the orders once issued;
- Adequate training would be required (particularly regarding the complexities of domestic abuse in relation to factors that would be relevant to the assessment of risk, dual reporting/reporting by perpetrators as a means of abuse and how to identify the person at risk in such circumstances). Issuing EBOs incorrectly in such circumstances (i.e. barring the person at risk, rather than the perpetrator, from the home) would put people at risk of abuse in an even more vulnerable position. We hope there will be improvements in awareness and understanding through the training which has been undertaken in relation to the Domestic Abuse (Scotland) Act 2018, but we submit that further specialist training would be necessary;

⁴ Council of Europe paper on Emergency Barring Orders

- There would need to be an adequate framework put in place to ensure EBOs are issued in appropriate situations, in a just and proportionate manner. There should be consideration given as to whether the decision to issue an EBO should require to be taken by a police officer at a certain level/rank and who has had specialist training (however the framework would need to be flexible enough to allow an emergency response). These should not be issued as a blanket policy and must be assessed on a case by case basis;
- There must be legal safeguards in place. This includes the need for the duration of the EBO to be limited and specified, and there must be a mechanism for the individual subject to the barring order to seek recall or variation of the EBO in court in order to comply with their rights under Article 6 of the European Convention on Human Rights. In order to allow for effective protection and safety of the person at risk of abuse this must not have the effect of suspending the order.⁵
- EBOs should not be conditional upon charges being brought (and should be available after a perpetrator is released, including after serving a sentence, if necessary);
- The informed views of the complainer should be taken and should feed in to the decision to issue an EBO. Their views need to be informed - they have to understand why their views are being taken, how they will be used, and the possible consequences. Their views should feed into the initial decision but not necessarily determine the outcome. This would be a fine balance as in some circumstances this may mean an order being issued against the wishes expressed by the person at risk. This appears to be necessary due to the emergency nature of the order and the importance of removing the burden of seeking protective orders from the person at risk as outlined above. This may be particularly important in situations of coercive control. Given that this would be a temporary short-term measure to protect against immediate danger with legal safeguards, and balancing that with the severity of the act that is being prohibited (act of domestic violence or immediate danger of such act) this would appear to provide an appropriate balance of rights and interests;
- Access to emergency accommodation should be improved and information provided to individuals subject to EBOs (including information relating to accommodation options for people who have No Recourse to Public Funds). This relates to the rights of the person being accused of domestic abuse, but also relates to the safety of the person at risk because, from what we are told by women, if a perpetrator is barred from their home with nowhere to go that could escalate the risk of harm to the victim/survivor. We also hear from women who do not wish to see their partner homeless, despite the risk to themselves, which could place further pressure on the person at risk to inform police that they do not wish the order to be imposed;

⁵ Ibid

- Safety measures should be implemented alongside EBOs because risk will not end with the person being barred from the home. An EBO may not be enough to protect the person – consideration would need to be given to the full circumstances, risk from the alleged perpetrator or others, and whether financial, refuge or other support is necessary in order to meet the needs of the victim/survivor and any children. For example, safety measures should be identified in the initial risk assessment such as alerts on the home, safety planning, referral to support services and so on.

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.

Careful consideration should be given to the length of the EBOs. The duration requires to be sufficient to establish a safe situation for the person at risk, but it should be an interim and short-term measure with mechanism for review and extension. We suggest that an initial period of 7 days with a mechanism to have the order considered by a court within that period would appear to strike a reasonable balance. The mechanism for review could be that the person subject to the order could seek to recall the order on cause shown. The application or request to recall the order must not have the effect of suspending the order, the decision on whether the order should be recalled should be taken by the court.

There should be a mechanism to allow for an extension of the order to be sought, and ideally the protected person should be able to be represented at any hearing relating to the extension or recall of the order should they wish. We note that if this process is implemented through the criminal courts, that may not be possible under the current arrangements (although provision could potentially be made for this – consideration would require to be given as to whether the criminal court would be the correct forum). If the process which is implemented is in the criminal courts, and if provision is not made to allow for the protected person to be represented at any hearings in relation to this, there would require to be a mechanism for the protected person to be able to feed information into any hearing (for example through the police, a court advocacy service or the Crown Office and Procurator Fiscal Service). Early access to information and advice would be essential.

An option would be to consider whether the framework relating to banning orders set out within the Adult Support and Protection (Scotland) Act 2007 could be appropriate (see our answer to Question 22 below), alongside the Istanbul Convention, the guidance provided within the Council of Europe paper on Emergency Barring Orders and taking into account the particular dynamics of domestic abuse and the rights of all parties.

The length of the period available for these orders should allow sufficient time for any appropriate criminal justice steps and measures (such as arrest and special bail conditions) to be taken and implemented, social services involvement where appropriate, and crucially for the person at risk to seek legal advice, support and consider their options, such as whether they require the order to be extended, and wish to put their views forward and/or apply for protective orders if they wish to do so. Accordingly, extension of the order should be able to be sought to allow further time for other protection measures to be put in place and prevent gaps in protection.

We note that it can take around two to three weeks for an interim protective order to be obtained through the civil courts. This is dependent on a lawyer being identified, and thereafter courts and lawyers being in a position to deal with this efficiently. We understand that some delays and difficulties could be encountered by lawyers undertaking this work under legal aid. Consideration should be given to whether there is anything that can be done to improve access to legal aid for people who are urgently in need of protective orders. For example, through further guidance for solicitors regarding undertaking work under Special Urgency provisions; creation of specific provisions (if that would be possible) for legal aid applications for this type of work to shorten or simplify the process; or removing means testing for legal aid for people at risk of abuse seeking protective orders.⁶ We note that a review of legal aid payment structures and levels is ongoing which may, in due course, have an impact on this issue.

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, courts are well placed to make such decisions and already do so. Courts should be given the power to issue EBOs if they deem it appropriate to do so, and to extend an EBO on cause shown.

⁶ We note that the Scottish Government is against taking this step. We suggest consideration could be given to whether it would be possible to remove the means test for discrete applications for protective orders or exclusion orders only, to prevent this extending to family actions and therefore reducing the cost to the legal aid budget

- 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.**

Courts should be able to grant these for as long as the court sees fit (like special bail conditions in criminal proceedings which can be fixed indefinitely, and in some cases may remain in place until the criminal case concludes). However, as noted above, EBOs should be temporary orders with a view to longer term solutions being put in place where appropriate, and the provisions should allow the court to recall or refuse to extend the order if they take the view that the test for the EBO is no longer met, for example. We note that courts routinely consider the length of time orders are put in place for, balancing interests and rights. The process should allow for the factors which are relevant to such considerations to be put forward to the court.

- 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.**

Consideration should be given to whether local authorities should have the power to apply to the courts for EBOs. Social work departments routinely deal with situations of abuse and protection of vulnerable people and accordingly would be well placed to handle the complexities of a civil court process like this, as well as the ethical and practice issues. It is important that the person at risk would have access to information, advice, representation and support through the process.

Statutory services such as health and social work services, housing services, Independent Domestic Abuse Advocates, Multi-Agency Risk Assessment Conferences and other relevant services should have a role in seeking EBOs, however we would suggest that the most appropriate method for most services may be for services to refer to the police (and social services if deemed appropriate) to request that they consider issuing/applying for an EBO. For these services to have the power to apply for EBOs this would be onerous and would require training and adequate resources and safeguards.

We note that if EBOs could only be obtained by services making an application to court, this would be more resource intensive and perhaps less likely to be utilised. We refer to the ability of local authorities (and other agencies potentially, with leave of the court) to seek forced marriage protection orders under the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011, and the provision within the Children (Scotland) Act 1995 for local authorities to seek an exclusion order if they think a child is at risk. As far as we are aware, these provisions are used relatively infrequently.

There should be a mechanism for the person at risk to request that the relevant authority seeks a protection order on their behalf.

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.

A criminal court can, and should, be able to impose measures to protect a person at risk. They can do this at present by issuing a non-harassment order (NHO). It is hoped that this will be utilised more frequently as a result of the Domestic Abuse (Scotland) Act 2018. This should be extended to enable criminal courts to extend EBOs in order to allow the complainer time to seek advice and perhaps seek further protective orders.

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?

This is a difficult question and there are various factors that require to be balanced when considering such an approach. As noted above there are reasons why views feeding into a decision may be more appropriate than being the determining factor. On the other hand, it is important for people to have autonomy, the ability to make decisions, control over their circumstances, not having decisions imposed on them that they do not want and/or are not necessary. There could be limited value in applying for orders where there is not agreement from the victim/survivor. If someone is leaving an abusive relationship this is a process that can take time and that can have set-backs. Further, it is essential that withholding consent would not carry a negative inference to potential future reports. The proportionality of decisions being made without consent depends on the implications of the decision (i.e. it may be proportionate to have powers to issue short-term orders without the need for consent, but longer-term orders may require consent). A further factor to consider is that the criminal justice system does not require the consent of the complainer to prosecute or in relation to special bail conditions or the granting of NHOs.

On balance, the safest option may be to seek views, not consent, when considering granting a short-term order for protection against immediate danger. A requirement for consent would take away the benefit of moving towards a new system for protection of victims/survivors. The aim should be to take it out of the person's hands as far as possible (and proportionate), also the police/court need to be able to make decisions based on the potential risk to any individuals including children. A requirement for consent would negate the

judgment/assessment of risk on the part of the police and could place the person at greater risk of coercion. We suggest that consideration should be given to whether there is a way to take views from the victim/survivor on a confidential basis for their safety. Consideration should be given as to whether consent should be required for longer-term orders, bearing in mind the dynamics of domestic abuse and the risks this could pose. An option could be to require consent but put in place provisions which mitigate this risk, such as the court being able to issue an order without consent if they deem the person at risk has been unduly pressurised to refuse consent.

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?

In our view the focus of orders for protection against domestic abuse should be partners or ex-partners and people connected to them (such as family members) where appropriate (we regularly hear from women who tell us that family members of their ex-partner harass, sometimes stalk, and abuse them following the end of an abusive relationship). That does not mean that crimes committed by, for example, other family members or people who are living together who are not in a relationship are lesser, but rather that domestic abuse has specific dynamics underpinned by societal and cultural norms that require to be specifically addressed, and specific factors which may act as barriers to the person at risk leaving their residence such as potential financial liabilities, children, family, stigma and so on.

For the orders to be extended to family members, this could be implemented in similar terms to those available in forced marriage protection order proceedings in Scotland.

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 wider test of domestic abuse should be used. We know that the risk of violence or use of violence is only one way perpetrators abuse. The statutory definition of domestic abuse in criminal law now includes coercive control

because the harm caused by psychological abuse has been recognised. From what we are told, often psychological abuse can be most damaging and hardest to escape. For example, the threat of losing children can be far more powerful than the threat of violence. It is essential therefore that the statutory definition is the measure by which protection is assessed. Risk assessments must include the impact of psychological abuse and the impact this has on the victim/survivor's ability to access the protective measures. Asking victims/survivors what their greatest fears are can indicate where coercive control is being used. Due weight requires to be given to coercive control as defined in the Act.

It would be illogical to expand the legislation to include coercive control and then exclude that from protection measures being implemented. We would suggest that the test for an EBO should be:

- based on risk of immediate danger;
- immediate danger does not require to be high
- there should be no requirement for a pre-existing history of abuse;
- the risk should be of **any violence**, and not a risk of lethal violence or serious injury;
- irrespective of criminal charges, investigations or convictions;
- proportionate.

We note "*The EBO needs to protect persons at risk before harm is done. Thus it is important to avoid a high threshold of violence as a condition to issue an EBO. It is equally important to avoid high standards of proof for any violent incident or threat*".⁷

Further, the test could be similar to the test for exclusion orders as set down in McCafferty (please see our answer to Question 17 below in relation to this).

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).

It should 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 in order to prevent approaching the victim/survivor at locations where they frequent such as places of work or study,

⁷ Ibid

schools and so on. The Council of Europe’s view is that “*any regulation that is limited only to banning the perpetrator from the residence of the victim, but allows him/her to contact the victim or person at risk in other places, would fall short of fulfilling the obligation under the Istanbul Convention*”.⁸ We frequently hear from women who tell us they are continuing to be stalked and harassed by ex-partners following the breakdown of an abusive relationship. This provision would be necessary for these orders to be effective.

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

The police and courts should have the ability to impose conditions to the children of the victim/survivor (not only children living with them), or any children they consider at risk due to the abuse where they consider it necessary to do so. Children do not generally have agency to change their circumstances. Further, women frequently report to us that they continue to be abused through contact with children, further children can experience harm as a result of this.⁹ The impact domestic abuse can have on children is recognised by the Domestic Abuse (Scotland) Act 2018. Any such measures should be aligned with and complement existing child protection measures and processes.

We note that this could in some circumstances have implications on the exercise of parental rights and responsibilities and Article 8 rights to family life, however, submit that this is proportionate given the short-term nature of the order, mechanism to seek recall and the risk of imminent danger. The order should allow time for a referral to social work services who would then be able to undertake the procedures available to them.

We suggest that consideration is given to the interaction between EBOs and civil court orders relating to child contact/residence. We submit that EBOs should trump orders relating to child contact and residence and provision should be made for any such contact to be automatically suspended in these circumstances.¹⁰

⁸ Ibid

⁹ We refer to our consultation response on reforming of Part 1 of the Children (Scotland) Act 1995 in this regard

¹⁰ Ibid

We suggest that consideration be given to widening this to include adult children, who may also be at risk of danger and restricted in leaving the residence by the factors referred to within our answer to question 8 above.

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

It should be a criminal offence to breach an EBO or other measures put in place to protect a person at risk of domestic abuse, and it should be an arrestable offence. We note that *“for EBOs to be effective and give real safety to victims, they must be diligently enforced”*.¹¹ In our view, this is crucial. If a breach of these measures would not be a criminal offence, they would be toothless and would afford no protection.

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.

The requirements for sentencing and penalties is outwith our area of expertise. However, we would suggest that it may be appropriate for sentences and penalties available should be aligned with those available for breaches of similar orders. We note that consideration could be given to repeated breaches resulting in an escalation of the penalties available.

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

There should not be a statutory duty on police to refer to support agencies. It is best practice to do so and this could be noted in any guidance produced in this area. However, the basis by which independent support agencies such as Women’s Aid operate their services is one by which victims/survivors choose to engage and are empowered to do so. A mandatory referral could significantly impact on victim/survivors’ ability to engage and may cause a perception that independent services are operating as an arm of the police which would be detrimental. This is also not realistic due to there also being significant resource issues in relation to this for services that are already overstretched and operating waiting lists. Further, a statutory duty would seem to be overly

¹¹ Council of Europe paper on emergency barring orders

prescriptive and onerous on the police (and/or other authority). It also does not, as far as we are aware, appear to be necessary. From what we hear, Police Scotland routinely signpost and/or refer women to services. Further, there are legal requirements for statutory bodies to share information.

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

We note the importance of viewing domestic abuse, stalking and harassment as gendered crimes. Failure to do so results in failure to identify people at risk of domestic abuse, and accordingly failure to identify people at risk of harm (including imminent danger). The identification of those at risk of domestic abuse is key to their effective protection.

Section 2: Exclusion Orders

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

It may be that public and professional information on exclusion orders from the Scottish Government would be helpful to increase awareness and improve understanding by providing clarity in relation to exclusion orders. People who are at risk of or experiencing domestic abuse are unable to exercise their rights without knowledge of them in the first place. However, there are some guides available. For example, Shelter Scotland produces helpful and clear guides and provides information on its website; the SWRC has a guide on Stopping Harassment and we will be releasing guides on family law related issues.

In our experience, women wish access to advice and information in order to establish how the law applies to their particular circumstances, what their options are, and how to access them. The SWRC provides advice and information about exclusion orders (and other protective orders) through its helplines and legal surgeries, and can provide representation in some cases. We also provide second-tier advice to professionals through our helplines.

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?

Don't know

In our view this would require further consideration, in conjunction with wider family law reforms, and it may be that research would be required to establish whether these provisions are preventing exclusion orders being sought or

granted. We note that, in its report which led to the 1981 Act, the Scottish Law Commission had recommended, “*the court should be required to make an exclusion order, if it is satisfied that the need for protection arises, unless there are **exceptional circumstances** which would make the grant of such an order unreasonable.*”¹²

If the provisions within section 4(3) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and section 104(3) of the Civil Partnership Act 2004 are having the effect of restricting the circumstances in which exclusion orders are being granted, it may be worthwhile considering amending the legislation so the focus would shift to the protection of the person at risk (and any children). Alternatively, it could be that there are practice issues which could be addressed through guidance and training.

We note that the test for obtaining an exclusion order is set out in *McCafferty v McCafferty* 1986 SLT 650. The applicant must satisfy the court that the order is *necessary* for the protection of the applicant or any child of the family because the non-applicant’s conduct (or threatened or reasonably apprehended conduct) is, or would be, injurious to the physical or mental health of the applicant or child. In assessing this, the court should ask:

- (a) What is the nature and quality of the alleged conduct?
- (b) Is the court satisfied that the conduct is likely to be repeated if cohabitation continues?
- (c) Has the conduct been or, if repeated, would it be injurious to the physical or mental health of the applicant or to any child of the family?
- (d) If so, is the order sought necessary for the future protection of the physical or mental health of the applicant or child? (para 656)

From what we are told, it may be that the test of necessity is being applied too strictly, for example it may be that it is at times interpreted as meaning violence has to have taken place, or that an exclusion order is not necessary and therefore does not require to be granted if special bail conditions are in place, whereas that may not be the case.¹³ On the other hand, a test of necessity is a relatively high test. Accordingly, it may be that clarification and/or training may be helpful to ensure the provisions and the test are being applied correctly and appropriately.

Society has changed significantly since 1981, and accordingly it may be appropriate for the legislation to be updated and simplified (and this could

¹² The Scottish Law Commission, *Occupancy Rights in the Matrimonial Home and Domestic Violence*, 1980 <https://www.scotlawcom.gov.uk/files/4212/8014/9994/rep60.pdf>, p55, emphasis added

¹³ See the use and effectiveness of exclusion orders under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 – Scottish Women’s Aid <http://womensaid.scot/wp-content/uploads/2017/07/ExclusionOrderReport.pdf>

include reform of these specific provisions). It may be appropriate to define domestic abuse under the 1981 Act in line with the definition within the Domestic Abuse (Scotland) Act 2018. It could be appropriate to amend the provisions in order to bring the McCafferty test into the legislation, utilising the Domestic Abuse (Scotland) Act 2018 definition of domestic abuse. The test could centre around whether domestic abuse has been established, whether the court satisfied that the conduct is likely to be repeated if cohabitation continues; and if the conduct has been or, if repeated, would be injurious to the physical or mental health of the applicant or to any child of the family. However, any reform of these provisions would require taking any implications on property rights into consideration (to avoid any unintended consequences of reform), and it may be that such reform would require to be consulted on. This should be considered within the wider review of family law in Scotland.

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

Our understanding is this would not be necessary as courts have wide powers to grant interdicts. It could be that they have the power to grant wider orders but that in practice they do not grant them frequently, or that they or not being sought frequently. If this is the case, training and/or guidance may assist.

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

There is certainly a lack of understanding and awareness of occupancy rights (and rights generally) of cohabiting couples (for example, through our helpline we speak to women who have believed that they are in a “common law marriage” and assume they have the same rights as married people). It may be that many people who live together as a cohabiting couple assume that they both have the right to reside in the property. However, we would suggest that more research would be required to establish whether this is the case. We are not sure it is correct to assume people are not marrying because they don't want their partner to get occupancy rights.

Lack of occupancy rights of cohabitants can put people in abusive situations at risk, however giving occupancy rights to cohabitants without title may also put people in abusive situations at risk (where the abuser is at present the person without title). The Office of National Statistics released a report in 2017 in which it is made clear that the cohabiting family is the second largest family type and the fastest growing, it has more than doubled from the 1.5 million in 1996

to 3.3 million in 2017.¹⁴ Rights of cohabiting couples is certainly an important issue that warrants consideration, and there may be an argument for extending occupancy rights in this way. However, this reform would have wider implications, impacting on property and other rights and this change could have unintended consequences. We suggest that this question is one that may be better placed to be considered by the Scottish Law Commission in their review of aspects of family law.

There is some protection available because there is a mechanism for cohabitants without title to seek occupancy rights. We would suggest that the focus of reforms around protective orders should be to allow for EBOs to protect the person at risk in their home regardless of their residential circumstances. We note the Council of Europe's position that "*property or housing rights of abusive partners should not be taken into consideration in cases of immediate danger because the **perpetrator's property rights cannot supersede the rights of the victim to life and physical and mental integrity.***"¹⁵ Accordingly, we submit that EBOs should be issued in circumstances including if the protected person is a cohabitant without title. This should allow the person a short period of time and space to consider their options, seek legal advice and make decisions on the steps they wish to take (e.g. finding somewhere else to live, seeking occupancy rights, seeking further protective orders including an exclusion order). Accordingly, EBOs could reduce the vulnerability of, and risks to, people in these circumstances by allowing some protection from immediate harm while they take steps to seek occupancy rights and exclusion orders.

Further steps could be taken to remove barriers to seeking occupancy rights (e.g. improving access to solicitors to apply for occupancy rights, such as by removing means testing for legal aid for people at risk of abuse, as suggested above). Access to alternative accommodation should also be improved, for those who decide to leave e.g. improving access to local authority accommodation; providing assistance with securing new accommodation such as a deposit scheme for new tenancies for those at risk of domestic abuse). These improvements would benefit people at risk of abuse who have occupancy rights as well as those who do not, as for some people they may not wish to, or be able to afford to, remain in the home.

¹⁴ https://www.familylaw.co.uk/news_and_comment/ons-statistics-show-cohabiting-couple-families-are-on-the-rise#.W-HmXuKny70

¹⁵ Council of Europe paper on Emergency Barring Orders

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

It appears exclusion orders are under-utilised and consideration should be given to the reasons for this.¹⁶

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?

We would welcome orders imposed in Magistrates courts in England being enforceable in Scotland. We speak to many survivors of domestic abuse who face cross-jurisdictional challenges, and this may go some way to addressing these. This would also comply with Article 62 of the Istanbul Convention. If widened by the UK government to have greater impact, the Scottish Government should enforce the wider definition.

A process for reciprocal enforcement should be introduced for this purpose, for example like those that exist in relation to European orders which can be enforced in Scotland. This should be as straightforward a procedure as possible, such as applying to the Court of Session to request recognition of these orders. There should be legal safeguards, such as the person whom the order is against should have the opportunity to seek recall of the order, on cause shown, particularly if the order could apply Scotland-wide (although, as with EBOs, applying for recall of such an order should not have the effect of suspending the order).

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?

Consideration should be given to how to make long terms orders more accessible to people experiencing or at risk of domestic abuse. Family law in Scotland is complex and made up of piecemeal legislation, with the provisions relating to civil protective orders being set out across various Acts. As part of the wider review of family law, consideration should be given to consolidating this. If all the provisions relating to protective orders were set down in one Act this could provide greater clarity, consistency and accessibility.

Further, this reform should not be undertaken in isolation and should be considered alongside other legislative provisions and frameworks which

¹⁶ We refer to the use and effectiveness of exclusion orders under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 – Scottish Women's Aid <http://womensaid.scot/wp-content/uploads/2017/07/ExclusionOrderReport.pdf>

currently exist where there are similarities and potential crossover. For example, the Children (Scotland) Act 1995 and the framework for child protection in Scotland; the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011; and the Adult Support and Protection (Scotland) Act 2007. We understand the latter Act may also be subject to upcoming review, and if so it would be important for these two processes to be aligned, so that the two pieces of legislation proceed from a common set of principles, have consistent approaches, and operate effectively in situations which might be relevant under either Act. That is particularly so as the UN Convention on the Rights of Persons with Disabilities would expect protection for people who have disabilities to be consistent with protection for others, except insofar as there may need to be additional support for a person who has a disability.

Lack of access to civil protection orders is a barrier to protection from domestic abuse. This includes lack of access to legal aid or affordable legal representation, and lack of solicitors with knowledge and understanding of domestic abuse and trauma. Training on domestic abuse and trauma for lawyers and judges is necessary. The SWRC has delivered some training to solicitors on domestic abuse, including in relation to protective orders, and will continue to deliver training on such matters.

The effectiveness of any such measures is determined by their enforcement and by the consequences of breach, and accordingly robust enforcement is important. Wider application of powers of arrest would be welcome both for the protection of victims/survivors and their children.

From what we are told, bail conditions are often relied on by victims/survivors in place of protective orders, however that can result in gaps in protection. This appears to be, from what we hear, due to conflicting practices and processes between the criminal and civil justice systems in relation to protective orders. For example, in some cases it may be that such orders are not being granted when bail conditions are in place because the court has taken the view that it is not necessary. However, this can place people in a vulnerable position because of the time it can take to seek a civil court order and, from what we are told, at times people may receive little or no notice of bail conditions ceasing. We have been told of civil courts declining to grant protective orders when bail conditions have recently ceased but there have been no recent incidents (which is potentially as a result of the bail conditions having been in place) and therefore it has not been possible to establish that the abuse is likely to continue. Some women tell us that this makes them feel as though they must wait to be abused further before they can seek protection. Reforms to the system should allow for coherent and complementary processes for seeking protective orders.

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)

The reforms proposed would have a particular impact on women as women are disproportionately affected by domestic abuse. The reforms would also have a particular impact on other equality groups in various ways. Women and girls experiencing domestic abuse who share other protected characteristics can face intersectional discrimination, an increased level of risk of experiencing violence and abuse and greater barriers to protection. For example, women who are migrants, refugees and/or have insecure immigration status may face additional barriers in seeking protection due to immigration policies, and women who have disabilities may face greater barriers to accessing safe and suitable accommodation.

We refer to Question 16 regarding public facing information and note that if translated into various languages and provided in accessible formats, this would have a positive impact on non-English speaking people and people who have disabilities by making them more aware of their rights in domestic abuse situations.

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

No

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?

No

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

There are various human rights implications from the proposals in this consultation for those accused of domestic abuse (which may include instances of dual reporting or reporting as a means of abuse), those experiencing domestic abuse and children affected by the abuse. We have sought to address the key considerations in relation to these in our answers. As noted throughout, reforms must be implemented in accordance with human rights (domestic human rights legislation and international human rights treaties), and should allow for protection of those at risk of abuse as the priority, however measures

and processes must allow for lawful and proportionate responses with adequate checks and balances.

These proposals may have a particular impact on island communities in Scotland. This is due to potential barriers in accessing services, including police, social services, solicitors and support services, particularly in small rural communities and/or remote locations. For example, if there are a small number of solicitors, or geographical barriers causing difficulty accessing solicitors, this could pose difficulties with challenging or seeking to extend an EBO, particularly within the initial 7 day time period. For example, in a small rural community, there may only be one firm of solicitors undertaking this type of work and accordingly a conflict could arise if both parties were to seek to instruct them. We hear about issues of this nature at times through our helpline.