

Consultation Response

Protective orders for people at risk of domestic abuse

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Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Family Law and Criminal Law Committees welcome the opportunity to consider and respond to the Scottish Government's consultation on protective orders for people at risk of domestic abuse. The committees have the following comments to put forward for consideration.

General comments

Domestic abuse is a situation that must not be tolerated in our law or society. Significant steps have been taken over recent years to revise the law and the public's understanding of domestic abuse. We fully support measures to prevent domestic abuse and to support victims and potential victims, and in particular to ensuring the safety of persons at risk in situations of immediate danger. We understand fully the rationale behind the consultation which includes account being taken of the Istanbul Convention¹ which was described as a 'landmark' treaty for creating a legal framework at pan-European level to protect women from all forms of violence including domestic violence.

Any proposed Scottish legislation can and should have regard to its provisions to ensure the safety of victims or persons at risk in situations of immediate danger.²

However, we are not convinced that the proposed legislative measures add meaningful additional options to those that already exists, and we are concerned about a proliferation of potentially overlapping measures. It is important to ask in what way the proposals will add to the range of measures that are currently provided. Any additional measures should be proportionate, fair and measured.

There are a number of current measures that need to be considered together with these proposals. The introduction of any new measures should be supported by a qualitative analysis of existing provisions to

¹ Council of Europe Convention on preventing and combating violence against women and domestic violence.

² Article 52 of the Istanbul Convention

understand fully how they fall short of providing a landscape of protections for those at risk and at all times. By way of example, we would include the Criminal Justice (Scotland) Act 2016 where the perpetrator can be released on conditions as part of investigative liberation. Such provisions only came into force on 25 January 2018 so it is difficult yet to ascertain how these provisions are working and what use is being made of them. Evaluation of such measures is needed to avoid duplication or complications in the process when what all want to achieve is effective protection for the victims of domestic abuse.

Where someone is suspected of committing a domestic offence, the police can, after enquiries, arrest an accused person. They can detain them in custody for the next custody day, release them on a bail undertaking³ for a specified court day, usually, a couple of weeks ahead or release them for Investigative Liberation.⁴ Such Investigative Liberation can and will contain special conditions, similar to bail, such as prohibiting contacting in any way or requiring an individual to stay away from persons and/or addresses. Criminal penalties will potentially follow any breach of these conditions.

The important point to stress is that the current range of legislative measures emulate any measures that would be included when introducing protection orders. Such conditions can be imposed by the police irrespective of the views of the alleged victim. This addresses the needs of public interest. This is important, as most commonly, in practice, such persons if released when accused of a domestic abuse offence will be required, irrespective of the views of the victim, to reside at a separate address pending trial to secure the alleged victim's safety. Breach of such conditions have significant consequences for the offender which will include returning to court and being remanded pending trial.

Where an offender does not comply with the terms of the measures currently existing such as a bail order or a non-harassment order or any other order or interdict, by bringing in protective orders, would there be more likelihood that they will comply with them? Though that may not be a reason for not bringing in such measures, we would emphasise that there should be a demonstrable need for them.

In addition, we question the use of externally imposed measures on adult individuals with full legal capacity and agency. We suggest that respecting personal autonomy by working with individuals to provide support and assistance with their consent should be the first approach. The consultation document does not make clear what role the views and wishes of the potential victim should play in deciding whether to make any order. In addition, there are human rights implications in imposing administrative orders with significant effects on an individual as a preventative measure. These issues will be discussed further in our responses to specific questions, below.

³ Section 25-30 of the Criminal Justice (Scotland) Act 2018

⁴ Section 16 of the Criminal Justice (Scotland) Act 2016

Part 1 – 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?

No.

The courts play an essential role in ensuring fair, transparent and proportionate exercise of powers. This is particularly important in situations where preventative measures are being sought, where an individual has not been charged with any offence. The orders being proposed could result in a significant restriction of an individual's right to private and family life and right to enjoy their property; and should therefore be handled with proper oversight and due process. Were this power to exist it would require to be a truly exceptional situation and would need to be subject to judicial determination at the earliest opportunity. Independent judicial oversight is essential to the whole process. In addition, careful consideration must be given to the definition of the term "at risk".

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.

We do not agree with the introduction of the proposed police power. However, if it is introduced, due to the issues raised in our response to question 1, above, we would suggest such an order would only be appropriate for a short period of time and subject to judicial oversight at the earliest opportunity which should be at an absolute maximum 48 hours. That review process would be essential to ensure that the exercise of such powers by the police are proportionate and accountable.

As well as securing adequate protection for the victim or alleged victim, there must be proper legal procedures in place to protect the alleged perpetrator who must have access to legal advice and representation. There may well be access to justice and legal aid implications as well as ensuring equality of arms. There are practical considerations too as the alleged perpetrator may be rendered homeless.

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?

Don't know.

In general, we do not support the introduction of a court imposed protective barring order, as we do not believe that it is a necessary addition to the existing set of measures, and it would risk over-complicating the legislative landscape. There are currently provisions for non-harassment orders, domestic abuse interdicts, police undertakings, and bail conditions. These ensure that individuals posing a risk of domestic abuse can be removed and prevented from entering a home, approaching, or otherwise contacting an individual at risk. We remain unclear as to any gaps in provision.

In addition, the proposals contained in the consultation paper do not adequately address issues around how these orders would operate, including, importantly, the role of the individuals involved (both the person at risk and the person posing a risk).

It may be that there is scope for an emergency order that can be issued by the court very quickly in order to address the potential for delay in obtaining any of the existing orders. However, any such order should be short term. Were such orders to be created, they would need to apply in only the most exceptional case and be subject to prompt judicial oversight, as indicated above.

We would encourage consideration of how the existing civil measures are being used at present. Are they being fully utilised?

If not, there may be a benefit in seeing how best to ensure that there is knowledge and understanding of what measures are available at present. Are there barriers preventing their successful operation? As we refer to above, that would allow the existing measures to be evaluated to see if there is indeed a gap in provision as indicated above, and to ensure that any new measures are designed to be as effective as possible.

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.

If such orders are introduced, they should be temporary, emergency measures and as such should be limited in the time they apply. We do not have a specific view on the exact period of time, but would suggest that the intention should be to allow sufficient time for other measures to be put in place while not imposing significant restrictions for longer than necessary, given the lower level of procedural formality that would be necessarily involved in their granting.

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.

We would consider that only the police should be involved in being able to obtain such orders. The police would require to give serious consideration to the intended role of the individual at risk. These types of order may assist in removing some of the burden of seeking a civil order but should still be made by the police, preferably in partnership with the affected individual. As they are intended to be short-term, emergency orders, as well as applying for such orders there will still be a need to support that individual in securing longer-term measures if required.

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.

No.

Such orders should not be part of the sentencing process as there are already wide-ranging powers under the non-harassment regime and the Domestic Abuse (Scotland) Act 2018 (2018 Act)⁵. These current measures are sufficiently robust.

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.

Discussion should be had around the issue of whether an order can or should be made in situations where the individual at risk does not support it. Although there may be cause to allow an application to be made without the formal endorsement of the individual at risk, it is unlikely to be appropriate to make an application for such an order against the will of the individual at risk. See our comments above about autonomy of the individual at risk.

We would even go further and suggest that it should be informed consent in writing in possible. Too often, there is experience with special conditions of bail or undertaking conditions being imposed by the courts for

⁵ <http://www.legislation.gov.uk/asp/2018/5/contents/enacted>

them to be reviewed on the basis that the alleged victim does not want the alleged perpetrator removed from the home.

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?

Don't know.

The scope of the application of any protective order should be revisited once the details of any such order are confirmed. In general, it may be helpful to have consistency across legislation relating to domestic abuse. The 2018 Act covers partners and ex-partners, the definition of which extends to intimate personal relationships. However, there is also an argument that the relationship between an individual at risk of abuse and the person purported to pose a risk should be broad, to ensure that adequate protection can be given whenever it is needed.

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?

This is a very important point. We believe that any breach should be subject to the sanctions available in criminal law. Accordingly, the test requires to be a high one to ensure that the interests of justice prevail. It should not be subject to a single strand of evidence. The test should comply with Scottish criminal evidential requirements, including the need for corroboration.

Any test would need to be linked to the concept of "at risk." It should not require to specify the type of abuse but should focus on the outcome in the sense of harm.

We would draw attention to the test set out in section 209 (1) of the Criminal Procedure (Scotland) Act 1995⁶ which relates to a supervised release order. It refers to:

⁶ <https://www.legislation.gov.uk/ukpga/1995/46/section/209>

“...the court on passing sentence may, if it considers that it is necessary to do so to protect the public from serious harm from the offender on his release, make such order...”

In that situation, the question is whether the public need to be protected from serious harm at the conclusion of a custodial sentence.

We feel that the test should be along the lines that an order should be imposed where it was considered necessary to prevent the person “at risk” of harm arising from the conduct of a person to be made subject to an order coming to harm. The conduct can be direct or indirect.

The necessity of granting the order would be the usual in achieving a balance between the rights of the State and the individual.

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)

Yes.

We agree otherwise the effectiveness of the orders would be limited. However, as discussed above, this illustrates the potentially very significant impact of an order and the need for proper judicial process and oversight.

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?

Don’t know.

We are not generally supportive of these measures being introduced. However, if they are introduced, we agree that children do need to be considered. There is no reason to treat children differently provided the test referred to in Question 9 is appropriately worded.

Children who witness criminal behaviour are subject to harm as a result and should fall to be considered in their own right in terms of any prevention order to be granted and who is included. It may be worth considering too the grant of orders for each person that is affected. That would allow the situation where, for example, the victim or the alleged victim does not provide adequate information to support any order

being imposed but a child witness provides sufficient information about what they have seen to satisfy a court that the child is at risk of harm. An order could then be granted.

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.

We refer to our answer to Question 9 regarding the standard of proof and the need for corroboration.

The drafting of any relevant offence would need to be clear.

The interests of justice test requires that any person is made fully aware of the consequences that may follow from the breach of any such measures. This is similar to the requirement for any accused person to specifically accept any conditions of bail including, where relevant, special conditions. The judge makes clear in court the consequences of any failure to comply. We would comment that if criminal sanctions are to be imposed for breach of an order, it is important that the individual subject to the order has had an opportunity to make representations. The proposed orders have potentially significant implications and are far reaching and would have the potential to have a substantial impact on the individual's day to day life. The process surrounding imposing such an order must include a mechanism for hearing from the individual concerned before imposition and a route to appeal the order. Provision would also need to be made for legal aid.

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.

It is for the Scottish Government to decide what penalties are felt to be proportionate. However, we would tend to suggest that any penalties would include the range of sentencing options up to the respective maximums under summary and solemn procedure.

Consideration should be given as to whether any breach should be treated as a separate aggravation, as is the situation with the breach of bail conditions.

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?

No.

There are conflicting interests. Police Scotland are there to investigate allegations of crime, not to provide support assistance and advice to alleged complainers. Transparency as well as separation of processes is very important. Furthermore, it would be excessive to place a statutory obligation on them; there are other organisations which are best placed to support the victim or alleged victim. Signposting by the police to relevant areas of support and advice is perfectly appropriate.

As discussed above, we believe that any such orders should be temporary, emergency orders to enable more formal measures to be put in place. Ensuring access to support for an individual at risk should be a key part of any plans designed to target domestic abuse.

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?

We do not consider that such orders are necessary.

Existing measures are available where there is evidence and the existence of a reasonable suspicion of domestic abuse. Where there is not the level of evidence required to meet the standards required for existing criminal and civil measures, great care should be taken before placing significant restrictions on individuals, in particular, where there would be limited or no judicial oversight. Resources should be focused on supporting the victim or alleged victim and working with them to ascertain why suspicions have arisen and act accordingly, making full use of the existing range of options.

Following this consultation exercise, it is important to be clear whether there is a need for such orders. If provision is made for such orders, it must be clear whether they are to follow the civil or criminal route. If the orders are to be criminal in nature, there must be clarity around the appropriate sanctions and appeal mechanisms, and legal aid must be provided where required to ensure access to justice.

We recognise that there are various models for implementing such orders amongst European countries where they have been adopted. We echo that: “care must be taken to ensure that the police are given appropriate resources and training to implement them...[prevention orders] are likely to work best as part of wider multi agency support.”⁷ The need for public awareness and education about domestic abuse is essential, supported by the agencies involved and best placed to contribute meaningfully to such education and resources.

⁷ http://www.parliament.scot/S5_JusticeCommittee/Inquiries/DA2Burton.pdf Mandy Burton

Part 2 – Exclusion orders

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

Yes.

Raising awareness of existing options for support and protection could increase the use of such measures and ability of professionals to support individuals in seeking exclusion orders.

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?

No.

Exclusion orders have a high threshold for granting, which is proper given the context of removing an individual's occupancy rights to a home that they own. The legislation provides for a range of areas that may be considered by the court, including the conduct of the parties, as well as requiring the court to have regard to all the circumstances of the case. As noted in the consultation document, the research on exclusion orders is no longer current, and it may be beneficial to re-evaluate the use of these orders and any issues arising.

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

No.

We are not aware of there being any difficulties with the scope of the current powers and, as noted in the consultation document, other means of obtaining interdicts or non-harassment orders are available.

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

Don't know.

There has been a significant growth in the number of cohabitating couples and families in the UK in recent years. The cohabiting couple family was the fastest growing family type in the UK over the 20-year period to 2017.⁸ The number of such families more than doubled – from 1.474 million cohabiting families in 1996 to 3.291 million in 2017, a growth of 123%.⁹ Cohabiting couple families now account for 17% of all families in the UK.¹⁰ These statistics are reflected in Scotland where, in 2011, 16% of families were cohabiting couples.¹¹

We note that the Scottish Law Commission has commenced a project on certain of the rights of cohabitants and suggest that this question should be considered as part of a wider view of the law around cohabitation.

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

No.

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?

Don't know.

We have no comment at this stage but note that it would be helpful to consider this question by analysing the English orders with any comparable orders introduced in Scotland, once the Scottish Government has determined the outcome of this consultation.

⁸ ONS 2017 Statistical Bulletin.

⁹ ONS 2015 and 2017 Statistical Bulletins.

¹⁰ ONS 2017 Statistical Bulletin.

¹¹ 2011 Census, Table DC1102SC and Table DC1108SC, www.scotlandcensus.gov.uk



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.

We suggest that a longer-term review of civil protection orders should focus on identifying the specific gaps that may exist within our current set of arrangements, and ensure that the law is clear, fair, and accessible, and coherent across the civil and criminal law.

For further information, please contact:

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