



# Consultation Response

## Proposed Stalking Protection (Scotland) Bill

A proposal for a Bill to increase protection for victims of stalking by giving the police the power to apply for stalking protection orders on behalf of victims

19 July 2019



## Introduction

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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.

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Our Criminal Law Committee welcomes the opportunity to consider and respond to the consultation on "*A proposal for a Bill to increase protection for victims of stalking by giving the police the power to apply for stalking protection orders on behalf of victims*" (the consultation). We have the following comments to put forward for consideration.

## Aim and approach

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### **Question 1: Which of the following best expresses your view of increasing protections for victim of stalking by giving police the power to apply for stalking orders on behalf of victims?**

Neutral. We fully support protection for victims and would wish to ensure that victims are given, if required, greater protection in cases of stalking.

However, much of the ground covered in the consultation overlaps with the recent Scottish Government consultation, "Protective orders for people at risk of domestic abuse". Both these consultations are concerned with providing additional protection to victims at the investigation and pre-trial stage when any alleged offender is entitled to the presumption of innocence. If new measures are required to support the victims, what is to be created should be considered carefully to provide new powers to deal with any gaps which is very much the view which we express through our response. While we would suggest that it may be appropriate to await the outcome of the Scottish Government's consultation to ascertain if and what the Scottish Government may be proposing by way of additional measures, what is important is ensuring effective protection, while avoiding unnecessary complexity to what could become a cluttered landscape.

We recognise that though most stalking incidents do arise in the domestic context, not all do, so that any protections must be available to victims in whatever type of stalking they experience.

The consultation identifies that young women “are disproportionately affected by stalking” which may be correct. It must be recognised in bringing forward any new measure for protection that these are gender neutral as men and other groups such as those that are representatives of the “protected characteristics”<sup>1</sup> can be and are similarly affected. Further analysis from the offences reported and convictions obtained under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010 (2010 Act) may be a source to provide further information as to who are the most vulnerable to stalking.

We refer to our response to the Scottish Government consultation where we recognised that significant steps had been taken over recent years to provide legislative solutions to abuse issues of which stalking forms part.<sup>2</sup> That has included the introduction of the criminal offence of stalking under section 39 of the 2010 Act.

As well as providing legislative solutions, there requires to be publicity as to what the problems are and how there are measures to address them. The proposals such as those outlined in the consultation do much to promote and raise awareness of the problems.

We would highlight too the establishment of the Victims Taskforce<sup>3</sup> by Scottish Government whose role is to establish and to improve support, advice and information for the victims of crime. That too does much to promote awareness of victims’ rights and interests.

What the consultation should seek to address is to identify where there are gaps as to the provision of necessary protections and, if such gaps are found to exist, whether the solution lies in a criminal or civil response. What appears here is a rather hybrid civil/criminal response which we discuss below.

The premise of the consultation is to provide, on an interim basis, protection for alleged victims of stalking. That is already available in the form of a Non-Harassment Order. The consultation recognises its existence and that it forms part of a range of measures currently available covering stalking issues. For there to be a need to introduce any Stalking Protection Order (SPO), it should be shown that there is a gap in the current existing measures and a need for an additional protective order.

In analysing existing measures, the consultation indicates, for instance, that the use of Non-Harassment Orders is very rare.<sup>4</sup> We would suggest as this is an important measure that exists to provide victims of stalking with protection, exploring why its use is considered to be very rare is essential before seeking to introduce new measures. Reviewing whether its use is limited through lack of knowledge or understanding would help establish if there is a need for legislative reform and how

<sup>1</sup> Equality Act 2010

<sup>2</sup> <https://www.lawscot.org.uk/media/362419/19-03-29-crim-fam-consultation-protective-orders-re-domestic-abuse.pdf>

<sup>3</sup> <https://www.gov.scot/groups/victims-taskforce/>

<sup>4</sup> Page 11 of the consultation

that should best be targeted. Greater publicity as to the use and availability or amendment of the current provisions may be sufficient without the need to introduce new, additional provisions.

In addition to a Non-Harassment Order, the victim can apply for a civil interdict and interim interdict. If there was a domestic element, that interdict can be enhanced with a power of arrest. Proof is on the balance of probabilities and if a prima facie case can be made, then an interim interdict would be granted.

We would also highlight the provisions of the domestic abuse interdict with a power of arrest under in terms of section 2 of the Domestic Abuse (Scotland) Act 2011.

All of this can be done quickly by the alleged victim's solicitor. Legal aid, including emergency legal aid, may be available for support such applications. If the legal means to protect the alleged victim is already there, reasons for that legal process not being used should be investigated. Likewise, if there are, for instance, issues with accessibility or availability of legal aid, these should be identified and resolved. New legislation would also require making legal aid available to support any applications.

There is a need to have regard to the provisions of the safety of victims and persons in immediate danger as outlined under Article 52 of the Istanbul Convention of the Council of Europe on preventing and combating violence against women and domestic abuse. Do the proposals in this consultation add to what is available, and are the measures that are being proposed proportionate, fair and measured? We would suggest that there are three issues to consider:

1. Standard of proof required: There may be concerns about whether the process is treated as civil and/or criminal. That needs to be clarified. What is being proposed is currently unclear.<sup>5</sup>
2. The rights of the alleged offender: At the end of relationships there can be complaints made regarding stalking. However, before the case ends up in court, there may be situations where the victim continues to contact the accused, for example repeatedly persuading that person to attend to various pieces of work in and around their home. What might be relevant if creating Stalking Protection Orders (SPOs) is for the alleged offender to be able to apply for reciprocal measures on similar grounds to protect the interests of both parties. This may encourage a balance to be achieved by the courts and to reflect what may be changes in a volatile relationship where up to date information is not always available for the court to fully assess.
3. Victim: There is a paternalistic view in that how do you deal with the issue of whether the victim requires to consent to an order being made in their favour. This raises further complex questions about the interests of a child who may be affected by the order being granted in favour of a parent but affecting the address at

<sup>5</sup> There may be some doubts as to which standard of proof should apply on occasions. Where an Anti-Social Behaviour Order is applied for, we understand that there is an argument whether the standard for is civil or criminal. In England and Wales R (on Application of McCann) v Manchester Crown Court (<https://www.casemine.com/judgement/uk/5a8ff7b560d03e7f57eb1698>), the House of Lords held that the criminal standard applied but in Aberdeen City Council v Fergus 2006 Hous LR 90 and Glasgow City Council v Ferguson 2009 SLT (Sh Ct) 47, the respective Sheriff Principals held that the civil standard applied. There seems to be no clear binding Scottish authority on the point. With Risk of Sexual Harm Order or a Sex Prevention Offenders, this seems to apply the civil standard. Practices seem inconsistent.

which they stay and access to the alleged perpetrator. There may be an issue too as the capacity of the victim to consent to any such order. Another aspect in relation to the victim if they are a victim of coercive control and how that affects their ability to consent to an order if required. The Domestic Abuse (Scotland) Act 2018 has recently come into force so exactly what amounts to coercive control and the effect on the victim may be more factors to consider exactly how such orders would be intended to operate.

In addition, what is not mentioned in the consultation is the further protection which could be given to alleged victims, in terms of section 26 of the Criminal Justice (Scotland) Act 2016. This is the release on an undertaking, pending further police investigation. As part of that undertaking, conditions can be imposed, which are legally enforceable by the courts. The whole purpose of introducing interim liberation on police bail, was to meet and deal with the particular problems associated as outlined in the consultation with cases such as those involving stalking.

The consultation provides little or no indication of the type of evidence which would be presented to the court by the police, when applying for a proposed SPO.

This is an example of where the consultation appears to be modelled largely on the Stalking Protection Act 2019 (2019 Act).<sup>6</sup> Before considering, any read across of the provisions of the 2019 Act, there is a need for the Scottish landscape to be considered in full. Also, if this is to be considered as a model, it would be useful to ascertain evidence as to how its provisions are working now, such as what the uptake is and success in the courts when applying for such orders.

Section 1 of the 2019 Act states:

“a chief officer of police may apply to a magistrates’ court for an order (a “stalking protection order”) in respect of a person (the “defendant”) if it appears to the chief officer that:

- (a) the defendant has carried out acts associated with stalking,
- (b) the defendant poses a risk associated with stalking to another person, and
- (c) there is reasonable cause to believe the proposed order is necessary to protect another person from such a risk (whether or not the other person was the victim of the acts mentioned in paragraph (a)).”

Apart from a statement that the grant of a SPO would be on “the balance of probabilities”, what evidence to justify the court granting such an order would be required? We would suggest that it would be necessary to include an insertion that there was reasonable cause to show why a SPO was required. How is the court to be “satisfied these acts have been carried out and the alleged perpetrator does indeed pose a risk”?

At page 14 of the consultation, it states that:

<sup>6</sup> Applicable to England and Wales

“However, the advantage of SPOs is that they also give victims protection where the police consider an alleged offender to be a genuine threat, but where there is not yet enough evidence to pursue criminal charges”.

These circumstances are already covered in that the accused can be liberated in terms of the interim liberation process, on bail with special conditions, while the police investigate further. This process also requires the court to be satisfied that the alleged offender is a genuine threat.

Part of the argument put forward in the consultation appears to be that the civil process is onerous for the alleged victim, based on the “associated costs and stress, which come with raising an action in court.” However, whether the action falls to be raised by the victims themselves, a solicitor on behalf of a victim, the police or the Procurator Fiscal, inevitably, there will be “associated costs and stress.” We are aware that the police have finite resources, and this would need to be considered if they were granted additional powers and responsibilities.

We therefore cannot agree with suggestion that the proposals would not increase any additional public expenditure or resource implications regarding changes to public service manpower. Enforcement will involve the police and require additional resources especially if there is a suggestion that stalking does not have the appropriate protections at present. Any new measure will have implications for the police and for legal aid, as mentioned above. Such funding implications include the alleged perpetrator arguing against the order as well as potentially the victim in seeking out the order.

## **Question 2: Which of the following best expresses your view of limiting Stalking Protection Orders to a maximum duration of two years, with the possibility of renewal by the court?**

We refer to our comments in relation to Question 1. We are not satisfied that the need for such SPOs has been established at this stage.

However, were the proposals to go forward, we would suggest that two years for such orders is too long. We have no information as to the basis on which England and Wales opted for two years as a minimum.

There would need to be evidence presented as to why any specific period was being selected as it would need to be fair, reasonable and measured (proportionate) to the risks involved in the alleged perpetrator being at unrestricted liberty. Any grant of a SPO inevitably restricts their freedom.

We would suggest possibly that twelve months as a maximum might be reasonable as most criminal proceedings would be underway if not concluded within twelve months of such an allegation being made. There would be, additionally, the likelihood in almost all cases if they had not been concluded within twelve months (bearing in mind the usual time bars of one year in summary proceedings), the accused would be subject to bail conditions imposed either by the police as mentioned above or by the court, which would protect the victim at risk.

**Question 3: Which of the following best expresses your view of making the breach of a Stalking Protection Order a criminal offence, with a maximum sentence of up to 6 months imprisonment and/or a fine on summary conviction, and up to 5 years imprisonment and/or a fine for conviction on indictment?**

We refer to our comments at Question 1. There are existing protections under the current provisions and for breach of bail or an undertaking as discussed above.

If SPOs are created, the sentence level for breach should be similar to those available for such breaches of bail or undertakings. This provides consistency in approach.

**Question 4: Which of the following best expresses your view of allowing a Stalking Protection Order to be made against a child (i.e. under the age of 16 and above the age of criminal responsibility in Scotland)?**

We refer to our comments in Question 1. There is a need to consider the status of the child who is over 16 and under supervision or the Children's Reporter until they are 18. Furthermore, most new legislation classifies anyone under 18 as a child.

Any SPO would need to take on board advice from the Children's Reporter where required as well as satisfying the requirements for being fair, measured (proportionate) and reasonable. There are implications too with the duration of any such orders affecting children at the most formative time of their lives.

## **Financial implications**

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**Question 5: Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:**

**(a) Government and the public sector, including the police and courts**

We refer to our comments in Question 1. There cannot be changes of this nature without significant financial implications for those involved which would include, in addition to the police and courts, the Crown Office and Procurator Fiscal Service and the Scottish Legal Aid Board.

We would anticipate most SPOs will be contested and that will have implications for legal aid. It would be helpful to have confirmation of whether legal aid would be available if these proceedings were subject to civil process.

There are also cost implications with regard to publicity and making all parties aware of the SBOs as well as providing the requisite training.

### **(b) Businesses**

We cannot comment on this as we are unsure as to what businesses would be affected.

### **(c) Individuals**

We refer to our comments regarding legal aid.

## **Equalities**

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**Question 6: What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation?**

We have no comments to make other than it would be useful to carry out an analysis to which we refer above as to those being charged, reported or convicted of offending under section 39 of the 2010 Act.

There would also be the need to consider the implications for more rural or island communities with regard to any SPOs with regard to access to the courts and associated costs as well as the effect of any such orders.

**Question 7: In what ways could any negative impact of the Bill on equality be minimised or avoided?**

We refer to our comments at Question 1. If there is a demonstrable need for such SPOs to be created, then any negative impact regarding the Bill would be outweighed by the positive aspects in providing greater protection to those who are the victims of stalking.

## **Sustainability**

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## **8. Do you consider that the proposed Bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?**

We have no comment to make.

## **General**

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### **Question 9: Do you have any comments or suggestions on the proposal?**

The suggestion in the consultation is that the police would apply themselves for a SPO, and the test would be on the balance of probabilities. As well as not indicating what evidence would require to be presented to the court to substantiate such an order, it does not indicate how the court should deal with these applications. What appears to be the process from the consultation is for the police to attend court and make verbal applications. We would be interested in further detail as to what will be required to support such a process, including, for example whether affidavit, productions or oral evidence under oath would be required.

The consultation envisages SPOs can be defended. We would also be interested in further detail as to how that would work in practice. Given the powers which could be attached to such an order, it would seem likely many will be contested. Consideration should be given to whether this would add to the stress, insofar as the alleged victim is concerned, and the overall costs, as opposed to interim liberation on police bail with conditions.

It is important to be clear about the implications of the quasi-civil nature of the proposed SPOs. Would it be for the police to carry out applications for these SPOs? Are they the best placed to carry out that function? The police role is to investigate criminal allegations and charge those who commit offences. If these orders are not to be applied for by the applicant (alleged victim) or their solicitor, would the role be fulfilled by the Procurator Fiscal? Though the Fiscals regularly deal with and apply for Non-Harassment Orders, they deal with matters relating to prosecution rather than pre-prosecution. Given breaches of the proposed SPOs are to be dealt with under criminal law, this adds to the complexity and involvement of different parties and systems of law which has implications for representation, legal aid and the courts.

If SPOs are created, it must be clear whether they follow the civil or criminal route. There are clear implications under Article 8 (right to privacy) of the European Convention on Human Rights. If they are to be criminal, appropriate sanctions for breach should apply as well as the provision for legal aid. There needs to be an appeal mechanism.

Whatever type of order is created, it will work best if it receives multi-agency support. There must be public awareness and education provided and supported by the agencies involved and those who are best placed to contribute to such education and resources.

At page 16 of the consultation, the proposals seem to follow broadly the notification requirements under the Sexual Offences Act 2003 (2003 Act). These are onerous requirements that apply after a criminal conviction. It is unclear that these would be appropriate in the context of SPOs and would add a further additional administrative burden on the police. Reference can be made to section 9 of the 2019 Act which includes a time period for notification and specifically, does not refer to those affected by the notification provisions under the 2003 Act.

What may be relevant to consider is in relation to sections 1(5)<sup>7</sup> and 2(5)<sup>8</sup> of the 2019 Act which indicates that:

“It does not matter whether the acts [associated with stalking] were carried out in a part of the United Kingdom or elsewhere or whether they were carried out before or after the commencement of this section.”

That would seem to have effect regarding incidents of stalking prior to the commencement of the 2019 Act and include incidents regarding stalking in Scotland where orders are being sought in England and Wales. Consideration could be given to how and what this means in practice.

<sup>7</sup> Application for an order

<sup>8</sup> Content of an order

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