

CIVIL REMEDIES FOR DOMESTIC ABUSE DISCUSSION PAPER

EXECUTIVE SUMMARY

Introduction

1.1 The Scottish Law Commission is an independent statutory body, whose role is to recommend reforms to improve, simplify and update the law of Scotland.

1.2 The Commission is currently conducting a review of the civil remedies available to victim/survivors of domestic abuse.

1.3 A Discussion Paper on Civil Remedies for Domestic Abuse was published on 23 October 2024. We are seeking views from all interested parties on reform of the law in this area. Responses to the Discussion Paper should be submitted by **22 January 2025**. Consultees are invited to respond to all or as many questions as they feel able to answer.

1.4 Details of how to respond are set out on the inside cover of our Discussion Paper and on the Aspects of Family Law project page on the Scottish Law Commission website: <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/aspects-of-family-law/>.

Domestic abuse

1.5 Domestic abuse is a significant problem in Scotland. In the year 2022 to 2023, Police Scotland recorded 61,934 incidents of domestic abuse. Of the incidents recorded, 81% involved a female victim and a male suspected perpetrator, where gender information was recorded. Of the remaining incidents, 16% involved a male victim and a female suspected perpetrator, 2% involved a female victim and a female suspected perpetrator, and 2% involved a male victim and a male suspected perpetrator. In Scotland, it is estimated that one in three women experience domestic abuse at some point in their lives, reflecting the global recognition that domestic abuse is gender-based violence. This abuse also has a harmful impact on children, with one in five children estimated to have experienced domestic abuse by the time they reach 18 years old.

1.6 While criminal law can be used to tackle many aspects of domestic abuse, civil protection orders – such as interdicts, exclusion orders, and non-harassment orders – are also a crucial tool in helping to protect victim/survivors. Civil protection orders may be useful in stopping behaviour which does not amount to a criminal offence, but which nevertheless causes fear and alarm. Our Discussion Paper seeks to examine the legal provisions for domestic abuse in the context of civil remedies; it does not extend to a review of the criminal law in this area.

Current law

1.7 The current law in this area is spread over a number of pieces of legislation: the Matrimonial Homes (Family Protection) (Scotland) Act 1981, the Civil Partnership Act 2004, the Protection from Harassment Act 1997, and the Domestic Abuse (Scotland) Act 2011, as well as the common law. The remedies available include: exclusion orders, interdicts (which can be termed “matrimonial interdicts”, “relevant interdicts”, or “domestic interdicts” depending on whether the parties concerned are or were spouses, civil partners, or cohabitants), non-harassment orders, and domestic abuse interdict determinations. A victim/survivor of domestic

abuse who has an interdict for the purpose of protection against abuse may also seek the attachment of a power of arrest in terms of the Protection from Abuse (Scotland) Act 2001.

1.8 Therefore, in order to achieve the most effective protection in law, a victim/survivor of domestic abuse needs to rely on multiple statutes, cumulatively building up the protective measures in place. The level of protection available also varies depending on the relationship between the victim/survivor and the perpetrator. The picture that emerges is of a complex and fragmented legal regime for victim/survivors and their advisors to navigate.

Background to review

1.9 It is now 43 years since the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (“the 1981 Act”) came into force, it has been amended several times since then, and it has also been supplemented by other Acts. The 1981 Act was a product of a Report by this Commission in 1980 (Report on Occupancy Rights in the Matrimonial Home and Domestic Violence (Scot Law Com No. 60, 1980)), and was predicated on protection being available in the form of an exclusion order, to spouses and cohabitants only (later to civil partners under the Civil Partnership Act 2004), on the basis of their occupancy rights in the property they lived in with their partner.

1.10 Respondents to both the Commission’s Tenth and Eleventh Programme of Law Reform consultations sought a review of the law of civil remedies for domestic abuse for the reasons set out in paragraph 1.10 below.

Problems with the current law

1.11 We have heard from a wide variety of stakeholders (including academics, lawyers, sheriffs, and third sector parties – such as domestic abuse support groups) that the legislation is complicated, confusing and spread over many pieces of legislation. Further criticisms of the law include that the terminology is confusing and inconsistent, and the remedies themselves are not working as well as they should. Additional comments and observations include:

- It is unclear how or if the law in this area interacts with criminal and child law.
- The legislation relating to the civil protection orders that can be sought in domestic abuse cases is fragmented, and the options are complicated.
- There are multiple different protective remedies available, all contained in different statutes and with different threshold tests (and there are concerns that some of the statutory tests are too high, for example for exclusion orders and powers of arrest).
- Even once a victim/survivor secures a civil protection order, there can be issues about enforcement: a protection order that does not require the victim/survivor to take further steps to enforce (such as raising an action for breach of that order) might be more effective.
- There is insufficient recognition of the impact of domestic abuse on children in the civil protection legislation.
- There may be merit in amending the legislation so that remedies for domestic abuse are available more widely than between partners/ex-partners, extending to encompass

other family relationships (such as adolescent to parent violence, or elder abuse by an adult child to a parent).

- A remedy involving greater financial consequences for the perpetrator of domestic abuse would be helpful in some cases.
- Cohabitants should have the same entitlement to occupancy rights in terms of the 1981 Act, and therefore to obtaining a power of arrest under the Protection from Abuse (Scotland) Act 2001, as spouses (and as civil partners in terms of the Civil Partnership Act 2004).
- There are concerns about the lack of special measures for victim/survivors in civil cases, with the consequence that they are often exposed to their abuser when attending court, including being required to sit opposite them in the court room, and having to enter and exit through the same door as the abuser, and wait in the same space.
- There is a lack of availability of legal aid. That and the cost of contributions the victim/survivor has to make, and the small number of solicitors offering legal aid services in civil cases, are very practical obstacles to victim/survivors seeking civil protection orders.
- Some victim/survivors report to the police in order to get the protection of bail conditions – these offer protection at no cost, but there is then a high attrition rate in the criminal justice system, as victim/survivors do not wish to (or are not ready to) engage with the prosecution of the offence. Improving civil remedies could help divert some victim/survivors from the criminal law, where bail conditions may not be appropriate, thereby freeing up police, court and the Crown Office and Procurator Fiscal Service time and resources.

1.12 Our Discussion Paper explores these and other criticisms. Relevant case law is considered, and the current Scots law is compared with the law of civil remedies for domestic abuse in other jurisdictions (including Australia, Canada, England and Wales, Ireland, and New Zealand). The Discussion Paper considers what possible changes could be made to improve the law for victim/survivors of domestic abuse (and their children) in Scotland, and seeks views from consultees on options for reform.

Issues for consideration

1.13 The Discussion Paper is divided into 10 chapters. Following the introductory chapter, the issues that have been raised with us are fully discussed in Chapters 2 to 9; questions are posed in Chapters 3 to 9. In Chapter 10 we list all of the Discussion Paper's 58 questions.

1.14 The main issues considered in Chapters 2 to 9 are summarised below:

Chapter 2 – International obligations

1.15 In Chapter 2, we consider the international human rights treaties to which the UK is subject, which are relevant to domestic abuse (such as the United Nations Convention on the Rights of the Child, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, and the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence). We also consider the UK's obligations under the European Convention on Human Rights. Any recommendations we make for reform of the law in this area must be informed by these obligations.

Chapter 3 – Occupancy Rights

1.16 In Chapter 3, we set out the law regulating the occupancy rights of spouses, civil partners, and cohabitants (contained in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Civil Partnership Act 2004). Occupancy rights are fundamental to understanding the civil remedies provided for in both Acts, in particular the remedy of an exclusion order, which allows the victim/survivor of domestic abuse to apply to court to exclude the perpetrator of abuse from their shared home. The detail of these remedies is however discussed in Chapter 4.

1.17 Chapter 3 also seeks consultees' views on possible options for reform of occupancy rights (for example, whether cohabitants should have the same occupancy rights as spouses/civil partners, and whether the court should be required to consider making an exclusion order suspending a person's occupancy rights, where that person is convicted of a domestic abuse offence). Given the issues discussed, Chapters 3 and 4 are the most legally technical of all the chapters in the Discussion Paper, and consultees are invited to answer only the questions that they wish to here.

Chapter 4 – Existing legal framework

1.18 Chapter 4 is split into three parts. In Part 1, we set out the current law of civil remedies for domestic abuse. We discuss the remedies available depending on whether the victim/survivor is a spouse, a cohabitant, or a civil partner, given at present, certain remedies differ depending on the relationship between the parties. We address them in this order because the statutory protections for civil partners and cohabitants have been framed in terms of the original measures introduced for spouses, which have, typically, been enacted after the protections for spouses. We review exclusion orders and interdicts for these three relationship types, before reviewing the attachment of powers of arrest and determinations of an interdict as a domestic abuse interdict. We also discuss the civil remedies available in intimate partner relationships, where the parties are not married, civil partners or cohabitants. Part 1 seeks views on possible individual reforms, including whether the statutory test for some orders (such as exclusion orders and powers of arrest) is too high, whether reform is required so that there is no longer any distinction in the remedies available based solely on the different type of relationship between the victim/survivor of domestic abuse and the perpetrator, and whether the terminology used in some of the legislation should be simplified.

1.19 In Part 2, we consider non-harassment orders and other remedies available under the Protection from Harassment Act 2007. In Part 3, we explore a number of other statutes which provide for civil remedies relating to domestic abuse (including the Lawburrows Act 1429 and the as-yet-uncommenced, Domestic Abuse (Protection) (Scotland) Act 2021) or which are otherwise relevant to the law in this area, and we include some information in relation to relevant criminal legislation.

Chapter 5: A proposal for a new law

1.20 Chapter 5 is arguably the most important chapter in the Discussion Paper, where we set out proposals for a new law, and a new suite of remedies, to help victim/survivors of domestic abuse. We are particularly keen to get consultees' views on our proposals here, especially from those with direct experience of the current regime of civil remedies for domestic abuse.

1.21 The chapter is split into two parts. In Part 1, we seek views on a new proposed law which will address the complexity of the current regime by introducing a new "purpose-built" scheme (a statutory delict of domestic abuse). It also seeks views on the introduction of a new definition of domestic abuse, or abusive behaviour in civil law, based on the equivalent definition of abusive behaviour in the Domestic Abuse (Scotland) Act 2018, with some additional factors: tech abuse, immigration abuse, and economic abuse. Consultees are also asked for views on our proposal for a defence of reasonableness of the behaviour in the particular circumstances.

1.22 Part 2 introduces a bespoke set of remedies for victim/survivors of abuse, if the delict of domestic abuse is established in court. The remedies would be a court order provisionally called a Domestic Abuse Civil Protection and Redress Order ("DACPRO"). This is an umbrella term covering a range of different orders: a protection order to prohibit any future abusive conduct (and an extension of that order to protect other named people, such as children of the household); a redress order to compensate a victim/survivor for losses suffered by way of damages; a civil barring order which would exclude the perpetrator from the home for a fixed period; an order for the delivery of specified documents; an order for the delivery of specified property and personal effects, and an order regulating the care of and responsibility for a pet, or for the delivery of a pet. We propose that a victim/survivor should be able to seek any element of a DACPRO either alone, or in combination with any other element, to suit their individual needs. We also ask consultees if any other order should be included in the DACPRO.

1.23 In Part 2, we also address ancillary matters such as enforcement of a DACPRO, obtaining protection from a person who carried out domestic abuse on behalf of or with the encouragement of the principal perpetrator, and third parties seeking a DACPRO on a victim/survivor's behalf. We invite views from consultees on these various remedies and associated matters. Finally we discuss how we might rationalise the current legal framework for civil remedies for domestic abuse, discussed in Chapters 3 and 4, with our proposals for a new law and remedies in Chapter 5.

Chapter 6: Domestic Abuse: the parties

1.24 Chapter 6 is split into two parts. In Part 1, we consider differing views and arguments as to whether civil remedies for domestic abuse should continue to be available to partners and ex-partners only (spouses, civil partners, cohabitants and those in an intimate partner relationship), or whether they should be extended more widely to encompass other domestic or family relationships where there can be abuse (such as adolescent to partner violence, elder abuse by an adult child, and abuse between adult siblings). It includes some discussion of the law in this area in a number of comparative jurisdictions (England and Wales, Ireland,

New Zealand and some Canadian provinces). We seek consultees' views on whether the law of civil remedies for domestic abuse should remain focused on partners and ex-partners.

1.25 Part 1 also includes a discussion of domestic abuse and intersectionality, and the need to ensure greater availability of domestic abuse support services to all victim/survivors. We do not propose any changes to the law in this part of Chapter 6, as service provision is outwith the scope of our project. However, we do note that some of the proposals for reform made in Chapter 5 (including in relation to immigration abuse and the ability to seek a domestic abuse civil protection and redress order against associated perpetrators) will have offer greater legal protection to victim/survivors from some minority ethnic backgrounds.

1.26 Part 2 includes a discussion of honour-based abuse (HBA) which is predominantly experienced by women and girls in certain communities (although it is not associated with particular religions and it can be experienced by men and boys too). HBA can involve multiple perpetrators, including people from the wider community, some of whom may be strangers to the victim/survivor, as well as family members, and extended family members. In Part 2, we consider the ongoing debate as to whether HBA should be considered as part of, or separate from, domestic abuse provision and legislation. We explain why we think that, while this issue merits further review (particularly given the lack of consensus as to whether HBA constitutes domestic abuse or not, and given the dearth of research in Scotland in relation to violence against women, children, and young people in minority ethnic communities), this is outwith the capacity of this current project.

1.27 We are conscious that existing civil remedies for harassment, abuse, and domestic abuse offer some protection for victim/survivors of HBA. Moreover, we think that the proposal we have put forward in Chapter 5, which would create the ability for a victim/survivor to obtain civil remedies against associates of the perpetrator, would offer some additional protection to victim/survivors of HBA, if this proposal is supported. Allowing victim/survivors to seek remedies against their partner as well as any persons associated with them who carry out abuse on behalf of or with the encouragement of the perpetrator, could capture some of the behaviour experienced by victim/survivors of HBA, which is carried out by wider family members and members of the community.

Chapter 7 – Domestic abuse: Children

1.28 In Chapter 7, we consider the law of civil remedies for domestic abuse from the perspective of children. The chapter is divided into three parts. Part 1 discusses the law from the perspective of children who experience domestic abuse perpetrated in their family; Part 2 considers how the law treats children and young people who are abused within their own relationships, and Part 3 considers how domestic abuse influences decisions relating to child contact and residence orders under the Children (Scotland) Act 1995.

1.29 Questions are posed in Part 1, on whether children should be recognised as an adjoined victim/survivor of domestic abuse, where that abuse is perpetrated against their parent, carer, or an adult they are connected to and if so, what legal consequences should flow from this. Part 3 seeks views on possible amendment to the Children (Scotland) Act 1995, to ensure greater account is taken of domestic abuse between parents (and the safety of the parents is part of the court's consideration of the child's welfare), when the court makes an order under section 11 of the 1995 Act, for example in relation to child contact or residence.

No questions are posed in Part 2 of the chapter, in light of our conclusions reached about the existing scope of the law.

Chapter 8: Access to justice

1.30 In this chapter, we consider a range of difficulties that may be experienced by victim/survivors of domestic abuse in accessing justice, reflecting the very practical concerns expressed to us by victim/survivors and their solicitors. We consider the current availability of special measures in court for victim/survivors of domestic abuse in civil cases (the use of a screen, of a live television link, of a supporter, and the giving of evidence in the form of a prior statement), and whether their availability might be expanded more widely. We also consider the lack of integration and communication between the criminal justice system, and the civil and family court system when dealing with domestic abuse and how this might be improved; the training of solicitors and the judiciary in relation to domestic abuse; and legal aid matters. We also note the particular impact on victim/survivors of domestic abuse in rural and island communities.

1.31 We seek consultees' views in particular in relation to the special measures afforded to victim/survivors in court, and in relation to communication between the civil and criminal justice system.

Chapter 9: Impact Assessment

1.32 In this chapter we ask for any information that consultees might have on the economic impact of the present law and of the possible economic impact of any of the options for reform discussed in the Discussion Paper. In particular, we are interested in information on the potential economic impact of any option for reform discussed in Chapter 5 ("A proposal for a new law"), relating to the raising of an action for a domestic abuse civil protection and redress order (the proposed "DACPRO"). We are also interested in any potential economic impact on the Scottish Courts and Tribunals Service and legal aid budgets of any options for reform (in particular those relating to special measures as discussed in Chapter 8, "Access to Justice").

Chapter 10

1.33 Chapter 10 lists all the questions included in Chapters 3 to 9. There is no requirement to answer all questions: consultees are invited to answer any or all of these questions they think appropriate, and to provide us with any other views or information which they consider relevant to our project.

Responding to the Discussion Paper

1.34 If consultees have any queries in relation to the Discussion Paper and how to submit a response, please contact the Aspects of Family Law project manager in the first instance at lorraine.stirling@scotlawcom.gov.uk. As noted above, we ask for responses to be submitted to us by **22 January 2025**.