



Scottish Law Commission
promoting law reform

| (DISCUSSION PAPER No.178)

Discussion Paper on Civil Remedies for Domestic Abuse

discussion
paper



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October 2024

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The Commission would be grateful if comments on this Discussion Paper were submitted by 22 January 2025.

Please ensure that, prior to submitting your comments, you read notes 1-2 on the facing page. Respondents who wish to address only some of the questions and proposals in the Discussion Paper may do so. All non-electronic correspondence should be addressed to:

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Abbreviations

- 1980 Report,
Report on Occupancy Rights in the Matrimonial Home and Domestic Violence (Scot Law Com No. 60, 1980)
- 1981 Act,
Matrimonial Homes (Family Protection) (Scotland) Act 1981
- 1991 Act,
Age of Legal Capacity (Scotland) Act 1991
- 1992 Report,
Report on Family Law (Scot Law Com No. 135, 1992)
- 1995 Act,
Children (Scotland) Act 1995
- 1996 Act (E&W),
Family Act 1996 – England & Wales
- 1997 Act,
Protection from Harassment Act 1997
- 2001 Act,
Protection from Abuse (Scotland) Act 2001
- 2004 Act,
Civil Partnership Act 2004
- 2004 Act (NZ),
Care of Children Act 2004
- 2010 Act,
Criminal Justice and Licensing (Scotland) Act 2010
- 2011 Act,
Domestic Abuse (Scotland) Act 2011
- 2018 Act,
Domestic Abuse (Scotland) Act 2018
- 2018 Act (Ireland),
Domestic Violence Act 2018 – Ireland
- 2018 Act (NZ),
Family Violence Act 2018 – New Zealand

2020 Act,
Children (Scotland) Act 2020

2021 Act (E&W),
Domestic Abuse Act 2021 – England & Wales

2021 Act,
Domestic Abuse Protection (Scotland) Act 2021

CPSA 1995,
Criminal Procedure (Scotland) Act 1995

COPFS,
Crown Office and Procurator Fiscal Service

DAPN,
Domestic Abuse Protection Notice

DAPO,
Domestic Abuse Protection Order

DACPRO,
Domestic Abuse Civil Protection and Redress Order

ECHR,
European Convention on Human Rights

ECtHR,
European Court of Human Rights

HBA,
Honour based abuse

LCEW,
Law Commission of England and Wales

MARAC,
A Multi-Agency Risk Assessment Conference: a meeting where information is shared on the highest risk domestic abuse cases between representatives of local police, health, child protection, housing practitioners, Independent Domestic Violence Advisors, probation and other specialists from the statutory and voluntary sectors

SCTS,
Scottish Courts and Tribunals Service

UNCRC,
United Nations Convention on the Rights of the Child

UNCRC Act 2024,

United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act
2024

VWSA 2004 Act,
Vulnerable Witnesses (Scotland) Act 2004

VWJR Bill,
Victims, Witnesses, and Justice (Scotland) Reform Bill

Glossary

Adjoined victim/survivor. In the context of this Discussion Paper, a proposal that a child under 18 is recognised as an adjoined victim/survivor where they have a family connection with either (or both) the victim/survivor or the perpetrator of domestic abuse.

Children’s hearing. A legal meeting to decide what is best for a child or young person under the age of 18 years (in terms of the Children’s Hearings (Scotland) Act 2011).

Citing. When a person is formally told to attend court as a witness (the official letter is called a “citation”).

Civil action. A court action raised by a person who has suffered from wrongful conduct, against the person who is alleged to have carried out the wrongful conduct. The remedy sought would usually be an interdict (to stop the wrongful conduct) or an award of damages (to compensate for the harm caused). A civil action is different from a criminal action, where the State charges a person with a crime, and the consequence of being found guilty could be a prison sentence or a fine.

Civil partnership. Section 1 of the Civil Partnership Act 2004 provides that a civil partnership is a relationship between two people (“civil partners”) (a) which is formed when they register as civil partners of each other (in Scotland under Part 3 of the Civil Partnership Act 2004). The Civil Partnership (Scotland) Act 2020 extended civil partnership to opposite sex couples in Scotland.

Civil protection order. A general term for any court order intended to protect a victim/survivor from domestic abuse.

Common law. The body of legal rules derived from custom, Roman law, the writings of Institutional writers and the reasoning of judges in court cases that create precedents. It stands in contrast to statute law, which are the written rules are set down in Acts of the UK or Scottish Parliaments (or regulations, orders or rules made in the exercise of powers granted by such Acts). Scots law comprises both common law and statute law.

Complainer. A person who is the victim of a crime is referred to as the complainer in criminal proceedings.

Contact order. A contact order regulates the arrangements for maintaining personal relations and direct contact between a child under the age of 16 years and a person with whom the child is not, or will not be, living (in terms of the 1995 Act, section 11(2)(d)).

Damages. A sum of money claimed as compensation for loss, injury or damage resulting from an act or omission of the defender, which is in breach of a duty owed by the defender. The amount of damages awarded is intended to put the person entitled thereto as nearly as may be in the same position as they were before the harm occurred.

Defender/defendant. A party against whom a civil action has been raised.

Delict. The Scottish term for a civil wrong, arising from the deliberate or negligent breach of a legal duty, and which may result in liability on the person who has breached the duty to compensate the injured party for the loss and injury caused. (In English law, this is known as a tort.)

Dissolution. Section 117(1) of the Civil Partnership Act 2004 provides that an action for the dissolution of a civil partnership may be brought in the Court of Session or in the sheriff court. Subsection (2) provides that in such an action the court may grant decree, if, but only if, it is established that (a) the civil partnership has broken down irretrievably, or (b) an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the date of registration of the civil partnership, been issued to either of the civil partners.

Divorce. An “action for divorce” has the meaning assigned to it by section 1(1) of the Divorce (Scotland) Act 1976. Section 1(1) provides that in an action for divorce the court may grant decree of divorce if, but only if, it is established in accordance with the following provisions of the 1976 Act that (a) the marriage has broken down irretrievably or (b) subject to subsection (3B) an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the date of the marriage, been issued to either party to the marriage.

Domestic Abuse Civil Protection and Redress Order (DACPRO). An umbrella term to cover a range of proposed court orders, a victim/survivor might seek in one single court action, to reflect their specific needs, comprising: a protection order in relation to the victim/survivor (and an extension of that order to protect other named people); a redress order to compensate the victim/survivor for losses by way of an award of damages; a civil barring order to exclude the perpetrator from the home for a fixed period; an order for the delivery of specified documents; an order for the return of specified property, and an order regulating the care of and responsibility for a pet, or for the delivery of a pet.

Domestic Abuse interdict. A “domestic abuse interdict” can be sought between parties who are or were: spouses; in a civil partnership; cohabitants; or in an intimate personal relationship, in terms of the Domestic Abuse (Scotland) Act 2011. It therefore applies to matrimonial, relevant, or domestic interdicts, as well as to any interdict between individuals in an intimate personal relationship, for the protection of one party from abuse.

Domestic abuse interdict determination. A partner or ex-partner who has obtained an interdict or who is applying for an interdict, may apply to the court for a determination that the interdict is a “domestic abuse interdict” in terms of section 3(1) of the Domestic Abuse (Scotland) Act 2011. This is not to be confused with a “domestic interdict” which is defined in section 18A of the 1981 Act in relation to cohabitants. A “domestic abuse interdict” can be sought between parties who are or were: spouses; in a civil partnership; cohabitants; or in an intimate personal relationship.

Domestic Abuse Protection Notice (DAPN). A notice made by a senior police constable in relation to a person, if the constable has reasonable grounds for believing that that person (person A) has engaged in behaviour which is abusive of another person (person B), and it is necessary for a domestic abuse protection order to be made for the purpose of protecting person B from that abusive behaviour (2021 Act, s 4). This Act is not yet in force, so the provision is not yet operative.

Domestic Abuse Protection Order (DAPO). A court order which is applied for by the chief constable of the police in relation to a person to whom a domestic abuse protection notice is given (a chief constable may apply to the court for such an order in relation to a person in any other case). The sheriff may make the order if satisfied that a person (person A) has engaged in behaviour which is abusive of another person (person B), there is an immediate or imminent risk of further behaviour which is abusive of person B, and it is necessary to make the order for the purpose of protecting person B from the person B's abusive behaviour (2021 Act, section 8). This Act is not yet in force, so the provision is not yet operative.

Domestic interdict. An interdict obtained by one cohabitant against another. Section 18A of the 1981 Act specifies that a domestic interdict is an interdict granted on the application of a person who is (or was) living with another person as if they were spouses, against their partner (or former partner), for the purposes of: restraining or prohibiting such conduct of the defender towards the pursuer, or any child in the permanent or temporary care of the pursuer; prohibiting the defender from entering or remaining in a family home occupied by the pursuer and defender, any other residence occupied by the pursuer, any place of work of the pursuer, or any school attended by a child in the permanent or temporary care of the pursuer.

Eleventh Programme of Law Reform. A five year programme of the Scottish Law Commission, running from 2023 to 2027. It incorporates ongoing work from the Tenth Programme as well as four new projects to be undertaken either on a short-term, medium-term or long-term basis. The Programme was approved by the Scottish Ministers and laid before the Scottish Parliament. It was prepared following extensive consultation with the legal profession and other interested parties including members of the public. Scot Law Com No. 264, 2023. Available at: https://www.scotlawcom.gov.uk/index.php/download_file/view/2497/1206/.

Emergency Barring Order. An order requiring a perpetrator of domestic abuse to leave the home they share with the victim/survivor, in situations where the victim/survivor is in immediate danger). Article 52 of the Istanbul Convention obliges States to create such orders. States must 'ensure that competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence or contacting the person at risk'. In Scotland, the requirements of Article 52 are currently met by arrest and bail conditions, and will be supplemented by part 1 of the Domestic Abuse (Protection) (Scotland) Act 2021 (which makes provision for emergency barring orders, in the form of Domestic Abuse Protection Notices and Domestic Abuse Protection Orders) once this is in force.

Evidential hearing. A court hearing, whether criminal or civil, in which evidence is given by one or more parties.

Exclusion order. An exclusion order is an order suspending one party's occupancy rights in the home for a specified period, so that they have no legal right to live there or enter the home, while the order is in force (1981 Act, section 4; 2004 Act, section 104).

Ex parte. An ex parte proceeding in court occurs at the request of and for the benefit of one party, usually without the knowledge and participation of any other party.

Interdict. A court order which prohibits certain future wrongful conduct, as specified in the order, by the person named in the order.

Istanbul Convention. The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence is known as the Istanbul Convention. It was ratified by the UK in July 2022 (having been opened for signature in 2011, and come into force in 2014). The focus of the Convention is on opposing violence against women and domestic violence.

Gender norms. Ideas about how women and men should be and act, and often internalised very early in a child's life, which may establish a life-cycle of gender socialisation and stereotyping.

Matrimonial interdict. Defined in section 14 of the 1981 Act as an interdict obtained by one spouse against the other which restrains or prohibits any conduct of one spouse towards the other spouse or a child of the family, or which prohibits a spouse from entering or remaining in: a matrimonial home; any other residence occupied by the applicant spouse; any place of work of the applicant spouse; any school attended by a child in the permanent or temporary care of the applicant spouse.

Non-evidential hearing. A court hearing, whether criminal or civil, in which no evidence is given by any party.

Non-harassment order. A court order obtained under sections 8 or 8A of the Protection from Harassment Act 1997 to protect an individual from harassment by the person named in the order. Breach of a non-harassment order made under sections 8 or 8A is a criminal offence (1997 Act, section 9). Non-harassment orders are also available under the Criminal Procedure (Scotland) Act 1995 (section 234AZA). Where a person is found guilty of a criminal offence under the 2018 Act or of an offence with an aggravation under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 the court *must*, without an application by the prosecutor, consider whether to make a non-harassment order to protect the victim.

Power of arrest. A person applying for, or who has obtained an interdict for the purpose of protection from abuse may apply to the court for a power of arrest to be attached to the interdict. Once attached, a power of arrest allows a police constable to arrest the person subject to the interdict without a warrant, if the constable has reasonable cause for suspecting the person has breached the interdict; and considers that if the person were not arrested there would be a risk of abuse or further abuse (2001 Act, sections 1 and 4).

Occupancy rights. The legal rights of occupancy of a spouse in a matrimonial home, of a cohabitant in house where they cohabit (1981 Act, sections 1 to 9A, and section 18), and of a civil partner in a family home (2004 Act, sections 101 to 111A).

Parental responsibilities and rights. The legal responsibilities and rights a parent or other adult has in relation to the child as set out in the 1995 Act, sections 1(1) and 2(1).

Perpetrator. In the context of this Discussion Paper, a person who carries out domestic abuse.

Pursuer. A person who brings a civil court action.

Relevant interdict. An interdict sought by one civil partner against the other civil partner (2004 Act, section 113(1)). Section 113(2) of the 2004 Act specifies that a relevant interdict is an interdict which restrains or prohibits any conduct of one civil partner towards the other or a child of the family, or prohibits a civil partner from entering or remaining in a family home, any other residence occupied by the applicant civil partner, any place of work of the applicant civil partner, any school attended by a child in the permanent or temporary care of the applicant civil partner.

Residence Order. An order regulating with whom a child under the age of 16 years is to live (1995 Act, section 11(2)(c)).

Special Measures. Adjustments which can be made to court proceedings to facilitate the giving of evidence by a vulnerable witness.

Solatium. Compensation/damages given for injury to feelings or reputation, pain and suffering and loss of expectation of life.

Statute Law. Written legal rules which are set down in Acts of the UK or Scottish Parliaments, or in regulations, orders or rules made under those Acts.

Tenth Programme of Law Reform. A five year programme of the Scottish Law Commission, which ran from 2018 to 2022. It incorporated ongoing work from the previous programme as well as new projects to be undertaken either on a short-term or medium-term basis. The Programme was approved by the Scottish Ministers and laid before the Scottish Parliament. It was prepared following extensive consultation with the legal profession and other interested parties including members of the public. Scot Law Com No 250, 2018. Available at: https://www.scotlawcom.gov.uk/files/5615/1922/5058/Tenth_Programme_of_Law_Reform_Scot_Law_Com_No_250.PDF.

Victim/survivor. In the context of this Discussion Paper, a person who experiences or who has experienced domestic abuse carried out by the perpetrator.

Chapter 1 Introduction

1.1 Domestic abuse is a form of abuse which violates the trust at the heart of intimate relationships and typically breaches the sanctity of the home, taking place behind closed doors in what should be a safe place for victims. Tackling domestic abuse requires input and support from a wide range of policy fields, including health, social work, housing, and law. This Discussion Paper seeks to address the last of these, examining the legal protection for victims of domestic abuse in the context of civil remedies.

1.2 The statistics illustrate that this work is essential, and that domestic abuse is a significant problem in Scotland. In the year 2022-23, Police Scotland recorded 61,934 incidents of domestic abuse.¹ This figure has been fairly constant over the last decade, ranging from a low of 58,104 in 2015-2016 to a high of 65,251 in 2020-21. It is of note that this high water mark is from the first year of the pandemic and lockdown: as we discuss below, lockdown severely exacerbated the impact of domestic abuse on victims. Of the incidents recorded in 2022-23, 81% involved a female victim and a male suspected perpetrator, where gender information was recorded. Again, this statistic has remained constant over the last 10 years. Of the remaining incidents in 2022-23, 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.² In total, 83% of victims recorded were women. There is global recognition that domestic abuse is gender-based violence. The Istanbul Convention, for example, recognises both that “domestic violence affects women disproportionately and that men may also be victims of domestic violence”.³ In Scotland, it is estimated that one in three women experience domestic abuse at some point in their lives.⁴ This abuse also has a harmful impact on children: one in five children is estimated to have experienced domestic abuse by the time they reach 18 years old.⁵

1.3 While criminal law can be used to tackle many aspects of domestic abuse, civil protection orders are also a crucial tool in helping to protect victims. As Alison Howells has observed, civil protection orders can be an important part of the legal landscape, offering protection to victims of domestic abuse where criminal prosecutions are not taken forward.⁶ Although recent statistics from the Crown Office and Procurator Fiscal Scotland (“COPFS”) show that the proportion of charges with a domestic abuse identifier being prosecuted has

¹ These figures are reported at: <https://www.gov.scot/news/domestic-abuse-recorded-by-the-police-in-scotland-2022-23/> (accessed 12 June 2024).

² These percentages total 101%, presumably because of rounding in the figures.

³ The Preamble to the Istanbul Convention (formally the Council of Europe Convention on preventing and combating violence against women and domestic violence, 11.V.2011). See further discussion of this Convention in Ch 2.

⁴ Implementing Safe & Together in Scotland: Creating Domestic Abuse-Informed Workforces, Service and Systems, Year One Learning Report 2021/2022 (available at: https://www.improvementservice.org.uk/_data/assets/pdf_file/0022/40675/Implementing-Safe-and-Together-in-Scotland-Year-1-Learning-Report.pdf and <https://www.gov.scot/publications/domestic-abuse-recorded-police-scotland-2020-21/pages/2/> (Page 15)).

⁵ L Radford et al. Child maltreatment in the United Kingdom: a study of the prevalence of child abuse and neglect (2011 NSPCC) (available at: <https://learning.nspcc.org.uk/research-resources/pre-2013/child-abuse-neglect-uk-today>).

⁶ A Howells, “Out with the Old, in with the New”: Remedies for Domestic Abuse in Scotland in Need of Reform?” *Edinburgh Student Law Review*, 2021, Vol IV, Issue 2, p 65.

increased over recent years and remains consistently high (for example, an initial decision to proceed to court was made in 93% of charges reported in 2023-24),⁷ the fact remains that prosecution decisions are in the hands of COPFS. Where the victim wishes to take steps to seek protection, civil remedies offer that opportunity. It is also of note that, of the incidents recorded by Police Scotland in 2022-23, 39% included the recording of at least one crime or offence:⁸ 61% therefore constituted domestic abuse not involving criminal conduct. In these cases, civil protection orders may be useful in stopping behaviour which does not amount to a criminal offence, but which nevertheless causes fear and alarm.

1.4 Those who have obtained a civil protection order report many benefits:⁹
“The order acts as a symbol that the victim has confronted their abuser and demanded that the abuse come to an end. The order also provides reassurance that the abuse in the relationship is wrong and that the authorities take it seriously.”¹⁰

1.5 It is crucial that the civil remedies available for domestic abuse are as clear, simple, accessible, and effective as possible. Only by ensuring that Scots law provides a comprehensive range of civil remedies, coupled with appropriate criminal measures, can we be sure that victims benefit from effective legal protection. As Lady Hale has observed:

“The experience of domestic violence and abuse has taught us that doing nothing is not a neutral option. Refusing to intervene or provide a solution legitimises and sustains the power of the abuser.”¹¹

This Discussion Paper examines civil remedies for domestic abuse, to put forward proposals to secure appropriate legal protection for victims, complementing the criminal law regime, and ensuring that Scots law in no way legitimises and sustains the power of abusers.

Background to the project

1.6 Aspects of Family Law was selected as a project for inclusion in this Commission’s Tenth Programme of Law Reform,¹² due to the level of support from respondents to the Tenth Programme consultation. The law relating to cohabitation¹³ and civil remedies for domestic abuse were the two topics considered most suitable for us to review, due to their importance, the level of support for review, and their legal rather than political nature. Phase one of our

⁷ COPFS Domestic abuse and stalking charges in Scotland, 10 September 2024 (available at: <https://www.copfs.gov.uk/publications/domestic-abuse-and-stalking-charges-in-Scotland-2023-2024/html/>).

⁸ These figures are reported at: <https://www.gov.scot/news/domestic-abuse-recorded-by-the-police-in-scotland-2022-23/> (accessed 12 June 2024).

⁹ C Connelly and K Cavanagh, “Domestic Abuse, Civil Protection Orders and the “New Criminologies”: Is there any value in engaging with the law?” (Fem Leg Stud 2007), p 259 at p 261.

¹⁰ Policy Memorandum for the Domestic Abuse (Scotland) Act 2011, para 15 (available at: <https://webarchive.nrscotland.gov.uk/20240327012538/https://archive2021.parliament.scot/parliamentarybusiness/Bills/21239.aspx>).

¹¹ Lady Hale at the University of East Anglia, Norwich, 16 February 2012 - The Supreme Court at p 19 (available at: <https://www.supremecourt.uk/docs/speech-120216.pdf>).

¹² Scot Law Com No. 250, 2018 (https://www.scotlawcom.gov.uk/files/5615/1922/5058/Tenth_Programme_of_Law_Reform_Scot_Law_Com_No_250.PDF).

¹³ That is, cohabitation without marriage or civil partnership, in terms of the Family Law (Scotland) Act 2006, ss 25-29.

project, a review of the law of cohabitation, concluded with publication of our Report on Cohabitation¹⁴ and draft Bill, in November 2022.

1.7 The second phase of our Aspects of Family Law Project therefore focuses on a review of civil remedies for domestic abuse, and this is carried over into our Eleventh Programme of Law Reform.¹⁵

Previous Commission work on domestic abuse

1.8 This Commission has previously recommended introducing civil remedies for domestic abuse.

1.9 In 1976, our predecessors were tasked with considering changes in the law to give additional protection to a spouse threatened with violence, and whether a statutory right of occupation of the matrimonial home should be introduced in Scotland. The Report on Occupancy Rights in the Matrimonial Home and Domestic Violence 1980 (“the 1980 Report”)¹⁶ followed. It made extensive recommendations for reform, including:

- introducing the concept of a matrimonial home as a dwelling house which has been provided by one or both spouses as a family residence;¹⁷
- where only one spouse is entitled to occupy a matrimonial home, whether as owner or tenant, the other spouse should, by virtue of the marriage, have a statutory right of occupancy;¹⁸
- a spouse with a statutory occupancy right should have the right to enter the home, to not be ejected and to carry out essential repairs;¹⁹
- a court should have the power to make an exclusion order suspending the occupancy rights of a spouse, if necessary for the protection of the applicant or any child residing with the applicant;²⁰
- proceedings for any matrimonial interdict should not be treated as incompetent by reason only of the fact that the spouses are living together as man and wife;²¹ and
- a non-entitled cohabitant should be able to apply to the court for a declaration of occupancy rights, which then gives them the same rights as a spouse.²²

¹⁴ Scot Law Com No. 261, 2022.

¹⁵ Scot Law Com No. 264, 2023 (available at:

https://www.scotlawcom.gov.uk/files/1816/8552/2957/Eleventh_Programme_of_Law_Reform_2023_-_2027.pdf).

¹⁶ Scot Law Com No. 60, 1980.

¹⁷ Part II, para 2.17.

¹⁸ Part II, para 2.13.

¹⁹ Part II, para 2.25.

²⁰ Part IV, para 4.11.

²¹ Part IV, para 4.27 (para 4.38 recommends that the court should be required to attach a power of arrest to any matrimonial interdict ancillary to an exclusion order). Please see Ch 4, para 4.23 for a discussion of the term “matrimonial interdict”.

²² Part VI, para 6.8.

1.10 Many of these proposals were implemented in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (the 1981 Act).²³ In keeping with this Commission's recommendations, access to protection depended on the nature of the relationship between the parties.

1.11 A further review of civil remedies for domestic abuse was carried out by this Commission in the early 1990s, along with a wider review of family law in general, resulting in the Report on Family Law 1992 (the 1992 Report).²⁴ That Report recommended many changes to family law in general,²⁵ including amendments to the 1981 Act. These amendments included that section 14(2), which defined a matrimonial interdict,²⁶ be extended to prohibit a spouse from entering or remaining in any home or other premises occupied by the applicant, their place of work, and the school attended by any child in their care.²⁷ It made recommendations in relation to powers of arrest, including that powers of arrest attached to matrimonial interdicts should cease to have effect three years after the date the power was granted, subject to the power being recalled, or renewed on cause shown within that time, regardless of whether there had been a divorce.²⁸ It also recommended the introduction of domestic interdicts for cohabitants (the term "matrimonial interdict" being inappropriate for a remedy available to cohabitants) with powers of arrest attachable, whether or not they have occupancy rights.²⁹

Scope of project

1.12 The Scottish Government's Equally Safe strategy outlines a holistic approach to combatting violence against women and girls, including domestic abuse: their ambition is "to stop it occurring in the first place, build the capability and capacity of support services, and strengthen the justice response to victims and perpetrators."³⁰ This recognises that domestic abuse requires input from a range of sectors, including the legal system. Our project aims to improve the protection available for victims of domestic abuse, by reviewing and reforming the civil legal remedies available. We also aim to ensure that those who have experienced domestic abuse and those who support and advise victims of domestic abuse participate in our law reform project, through this consultation exercise.

1.13 In our research and discussions with stakeholders, the question of the purpose of the law of civil remedies for domestic abuse has been raised. Most consider that the purpose of the law in this area should be protective and as noted above, our project aims to improve protection by reviewing and reforming the civil legal remedies available to victims.

²³ See Ch 4 for a discussion of the 1981 Act.

²⁴ Scot Law Com No. 135, 1992.

²⁵ Including abolition of marriage by cohabitation with habit and repute, provision for parental responsibilities and rights and financial provision at the end of a cohabiting relationship.

²⁶ "Matrimonial interdict" was defined as "... an interdict including an interim interdict which (a) restrains or prohibits any conduct of one spouse towards the other or a child of the family, or (b) prohibits a spouse from entering or remaining in a matrimonial home or in a specified vicinity of that home." S 14(2) as originally enacted.

²⁷ The 1992 Report (Scot Law Com No. 135, 1992), para 11.33, recommendation 57(c). This was implemented by the Family Law (Scotland) Act 2006.

²⁸ 1992 Report, para 11.39, recommendation 60. The Commission recommended that the definition of "matrimonial interdict" be extended to cover a corresponding interdict to protect former spouses (para 11.40, recommendation 61). However, this change was not ultimately made to the 1981 Act. Instead, the 2001 Act provided that powers of arrest could be attached to common law interdicts, which ex-partners could seek.

²⁹ Implemented by the inclusion of s 18A in the 1981 Act.

³⁰ Equally Safe 2023 (available at: <https://www.gov.scot/policies/violence-against-women-and-girls/equally-safe-strategy/>).

1.14 Some have questioned the purpose of civil protection orders and why they are needed, considering that all aspects of domestic abuse are matters for the police. However, as noted in paragraph 1.3 above, others, including Clare Connelly and Professor Kate Cavanagh, point out that civil protection orders can protect a victim against behaviour which “may induce fear... but is not in itself criminal and therefore may not attract police attention,”³¹ as well as prohibiting criminal behaviour. Seeking a civil order also allows victims to respond actively, thereby empowering them.

1.15 Separately, Connelly and Cavanagh also point out that civil protection orders “do not and cannot on their own stop abusive behaviour. This requires social and cultural reforms to parallel legal reform”.³² While we fully support holistic approaches to tackling domestic abuse, we also recognise that wider service provision is beyond the scope of this project. This project is only one part of the jigsaw, and wider social and cultural changes are required to eliminate violence against women and girls and domestic abuse.

1.16 Because the current project is to review the law of *civil* remedies for domestic abuse, we are not looking in any detail at how the criminal law addresses domestic abuse. However, the criminal legislation has developed alongside the various civil statutes, and therefore we do consider this as part of our review. We also consider, in Chapter 8, the difficulties there are in information sharing between the civil and criminal courts, as this is relevant to victims of domestic abuse and their access to justice generally. We are also not reviewing child law, but again, there are several aspects of the law of civil remedies of domestic abuse which affect children significantly, and therefore in Chapter 7, we do consider how the law affects children and whether it should be reformed.

1.17 Arguably the most important chapter is **Chapter 5**, where we set out proposals for a new law, and a new suite of remedies, to help victims of domestic abuse. We are particularly keen to get consultees’ views on our proposals there, especially from those with direct experience of the current regime of civil remedies for domestic abuse. In contrast to Chapters 3 and 4, which deal with fairly complex statutory provisions and are the most technical in the Discussion Paper, Chapter 5 raises higher-level policy matters and asks questions concerning the future direction of law reform in this area. Please note there is no requirement to answer all questions: feel free to respond only to those questions which are directly relevant to you.

Policy context

Social and cultural context/attitudes

1.18 Attitudes to domestic abuse in Scotland have changed greatly over the last 50 years. In the 1970s and 1980s, domestic abuse was often minimised, with people turning a blind eye to it:

“Police attitudes to domestic violence were very unfortunate, both from the point of view of the women involved and for society as a whole. It seemed that Scots lived in a

³¹ C Connelly and K Cavanagh, “Domestic Abuse, Civil Protection Orders and the “New Criminologies”: Is there any value in engaging with the law?” (Fem Leg Stud 2007), p 261.

³² C Connelly and K Cavanagh, “Domestic Abuse, Civil Protection Orders and the “New Criminologies”: Is there any value in engaging with the law?” (Fem Leg Stud 2007), p 281.

society which accepted the use of violence by a husband against his wife (Dr Rebecca Dobash quoted in *The Scotsman* 6/11/77).³³

“The criminal justice system minimised its interventions in ‘domestics’ focussing instead on stopping couples fighting, drinking and separating... Reporting to the police was a waste of time and could lead to violent reprisals by aggrieved husbands. The Scots legal requirement for corroboration made prosecution difficult while successful convictions, fines and imprisonment left women financially disadvantaged and stigmatised. The police and criminal justice system remained male-dominated professions until the later decades of the 20th century.”³⁴

Politicians too, seemed to be against what they saw as state intervention in domestic abuse cases. Evelyn Scott-Walker, a Scottish local councillor, commented in 1975 in relation to the need for refuges for battered women and the aims of Women’s Aid:

“...they are playing with fire if they attempt to interfere between a husband and wife in this way... Anyway, some of these women might well deserve the batterings they get from their husbands.”³⁵

Nicholas Fairbairn, MP, was of a similar view, noting in 1975 that:

“We have heard a lot recently about battered wives which is not something new, and we have also heard a lot from pressure groups demanding that the Government set up centres for these wives, but I do not think this is right. I know there are battered wives in Britain, but why should the Government get involved in a family squabble as the Courts are quite capable of dealing with violent husbands?”³⁶

1.19 However, there were signs of a change in attitudes following increased media attention on the lives of “battered women” due to campaigns run by the Scottish Women’s Liberation and Women’s Aid Movements in the 1970s and 1980s, and the introduction of Police: Female and Child Units in 1987.³⁷ The recommendations of the UK Government’s Select Committee on Violence against Women in 1975 on the need for women’s refuges led to an expansion of the national network of refuges in Scotland in the 1980s. It also made recommendations to the police to review their policies and approach to domestic violence.³⁸

“In 1992 the first public domestic abuse prevention campaign was launched by Edinburgh City Council and was very quickly replicated nationwide. In the final decade

³³ Available at: <https://womensaid.scot/domestic-abuse-culture-and-scottish-history/>.

³⁴ Available at: <https://womensaid.scot/domestic-abuse-culture-and-scottish-history/>.

³⁵ “Home for Battered Wives Opposed,” *Guardian*, 7 August, 1975.

³⁶ “MP Attacks Aid for Battered Wives,” *Glasgow Herald*, 22 September, 1975.

³⁷ Where “specially trained female officers assisted both CID and uniform personnel in the investigation of crime and incidents involving women and children and emphasised the support needs of women and child victims” (available at: https://new.basw.co.uk/sites/default/files/resources/session_3_-_learning_from_history_slidepack.pdf).

³⁸ Available at: <https://womensaid.scot/just-a-domestic-or-treacherous-double-bind-police-and-social-work-responses-to-domestic-abuse-in-late-twentieth-century-scotland/>.

of the twentieth century, the Zero Tolerance campaign marked a turning point in Scotland's long domestic abuse story."³⁹

1.20 More recently, there has been a growing awareness that domestic abuse can involve psychological as well as or instead of physical abuse, and can involve one partner coercively controlling the other, for example emotionally or financially. The Scottish Government carried out a social attitudes survey in 2019 on the attitudes of the Scottish public to various forms of violence against women, which included domestic abuse.⁴⁰ This included exploring attitudes towards controlling behaviour, such as financial control, trying to control what someone wears, and excessive monitoring. For example, just over two-thirds (68%) considered that a husband insisting on looking at his wife's bank statements without showing her his bank statements was 'very seriously wrong', while 55% thought it was 'very seriously wrong' for a man to control what his wife wears (an increase from 39% in a previous survey in 2014).⁴¹

1.21 However, there may still be some way to go, as a public survey recently carried out by Women's Aid in the UK in 2022, as part of its Come Together to End Domestic Abuse campaign, found that behaviours classed as emotional/psychological abuse, controlling behaviour or stalking are perceived as less harmful than others. Women's Aid noted that this "indicates a need to increase understanding of the escalatory nature of domestic abuse and the harm caused by coercive control".⁴² Although relating to England and Wales, the first national analysis of the scale of violence against women and girls by the National Police Chiefs' Council (NPCC), released on 23 July 2024, showed that two million women are estimated to be victims of violence perpetrated by men each year in an epidemic so serious that police chiefs have warned it amounts to a "national emergency".⁴³ Crimes including stalking, harassment, sexual assault and domestic violence affect one in 12 women in England and Wales, with the number of recorded offences growing by 37% in the past five years, and the perpetrators getting younger.

Policy developments

1.22 Since the 1980s, the State's response to domestic abuse has focused on offering protection orders via the civil courts and certain housing rights for those who experience domestic abuse. From the early 1990s, the following developments, both within and outwith Scotland, became catalysts for change:

³⁹ Available at: <https://womensaid.scot/just-a-domestic-or-treacherous-double-bind-police-and-social-work-responses-to-domestic-abuse-in-late-twentieth-century-scotland/>.

⁴⁰ Available at: <https://www.gov.scot/publications/scottish-social-attitudes-survey-2019-attitudes-violence-against-women-scotland/>, Executive Summary.

⁴¹ Differences in responses by gender were evident. "Women were more likely (71%) than men (64%) to consider financial control to be 'very seriously wrong' and were also more likely (62%) than men (46%) to describe the behaviour of a man who controls what his wife wears as 'very seriously wrong'. Younger people were less likely to consider excessive monitoring to be wrong: around a quarter (27%) of those aged 18 to 34 thought a man texting his wife multiple times throughout the evening was 'very seriously wrong' compared with half (50%) of those aged 65 and over." (available at: <https://www.gov.scot/publications/scottish-social-attitudes-survey-2019-attitudes-violence-against-women-scotland/>, Executive Summary).

⁴² Available at: <https://www.womensaid.org.uk/womens-aid-releases-new-research-on-how-uk-public-attitudes-tolerate-domestic-abuse/>.

⁴³ Available at: <https://www.theguardian.com/society/article/2024/jul/23/violence-against-women-national-emergency-england-wales-police>; <https://news.npcc.police.uk/releases/call-to-action-as-violence-against-women-and-girls-epidemic-deepens-1>.

- The UN Declaration on Violence Against Women in 1993;⁴⁴ This Declaration in 1993 contributed to understanding gender violence as a cause and consequence of gender inequality, and has informed the Scottish definition of domestic abuse;
- The UK Government commitment to the Beijing Platform for Action⁴⁵ in 1995;
- The work of the Scottish Partnership on Domestic Violence from 1998 onwards.⁴⁶ The work was a pre-cursor to the first Scottish Parliamentary debate on domestic abuse,⁴⁷ and formed the groundwork on “the National Strategy” (see below);
- “The National Strategy to Address Domestic Abuse in Scotland”, published in 1999, led to various criminal justice agencies working together to develop a specialist response to domestic abuse to protect those who experience abuse and deal appropriately with the perpetrators of abuse;⁴⁸
- The UK becoming a signatory to the Istanbul Convention in 2012.⁴⁹ (The UK subsequently ratified the Convention in July 2022); and
- In June 2014, the Scottish Government launched the “Equally Safe Strategy”⁵⁰ to create: “A strong and flourishing Scotland where all individuals are equally safe and respected, and where women and girls live free from all forms of violence and abuse - and the attitudes that help perpetuate it”.⁵¹ The latest refresh of this Strategy was published in December 2023.⁵²

⁴⁴ Available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-elimination-violence-against-women>.

⁴⁵ In 1995, the Beijing Declaration and Global Platform for Action called on governments to take integrated measures to prevent and eliminate violence against women (available at: https://archive.unescwa.org/sites/www.unescwa.org/files/u1281/bdpfa_e.pdf).

⁴⁶ Commissioned by the Scottish Office and led by Anne Smith, QC (now The Right Honourable Lady Smith, KC); it highlighted the need to develop a national strategy to tackle domestic abuse.

⁴⁷ Official Report, 2 September 1999 (available at: <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=4174&i=2675>). See also Official Report of Parliamentary business on 27 October 1999, which was an extension of the debate from 2 September 1999 (available at: <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=4185&i=26948>).

⁴⁸ Scottish Executive, *Preventing Domestic Abuse: A National Strategy* (Scottish Executive, Edinburgh 2003) (available at:

<https://webarchive.nrscotland.gov.uk/20190127020652/http://www2.gov.scot/Publications/2003/09/18185/26445>).

⁴⁹ Preventing and Combating Violence Against Women and Domestic Violence Convention (available at: <https://www.coe.int/en/web/istanbul-convention/text-of-the-convention>). The Convention consists of 81 articles aimed at tackling violence against women and girls with a focus on prevention, protection of victims, prosecution, and integrated policies. See Ch 2.

⁵⁰ The strategy was developed in partnership with CoSLA and in association with a wide range of partners, including Scottish Women’s Aid, Rape Crisis Scotland, Police Scotland, and NHS Health Scotland. An updated version was published in March 2016 (available at: <https://www.gov.scot/policies/violence-against-women-and-girls/equally-safe-strategy/>).

⁵¹ The Scottish Government developed the Equally Safe Delivery Plan to take forward specific actions to realise these ambitions. The Delivery Plan was first published in November 2017 (available at: <https://www.gov.scot/publications/equally-safe-delivery-plan-scotlands-strategy-prevent-violence-against-women/>).

⁵² The 2023 Refresh (available at: <https://www.gov.scot/policies/violence-against-women-and-girls/equally-safe-strategy/>).

Legislative context

1.23 As well as the numerous policy developments since the early 1980s, there have been a large number of pieces of legislation introduced in Scotland, both in the criminal and civil context. Of particular note in the criminal context is the Domestic Abuse (Scotland) Act 2018 (“the 2018 Act”), which has been described as “a new gold standard” in terms of domestic abuse legislation internationally.⁵³

1.24 The 2018 Act introduced the statutory offence of engaging in a course of behaviour that is abusive toward a partner or ex-partner,⁵⁴ an offence which incorporates the concept of coercive control (a form of psychological abuse). It also recognised the effect of domestic abuse on children, by providing that the offence is aggravated if in committing the offence of abuse of a partner or ex-partner, the perpetrator directs behaviour at a child or makes use of a child in directing behaviour at the partner/ex-partner (this includes if a child sees or hears, or is present during the abusive behaviour).⁵⁵ The 2018 Act also made a number of changes to the Criminal Procedure (Scotland) Act 1995, one in particular being the introduction of the requirement on courts to consider making a non-harassment order to protect a victim (without an application by the prosecutor) where a person is found guilty of a criminal offence under the 2018 Act or an offence with an aggravation under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (a statutory aggravation which can be attached to any crime which involves abuse of a partner/ex-partner).⁵⁶

1.25 The relevant legislation in the civil context is as follows:

- The Matrimonial Homes (Family Protection) (Scotland) Act 1981 (“the 1981 Act”) allows the court to make orders relating to the occupancy rights of spouses and cohabitants in the matrimonial home/house and provides for exclusion orders and ancillary matrimonial/domestic interdicts;
- The Protection from Harassment Act 1997 (“the 1997 Act”) provides civil protection from harassment and similar conduct (including stalking);
- The Protection from Abuse (Scotland) Act 2001 (“the 2001 Act”) makes provision for powers of arrest to be attached to interdicts obtained for the purpose of protection from abuse;
- The Civil Partnership Act 2004 (“the 2004 Act”) contains protections for civil partners similar to those for spouses in the 1981 Act (court orders relating to occupancy rights, exclusion orders and relevant interdicts);
- The Domestic Abuse (Scotland) Act 2011 (“the 2011 Act”) allows a person with or applying for an interdict to ask the court for a determination that the interdict is a “domestic abuse interdict”, which if breached is a criminal offence;

⁵³ Professor Evan Stark, cited by L Brooks, “Scotland set to pass ‘gold standard’ domestic abuse law”, *The Guardian*, 1 February 2018 (available at: <https://www.theguardian.com/society/2018/feb/01/scotland-set-to-pass-gold-standard-domestic-abuse-law>).

⁵⁴ 2018 Act, s 1.

⁵⁵ 2018 Act, s 5.

⁵⁶ S 234AZA of the 1995 Act, inserted by the 2018 Act, Sch para 9(2).

- The Domestic Abuse (Protection) (Scotland) Act 2021 (“the 2021 Act”) makes provision for third parties (the police and registered social landlords) to take action against perpetrators of abusive behaviour (most of the Act is not yet in force).

This legislation is discussed in more detail in Chapters 3 and 4.

Domestic abuse statistics

1.26 We have included some statistics on domestic abuse incidents in Scotland below. However, it should be borne in mind that the domestic abuse recorded by the police does not reveal the true incidence of all domestic abuse in Scotland, as not all incidents are reported to police,⁵⁷ and therefore that the true extent remains unknown.

1.27 Police Scotland’s ten-year policing strategy identifies domestic incidents as “... the most resource intensive type of incident attended by local police officers” and notes that domestic crimes account for 26% of all violent crime in Scotland.⁵⁸ The definition of domestic abuse used by Police Scotland, as per the Joint Protocol between Police Scotland and COPFS, is:

“any form of physical, verbal, sexual, psychological or financial abuse which might amount to criminal conduct and which takes place within the context of a relationship. The relationship will be between partners (married, cohabiting, civil partnership or otherwise) or ex-partners. The abuse can be committed in the home or elsewhere, including online.”⁵⁹

1.28 As noted above, the police recorded 61,934 incidents of domestic abuse from 1 April 2022 to 31 March 2023.⁶⁰ Of these, 39% of incidents included the recording of at least one crime or offence. The type of crime or offence that was most frequently recorded as part of a domestic abuse incident was common assault (32%). This was followed by threatening and abusive behaviour (21%). Five percent of recorded incidents involved offences under the 2018 Act. The data also shows that 90% of incidents occurred in a house or dwelling.⁶¹

1.29 The recorded incidents showed that there were 156 incidents per 10,000 population where women were victims, compared with a rate of 35 per 10,000 population for men.⁶² Where gender information was recorded, 81% of domestic abuse incidents involved a female

⁵⁷ Available at: <https://www.gov.scot/publications/domestic-abuse-statistics-recorded-police-scotland-2022-23/>.

⁵⁸ Available at: <https://www.scotland.police.uk/spa-media/jjkpn4et/policing-2026-strategy.pdf?view=Standard>, p 22. The strategy is laid before the Scottish Parliament in pursuance of section 34 of the Police and Fire Reform (Scotland) Act 2012. The latest strategy was laid in June 2017.

⁵⁹ Joint Protocol between Police Scotland and COPFS, most recently updated 12 June 2023 (available at: <https://www.copfs.gov.uk/publications/joint-domestic-abuse-protocol/html/>).

⁶⁰ Police Scotland statistics, as published by the Scottish Government, March 2024 (available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2024/03/domestic-abuse-statistics-recorded-police-scotland-2022-23/documents/domestic-abuse-recorded-police-scotland-2022-23/domestic-abuse-recorded-police-scotland-2022-23/govscot%3Adocument/domestic-abuse-recorded-police-scotland-2022-23.pdf>).

⁶¹ Police Scotland statistics, as published by the Scottish Government, March 2024 (available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2024/03/domestic-abuse-statistics-recorded-police-scotland-2022-23/documents/domestic-abuse-recorded-police-scotland-2022-23/domestic-abuse-recorded-police-scotland-2022-23/govscot%3Adocument/domestic-abuse-recorded-police-scotland-2022-23.pdf>).

⁶² Table 8 of the Police Scotland statistics, as published by the Scottish Government, March 2024 (available at: <https://www.gov.scot/publications/domestic-abuse-statistics-recorded-police-scotland-2022-23/documents/>).

victim and a male suspected perpetrator.⁶³ COPFS data shows that, in 2023-24, 25,825 (86%) of the charges reported with a domestic abuse identifier were cases where the accused was male.⁶⁴ This proportion increases when considering charges brought under the Domestic Abuse (Scotland) Act 2018, where 95% (1,736) of the charges reported involved a male accused.⁶⁵

1.30 Thus, while any person can experience domestic abuse, women are much more likely to be victim, regardless of race, ethnicity or religion, sexuality, or disability, while men are statistically more likely to be the perpetrator. Some women who experience other forms of oppression and discrimination may face higher levels of domestic abuse, as well as more barriers to seeking and finding help.⁶⁶ For example, minority ethnic and migrant women in the UK face higher levels of domestic homicide and abuse-driven suicide, and Asian women are up to three times more likely to commit suicide than other women.⁶⁷ Women with disabilities in the UK are also twice as likely to experience men's violence as non-disabled women.⁶⁸ Intersectionality therefore compounds the risk of harm and presents obstacles to seeking help.⁶⁹

1.31 This is also the case for the lesbian, gay, bisexual, transgender, queer/questioning, intersex, and more community ("LGBTQI+"), who may experience domestic abuse at equal or even higher rates. Research has found that between 25% to 40% of LGBTQI+ people report at least one incident of domestic abuse from a partner, a family member, or someone close to them in their lifetimes.⁷⁰ There are also several aspects of domestic abuse which can be unique to the LGBTQI+ community:

"LGBT victims may experience abuse of power and control closely associated with having their sexuality, gender identity or gender reassignment used against them. This may include the following abusive behaviours:

⁶³ Police Scotland statistics, as published by the Scottish Government, March 2024 (available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2024/03/domestic-abuse-statistics-recorded-police-scotland-2022-23/documents/domestic-abuse-recorded-police-scotland-2022-23/domestic-abuse-recorded-police-scotland-2022-23/govscot%3Adocument/domestic-abuse-recorded-police-scotland-2022-23.pdf>).

⁶⁴ COPFS Domestic abuse and stalking charges in Scotland, 10 September 2024 (available at: <https://www.copfs.gov.uk/publications/domestic-abuse-and-stalking-charges-in-Scotland-2023-2024/html/>).

⁶⁵ COPFS Domestic abuse and stalking charges in Scotland, 10 September 2024 (available at: <https://www.copfs.gov.uk/publications/domestic-abuse-and-stalking-charges-in-Scotland-2023-2024/html/>).

⁶⁶ Available at: [Domestic abuse, the facts - Women's Aid \(womensaid.org.uk\)](https://www.womensaid.org.uk). (Website accessed August 2024).

⁶⁷ United Nations Human Rights Office of the High Commissioner, Report from 2014 (available at: <https://www.ohchr.org/en/statements/2014/04/special-rapporteur-violence-against-women-finalizes-country-mission-united?LangID=E&NewsID=14514>). International evidence highlights how barriers to leaving abusive relationships are heightened for minority ethnic women, and there is also widespread recognition of under-reporting of gendered-based violence by minority ethnic women (p 6 of the Scottish Government's Report on Minoritised Ethnic Women's Experiences of Domestic Abuse and Barriers to Help-Seeking: A Summary of the Evidence, August 2024 (available at: <https://www.gov.scot/publications/minoritised-ethnic-womens-experiences-domestic-abuse-barriers-help-seeking-summary-evidence/documents/>).

⁶⁸ Double the Oppression: Violence against Disabled Women (A resource pack for practitioners), p 2 (available at: <https://niaendingviolence.org.uk/wp-content/uploads/2020/02/double-oppression-violence-against-disabled-women.pdf>).

⁶⁹ The concept of intersectionality has long been used to articulate and analyse the lived reality of those who experience multiple inequalities, and to recognise that multiple inequalities compound and entrench discrimination, leading to even greater inequality. The term has its roots in Black feminist activism, and was originally coined by critical legal race scholar Kimberle Williams Crenshaw in 1989, who used the term to refer to the double discrimination of racism and sexism faced by Black women (K Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine Feminist Theory and Antiracial Politics, 1 January 1989).

⁷⁰ J Magić and P Kelley, Barriers to accessing services for LGBT+ victims and survivors, (2018, Safelives Blog) (available at: https://safelives.org.uk/practice_blog/barriers-accessing-services-lgbt-victims-and-survivors).

- threats of disclosure of sexual orientation and gender reassignment to family, friends, work colleagues, community and others;
- disclosing gender identity history, sexual orientation or HIV status without consent;
- limiting or controlling access to LGBT spaces or resources;
- using immigration law to threaten with deportation to the country of origin, which might be unsafe, due to, for example, anti-gay legislation;
- violent physical or sexual acts motivated by beliefs about an individual's sexual orientation or gender identity."⁷¹

1.32 In 2020, the lockdown imposed in response to the coronavirus pandemic was shown to have exacerbated domestic abuse. Perpetrators had more opportunity to control partners and to carry out abuse, and victims had much less ability to seek help and support from family, friends and health service providers:

“Solace Women’s Aid reported a drastic drop in the calls received from domestic abuse survivors in April 2020... Not only were victims suffering more abuse, but they were also incapacitated, imprisoned in their own home, with very limited chances to ask for help. Later, when schools re-opened in September 2020, Solace Women’s Aid experienced a 138% increase in calls. Survivors finally had a chance to seek help, after months of abuse and suffering in silence.”⁷²

Domestic abuse killings in the UK also appeared to double in the first three weeks of lockdown from an average of two women per week to an average of five.⁷³

Court order statistics

1.33 In 2022 to 2023, there were at least 1,283 applications for a civil protection order in family cases.⁷⁴ We have set out the statistics in a table below, divided into: (i) orders sought as a main crave in a family procedure case, (ii) orders sought in applications for divorce or dissolution of a civil partnership proceedings, (iii) orders sought in parental responsibilities and rights cases, (iv) orders sought in other family law cases, (v) orders sought in other *non-family* civil cases (however, in relation to non-family civil cases, these may not all relate to protection from abuse or harassment in a domestic or family context), or (vi) subsidiary applications for a power of arrest.

⁷¹ Domestic Abuse: Statutory Guidance (2022) Ch 5 para 178 (available at: <https://www.gov.uk/government/publications/domestic-abuse-act-2021/domestic-abuse-statutory-guidance-accessible-version#chapter-5--different-experiences-needs-and-related-considerations>). For a further discussion of this see Ch 6, Part 1.

⁷² Available at: <https://www.gre.ac.uk/women/articles/domestic-abuse-structural-inequality-and-lockdown>. Solace Women’s Aid is a registered charity in England and Wales, providing advice and services to women and children in London.

⁷³ See, for example: <https://www.independent.co.uk/news/uk/home-news/coronavirus-domestic-abuse-uk-killings-women-girls-a9467131.html>. I Cairns & I Callender (available at: <https://www.abdn.ac.uk/law/blog/the-impact-of-the-covid19-pandemic-on-scotlands-criminal-justice-responses-to-domestic-abuse-part-1/>).

⁷⁴ Powers of arrest are not included in this figure, as these are requests subsidiary to the request for certain types of civil protection orders, such as common law, matrimonial, relevant or domestic interdicts and those determined to be domestic abuse interdicts.

Type of case	Interdict	Interim Interdict	Non-harassment Order	Exclusion Order	Power of Arrest
Family procedure cases - civil courts - main crave	206	-	-	4	Not captured as would be a subsidiary crave
Sheriff court - crave in divorce/dissolution	87	4	9	15	21
Sheriff court - crave in Parental Responsibilities and Rights case	274	32	3	3	29
Sheriff court Family - other case	281	8	14	10	21
Sheriff court Other civil case	294	19	18	2	28
Total initiated	1,142	63	44	34	99

Legal aid statistics

1.34 It can be difficult to identify statistics for legal aid applications for civil remedies for domestic abuse, given most cases where civil remedies are sought also involve other matters, such as divorce or child contact. In addition, the Scottish Legal Aid Board (“SLAB”) tell us that in a small number of cases (around 2%), some of the work may be carried out by solicitors under special urgency provisions (which allow urgent work to be done prior to an application for legal aid being granted), when the application is subsequently refused. Therefore, the figures outlined below give a rough idea of the number of applications involved, and the related costs for all cases finishing in the financial year 2022 to 2023, where one or more craves for protective orders was granted.⁷⁵ SLAB also note that the current costs will be higher than those set out below, due to the recent fee increases which have not yet had time to fully filter through to the payments information. We understand that current costs could be up to 10% higher than those noted.

1.35 The number of applications for legal aid received which contained one or more protective order craves was 1,610.⁷⁶ The total number of applications for legal aid where at least one or more of the protective order craves was granted was 1,017.⁷⁷

⁷⁵ Final accounts are usually submitted at the end of the case. SLAB is unlikely to receive accounts for all the applications granted in a financial year within that same financial year. The accounts paid in financial year 2022 - 2023 will probably have had legal aid granted at an earlier stage. However, SLAB understand that the numbers of applications granted, and numbers of accounts paid, are reasonably similar across this time period.

⁷⁶ The pursuer was the applicant in 995 cases, the defender in 531 cases, and “other” in 84 case (cases with ‘other’ parties may be ones involving curators ad litem, or interested third parties).

⁷⁷ The pursuer was the applicant in 701 cases, the defender in 289, and ‘other’ in 27 cases.

1.36 The total costs (including VAT) to the legal aid budget for 2022 - 2023 for civil remedies for domestic abuse cases was £7,500,000,⁷⁸ with the total average case cost of £6,950.⁷⁹

Criticism of the law and the case for reform

1.37 The principal reasons given by respondents to the Tenth and Eleventh Law Reform Programme consultations for the need for a review of the law in this area were that: the law is contained in several statutes and is overly complicated and inaccessible; there are multiple remedies available in different provisions, and it is often not clear which is the most appropriate remedy to seek; this complexity and uncertainty has led to varying and inconsistent practice by legal practitioners and decision-makers; and it is unclear how or if the law in this area interacts with criminal and child protection law.⁸⁰ Comments included:

“The legislation relating to the protective civil orders that can be sought in domestic abuse cases is fragmented, and the options are complicated.”⁸¹

“The legislative foundation of protection from domestic abuse, the much-amended Matrimonial Homes (Family Protection) (Scotland) Act 1981... has been supplemented over the years by numerous statutes ... the result is a bewildering patchwork of legislation and remedies that makes the law more complex and less accessible.”⁸²

“This area of the law is in desperate need of consolidation. These cases involve particularly vulnerable people for whom the law is impenetrably complicated. There are multiple different protective remedies available, all contained in different statutes and with different threshold tests. ... any review should also look at the interaction with the criminal law and child protection law in so far as they interact (or don't interact) with family law legislation.....”⁸³

“Integrate family and criminal courts for domestic abuse cases.”⁸⁴

“The Scottish Government has recognised that violence against women is a blight on Scottish society and has committed to various plans to tackle and reduce this issue. The passing of the Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act 2017 puts an onus on the UK Government (and the devolved administrations) to work toward ratification of the Istanbul Convention.”⁸⁵

⁷⁸ £5,200,000 relates to costs for pursuer applicants, £2,100,000 relates to cost for defender applicants, and c.£300,000 relates to “other” applicants.

⁷⁹ The total average case cost for pursuer applicants is £6,940, for defender applicants it is £6,560, and for ‘other’ applicants is £14,330.

⁸⁰ See Ch 4 for a discussion of these issues.

⁸¹ Jennifer Maciver (Gillespie Macandrew).

⁸² Professor Sutherland (University of Stirling).

⁸³ SKO Family Law Specialists.

⁸⁴ Gillian Crandles (Turcan Connell).

⁸⁵ Dr Lynsey Mitchell (Leeds Beckett University) and Dr Elaine Webster (University of Strathclyde): a reference to the Council of Europe’s Preventing and Combating Violence Against Women and Domestic Violence Convention. This comment pre-dates the ratification of the Istanbul Convention by the UK Government in July 2022 (see para 1.22).

1.38 These criticisms have been echoed by the stakeholders with whom we have met during the scoping period for this phase of our project.⁸⁶ Additional comments and criticisms will be explored throughout this Discussion Paper but, in brief, these include:

- The legislation should be clearer about the kind of violence/abuse it seeks to regulate;⁸⁷
- Most victims need immediate protection; a protection order that does not require the victim to take further steps, such as raising an action for breach of that order might be effective;
- There is insufficient recognition of the impact of domestic abuse on children in the civil protection legislation;⁸⁸ there is not enough opportunity for children to express their views, for example by being co-pursuers/pursuers in their own right, particularly from the age of 9 or 10 onwards. With support, children could get outcomes that work best for them, independent of the wishes of their parents and ideally children should be able to apply for domestic abuse orders themselves;
- There may be merit in amending the legislation which provides civil remedies for domestic abuse, so that the remedies available are for all victims of abuse, regardless of their relationship with the perpetrator;
- A remedy involving greater financial consequences for the perpetrator of domestic abuse would be helpful;
- Some stakeholders consider that exclusion orders under the 1981 Act are now rarely sought, because it takes too long to obtain them and they are expensive. However other stakeholders have commented that they are often sought in interim, either alone or as part of a divorce action, and if granted in interim, there may be no need or incentive to obtain a final exclusion order (which would require an expensive and stressful proof). We have also heard the ability to seek an exclusion order can be useful as part of the bargaining/negotiating strategy;
- Sheriffs may take the view that an exclusion order is not necessary if existing bail conditions are in place;⁸⁹

⁸⁶ Including legal practitioners, academics, a sheriff, officials at the Crown Office and Procurator Fiscal Service (COPFS), the Law Society of Scotland and domestic abuse support groups (including Scottish Woman's Aid, SafeLives, a UK wide charity dedicated to ending domestic abuse, and ASSIST, who provide a free specialist domestic abuse advocacy and support service within most of the Central West of Scotland).

⁸⁷ See also M Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women' (1995) 57(2) *Journal of Marriage and the Family* 283.

⁸⁸ Concerns were also expressed that insufficient account is also taken of the effect of domestic abuse in relation to the making of orders under s 11 of the Children (Scotland) Act 1995 (s 11 makes provision for court orders relating to parental responsibilities and parental rights). We discuss this further in Ch 7.

⁸⁹ This can be problematic if the bail conditions are varied, or bail comes to an end and the victim is not aware of this.

- In relation to occupancy rights, the distinction between spouses/civil partners on the one hand,⁹⁰ and cohabitants on the other (who must apply to the court for a declarator of occupancy rights), is viewed by some as one of the main flaws of the 1981 Act; others agreed that cohabitants should have the same entitlement to occupancy rights;
- There is a lack of awareness among some practitioners of the ability to seek a determination that an interdict is a “domestic abuse interdict” (section 3 of the 2011 Act);⁹¹
- There is a lack of joined up thinking and communication between the civil and criminal courts dealing with family law actions (for example child contact) and criminal prosecutions relating to domestic abuse involving the same victim and perpetrator;⁹²
- Additional difficulties are faced by abused persons who belong to vulnerable groups. Specific remedies may be necessary to ensure that effective protection is available for victims in these groups;
- Making civil remedies more accessible could help some male victims who need protection but are reluctant to turn to the police: we have been told they may be reluctant to take steps to criminalise the perpetrator when she is the mother of their children;
- There is a lack of availability of legal aid. That and the cost of contributions the victim has to make, and the small number of solicitors offering legal aid services in civil cases, are very practical obstacles to victims seeking civil protection orders;
- At present, some victim/survivors report to the police in order to get the protection of bail conditions which offer protection at no cost to the victim. However, having gained the protection of bail conditions, victims often do not wish to pursue the criminal action, and so do not provide evidence to the Crown Office and Procurator Fiscal Service (“COPFS”), leading to a high attrition rate of domestic abuse cases in the criminal justice system. Improving civil remedies for domestic abuse could help divert some victims from the criminal law system, if they do not wish to be there, thereby freeing court and COPFS time and resources.

1.39 Other organisations have raised concerns about the justice system’s ability to cope with domestic abuse cases, including the Scottish Human Rights Commission, which has a role to independently monitor the impact of international human rights treaties in Scotland to support accountability for compliance at the United Nations and Council of Europe. In

⁹⁰ Who have occupancy rights automatically (1981 Act, s 1(1) and 2004 Act, s 101).

⁹¹ Without a determination, after the alleged abuser is arrested for breach of interdict, it must be proved to the criminal standard (beyond reasonable doubt) that their behaviour amounted to a criminal offence; and corroboration is required.

⁹² This generally comes to light first when bail conditions are considered and opposed on the basis they may interfere with child contact, including court ordered contact.

December 2023 it published a parallel report to the Group of Experts on Violence Against Women as part of the Baseline Assessment of the UK's Compliance with the Istanbul Convention.⁹³ The Finding reached in relation to Scotland was that:

“Criminal justice and civil justice are struggling to cope, with real daily impacts and human rights risks for victim-survivors as justice is delayed or denied. A reform agenda is a necessary attempt to respond to historic and recent issues, but a lack of consensus here threatens opportunity to improve things for women and children.”⁹⁴

1.40 As can be seen from these points, there are many aspects of the law of civil remedies for domestic abuse and its interaction with other areas of law which need to be reviewed, and there is also considerable support for reform from a wide range of stakeholders.

Choice of language/terminology used in the Discussion Paper

1.41 We have been mindful of the language and terminology we have used throughout this paper. We refer to “domestic abuse” and not “domestic violence”, as the latter term may suggest that the conduct or behaviour has to involve physical violence. Where we discuss the law in some comparative jurisdictions however, we may use other terms such as “family violence” to reflect the terms used in these jurisdictions. We also use “domestic violence” where we quote directly from other sources, if that is the language used in the quotation.

1.42 A small number of stakeholders we have met with have queried whether “domestic abuse” is the most appropriate term to use. We have heard that the use of “domestic” excludes or deters people who do not live together, in other words those relationships where there is no “domestic” element, from seeking remedies. We also heard that current terminology does not always resonate with young people, including young people who are victims of abuse in their own relationships.⁹⁵ Professor Cowan and Professor Hodgson address this point and explain the significance of “domestic” in the context of “domestic abuse”:

“Such abuse takes place more frequently, but not exclusively, within the home; the term ‘domestic’ refers to the relationship between the perpetrator and victim, rather than the setting for the violence.”⁹⁶

1.43 Further, domestic abuse often continues after the relationship has ended, when the parties are no longer sharing a home, so any limitation in the definition to parties who live together would adversely affect ex-partners. These concerns are reflected in the Istanbul Convention, which specifically states in its definition of “domestic violence” that it applies “whether or not the perpetrator shares or has shared the same residence with the victim.”⁹⁷ We are firmly of the view that the abuse need not take place within the home in order to count

⁹³ Available at: <https://www.scottishhumanrights.com/media/2591/istanbul-convention-report.pdf>.

⁹⁴ Istanbul Convention, Treaty Monitoring Report 2023, p 83.

⁹⁵ Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2023/06/violence-against-women-girls-independent-strategic-review-funding-commissioning-services-report/documents/independent-strategic-review-funding-commissioning-violence-against-women-girls-services/independent-strategic-review-funding-commissioning-violence-against-women-girls-services/govscot%3Adocument/independent-strategic-review-funding-commissioning-violence-against-women-girls-services.pdf>, p 23.

⁹⁶ S Cowan and J Hodgson, “Violence in a Family Context: The Criminal Law’s Response to Domestic Violence”, in R Probert (eds) *Family Life and the Law: Under one Roof* (Routledge, 2007), at p 43.

⁹⁷ Istanbul Convention, Art 3(b).

as “domestic” abuse, nor should it be limited to those who share a home. Domestic abuse can therefore apply to any boyfriend or girlfriend,⁹⁸ or “living apart together” relationship, as indeed is the case in the criminal context, in terms of the Domestic Abuse (Scotland) Act 2018.⁹⁹ In recognition of the fact that this term is widely used in many jurisdictions, and in international instruments, we therefore use the term “domestic abuse”.

1.44 There is ongoing debate as to how to refer to those experiencing domestic abuse, and whether to use the term “survivor” or “victim” in respect of the person who suffers domestic abuse at the hands of the abuser. Survivor is preferred by some as it is viewed as having more empowering and positive connotations. However, the word victim acknowledges that an individual has been victimised by another and brings a focus to the perpetrator whose behaviour causes harm. “Victim” is widely used, especially in the criminal law context.¹⁰⁰ However, in the civil law regime, the person seeking remedies is referred to as the pursuer, and not a victim. We have therefore decided to use the term “victim/survivor”, to reflect the fact that either or both these elements may be present. We refer to those committing the abuse or suspected of committing the abuse as the “perpetrator” (while acknowledging that this is not a term which is likely to be used in the Bill). However, in some places, depending on the context, and in particular when referring to court proceedings, we refer to the person who raises the civil action as the “pursuer” and the person who defends it as the “defender”. Again, we will also use other terms where we are quoting material, to reflect the term used in the original source.

1.45 We have chosen to use the term LGBTQI+ (lesbian, gay, bisexual, transgender, queer/questioning, intersex and/or other terms under the LGBTQI+ umbrella) except when referencing the work of others where different terminology has been used. We are aware that this term is not the perfect descriptor for everyone included within it, and may not be the chosen term for some individuals, but that the same may be true for alternative terms.

1.46 We use the term minority ethnic. However, again, we recognise the limitations to this term, in that many individuals from minority ethnic groups do not identify themselves in this way, and it can also imply that minority ethnic individuals are a homogenous group, when this is not the case.

1.47 We have chosen to use gender neutral terminology throughout the Discussion Paper, given domestic abuse can be carried out by and suffered by people regardless of gender, except when referencing the work of others where different terminology has been used. We have however, on occasion, used gendered pronouns in some examples of domestic abuse scenarios. This is to reflect the fact that abuse is highly gendered, most often being carried out by men against women, and it is important to recognise this for lots of reasons:

“... Understanding gender as the central factor in domestic abuse enables us to develop services which are sensitive to the differing needs of individuals affected by domestic abuse. It highlights that as men and women have differing needs they require

⁹⁸ We discuss domestic abuse in young people’s relationships in further detail in Chapter 7, Part 2: Peer to Peer Abuse: Children and young people who experience domestic abuse within their own relationships.

⁹⁹ The Domestic Abuse (Scotland) Act 2018, s 1, defines abusive behaviour in the context of the perpetrator’s “partner or ex-partner”.

¹⁰⁰ S Cowan and J Hodgson, “Violence in a Family Context: The Criminal Law’s Response to Domestic Violence”, in R Probert (eds) *Family Life and the Law: Under one Roof* (Routledge, 2007), at p 43.

different services and service approaches... Approaches which do not recognise the influence of gender in everyday experiences fail both men and women. Assumptions that experiences of men and women are equivalent will not achieve equality of outcome. Failure to acknowledge the influence of gender in perpetration of abuse, as well as the experience of abuse, presents a barrier to eliminating or reducing domestic abuse in our society.”¹⁰¹

1.48 We discuss this further in Chapter 6, Part 1.

Structure of Discussion Paper

Content of chapters

1.49 The Discussion Paper is divided into ten chapters, including this Introduction. Chapter 2 sets out the international obligations that the UK is subject to and with which the proposals in this paper must comply. Chapters 3 and 4 describe the legal basis for the various statutory and common law remedies for domestic abuse, in some detail. Given the law in this area has been criticised for its complexity, involving a number of pieces of legislation (dating from 1981) as well as the common law, these chapters and the questions posed are more technical than the chapters that follow. Chapter 5 is of particular importance, as it sets out proposals for a new law to offer enhanced protection to victim/survivors, and we are particularly keen to hear views on this. Consultees are invited to answer as many questions as they feel able to, and there is no requirement to answer all questions in this Discussion Paper. Further information on each of the nine chapters is as follows:

Chapter 2 International obligations: we set out an overview of the international obligations and duties the UK and Scotland is subject to in relation to domestic abuse.

Chapter 3 Occupancy Rights: in this chapter we discuss the different occupancy rights people have in relation to a home, depending on their relationship status – whether spouses, civil partners, or cohabitants. Occupancy rights are fundamental to understanding some of the statutory civil remedies available to victim/survivors.

Chapter 4 Existing legal framework: this chapter explores the current legal framework, both statutory and common law, which provides for civil remedies for domestic abuse. We also set out some relevant criminal legislation in relation to domestic abuse offences.

Chapter 5 A proposal for a new law: this chapter is split into two parts. In Part 1 we discuss the over-arching problems with the current legal regime and seek views on a new law to address the complexity of the current regime and the introduction of a definition of domestic abuse. In Part 2, we consider new remedies and enforcement in relation to the new proposed law.

¹⁰¹ C McFeely, N Whiting, N Lombard, O Brooks, M Burman, M McGowan, *Domestic Abuse and Gender Inequality: An overview of the current debate*, Centre for Research on Families and Relationships, Briefing 69, August 2013 (available at: <https://era.ed.ac.uk/bitstream/handle/1842/8769/briefing-69.pdf?sequence=1&isAllowed=y>).

Chapter 6 Domestic abuse: the parties: this chapter is also split into two parts. In Part 1 we consider who is considered to be a victim/survivor of domestic abuse and whether that category of person should be extended beyond intimate partner abuse to include family members. We also discuss intersectionality and how the risk of domestic abuse increases where a victim/survivor belongs to one or more marginalised groups. In Part 2, we consider honour based abuse.

Chapter 7 Children and Domestic abuse: this chapter is split into three parts. Part 1 explores how children are impacted by domestic abuse which takes place between their parents, and how this could be better reflected in the civil law regime. Part 2 considers domestic abuse which occurs within relationships between children/young people, and Part 3 considers domestic abuse in the context of child contact.

Chapter 8 Access to justice: this chapter explores access to justice issues, focusing in particular on special measures available in court for victim/survivors of domestic abuse, information sharing and communication between the criminal and civil court system, access to legal aid, and how these issues affect victim/survivors and their ability to access civil remedies.

Chapter 9 Impact assessment: this chapter considers and seeks views from consultees on the potential economic impact of any option for reform discussed in this Discussion Paper.

Chapter 10 Questions: in this chapter, we provide a list of all consultation questions asked in this Discussion Paper.

1.50 We have asked a number of questions in Chapters 3 to 9, which are also set out in Chapter 10. As noted above, consultees are invited to respond to as many of these questions as they wish, and to leave questions which are not relevant or which they otherwise do not wish to respond to. We recognise that not all questions will be relevant to all consultees.

Comparative law

1.51 We have undertaken comparative research into the civil remedies for domestic abuse in a number of different jurisdictions, considering in particular, the language used to refer to domestic abuse and who is considered to be a victim/survivor. Our research has focused in particular on England and Wales; Ireland; the provinces and territories in Canada; and New Zealand.

Legislative competence

1.52 In terms of section 29 of the Scotland Act 1998 (“the Scotland Act”), a provision is outside the competence of the Scottish Parliament if, among other things, it relates to reserved matters, as defined in Schedule 5 to that Act. This Discussion Paper relates to family law in Scotland (specifically civil remedies for domestic abuse). As family law is not a reserved matter under the Scotland Act, the proposals within this paper generally lie within the legislative competence of the Scottish Parliament. Chapter 3 of the Discussion Paper considers the occupancy rights of spouses, civil partners and cohabitants in a shared home and makes a

number of proposals for change, in particular in relation to the occupancy rights of cohabitants. Chapter 4 discusses exclusion orders, which the court may make against a perpetrator of domestic abuse, which has the effect of excluding a perpetrator from the family home for a set period of time, and we propose some potential reforms. Chapter 5 discusses our proposals for a new type of order, a barring order, which would also exclude a perpetrator of domestic abuse from the family home, on a temporary basis. The law of property and obligations are not reserved matters in terms Schedule 5 of the Scotland Act and therefore we do not think that any of our proposals in relation to this new order stray into reserved matters. In Chapter 5, we discuss the issue of immigration abuse, which is where domestic abuse is perpetrated or exacerbated when a perpetrator uses a victim/survivor's immigration status to control or threaten them. A range of factors may also limit the ability of a victim/survivor to seek help, including language barriers and a fear of being alienated from their own family and community. We propose that any definition of domestic abuse includes immigration abuse and that the term itself might be defined in legislation. We do not however make any proposal in relation to immigration itself, which is reserved to the UK Parliament in terms of Schedule 5, B6 of the Scotland Act 1998.

1.53 A further aspect of legislative competence in terms of section 29 of the Scotland Act is that an Act of the Scottish Parliament must be compatible with rights under the European Convention on Human Rights ("the ECHR"). In a family law context, Articles 6 (right to a fair trial), 8 (right to respect for private and family life, home, and correspondence), 13 (right to an effective remedy), and Article 1 Protocol 1 (right to peaceful enjoyment of possessions) of the Convention are particularly relevant. Articles 2 and 3 (the right to life and the prohibition of torture) may also be relevant in the context of violence against victim/survivors. We are mindful of the European Court of Human Rights jurisprudence, in particular in relation to compliance with Articles 6 and 8 and will continue to be so following consultation, when developing our recommendations for legislative change.

1.54 We refer to the ECHR in a number of chapters of the Discussion Paper, in considering whether any of our proposals would interfere with the Articles referred to above.

1.55 As of 16 July 2024, Acts of the Scottish Parliament must also comply with the United Nations Convention on the Rights of the Child ("the UNCRC"), and we discuss the rights of children throughout this Discussion Paper, and in particular in Chapter 7. Section 23(1) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 requires the Member of the Scottish Parliament introducing a Bill into the Scottish Parliament to make a statement in writing about the extent to which, in the member's view, the provisions of the Bill would be compatible with the UNCRC requirements. We take the view that any of the possible options for legislation described in this Paper would, if contained in such a Bill, be compatible with the UNCRC requirements.

Advisory Group and acknowledgements

1.56 We met with practitioners, sheriffs, academics, support groups, victim/survivors of domestic abuse, and other interested parties and organisations while we were carrying out the scoping and research for this phase of the project. These meetings helped us to build up a picture of the problems with civil remedies for domestic abuse from several different perspectives and to start thinking of possible options for reform. We are very grateful to those who generously gave their time and provided us with advice and information.

1.57 We established an Advisory Group in September 2023, whose advice and assistance in the course of our preparation of this Discussion Paper has been invaluable. We look forward to working with the Advisory Group further following publication of this paper and prior to publication of our Report. Members of the Advisory Group are listed in Appendix A. No member of this group is to be held to have taken any substantive position on the various reform options discussed in this paper.

1.58 In addition to the members of our Advisory Group (listed in Appendix A) we are very grateful to the following individuals for their advice and assistance with specific parts of this Discussion Paper: Dr Lesley-Anne Barnes-Macfarlane (University of Glasgow), Felicity Belton (University of Glasgow), Dr Ilona Cairns (University of Aberdeen), Dr Isla Callander (University of Aberdeen), Gordon Cameron, Professor Eric Clive, Mairead Corrigan (SKO Family Law Specialists), Dr Ruth Friskney (University of Glasgow), Jennifer Gilmour (COPFS), Mary Glasgow (Children 1st), Dr Jenn Glinski, Sarah Harvie-Clarke (SPiCE), Dr Bobby Lindsay (University of Glasgow), Dr Kasey McCall-Smith (University of Edinburgh), Dr Kirsteen Mackay (Open University), Anna Montgomery (Queen's University Belfast), Jackie Pringle (SKO Family Law Specialists), Janys Scott KC, and Professor Nicola Taylor (University of Otago).

1.59 We also benefitted from guidance from AMINA (the Muslim Women's Resource Centre); ASSIST (a domestic abuse advocacy service, based in Glasgow) the Family Law Committee of the Law Society of New Zealand; officials from West Lothian Council Social Work department; the office of the Children and Young People's Commissioner Scotland; the office of the English and Welsh Domestic Abuse Commissioner; Turcan Connell; the Scottish Courts and Tribunals Service, and the Scottish Legal Aid Board.

1.60 Our thanks go to Sheriff Nicholson and colleagues for allowing us to attend a number of court hearings relating to domestic abuse at Hamilton Sheriff Court.

Chapter 2 International Obligations

2.1 This chapter considers the international treaties and conventions the United Kingdom (“UK”) is party to, which are relevant to this review of civil remedies for domestic abuse. It is important that any recommendations we make for reform of the law in this area are informed by these international obligations. Any reforms we recommend must be compatible with the European Convention on Human Rights (“ECHR”) requirements relating to victim/survivors and perpetrators of domestic abuse (see paragraphs 2.6 to 2.14 below).¹ Additionally, given the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, any reforms we recommend must also meet the compliance requirements of that legislation (see paragraphs 2.24 to 2.29 below).

2.2 There are a range of international treaties relating to human rights which set standards as to how individuals who are victim/survivors, perpetrators, or witnesses of domestic abuse must be treated. The two most directly relevant to our project are the ECHR and the Council of Europe² Convention on Preventing and Combating Violence Against Women and Domestic Violence (commonly referred to as the Istanbul Convention). These treaties create obligations on States as to how domestic abuse must be dealt with. Two further treaties which indirectly concern domestic abuse are the United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) and the United Nations Convention on the Rights of the Child (UNCRC). Each of these treaties will be discussed below, following a brief consideration of the legal status of international treaties in the UK and Scotland.

2.3 This chapter is not intended as a summary of human rights law in Scotland, nor a comprehensive account of the international response to domestic abuse. The aim of this chapter is to provide an overview of the relevant obligations. No consultation questions will be asked in this chapter.

The status of international treaties in Scots law

2.4 International law does not form part of domestic law, unless it has been expressly incorporated with parliamentary authority.³ Such parliamentary authority could be provided through an Act of Parliament or secondary legislation, such as regulations. However, Lord Hope of Craighead has noted that when construing any provision in domestic legislation which is ambiguous in the sense that it is capable of a meaning which either conforms to or conflicts with an international treaty, the courts will presume that Parliament intended to legislate in conformity with the treaty and not in conflict with it.⁴ Not all of the international treaties the UK has signed up to have been incorporated into UK domestic law. For example, the ECHR rights

¹ Acts of the Scottish Parliament must be compatible with rights under the ECHR (in terms of the Scotland Act 1998, s 29).

² The Council of Europe is the continent of Europe’s leading human rights organisation. It has 46 member states, 27 of which are also members of the European Union (See <https://www.coe.int/en/web/portal/>).

³ A Bradley, Ewing and C Knight, *Constitutional and Administrative Law* (18th ed 2022), pp 316 to 321. See also discussions in *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 at [252] and *R (on application of Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61 at [56].

⁴ *T, Petitioner* [1997] SLT 724, at [733L] to [734C]. This dicta related to the ECHR but has been applied for the UNCRC in *White v White* [2001] SC 689 at [703] (Lord McCluskey).

have been incorporated into UK domestic law,⁵ whereas the Istanbul Convention and CEDAW obligations have not. This means that there is a difference in the legal status of different international obligations in the UK. It is worth noting that most international human rights obligations are addressed through legislation covering individual topics and sectors, as opposed to directly incorporating individual treaties.

2.5 International relations are reserved to the UK Government in terms of the Scotland Act 1998.⁶ Therefore the Scottish Government cannot sign, ratify, or amend international treaties. The Scottish Parliament and the Scottish Government must observe and work to fulfil the UK's obligations under the ECHR, and other international obligations. However, where matters are devolved, they may choose to implement international obligations differently from the UK Government and Westminster.⁷ The Scottish Parliament has recently approved legislation which incorporates the UNCRC into Scots law to a certain extent. This came into force on 16 July 2024, and any new legislation passed by the Scottish Parliament must comply with it.⁸

The European Convention on Human Rights

2.6 The UK enacted the Human Rights Act 1998, which incorporates the “convention rights” in the ECHR into UK law. This Act requires public bodies, such as the courts and the Scottish Parliament to act compatibly with the ECHR. Although there is no explicit reference to domestic abuse within the text of the ECHR, it is clear from the case law of the European Court of Human Rights (ECtHR) that domestic abuse falls within the scope of European human rights protection.⁹ Several articles of the ECHR are of relevance to domestic abuse generally, and of particular relevance to civil orders, and these are discussed below.

Articles 2 and 3

2.7 Articles 2 and 3 of the ECHR concern physical and mental integrity, covering the right to life, and the prohibition of torture, and of inhuman and degrading treatment. Both Articles impose a duty on the State to refrain from killing (except in limited circumstances) and from inflicting torture or inhuman or degrading treatment in any circumstances. This aspect of the obligation is unlikely to be relevant to our review of civil remedies for domestic abuse. However, States also have a duty to prevent the killing or torture and inhuman and degrading

⁵ The Human Rights Act 1998 mirrors the content of the ECHR, in the list of “Convention rights” in s 1(1) of the Act (J Murdoch, *Reed and Murdoch: Human Rights Law in Scotland* 4th edn 2017 para 1.04).

⁶ Scotland Act 1998, Schedule 5 Part 1 Paragraph 7(1).

⁷ Scotland Act 1998, Schedule 5 Part 1 Paragraph 7(2).

⁸ The United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Bill, was approved by the Scottish Parliament on 7 December 2023. A version of this Bill was originally approved by the Scottish Parliament on 16 March 2021. However, the legislative competence of that version of the Bill was challenged by the UK Government in the Supreme Court, which held that some of the Bill provisions were not within the powers of the Scottish Parliament and because of this, the Bill could not become law in its then form. An amended version of the Bill was therefore considered by the Scottish Parliament, which was then approved on 7 December 2023.

⁹ See for instance *Opuz v Turkey* 2009 (33401/02) (available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-92945%22%5D%7D>) §200 “Bearing in mind its finding above that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence (see, in particular, section 9 of the CEDAW Committee’s General Recommendation No. 19, cited at paragraph 74 above)”. Therefore, the ECtHR views domestic abuse, when insufficiently challenged by the domestic legal system, as a form of discrimination against women and considers other international obligations and comparative human rights jurisprudence in its assessment of this.

treatment of people within their jurisdiction where this is done by a third party in certain situations.¹⁰ The ECtHR case law has established that this can arise in the context of domestic abuse.¹¹ The duty to take preventative operational measures against the perpetration of domestic abuse by individuals would fall on the State, usually by way of the police, and is unlikely to engage civil remedies for domestic abuse. It is worth noting that the UNCRC contains an equivalent protection in respect of children.¹²

Article 6

2.8 Article 6 protects the right to a fair trial, and is split into a criminal limb, which covers the rights of the accused in the criminal justice process, and a civil limb. The civil limb is relevant to our review as it covers an individual's right of access to justice where there is an interference with their legal rights.¹³ Many domestic abuse orders place restrictions on perpetrators, such as barring them from certain locations, including their own home, and they therefore must be made in a way which takes account of the perpetrator's Article 6 rights. However, the ECtHR does not prescribe specific rules as to how States must conduct civil cases, provided that the overall process is fair.¹⁴

2.9 It is clear that Article 6 applies to proceedings for civil orders for domestic abuse, especially at the point of proof (trial), and execution of judgments.¹⁵ It can also apply to interim decisions, where they substantively interfere with an individual's legal rights.¹⁶ For example, Article 6 could apply to the making of an interim interdict, because it could restrict an individual's right to do certain things they would otherwise be entitled to do, such as contact their ex-partner. An underpinning principle of the civil limb is also that where one party's rights might be interfered with, both parties must be heard by the court.¹⁷ This is of particular relevance because it limits the opportunity for some civil remedies for domestic abuse to be awarded to a victim/survivor without the perpetrator being heard by the court first.

Article 8

2.10 Article 8 constitutes the right to private and family life. This is a far reaching right and can take in a wide range of issues related to domestic abuse. These include: the right to physical and mental integrity, the right to family life and the right to privacy of correspondence.¹⁸ However, it is a qualified right, which means that the State can balance it against the public interest and the rights of others, and it may therefore be interfered with in certain limited ways. In many cases, a measure – such as a civil protection order – can

¹⁰ *Osman v United Kingdom* 1998 (87/1997/871/1083) §116.

¹¹ Cases involving domestic abuse and the positive obligation under Article 2 include *Kontrova v Slovakia* (2007) 7510/04 and Cases involving domestic abuse and the positive obligation under Articles 2 and 3 include *Talpis v Italy* (2017) 41237/14. See the ECtHR Press Unit Factsheet on domestic violence November 2022, the non-exhaustive document catalogues numerous domestic abuse cases where Articles 2 and 3 were relevant (available at: https://www.echr.coe.int/documents/d/echr/FS_Domestic_violence_ENG).

¹² As part of UNCRC, Article 37(a) provides that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

¹³ The extent of the application of Article 6 is complex, but it will always apply to "litigation in the civil courts between two private individuals"... J Murdoch, *Reed and Murdoch, Human Rights Law in Scotland*, 4th Edn para 5.13.

¹⁴ See J Murdoch, *Reed and Murdoch: Human Rights Law in Scotland* 4th edn 2017 para 5.03.

¹⁵ J Murdoch, *Reed and Murdoch: Human Rights Law in Scotland* 4th edn 2017 para 5.13.

¹⁶ *Micallef v Malta* [GC] 2009 §§83-86.

¹⁷ Known as the "equality of arms principle": J Murdoch, *Reed and Murdoch: Human Rights Law in Scotland* 4th edn 2017 para 5.107.

¹⁸ Unlike Articles 2 and 3, Article 8 complaints are likely to be made by both perpetrators and victim/survivors of domestic abuse.

interfere with an individual's Article 8 rights without being a violation of the ECHR, if the interference is necessary and proportionate to the legitimate aim pursued.

2.11 The protection of psychological integrity extends to tech abuse,¹⁹ which is termed "cyberviolence" by the ECtHR, where the State has a duty to intervene.²⁰ The protection of psychological integrity can also extend to the courtroom, for instance in cases where a victim/survivor or witness is cross examined by the accused perpetrator.²¹ Clearly this could extend to cases involving domestic abuse. However, the court has a duty to balance the interests of the victim/survivor with the perpetrator's rights under Article 6. There is no overall ban on this type of cross examination, and violations have so far been found only in criminal cases.

2.12 The key ingredient of "family life" is the right to live together so that family relationships develop normally,²² and members of the family may enjoy each other's company.²³ Child contact therefore falls within the scope of family life, and consequently is protected by Article 8. However, because Article 8 rights may be interfered with by States subject to certain conditions, there are limitations on the extent to which perpetrators can rely on it. For example, Article 8 cannot be relied upon by an individual to complain about "the foreseeable negative consequences on private life as a result of the criminal offences or other misconduct [of the individual] entailing a measure of legal responsibility."²⁴ Finally, regarding the personal integrity of children, there is an obligation on the part of the State to prevent them from witnessing domestic violence in their homes.²⁵ Therefore, to an extent, the ECtHR recognises the effect on children of witnessing domestic abuse between their parents. Likewise, Article 19 of the UNCRC creates an obligation to protect children from exposure to physical or mental violence, injury or abuse.²⁶

¹⁹ For a further discussion of tech abuse, see paras 5.43 – 5.51.

²⁰ See *Volodina v Russia* (No.2) 2021 (40419/19) where the victim was repeatedly harassed and impersonated online by her former partner, and had her intimate photos deliberately leaked, and sent to friends of her 12 year son and his class teacher. There had also been physical abuse in the past, including abduction and assault as well as death threats from the perpetrator. Some of the threats were sent via social media. The police repeatedly declined to investigate because the acts took place over social media, as opposed to in conventional media or communication methods. The ECtHR noted that cyberviolence is a recognised form of violence against women and often closely linked to "real life" violence, and is a form of domestic violence that States have a duty to adequately prevent through legislative measures. It was held there had been a violation of Article 8 obligations.

²¹ For example, *Y v Slovenia* 2015 (41107/10) where the applicant was asked over 100 questions by the perpetrator about her sexual assault. The court took into account the requirements of the Istanbul Convention regarding repeat victimisation and cross examination and held that there was a violation of Article 8, although this turned on certain specific facts in relation to the cross examination including its length, the nature of the questions, and the fact that the perpetrator was represented by counsel and therefore did not need to conduct the cross-examination himself.

²² *Marckx v. Belgium*, § 31.

²³ *Olsson v. Sweden* (no. 1), § 59. ECHR Registry, Guide to Article 8, para 325 (available at: https://ks.echr.coe.int/documents/d/echr-ks/guide_art_8_eng).

²⁴ *Evers v Germany* 2020 (17895/14) §55, The case concerned an applicant who sought to rely on Article 8 to be allowed contact with a mentally disabled woman whom he had sexually assaulted (due to her lack of capacity to consent; she had the mental capacity of a 4-year-old) and fathered a child with. He also had a quasi-parental relationship with her, given he resided with her and was intimately involved with her mother. Article 8 was held inadmissible, because Article 8 was not engaged because he had forfeited any right to contact through his wrongful actions.

²⁵ For example, in *Eremia v Moldova* 2013 (3564/11), the applicant applied for a protective order on the basis that her husband was being abusive through beating, insulting and threatening her and mistreating their pet. The husband abused the applicant in the presence of their teenage daughters who suffered psychologically as a result. They were also abused directly, albeit to a much less severe extent than their mother. The State did not effectively enforce the protection order. This was held to be a violation of Article 3 in relation to the mother, and of Article 8 in relation to her daughters, noting specifically the effect that the abuse of their mother had on them.

²⁶ See further discussion at para 2.29 below.

Article 1 of Protocol 1

2.13 Protection from domestic abuse can involve removing and barring the perpetrator from their home. Article 1 of Protocol 1 to the ECHR is therefore relevant, as this protects certain property rights. The Article contains three rules: the right to peacefully enjoy one's property in the general sense, the right not to be deprived by the State of possessions except for in the public interest, and the rule that States are entitled to control the use of property in accordance with the general interest.²⁷ Therefore, property rights are not absolute and can be restricted where there is a public or general interest in doing so (provided it is proportionate to the aim sought) and in accordance with domestic law and international law. What constitutes a public or general interest is a matter for the State and the ECtHR will only intervene if the consideration is "manifestly without reasonable foundation".²⁸ An example of this is an emergency barring order (which requires the perpetrator to leave the home they share with the victim/survivor, in situations where the victim/survivor is in immediate danger).²⁹ The Istanbul Convention obliges States to create such orders, and as this convention is part of the Council of Europe's rights protection apparatus, it can be inferred that emergency barring orders are in principle compliant with Article 1 Protocol 1.³⁰ Additionally, because orders relating to domestic abuse, such as exclusion orders which remove an individual from their property,³¹ are usually time limited, they do not amount to a "deprivation of property" in terms of the second rule, as deprivations must be irrevocable.³²

2.14 Aside from the relevance of the individual articles of the ECHR, the ECtHR has developed a consistent understanding and response to domestic abuse across its case law. Jurgita Bukauskaite explains that the Court ... "has had a positive impact in the area of domestic violence. Although the Convention does not directly address the issue of violence against women, the jurisprudence of the ECtHR [has] interpreted domestic violence as gender based violence and a form of discrimination against women".³³ Likewise, Lena Retsina notes that the recent case of *AE v Bulgaria*³⁴ demonstrates that "the Court through its jurisprudence has managed to develop clear principles concerning the protection of the victims of domestic violence as victims of human rights violations. The Court reaffirmed that domestic violence is no longer a private matter and that States have a positive obligation to implement adequate and effective legislation in order to protect the victims".³⁵

²⁷ ECHR, Article 1 of Protocol 1. The first and third rules both have a wider margin of appreciation than that of the second rule, meaning the ECtHR is less unlikely to interfere with decisions of a State if they are made in the general/public interest or are proportionate (J Murdoch, Reed and Murdoch, *Human Rights Law in Scotland*, 4th edn 2017 p 960).

²⁸ *Belane Nagy v Hungary* (2016) [GC] 53080/13 §113.

²⁹ The Istanbul Convention (discussed in paras 2.15 to 2.23 below) obliges States to create emergency barring orders which require the perpetrator to leave the home of the victim/survivor in situations of immediate danger. See Part 1 of the 2021 Act, which creates domestic abuse protection notice and orders (not yet in force), discussed in Ch 4).

³⁰ For example, Article 52 of the Istanbul Convention, discussed at para 1.22 is an obligation to create an interference with Article 1 Protocol 1 of the ECHR, therefore the interference is in accordance with the general principles of international law, and is in the public interest, so if the order is provided for by domestic law, it would not be a violation.

³¹ See Ch 4, paras 4.13 to 4.16.

³² J Murdoch, Reed and Murdoch, *Human Rights Law in Scotland*, 4th edn 2017 p 974, para 8.18, citing *Raimondo v Italy* (1994) A 281-A, para 29.

³³ Jurgita Bukauskaite, *Understanding Domestic Violence as a Gender-Based Human Rights Violation*, Routledge 2023, p 84.

³⁴ *AE v Bulgaria* (53891/20) 23 May 2023.

³⁵ Lena Retsinia *AE v Bulgaria* (Case Comment) *European Human Rights Law Review* 5, 516-18.

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence: the Istanbul Convention

2.15 The Istanbul Convention sets out a range of obligations on States, designed to facilitate the eradication of violence against women. The UK signed the Convention in 2012 and ratified it in 2022, subject to two reservations.³⁶ It is a Council of Europe treaty, which means that it takes into account various other recommendations and declarations of the Council of Europe.³⁷ The treaty sets out wholesale responses to domestic abuse, encompassing criminal and civil law, procedure, awareness raising and substantive policy requirements. However, the Istanbul Convention has not been incorporated into the domestic law of the UK.³⁸ Therefore, individuals cannot bring claims based on the Convention in court, and public authorities do not have a specific statutory duty to comply with it. That said, the UK's ratification of the treaty means that it has committed to complying with it (subject to the two reservations). Istanbul Convention compliance is monitored by a group of experts established by the treaty (GREVIO), and States have an obligation to submit reports to them. As part of this process a baseline report has been submitted by the Scottish Human Rights Commission.³⁹

2.16 The Istanbul Convention is focused on both violence against women generally, and domestic violence specifically. In these contexts, it covers criminal law, the treatment of witnesses and perpetrators, and the delivery of support services to victim/survivors. As such, only certain aspects of the Convention are directly relevant to our project. However, it is underpinned by a set of general principles, which need to be taken into account when considering options for reform of the law in this area, as follows:

- a) “[To] protect women against all forms of violence and prevent, prosecute and eliminate violence against women and domestic violence.”
- b) “[To] contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women.”
- c) “[To] design a comprehensive framework, policies, and measures for the protection of and assistance to all victims of violence against women and domestic violence.”
- d) “[To] promote international co-operation with a view to eliminating violence against women and domestic violence.”

³⁶ It was ratified after then Home Secretary Priti Patel deemed domestic law compliant with it. The reservations relate to the provision in Article 5 that victim/survivors with insecure immigration status be supported, and part of Article 44, which relates to the prosecution of UK residents for committing acts in another country which are crimes in UK law but not under the law of that other country (available at: <https://lordslibrary.parliament.uk/istanbul-convention-preventing-and-combating-violence-against-women-and-domestic-violence/#heading-6>). The UK has since submitted its initial report on the legislative and other measures which give effect to the Convention to the Council of Europe. This is required to be submitted to the secretary General of the Council of Europe, in terms of Article 68, para 1 of the Istanbul Convention (available at: <https://rm.coe.int/state-report-uk-baseline-evaluation/1680abd6d3>).

³⁷ Explanatory Report to the Istanbul Convention, Paragraphs 7-21 (available at: <https://rm.coe.int/1680a48903>).

³⁸ A Foreign, Commonwealth and Development Office Command Paper was presented to Parliament in September 2024, setting out the text of the Istanbul Convention (available at: <https://www.gov.uk/government/publications/council-of-europe-convention-on-preventing-and-combating-violence-against-women-and-domestic-violence-ts-no732024>).

³⁹ Parallel Report for the Baseline Report in Monitoring the United Kingdom (December 2023) (available at: <https://www.scottishhumanrights.com/media/2595/istanbul-convention-report.pdf>).

e) “[To] provide support and assistance to organisations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence.”⁴⁰

2.17 The Convention encourages parties to apply provisions related to domestic violence to all victims including men. However, there is a duty to pay particular attention to female victims of gender-based violence in the implementation of the Convention.⁴¹ It is therefore up to States as to whether to extend applicability of the Convention to domestic abuse victims who are not female victims of male violence.⁴² If they do decide to do this, the implementation process must remain focused on gender-based violence against women.⁴³ Therefore, any recommendations for reform in this area should take this into account, while also ensuring any recommendations comply with the ECHR and the UNCRC.

Article 29 – Civil lawsuits and remedies

2.18 Article 29 of the Istanbul Convention sets out a range of requirements regarding the civil law when dealing with domestic abuse. It obliges States to:

“[T]ake the necessary legislative or other measures to provide victims with adequate civil remedies against the perpetrator.”⁴⁴

This duty entails providing remedies which can prevent conduct, or anticipated future conduct, or require a person to take a specific action (referred to in the Explanatory Report to the Convention as an “injunction”).⁴⁵ The Explanatory Report to the Convention highlights a specific example of a civil remedy being used to require someone withholding another person’s passport to return it, for example, helping a person faced with the prospect of a forced marriage.⁴⁶ The Explanatory Notes also note that there ought to be specific protection from defamation for victim/survivors, in the context of harassment and stalking.⁴⁷

2.19 The second paragraph of Article 29 obliges States to:

“[T]ake the necessary legislative or other measures to provide victims...with adequate civil remedies against State authorities that have failed in their duty to take the necessary preventative or protective measures within the scope of their powers.”⁴⁸

This requires States to ensure that there is a way in which victim/survivors of domestic abuse who have not been adequately helped by the State can seek compensation, and there is also provision for compensation to be sought for serious injuries or ongoing impairments as a result

⁴⁰ Istanbul Convention, Article 1(1).

⁴¹ Istanbul Convention, Article 2.

⁴² Explanatory Report to the Istanbul Convention, para 37.

⁴³ Explanatory Report to the Istanbul Convention, para 37.

⁴⁴ Istanbul Convention, Article 29(1).

⁴⁵ The Scottish equivalent to an injunction to prevent conduct is an interdict, and to an injunction to compel conduct is a specific implement.

⁴⁶ Explanatory Report to the Istanbul Convention, para 157.

⁴⁷ Where this is not already covered by the criminal law of the parties. Explanatory Report to the Istanbul Convention, para 159.

⁴⁸ Istanbul Convention, Article 29(2).

of domestic abuse.⁴⁹ The UK's compliance report⁵⁰ notes that Scotland already provides civil orders which comply with the requirements of the Istanbul Convention. There is also access to criminal injury compensation.⁵¹ However, there are further requirements for restraining and protection orders, and emergency barring orders discussed below, which could take the form of civil remedies, but which are not required to be civil remedies under the Convention.

Article 31 – Custody, visitation rights and safety

2.20 Article 31 of the Istanbul Convention places a requirement on States to ensure that acts of violence covered by the scope of the Convention, that is domestic abuse and gender based violence, are taken into account in the determination of child custody and visitation arrangements. Specifically, any visitation, contact or custody arrangement must not jeopardise the safety of victims or children.

Article 52 – Emergency barring orders

2.21 Article 52 provides that States must “ensure that competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence or contacting the person at risk”⁵² (referred to as “emergency barring orders”). The Explanatory Report to the Convention highlights that, while it is at the discretion of States, existing examples of such orders range between ten days and four weeks, with the possibility of renewal. It is up to States to determine the way in which these orders are made, and as noted above, they need not be by civil order, nor necessarily made by the police.⁵³ In Scotland, the requirements of Article 52 are currently met by arrest and bail conditions,⁵⁴ and will be supplemented by part 1 of the Domestic Abuse (Protection) (Scotland) Act 2021 (which makes provision for emergency barring orders, in the form of Domestic Abuse Protection Notices and Domestic Abuse Protection Orders⁵⁵) once this is in force.

Article 53 – Restraining or protection orders

2.22 Article 53 requires that there are restraining or protective orders available to victim/survivors of violence against women and domestic violence. States must ensure that these orders are:

- i) available for immediate protection without undue financial/administrative burdens on the victim;

⁴⁹ Under Article 30 of the Istanbul Convention; compensation should primarily be available from the perpetrator, though in circumstances where this is not possible it should be provided by the State.

⁵⁰ Article 68, para 1 of the Istanbul Convention requires States to submit a report on legislative and other measures which give effect to the Convention for consideration by the Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO). The UK's Baseline Compliance Report, 3 July 2023 (available at: <https://rm.coe.int/state-report-uk-baseline-evaluation/1680abd6d3>).

⁵¹ The details of which are set out in this document (available at: <https://assets.publishing.service.gov.uk/media/5d00c89ee5274a3cfa8a4ffe/criminal-injuries-compensation-scheme-2012.pdf>).

⁵² Istanbul Convention, Article 52.

⁵³ Explanatory Report to the Istanbul Convention, para 264 (available at: <https://rm.coe.int/1680a48903>).

⁵⁴ See UK Baseline compliance report, p 49.

⁵⁵ See Ch 4, paras 4.94 to 4.96 of for a discussion of domestic abuse protection notices and orders.

- ii) issued for a specified period unless varied or discharged;
- iii) where necessary, issued *ex parte* with immediate effect;
- iv) available irrespective of, and in addition to other legal proceedings;
- v) allowed to be introduced (as evidence) in subsequent legal proceedings.⁵⁶

These orders may be part of civil, criminal, or procedural law depending on the national legal system.⁵⁷ There is a requirement that the existence of the protection order may be introduced into other proceedings, for instance child contact proceedings and that judges should have access to this information.⁵⁸ In Scotland, these requirements are currently fulfilled by a range of different orders, though no single order necessarily fulfils all of the criteria at once.

2.23 Therefore, the Istanbul Convention provides some concrete requirements as to the forms which civil orders for domestic abuse must take, and we will be mindful of these in any recommendations for law reform.

The United Nations Convention on the Rights of the Child

2.24 The United Nations Convention on the Rights of the Child (“UNCRC”) was adopted by the General Assembly of the United Nations on 20 November 1989, and came into force on 2 September 1990 after it reached the requisite 20 ratifications. The UK signed the UNCRC in 1990 and ratified it in 1991, subject to certain reservations.⁵⁹ On 7 December 2023, the Scottish Parliament approved the UNCRC Bill, which received Royal Assent on 16 January 2024. The compatibility provisions came into force on 16 July 2024 and require that all legislation passed by the Scottish Parliament is compliant with the UNCRC. Therefore, any recommendations we make for reform must also be compatible with the UNCRC.

2.25 The treaty is designed to set out the civil, political, economic, social and cultural rights held by children. Several of the rights have relevance to domestic abuse,⁶⁰ including Articles 3, 12, 16 and 19, which are discussed now, and then we briefly consider the status of the UNCRC in the domestic law of Scotland.

2.26 Article 3 requires that, in all actions concerning children, the best interests of the child must be a primary consideration. Article 12 obliges States to take into account the views of a child in matters concerning them. Article 16 provides that the child shall have a right to private and family life. Article 19 requires States to protect children from violence, abuse and neglect, this includes mental abuse or injury.

2.27 Article 3 and Article 16 broadly mirror the duties under Article 8 of the ECHR. It is important to note that both the UNCRC and the ECHR consider that the best interests of the

⁵⁶ Istanbul Convention, Article 53, para 2. Member states are also required to take the necessary legislative or other measures to ensure that breaches of restraining or protection orders issued shall be subject to effective, proportionate and dissuasive criminal or other legal sanctions (Art 53, para 3).

⁵⁷ Explanatory Report to the Istanbul Convention, para 269.

⁵⁸ Explanatory Report to the Istanbul Convention, para 274.

⁵⁹ These being in regard to Immigration (Article 22) and other reservations relating to overseas territories and crown dependencies.

⁶⁰ Other UNCRC articles are relevant to the protection of children from abuse in general, including Article 34 (protection from sexual abuse) and Article 37 (protection from torture).

child⁶¹ can eclipse the rights of either parent, and also the views of the child, if the view expressed by them is held to be contrary to their best interests.⁶² Under the UNCRC, the best interests of the child is a primary consideration in any action or decision concerning that child,⁶³ and this would extend to decisions such as the making of an exclusion order (which removes a perpetrator from the family home)⁶⁴ against one of their parents, even where the action does not directly involve the child.

2.28 It is widely established that domestic abuse affects the whole family.⁶⁵ As a consequence, responses to abuse will also affect the whole family, including children, especially where the response involves changes to living arrangements or child contact, even when the purpose of the order made is not to establish child contact and residence arrangements. Therefore, a duty to hear and take due account of the views of children in terms of Article 12 could arise in the context of making exclusion orders, or other protective orders that would have an impact on the relationship between a child and their parents.⁶⁶

2.29 Article 19 requires States to protect children from violence, abuse and neglect, including mental abuse or injury. As explained by Professor Tobin and Professor Cashmore;

“Article 19 is the central protective right which sits within a collection of rights under the Convention that are designed to protect children against all forms of violence and harm, whether intentional or unintentional, physical or mental.”⁶⁷

It has been widely recognised that witnessing domestic abuse has a negative and traumatic effect on children to the extent that it can be mentally injurious.⁶⁸ Therefore, Article 19 could be engaged. Equally, children and young people can be victims/survivors of domestic abuse in their own intimate relationships, which would also engage Article 19. Within the context of civil remedies for domestic abuse, it is important to recognise that States have obligations in respect to children under the UNCRC, in addition to those under Articles 2, 3 and 8 of the ECHR in regard to violence.

The United Nations Convention on the Elimination of all forms of Discrimination Against Women

2.30 The United Nations Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), was adopted by the General Assembly of the United Nations on 18 December 1979, and entered into force on 3 September 1981, after it had been ratified by 20

⁶¹ The ECtHR notes that “It is well established in the Court’s case-law that in all decisions concerning children their best interests are of paramount importance”. *Vavricka and others v Czechia* 47621/13 (2021) [GC] §287, whereas Article 3 of the UNCRC states “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”.

⁶² *Adi Ibrahim v Norway* (15379/16) [GC] 10/12/2021 §145.

⁶³ Note that, where the Children (Scotland) Act 1995 applies, the best interests of the child are elevated from “a primary consideration” to “the paramount consideration”.

⁶⁴ See Ch 4, paras 4.13 to 4.21.

⁶⁵ F Morrison & C Houghton (2023) *Children’s human rights in the contexts of domestic abuse and COVID-19*, The International Journal of Human Rights, 27:9-10, 1353-1368 at 1355.

⁶⁶ See Ch 4, paras 4.35 to 4.44.

⁶⁷ J Tobin and J Cashmore, “Article 19. The Right to Protection against All Forms of Violence” in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (OUP, 2019), at p 723.

⁶⁸ F Morrison & C Houghton (2023) *Children’s human rights in the contexts of domestic abuse and COVID-19*, The International Journal of Human Rights, 27:9-10, 1353-1368 at 1355. See paras 7.8 to 7.15 of Part 1 of Ch 7, for a further discussion of this.

countries.⁶⁹ The UK signed the Convention in 1981 and ratified it in 1986, with certain general reservations.⁷⁰ The Convention in and of itself does not address domestic abuse but certain articles do have a bearing on how States should respond to it. Additionally, there are general comments and optional protocols to CEDAW which discuss violence against women, and these could potentially start to have advisory effect in Scots law in view of the Scottish Government's plans for a Scottish Human Rights Bill.⁷¹ The proposed Bill would incorporate a number of international human rights treaties into Scots law, including CEDAW, as far as within the competence of the Scottish Parliament. The proposed Bill may mirror the rights set out under CEDAW into domestic law, insofar as is compatible with the devolution settlement.⁷² However, the method of incorporation of the treaties in the proposed bill has not yet been decided. It will nevertheless be important that our recommendations for reform take account of the obligations imposed by CEDAW.

2.31 Firstly, Article 15 of CEDAW sets out that women should be accorded identical legal capacity to men.⁷³ Both male and female victims of domestic abuse should have access to the same civil remedies, and more generally, that male and female victims of domestic abuse should be treated equally under the law. Article 16 notes that within family relations and marriage, all discrimination against women is to be eliminated. This includes that men and women should have "the same rights and responsibilities during marriage and at its dissolution" and "the same rights and responsibilities as parents irrespective of marital status".⁷⁴ However, Article 4 of CEDAW notes that temporary measures for the purpose of increasing equality are not to be considered discrimination so long as they are removed once equality of opportunity and equal treatment are achieved.

2.32 General recommendation No. 35 of CEDAW is also relevant. It provides that governments must act with "due diligence" to protect women from domestic abuse and other forms of gender-based violence:

"The failure of a State party to take all appropriate measures to prevent acts of gender-based violence against women in cases in which its authorities are aware or should be aware of the risk of such violence, or the failure to investigate, to prosecute and punish perpetrators and to provide reparations to victims/survivors of such acts, provides tacit permission or encouragement to perpetrate acts of gender-based violence against women. Such failures or omissions constitute human rights violation."⁷⁵

⁶⁹ Convention on the Elimination of All Forms of Discrimination against Women New York, 18 December 1979 (available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>). The Convention was the culmination of thirty years of work by the UN Commission on the Status of Women, which was formed in 1946.

⁷⁰ Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=en (table of treaty ratifications, accessions, reservations and objections).

⁷¹ The Scottish Government consulted on a proposed Human Rights Bill for Scotland in June 2023 (available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2023/06/human-rights-bill-scotland-consultation/documents/human-rights-bill-scotland-consultation-june/human-rights-bill-scotland-consultation-june/govscot%3Adocument/human-rights-bill-scotland-consultation-june.pdf>). The intention was for the Bill to be introduced in to the Scottish Parliament during the 2023/2024 Parliamentary year, but this did not materialise, and there are no plans to introduce it during the 2024/2025 Parliamentary year (available at: <https://www.gov.scot/policies/human-rights/>).

⁷² A Human Rights Bill for Scotland: Consultation p 13.

⁷³ CEDAW, Article 15(2).

⁷⁴ CEDAW, Article 16.

⁷⁵ CEDAW, General recommendation No. 35, para 24, 2(b).

Overall considerations

2.33 As can be seen, there are a number of international obligations which are relevant to this project. There can also be a tension between some of the differing obligations and a need to achieve a balance between certain duties. For example, the right of a child to be heard in proceedings which concern them may be outweighed in situations where interim or emergency orders are made to protect them or an adult in their lives. While not all of the international obligations discussed in this chapter have been incorporated into Scots law, they remain important to our considerations for proposals for reform, and they will be discussed where relevant in the chapters to follow.

Chapter 3 Occupancy Rights

3.1 The term “occupancy rights” describes the legal right to live in a property and connected powers, like maintaining that property. A person may have occupancy rights in a property because they own or lease it, or because they are in a relationship with the owner or tenant (whether married or in a civil partnership). Occupancy rights are important in the context of domestic abuse, because the right to seek an exclusion order, to exclude an abusive partner from the house, depends on occupancy rights. This chapter sets out the current law concerning occupancy rights for all parties (regardless of whether there is domestic abuse perpetrated in the relationship), and the following chapter then looks at civil remedies for domestic abuse, including exclusion orders and ancillary interdicts. Occupancy rights for spouses and cohabitants are the foundation of the protections in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (“the 1981 Act”).¹ The Civil Partnership Act 2004 (“the 2004 Act”) adopted the provisions in the 1981 Act for spouses and applied them to civil partners. This chapter sets out briefly the history behind the 1981 Act and then the system of occupancy rights and their regulation in general under the 1981 and 2004 Acts, and seeks consultees’ views on possible options for reform.

3.2 There is different statutory terminology depending on whether the parties are married, in a civil partnership, or cohabiting. When we refer to a specific category of relationship in this chapter, we will use the appropriate statutory terminology, such as “non-entitled spouse” or “entitled partner”. When we refer to all of these relationships together, we will use the terms “entitled party” and “non-entitled party”, to indicate that party could be a spouse, civil partner, or cohabitant. We will refer to the house they live in as the “home”, rather than describing it as the matrimonial home (for spouses) or family home (for civil partners) or house (for cohabitants). We discuss the use of different terminology across the statutes at paragraphs 4.49 to 4.51 below.

The Matrimonial Homes (Family Protection) (Scotland) Act 1981

3.3 The 1981 Act stemmed from recommendations made by this Commission in its Report on Occupancy Rights in the Matrimonial Home and Domestic Violence 1980 (“the 1980 Report”).² Prior to the 1981 Act, a spouse who was not the owner or tenant had no legal right to occupy the home without the consent of the owner or tenant of the house in which the couple lived, and had no rights in relation to its sale or division, or to a transfer of tenancy.³ The owner or tenant was entitled to eject the spouse who was not an owner or tenant, and to enforce this action in court.⁴

¹ They concern only the right to occupy the property, and are separate from the right of ownership.

² Scot Law Com No. 60, 1980 (available at: <https://www.scotlawcom.gov.uk/files/4212/8014/9994/rep60.pdf>).

³ A Jackson, M Robertson and P Robson, *The Operation of the Matrimonial Homes (Family Protection) (Scotland) Act 1981: A report to the Scottish Home and Health Department* (Scottish Executive, 1988) at p 38. The Married Women’s Property (Scotland) Acts 1881 and 1920 affirmed that the position was no different for married couples: throughout a marriage, spouses acquired, owned and transferred property as if they were unmarried. For a discussion of the previous law, see EM Clive and JG Wilson, *The Law of Husband and Wife in Scotland* (1st ed, 1974), chapter 10.

⁴ A Jackson, M Robertson and P Robson, *The Operation of the Matrimonial Homes (Family Protection) (Scotland) Act 1981: A report to the Scottish Home and Health Department* (Scottish Executive, 1988) at p 38.

3.4 The 1980 Report made extensive recommendations for reform, including: introducing the concept of a matrimonial home as a dwelling house which has been provided by one or both spouses as a family residence;⁵ introducing the concept of occupancy rights distinct from ownership, so that where only one spouse has a right to occupy a matrimonial home as the owner or tenant, the other should, by virtue of marriage, have a statutory right of occupancy;⁶ and a suite of rights following on from that. The 1980 Report also made provision for cohabitants in relation to occupancy rights. These recommendations were implemented in the 1981 Act,⁷ introducing a very significant change to the rights of spouses and cohabitants to occupy the home. The 1981 Act has been described as “a radical piece of law”.⁸ As Professor Sutherland has observed: “It would be all too easy, some four decades after the 1981 Act was passed, not to grasp the magnitude of what it achieved. By creating these occupancy rights, it placed the very basic human need to have somewhere to live above property rights.”⁹

3.5 The 1981 Act regulates occupancy rights for spouses and cohabitants. The house that is the subject of occupancy rights is known as the “matrimonial home”¹⁰ in the case of spouses, and the “house” in the case of cohabitants.¹¹

The Civil Partnership Act 2004

3.6 When civil partnerships were introduced by the Civil Partnership Act 2004, that Act introduced occupancy rights and consequential rights for civil partners on almost the same terms as for spouses under the 1981 Act, with some changes in terminology. For example, the “matrimonial home” for spouses becomes the “family home” for civil partners.¹²

Occupancy rights

Spouses and civil partners

3.7 An owner or tenant of a property has a right to occupy that property.¹³ Where two people share ownership of a property (known as common ownership), or where two people

⁵ Scot Law Com No. 60, 1980, Part II, para 2.17.

⁶ Scot Law Com No. 60, 1980, Part II, para 2.13.

⁷ Amendments to the 1981 Act were then made by the Family Law (Scotland) Act 2006, following a further review of civil remedies for domestic abuse carried out by this Commission in the early 1990s, which resulted in the Report on Family Law 1992. Scot Law Com No. 135, 1992 (available at:

<https://www.scotlawcom.gov.uk/files/5912/8015/2668/Report%20on%20family%20law%20Report%20135.pdf>).

Not all of the recommendations were implemented, but one of the principal recommendations was: s 14 of the 1981 Act was amended (by s 10 of the 2006 Act), to extend the meaning of matrimonial interdict to include an interdict prohibiting a spouse from entering or remaining in any residence occupied by the applicant spouse (as well as from the matrimonial home), any place of work of the applicant spouse, and any school attended by a child in the care of the applicant (Recommendation 57(c)).

⁸ R McPherson, “Unintended consequences of non-harassment orders: child contact decision-making,” *Journal of Social Welfare and Family Law* (2022), Vol. 44(4) 495, at p 496.

⁹ E Sutherland, *Child and Family Law* (3rd edn, 2023), para 4-069.

¹⁰ A “matrimonial home” is defined in the 1981 Act, s 22 as meaning: “any house, caravan, houseboat or other structure which has been provided or has been made available by one or both of the spouses as, or has become, a family residence and includes any garden or other ground or building usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure, but does not include a residence provided or made available by a person for one spouse to reside in, whether with any child of the family or not, separately from the other spouse”. For further discussion of this definition, see E Sutherland, *Child and Family Law* (3rd edn, 2023), paras 4-061/4-064.

¹¹ 1981 Act, s 18(6).

¹² 2004 Act, s 135.

¹³ See the discussion of real rights, and the incidents of ownership discussed in K Reid, *The Law of Property in Scotland* (Butterworths, 1996), at para 127. Note that ownership gives rise to the right to possession, but this may

are named as tenants of a property (known as a joint tenancy), they each have a right to occupy that property.

3.8 Under the 1981 Act, an owner or tenant of a property which is used as their matrimonial home is known as an “entitled spouse”. This term is used to recognise the spouse’s entitlement (their right) to occupy the home by virtue of their right of ownership or tenancy.¹⁴ A person may also be an entitled spouse where their right to occupy the matrimonial home is based on permission from a third party.¹⁵ Where spouses share ownership of the matrimonial home, or are joint tenants of the matrimonial home, they will accordingly both be entitled spouses.¹⁶ This is also the case where they are both permitted by a third party to occupy the matrimonial home.

3.9 Where the matrimonial home is in sole ownership of one spouse, or one spouse holds a sole tenancy or right of permission from a third party, there will only be one entitled spouse in the marriage. Section 1(1) of the 1981 Act provides that the other spouse is the “non-entitled spouse”, and shall have the right to continue to occupy the matrimonial home, or (if not in occupation) to enter into and occupy the matrimonial home. These occupancy rights of a non-entitled spouse therefore arise from the statutory provisions by virtue of being married to an owner, tenant or permitted occupier of a matrimonial home.

3.10 The 2004 Act makes identical provisions for civil partners. A civil partner who owns or is the tenant of the family house or is permitted to occupy by a third party is the entitled partner. Both civil partners may be entitled partners. Where one civil partner does not own the family home or is not the tenant or is not permitted to occupy by a third party, then they are the “non-entitled partner” and acquire statutory occupancy rights under the 2004 Act, by virtue of being in a civil partnership with the owner, tenant or permitted occupier of the family home.¹⁷

3.11 Thus, in a marriage or civil partnership, both parties will have occupancy rights in the matrimonial or family home, as a result of: (i) ownership, tenancy, or being permitted to occupy the home; or (ii) statutory provision which takes effect on marriage or civil partnership with the owner, tenant or permitted occupant.

3.12 Both Acts provide for subsidiary and consequential rights, and for an applicant to seek relevant court orders. The subsidiary and consequential rights include the right of the non-entitled party to make any payment due by the entitled party in respect of rent, council tax, repayments on a mortgage loan (referred to as “secured loan instalments”), or other outgoings.¹⁸ They are also entitled to carry out essential repairs and to enforce performance of any obligation by a third party which is due to the entitled party, and otherwise to take steps to protect their occupancy rights.¹⁹ These incidental and consequential rights are essential to protect the position of non-entitled parties: as Professor Clive has commented, the right to

be altered through dealings: for example, an owner is entitled to natural possession but if the owner grants a lease, his right to natural possession passes to the tenant in terms of the lease.

¹⁴ There is a question as to whether an entitled spouse/partner has “occupancy rights” as defined in the 1981 and 2004 Acts as the statutes do not make express provision for this: G Gretton and K Reid, *Conveyancing*, 5th ed, para 10-02, fn 6. However, the 1981 Act and 2004 Act proceed on the basis that an entitled spouse/partner can exercise the statutory rights regulating occupancy rights provided in the Acts. For example, s 4(1) of the 1981 Act says that where there are two entitled spouses, or an entitled and a non-entitled spouse, either may apply for an order suspending “the occupancy rights of the other spouse”.

¹⁵ 1981 Act, s 1(2).

¹⁶ 1981 Act, s 4(1) specifically refers to the situation where both spouses are entitled.

¹⁷ 2004 Act, s 101.

¹⁸ 1981 Act, s 2(1); 2004 Act, s 102(1).

¹⁹ 1981 Act, s 2(1); 2004 Act, s 102(1).

occupy the home might be “short-lived”²⁰ if the non-entitled party could not take steps if the house fell into disrepair or the rent was not paid, and the entitled party refused to do anything about it.²¹

3.13 Section 3 of the 1981 Act and section 103 of the 2004 Act allow the court to regulate occupancy rights, by making orders declaring, enforcing or protecting the occupancy rights of the applicant, or by restricting or regulating the occupancy rights of the non-applicant.²² There is also provision for the court to make orders regulating the furniture and furnishings of the home and, again, such statutory measures are necessary to ensure that the occupancy rights of the non-entitled party are meaningful, and cannot be defeated by the other party removing all the furniture from the house.

Cohabitants

3.14 In contrast, where the parties are cohabiting, a non-entitled cohabitant does *not* automatically acquire occupancy rights by virtue of the cohabitation. The entitled partner is the one who owns or is the tenant of the home or is permitted to occupy it by a third party – and again, both cohabitants can be entitled. However, a cohabitant who does not own the property or is not the tenant or is not permitted to occupy by a third party must apply to court for occupancy rights, in terms of section 18 of the 1981 Act.²³ Occupancy rights granted by the court can last for a maximum of 6 months, although they can be extended for further periods of up to 6 months at a time.²⁴

3.15 Where a cohabitant does successfully seek an award of occupancy rights from the court, then the incidental and consequential rights in section 2 of the 1981 Act will also apply, together with the right to seek orders under section 3.²⁵

3.16 One question which arises is whether, in 2024, it is still appropriate to treat cohabitants differently from spouses and civil partners, by not providing for automatic occupancy rights for non-entitled cohabitants (and the consequential protection that goes with them, such as the right to exclude an abusive partner from the family home). The 1981 Act is now over 40 years old and when this legislation was enacted there were no statutory rights for cohabitants to claim a financial remedy on cessation of their relationship or on death:²⁶ the Family Law (Scotland) Act 2006 has since addressed this.²⁷ Over the last 40 years, the incidence of cohabitation has increased dramatically, and attitudes towards cohabitation have changed.²⁸

²⁰ EM Clive, *The Law of Husband and Wife* (4th ed, 1997), para 15.024.

²¹ The non-entitled party who makes payments which are due by the entitled party will be entitled to seek to recover these sums under the common law: see for example Bell's *Principles*, para 557.

²² 1981 Act, s 3(1); 2004 Act, s 103(1).

²³ It is unclear how often, if at all, cohabitants seek occupancy rights under s 18: the Scottish Civil Justice Statistics do not record statistics on these.

²⁴ 1981 Act, s 18(1).

²⁵ These sections are discussed at paras 3.12 to 3.13 above.

²⁶ Claims may have been possible under the common law, for example by way of informal marriage by cohabitation with habit and repute, or a claim for unjustified enrichment.

²⁷ 2006 Act, ss 28 and 29.

²⁸ See for example the SLC Report on Cohabitation (Scot Law Com No. 261, 2022), para 1.4; See also: (available at: <https://www.gov.scot/publications/future-civil-partnership-scotland/pages/9/>). In 2022 19% of families in the UK comprised cohabiting couples (available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2022>).

3.17 In light of increasing protection for cohabitants in other areas, we wish to consider whether cohabitants should benefit from stronger provision and protection in relation to occupancy rights under the 1981 Act. For example, the 1981 Act could be amended to provide that if a couple meets the definition of “cohabiting couple” in section 18, they are automatically entitled to occupancy rights. Occupancy rights would then be lost when the cohabiting relationship comes to an end.²⁹ An alternative approach would be to amend the 1981 Act to provide that occupancy rights are only acquired automatically under the 1981 Act when some further test is met, such as a minimum period of cohabitation.

3.18 However, there are difficulties with either approach. In the first place, the reasons advanced in our 1980 Report, which led to the 1981 Act, are still persuasive:

“The law should in our view seek to make available an occupancy right which is appropriate to the legitimate expectations of an unmarried partner. This suggests that the occupancy right to be made available to an unmarried partner should be limited, so as to enable the unmarried partner to continue in occupation of a home without risk of ejection by the other partner during such period as he or she may reasonably require to secure alternative accommodation following upon the ending of the cohabitation.”³⁰

3.19 It remains the case that couples who cohabit have not opted in to the more extensive legal regimes for spouses or civil partners. This thinking also influenced this Commission’s recent review of cohabitation law in 2022, when it was recommended that the legal rights for cohabitants when the relationship ends (otherwise than by the death of one party) should be strengthened, but not brought in line with financial provision on divorce or dissolution.³¹ Introducing a minimum cohabitation period would help ensure that occupancy rights are only acquired in circumstances where the parties have cohabited for a sufficiently long time. Nevertheless, it would always be arbitrary as to where to draw the line when identifying the minimum period, and may encourage litigation as to the commencement date or duration of the cohabitation.³² In any event, consideration of the duration of the relationship is already part of the court’s determination as to whether the parties are a cohabiting couple, in terms of the current definition of “cohabiting couple” in section 18 of the 1981 Act.³³ Any strengthening of occupancy rights for one party results in an encroachment on the property rights of the other party. It is of note that a Scottish Government consultation in 2018-2019, on protective orders for people at risk of domestic abuse, reviewed the position of cohabitants and asked whether cohabitants without title should be given the same occupancy rights as spouses and civil partners: the Scottish Government proposed no change to the 1981 Act on this issue as a result of this consultation.³⁴

²⁹ Unless the cohabiting relationship ends because the parties get married or enter into a civil partnership. In that case, the non-entitled partner would acquire occupancy rights by virtue of the marriage or civil partnership instead. Unlike the end of marriage or civil partnership, there would however be no bright line to determine the date on which the relationship ended: whether the cohabiting relationship had ended would be a question of fact.

³⁰ Scot Law Com No. 60, 1980 (available at: <https://www.scotlawcom.gov.uk/files/4212/8014/9994/rep60.pdf>, at para 6.6).

³¹ Report on Cohabitation (Scot Law Com No. 261, 2022), paras 2.38-2.39.

³² A minimum qualifying period was canvassed but rejected by this Commission in our 2022 Report on Cohabitation. Reasons for this included a lack of support from consultees, stakeholders and the public for a minimum period, and a huge variation of views as to what the length of any minimum term should be, ranging from 6 months to 25 years. Report on Cohabitation, (Scot Law Com No. 261, 2022), paras 3.40 – 3.49.

³³ The current definition of “cohabiting couple” is included in para 3.30.

³⁴ See paras 2.29 – 2.45, and Question 19, of the Scottish Government consultation paper “Protective Orders for People at Risk of Domestic Abuse” (December 2018) (available at: <https://consult.gov.scot/justice/people-at-risk->

3.20 A further relevant factor is that, whether or not they have occupancy rights, cohabitants will benefit from the protections in Part 2 of the Domestic Abuse (Protection) (Scotland) Act 2021 when this part of the Act is commenced (the “2021 Act”). This will enable a social landlord (but not a private landlord) to transfer a Scottish secured tenancy from an abusive partner tenant to a non-abusive partner. This right can be used by social landlords regardless of whether the non-abusive partner has occupancy rights in the rented property. Accordingly, cohabitants without occupancy rights may be able to achieve the protection they need, through the 2021 Act, even absent any reform of occupancy rights in the 1981 Act. However, the 2021 Act will not apply to a privately owned or privately rented home, so will not protect cohabitants in those situations. The 2021 Act is discussed in more detail below at paragraphs 3.62 to 3.63.

3.21 Stakeholders have also shared concerns that, where there is domestic abuse, then any automatic occupancy rights for cohabitants (who have not chosen to formalise their relationship) might serve to benefit a non-entitled partner who is the perpetrator of domestic abuse in a cohabiting relationship, making it considerably harder for the entitled partner, as victim/survivor, to eject the perpetrator from the home.

3.22 For these reasons, we think that the current scheme, requiring a cohabitant to seek occupancy rights in court, should be maintained. Nevertheless, we would be grateful for consultees’ input on the following question:

- 1. Does the current law, requiring cohabitants to apply to court for occupancy rights, cause problems for cohabitants, and if so, can you provide more detail?**

3.23 An alternative reform would be to continue to require a cohabitant to seek occupancy rights through a court order, as at present, but to provide that the order could last longer than six months. An award for longer than six months would benefit the non-entitled partner, since being required to return to court frequently can be expensive, stressful, and potentially provocative in a domestic abuse situation.

3.24 If the maximum period of an award of occupancy rights was to be extended beyond six months, the court would continue to have discretion to determine the end point, based on all the relevant factors in the case. The question then becomes what the new maximum period should be, balancing the interests of both parties. We provisionally propose that the current maximum period of six months should be increased to 12 months, allowing the court to make an award of occupancy rights in favour of the non-entitled partner for any duration up to this maximum, taking into account all the relevant factors in the case. The court could then specify an appropriate period to offer protection to the non-entitled partner and any children. When the period specified in the order came to an end, the non-entitled partner could seek to renew, as they are currently entitled to do. Since occupancy rights are most likely to be sought when there is a dispute between the parties, or an exclusion order is required, it would be advantageous to ensure the court has greater discretion as to the duration of the order, taking into account all relevant factors in the case.

3.25 At present, the 1981 Act does not list any factors to be taken into account by the court in making such an order. It would be possible to provide a non-exhaustive list of factors which

of-domestic-abuse/user_uploads/290884_sct1218171740-001_protective_p3.pdf); and the subsequent feedback, published in October 2019 (available at: <https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/>).

are relevant. These could include whether there is evidence of domestic abuse, or a need for an exclusion order,³⁵ and whether the applicant and any children need time to be able to find alternative accommodation, or move schools or work. Alternatively, it may be preferable to leave it entirely to the discretion of the court as to how to determine the duration of the order.

3.26 This proposal reflects concerns of the Commission in 1980 about the duration of occupancy rights. At that time, the Commission recommended:

“In our Memorandum we proposed that a fixed occupancy period of three months might suffice for this purpose. On reconsideration we think that such a period might not give sufficient time for an unmarried partner to find suitable alternative accommodation, and we therefore now propose that the period of three months should be capable of being extended by the court for one further period of not more than three months.”³⁶

3.27 The 1981 Act as enacted allowed for occupancy rights to be awarded for up to six months, and for the initial award to be renewed more than once.³⁷ It may be that this remains sufficient protection for cohabitants. However, it strikes us that, in the event that the victim/survivor and any children need to move house (and potentially school and work), it would be beneficial to enable them to acquire occupancy rights for longer periods, to sort out these important matters, without the need to return to court for a renewal of occupancy rights.

3.28 We therefore propose that occupancy rights for cohabitants should be capable of lasting for longer than six months. We think that such reform would be within the scope of this project, although it would also have application for cohabitants in non-domestic abuse scenarios. This is because the current rationale for the law would not be changed: a cohabitant would need to choose to apply to court for occupancy rights, and any grant would be on the same basis as at present. The only reform would be to introduce a longer term, which would be at the discretion of the court. We are, however, aware that where there is domestic abuse, it would be possible for the perpetrator of that abuse to benefit from a longer period of occupancy rights also.

3.29 Accordingly, we ask:

2. **Should the court, at its discretion, be able to make an order for occupancy rights for up to 12 months, rather than the current maximum of six months?**
3. **What specific factors, if any, should the court take into account when exercising its discretion?**
4. **Do you support any other way of reforming occupancy rights for cohabitants, and if so what?**

³⁵ An exclusion order is an order suspending one party's occupancy rights in the home, so that they have no legal right to live there or enter the home, while the order is in force: 1981 Act, s 4. Exclusion orders are discussed in more detail in Ch 4.

³⁶ Scot Law Com No. 60, 1980 (available at: <https://www.scotlawcom.gov.uk/files/4212/8014/9994/rep60.pdf>), at para 6.6, and Recommendation 6.1.

³⁷ 1981 Act, s 18(1).

3.30 At present, the 1981 Act defines a “cohabiting couple” as two people living together as if they were married.³⁸ The Act also provides that in determining whether two persons are cohabiting, the court shall have regard to all the circumstances of the case, including:

- (a) the time for which it appears they have been living together; and
- (b) whether there is any child—
 - (i) of whom they are the parents; or
 - (ii) who they have treated as a child of theirs.³⁹

3.31 This definition of living together as if married is broadly similar to the current definition in the 2006 Act,⁴⁰ although there is no mention in the 2006 Act of whether the parties have children. We have not heard of any issues that arise from having a different definition in the 1981 Act. We think that, in the circumstances, this remains an appropriate test, leaving it to the court to determine having regard to all the circumstances. However, it would be helpful to find out if this definition gives rise to any concerns in practice, or if it is problematic having different definitions for different purposes in the 1981 Act and the 2006 Act.

3.32 We therefore ask:

5. Does the definition of “cohabiting couple” in the 1981 Act give rise to any concerns in practice?

Children

3.33 Although occupancy rights are held only by spouses, civil partners or cohabitants in terms of the 1981 and 2004 Acts, there is specific protection for children of the family in the Acts. The legislation provides that in making an order in respect of occupancy rights under section 3/section 103 (for example to restrict the occupancy rights of an abusive partner), the court must take into account the needs of any child of the family.⁴¹ It is important to note that a “child” can be of any age, including an adult, in terms of the statutory definition: “‘child of the family’ means any child or grandchild of either [spouse/civil partner], and any person who has been brought up or treated by either [spouse/civil partner] as if the person were a child of that [spouse/civil partner], whatever the age of such a child, grandchild or person”.⁴² This means that an entitled party’s occupancy rights could be regulated by the court to take into account the needs of a 32 year old child of the family living with them. The rationale behind recognising

³⁸ 1981 Act, s 18(1). The wording of the 1981 Act continues to refer, on the face of it, to a man and woman living together as spouses or two persons of the same sex living together as if they were civil partners. S 4 of the Marriage and Civil Partnership (Scotland) Act 2014 implements a change to all previous statutory references so that they refer to two persons living together as if married, and that references to two people living together as if in a civil partnership cease to have effect.

³⁹ 1981 Act, s 18(2).

⁴⁰ 2006 Act, s 25, as amended by s 4 of the Marriage and Civil Partnership (Scotland) Act 2014. In 2022, this Commission published a Report on reform of ss 25-28 of the 2006 Act, including the definition of cohabitants: Report on Cohabitation (Scot Law Com No. 261, 2022). If these recommendations were to be implemented, there may be merit in reflecting any changes in the 1981 Act as well. That would be a question for the Scottish Government when implementing any recommendations in the 2022 Report.

⁴¹ 1981 Act, s 3(3)(c); 2004 Act, s 103(3)(c).

⁴² 1981 Act, s 22; 2004 Act, s 101(7). This also applies to the children of cohabitants, by virtue of the 1981 Act, s 18(3).

the needs of children (including adult children) seems to be to ensure that the occupancy rights of one party cannot be undermined by the exclusion of their children.⁴³

Termination of occupancy rights

3.34 Occupancy rights conferred by the 1981 and 2004 Acts continue unless they are renounced⁴⁴ or prescribe,⁴⁵ or the relationship ends through death, divorce or dissolution (as there will then be no entitled spouse or civil partner).⁴⁶ However, in finalising the divorce or dissolution, the court has power to make provision in relation to the house (for example, an order for sale or regulating occupation of the house),⁴⁷ thereby offering protection to a spouse or civil partner at the end of the relationship. For cohabitants, occupancy rights come to an end on death or at the end of the period for which the court granted them.⁴⁸ Common law occupancy rights, which arise by virtue of the party's ownership or through being the tenant or licensee of the property, terminate on cessation of ownership or of the tenancy/lease or licence (or when the owner grants a lease or licence of the property, thereby suspending their own occupancy rights).

3.35 In reviewing occupancy rights in relation to domestic abuse, it would be possible to make new provision for them to terminate or be suspended where one party is convicted of domestic abuse offences. Although it is not typical for criminal convictions to give rise to consequences in civil law, there is increasing recognition that some criminal convictions are so serious that consequent civil measures are appropriate. For example, in England and Wales, Parliament passed "Jade's Law" in 2024.⁴⁹ By virtue of section 18 of the Victims and Prisoners Act 2024, which inserts section 10A to the Children Act 1989, the Crown Court is required to make a "prohibited steps order" when sentencing an offender, where the offender (who has parental responsibility for the child) has been convicted of the murder or (in certain circumstances) the manslaughter of the other parent of the child. This prohibited steps order must:

"(a) specify that no step which could be taken by a parent in meeting their parental responsibility for a child may be taken by the offender with respect to the child without the consent of the High Court or the family court, and (b) be made to have effect until the order is varied or discharged by the High Court or the family court."

3.36 Thus, there is recognition that the murder of one parent by the other is so heinous that the murderer should not exercise parental responsibility without the consent of the High Court or family court.

3.37 In relation to domestic abuse in Scotland, section 234AZA of the Criminal Procedure (Scotland) Act 1995 requires the court to consider making a non-harassment order in respect of a perpetrator who is convicted of abusive behaviour under section 1 of the Domestic Abuse

⁴³ E Sutherland *Child and Family Law*, 3rd Edn Vol.2, para 4-073, and see footnote 284. However, Clive queries why protection for adult children is required: EM Clive, *The Law of Husband and Wife* (4th ed, 1997), at para 15.048.

⁴⁴ 1981 Act, s 1(5); 2004 Act, s 101(5).

⁴⁵ 1981 Act, s 1(7); 2004 Act, s 101(6A).

⁴⁶ This would also be the case if the entitled spouse ceases to be permitted by a third party to occupy the home.

⁴⁷ 1985 Act, s 14(2) and (3). See also E Sutherland, *Child and Family Law*, (3rd edn, 2022), vol.2, para 4-072.

⁴⁸ Where they have been granted to a cohabitant in terms of s 18 of the 1981 Act.

⁴⁹ Named after Jade Ward, who was murdered by her partner in 2021, and her murderer continued to take part in decisions concerning their children (available at: <https://www.gov.uk/government/news/jades-law-to-be-introduced-to-better-protect-children> and <https://www.bbc.co.uk/news/articles/cqvvl7w2607o>).

(Scotland) Act 2018 or section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

3.38 We think there is merit in taking similar steps in relation to a perpetrator's occupancy rights, where the perpetrator is convicted of abusive behaviour under the Domestic Abuse (Scotland) Act 2018 or section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. The court could be required by statute to consider whether to suspend the perpetrator's occupancy rights for a fixed period, by way of an exclusion order. This could be made in respect of an entitled or a non-entitled party, where that party is convicted of a domestic abuse offence. This would allow the court to take into account any relevant circumstances, including in relation to any children, and to determine how long the exclusion order should last. It would ensure that the victim/survivor is not faced with the need to seek civil protection following on from the perpetrator's criminal conviction.

3.39 An alternative route would be to provide for occupancy rights to terminate automatically following a criminal conviction for domestic abuse. However, we think this is unsatisfactory, for a number of reasons. Automatic termination of statutory occupancy rights could only affect a non-entitled party, leaving an entitled party who is convicted of abusive behaviour with their common law right of occupancy unaffected. Moreover, it would adversely affect the perpetrator's right to visit or live with children at the home in question, which would interfere with the perpetrator's Article 8 ECHR rights. Automatic termination, without a judicial determination that it is appropriate on the facts and circumstances of each case, would be an interference with Article 6 and may therefore fail to meet the ECHR tests of necessity or proportionality. Separately, the automatic termination of occupancy rights might be seen as a disproportionate interference with the perpetrator's Article 1, Protocol 1 rights.

3.40 We therefore seek views:

6. **Should the court be required to consider making an exclusion order to suspend the occupancy rights of an entitled or non-entitled party, where that party is convicted of an offence under the 2018 Act or an offence which is aggravated in terms of section 1 of the 2016 Act?**

Dealings with the property

3.41 Occupancy rights would offer considerably less protection to a vulnerable party, such as a victim/survivor of domestic abuse, if the other party could defeat them by selling the house or relinquishing the tenancy. Thus, provisions in the 1981 and 2004 Acts offer protection for spouses/cohabitants and civil partners, by providing that occupancy rights can continue in certain circumstances, even where there has been a "dealing" with the property. To this extent, occupancy rights of a non-entitled party can be thought of as "quasi-real" rights, because they can be enforced against certain – but not all – third parties.⁵⁰ We look first at the protections in the law where the parties co-own the property and both are therefore entitled parties, and then at the situation where there is an entitled and a non-entitled spouse, civil partner or

⁵⁰ G Gretton and K Reid, *Conveyancing*, 5th ed, para 10-05. The authors note that occupancy rights are not real rights, but behave "rather like" them, concluding that "Occupancy rights are probably to be classified as personal rights that in some situations can bind third parties."

cohabitant. In either situation there is a risk that abusive conduct by an entitled party could undermine the protection of occupancy rights of the other party.

Ownership: where both parties are entitled

3.42 This section covers the situation where the parties share ownership of the property. Under the general law of common ownership, both co-owners are entitled to occupy the whole property, and either co-owner can carry out essential repairs to the property without requiring consent from the other.⁵¹ The general law of common ownership would not allow for non-essential repairs or improvements to be carried out unless both co-owners agree. However, the 1981 Act and 2004 Act provide that either party is entitled to carry out non-essential repairs or improvements to the home appropriate for the reasonable enjoyment of occupancy rights where authorised by the court.⁵²

3.43 Under the general law of common ownership, either co-owner may sell or gift their share of ownership, or grant a standard security over it (mortgage it).⁵³ However, where the co-owners are spouses or civil partners (but not cohabitants), statutory protection applies: where one co-owner's share is sold, the purchaser (being the new co-owner) will not be entitled to occupy the property, and the remaining co-owner's occupancy rights will be unaffected.⁵⁴ Buying a share of ownership in a property will not usually be attractive to purchasers, and it will be less so where the purchaser's right to occupy is suspended by the 1981 Act or 2004 Act. The general law of common ownership provides a solution to this practical difficulty by allowing either co-owner to apply to court for a decree of division and sale. This court order would allow the whole property to be sold, and the sale proceeds divided between the co-owners.⁵⁵ (In most cases, the parties will own the house equally, so the sale proceeds will be divided equally between them.) The court generally has no discretion to refuse an order for division and sale,⁵⁶ but the 1981 Act and 2004 Act provide a specific protection for spouses/civil partners in this situation. The court may refuse to grant the order for division and sale, taking into account a range of factors⁵⁷ including whether the spouse/civil partner seeking division and sale has offered any suitable alternative accommodation to the other spouse/civil partner. This statutory protection is not available to cohabitants: where both the cohabitants are entitled as co-owners, the usual rules of division and sale will apply, with no additional statutory protection.⁵⁸

3.44 The fact that cohabitants do not benefit from additional protection in an action for division and sale might be seen to be problematic, especially where there is domestic abuse.

⁵¹ K Reid, *The Law of Property in Scotland* (Butterworths, 1996), at para 25.

⁵² 1981 Act, s 2(4); 2004 Act, s 102(4). These sections provide that it shall not be competent for a non-entitled spouse to apply for an order transferring the tenancy of a matrimonial home to that spouse, where the home— a) is let to the entitled spouse by his or her employer as an incident of employment, and the lease is subject to a requirement that the entitled spouse must reside therein; (b) is on or pertains to land comprised in an agricultural lease; (c) is on or pertains to a croft or the subject of a cottar or the holding of a landholder or a statutory small tenant; (d) is let on a long lease; (e) is part of the tenancy land of a tenant-at-will.

⁵³ K Reid, *The Law of Property in Scotland* (Butterworths, 1996), at para 28. In practice, it is highly unlikely that a creditor will accept security over a half-share of ownership of a house.

⁵⁴ 1981 Act, s 9(1); 2004 Act, s 109(1).

⁵⁵ In principle, the court should authorise the sale of a property only where it is not reasonably practicable to physically divide the property into two separate properties, but such physical division will be impracticable for the overwhelming majority of properties: K Reid, *The Law of Property in Scotland* (Butterworths, 1996), at para 32.

⁵⁶ K Reid, *The Law of Property in Scotland* (Butterworths, 1996), at para 32, citing *Upper Crathes Fishings Ltd v Bailey's Executors*, 1991 SCLR 151.

⁵⁷ 1981 Act, s 19, with reference to s 3; 2004 Act, s 110, with reference to s 103.

⁵⁸ See WM Gordon and S Wortley, *Scottish Land Law Vol I* (SULI, 3rd ed. 2009), paras 15-29 – 15-37.

The other side of the coin is that, absent a formalised relationship such as marriage or civil partnership, there is nothing in law to justify a departure from the common law property rules. Nevertheless, in recognition of the increasing legal protections given to cohabitants in intimate relationships, we wonder if it is time to treat cohabitants in the same way as other intimate partners in relation to division and sale. A statutory provision for cohabitants who co-own property (and who meet the definition of cohabiting couple in the 1981 Act) would apply to all cohabitants, regardless of whether there is domestic abuse. This would have implications under Article 1 Protocol 1 ECHR, as it would dilute the property rights of cohabitants, by removing their (currently unfettered) right to seek division and sale. However, States have a broad margin of appreciation here, as noted by Professor Murdoch: “property rights have a strong claim to be considered more akin to economic rather than to civil rights, and Strasbourg supervision in this area is covered by recognition of a wide margin of appreciation on the part of state authorities.”⁵⁹ It is also relevant that this judicial discretion to refuse division and sale already exists for spouses and civil partners and has not been challenged. Accordingly, introducing it for those who meet the statutory definition of cohabiting couple can be justified by the need to ensure equal protection for couples, regardless of the legal basis of their relationship.

3.45 The regulation of division and sale in respect of spouses and civil partners can also be justified on the basis that they have taken steps to enter into a formal relationship, regulated by law, while cohabitants have not done so. Spouses and civil partners have therefore effectively “contracted in” to the regime, by formalising their relationship. To reflect that difference, it would be possible to permit cohabitants to be able to contract out of any statutory protection in relation to division and sale (for example, by way of a cohabitation agreement).

3.46 It would also be useful to find out if the current differential treatment causes problems, and what solution, if any, consultees support. Accordingly, we ask:

7. **Can you provide details of any case(s) where cohabitants have suffered because of a lack of statutory protection in relation to division and sale?**
8. **Should cohabitants (who meet the definition in the 1981 Act) benefit from the same statutory protection in relation to division and sale that spouses and civil partners do?**
9. **Should cohabitants (unlike spouses and civil partners) be able to contract out of any statutory protection in relation to division and sale?**

Ownership: where one party is non-entitled

3.47 Under the 1981 Act and 2004 Act, a non-entitled party acquires occupancy rights in a matrimonial or family home by virtue of the statute, on entering into marriage or civil partnership or, in the case of cohabitants, as a result of an order of the court conferring such rights. Non-entitled parties benefit from subsidiary and consequential rights, such as the right to make any payment due on the mortgage or rent, or to carry out essential repairs that the entitled partner could carry out, without the consent of the entitled party.⁶⁰ These subsidiary rights are important, to ensure that the non-entitled party’s occupancy rights are not

⁵⁹ J Murdoch, (2017), *Reed and Murdoch: Human Rights Law in Scotland*, 4th Edn, at para 8.06.

⁶⁰ 1981 Act, s 2(1) lists the subsidiary rights of the non-entitled partner; 2004 Act, s 102.

undermined by the entitled party defaulting on mortgage payments, or allowing the house to fall into disrepair, thereby risking the house being sold by the secured lender or becoming uninhabitable.⁶¹

3.48 A non-entitled spouse or civil partner (but not a cohabitant) can give up or renounce those occupancy rights.⁶² However, there are protections built into this. As previously noted, a non-entitled spouse or civil partner may renounce their occupancy rights only (i) in writing; and (ii) in respect of a particular home.⁶³ They cannot prospectively give up occupancy rights in any future home they may live in. Moreover, the renunciation will only be effective if the non-entitled spouse or civil partner affirms before a notary public that it was made “freely and without coercion of any kind.”⁶⁴ Once made, a renunciation is irrevocable.⁶⁵

3.49 A non-entitled spouse or civil partner will also lose occupancy rights if they have not lived with the entitled spouse or civil partner for a continuous period of two years *and* during that time the non-entitled spouse or civil partner has not occupied the matrimonial/family home.⁶⁶

3.50 The most important protections come in section 6 of the 1981 Act and section 106 of the 2004 Act, which regulate occupancy rights for spouses and civil partners after dealing.⁶⁷ The first question which arises is, what is a “dealing”? As Professor Gretton and Professor Reid note, “It is not a term of art in Scots law, and the legislation nowhere explains it...”⁶⁸ They do point to the limited and partial definition in section 6(2) of the 1981 Act and section 106(2) of the 2004 Act:

“ ‘dealing’ includes the grant of a heritable security and the creation of a trust but does not include a conveyance under section 80 of the Lands Clauses Consolidation (Scotland) Act 1845.”

3.51 The rest of section 6/section 106 does give some further insight, including the reference to a “transfer for value”: thus sale is covered.⁶⁹ The “cautious view” advanced by Gretton and Reid is that a dealing is “any juridical act which might adversely affect occupancy rights”, and they give examples of gifts, leases and servitudes.⁷⁰ However, given the

⁶¹ EM Clive, *The Law of Husband and Wife* (4th ed, 1997), paras 15.024 – 15.032.

⁶² In the context of a sale of the property, there is guidance on the conveyancing practice and relevant styles in A Stewart and E Sinclair, *Conveyancing Practice in Scotland*, 8th ed (Bloomsbury, 2020) at para 4.32.

⁶³ 1981 Act, s 1(5); 2004 Act, s 101(5). Note that these protections do not extend to non-entitled cohabitants, presumably on the basis that cohabitants only acquire occupancy rights through actively seeking them by way of a court order, and they only last for six months. If a non-entitled cohabitant wished to renounced occupancy rights, they would simply not seek them in the first place, or allow them to lapse after six months.

⁶⁴ 1981 Act, s 1(6); 2004 Act, s 101(6).

⁶⁵ EM Clive, *The Law of Husband and Wife* (4th ed, 1997), para 15-015.

⁶⁶ 1981 Act, s 1(7); 2004 Act, s 101(6A). The period was originally five years, but was reduced to two years by the Family Law (Scotland) Act 2006, on the recommendation of this Commission: Report on Family Law 1992 (Scot Law Com No. 135, 1992). Again, it only applies to spouses and civil partners, and not to cohabitants, since their occupancy rights expire on the expiry of the court order, which cannot last for more than 6 months: 1981 Act, s 18(1). In calculating this period of two years, s 9A of the 1981 Act says that no account shall be taken of any court applications under s 3 or s 4 of the 1981 Act. S 111A of the 2004 Act makes the same provision for civil partners.

⁶⁷ The protections also only apply where the house is owned or rented, and do not apply where the entitled spouse or civil partner is permitted by a third party to occupy the house (1981 Act, s 6(2); 2004 Act, s 106(2)). For the avoidance of doubt, these protections do not extend to cohabitants. S 18(5) of the 1981 Act confirms that nothing in this section shall prejudice the right of any third party having an interest in the house. See also EM Clive, *The Law of Husband and Wife* (4th ed, 1997), para 15.121.

⁶⁸ G Gretton and R Reid, *Conveyancing*, 5th ed, para 10-06.

⁶⁹ G Gretton and R Reid, *Conveyancing*, 5th ed, para 10-06.

⁷⁰ G Gretton and R Reid, *Conveyancing*, 5th ed, para 10-06.

uncertainty as to what a “dealing” is, it seems prudent to attempt to add a definition to the 1981 and 2004 Acts. This clarity would improve the position for everyone affected, including of course, victim/survivors of domestic abuse. Reflecting the position advanced by Gretton and Reid, we propose that the critical elements are (i) any legal act in respect of the home; (ii) carried out by an entitled party; and (iii) which may adversely affect occupancy rights. This would include sale, excambion,⁷¹ granting a heritable security (mortgage) or a lease, or placing the home into a trust, as well as gifting the property or granting a servitude. We therefore ask:

10. Do you support the inclusion of a definition of “dealing” being a legal act in respect of the home, carried out by an entitled party, which may adversely affect occupancy rights?

3.52 When there are “dealings” with the home, then the statutory regime provides protection to the non-entitled spouse or civil partner in terms of section 6(1) of the 1981 Act and section 106(1) of the 2004 Act. Where the entitled spouse/civil partner “deals” with the house, by selling it for example, the non-entitled spouse/civil partner’s occupancy rights continue. This means that, where a third party purchases the home (or enters into any other “dealing” in relation to it), they are not entitled to occupy the home, or any part of it.⁷² They will be the legal owner of the property, but it will be subject to the occupancy rights of the non-entitled spouse or civil partner.⁷³ Therefore, an entitled spouse or civil partner cannot defeat the occupancy rights of the non-entitled party simply by selling or otherwise transferring the home. This considerably reduces the attractiveness to any third party of dealing with a home which is the subject of occupancy rights, as well as offering some protection to a vulnerable party (such as a victim/survivor of domestic abuse).

3.53 However, there are certain situations in which an entitled spouse/civil partner may enter into a dealing which entitles the third party purchaser to occupy the home and which ends the occupancy rights of the non-entitled party. These situations are set out in sections 6(3)(a) to (f) of the 1981 Act/section 106(3)(a) to (f) of the 2004 Act. For example, where the non-entitled spouse or civil partner consents to the dealing or renounces their occupancy rights in writing, the protections in section 6(1) or section 106(1) do not apply.⁷⁴ A purchaser will also take the property without any occupancy rights where the dealing comprises a transfer for value to a third party who has acted in good faith and the seller produces either (i) a written declaration, signed by them, confirming that the property is not a matrimonial/family home; or (ii) a renunciation of occupancy rights or consent to the dealing which bears to have been properly made or given by the non-entitled spouse or civil partner.⁷⁵ It is also possible for the court to make an order under the 1981 or 2004 Acts dispensing with the consent of the non-entitled spouse or civil partner to the dealing.⁷⁶ In each of these scenarios, the protections in sections 6(1) and 106(1) do not apply.

3.54 There is also some statutory protection for the non-entitled spouse or civil partner in respect of second and subsequent sales (or other dealings) of the home, but only where (i)

⁷¹ This is an exchange of property, rather than a sale: G Gretton and R Reid, *Conveyancing*, 5th ed, para 11-02.

⁷² 1981 Act, s 6(1)(b); 2004 Act, s 106(1)(b).

⁷³ 1981 Act, s 6(1); 2004 Act, s 106(1), and see G Gretton and R Reid, *Conveyancing*, 5th ed, para 10-07.

⁷⁴ 1981 Act, s 6(3)(a); 2004 Act, s 106(3)(a). Practical guidance as to how this can be achieved, along with renunciation and consent styles, is provided in A Stewart and E Sinclair, *Conveyancing Practice in Scotland*, 8th ed (Bloomsbury, 2020) at para 4.32. See also G Gretton and R Reid, *Conveyancing*, 5th ed, paras 10-07 – 10-14.

⁷⁵ 1981 Act, s 6(3)(e); 2004 Act, s 106(3)(e).

⁷⁶ 1981 Act, s 6(3)(b) and s 7; 2004 Act, s 106(3)(b) and s 107.

the seller is not the entitled spouse or civil partner; and (ii) those second and subsequent sales are *not* in good faith and for value.⁷⁷ The non-entitled spouse/civil partner will therefore lose their occupancy rights where a subsequent purchaser acquires the home “in good faith and for value” from someone other than the entitled spouse or civil partner.

3.55 It should be noted that the Acts do not define “good faith” and, as Sutherland observes “it is not clear what, if any, enquiries a prospective purchaser would be expected to make”.⁷⁸ However, in practice, it appears that the test of good faith is not too onerous on a purchaser: Gretton and Reid state that “Unless the grantee positively knows about prior occupancy rights he is entitled, under the legislation, to assume there are none and to take free of any such rights as might have existed”.⁷⁹

Tenancies

3.56 Where the property is leased, the court has power to make an order transferring the tenancy from the entitled party to the non-entitled one, and may order payment by the non-entitled party to the entitled party of such compensation as is just and reasonable in the circumstances.⁸⁰ When transferring a tenancy from a non-entitled to an entitled party, the court must have regard to the five factors set out in section 3(3) of the 1981 Act or section 103(3) of the 2004 Act,⁸¹ as follows:

- (a) the conduct of the [spouses/civil partners/cohabitants] in relation to each other and otherwise;
- (b) the respective needs and financial resources of the spouses;
- (c) the needs of any child of the family;
- (d) the extent (if any) to which—
 - (i) the [matrimonial/family] home; and
 - (ii) in relation only to an order under subsection (2) above, any item of furniture and furnishings referred to in that subsection,

is used in connection with a trade, business or profession of either [spouse/civil partner/cohabitant]; and

- (e) whether the entitled [spouse/civil partner/cohabitant] offers or has offered to make available to the non-entitled [spouse/civil partner/cohabitant] any suitable alternative accommodation.

⁷⁷ 1981 Act, s 6(1A); 2004 Act, s 106(1A).

⁷⁸ E Sutherland, *Child and Family Law*, (3rd edn, 2022), para 4-083, citing EM Clive, *The Law of Husband and Wife* (4th ed, 1997), para 15.076.

⁷⁹ G Gretton and R Reid, *Conveyancing*, 5th ed, para 10-14.

⁸⁰ 1981 Act, s 13(1); 2004 Act, s 112(1). Note that s 18 of the 1981 Act, as amended, extends s 13 to cohabitants.

⁸¹ Per s 13(3) of the 1981 Act and s 112(3).

3.57 There are restrictions on when a non-entitled party can apply for a transfer of the tenancy, including where the house is let to the entitled party as a part of their employment, or where it is an agricultural holding.⁸²

3.58 Further, where both parties are entitled, that is they are joint or common tenants, the court may make an order vesting that tenancy solely in the name of one party, again subject to any order for compensation to be paid to the party who is being deprived of their tenancy.⁸³

3.59 The protections in section 6 of the 1981 Act and section 106 of the 2004 Act in relation to dealings, discussed at paragraphs 3.52 to 3.55 above, also apply where the property is leased instead of owned. If the entitled spouse or civil partner is the tenant, rather than the owner, then a “dealing” would include assigning the tenancy to someone else, or granting a sub-tenancy. Again, any dealing by the entitled spouse or civil partner will not defeat the occupancy rights of the non-entitled spouse or civil partner.⁸⁴ The assignee or sub-tenant will require to obtain a consent, revocation or affidavit (in good faith) to defeat these rights. A second or subsequent dealing will only defeat the occupancy rights of the non-entitled spouse or civil partner where that second or subsequent dealing is in good faith and for value.⁸⁵ Again, these protections do not apply to cohabitants.

3.60 A separate issue may arise where both parties are tenants in a “private residential tenancy” under the Private Housing (Tenancies) (Scotland) Act 2016. If the parties are joint tenants (and therefore both entitled parties), then all tenants must give notice to leave: one tenant alone cannot do so.⁸⁶ It would be possible for the tenant who is staying to refuse to accept full liability for the lease, and so in an abusive relationship, a joint tenant who wants to move out might be prevented from doing so if they still have financial ties to the joint tenancy that they cannot pass on.⁸⁷

3.61 Whereas we have heard that dealings with a property which is owned can cause problems (such as where the entitled party attempts to sell it to defeat the non-entitled party’s occupancy rights), we have not heard of any similar issues with tenancies in practice.⁸⁸ It would therefore be helpful to get a clearer understanding of whether the law here is operating effectively, or whether there are problems and further protection of a potentially vulnerable non-entitled party is required. We should be grateful for consultees’ views, as follows:

11. Can you provide details of any case(s) where the entitled party, who is the tenant, has attempted to transfer the tenancy or sub-let it, in order to defeat the occupancy rights of a non-entitled party; or where one party

⁸² 1981 Act, s 13(7); 2004 Act, s 112(8).

⁸³ 1981 Act, s 13(9); 2004 Act, s 112(10).

⁸⁴ 1981 Act, s 6(1); 2004 Act, s 106(1).

⁸⁵ 1981 Act, s 6(1A)(a) and (b); 2004 Act, s 106(1A)(a) and (b).

⁸⁶ Ss 48 and 49 govern the giving of notice by a tenant, and s 78(3) provides that “tenant” includes all persons who are joint tenants.

⁸⁷ This prospect was raised by John Stirling and Conner McConnell (available at: <https://www.scottishlegal.com/articles/john-stirling-the-unaddressed-issue-in-residential-tenancies>) (17 May 2024).

⁸⁸ A potential problem in an abusive relationship where *both* parties are entitled has been canvassed by John Stirling and Conner McConnell, in relation to the proposal in section 38 of the Housing (Scotland) Bill (as introduced) that would require both parties to give notice to bring a lease to an end (available at: <https://www.scottishlegal.com/articles/john-stirling-the-unaddressed-issue-in-residential-tenancies>) (17 May 2024).

has refused to consent to the other party giving notice to leave? Do you think reform is required to prevent this?

3.62 The provisions in the 1981 Act and 2004 Act allow a party to seek a transfer of the tenancy. However, there is a separate transfer of tenancy regime, introduced by the Domestic Abuse (Protection) (Scotland) Act 2021. Once in force, Part 2 will amend the Housing (Scotland) Act 2001, to enable a registered social landlord to apply to court to terminate a Scottish secure tenancy where the tenant has been abusive.⁸⁹ The landlord (rather than the victim/survivor) may also apply to transfer a Scottish secure tenancy from an abusive partner (whether spouse, civil partner or cohabitant), to their partner or ex-partner. This can apply where the perpetrator is the sole tenant, or where they are a co-tenant along with the victim/survivor (whether or not with others),⁹⁰ where (i) the tenant or joint tenant has engaged in behaviour which is abusive of their partner or ex-partner;⁹¹ and (ii) the house in question is the victim/survivor's only or principal house;⁹² and (iii) the victim/survivor wishes to continue living in the house.⁹³

3.63 This applies to residential tenancies where the landlord is a local authority, a registered social landlord or Scottish Water, but not to tenancies with private landlords. This may be of particular importance to cohabitants, as there is no need for the non-tenant cohabitant to have occupancy rights.

Dealings which perpetuate domestic abuse

3.64 We are aware that some dealings with the property may perpetuate the domestic abuse. The first situation we consider is where the perpetrator sells the house in disregard of the victim/survivor's occupancy rights. The second issue is where the perpetrator uses the sale of the house, or communications in relation to the sale of the house, to continue to harass and abuse the victim/survivor. We deal with these in turn.

Sale of the house to defeat occupancy rights

3.65 The first scenario involves an entitled party who deliberately sets out to defeat the occupancy rights of the non-entitled party and the protections in the 1981 Act/2004 Act. For example, if the perpetrator makes a false written declaration that the property is not a matrimonial (or family) home which is subject to occupancy rights (or alternatively, produces a forged renunciation of occupancy rights or consent to the dealing, purporting to be from the non-entitled spouse or civil partner) and the third party purchaser deals in good faith and for value, then the property rights of that purchaser will trump the occupancy rights of the victim/survivor and the purchaser will be entitled to move in.⁹⁴ The genuine purchaser would

⁸⁹ Domestic Abuse (Protection) (Scotland) Act 2021, s 22, amending ss 14 et seq of the Housing (Scotland) Act 2001.

⁹⁰ The Housing (Scotland) Act 2001, para 15A(2)(a), Schedule 2, to be inserted by the Domestic Abuse (Protection) (Scotland) Act 2021, s 22.

⁹¹ The Housing (Scotland) Act 2001, para 15A(1), Schedule 2, to be inserted by the Domestic Abuse (Protection) (Scotland) Act 2021, s 22.

⁹² The Housing (Scotland) Act 2001, para 15A(2)(b), Schedule 2, to be inserted by the Domestic Abuse (Protection) (Scotland) Act 2021, s 22.

⁹³ The Housing (Scotland) Act 2001, para 15A(2)(c), Schedule 2, to be inserted by the Domestic Abuse (Protection) (Scotland) Act 2021, s 22.

⁹⁴ 1981 Act, s 6(3)(e); 2004 Act, s 106(3)(e).

be in good faith, and the victim/survivor's only recourse would be a personal action against the perpetrator, which is unlikely to achieve any meaningful remedy for them.

3.66 This risk arises where there is an entitled party and a non-entitled party, that is where one party owns the house and the other does not.⁹⁵ The entitled party could attempt to sell the house to defeat the non-entitled party's occupancy rights. This could arise whether or not there is an exclusion order in place.⁹⁶ Any sale would require the entitled party to engage in deceitful conduct, by denying the existence of the occupancy rights to their solicitor and/or to the purchaser, or alternatively by getting someone else to impersonate the non-entitled party.⁹⁷ This situation is plausible in part because statutory occupancy rights in relation to a property are not registered in the Land Register of Scotland to alert third parties to their existence; there is no public record of occupancy rights. (A public record would undermine a false declaration by the seller, but would not prevent the production of a forged consent or renunciation, purporting to be from the non-entitled party.) As a result, third parties are reliant on the seller disclosing this information: where the seller does not do so or does so fraudulently, then the purchaser may be unaware of the non-entitled party's occupancy rights, and accordingly their purchase would be in good faith, entitling them to occupy the property.

3.67 This Commission considered how to protect the non-entitled party's occupancy rights in its 1980 Report:

“We recommend that where one spouse is the owner of a matrimonial home the other spouse should be entitled to give notice of his or her occupancy rights but only by registering in the Land Register (or recording in the Sasine Register) a notice (called a "matrimonial home notice") in a prescribed form.”⁹⁸

3.68 Where there was a “matrimonial home notice” registered in the Register and the property was then sold, our predecessors recommended that the non-entitled party could overturn, or annul, the transaction.⁹⁹ However, this scheme was not adopted by Government when the 1980 Report was implemented, nor at any time thereafter.¹⁰⁰ Whether occupancy rights should be noted in the Land Register was subsequently considered, and dismissed, by this Commission in 2010, on the basis that such rights may be relatively short lived, and could require relatively frequent changes to the Register. There may also be problems in seeking to remove rights which have terminated, and this could be costly and time consuming for staff.¹⁰¹

⁹⁵ Where both parties are entitled, because they both own the house, then s 19 of the 1981 Act or s 110 of the 2004 Act protects the co-owning spouse/civil partner (but not the co-owning cohabitant), by giving the court specific powers in relation to an action for division and sale. Where both cohabitants are entitled, as co-owners, the usual rules of division and sale will apply, with no additional statutory protection. See discussion at paras 3.43 to 3.44 above.

⁹⁶ Exclusion orders are discussed in more detail in Ch 4. Where granted, they suspend someone's occupancy rights, so that they are not allowed to live in or visit the house: 1981 Act, s 4.

⁹⁷ This happened in a recently reported case, albeit the house which was fraudulently sold was co-owned, and the man who sold it found someone to impersonate his girlfriend who co-owned it. It would also be possible to get someone to impersonate the non-entitled party to give their “consent” to the dealing (available at: <https://www.glasgowlive.co.uk/news/fraudster-bought-lanarkshire-house-lotto-28399970>) (6 January 2024).

⁹⁸ Scot Law Com No. 60, 1980, para 3.38, recommendation 3.6.

⁹⁹ Scot Law Com No. 60, 1980, para 3.15.

¹⁰⁰ See the discussion in this Commission's Report on Family Law (Scot Law Com No. 135, 1992), para 11.4. Professor Clive discusses the reasons for this, including the impossibility of ensuring an up-to-date search of the Register at the time of the transaction and the burden on Register staff, for a fairly limited benefit: see EM Clive, *The Law of Husband and Wife* (4th edn, 1997), para 15.062.

¹⁰¹ Report on Land Registration, Vol I (Scot Law Com No. 222, 2010) at para 7.19.

3.69 Instead, it is simply the case that any non-entitled party's occupancy rights will not be defeated by a transaction unless certain conditions apply: they consented; the court dispensed with their consent; or the purchaser was in good faith and for value and the seller had produced a written declaration that the property was not a home subject to occupancy rights, or a consent or renunciation from the non-entitled spouse or civil partner.¹⁰² This position resulted in a change in domestic conveyancing practice, whereby "the solicitor acting for the purchaser of any residential property has to be satisfied... that it is not a matrimonial home or that the necessary consent or renunciation has been given and can be proved."¹⁰³ Matrimonial affidavits became an established part of the conveyancing landscape, and by 1992, the Commission could state: "The impression we gained from consultees was that the requirements of the 1981 Act had been absorbed into ordinary conveyancing practice and that a radical new departure would be unwelcome".¹⁰⁴

3.70 This system still remains open to exploitation by a deceitful seller, who could sell the property by producing a fraudulent affidavit, and the non-entitled party's occupancy rights would be defeated by the rights of the good faith purchaser for value. We would like to understand whether this is an extensive problem in practice, and whether further reform is needed. We therefore ask:

- 12. Can you provide details of any case(s) where an entitled party (whether acting in bad faith or not) has sold the property, in spite of a non-entitled party's occupancy rights?**
- 13. What legal measures do you think could prevent this happening?**

Sale of the house and associated correspondence to perpetrate abuse

3.71 The second issue where dealings with the property can continue the abuse is where the perpetrator uses the sale of the house, or communications in relation to the sale of the house, to continue to harass and abuse the victim/survivor. This applies whether both parties are entitled, or whether there is an entitled and a non-entitled party. In either case, a perpetrator seeking to sell the house will need to communicate with the victim/survivor.

3.72 We are aware of a recent petition to the Scottish Parliament on this point. Petition 1981 is as follows:

"Calling on the Scottish Parliament to urge the Scottish Government to strengthen legislation to stop perpetrators of domestic abuse, who have been excluded from the matrimonial home by a court order, being able to cause further trauma and distress to their victims by trying to force the sale of the property."¹⁰⁵

¹⁰² 1981 Act, s 6(3); 2004 Act, s 106(3).

¹⁰³ EM Clive, *The Law of Husband and Wife* (4th edn, 1997), para 15.063. See also the discussion on the impact on conveyancing practice caused by these provisions in the 1981 Act, in G Gretton and R Reid, *Conveyancing*, 5th ed, para 10-14.

¹⁰⁴ Scot Law Com No. 135, 1992, para 11.9. This Report also made a number of recommendations for minor revisions to the 1981 Act, in para 11.23.

¹⁰⁵ PE 1981, of 9 November 2022, submitted by Caroline Gourlay. The petition was closed on 25 October 2023. (the petition, together with written submissions in respect of it, are available at: <https://www.parliament.scot/get-involved/petitions/view-petitions/pe1981-ensure-perpetrators-of-domestic-abuse-who-have-been-excluded-from-the-matrimonial>).

3.73 The petition also referred to the distress experienced by the victim/survivor who is contacted by the perpetrator’s solicitor in relation to the sale of the house.

“The court granted an interdict and exclusion order preventing the perpetrator from contacting me or causing me mental injury or distress. Within weeks of the exclusion order being issued I received solicitors letters about the sale of the property. I have contacted dozens of people but no one can tell me if the interdict and exclusion order prevents him from doing that.”¹⁰⁶

3.74 This raises two issues: whether an excluded party should be prohibited from being able to force the sale of the home; and whether they (and their solicitor) should be precluded from contacting the victim/survivor in order to do so. Where the excluded party owns or co-owns the house, there are already a range of measures to protect the victim/survivor. For example, in the case of co-ownership, the sale can only proceed with (i) the consent of the co-owners; or (ii) a court decree authorising division and sale, as discussed at paras 3.43 to 3.45 above – and the court has power under the 1981 Act and 2004 Act to refuse such a decree.¹⁰⁷ Where only one party owns the house, there are statutory measures to protect the occupancy rights of a non-entitled party. In certain circumstances, occupancy rights continue after the house has been sold, entitling the non-entitled party to continue to live there, notwithstanding the change in ownership. This has been discussed above at paras 3.52 to 3.55 and 3.65 to 3.70. We ask a question at para 3.70 about what further legal measures could prevent the sale of the property to defeat the occupancy rights of the non-entitled party.

3.75 In relation to the second point, it seems clear that a perpetrator could be prohibited, by way of interdict, from contacting the victim/survivor directly, if that communication causes fear, alarm or distress. However, it would be highly problematic if they could not instruct a solicitor to send letters relating to legal matters. Sending a letter or email is not illegal in and of itself, and a solicitor has an obligation to act on the reasonable instructions of their client. Nevertheless, we appreciate the distress that could be caused for the victim/survivor, on receiving a letter from their partner’s or ex-partner’s solicitor. This was made very clear in Petition PE 1981. We therefore wonder if it should be possible for the court to order that any communication from the perpetrator or anyone acting on their behalf should be directed to the victim/survivor’s solicitor or a specified contact named in the order who is willing to receive such correspondence. That would allow the victim/survivor’s solicitor or named contact to assess the information in the correspondence and communicate it appropriately with the victim/survivor. This protection could of course be used regardless of whether there was an exclusion order, and regardless of whether the correspondence was in relation to the sale of a property, or the transfer of a tenancy, or any other legal matter.

3.76 We ask:

- 14. Should it be possible, as part of an exclusion order or any other civil protection order, for the court to require any communication between the**

¹⁰⁶ PE 1981, of 9 November 2022, submitted by Caroline Gourlay (available at: <https://www.parliament.scot/get-involved/petitions/view-petitions/pe1981-ensure-perpetrators-of-domestic-abuse-who-have-been-excluded-from-the-matrimonial>).

¹⁰⁷ 1981 Act, s 19, with reference to s 3; 2004 Act, s 110, with reference to s 103.

perpetrator (or anyone acting on their behalf), and the victim/survivor, to be addressed only to the victim/survivor's solicitor or named contact?

Chapter 4 Existing Legal Framework

4.1 As noted in Chapter 1, there are numerous pieces of legislation which make provision for civil remedies for domestic abuse in Scotland. This chapter sets out the current regime of those civil remedies. Broadly, a victim/survivor who seeks a civil protection order will seek either an interdict, possibly along with an exclusion order, or alternatively a non-harassment order. We start by reviewing the legal regime governing interdicts and exclusion orders, before moving on to non-harassment orders. We conclude the chapter with a review of other relevant legislation. In this chapter, we ask a number of questions seeking views as to reform of certain existing provisions as regards civil remedies for domestic abuse. In Chapter 5, we consider proposals for a new law. We envisage that the proposals for change of the existing law and a new law in these two chapters can operate together, as discussed in paras 5.154 to 5.157.

Part 1: Exclusion Orders and Interdicts

4.2 This Part of the chapter looks at exclusion orders and interdicts which can be sought by people who are or were married, in a civil partnership, or cohabiting. Where there is domestic abuse within an intimate relationship where the parties are not and have not been spouses, civil partners, or cohabitants, the relevant legal provisions are discussed at paragraphs 4.75 to 4.77 below.

4.3 An exclusion order is a court order which suspends the occupancy rights¹ of the person named in the order, and means that they have no legal right to live in, or occupy, the house specified in the order, for the duration that the order is in force. It does not affect their legal *ownership or tenancy* of the house (if they are the owner or tenant), but they are not allowed to *occupy* it for the duration of the exclusion order. A victim/survivor may wish to seek an exclusion order against the perpetrator of domestic abuse, so that the victim/survivor and any children of the family can remain in the house in safety, while the perpetrator can no longer live there.

4.4 An interdict is a common law remedy, and has been described as “a most important one, for it proceeds on the principle that prevention is better than cure”.² It is a court order which prohibits certain specified wrongful *future* conduct by the person named in the order:

“Interdict is a remedy, by decree of court, either against a wrong in course of being done, or against an apprehended violation of a party’s rights, to be awarded only on evidence of the wrong, or on reasonable grounds of apprehension that such violation is intended.”³

4.5 Two critical factors are, first, that interdicts can only be sought in respect of future conduct, and are not relevant remedies in respect of any wrongdoing which has already

¹ For a detailed discussion of occupancy rights, see Ch 3.

² H Burn-Murdoch, *Interdict in the Law of Scotland* (Hodge & Co, 1933), p 1, citing Lord Gifford in *Hay’s Trustees v Young* 1877 4R 398.

³ *Hay’s Trustees v Young* 1877 4R 398, at 401.

happened or been accomplished;⁴ and second, that interdicts restrain conduct, and cannot be used to compel particular conduct or require the defender to carry out a certain act in future.⁵

4.6 Interdicts can be used in many different situations in Scots law (for example, a company might seek an interdict to stop another company from infringing its trade mark, or a person might seek an interdict to stop a neighbour from erecting a fence which would block sunlight). In domestic abuse situations, an interdict may be sought by a victim/survivor to prohibit specified abusive conduct by the perpetrator. Interdicts can be sought in their own right, or as ancillary orders alongside other orders, such as an exclusion order. Thus, a victim/survivor might seek an exclusion order together with an ancillary interdict, which together would: (i) suspend the perpetrator's occupancy rights in the home; (ii) prohibit the perpetrator from entering the house or approaching the victim/survivor and children in the street or outside the school, and (iii) prohibit the removal by the perpetrator of any furniture or plenishing from the home.⁶ The exact terms of the interdict will depend on the parties and the harmful conduct which needs to be stopped.

4.7 At common law, an order for a final interdict is an order preventing a defender from carrying out any legally wrongful conduct in future, and can last in perpetuity. An interim interdict will be granted where the pursuer has a *prima facie* case in support of a final interdict and the balance of convenience justifies it (this means that there is a valid case on the face of it, and it is less harmful to grant the interim interdict than to not grant it). An interim interdict may be required to prevent the harm being done pending the hearing for a final interdict.⁷ It is also possible to seek an interim interdict on an "ex parte" basis, which means that the defender is not given notice of the hearing, and will only be notified about the interim interdict if the order is granted. As regards the balance of convenience in cases involving abuse:

"An interim interdict *ex parte* is very hard for the defender to overturn at an interim hearing [that is, pending the final hearing] since where any *prima facie* case based on allegations of violence or abuse towards the pursuer is made out, an interim interdict is likely to be granted on the balance of convenience. Many sheriffs take the view that there is no prejudice to the party restrained."⁸

If granted, an interim interdict will last until it is recalled or until final interdict is granted or refused.

4.8 The current statutory framework for exclusion orders and related interdicts is found in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (the "1981 Act"), for spouses and cohabitants, and in the Civil Partnership Act 2004 (the "2004 Act") for civil partners. These Acts have also been supplemented by subsequent pieces of legislation, which give additional protection, through a power of arrest and criminal sanctions. In order to achieve the most effective protection in law, the applicant therefore needs to rely on multiple statutes, cumulatively building up the protective measures in place. For example, a married

⁴ H Burn-Murdoch, *Interdict in the Law of Scotland* (Hodge & Co, 1933), p 1.

⁵ A court order which requires a person to do something is an order for specific implement: see H Burn-Murdoch, *Interdict in the Law of Scotland* (Hodge & Co, 1933), Chapter VI "Specific Performance (The Enforcement of Positive Acts).

⁶ 1981 Act, s 4(4).

⁷ H Burn-Murdoch, *Interdict in the Law of Scotland* (Hodge & Co, 1933), p 11.

⁸ Butterworth's Scottish Family Law Service, Division A 'Married Couples' (3) Domestic Violence, para A384. See for example *McKenna v McKenna* 1984 SLT (Sh Ct) 92. Proceedings are *ex parte* when only one party is present, and the party against whom proceedings are brought, for example the perpetrator, is not heard.

victim/survivor who wishes an exclusion order with ancillary interdict which can be enforced through arrest and criminal conviction will need to seek the following:

- i) An exclusion order under the Matrimonial Homes (Family Protection) (Scotland) Act 1981;⁹
- ii) An ancillary interdict, in terms of the same Act;¹⁰
- iii) A power of arrest under the Protection from Abuse (Scotland) Act 2001,¹¹ which gives the police power to arrest the perpetrator; and
- iv) A determination that this is a domestic abuse interdict under the Domestic Abuse (Scotland) Act 2011,¹² which means that breach of the interdict is a criminal offence.

4.9 Accordingly, the applicant and their solicitor need to refer to the common law together with a number of statutory provisions to achieve the maximum level of protection. These statutory provisions also vary depending on the relationship between the victim/survivor and the perpetrator: the writ will need to specify the correct statutory sections depending on whether they are married, in a civil partnership, or cohabiting. The picture that emerges is of a complex and fragmented legal regime for victim/survivors and their advisors to navigate.

4.10 In this section, we set out as clearly as possible the current legal regime, starting with the provisions for an exclusion order and ancillary interdict for spouses, then civil partners, and then cohabitants. 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, and have, typically, been enacted after the protections for spouses: it should not be taken as implying any hierarchy of relationships. After reviewing exclusion orders and interdicts for these three relationship types, we turn to the attachment of powers of arrest and determinations of an interdict as a domestic abuse interdict.

4.11 The discussion in this section refers to exclusion orders and interdicts and should be taken to include interim exclusion orders and interim interdicts, unless the distinction is made specifically.

Exclusion orders and interdicts: spouses

The Matrimonial Homes (Family Protection) (Scotland) Act 1981

4.12 As discussed in Chapter 3, the 1981 Act makes provision for occupancy rights for entitled and non-entitled spouses. A spouse with statutory occupancy rights has, if in occupation, the right to continue to occupy, or, if not in occupation the right to enter and occupy

⁹ 1981 Act, s 4(1).

¹⁰ 1981 Act, s 4(4) and potentially s 4(5). See paras 4.22 to 4.28 for further discussion of interdict as a remedy for domestic abuse between spouses.

¹¹ Protection from Abuse (Scotland) Act 2001, s 1(1A).

¹² Domestic Abuse (Scotland) Act 2011, s 3.

the matrimonial home,¹³ together with any child of the family.¹⁴ Stemming from occupancy rights are a number of subsidiary rights which exist for the purpose of securing the right of occupancy.¹⁵ Either spouse can seek protection orders stemming from these occupancy rights, namely an exclusion order, typically with an ancillary interdict.

Exclusion orders

4.13 An exclusion order suspends the occupancy rights of an entitled or non-entitled spouse, without affecting any right of ownership or tenancy of the matrimonial home. The practical effect of this is that the excluded spouse will be prohibited from, for example, exercising their right to occupy or enter the matrimonial home without the express permission of the applicant.¹⁶

4.14 The test for making an exclusion order is set out in section 4 of the 1981 Act. Section 4(2) provides that (subject to subsection (3)), the court shall make an exclusion order if it appears to the court that “the making of the order is necessary for the protection of the applicant or any child of the family, from any conduct, or threatened or reasonably apprehended conduct of the non-applicant spouse/cohabitant, which is or would be injurious to the physical or mental health of the applicant or child”. There is no specific mention of domestic abuse in this provision (nor elsewhere in the 1981 Act): the focus is on conduct, or threatened conduct, which is or would be harmful to the health of the applicant or a child living in the house. As Professor Sutherland notes, an exclusion order is “not intended to punish a spouse... although that may be how it is perceived. Rather, it seeks to provide a safe living environment for the victim-spouse and, often, the children”.¹⁷ “Child of the family” is widely defined in section 22 of the 1981 Act as including “any child or grandchild of either spouse, and any person who has been brought up or treated by either spouse as if he or she were a child of that spouse, whatever the age of such a child, grandchild or person may be”. Thus, the child in question could be an adult.¹⁸

4.15 Subsection (3) provides that the court shall *not* make an exclusion order if it appears to the court that the making of the order would be unjustified or unreasonable—

(a) having regard to all the circumstances of the case including the matters specified in paragraphs (a) to (e) of section 3(3) ...;¹⁹ and

¹³ As defined in s 22 of the 1981 Act: “matrimonial home” means any house, caravan, houseboat, or other structure which has been provided or has been made available by one or both of the spouses as, or has become, a family residence and includes any garden or other ground or building usually occupied with or otherwise required for the amenity or convenience of, the house, caravan, houseboat, or other structure; but does not include a residence provided by a person for one spouse to reside in, whether with any child of the family or not, separately from the other spouse. See Ch 3 of this Discussion Paper.

¹⁴ 1981 Act, ss 1(1) and 1(1A). The definition of child of the family is discussed at para 4.14.

¹⁵ 1981 Act, s 2(1).

¹⁶ 1981 Act, s 4(4)(a) and (b). An application may be made whether or not the applicant is in occupation of the matrimonial home at the time of the application (s 4(1) (as amended by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, s 13(5)); *Millar v Millar* 1991 SCLR 649).

¹⁷ E Sutherland, *Child and Family Law*, (3rd edn, 2023), para 4-097.

¹⁸ See also para 3.33.

¹⁹ S 3 makes provision for orders regulating rights of occupancy; subsection (3) provides that the court may make such order relating to the application as appears just and reasonable having regard to all the circumstances, including:

- (a) the conduct of the spouses in relation to each other and otherwise;
- (b) the respective needs and financial resources of the spouses;
- (c) the needs of any child of the family;
- (d) the extent (if any) to which—

(b) where the matrimonial home—

(i) is or is part of an agricultural holding within the meaning of section 1 of the Agricultural Holdings (Scotland) Act 1949; or

(ii) is let, or is a home in respect of which possession is given, to the non-applicant spouse or to both spouses by an employer as an incident of employment,

subject to a requirement that the non-applicant spouse or, as the case may be, both spouses must reside in the matrimonial home, having regard to that requirement and the likely consequences of the exclusion of the non-applicant spouse from the matrimonial home.²⁰

This grants the court discretion as to whether to make the exclusion order, depending on whether the order would be unjustified or unreasonable in all the circumstances. Where the home is part of an agricultural holding or is provided by an employer as an incident of employment, then again the court may determine that it would be unreasonable or unjustified to make the exclusion order. Although this provides a measure of protection for the non-applicant spouse, it also operates as a further barrier to protection for victim/survivors of domestic abuse.²¹

4.16 Exclusion orders must be sought “on notice”, which means that the defender has to be told about the action and given the opportunity to be heard by the court before an exclusion order is made.²² Informing the defender that the pursuer is seeking to exclude them from the matrimonial home could elicit a negative reaction from the defender which leads to further or more severe abuse. Therefore, it is important to ensure that protection is in place for the period between the exclusion order application being served on the defender, and the hearing at which the exclusion order (and ancillary interdict) can be granted *ad interim* (for the intervening or temporary period of time). For this reason, pursuers normally seek an interim interdict at common law (which can be granted without notice)²³ to provide protection during this intervening period. This demonstrates the complexity of the current arrangements for civil

(i) the matrimonial home; and

(ii) in relation only to an order under subsection (2) above, any item of furniture and plenishings referred to in that subsection, is used in connection with a trade, business or profession of either spouse; and

(e) whether the entitled spouse offers or has offered to make available to the non-entitled spouse any suitable alternative accommodation.

²⁰ The fact that the test in s 4(2) can be met, and yet a court may not make an exclusion order, if it considers it would be unjustified and unreasonable for the reasons outline in s 4(3), has been the subject of judicial comment: *Brown v Brown* 1985 SLT 376, per Lord Justice Clerk Wheatley at p 376: ‘We have difficulty in envisaging the circumstances in which an order which is necessary for the protection of the spouse may be “unjustified” or “unreasonable” ...’ and *Millar v Millar* 1991 SCLR 649, Sheriff Principal Maguire at p 651: ‘As has been said before, it is difficult to see how, if an exclusion order is necessary, it can also be unjustified or unreasonable’. In *McCafferty v McCafferty* 1986 SC 178, Lord Justice Clerk Ross discussed the requirements of the test further: “In my opinion before granting an interim exclusion order the court does not require to be satisfied that the applicant spouse would be in immediate danger of suffering irreparable harm. What the statute requires is evidence that an order is needed for the protection of the spouse against a risk of injury to her physical or mental health from the conduct or threatened conduct or reasonably apprehended conduct on the part of the defender; It is injury to health not serious injury to health with which the statute is concerned.” 1986 SC 178 at 182 (Lord Justice Clerk Ross).

²¹ See E Sutherland, *Child and Family Law* (3rd Edn, 2023), para 4-099 for further discussion of both academic and judicial commentary on this point.

²² See Sheriff Andrew M Cubie, *Macphail’s Sheriff Court Practice* (4th Edn, 2022), para 22.81: “Applications for exclusion orders under s 4 of the [1981] Act are made by way of motion after the service of the Initial Writ.”

²³ Sheriff Andrew M Cubie, *Macphail’s Sheriff Court Practice* (4th Edn, 2022), para 21.51: “Where interim interdict has been craved, with supporting averments, it may be granted before or after service of the writ.”

remedies for domestic abuse, where it may be necessary to seek an interim (common law) remedy as a preliminary to seeking the main (statutory) remedy required.

4.17 When making an exclusion order, the court *must* grant certain orders ancillary to it, on the application of the applicant spouse.²⁴ The mandatory orders are:

- a warrant for the summary ejection of the non-applicant spouse from the matrimonial home;
- an interdict prohibiting the non-applicant spouse from entering the matrimonial home without the express permission of the applicant; and
- an interdict prohibiting the removal by the non-applicant spouse (except with the written consent of the applicant or by a further order of the court), of any furniture and furnishings in the matrimonial home.²⁵

4.18 Section 4(5) also *permits* the court to make a number of orders ancillary to an exclusion order, where sought, including an interdict prohibiting the non-applicant spouse from entering or remaining in a specified area in the vicinity of the matrimonial home, and warrant for removal or interdict subject to such terms and conditions as the court may prescribe. There is no test set out in the statute for when such orders should be made, and they therefore remain at the discretion of the court.

4.19 Interim orders suspending the occupancy rights of the non-applicant spouse may be granted, pending the making of an exclusion order, provided the non-applicant spouse has been afforded an opportunity to be heard by or represented before the court.²⁶

4.20 Either spouse may seek to have an exclusion order, and any ancillary interdict, varied or recalled by the court.²⁷ Unless varied or recalled by the court, an exclusion order (and any ancillary order) will cease to have effect on the termination of the marriage or on the cessation of occupancy rights of the entitled spouse;²⁸ or, where both parties have occupancy rights by virtue of joint ownership or joint tenancy, on the cessation of the occupancy rights of both spouses.²⁹

4.21 We have heard that it can be problematic for the victim/survivor when this protection ceases automatically on divorce. The end of the relationship can be one of the most dangerous points for the victim/survivor, and there is evidence that the nature and intensity of the abuse tends to increase at this point.³⁰

“... one of the most dangerous periods for a woman is at the point of separation or after leaving an abusive partner... The date when a divorce is finalised is therefore a

²⁴ 1981 Act, s 4(4).

²⁵ Unless, in relation to a warrant for the summary ejection of the spouse from the home and an interdict prohibiting the removal by the spouse of any furniture and furnishings in the home, the non-applicant spouse satisfies the court that it is unnecessary for it to grant such a remedy.

²⁶ 1981 Act, s 4(6).

²⁷ 1981 Act, s 5(1).

²⁸ Such as on transfer of tenancy/title or sale of the property, but subject to the protections in s 6(1) of the Act concerning dealings, for example requiring any sale of the property to be in good faith and for value (discussed in Ch 3).

²⁹ 1981 Act, s 5(1).

³⁰ R Desai, S Bandyopadhyay, S Zafar, and C Bradbury-Jones, (2022) “The Experiences of Post-Separation Survivors of Domestic Violence During the Covid-19 Pandemic: Findings From a Qualitative Study in the United Kingdom”, *Violence Against Women*, 0(0), p 2.

significantly vulnerable period for a victim of domestic abuse. To cease protection at this time actively places a victim in harm's way."³¹

An exclusion order is predicated on the existence of occupancy rights in the matrimonial home and, at the point of divorce, there is no longer a matrimonial home, nor any legal basis for the non-entitled (ex)spouse to benefit from occupancy rights. However, in finalising the divorce, the court has power to make provision in relation to the house (for example, an order for sale or regulating occupation of the house),³² thereby offering protection to a spouse at the end of the relationship. While the court can regulate the occupation of the house at divorce, it has no power to make separate provision for any ancillary interdicts which will also come to an end when the primary exclusion order comes to an end. We note that this only applies to interdicts under section 4 of the 1981 Act, which are ancillary to an exclusion order, and which therefore fall at the point of divorce along with the exclusion order. Any other interdict continues until recall or expiry. We understand that interdicts are routinely craved during divorce actions. Accordingly we ask:

15. In your experience, as a practitioner or otherwise, is it an issue that interdicts ancillary to exclusion orders fall at the point of divorce or dissolution, and if so, why?

Matrimonial interdicts

4.22 The 1981 Act defines "matrimonial interdicts,"³³ being an interdict, including an interim interdict, which:

"(a) restrains or prohibits any conduct of one spouse towards the other spouse or a child of the family; or

(b) subject to subsection (3), prohibits a spouse from entering or remaining in-

(i) a matrimonial home;

(ii) any other residence occupied by the applicant spouse;

(iii) any place of work of the applicant spouse;

(iv) any school attended by a child in the permanent or temporary care of the applicant spouse."³⁴

4.23 From this, it can be seen that "matrimonial interdict" is simply a descriptive term: it is any interdict between spouses which prohibits or restrains certain conduct. It is not restricted to interdicts under the 1981 Act. As Sheriff Principal Caplan QC observed, it is not competent to grant a "matrimonial interdict":

".. the said paragraph of s. 14(2) [paragraph (a)] does not empower the grant of any specific interdict but merely defines the category of interdict to which ss. 14 and 15 of the Act apply. In my view to grant "matrimonial interdict" is meaningless since the

³¹ A Howells, "Out with the Old, in with the New": Remedies for Domestic Abuse in Scotland in Need of Reform?" *Edinburgh Student Law Review*, 2021, Vol IV, Issue 2, p 68.

³² Family Law (Scotland) Act 1985, ss 8 and 14(2) and (3), regulating incidental orders. See also E Sutherland, *Child and Family Law*, (3rd edn, 2022), vol.2, para 4-072.

³³ 1981 Act, s 14.

³⁴ 1981 Act, s 14(2).

phrase itself has no content unless applied to an interdict in specific terms. ... Whether or not a particular interdict is a matrimonial interdict for the purposes of the statute arise from the operation of the law and the sheriff's pronouncement on the matter can in my view serve no purpose."³⁵

Likewise, Professor Clive has observed that:

"The term matrimonial interdict is used in the Act as a convenient label for certain types of interdicts, but the interdicts in question remain interdicts. The Act does not create a new remedy: it merely strengthens an old. Accordingly it is meaningless to crave, conclude or grant a matrimonial interdict."³⁶

4.24 Thus, any interdict between spouses which restrains or prohibits certain conduct between them can be described as a matrimonial interdict, but it remains at heart an interdict.

4.25 One issue that had posed problems in the past was highlighted in this Commission's Report on "Occupancy Rights in relation to Domestic Violence", published in 1980. This was whether, under the common law, it was "competent for a court to grant an interdict prohibiting the husband from assaulting or molesting his wife".³⁷ To remove any doubt, the 1981 Act therefore makes important provision that a matrimonial interdict will not be incompetent simply because the spouses are living together as "man and wife".³⁸

4.26 A court may not grant an interdict which prohibits the defender from entering or remaining in a matrimonial home, unless it is ancillary to an exclusion order.³⁹

4.27 In many cases, the spouse will seek an interdict ancillary to an exclusion order, in terms of section 4(4) and (5) of the 1981 Act. However, it is also open to the spouse to seek a standalone interdict under the common law (which can still be referred to as a matrimonial interdict as it prohibits or restrains the conduct of one spouse against another⁴⁰) and this might also be necessary if the exclusion order is refused by the court. The interdict would prohibit specified conduct, depending on the terms of the interdict sought. In domestic abuse cases, the interdict will typically be in respect of molestation, to prevent "... assault, nuisance or any other obviously vexatious conduct... [including] verbal abuse or physical threats".⁴¹ The crave might be worded as follows: to prohibit the defender from "molesting the pursuer by abusing [him/her] verbally, by threatening [him/her], by putting [him/her] into a state of fear, alarm or

³⁵ *McKenna v McKenna*, 1984 SLT (Sh Ct) 92 and 95.

³⁶ EM Clive *Husband and Wife* (4th ed 1997) para 15.104.

³⁷ Scot Law Com No. 60, 1980, para 4.26. Clive noted there was evidence that different courts adopted different approaches to this question: EM Clive, *The Law of Husband and Wife in Scotland* (4th edn, W Green), para 15.106.

³⁸ 1981 Act, s 14(1). Note that "man and wife" is the wording used in s 14 of the 1981, but it must be read subject to s 4 of the Marriage and Civil Partnership (Scotland) Act 2014, which clarifies that, as of 2014 when that Act came into force, any references to spouses, however worded, include references to marriage between parties of the same sex and between parties of different sexes.

³⁹ Ss 14(4) and (5). In relation to spouses, the court may also grant such an interdict where, by virtue of s 1(3), the court refuses leave to an entitled spouse to exercise occupancy rights.

⁴⁰ 1981 Act, s 14(2).

⁴¹ EC Reid, *The Law of Delict in Scotland*, (EUP, 2023), para 28.22 (hereafter "EC Reid, *The Law of Delict in Scotland*"). Note that molestation originally used to be relevant in a property context, and particularly "directed towards resolving neighbourhood disputes" but that purpose shifted over time, and it is no longer used in relation to property. See further K McK Norrie, "The Intentional Delicts", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, (OUP, 2000), at pp 493-495. Visser and Whitty note that "The remedy of interdict against personal molestation [is] now well established": D Visser and N Whitty, "The Structure of the Law of Delict in Historical Perspective", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, (OUP, 2000), at p 471.

distress and by using violence towards [him/her]”. It would also be possible to seek an interdict in respect of any of the other common law delicts where relevant, such as assault,⁴² sexual assault,⁴³ wrongful deprivation of liberty,⁴⁴ or trespass.⁴⁵ However, we understand from practitioners that these are not commonly used in respect of domestic abuse. The statutory delict of harassment also gives rise to a remedy in interdict, under the Protection from Harassment Act 1997.⁴⁶

4.28 An interdict would also be available where the parties are divorced, although it would no longer be called a matrimonial interdict, and an exclusion order would no longer be available. However, an interdict could be sought to protect the victim/survivor from fear, alarm or distress, or other wrongful conduct perpetrated by their ex-spouse. As discussed above, the automatic termination of an exclusion order and ancillary interdict on divorce risks leaving a victim/survivor unprotected at the end of the marriage. As discussed at paragraph 4.21 and Question 15, we seek views on whether this creates problems in practice.

Exclusion orders and interdicts: civil partners

The Civil Partnership Act 2004

4.29 Civil partners can also seek exclusion orders and ancillary interdicts on the same terms as spouses, but the governing legislation is different. The relevant statutory provisions are contained in the Civil Partnership Act 2004.

4.30 As with spouses under the 1981 Act, a non-entitled partner under the 2004 Act acquires occupancy rights automatically in “the family home”⁴⁷ (instead of the matrimonial home) by virtue of statutory provision when they enter into a civil partnership with the owner or tenant.⁴⁸ Accordingly, a civil partner may apply to court for an exclusion order suspending the occupancy rights of the other civil partner in the family home.⁴⁹ Under the 2004 Act, the test for an exclusion order is that the making of the order is “necessary for the protection of the applicant or any child of the family, from any conduct, or threatened or reasonably apprehended conduct of the non-applicant partner, which is or would be injurious to the physical or mental health of the applicant or child”.⁵⁰ This follows the wording of the 1981 Act in relation to spouses and, as with that Act, there is no specific mention of domestic abuse: the focus is on conduct, or threatened conduct, which is or would be harmful to the health of the applicant or a child living in the house.

⁴² EC Reid, *The Law of Delict in Scotland*, para 16.11 onwards, and para 16.59 in respect of assault which is constituted by the intentional infliction of mental harm.

⁴³ EC Reid, *The Law of Delict in Scotland*, paras 16.22 - 16.23.

⁴⁴ EC Reid, *The Law of Delict in Scotland*, paras 17.10 – 17.16.

⁴⁵ EC Reid, *The Law of Delict in Scotland*, paras 23.01 – 23.04.

⁴⁶ Protection from Harassment Act 1997, s 8(5)(b).

⁴⁷ Defined in s 135(1) as, subject to subsection (2), “any house, caravan, houseboat or other structure which has been provided or has been made available by one or both of the civil partners as, or has become, a family residence and includes any garden or other ground or building usually occupied with, or otherwise required for the amenity or convenience of, the house, caravan, houseboat or other structure but does not include a residence provided or made available by a person for one civil partner to reside in, whether with any child of the family or not, separately from the other civil partner.” This mirrors the definition of “matrimonial home” under the 1981 Act for spouses.

⁴⁸ 2004 Act, s 101(1).

⁴⁹ 2004 Act, s 104(1). The court may vary or recall any order regulating occupancy rights or an exclusion order (s 105(1)).

⁵⁰ 2004 Act, s 104(2).

4.31 A “relevant interdict”⁵¹ may be sought under section 113(1) of the 2004 Act, which serves the same function as a matrimonial interdict and the same conditions apply to the granting of relevant interdicts which prohibit an abusive partner from entering or remaining in the home.⁵² As with matrimonial interdicts, the term “relevant interdict” is a descriptive label which covers any interdict between civil partners which falls within the definition in section 113(2).⁵³

4.32 While civil partners can seek an interdict ancillary to an exclusion order in terms of section 104(4) and (5) of the 2004 Act, it is also possible for them to seek a standalone interdict under the common law, and this might be necessary if the exclusion order is refused by the court. The interdict would prohibit specified conduct, depending on the terms of the interdict sought. As with spouses, in domestic abuse cases, the interdict will typically be in respect of molestation, to prevent “...assault, nuisance or any other obviously vexatious conduct... [including] verbal abuse or physical threats”.⁵⁴ The crave might be worded as follows: to prohibit the defender from “molesting the pursuer by abusing [him/her] verbally, by threatening [him/her], by putting [him/her] into a state of fear, alarm or distress and by using violence towards [him/her]”. As noted above in respect of spouses, it would also be possible to seek an interdict in relation to any of the other common law delicts where relevant, such as assault,⁵⁵ sexual assault,⁵⁶ wrongful deprivation of liberty,⁵⁷ or trespass.⁵⁸ However, we understand from practitioners that these are not commonly used in respect of domestic abuse. The statutory delict of harassment also gives rise to a remedy in interdict, under the Protection from Harassment Act 1997.⁵⁹

4.33 An exclusion order and any ancillary interdict can be varied or recalled by the court on the application of either partner.⁶⁰ Otherwise, the order(s) will cease to have effect:

- on the dissolution of the civil partnership; or,
- where there is an entitled and a non-entitled partner, on the entitled partner ceasing to be entitled (for example, on sale or on termination of tenancy⁶¹); or
- where both partners are entitled or permitted by a third party to occupy, on both partners ceasing to be so entitled or permitted (on sale/termination of tenancy).⁶²

⁵¹ 2004 Act, s 113(2) defines “relevant interdict” as “an interdict, including an interim interdict, which— (a) restrains or prohibits any conduct of one civil partner towards the other civil partner or a child of the family, or (b) subject to subsection (3), prohibits a civil partner from entering or remaining in— (i) a family home, (ii) any other residence occupied by the applicant civil partner, (iii) any place of work of the applicant civil partner, (iv) any school attended by a child in the permanent or temporary care of the applicant civil partner.”

⁵² 2004 Act, s 113(4).

⁵³ Restraining and prohibiting any conduct of one civil partner towards the other, or a child of the family, or which prohibits a civil partner from entering or remaining in a family home, any other residence occupied by the applicant, the applicant’s place of work or any school attended by a child in the applicant’s care.

⁵⁴ EC Reid, *The Law of Delict in Scotland*, at 1033.

⁵⁵ EC Reid, *The Law of Delict in Scotland*, para 16.11 onwards, and para 16.59 in respect of assault which is constituted by the intentional infliction of mental harm.

⁵⁶ EC Reid, *The Law of Delict in Scotland*, paras 16.22-16.23.

⁵⁷ EC Reid, *The Law of Delict in Scotland*, paras 17.10 – 17.16.

⁵⁸ EC Reid, *The Law of Delict in Scotland*, paras 23.01 – 23.04.

⁵⁹ Protection from Harassment Act 1997, s 8(5)(b).

⁶⁰ 2004 Act, s 105(1).

⁶¹ Subject to the restrictions on dealing in s 106 of the 2004 Act, as discussed further in Ch 3.

⁶² 2004 Act, s 105(2).

A common law interdict would also be available where the parties' civil partnership has been dissolved, although it would no longer be called a relevant interdict, and an exclusion order would no longer be available. However, an interdict could be sought to protect the victim/survivor from fear, alarm or distress, or other wrongful conduct perpetrated by their ex-civil partner.

4.34 As with divorce, the automatic termination of an exclusion order and ancillary interdict on dissolution of a civil partnership risks leaving a victim/survivor unprotected at the end of the civil partnership. As discussed at paragraph 4.21 and Question 15, we seek views on whether this creates problems in practice.

Exclusion orders and interdicts: cohabitants

4.35 The position for cohabitants seeking civil remedies for domestic abuse is similar to that for spouses and civil partners, with a number of key exceptions, which arguably weaken their legal position and ability to obtain protection, as outlined below.

The 1981 Act

4.36 Occupancy rights, exclusion orders, and ancillary interdicts for cohabitants are regulated by the 1981 Act. However, cohabitants are treated differently to spouses under the 1981 Act, and to civil partners under the 2004 Act, in relation to occupancy rights. As discussed in Chapter 3, if only one cohabitant is the owner or tenant, or is permitted by a third party to occupy the property, then only that cohabitant, the "entitled partner", is entitled to occupy the property.⁶³ The other cohabitant, the "non-entitled partner", has no automatic right of occupancy and must therefore apply to the court for an order granting occupancy rights.⁶⁴ The court must be satisfied that the applicant and the entitled partner are a "cohabiting couple" before such an order may be made.⁶⁵ While an order granting occupancy rights is in force, or where both cohabitants are entitled or are permitted by a third party to occupy the house, the 1981 Act exclusion order provisions apply (subject to necessary modifications⁶⁶) to the cohabiting couple as they apply to spouses, and have effect in relation to any child residing with the cohabiting couple.⁶⁷ The house in question is referred to as "the house" and is defined as including "a caravan, houseboat or other structure in which the couple are cohabiting and any garden or other ground or building attached to, and usually occupied with, or otherwise

⁶³ 1981 Act, s 18(1)(a). See also Ch 3, paras 3.14 to 3.32.

⁶⁴ 1981 Act, s 18(1).

⁶⁵ Defined in s 18(1) as "a man and a woman [who] are living with each other as if they were man and wife or two persons of the same sex are living together as if they were civil partners". In determining whether the two persons are a "cohabiting couple", the court shall have regard to all the circumstances of the case, including: (a) the time for which it appears they have been living together; and (b) whether there is any child of whom they are the parents or who they have treated as a child of theirs (s 18(2)). Occupancy rights for cohabitants may be granted for a maximum period of 6 months, which may be extended by the court at the end of each such period for a further period not exceeding 6 months (s 18(1)).

⁶⁶ 1981 Act, s 18(3) provides that while an order granting an application for occupancy rights under s 18(1) is in force, or whether both partners of a cohabiting couple are entitled, or permitted by a third party, to occupy the house, the following provisions of the Act apply to cohabitants (and have effect in relation to any child residing with the couple) subject to the following modifications: ss 2 and 3 (except subsection (1)(a)), 4, 5(1) (in respect only of the power of the court to vary or recall an order regulating occupancy rights under s 3 or an exclusion order, under s 4), 13 and 22.

⁶⁷ S 18(3). Ss 2 and 3 (except subs (1)(a)), 4, 5(1) (the words from the beginning to "Act" where it first occurs), 13 and 22 apply in relation to the cohabitants while they are both entitled).

required for the amenity or convenience of, the house, caravan, houseboat or other structure”.⁶⁸

4.37 In comparison with spouses and civil partners, non-entitled cohabitants therefore have an extra step to take before they can obtain an exclusion order: only once occupancy rights have been granted by the court, could a cohabitant then seek an exclusion order, as it is necessary for both partners to have occupancy rights before either can seek an exclusion order, or any other order or remedy under the 1981 Act.⁶⁹ A further distinction between spouses and civil partners on the one hand and cohabitants on the other is that a grant of occupancy rights to a non-entitled partner only lasts for a six month period (although the period may be extended by a further period or periods of six months).⁷⁰ We have put forward proposals in relation to this limited period in Chapter 3.⁷¹

4.38 A cohabitant may obtain a “domestic interdict” in terms of the 1981 Act. Section 18A⁷² specifies that a domestic interdict is an interdict granted on the application of a person who is (or was) living with another person as if they were spouses, against their partner (or former partner), for the purposes of:

- restraining or prohibiting such conduct of the defender towards the pursuer, or any child in the permanent or temporary care of the pursuer;
- prohibiting the defender from entering or remaining in a family home⁷³ occupied by the pursuer and defender, any other residence occupied by the pursuer, any place of work of the pursuer, or any school attended by a child in the permanent or temporary care of the pursuer.⁷⁴

It therefore has the same purpose as a matrimonial interdict for spouses and a relevant interdict for civil partners, and similarly the term “domestic interdict” is descriptive, indicating that the parties to the interdict are cohabitants, rather than defining the nature of the interdict itself.

4.39 As with spouses and civil partners, it is also open for cohabitants to seek a standalone interdict under the common law. In such cases, the interdict will typically be in respect of molestation, to prevent “...assault, nuisance or any other obviously vexatious conduct... [including] verbal abuse or physical threats”.⁷⁵ The crave might be worded as follows: to prohibit the defender from “molesting the [pursuer] by abusing [him/her] verbally, by threatening [him/her], by putting [him/her] into a state of fear, alarm or distress and by using

⁶⁸ 1981 Act, s 18(6).

⁶⁹ 1981 Act, s 18(3).

⁷⁰ 1981 Act, s 18(1).

⁷¹ See Ch 3, paras 3.23 to 3.29, and Question 2.

⁷² S 18A was inserted into the 1981 Act by the Family (Scotland) Act 2006 (s 31(3)). Prior to this, s 18(3) provided that while an order granting occupancy rights is in force, or where both cohabitants are entitled to occupy a house where they are cohabiting, a number of provisions of the 1981 Act applied to cohabitants (subject to any necessary modifications) as they apply to spouses. These provisions were ss 2, 3 (except subsection (1)(a)), 4, 5(1), 13, 14, 15 (except the words in subsection (2) from “and such a power of arrest” to the end), 16, 17, and 22. The effect of s 18(3) as originally enacted, was that certain provisions, including the provisions on exclusion orders and matrimonial interdicts were extended to apply to cohabitants. S 18(3) was consequentially amended by the 2006 Act, following the introduction of a set of bespoke provisions on “domestic interdicts” for cohabitants (ss 18A and 18B), inserted into the 1981 Act by the 2006 Act.

⁷³ “Family home” is defined in s 18A(3), and “child of the pursuer and the defender” is defined in s 18A(5).

⁷⁴ 1981 Act, s 18A(2).

⁷⁵ EC Reid, *The Law of Delict in Scotland*, at 1033.

violence towards [him/her]”. Again, it would also be possible to seek an interdict in respect of any of the other common law delicts where relevant, such as assault,⁷⁶ sexual assault,⁷⁷ wrongful deprivation of liberty,⁷⁸ or trespass.⁷⁹ However, we understand from practitioners that these are not commonly used in respect of domestic abuse. The statutory delict of harassment also gives rise to a remedy in interdict, under the Protection from Harassment Act 1997.⁸⁰

4.40 The original wording of the provisions in the 1981 Act gave rise to some confusion as to whether occupancy rights and protection orders would be available where a cohabitant had moved out as a result of the abuse, and the parties were therefore no longer “cohabiting”. This was addressed by the court in *Armour v Anderson*.⁸¹ In this case, the applicant, who sought an exclusion order, cohabited with the defender for two years before separating. They were joint tenants of the house they had shared. The applicant sought the exclusion order ten months after the parties had separated. The orders were granted, and the defender appealed on the basis that section 18 of the 1981 Act did not cover couples who had lived, but were no longer living, together. The Sheriff Principal granted the appeal on the basis that the orders were incompetent. The pursuer appealed to the Inner House, which allowed the appeal and affirmed the sheriff’s decision. Lord President Hope, delivering the opinion of the First Division, noted:

“There are... a number of difficulties in the wording of section 18 which make it far from easy to find a satisfactory answer to the question which has been raised in this case. The section has been drafted entirely in the present tense, and no attention appears to have been given to the problem of definition which arises in applying provisions which have been designed for the status of marriage to cohabitation, which is not a status but is a question of fact and intention”.⁸²

4.41 Lord President Hope noted that there is no requirement, where a section 18(1) order granting occupancy rights is in force, that the parties are still living together in the house when an application is made under any of the provisions mentioned in subsection (3) (which includes an exclusion order under section 4). Accordingly, a party who was not in need of an order granting occupancy rights, because (as in this case) they were entitled or permitted by a third party to occupy the house, should not be in a weaker position. It should therefore be possible for an entitled cohabitant to seek an exclusion order even where the parties are no longer living together:

“... the only tests which require to be satisfied for the application to be competent ... are that both partners are entitled or are permitted by a third party to occupy the house and the house was one where, while so entitled or permitted, they were cohabiting when the conduct occurred which gave rise to the application.”⁸³

⁷⁶ EC Reid, *The Law of Delict in Scotland*, para 16.11 onwards, and para 16.59 in respect of assault which is constituted by the intentional infliction of mental harm.

⁷⁷ EC Reid, *The Law of Delict in Scotland*, paras 16.22-16.23.

⁷⁸ EC Reid, *The Law of Delict in Scotland*, paras 17.10 – 17.16.

⁷⁹ EC Reid, *The Law of Delict in Scotland*, paras 23.01 – 23.04.

⁸⁰ Protection from Harassment Act 1997, s 8(5)(b).

⁸¹ *Armour v Anderson* 1994 SC 488.

⁸² *Armour v Anderson* 1994 SC 488, Lord President (Hope) at 495.

⁸³ *Armour v Anderson* 1994 SC 488, Lord President (Hope) at 496.

4.42 Although the Inner House resolved this problem with the terminology in the 1981 Act, it remains the case that the wording on the face of the statute makes it “far from easy” to apply it to cohabitants. We think it is desirable to ensure that any test as to when a cohabitant can seek an exclusion order is clear on the face of the statute, and that it should expressly cover cohabitants and ex-cohabitants where they have occupancy rights, whether as entitled or non-entitled partners. We therefore propose that the test for an exclusion order for cohabitants should include parties who are *or were* cohabiting, so long as both parties have occupancy rights, whether by virtue of being entitled or as a result of an order under section 18.

4.43 We seek views on this:

16. Should statutory provision for an exclusion order for cohabitants expressly include parties who were cohabiting, so long as both parties have occupancy rights?

4.44 Where a cohabiting relationship has otherwise come to an end, so that the parties are no longer cohabitants, one party would still be entitled to seek an interdict to protect them from fear, alarm or distress, or other wrongful conduct perpetrated by their former cohabitant. However, it would no longer be called a domestic interdict, and a party without occupancy rights could no longer seek them under section 18. Exclusion orders would no longer be available.

The test for an exclusion order

4.45 We have heard from practitioners, stakeholders, and our Advisory Group members that the requirement of necessity for obtaining an exclusion order sets a “high and severe test”⁸⁴ and makes it very difficult to obtain a final order. The applicant must show that the order is “necessary for the protection of the applicant or any child of the family from any conduct or threatened or reasonably apprehended conduct of the non-applicant spouse which is or would be injurious to the physical or mental health of the applicant or child.”⁸⁵ Even if the order is judged to be necessary, the court can still refuse it if the exclusion order would be “unjustified or unreasonable” in all the circumstances of the case, including where the home in question is an agricultural holding, or is given or required as part of the defender’s employment.⁸⁶

4.46 Stakeholders have commented that a high evidential standard is required to satisfy this test, and the perpetrator’s behaviour has to be quite severe. One practitioner commented that when seeking an exclusion order at proof, they would require reports from medical professionals and possibly also the school attended by the children, as well as affidavits, suggesting that this is because courts are slow to exclude someone from a property in which they have occupancy rights. They also noted that the evidential burden is harder to meet than for an interdict or non-harassment order, so obtaining an exclusion order is harder to achieve.

4.47 In this Commission’s 1980 Report⁸⁷ which led to the 1981 Act, our predecessors did not discuss the level of the test required to obtain an exclusion order in any detail but they did note that where an interdict was not sufficient to ensure “peaceable possession of the matrimonial homes” to a wife and children who require to share that home with a violent

⁸⁴ Morag McEwan, “Exclusion Orders”, 2024 Green’s Family Law Bulletin, 191, 6-8.

⁸⁵ 1981 Act, s 4; 2004 Act, s 104 (subject to 1981 Act, s 4(3) and 2004 Act, s 104(3)).

⁸⁶ 1981 Act, s 4(3); 2004 Act, s 104(3).

⁸⁷ Scot Law Com No. 60, 1980.

husband”, “... then it may be necessary in the last resort to order what interdict cannot order: namely the exclusion of the husband from the matrimonial home.”⁸⁸ Therefore, it was considered that seeking an exclusion order would only be required as a last resort. In the context of civil remedies generally, Alison Howells notes that:

“Victims may encounter significant barriers trying to demonstrate that a civil order or a power of arrest is “necessary” for their protection. (Matrimonial Homes (Scotland) Act 1981, Section 4(2) and Protection from Abuse Act 2001, Section 1(1A) (C)). A test of necessity places an unfair burden on victims and does not reflect the practical reality that domestic abuse is a largely hidden crime that takes place behind closed doors... Accordingly, victims will often struggle to accumulate evidence of the abuse they have endured.”⁸⁹

4.48 We would be grateful for further evidence as to the current test of “necessity” for an exclusion order. We therefore ask:

- 17. Is the statutory test of necessity for an exclusion order too high?**
- 18. What changes, if any, would you suggest to the statutory test for an exclusion order?**

Questions of terminology

4.49 The fact that the current statutory regime for exclusion orders, ancillary interdicts and partner-to-partner interdicts is organised according to the type of relationship results in over-complicated terminology. Those with occupancy rights are either entitled or non-entitled spouses, or entitled or non-entitled partners (there is no distinction here between civil partners and cohabitants). The same remedy has a different name depending on whether it is between spouses, civil partners, or cohabitants, being a matrimonial interdict, relevant interdict, or domestic interdict respectively. It would be possible to simplify the terminology without making any substantive change to the rights in question. Introducing the same terminology for entitled and non-entitled parties, and for interdicts, without distinction based on the nature of the relationship, would promote simplicity, and coherence. The use of different terminology (where there is no substantive difference) adds to confusion for those trying to navigate the system. The terminology could be simplified and applied consistently. For example, the 1981, 2001 and 2004 Acts could refer to:

- i) “entitled party” in place of entitled spouse or entitled partner;
- ii) “non-entitled party” in place of non-entitled spouse or non-entitled partner;
- iii) “partner interdict” in place of matrimonial, relevant or domestic interdict.

4.50 In relation to the different terms used for the house in question, being the matrimonial home, family home, and home, Sutherland has commented that “The term ‘couple’s home’ might be a more appropriate generic term”.⁹⁰ While we agree that it would be preferable to

⁸⁸ Scot Law Com No. 60, 1980, para 4.1.

⁸⁹ A Howells, “Out with the Old, in with the New”: Remedies for Domestic Abuse in Scotland in Need of Reform?” *Edinburgh Student Law Review*, 2021, Vol IV, Issue 2, p 7.

⁹⁰ E Sutherland, *Child and Family Law* (3rd edn, 2023), para 4-061.

have a single term to describe the couple's home, we are concerned that reform here would have ramifications beyond the 1981 Act and 2004 Act. For example revising the terminology would impact on the use of "matrimonial home" in the Family Law (Scotland) Act 1985, in the very different context of financial provision on divorce, where the definition makes specific reference to the term in the 1981 Act.⁹¹ We are therefore of the view that changes to the terms for the house would need to be considered in light of the wider use of these terms in family law.

4.51 We should be grateful for consultees' views on the following, while emphasising that these changes would not impact on the substantive rights protected:

- 19. Do you agree that terminology should, where possible, be simplified, so that there is no longer any distinction based solely on the different type of relationship?**

Powers of arrest and detention: The Protection from Abuse (Scotland) Act 2001

4.52 Where a spouse, civil partner or cohabitant successfully seeks an interdict, with or without an exclusion order (and regardless of whether it is termed a matrimonial, relevant or domestic interdict), they are left with the responsibility of enforcing it if the order is breached. There is no automatic provision for the police to arrest a perpetrator who breaches the terms of an interdict, nor is any such breach a criminal offence. Instead, as with any interdict, the only recourse available to the holder of the interdict is to bring proceedings against the defender for breach of interdict in a separate action commenced by initial writ.⁹² Breach of the interdict constitutes contempt of court and can lead to punishment.⁹³ Both the existence of an enforceable interdict and the breach of it must be proved, and the standard of proof is beyond reasonable doubt.⁹⁴

4.53 Since this leaves a victim/survivor very vulnerable, even after having successfully sought an interdict, the 1981 Act when enacted contained provisions which allowed for a power of arrest to be attached to matrimonial interdicts, police powers after arrest, and procedure after arrest.⁹⁵ These provisions were repealed by the Family Law (Scotland) Act 2006,⁹⁶ which at the same time amended the Protection from Abuse (Scotland) Act 2001 ("the

⁹¹ Family Law (Scotland) Act 1985, s 27(1).

⁹² Sheriff Andrew M Cubie, *Macphail's Sheriff Court Practice* (4th Edn, 2022), para 21.62. This action also requires the concurrence of the procurator fiscal: *Gribben v Gribben* 1976 SLT 266. Breach of interdict has quasi-criminal status and raising the relevant action can be costly and time consuming: see also MP Hughes, 'Domestic abuse interdicts: a practitioner's guide' 2014 SLT 1.

⁹³ Sheriff Andrew M Cubie, *Macphail's Sheriff Court Practice* (4th Edn, 2022), para 21.62.

⁹⁴ *Gribben v Gribben*; *Johnston v Johnston* 1996 SLT 499. Where the pursuer successfully proves breach of interdict, the sheriff has discretion in the penalty, subject to the Contempt of Court Act 1981, s 15: the maximum penalty is 3 months imprisonment or a fine of level 4 of the standard scale or both.

⁹⁵ Ss 15, 16 and 17. S 15(1) as originally enacted provided that if the matrimonial interdict, including interim interdict was ancillary to an exclusion order, the court had to attach a power of arrest and the court could only attach a power of arrest in relation to any other matrimonial interdict where the non-applicant spouse has had the opportunity of being heard by or represented before the court, unless it appears to the court that in all the circumstances of the case such a power is unnecessary.....must attach a power of arrest.

⁹⁶ 2006 Act, Sch 3. Para 51 of the Explanatory Notes to the 2006 Act notes that "This section [s 32 which amended the 2001 Act] provides that where an application is made to the court for an interdict for the purposes of protection from abuse, the court must attach a power of arrest to the interdict if that interdict is ancillary to an exclusion order, including an interim exclusion order made under section 4 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 or section 104 of the Civil Partnership Act 2004. The effect of this is that Protection from Abuse (Scotland) Act 2001 will contain exclusively the power of the court to attach powers of arrest to interdicts granted under the Matrimonial Homes (Family Protection) (Scotland) Act 1981, including domestic interdicts, and the Civil Partnership Act 2004." (available at: <https://www.legislation.gov.uk/asp/2006/2/notes/contents>).

2001 Act”), to introduce largely equivalent provisions and to ensure that protection was available to civil partners and cohabitants as well as spouses.⁹⁷ Thus, powers of arrest and detention are in all cases now governed by the 2001 Act. This Act extends to all interdicts granted to protect the pursuer from abuse, not only in relation to domestic abuse. It would therefore apply to an interdict in respect of abuse between neighbours or colleagues, for example.

4.54 Section 1(1) of the 2001 Act, as amended, allows a person applying for, or who has obtained, an interdict for the purpose of protection from abuse, to apply to the court for a power of arrest to be attached. Obtaining a power of arrest therefore requires the applicant to take an extra step: it does not come automatically with the grant of an interdict.

4.55 Once attached, a power of arrest means that a constable may arrest the person subject to the interdict without a warrant, if the constable (i) has reasonable cause for suspecting the person has breached the interdict; and (ii) considers that if the person were not arrested there would be a risk of abuse or further abuse.⁹⁸ If arrested, the person must be detained until brought before a court.⁹⁹ At this stage, the person can be charged with a criminal offence. Even if no charge is made, the person may still be detained for up to 48 hours if the sheriff considers there is a risk of (further) abuse, or otherwise released.¹⁰⁰ A power of arrest therefore offers significant protection to a victim/survivor, by enabling them to call the police if the interdict is breached, and for the perpetrator then to be detained.

4.56 A victim/survivor who has obtained an interdict, or who is applying for an interdict, can seek to have a power of arrest attached, if the interdict is for the purpose of protection against abuse.¹⁰¹ Abuse and conduct are defined in the 2001 Act as follows:

“abuse” includes violence, harassment, threatening conduct, and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress;

“conduct” includes—

(a) speech; and

(b) presence in a specified place or area;¹⁰²

4.57 Once it is established that the interdict is for protection against abuse, the applicant may seek a power of arrest. In practical terms, the applicant can seek the interdict and the power of arrest in a single application to court:

⁹⁷ Prior to the 2001 Act, the courts could only attach a power of arrest to a matrimonial interdict to protect individuals from abuse. The courts had no power to attach a power of arrest to any other interdict. The 2001 Act’s original solution was to allow powers of arrest, recognised to be one of the most effective protections available under the 1981 Act, to be attached to common law interdicts. The 2001 Act was then further amended by the 2006 Act, in response to evidence received from the Law Society of Scotland, Scottish Women’s Aid and Professor Clive, that there was a need to simplify the law on the attachment of powers of arrest in general. In response to this evidence, the provisions on powers of arrest for all interdicts related to abuse, regardless of their nature, were placed in one piece of legislation, the 2001 Act.

⁹⁸ 2001 Act, s 4(1).

⁹⁹ 2001 Act, s 4(2).

¹⁰⁰ 2001 Act, s 5.

¹⁰¹ 2001 Act, s 1.

¹⁰² 2001 Act, s 7.

“an individual may apply both for an interdict and for a power of arrest in one court application, or may apply to have a power of arrest attached to a pre-existing interdict. There is nothing in the Act to prevent an application for a power of arrest being made in respect of an interdict granted before the Act comes into force.”¹⁰³

4.58 The test for attaching a power of arrest varies depending on whether the interdict is ancillary to an exclusion order *and* whether the applicant is a spouse/civil partner, or a cohabitant. Where the interdict in question is ancillary to an exclusion order (or an interim exclusion order) and the interdict is a matrimonial or relevant interdict (that is, one between spouses or civil partners respectively), then section 1(1A) applies and the court *must* attach the power of arrest if asked to do so.¹⁰⁴ Although there is no need to give the respondent an opportunity to be heard by, or represented before, the court where the power of arrest is sought under section 1(1A), the fact that the interdict is ancillary to an exclusion order means that the primary order cannot have been granted without the respondent being given such an opportunity, as an exclusion or interim exclusion order can only be granted on notice.¹⁰⁵

4.59 Where the spouse or civil partner has any other interdict for the purpose of protection from abuse (that is, any interdict which is not ancillary to an exclusion/interim exclusion order), then the higher test in section 1(2) of the 2001 Act applies. The court may only attach the power of arrest if the respondent has had the opportunity to be heard by, or be represented before, the court and if attaching the power of arrest is necessary to protect the applicant from a risk of abuse in breach of the interdict.

4.60 Where the interdict is a domestic interdict, between cohabitants, then it does not matter whether it is ancillary to an exclusion order or not: the power of arrest must be sought under the higher test in section 1(2) of the 2001 Act. This is because domestic interdicts for cohabitants are not listed in section 1(1A). Therefore, where a cohabitant has successfully obtained an interdict ancillary to an exclusion order, they are not automatically entitled to a power of arrest, but must meet an additional statutory test not imposed on spouses or civil partners.

4.61 It is not entirely clear why this is. We understand that section 1 of the 2001 Act was amended by the Family Law (Scotland) Act 2006 to ensure that all the provisions relating to powers of arrest, for any type of interdict “for the purpose of protection against abuse”,¹⁰⁶ were placed in one Act, as opposed to in three different pieces of legislation (the 1981, 2004 and 2001 Acts). However, we have not found any explanation in the Policy Memorandum or the Explanatory Notes, nor in evidence given to the Scottish Parliament during the Bill’s passage, as to why cohabitants are not treated the same way as spouses and civil partners in this respect. Given the change in attitudes to and growth in numbers of cohabiting relationships, we think that there is no clear rationale for continuing to require cohabitants to meet the additional requirement when seeking a power of arrest in relation to an interdict.

¹⁰³ 2001 Act Explanatory Notes, at para 14. See *Thomson v Thomson* 2002 SLT (Sh Ct) 97; the issue in that case related to the procedural competence of an application for power of arrest to be attached to an existing interdict where decree of divorce had been granted. The issue has since been resolved by amendment made to OCR 42.1, by SSI 2003/26.

¹⁰⁴ S 1(1A), inserted into the 2001 Act by the 2006 Act, s 32(2).

¹⁰⁵ 1981 Act, s 4(6); 2004 Act, s 104(7).

¹⁰⁶ 2001 Act, s 1(1).

4.62 Accordingly, we would be grateful for consultees' views on the following:

20. Should cohabitants with an interdict ancillary to an exclusion order be entitled to a power of arrest when craved, in terms of section 1(1A) of the 2001 Act, in the same way as spouses and civil partners?

4.63 A power of arrest ceases to have effect on the expiry date stated by the court, or if it is recalled, or if the interdict to which it is attached is recalled or varied.¹⁰⁷ Under the 2001 Act, the expiry date of a power of arrest attached to *any* interdict must be no later than three years after the date the power of arrest is attached by the court.¹⁰⁸ Thus the maximum period for a power of arrest is three years, but the duration could be shorter if the court specifies an earlier expiry date. The power of arrest may be extended for further periods of up to three years, any number of times.¹⁰⁹ In the case of matrimonial interdicts, this represented a substantive change to the original policy position, where the power of arrest lasted as long as the interdict itself, only being terminated on divorce or if recalled.¹¹⁰ The change to the three-year duration of the power of arrest followed on from recommendations in this Commission's Report on Family Law in 1992 (paras 11.37-11.39), which looked for a balance between terminating powers of arrest which are no longer desirable or appropriate whilst preserving protection for a reasonable amount of time.¹¹¹ However, stakeholders have noted that in certain situations, three years can be less time than the duration of the interdict. This termination of the power of arrest leaves victim/survivors more vulnerable, as the interdict may continue on in force without a power of arrest. Seeking an extension of the power of arrest requires victim/survivors to apply to court again, which can be expensive and stressful, and consequently acts as a barrier to protection.

4.64 Accordingly, we propose that a power of arrest should last for the duration of the interdict, in the case of any interdict to protect against domestic abuse between current or former spouses, civil partners, cohabitants or intimate partners.¹¹² For the avoidance of doubt, this would not affect the statutory right of any party to seek to have the power of arrest recalled, as at present.¹¹³ Nor would it affect interdicts for abuse generally, for example abuse between neighbours, where the 2001 Act would continue to provide that a power of arrest could last for a maximum of three years. We ask:

21. In the case of interdicts for the purpose of protection from domestic abuse, should the length of the power of arrest attached be the same as the length of the interdict?

¹⁰⁷ 2001 Act, s 2.

¹⁰⁸ 2001 Act, s 1(3).

¹⁰⁹ 2001 Act, s 2(4).

¹¹⁰ Matrimonial Homes (Family Protection) (Scotland) Act 1981 (as enacted), s 15.

¹¹¹ Scot Law Com No. 135, 1992, paras 11.37 – 11.39.

¹¹² However, in the case of perpetual interdicts, there needs to be an end date for the power of arrest because uncertain lengths of criminal sanction raise ECHR issues.

¹¹³ Under the 2001 Act at present, the perpetrator can apply to court to have the power of arrest recalled in terms of section 2(7). This provides that the court may recall the power of arrest if satisfied that— (i) the person who obtained the power has been given an opportunity to be heard by, or represented before, the court; and (ii) the power is no longer necessary to protect that person from a risk of abuse in breach of the interdict. A power of arrest also ceases to have effect when the interdict to which it is attached, is varied or recalled (s 2(2)).

The test for a power of arrest

4.65 Practitioners have also told us that it is often difficult to obtain a power of arrest to be attached to an interdict, as the test is too high. Where the interdict is ancillary to an exclusion order and is between spouses or civil partners, then the court must attach the power of arrest.¹¹⁴ For all other interdicts, including interdicts to protect against molestation or abuse in any intimate partner relationship, then the test requires that the court be satisfied that “attaching the power of arrest is necessary to protect the applicant from a risk of abuse in breach of the interdict”.¹¹⁵ Anecdotally, the court might conclude that the power of arrest is not “necessary” as the perpetrator is abiding by the terms of the interdict even without a power of arrest being attached. We have heard that some practitioners choose instead to apply for a non-harassment order under the 1997 Act, as the test is easier to meet (whether the conduct amounts to harassment and is intended to amount to harassment) and breach is automatically a criminal offence, removing the need to attach a power of arrest.¹¹⁶

4.66 As noted by Griffiths, Fotheringham and McCarthy:

“The court must be satisfied that the attachment of powers of arrest is necessary to protect the applicant from a risk of abuse in breach of the interdict. The fact that a woman has an interdict and that the interdicted person is abusive or potentially abusive is not sufficient proof to the court that attaching the power of arrest is necessary to protect the applicant from a risk of abuse in breach of the interdict.”¹¹⁷

4.67 Given the concerns above, we would be grateful for consultees’ views on this issue. For the avoidance of doubt, this would only apply to interdicts in the context of domestic abuse, and not wider interdicts for protection from abuse, such as abuse between neighbours. Accordingly we ask:

22. Is the test for attachment of a power of arrest to an interdict in relation to domestic abuse too high, and if so, what should the test be?

Domestic abuse interdict determinations: The Domestic Abuse (Scotland) Act 2011

4.68 Even where an applicant successfully seeks an interdict with a power of arrest attached, breach of that interdict is not a criminal offence¹¹⁸ (and arrest under a power of arrest does not mean the breach of interdict amounted to a crime). In order for breach of an interdict to be a criminal offence, it must be determined by the court to be a “*domestic abuse interdict*”. For that, the applicant must seek a third order, under the Domestic Abuse (Scotland) Act 2011.

¹¹⁴ 2001 Act, s 1(1A)(a) and (b).

¹¹⁵ 2001 Act, s 1(2)(c). As noted in para 4.58, in the case of a matrimonial interdict or a relevant interdict which is ancillary to an exclusion order, the court must attach a power of arrest (2001 Act, s 1(1A)).

¹¹⁶ 1997 Act, ss 8(1), 8A(1) and 9.

¹¹⁷ A Griffiths, J Fotheringham and F McCarthy, *Family Law*, 4th Edn para 11-63 (internal citations omitted).

¹¹⁸ Breach of an interdict constitutes contempt of court (Sir Gerald Gordon, *Criminal Law in Scotland Vol II*, 4th edn, by J Chalmers and F Leverick (2016), para 58.09), and the court can impose a financial penalty or a term of imprisonment in any situation where there is contempt of court. However, imprisonment in this circumstance is not a criminal offence, but an offence sui generis and where it arises in civil actions it is treated as a civil matter. See also R McInnes, *Contempt of Court in Scotland* (2000).

4.69 The Bill¹¹⁹ which became the 2011 Act had two main policy objectives: to increase access to justice for victims of domestic abuse,¹²⁰ and to enable the police and prosecutors to provide a more robust response to breaches of civil protection orders.¹²¹

4.70 A partner or ex-partner¹²² who has obtained an interdict or who is applying for an interdict, may therefore apply to the court for a determination that the interdict is a “domestic abuse interdict”.¹²³ As an initial point, this terminology is not to be confused with a “domestic interdict” which is defined in section 18A of the 1981 Act in relation to cohabitants. A “domestic abuse interdict” can be sought between parties who are or were: spouses; in a civil partnership; cohabitants; or in an intimate personal relationship. It therefore applies to matrimonial, relevant, or domestic interdicts, as well as to any interdict between individuals in an intimate personal relationship.

4.71 The test for making a domestic abuse interdict determination is set out in section 3(2), which provides that the court may make the determination if satisfied that the interdict is, or is to be granted, for the protection of the applicant against a person who is (or was) their spouse, civil partner, cohabitant, or intimate partner. Before making such a determination, the court must give the respondent an opportunity to make representations.¹²⁴

4.72 Section 2(2) provides that a person who breaches an interdict (including an interim interdict), which has been determined to be a domestic abuse interdict,¹²⁵ is guilty of an offence,¹²⁶ *provided a power of arrest is attached to the interdict under section 1(1A) or (2) of the 2001 Act and is still in effect.*¹²⁷ This introduces, via the 2001 Act, a test for “abuse” in relation to a domestic abuse interdict, since the interdict must have satisfied that test in the 2001 Act for a power of arrest to be attached *before* criminal consequences can flow from it being a domestic abuse interdict in terms of the 2011 Act.¹²⁸ Although the 2011 Act does not specifically require evidence of domestic abuse, the nature of the abuse covered is limited to abuse in intimate relationships, because a domestic abuse interdict can only be recognised in respect of an interdict which is (i) for protection against abuse in terms of the 2001 Act *and* (ii) is between spouses, civil partners, cohabitants, or intimate partners (or ex-partners).

4.73 A person who breaches a domestic abuse interdict (which has a power of arrest attached and has been determined by the court to be a domestic abuse interdict) is thereby guilty of an offence under the 2011 Act, and is liable (i) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory

¹¹⁹ A member’s Bill introduced by Rhoda Grant MSP.

¹²⁰ By removing the requirement to show a course of conduct before a non-harassment order can be granted in domestic abuse cases (s 8A of the 1997 Act as inserted by the 2011 Act, ss 1(2), 5(2); see paras 4.85 to 4.87).

¹²¹ By making it a criminal offence to breach an interdict with a power of arrest, where domestic abuse is involved (s 2(2)).

¹²² 2011 Act, s 3(2).

¹²³ 2011 Act, s 3(1).

¹²⁴ 2011 Act, s 3(3).

¹²⁵ 2011 Act, s 2(1)(a) & (b).

¹²⁶ Liable on summary conviction to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum or to both, on conviction on indictment, to imprisonment for a term not exceeding 5 years or to a fine or to both (s 2(3)). Higher fines and longer periods of imprisonment can be imposed for breaches of domestic abuse interdicts than for breaches of interdicts with powers of arrest attached under the 2001 Act or for breaches of non-harassment orders.

¹²⁷ 2001 Act, s 2(1)(d) & (e).

¹²⁸ See paras 4.54 to 4.56.

maximum, or both; or (ii) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or a fine, or both.¹²⁹

4.74 In practice, an interdict, power of arrest and domestic abuse interdict determination might be applied for as part of the same court action (with or without an exclusion order). We do not propose any reform to domestic abuse interdict determinations, but we discuss their interaction with future law reform in Chapter 5, paragraph 5.156.

Other Intimate Relationships

4.75 For couples in an intimate personal relationship, but who are not married, in a civil partnership, or cohabiting – such as boyfriend/girlfriend/significant other, or living apart together – there are no protection orders available under the 1981 Act or 2004 Act. However, a member of such a couple (or ex-couple) could apply for an interdict in respect of abusive conduct (see paragraphs 4.4 and 4.5). If it is granted, they could then apply for a power of arrest to be attached (provided the interdict is for the purpose of protection from abuse) under section 1(2) of the 2001 Act. The court can only grant a power of arrest where the respondent has had the opportunity to be heard by, or represented before, the court and where the attachment of a power of arrest is necessary to protect the applicant from a risk of abuse in breach of the interdict.

4.76 If a member of a couple/ex-couple has a common law interdict, they can apply for a domestic abuse interdict determination under the 2011 Act, provided they are (or were) “in an intimate personal relationship” with the person they seek protection from.¹³⁰ Breach of the interdict will only be a criminal offence in terms of section 2(2) of the 2011 Act if a power of arrest has been attached to the interdict under section 1(2) of the 2001 Act and that power of arrest is in effect.

4.77 There is therefore protection available through the common law and statutory measures which can protect victim/survivors from abuse in an intimate partner relationship/former relationship, even absent the specific statutory protections directed at spouses, civil partners, and cohabitants.

The overall framework of exclusion orders and interdicts

4.78 Stakeholders have raised with us the fact that, taken together, the legal framework for exclusion orders, interdicts, powers of arrest, and domestic abuse interdict determinations produces a complex picture, reliant on four different statutes. The threshold tests for awarding each remedy differ, and the tests for some orders, if met, either require the court to impose an order, or are at the court’s discretion. For example, there is a high standard of necessity to be met before the court will grant an exclusion order. Some ancillary interdicts attached to an exclusion order are mandatory, whereas others are discretionary.¹³¹ Likewise, powers of arrest

¹²⁹ 2011 Act, s 2(3). Note that s 2(4) provides that, following a conviction, a breach of an interdict covered by this section is not punishable other than in accordance with s 2(3) – while s 2(5) confirms that a conviction for an offence under this section means that the breach of interdict is not punishable as contempt of court. If the breach of interdict has already been punished as contempt of court, then s 2(6) provides that the person in breach cannot then be convicted of an offence under this section.

¹³⁰ 2011 Act, s 3(2)(d). In determining whether the applicant and the perpetrator of domestic abuse are in ‘an intimate personal relationship’, the Explanatory Notes to the 2011 Act (para 17) provide some guidance (available at: <https://www.legislation.gov.uk/asp/2011/13/notes/contents>).

¹³¹ For example, the court **must** grant it where it seeks to prohibit the non-applicant from entering the home without the express permission of the applicant (1981 Act, s 4(4)(b); 2004 Act, s 104(4)(b)), whereas it is at the court’s

must be attached where sought in respect of matrimonial interdicts or relevant interdicts (for spouses and civil partners respectively, but not for cohabitants) where the interdict is ancillary to an exclusion order. For all other interdicts, however, the victim/survivor must show that a power of arrest is necessary. In terms of the 2011 Act, the court may make a determination that an interdict is a domestic abuse interdict, simply where the interdict is granted for the protection of an applicant against their spouse, civil partner, cohabitant or intimate partner, and there is no other test to apply.

4.79 We agree that this mixture of different standards makes for a confused and confusing landscape of civil remedies. However, each remedy is trying to achieve something different, for different purposes, and they have different legal effects, which sometimes explains why they vary in degree. Orders with criminal consequences have high tests and procedural requirements because this is an interference with the perpetrator's human rights.¹³² In contrast, orders which are less onerous on the perpetrator allow for speed and flexibility in granting protection. Moreover, some of these statutory provisions apply more widely than domestic abuse, and can protect from abuse between neighbours or colleagues, for example, or regulate occupancy rights between partners even where there is no abuse. We therefore think there can be good reasons for the differing thresholds across the various pieces of legislation. Where we can, we have suggested proposed reforms (above) to address specific concerns. Even if these individual reforms were implemented, however, the picture would remain complex, as a result of the piecemeal way in which this has come about, over the last 40 years. Consequently we are of the view that more fundamental reform is required. Improving individual provisions across the relevant statutes will help, but a more innovative approach to reform is required, to make a meaningful difference. We turn to this in Chapter 5.

Part 2: Protection from Harassment

4.80 The Protection from Harassment Act 1997 (the "1997 Act")¹³³ and was enacted to provide civil legal protection to victims of harassment, in particular from "so-called stalking behaviour, racial harassment, or anti-social behaviour by neighbours".¹³⁴

Non-harassment orders

4.81 Given the nature of the wrong, non-harassment orders are not limited to couples in a relationship. However, in the context of domestic abuse, it is open to a spouse, civil partner, cohabitant, or partner in an intimate relationship (as well as ex-spouses, ex-civil partners, former cohabitants, and former partners) to obtain a non-harassment order under sections 8 or 8A of the 1997 Act.

discretion to grant an interdict prohibiting the non-applicant spouse/civil partner from entering or remaining in a specified area in the vicinity of the home (1981 Act, s 4(5)(a); 2004 Act, s 104(5)(a)).

¹³² See H MacQueen and the Right Hon Lord Eassie (eds), *Gloag and Henderson: The Law of Scotland*, (Sweet & Maxwell, 2022), para 29.34 (hereafter "Gloag and Henderson, 15th ed"): "Breach of a non-harassment order is an offence, a conviction will result in imprisonment or a fine or both. Consequently, the award of a non-harassment order before the defender has had an opportunity to be heard has been described as a fundamental breach of natural justice and overturned on appeal." (internal citations omitted).

¹³³ This Act extends to England, Wales and Scotland: ss 8 to 11 of the 1997 Act apply to Scotland.

¹³⁴ Comments by the then Lord Chancellor, Lord Mackay of Clashfern, introducing the Second Reading of the Bill for the 1997 Act in the House of Lords (available at:

https://publications.parliament.uk/pa/ld199697/ldhansrd/vo970124/text/70124-01.htm#70124-01_head0). Further background is available in: The House of Commons Library Research Briefing Paper, 9 June 2017 (available at: <https://researchbriefings.files.parliament.uk/documents/SN06648/SN06648.pdf>).

Harassment - general

4.82 Section 8(1) provides that every individual has a right to be free from harassment and, accordingly, a person must not pursue a *course of conduct* which amounts to harassment of another and—

- (a) is *intended* to amount to harassment of that person; or
- (b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.

4.83 Section 8(2) provides that an actual or apprehended breach of subsection (1) may be the subject of a claim in civil proceedings (“an action of harassment”) by the person who is or may be the victim of the course of conduct. Section 8(3) defines “harassment” as including “causing the person alarm or distress”; “conduct” as including “speech” and provides that “a course of conduct must involve conduct on at least two occasions”.¹³⁵ Unlike powers of arrest attached to interdicts, a non-harassment order lasts as long as directed by the court, unless it is varied or recalled.¹³⁶

4.84 Section 8(5) allows the court to award damages,¹³⁷ grant interdict or interim interdict or, if satisfied it is appropriate in order to protect the person from further harassment, grant a “non-harassment order”. This order requires the defender to refrain from such conduct in relation to the pursuer as may be specified in the order for a specified period.¹³⁸ A person may not be subjected to the same prohibitions in an interdict/interim interdict and a non-harassment order at the same time.¹³⁹

Harassment amounting to Domestic Abuse

4.85 Alternatively, a victim/survivor could apply for a non-harassment order or an interdict or damages in terms of section 8A of the 1997 Act. Section 8A was inserted into the 1997 Act by the 2011 Act,¹⁴⁰ to make express provision for harassment amounting to domestic abuse. Section 8A(1) provides that:

- Every individual has a right to be free from harassment and, accordingly, a person must not engage in conduct which amounts to harassment of another and—
- (a) is intended to amount to harassment of that person; or
 - (b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.

¹³⁵ However, it may be sufficient to show that there has been a single act together with a reasonably apprehended act. S 8 also makes provision for a defence to an action of harassment, if the course of conduct complained of “(a) was authorised by, under or by virtue of any enactment or rule of law; (b) was pursued for the purpose of preventing or detecting crime; or (c) was, in the particular circumstances, reasonable.” (s 8(4)).

¹³⁶ 1997 Act, s 8(7). We discuss complications arising from the varying/recalling of certain non-harassment orders in Ch 8.

¹³⁷ The damages include damages for any anxiety caused by the harassment and any financial loss resulting from it (s 8(6)). The claim is subject to the limitation period applicable in personal injury cases; see s 18B of the Prescription and Limitation (Scotland) Act 1973; see also *Moulds v Reid* [2012] CSOH 13; *G v S* 2006 SLT 795.

¹³⁸ Which includes an indeterminate period.

¹³⁹ 1997 Act, s 8(5). This restriction applies only where the interdict has been granted under s 8(b)(i) of the 1997 Act; see *McCann v McGurran* 2002 SC 592, Lord Caplan delivering the opinion of an Extra Division at paras [9] to [11].

¹⁴⁰ 2011 Act, ss 1(2) and 5(2).

4.86 Section 8A(2) provides that subsection (1) only applies where “the conduct ... amounts to domestic abuse” although the term “domestic abuse” is not defined in the 1997 Act. Subsections (2) to (7) of section 8 apply in relation to conduct which amounts to domestic abuse, as they apply in relation to section 8(1), subject to the modifications listed.¹⁴¹ The effect of the modifications is that conduct which amounts to domestic abuse may involve *behaviour on one or more than one occasion* (therefore, unlike section 8, no course of conduct is required). It includes speech and also presence in any place or area, and “harassment” of a person includes causing them alarm or distress.¹⁴²

4.87 Section 9(1) of the 1997 Act provides that breach of a non-harassment order made under sections 8 or 8A is a criminal offence.¹⁴³ There is no need to attach a power of arrest or seek any further declaration in respect of a non-harassment order, as must be done with interdicts. If convicted on indictment, the penalty can be imprisonment for a term not exceeding five years, or a fine, or both; and on summary conviction, the penalty is imprisonment not exceeding six months or a fine not exceeding the statutory maximum, or to both.¹⁴⁴

4.88 Non-harassment orders are also available under the Criminal Procedure (Scotland) Act 1995, as discussed further in paragraphs 4.104 and 4.105 below.

4.89 From our engagement with interested parties to date, we are not aware of any difficulties which arise in practice in relation to section 8 or section 8A of the 1997 Act in relation to non-harassment orders.

Other remedies under the 1997 Act

4.90 While the 1997 Act introduced non-harassment orders as a remedy for stalking and harassing conduct, it also made provision for two other remedies for victim/survivors. Thus, in an action concerning harassment, a victim/survivor can seek an interdict covering the conduct in the 1997 Act¹⁴⁵ and/or seek an award of damages.¹⁴⁶ As previously noted, one important feature is that it is not possible to seek a non-harassment order and an interdict in respect of the same conduct.¹⁴⁷ However, since breach of a non-harassment order leads to criminal sanctions, it is not possible for one to be made without the defender having been heard.¹⁴⁸ In practice, the pursuer will usually crave an interim interdict without notice under the 1997 Act, to offer protection in the period prior to the non-harassment order being granted.

¹⁴¹ 1997 Act, s 8A(3).

¹⁴² Which could apply to stalking. As with s 8, s 8A(3) defines “conduct” as including “speech”, and “harassment” of a person as including “causing the person alarm or distress”.

¹⁴³ With the person in breach liable on conviction on indictment, to imprisonment for a term not exceeding five years or to a fine, or to both such imprisonment and such fine; and on summary conviction, to imprisonment for a period not exceeding six months or to a fine not exceeding the statutory maximum, or to both such imprisonment and such fine. S 9(3) and (4) give a police constable the power to arrest without warrant if they reasonably believe a person is committing or has committed an offence under s 9(1).

¹⁴⁴ 1997 Act, s 9.

¹⁴⁵ 1997 Act, s 8(5)(b)(i). A victim/survivor could also seek to have an interdict obtained under the 1997 Act determined to be a domestic abuse interdict under the 2011 Act (see paras 4.68 et seq).

¹⁴⁶ 1997 Act, s 8(5)(a).

¹⁴⁷ 1997 Act, s 8(5).

¹⁴⁸ Sheriff Andrew M Cubie, *Macphail’s Sheriff Court Practice* (4th Edn, 2022), para 21.71.

Part 3: Other Relevant Legislation

4.91 There are a number of other statutes which provide for civil and criminal remedies relating to domestic abuse or are otherwise relevant to the legislation discussed above.

Civil legislation

Lawburrows Act 1429

4.92 The earliest civil law remedy which provided protection against abuse in Scotland is lawburrows:¹⁴⁹ “lawburrows is a caution¹⁵⁰ to keep and maintain the peace taken out at the instance of a person who has reason to fear harm to himself or his family from another”.¹⁵¹ Lawburrows therefore provides a remedy to a pursuer who is at risk of harm by another person.¹⁵² The remedy originated in the common law, but was regulated by a series of statutes, starting with the Lawburrows Act 1429.¹⁵³ Its scope was later extended to cover the protection of property¹⁵⁴ and family members.¹⁵⁵ The procedure is now regulated by the Civil Imprisonment (Scotland) Act 1882. In an action for lawburrows,¹⁵⁶ the pursuer requests that the court ordain the defender to: (a) find caution or lodge a sum of money with the court; or (b) grant a bond of insurance without caution for the amount specified by the court, as security against being harmed by the defender.¹⁵⁷ If the defender fails to find caution or to grant a bond without caution, they may be imprisoned for up to six months.¹⁵⁸ If the defender subsequently commits any of the acts specified in the lawburrows, the pursuer may raise a separate action for contravention of the lawburrows.¹⁵⁹

4.93 In practice, this legislation is rarely, if ever, relied on.¹⁶⁰ It is generally agreed that the principles behind it have been subsumed for the modern era by the action of harassment under the 1997 Act as detailed above.¹⁶¹ However, it remains on the statute books and, as it can apply in circumstances well beyond those relating to domestic abuse, any reform is beyond the scope of this project. We therefore propose no change in relation to this legislation.

¹⁴⁹ *The Laws of Scotland (Stair Memorial Encyclopaedia)* Volume 13(1) para 901.

¹⁵⁰ Caution is a form of security (a guarantee) of payment by lodging money upfront.

¹⁵¹ K McK Norrie, “The Intentional Delicts”, in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, (OUP, 2000), at p 497.

¹⁵² *The Laws of Scotland (Stair Memorial Encyclopaedia)* Volume 13(1) para 901.

¹⁵³ K McK Norrie, “The Intentional Delicts”, in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, (OUP, 2000), at p 497.

¹⁵⁴ Law Burrows Act 1581.

¹⁵⁵ Law Burrows Act 1597.

¹⁵⁶ Which must be raised in the sheriff court, Civil Imprisonment (Scotland) Act 1882, s 6(1). When the initial writ is lodged with the court, a warrant is granted for service of the action on the defender, and the sheriff may order both parties to proceed to proof and cite witnesses if they wish. The pursuer must show that the apprehension of violence is well founded. The standard of proof is the balance of probabilities and the onus is on the pursuer; corroboration is unnecessary as lawburrows is a civil remedy, so evidence of one credible witness (this may be the pursuer) is sufficient to substantiate the need for an order to be made.

¹⁵⁷ The Civil Imprisonment (Scotland) Act 1882, s 6.

¹⁵⁸ 1882 Act, s 6(6) & (7).

¹⁵⁹ *Stair Memorial Encyclopaedia*, Volume 13, para 901.

¹⁶⁰ A freedom of information request was made to the Scottish Courts and Tribunals Service on 11 Feb 2017 asking how many lawburrows actions had been raised in the sheriff courts between Jan 2014 and Jan 2017. The response was that there had been none. Examples of actions raised are *Morrow v Neil* 1975 SLT (Sh Ct) 65; *Cooney v Kirkpatrick* 1989 SC 61; *Morton v Liddle* 1996 JC 194; *Duff v Strang* 2008 JC 251; and *Duff v Chief Constable of Dumfries and Galloway* 2012 SLT 975. None of these cases concerned allegations of domestic abuse; *Morrow* and *Morton* concerned neighbour disputes. The nature of the remedy was discussed by Sheriff Macphail in *Morrow*, at pages 66 to 67 and by the High Court of Justiciary in *Duff v Strang* (2008) at paras [3] to [4].

¹⁶¹ Sheriff Andrew M Cubie, *Macphail’s Sheriff Court Practice* (4th Edn, 2022), para 21.71.

The Domestic Abuse (Protection) (Scotland) Act 2021

4.94 The Domestic Abuse (Protection) (Scotland) Bill received Royal Assent on 5 May 2021 but is largely not yet in force. While it provides for civil remedies for domestic abuse, the origins of the policy can be found in responses to the consultation on the Bill which became the Domestic Abuse (Scotland) Act 2018 (“the 2018 Act”) which created the new criminal offence of engaging in a course of behaviour which is abusive of a partner or ex-partner.¹⁶² A number of third sector respondents to the consultation for the then Bill, raised concerns about a gap in protection available to victim/survivors of domestic abuse; a person requiring protection can only obtain it if the perpetrator enters the criminal justice system¹⁶³ or if the victim/survivor applies to court themselves for a civil protection order. The Government proposed creating new civil protection orders,¹⁶⁴ which the police could apply for, to protect people at risk of domestic abuse in the immediate term by banning perpetrators from their homes.¹⁶⁵ The 2021 Act is a result of that consultation.¹⁶⁶

4.95 The 2021 Act, when in force, will allow a senior police constable to make a domestic abuse protection notice (DAPN)¹⁶⁷ and the court to make a domestic abuse protection order (DAPO),¹⁶⁸ on the application of the chief constable, for the purpose of protecting a person from abusive behaviour by their partner or ex-partner. Section 2 of the 2021 Act defines “abusive behaviour” and section 3 provides for what constitutes “abusive behaviour”. Sections 2 and 3 are broadly similar to sections 1 and 2 of the 2018 Act (see paragraphs 4.100 to 4.101). A DAPN or DAPO may be made in relation to a person who is aged 18 or over (person A), for the purpose of protecting a person aged 16 or over (person B) who is the partner or ex-partner of person A. Person A and person B are partners (or ex-partners) if they are or were spouses, civil partners of each other or in an intimate personal relationship with each other.

4.96 A senior constable may make a DAPN if there are reasonable grounds for believing that the person in relation to whom the notice is made has engaged in abusive behaviour of another person, there is a risk of further such abusive behaviour, and the notice is necessary for the protection of the other person from the behaviour.¹⁶⁹ Once a DAPN is in place, the chief constable *must* make an application to the court for a DAPO (not later than the first court day after the day on which the DAPN is given¹⁷⁰) which can contain, but is not limited to, the same prohibitions as the DAPN.¹⁷¹ Breach of a DAPN or DAPO is a criminal offence.¹⁷²

¹⁶² For discussion of the 2018 Act, see paras 4.100 to 4.103.

¹⁶³ Such that bail conditions are imposed, or an undertaking is given by an arrested person on their release without bail pending prosecution.

¹⁶⁴ Scottish Government, *Protective Orders for People at Risk of Domestic Abuse: Analysis of Consultation Responses* (July 2020) (available at: <https://www.gov.scot/publications/protective-orders-people-risk-domestic-abuse-analysis-consultation-responses/documents/>).

¹⁶⁵ The great majority of respondents were in support of the proposals.

¹⁶⁶ See also para 2.21 of Ch 2 on the Istanbul Convention.

¹⁶⁷ 2021 Act, s 4.

¹⁶⁸ 2021 Act, s 8.

¹⁶⁹ The notice must be in writing and must give details of what it requires the person to do, or prohibits them from doing; it must be delivered personally by a police officer, 2021 Act (ss 4 to 6). The sanctions imposed can include prohibiting the perpetrator from entering a home shared with the victim (s 5(1)).

¹⁷⁰ 2021, s 11(2).

¹⁷¹ 2021 Act, ss 8(1) and 9(2). A DAPN ceases to have effect on the making of a DAPO or interim DAPO (s 10); otherwise it ceases to have effect when the hearing of the application for a DAPO ends (s 11(9)). DAPOs have effect for a maximum period of 2 months (s 9(5)). A DAPO *may* also be applied for by the chief constable, where no DAPN in place (s 8(1)(b)).

¹⁷² 2021 Act, ss 7 and 17. If an offence is committed under s 7 (breach of DAPN), the person is liable on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding level 3 on the standard

Termination or transfer of Scottish secure tenancy

4.97 The 2021 Act also makes provision (not yet in force) for social landlords to terminate or transfer¹⁷³ a Scottish secure tenancy¹⁷⁴ when a tenant has engaged in behaviour which is abusive towards a partner or ex-partner who lives or has lived with them.¹⁷⁵ Currently, the landlord may only recover possession of these tenancies on prescribed grounds, including where rent lawfully due from a tenant is unpaid.¹⁷⁶ This new ground for recovering possession, once in force, will enable the landlord to enter into a new tenancy agreement with the partner/ex-partner of the perpetrator of abusive behaviour.¹⁷⁷

The Domestic Abuse Disclosure Scheme

4.98 The Domestic Abuse Disclosure Scheme for Scotland, also known as Clare's Law, was created in 2015, alongside an equivalent scheme in England and Wales. It allows individuals to request information about their partner or the partner of a friend or relative in relation to domestic abuse. This is done by filling in an online form or by going to the police in person. Disclosures can be made to the partner or the applicant or other third party if such a disclosure is deemed necessary and proportionate to keep the person safe.¹⁷⁸ The scheme in Scotland is not on a statutory footing.¹⁷⁹ Although not directly linked to domestic abuse applications made under the Sex Offender Community Disclosure Scheme, which must be made in relation to child protection concerns, the Domestic Abuse Disclosure Scheme can lead to disclosures where the reported person is known to the police for offences such as 'serious domestic violence.'¹⁸⁰

Proposal for a Domestic Abuse Register (Scotland) Bill

4.99 A proposal for a Domestic Abuse (Prevention) (Scotland) Bill has recently been consulted on. It is a proposed Member's Bill,¹⁸¹ which aims to establish a Domestic Abuse Offenders' Register, which may require those with certain serious domestic abuse convictions to report certain changes in their circumstances to police. It would also seek to make provision for funding for rehabilitation programmes at the national level, mandatory reporting requirements, and mandatory education on domestic abuse in schools.¹⁸² It is not yet clear if

scale (or both). If an offence is committed under s 17 (breach of DAPO), the person is liable on summary conviction to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both), or on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine (or both).

¹⁷³ Terminate, in the case of a sole tenant, or transfer, in the case of a joint tenant (s 22(4)) which inserts new para 15A into Sch 2 of the Housing (Scotland) Act 2001.

¹⁷⁴ Where the landlord is a local authority, a registered social landlord, or Scottish Water. Housing (Scotland) Act 2001, s 11.

¹⁷⁵ 2021 Act, s 22, which amends ss 14, 16 and Sch 2 (proceedings for possession, powers of court in possession proceedings, grounds for recovery of possession) of the Housing (Scotland) Act 2001.

¹⁷⁶ Housing (Scotland) Act 2001, Sch 2 para 1.

¹⁷⁷ 2021 Act, Explanatory Notes, para 138 (available at: <https://www.legislation.gov.uk/asp/2021/16/notes/contents>).

¹⁷⁸ E Sutherland, *Child and Family Law Vol.2* Third Edn. 2022 para 4-123.

¹⁷⁹ In England and Wales, the Secretary of State is required to issue statutory guidance to the police about the disclosure of police information by police forces for the purposes of preventing domestic abuse (that is, about the exercise of their functions under the Domestic Violence Disclosure Scheme), in terms of s 77 of the Domestic Abuse Act 2021.

¹⁸⁰ Available at: <https://www.gov.scot/publications/sex-offender-community-disclosure-scheme/pages/4/>.

¹⁸¹ Pam Gosal, MSP.

¹⁸² Available at: <https://www.parliament.scot/-/media/files/legislation/proposed-members-bills/consultation-summary-domestic-abuse-final.pdf> p 61.

the Bill will receive sufficient cross-party support for it to be introduced in the Scottish Parliament.

Criminal legislation

The Domestic Abuse (Scotland) Act 2018

4.100 The Domestic Abuse (Scotland) Act 2018 aims to improve how the justice system responds to domestic abuse by recognising that domestic abuse can take place over a sustained period of time and by recognising the impact and consequences of all types of abusive behaviour, including patterns of controlling behaviour. It provides that a person commits an offence if they engage in a course of behaviour which is abusive of their partner or ex-partner,¹⁸³ if the following conditions are met: a reasonable person must consider that the course of behaviour would be likely to cause the complainer to suffer physical or psychological harm, and that the accused must either intend that their course of behaviour causes the complainer to suffer physical or psychological harm, or else be reckless as to whether their course of behaviour would do so.¹⁸⁴

4.101 What constitutes abusive behaviour is provided for in section 2. It includes behaviour by person A directed towards their partner or ex-partner, person B, that is violent, threatening or intimidating. It also covers behaviour directed at B or at any other person (such as a child of B) which has as its purposes, or among its purposes, or would be considered by a reasonable person likely to have one or more of the effects listed in section 2(3), which include for example: behaviour which makes the victim dependent on or subordinate to the perpetrator; behaviour which has the effect of isolating the victim from friends, relatives or other sources of support, and behaviour which has the effect of controlling, regulating or monitoring the victim's day to day activities. The description is non-exhaustive and therefore it is open to the court to decide that the behaviour was abusive.

4.102 The 2018 Act also provides for an associated statutory aggravation that the perpetrator, in committing the offence, involved or affected a child, or that a child saw, heard or was present during an incident that happened as part of the course of behaviour amounting to the offence.¹⁸⁵

4.103 Section 9 provides for the available penalties for the offence of abusive behaviour.

The Criminal Procedure (Scotland) Act 1995

4.104 Alongside the introduction of the new offence in the 2018 Act, a number of associated reforms to criminal procedure, evidence and sentencing were also introduced. One such reform is the insertion of a new provision into the Criminal Procedure (Scotland) Act 1995 in relation to non-harassment orders.¹⁸⁶ New section 234AZA provides that where someone is found guilty of a criminal offence under the 2018 Act or of an offence with an aggravation under section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (discussed below at para 4.108) the court *must*, without an application by the prosecutor, consider

¹⁸³ 2018 Act, s 1(1). Partner and ex-partner means spouses, civil partners, those living together as if spouses, or those in an intimate personal relationship (s 11).

¹⁸⁴ 2018 Act, s 1(2).

¹⁸⁵ 2018 Act, s 5. See Ch 7, Part 1 on children who experience domestic abuse within their family environment.

¹⁸⁶ 1995 Act, s 234AZA.

whether to make a non-harassment order to protect the victim.¹⁸⁷ It also provides that after hearing the prosecutor as well as the person, the court must make a non-harassment order unless it concludes that there is no need for a victim to be protected by such an order, and if the court concludes an order is not required, it must explain why.¹⁸⁸ Section 234AZA(3) provides that a non-harassment order, in addition to making provision to protect the victim as defined in section 234A of the 1995 Act, can include provision in relation to children close to the domestic abuse offence.¹⁸⁹

4.105 In a recent appeal to the High Court of Justiciary, the High Court overturned the trial judge's decision not to make such a non-harassment order, and clarified the test that applied as to when an order should be made:

“...the court must make such an order unless the court concludes that there is no need for the complainer to be protected by such an order. The trial judge declined to make such orders on the basis that there were no indications that the respondent had contacted the complainers or that he feared he would do so, and that the second complainer now lives in England. Given that the respondent would be in prison for a lengthy period of time he “did not consider an order appropriate”. This, of course, is not the test. As noted in the Sheriff Appeal Court:

“Marrying those provisions together, the court must make a non-harassment order unless it concludes that there is no need for the victim to be protected by such an order. In other words, the court must make an order unless it is positively able to conclude that there is no need for the victim to be protected by such an order. If the court, on the information before it, is not able to so conclude, the order must be made.” (*Finlay v Corrins* [2020] SAC (Crim) 1 para 11).”

In light of the evidence of two of the victims, the High Court imposed a non-harassment order for 15 years.¹⁹⁰

The Criminal Justice and Licensing (Scotland) Act 2010

4.106 Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (“the 2010 Act”) criminalises threatening or abusive behaviour. Section 38 provides that a person A commits an offence if A behaves in a threatening or abusive manner, the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.¹⁹¹ The offence applies to behaviour of any kind including, in particular, things said or otherwise

¹⁸⁷ S 234A of the 1995 Act inserted into the 1995 Act by the Protection from Harassment Act 1997, s 11, provides that where a person is convicted of an offence involving harassment of a person, the prosecutor may apply to the court to make a non-harassment order against the offender, requiring the offender to refrain from such conduct in relation to the victim as may be specified, for such period as may be specified, in addition to any other disposal made in relation to the offence.

¹⁸⁸ 1995 Act, s 234AZA(4)(b) and (c).

¹⁸⁹ The Explanatory Notes for the 2018 Act notes that this refers to: “... i.e. children living with the perpetrator or the victim of domestic abuse or children to whom the aggravation at section 5 applies” (available at: <https://www.legislation.gov.uk/asp/2018/5/notes>).

¹⁹⁰ *HMA v RM* [2023] HCJAC 43, paras 49-51.

¹⁹¹ 2010 Act, s 38(2) provides that it is a defence for a person charged with an offence under subsection (1) to show that the behaviour was, in the particular circumstances, reasonable.

communicated as well as things done, and behaviour consisting of a single act, or a course of conduct.¹⁹²

4.107 Section 39 of the 2010 Act provides for the criminal offence of stalking. This applies where a person engages in a course of conduct which causes another person to suffer fear or alarm.¹⁹³ The 2010 Act contains a lengthy list of what conduct is captured by the offence, including: following a person; contacting, or attempting to contact a person; monitoring the use by a person of the internet, email or any other form of electronic communication; entering any premises; watching or spying on a person; acting in any other way that a reasonable person would expect would cause a person to suffer fear or alarm; and “course of conduct” involves conduct on at least two occasions.¹⁹⁴

The Abusive Behaviour and Sexual Harm (Scotland) Act 2016

4.108 Section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 created a statutory aggravation which can be attached to any crime which involves abuse of a partner or ex-partner.¹⁹⁵ This includes an offence which is not committed against the person’s partner/ex-partner, but where the person acted with the intent of causing their partner/ex-partner to suffer physical or psychological harm,¹⁹⁶ or an offence which is committed against the person’s partner or ex-partner, where the convicted person is reckless as to causing the partner/ex-partner to suffer physical or psychological harm.¹⁹⁷ Only one source of evidence is required to establish the aggravation.¹⁹⁸ Partners are defined as spouses, civil partners, individuals living together as if spouses and individuals in an intimate personal relationship, and ex-partners are to be understood accordingly.¹⁹⁹ The relationship between the parties is presumed as established on the basis of the details of the complaint or indictment unless

¹⁹² 2010 Act, s 38(3). Subsection (4) provides that a person guilty of an offence under subsection (1) is liable (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

¹⁹³ And where A engages in the course of conduct with the intention of causing B to suffer fear or alarm, or where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause B to suffer fear or alarm (s 2(2) to (4)).

¹⁹⁴ It is a defence for a person charged with stalking to show that the course of conduct was authorised by virtue of any enactment or rule of law, was engaged in for the purpose of preventing or detecting crime, or was, in the particular circumstances, reasonable (s 39(5)). A person convicted of the offence is liable (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine or to both, (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both. Where, in a trial of a person charged with stalking, the jury or, in summary proceedings, the court is not satisfied that the accused committed the offence, but is satisfied that the accused committed an offence under s 38(1), the jury or court may acquit the accused and, instead, find the accused guilty of an offence under s 38(1).

¹⁹⁵ Abusive Behaviour and Sexual Harm (Scotland) Act 2016, s 1(1).

¹⁹⁶ 2016 Act, s 1(2)(a). The Explanatory Notes to the Act give the example of an aggravation being labelled (charged), where a person commits an assault against their ex-partner’s child with the intent of causing psychological harm to their ex-partner (para 9) (available at: <https://www.legislation.gov.uk/asp/2016/22/notes/contents>).

¹⁹⁷ 2016 Act, s 1(2)(b). The Explanatory Notes give the example of an aggravation applying where, for example, someone assaults their partner or damages their partner’s property, irrespective of whether it was their *intent* to cause such harm to that person (para 10). S 1(3) of the Act provides that it is immaterial that the offence does not in fact cause the victim harm.

¹⁹⁸ 2016 Act, s 1(4).

¹⁹⁹ 2016 Act, s 1(6).

challenged by the accused.²⁰⁰ In 2021/22, 26,248 offences were reported with a section 1 aggravation under the 2016 Act, accounting for 80% of all domestic abuse cases.²⁰¹

²⁰⁰ 2016 Act, s 1A.

²⁰¹ Available at: <https://www.copfs.gov.uk/media/xq1iwhm3/domestic-abuse-publication-2021-22-final.pdf#:~:text=In%20202122%2C%2026%2C248%20charges%20were%20reported%20with%20a,slight%20reduction%20in%20comparison%20with%2083%25%20in%202020-21>. p 4.

Chapter 5 A Proposal for a New Law

5.1 In the two previous chapters (Occupancy Rights and the Existing Legal Framework) we set out the current law regarding occupancy rights, exclusion orders, interdicts, powers of arrest, determinations of domestic abuse interdicts, and non-harassment orders. We identified a number of problems with specific statutory measures, and sought views on possible reforms. However, it is also clear that, in addition to these specific statutory problems, there are a number of over-arching problems with the current legal regime, which require more comprehensive reforms in order to tackle them.

5.2 In this chapter, we summarise these issues, and seek views on a new law which would address the complexity of the current regime by introducing a new “purpose-built” scheme. As set out below, our proposal is that domestic abuse should be specifically recognised in Scots law as wrongful conduct in the form of a civil wrong, known as a “delict”.¹ This would be introduced by way of a statute, which would define domestic abuse, set out the remedies available to victim/survivors, and make provision for ancillary matters such as defences and third party orders. This chapter sets out our proposals for this in some detail. Further proposed details of this scheme will be considered in the following chapters, concerning victim/survivors of domestic abuse, children, and access to justice issues. We appreciate that your views on the proposals discussed in this chapter may be influenced by the details discussed in the following chapters. You may wish to read these chapters before answering the policy questions below. At this stage, we set out the policy considerations which underpin our proposals for law reform, and the basis on which we think a new civil wrong of domestic abuse should be introduced, and seek views on these proposals.

5.3 In Part 1 of this chapter, we make the case for introducing a statutory delict of domestic abuse, and examine the possible definition of domestic abuse in such a scheme. In Part 2, we move on to look at remedies and enforcement.

Part 1: Introducing a Statutory Delict of Domestic Abuse

The complexity of the current regime: the need for a new approach

5.4 In Chapters 3 and 4, we set out the current law, identified problems with specific provisions, and suggested some possible reforms. However, even if those individual problems were remedied, there is still a wider problem, caused by the interaction of multiple pieces of legislation, enacted over a 40 year period, which all approach domestic abuse in a slightly different way. There is therefore an overarching problem with the current civil regime, which is evident in a number of different ways.

5.5 In the first place, the different pieces of legislation which make provision for civil remedies for domestic abuse typically do not define the term “domestic abuse,” or include any reference to the term or any similar term.

¹ See para 5.15 for an explanation of what a delict is.

5.6 There is no reference to “domestic abuse” or “abusive behaviour” in the 1981 Act. Instead, section 4(2) refers to the court having to make an exclusion order if it appears that it is “necessary for the protection of the applicant or any child of the family, from any conduct, or threatened or reasonably apprehended conduct of the non-applicant spouse / cohabitant, which is or would be injurious to the physical or mental health of the applicant or child”.

5.7 The 2001 Act enables a power of arrest to be attached to an interdict, and refers to interdicts obtained for “the purpose of protection against abuse”. Abuse and conduct are defined in the 2001 Act as follows:

“abuse” includes violence, harassment, threatening conduct, and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress;

“conduct” includes—

(a) speech; and

(b) presence in a specified place or area;²

5.8 The 2011 Act does refer to domestic abuse, when it makes provision for a determination that an interdict is a domestic abuse interdict. However, it does not define domestic abuse, and simply requires (i) that the interdict has a power of arrest attached in terms of the 2001 Act (which necessitates that the interdict is to protect the applicant from “abuse” as defined³); and (ii) that the interdict is between parties who are (or were) spouses, civil partners, cohabitants, or intimate partners. Thus a determination that an interdict is a domestic abuse interdict under the 2011 Act indicates that the interdict is to protect against “abuse” between partners.

5.9 The 1997 Act makes reference to domestic abuse in section 8A (inserted by the 2011 Act), which makes provision for “Harassment amounting to domestic abuse”. However, the term is not defined in any of the provisions in the 1997 Act. Harassment itself is defined as including “causing the person alarm or distress”, while conduct is defined as including speech.⁴

5.10 A second problem is that the relevant legislation introduces a wide range of terms, some of which vary depending on the legal relationship between the perpetrator and the victim/survivor. Thus, the 1981 Act and 2004 Act introduce exclusion orders, which can have ancillary interdicts, and these interdicts can be described as “matrimonial interdicts”; “relevant interdicts”; or “domestic interdicts”, depending on whether the parties are married, in a civil partnership, or cohabiting respectively. (This has been discussed in Chapter 4, where reforms were proposed.⁵) Even where a victim/survivor has an exclusion order and interdict, a separate power of arrest is required. The 2011 Act introduces a “domestic abuse interdict”, although this is not the same as a “domestic interdict” under the 1981 Act. Alternatively, a victim/survivor could seek a non-harassment order or interdict in respect of harassment, in terms of the 1997 Act, whether specifically for domestic abuse under section 8A, or not, although it is not possible

² 2001 Act, s 7.

³ See para 5.7, and Ch 4, para 4.56.

⁴ 1997 Act, s 8(3).

⁵ See Ch 4, paras 4.49 to 4.51.

for a perpetrator to be subjected to a non-harassment order and interdict in respect of the same conduct.⁶

5.11 A third complication is that there is no specific civil regime which recognises domestic abuse as a wrong, and the complexities which are unique to domestic abuse, and which seeks to provide specific remedies for it. Only one Act (the 2011 Act) is focused exclusively on domestic abuse. The other various common law and statutory measures that can offer protection to victim/survivors of domestic abuse all have a wider remit than purely domestic abuse. For example, a common law interdict can be used to prohibit wrongful conduct in any personal or commercial relationship. The 1981 Act and 2004 Act regulate occupancy rights, which have legal significance in intimate partner relationships in a wider context, whereby occupancy rights give non-entitled spouses and civil partners a legal right to reside in the home, and take certain steps in relation to it, even outwith the context of domestic abuse, as discussed in Chapter 3. The 1997 Act is primarily aimed at protection from harassment, and can be used by anyone who suffers from stalking or harassment: the specific domestic abuse measure in section 8A is only part of this framework, and was introduced at a later stage.⁷ The 2001 Act can be used to seek a power of arrest where there is an interdict for the purpose of protection from abuse, and this applies in *any* case of abuse, not only domestic abuse.

5.12 Related to these concerns, stakeholders have also identified that the current law does not provide a sufficient range of remedies, including immediate protection and specific orders that victim/survivors may need, such as return of property orders.⁸

5.13 We think that there is merit in trying to tackle all these issues holistically, rather than through piecemeal reform of the current law. Everyone has the right to be free from domestic abuse, and the law should recognise this explicitly.⁹ Victim/survivors should benefit from a civil protection regime which recognises the specific harms they suffer, and offers appropriate tailored remedies. Introducing a new civil law in respect of domestic abuse could address: the complexity and confusion arising from the plethora of civil orders, which apply in different contexts; the lack of a standard definition of domestic abuse in the civil law; and the lack of an effective remedy focused solely on domestic abuse.¹⁰ As well as addressing these problems, the introduction of a new civil law regime to offer protection and redress for domestic abuse would also send a strong signal that domestic abuse is wrong and will not be tolerated.

5.14 There is one route to offering this necessary protection in Scots law: the creation of a statutory delict of domestic abuse.

Domestic abuse as a delict

5.15 A delict is a civil “offence” or wrong. Where there is wrongful conduct which causes physical or psychological harm, there is an obligation to compensate for the damage done: the victim is entitled to seek damages in respect of the harm caused, and protection to ensure

⁶ 1997 Act, s 8(5)(b), although see *McCann v McCann* [2002] ScotCS 67, 2002 SLT 592, where the Court of Session held that it was possible to have the protection of a permanent interdict in a divorce action and seek a non-harassment order in a separate action.

⁷ Section 8A was inserted into the 1997 Act by s 1 of the 2011 Act.

⁸ The 1981 Act does provide for the court to order the return of possessions, in s 3(4), but it appears to be little used.

⁹ By way of comparison, this is made explicit in relation to harassment in s8(1) of the 1997 Act: “Every individual has the right to be free from harassment”.

¹⁰ See paragraphs 5.154 to 5.157 on rationalising the law in this area.

it is not repeated.¹¹ Scots law recognises a wide range of delicts, which are traditionally divided into two categories: intentional and non-intentional. (Non-intentional wrongful conduct is also known as negligence.¹²) Intentional delicts, such as unjustified detention, nuisance, harassment or defamation,¹³ involve conduct which may be deliberate or reckless or, in the case of harassment, which appears to a reasonable person to amount to harassment. The delict of molestation is also intentional, with the conduct required for this common law interdict including "...assault, nuisance or any other obviously vexatious conduct... [including] verbal abuse or physical threats".¹⁴ Intentional delicts cause harm to protected interests of the victim,¹⁵ such as "protection of the person, protection of liberty, protection of reputation and protection of interests in property."¹⁶ A delict therefore occurs when there is a wrongful invasion of a protected right or interest of the victim.

5.16 There was historically a close link between delictual wrongs and criminal conduct: "Little distinction was drawn between delicts and crimes in medieval law".¹⁷ It is still the case that some delicts are also criminal offences: for example, assault can be prosecuted as a crime, while separately the victim can pursue a civil action for damages (and an interdict if the conduct is likely to happen again).¹⁸ The existence of a criminal offence does not prevent the victim of the offence also seeking to claim damages in the civil law for the wrong: "Civil actions and criminal prosecution are, in general, concurrent and independent."¹⁹ One critical difference is that any criminal prosecution lies in the hands of the Crown Office and Procurator Fiscal Service, whereas a civil action is raised by the person who has suffered from the wrongful conduct. Allowing a civil action therefore respects the autonomy of victim/survivors by enabling them to seek the remedies that work best for them. It might be the case that criminal conduct is also actionable as a delict, but Walker advances the view that conduct which is criminal by statute (rather than at common law) is not automatically actionable as a delict.²⁰ The abusive behaviour of domestic abuse was criminalised through the Domestic Abuse (Scotland) Act 2018, and there is no explicit provision in the Act that this statutory criminal offence is also actionable by the victim/survivor as a delict.

5.17 Although most delicts in Scotland are common law delicts, there are also delicts created by statute, and the Scottish Parliament has the power to create new statutory delicts.²¹ The creation of new delicts is not common, but it is well established both at common law and in statute.²² For example, the Protection from Harassment Act 1997 created the statutory delict of harassment,²³ while the delict of misuse of private information was created by the courts.²⁴

¹¹ Gloag and Henderson, 15th ed, para 25.01.

¹² The classic statement of negligence is that in *Donoghue v Stevenson* 1932 SC(HL) 31, the "snail in the ginger beer bottle" case. See also Gloag and Henderson, 15th ed, chapter 26.

¹³ EC Reid, *The Law of Delict in Scotland*, para 15.01.

¹⁴ EC Reid, *The Law of Delict in Scotland*, at 1033.

¹⁵ Gloag and Henderson, 15th ed, para 25.06.

¹⁶ Gloag and Henderson, 15th ed, para 25.04.

¹⁷ Gloag and Henderson, 15th ed, para 25.03. See also K McK Norrie, "The Intentional Delicts", in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, (OUP, 2000), at pp 477-478.

¹⁸ EC Reid, *The Law of Delict in Scotland*, para 21.72, citing *Hay's Trustees v Young* (1877) 4 R 398.

¹⁹ DM Walker, *Principles of Scottish Private Law*, Vol II, Obligations, 4th ed (OUP, 1988), p 530.

²⁰ DM Walker, *Principles of Scottish Private Law*, Vol II, Obligations, 4th ed (OUP, 1988), p 530.

²¹ The Scotland Act 1998, s 126(4)(c) lists delict as a branch of the law of obligations, within the scope of Scots private law. See also EC Reid, *The Law of Delict in Scotland*, para 1.38.

²² EC Reid, *The Law of Delict in Scotland*, para 1.38.

²³ Protection from Harassment Act 1997, s 8(2). Note the wording in s 8(1) of that same Act 'Every individual has a *right* to be free from harassment....' (emphasis added).

²⁴ *Campbell v MGN* [2004] UKHL 22.

Much of the recent delictual innovation has been to ensure ECHR compliance, for example the delict of misuse of private information, which protects Article 8 interests.

5.18 The wrongful conduct required to establish liability for specific delicts at common law, such as assault or defamation, has generally been clearly delineated,²⁵ and, in the case of statutory delicts, will be specified in the statute. Although these named delicts are referred to as intentional delicts, there is a question as to what “intention” means:

“Some modern writers suggest that the intention that justifies the imposition of legal liability is the intent to perform an act, or to fail to perform an act, which would have injury to another as its normal and natural consequence. Others suggest that the intention that justifies liability lies in the intent to cause the injury itself.”²⁶

5.19 Professor Norrie notes that this second sense resolves issues of causation and remoteness.²⁷ However, while this distinction may be an issue for the common law delicts, it is less of an issue for delicts created by statute, such as harassment, where the test is set out in the statute. Thus, the 1997 Act refers to conduct which amounts to harassment (as defined²⁸) and which

“(a) is intended to amount to harassment of that person; or

(b) occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that person.”

5.20 Accordingly, the standard of conduct required to establish a new delict of domestic abuse could be set out in statute, to include conduct which is intentional or where it would appear to a reasonable person to constitute abuse of that victim/survivor.

5.21 Liability in delict is not usually strict (which is where an individual is liable for damage or losses, regardless of their intention or mental state),²⁹ and a defence generally exists if the conduct is justified.³⁰ In the case of a statutory delict, any specific defences which are considered appropriate can be included in the legislation.³¹ This is the case in respect of the delict of harassment, where section 8(4) of the 1997 Act provides that it shall be a defence to an action for harassment to show that the conduct was (a) authorised by law; (b) pursued for the purpose of preventing or detecting crime; or (c) was reasonable in the circumstances.

5.22 At present, there is no specific delict of domestic abuse. There are a number of delicts which could potentially be used by a victim/survivor, depending on the circumstances, such as assault, nuisance, or harassment. However, it remains a matter of chance as to whether the wrongful conduct suffered by a victim/survivor meets the criteria of an existing delict, in order to provide them with a remedy. There is no existing delict which could be adapted to

²⁵ Gloag and Henderson, 15th ed, para 25.05, noting that there has been “relatively little judicial discussion of culpa” (ie fault) except in nuisance cases.

²⁶ K McK Norrie, “The Intentional Delicts”, in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, (OUP, 2000), at p 478, references omitted.

²⁷ K McK Norrie, “The Intentional Delicts”, in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, (OUP, 2000), at p 478. He also notes that the distinction between intentional and unintentional wrongs does not have “much practical effect” in civil law: at p 480.

²⁸ 1997 Act, s 8(3).

²⁹ Although it may be: for discussion, see Gloag and Henderson, 15th ed, para 27.04.

³⁰ Gloag and Henderson, 15th ed, para 25.06.

³¹ Common law defences may also apply, although could be specifically excluded in the statute.

accommodate domestic abuse. The law as it stands therefore fails to recognise the specific wrongs at the heart of domestic abuse, and the right of the victim/survivor to be free from that harm. It also fails to provide remedies tailored to the harms suffered by victim/survivors. Fortunately the categories of nominate delicts are not finite: “The law is flexible so that unprecedented wrongs may be reparable, but an interest will remain unprotected until, as a matter of policy, the decision is made to protect it”.³²

5.23 We think that there is a strong case for taking that decision to recognise domestic abuse as a delictual wrong, and for introducing a clear statement in law that every individual has the right to be free from domestic abuse. The conduct of the perpetrator and the remedies sought by the victim/survivor in cases of domestic abuse sit well within the existing principled framework of delictual wrongs and remedies. This would recognise the wrongful conduct and the obligation on the perpetrator to make reparation for the harm caused, as well as the right of the victim/survivor to ensure the conduct is not repeated. The interests protected by delict are typically the person and property of the victim, and these are exactly the interests which suffer when domestic abuse is perpetrated. There is an established recognition in Scots law of the link between criminal offences and delictual wrongs, which is also present here. And there is also scope for defences where the conduct in question is justified. A new statutory delict could therefore make specific provision for (i) a definition of domestic abuse; (ii) specific remedies centred on protecting the person and the property of the victim/survivor, and providing redress for the harm caused; and (iii) identifying any defences where justified.³³

5.24 A new delict of domestic abuse would also bring a number of benefits. It would provide a single civil wrong, in a single statute. This would make it much easier for victim/survivors to understand their rights, and identify whether they have been suffering domestic abuse, as legally defined. It would also make it more straightforward for lawyers to advise on whether the conduct is abusive behaviour, and what remedies are available. This would present a simple and streamlined law, in one Act of Parliament, in contrast to the current regime, spread across the common law and five different Acts which are potentially relevant.³⁴ The language would also be unified, rather than having different terminology based on whether the parties are spouses, civil partners, or cohabitants, for example. A final advantage of a new civil wrong set out in statute is that that statute could also provide an appropriate and effective enforcement regime, so that victim/survivors do not have to seek powers of arrest and determinations of domestic abuse in relation to an interdict. A new civil regime would therefore provide a clear statement that domestic abuse is wrong and that civil remedies are available, while removing many of the obstacles to effective civil protection that exist at present.

5.25 Introducing a new civil wrong in statute does not automatically interfere with existing obligations or rights under the common law. As is explained in Gloag and Henderson:

“While they may do so, either expressly or impliedly, statutes do not generally extinguish common law rights and duties although they may place limitations on liability. The existence of a statutory duty does not, on the other hand, create a common law duty that would not otherwise have existed. There are statutes, moreover, in which

³² Gloag and Henderson, 15th ed, para 25.04, citing *Micosta v Shetland Islands Council* 1986 SLT 193.

³³ There are defences set out in the Domestic Abuse (Scotland) Act 2018, s6, where the course of behaviour was reasonable in the circumstances.

³⁴ Being the 1981, 2004, 1997, 2001, and 2011 Acts. See also paras 5.154 to 5.158 on rationalising the current regime.

common law duties are expressly superseded. In such circumstances, actions may only be founded on the statute.”³⁵

5.26 Regardless of the existing common law and statutory measures to tackle domestic abuse (as discussed in Chapters 3 and 4), we propose that a statutory delict of domestic abuse should make express provision for civil liability in the event of a breach. Conduct amounting to domestic abuse may already be covered by delicts such as harassment and assault. However, this is not a barrier to domestic abuse being recognised as a wrong in and of itself. Additionally, coercive control, which is at the heart of the definition which we propose below (at paragraphs 5.36 and 5.37) is not covered by existing civil remedies. We therefore propose that a statutory delict of domestic abuse is introduced, to define the civil wrong of domestic abuse, and make provision for a unified scheme of remedies and enforcement. We turn now to the options for defining domestic abuse.

Defining domestic abuse

5.27 If a statutory delict of domestic abuse were to be introduced, the next question then is what the definition of domestic abuse should be. There seems to be a clear benefit to drawing on the definition in the Domestic Abuse (Scotland) Act 2018. The 2018 Act created the first specific criminal offence of domestic abuse, using the term “abusive behaviour” and defining what constitutes abusive behaviour. Abusive behaviour is defined as:

1 Abusive behaviour towards partner or ex-partner

(1) A person commits an offence if—

- (a) the person (“A”) engages in a course of behaviour which is abusive of A’s partner or ex-partner (“B”), and
- (b) both of the further conditions are met.

(2) The further conditions are—

- (a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,
- (b) that either—
 - (i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or
 - (ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.

(3) In the further conditions, the references to psychological harm include fear, alarm and distress.

2 What constitutes abusive behaviour

(1) Subsections (2) to (4) elaborate on section 1(1) as to A’s behaviour.

(2) Behaviour which is abusive of B includes (in particular)—

- (a) behaviour directed at B that is violent, threatening or intimidating,
- (b) behaviour directed at B, at a child of B or at another person that either—

³⁵ Gloag and Henderson, 15th ed, para 27.01.

- (i) has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3), or
- (ii) would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (3).

(3) The relevant effects are of—

- (a) making B dependent on, or subordinate to, A,
- (b) isolating B from friends, relatives or other sources of support,
- (c) controlling, regulating or monitoring B's day-to-day activities,
- (d) depriving B of, or restricting B's, freedom of action,
- (e) frightening, humiliating, degrading or punishing B.

(4) In subsection (2)—

- (a) in paragraph (a), the reference to violent behaviour includes sexual violence as well as physical violence,
- (b) in paragraph (b), the reference to a child is to a person who is under 18 years of age.

5.28 During stage 1 of the Bill process, the Criminal Justice Committee heard evidence from a number of stakeholders who were supportive of the definition of “abusive behaviour” in the Bill, including an official from the Crown Office and Procurator Fiscal Service (Anne Marie Hicks), who commented that:

“... dealing with domestic abuse has always been a matter in which people have said that there is a danger that we stray into family life. Even under the current law, it is sometimes asked whether we criminalise normal behaviours in a relationship. We do not, and I do not think that the bill does that. It defines “abusive behaviour” as behaviour “that is violent, threatening or intimidating”. It also defines it in terms of “relevant effects”, which include “controlling, ... frightening, humiliating, degrading or punishing” someone. That is not how I would define normal friction in a relationship. Once we get to the boundaries of “humiliating, degrading or punishing” treatment, that is where the criminal law should step in.”³⁶

5.29 Megan Farr from the office of the Children & Young People’s Commissioner Scotland noted that: “We are comfortable with, and agree strongly with, the definition of domestic abuse that is in the bill”.³⁷

5.30 Since coming into force in 2019, this definition has become well-established, and well-understood by the police and the legal actors who apply it. In 2023, the Criminal Justice Committee carried out a post-legislative scrutiny of the 2018 Act. The witnesses who gave evidence were also supportive of the definition of abusive behaviour and the language in the 2018 Act generally. Dr Marsha Scott, of Scottish Women’s Aid, indicated her satisfaction with

³⁶ Anne Marie Hicks, COPFS, who also commented: “The relevant effects [s 2(3)] are based on consultation with key stakeholders and experts in domestic abuse, and I think that they capture the essence of what victims say about their lived experience of abuse with regard to their being made to be subordinate; being controlled, monitored and isolated; being deprived of their freedom; and suffering punishing and humiliating treatment. From the cases that we see and the cases that I have heard about, I think that that covers what we would be looking for in trying to prosecute these cases.”

³⁷ Criminal Justice Committee Session, 20 June 2017 (available at: <https://www.parliament.scot/bills-and-laws/bills/domestic-abuse-scotland-bill>).

the Act "...in part because survivors contributed so much of the language, especially in the guidance, around freedom, autonomy, fear and distress. The language around what coercive control looks and feels like is fine".³⁸ This view was shared by Amanda Masson who commented that "From a practitioner's perspective the law is well drafted and clear. It could not be clearer. Clients certainly understand what it means, which is the important thing".³⁹

5.31 A similar definition of "abusive behaviour" and what constitutes abusive behaviour is provided for in the Domestic Abuse (Protection) (Scotland) Act 2021.⁴⁰ It was noted during a Justice Committee Stage 1 evidence session for the Bill that became the 2021 Act that "the definition of abuse had been closely modelled on the definition of domestic abuse in the 2018 Act".⁴¹ It is not possible to assess how the definition works in practice in the 2021 Act, as it is not yet in force.

5.32 We are not aware of any significant criticism being made of the definition of abusive behaviour and what constitutes such behaviour in the 2018 Act, and neither has it been the subject of criticism from the stakeholders we have met with or members of our Advisory Group.

5.33 One key advantage of adopting the definition in the 2018 Act is that it covers coercive control, which would allow the courts to recognise coercive control as abusive behaviour in the civil context, and provide a remedy for it. Coercive control has been described as "a singular malevolent intent to dominate",⁴² regardless of the means used by the perpetrator to achieve this domination. It is important to recognise this intent to dominate and control as a key element of the definition of domestic abuse, rather than focusing solely on the ways in which this control can be established, such as physical, sexual, or emotional abuse.

5.34 A further important advantage of adopting the definition in the 2018 Act in the civil context is that it could encompass conduct which is otherwise regarded as acceptable or normal, where that conduct causes fear, alarm and distress. This is explicitly recognised in the criminal offence of domestic abuse: as the 2018 Act Policy Memorandum states, "there may be cases where behaviour that may appear innocuous when seen out of context can clearly be seen as psychologically abusive when viewed in the context of, for example, past threats or physical violence between the perpetrator and the victim".⁴³ If this definition were adopted for a civil wrong of domestic abuse, then repeatedly phoning or contacting the victim/survivor, or sending them flowers, could meet the test of abusive behaviour, if a reasonable person would consider the course of behaviour to be likely to cause the victim/survivor to suffer physical or psychological harm, and the perpetrator either intends to cause harm or is reckless as to the harm caused. Psychological harm includes fear, alarm and distress. The behaviour in question would need to be directed at the victim/survivor (or at

³⁸ Criminal Justice Committee, 8 March 2023, [Official Report \(parliament.scot\) 2023](https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=15193), p 15 (available at: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=15193>).

³⁹ Criminal Justice Committee, 8 March 2023, [Official Report \(parliament.scot\) 2023](https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=15193), p 16 (available at: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=15193>).

⁴⁰ "Abusive behaviour" is defined in s 2; what constitutes abusive behaviour is provided for in s 3.

⁴¹ Patrick Down, Scottish Government policy official, Justice Committee Stage 1 evidence session, 15 December 2020 (available at: <https://www.parliament.scot/bills-and-laws/bills/domestic-abuse-protection-scotland-bill>).

⁴² E Stark, "The 'Coercive Control Framework': Making Law work for Women", in M McMahon and P McGorrrery (eds) *Criminalising Coercive Control*, (Springer, 2020), at p 40.

⁴³ Domestic Abuse (Scotland) Act 2018 Policy Memorandum, para 57. See also paras 22, 37 and 38 (available at: <https://www.parliament.scot/-/media/files/legislation/bills/previous-bills/domestic-abuse-bill/introduced/policy-memorandum-domestic-abuse-scotland-bill.pdf>).

another person, including a child of the victim/survivor⁴⁴) and be intended or likely to have specified effects on the victim/survivor, such as frightening, humiliating, or degrading them. Thus, conduct which was intended to harass the victim/survivor and demonstrate that the perpetrator was constantly monitoring them, for example, could constitute conduct which frightens the victim/survivor and causes psychological harm, and thus be caught by the definition, even if it was otherwise “lawful”. This would mean that it would be covered by the statutory delict, and the victim/survivor would be able to seek remedies in relation to this conduct. A further advantage would be that there would then be civil redress available for conduct which is also criminal, reflecting the close links between criminal law and delict.⁴⁵

5.35 The 2018 Act also makes provision for a defence, which would justify the behaviour in question. Section 6 provides that “In proceedings for an offence under section 1(1), it is a defence for A to show that the course of behaviour was reasonable in the particular circumstances”. The Explanatory Notes to the 2018 Act give some examples:

“This may apply where, for example, the accused acted in order to protect the household finances where their partner is suffering from a gambling addiction, or to prevent their partner from associating with certain persons or frequenting certain places if they are recovering from alcohol or drug addiction, or to restrict the freedom of movement of a partner who is suffering from dementia.”⁴⁶

5.36 The definition of abusive behaviour in the 2018 Act has much to recommend it in the criminal sphere. We think there would be a considerable benefit to having a single definition of abusive behaviour in civil law too, and there would be obvious advantages to harmonising the definition here by applying the definition in the 2018 Act in creating a statutory delict of domestic abuse. It sets out clearly the wrongful conduct that constitutes the delict: a course of conduct of abusive behaviour which the perpetrator intends will harm the victim/survivor, or is reckless as to whether it harms the victim/survivor. This definition could include the same defence in section 6, to recognise where the behaviour was reasonable in the circumstances.⁴⁷ For the avoidance of doubt, if the 2018 Act definition were to be introduced in the civil context, the standard of proof would nevertheless remain distinct: cases in the criminal court would need to be established beyond reasonable doubt, while in civil matters, the court would need to be satisfied on the balance of probabilities.⁴⁸

5.37 Having a civil definition of domestic abuse which mirrors the definition of the criminal offence does not result in unnecessary duplication. In the first place, as noted above, the standard of proof would be different. Secondly, even where the perpetrator is convicted of abusive behaviour under the 2018 Act, the victim/survivor may well need separate remedies in a civil context. Introducing a statutory delict of domestic abuse would allow us to offer those

⁴⁴ A child being under the age of 18, in line with the 2018 Act definition. This is a departure from the broader definition of child under the 1981 Act (“child of the family” is defined in s 22 of the 1981 Act as including any child or grandchild of either spouse, and any person who has been brought up or treated by either spouse as if he or she were a child of that spouse, whatever the age of such a child, grandchild or person may be) as mentioned in Ch 4 (and which of course remains available as protection for adult children). However, it is in line with the criminal law and the UNCRC. Moreover, the Adult Support and Protection (Scotland) Act 2007 provides for orders to protect certain at risk adults (albeit these must be sought by the local authority), and accordingly, there is protection available for adult children where required.

⁴⁵ See para 5.16 above.

⁴⁶ Explanatory Notes to the 2018 Act, para 42 (available at: <https://www.legislation.gov.uk/asp/2018/5/notes>).

⁴⁷ As noted in paragraph 5.21 above, delictual liability is rarely strict.

⁴⁸ To prove something on the balance of probabilities is to prove that it is more likely than not, which is a lower standard of proof than in criminal cases, where something has to be proved beyond reasonable doubt.

specific and focused civil remedies (discussed below). Importantly, a regime of civil remedies allows victim/survivors to take control, and seek the protection or redress they need, rather than relying on a decision to prosecute being taken by the Crown Office and Procurator Fiscal Service.

5.38 As a civil action, any claims arising out of a statutory delict of domestic abuse would be subject to the usual rules governing any civil action. For example, the rules on limitation would require a claim to be brought within three years of when the wrongful conduct ceased, as is the case for harassment under the 1997 Act.⁴⁹

5.39 Having set out the case for a new statutory delict of domestic abuse to be introduced, to recognise abusive behaviour as a civil wrong, and proposed that domestic abuse in this civil law should be defined on the same terms as in the 2018 Act, we therefore ask:

- 23. Do you support the introduction of a new statutory delict of domestic abuse?**
- 24. Should the delict of domestic abuse be defined in terms of “abusive behaviour”, as in the 2018 Act?**
- 25. If not, what definition do you propose instead?**
- 26. Should the defence recognise behaviour which was reasonable in the particular circumstances, as in the 2018 Act?**

Defining domestic abuse: additional factors

5.40 While the definition of domestic abuse in the 2018 Act has become established as a clear and relevant test in the criminal courts, we have become aware of three particular modes of abuse which are not explicitly referenced: tech abuse, immigration abuse, and economic abuse. In most cases, these types of abuse do not happen in isolation. Domestic abusers will perpetrate tech abuse, immigration abuse and/or economic abuse alongside more widely recognised forms of abuse, such as physical, psychological, or sexual abuse. Either singly or in combination, these modes of abuse can allow the perpetrator to exert control over the victim/survivor.

5.41 Where these types of abuse meet the definition in the 2018 Act, then they will constitute domestic abuse. However, the lack of explicit naming and identification leads to the very real concern that they are insufficiently recognised as types of domestic abuse, or as ways that the perpetrator can control and harm the victim/survivor. For this reason, there is significant merit in naming them in relation to the civil wrong, to increase understanding and awareness. This helps enable victim/survivors to identify and name the abuse they have suffered. Naming them also helps ensure that all those involved in working with and supporting victim/survivors of domestic abuse – whether solicitors, advocates, judges, sheriffs, police, government agencies, or third sector support workers – are aware that these actions or behaviours constitute domestic abuse. Finally, as has been noted in the specific context of immigration abuse, naming the wrong is vital, to ensure that “national and local policy makers and frontline

⁴⁹ Prescription and Limitation (Scotland) Act 1973: see in particular s 18B in respect of harassment claims under the 1997 Act.

practitioners are equipped to identify and respond appropriately to victims and survivors”.⁵⁰ Thus, even if these modes of abuse are currently covered by the definition in the 2018 Act, it may be advantageous to define them specifically in a new statutory delict of domestic abuse, to promote greater understanding and awareness.

5.42 We deal with each of tech abuse, immigration abuse, and economic abuse in turn. We seek views on whether these types of abuse should be expressly identified within a civil law definition of domestic abuse.

*Tech abuse*⁵¹

5.43 In 2023, the Culture, Media and Sport Committee at Westminster produced a report on “Connected tech: smart or sinister”.⁵² The Committee inquired into “the potential benefit and harms of connected technology, such as smart speakers, virtual assistants and wearable fitness trackers,” and chapter 3 of the report focused specifically on technology-facilitated abuse. As part of this, the Committee heard evidence that the vast majority of domestic abuse cases now include a cyber element, such as use of spyware, perpetrators monitoring movements and collecting recordings/images of victim/survivors. This can be referred to as “tech abuse”, and was defined by the Committee as “a form of domestic abuse where perpetrators use technology, including connected devices and social media, to abuse victims and survivors”.⁵³

5.44 Perpetrators may set up and manage devices, such as Amazon Alexa, Google home, smart TVs, and Ring doorbells, within the home and which they can control remotely to monitor, harass and intimidate a victim/survivor. Perpetrators can install intrusive surveillance apps and software or to listen in on conversations, collect recordings and intimate images for blackmail purposes. Part of the abuse can even be lying to the victim/survivor about the capability of their phone to record or monitor them, even when the device cannot do that.⁵⁴ Tech abuse can also fundamentally threaten and undermine the victim/survivor’s attempt to seek safety. One solicitor reported that a client had to leave her phone in her car at a shopping centre and take the bus to the solicitor’s office for a meeting to obtain legal advice in relation to domestic abuse, in order to avoid her partner tracking her movements through her phone. Evidence collected by the Committee reports: “Women are often detected in refuge through their Netflix account because they forget they are still connected when they log in at the refuge”.⁵⁵

5.45 The Committee’s report also highlighted the prevalence of tech abuse in domestic abuse. Data from Refuge (a specialist provider of gender-based violence services in the UK)

⁵⁰ Domestic Abuse Commissioner, “Safety Before Status”, (2021) (available at: <https://domesticabusecommissioner.uk/wp-content/uploads/2021/10/Safety-Before-Status-Report-2021.pdf>) at p 5.

⁵¹ We are particularly grateful to Anna Montgomery, a PhD student at Queens University Belfast, for sharing her research into “Smart Home Tech Abuse” with us and helping us to understand the myriad ways in which smart and connected technology can be used to perpetrate domestic abuse.

⁵² Available at: <https://publications.parliament.uk/pa/cm5803/cmselect/cmcomeds/157/report.html> (August 2023). We use the term “tech abuse” rather than “technology” or “technological” abuse, reflecting the terminology used by the Committee and by academics in this field.

⁵³ Available at: <https://publications.parliament.uk/pa/cm5803/cmselect/cmcomeds/157/report.html> at para 122.

⁵⁴ Available at: <https://publications.parliament.uk/pa/cm5803/cmselect/cmcomeds/157/report.html> at para 124, citing evidence from Dr Leonie Tanczer.

⁵⁵ Available at: <https://publications.parliament.uk/pa/cm5803/cmselect/cmcomeds/157/report.html> at para 124, citing Dr Leonie Tanczer.

indicated that, of the women and children it supported in 2020-21, 59% had experience tech abuse.⁵⁶ The Committee cited evidence from Dr Leonie Tanczer which provided “even starker figures”, whereby some support organisations reported “figures between 75 percent, 85 percent and... 100 percent” of victim/survivors of domestic abuse experiencing tech abuse.⁵⁷ This data mirrors the evidence we have heard from stakeholders throughout the course of this project so far. Solicitors have told us that there has been an exponential growth in the use of tech abuse in recent years, and many of them reported that they have not had a case of domestic abuse in the last year which has not included some form of tech abuse.

5.46 One of the most invidious aspects of tech abuse is that it is boundaryless: the abuse can be continued and perpetrated even when the parties are not in the same vicinity. Victim/survivors can never get away from the perpetrator, adding to the psychological harm and mental fatigue of the abuse. As the Culture, Media and Sport Committee observed:

“Tech abuse is a significant related issue because technology, and particularly connected technology, can broaden and exacerbate patterns of abuse and the reach of perpetrators, as perpetrators no longer need to be physically co-present with victims and survivors in order to inflict abuse.”⁵⁸

5.47 As a result of their 2023 report, the Committee recommended that Government should make tackling tech abuse a priority and the Office for Product Safety and Standards should convene a ‘tech abuse working group’ to bring the industry together to tackle it.⁵⁹

5.48 While policy and legislative reforms to regulate tech abuse, especially to require technology companies to introduce reforms and safeguards, are a matter for Government, we are of the view that an express statutory definition of tech abuse as part of a wider definition of domestic abuse would have a number of benefits. In the first place, a statutory definition would draw awareness to this type of abuse and allow victim/survivors and all those working with them to identify it and name it. Secondly, some tech abuse may appear “harmless”, unless it is properly understood. While activities such as using social media to harass or stalk victim/survivors, or blackmailing them in relation to intimate images, are widely recognised as harmful, there is a risk that the use of smart technology to control all aspects of the victim/survivor’s life may be overlooked or minimised. For example, a perpetrator who is out at work and uses an app to turn off the central heating at home all day, while the victim/survivor is at home with no control over the heating, could present their conduct as a reasonable attempt to control heating bills, rather than it being recognised as part of a wider pattern of controlling behaviour. Likewise, plenty of partners share their location data with each other, and this is not necessarily harmful, and may therefore not be recognised as tech abuse even where it is used in a controlling and abusive way. A third concern, which was highlighted in evidence from Dr Tanczer to the UK Government’s Media, Culture and Sport Committee, is that legal and policing responses to tech abuse are often inappropriate and ineffectual, most notably the advice that victim/survivors should simply “go offline” in order to avoid abuse.⁶⁰

⁵⁶ Available at: <https://publications.parliament.uk/pa/cm5803/cmselect/cmcmds/157/report.html> at para 123. The committee were given evidence by Refuge, who provide a network of 42 refuges across England and Wales, and are based in London.

⁵⁷ Available at: <https://publications.parliament.uk/pa/cm5803/cmselect/cmcmds/157/report.html> at para 123.

⁵⁸ Available at: <https://publications.parliament.uk/pa/cm5803/cmselect/cmcmds/157/report.html> at para 122.

⁵⁹ Available at: <https://publications.parliament.uk/pa/cm5803/cmselect/cmcmds/157/report.html> at paras 131 and 138.

⁶⁰ Available at: <https://publications.parliament.uk/pa/cm5803/cmselect/cmcmds/157/report.html> at para 128.

Identifying tech abuse in a statutory definition makes it explicitly clear that it is harmful and is a wrong which should be stopped: responsibility for avoiding it should not be placed on victim/survivors changing their behaviour.

5.49 It is important to emphasise that any definition of tech abuse introduced in a civil law definition of domestic abuse would need to meet the definition of abusive behaviour in order to be caught. This means conduct would only constitute tech abuse where it was carried out with the intention and consequence of harming the victim/survivor (or where the perpetrator is reckless as to the harm caused). It would also be subject to the defence, discussed above, of reasonableness. Accordingly, one spouse turning the heating off, or a person monitoring their partner's location online to see if they are safe, for example, would not constitute domestic abuse unless it was part of a course of abusive conduct as defined (that is, violent, threatening or intimidating behaviour which is intended to cause (or reckless as to whether it causes) their partner physical or psychological harm, and which has certain defined effects, such as frightening or humiliating their partner).

5.50 It seems likely that tech abuse would currently be caught by the definition of domestic abuse under the 2018 Act. There is also explicit mention of the use of technology in the statutory definition of stalking, in the Criminal Justice and Licensing (Scotland) Act 2010, where section 39 contains a lengthy list of what conduct is captured by the offence, including: following a person; contacting, or attempting to contact a person; monitoring the use by a person of the internet, email or any other form of electronic communication; watching or spying on a person; acting in any other way that a reasonable person would expect would cause a person to suffer fear or alarm, and "course of conduct" involves conduct on at least two occasions.⁶¹

5.51 In the civil context, however, there is no explicit mention of tech abuse, and we are of the view that a new statutory delict of domestic abuse would benefit from naming and identifying this prevalent and harmful conduct, to allow victim/survivors to be able to seek civil protection orders as a result of such abusive behaviour. Of course, if tech abuse were to be included in a definition of domestic abuse, it would ideally need to be future-proofed, and as such cannot be exhaustive due to the evolving nature of technology. We ask consultees:

27. Do you support the inclusion of tech abuse as one element of abusive behaviour in a statutory definition of domestic abuse as a delict, and if so, what factors should be included?

Immigration abuse

5.52 Domestic abuse can be perpetrated or exacerbated where the perpetrator uses the victim/survivor's immigration status to control or threaten them. As Professor Sutherland sets out, "women who have come from abroad recently... may be amongst the most vulnerable

⁶¹ It is a defence for a person charged with stalking to show that the course of conduct was authorised by virtue of any enactment or rule of law, was engaged in for the purpose of preventing or detecting crime, or was, in the particular circumstances, reasonable (s 39(5)). A person convicted of the offence is liable (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine or to both, (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both. Where, in a trial of a person charged with stalking, the jury or, in summary proceedings, the court is not satisfied that the accused committed the offence, but is satisfied that the accused committed an offence under s 38(1) (threatening or abusive behaviour), the jury or court may acquit the accused and, instead, find the accused guilty of an offence under s 38(1).

people”⁶² as regards domestic abuse because of a range of factors which limit their ability (still further) to seek help. These include language barriers, a fear of being alienated from their own family and community, adverse experience of legal systems which are exclusive or punitive, and other cultural norms.⁶³ Where immigrants experience domestic abuse which exploits these vulnerabilities, it can be referred to as “immigration abuse”.⁶⁴

5.53 There is no statutory definition of immigration abuse, but the Domestic Abuse Commissioner for England and Wales has produced a number of reports focused on the harms resulting from immigration abuse and possible remedies.⁶⁵ The working definition of “immigration abuse” adopted in the Domestic Abuse Commissioner’s 2021 Report “Safety before Status: Improving pathways to support for migrant victims of domestic abuse” is:

“... a form of perpetration that uses the ‘insecure’, ‘uncertain’ or ‘unknown’ immigration status of an individual (or their dependents) to threaten, coerce, exploit and/or subjugate them (or their dependents) as part of a pattern of control and/or abuse and violence.”⁶⁶

5.54 The harm resulting from domestic abuse is exacerbated by the fact that the victim/survivor’s insecure immigration status typically leaves them unable to access public services and support, including housing accommodation and welfare benefits, as a result of having no recourse to public funds.⁶⁷ As the Domestic Abuse Commissioner notes: “Immigration abuse is a form of abuse that is compounded by immigration legislation, policy, and practice.”⁶⁸ The specific harm, and fear of harm, which insecure immigration status gives rise to, and which can be exploited by perpetrators, has been described as follows:

“Victims and survivors with insecure immigration status are currently shut out of vital routes to safety and security. Without recourse to public funds, too many are unable to access life-saving refuge, if they are forced to flee their homes. A fear of their data being shared with immigration enforcement also prevents many victims and survivors from reporting abuse and reaching out for support from public services. In turn, this enables perpetrators to exploit victims’ and survivors’ insecure immigration status as a tool of coercive control – and to do so with impunity.”⁶⁹

5.55 Immigration abuse therefore occurs when the perpetrator plays on the insecurity of victim/survivors and their children resulting from their immigration status, and which often

⁶² E Sutherland, *Child and Family Law*, 3rd ed, (Sweet and Maxwell, 2022), para 4-026.

⁶³ E Sutherland, *Child and Family Law*, 3rd ed, (Sweet and Maxwell, 2022), para 4-026.

⁶⁴ Note that, in the employment context, the Supreme Court has explicitly held that the victim’s (illegal) immigration status does not have any bearing on their ability to bring a claim against their former employer, or operate to deny them the protection of employment law: *Hounga v Allen* [2014] UKSC 47.

⁶⁵ Safety before Status (2021); and Safety before Status: Solutions (2022).

⁶⁶ Domestic Abuse Commissioner, “Safety Before Status”, (2021) (available at: <https://domesticabusecommissioner.uk/wp-content/uploads/2021/10/Safety-Before-Status-Report-2021.pdf> at p 22).

⁶⁷ This is something that charities supporting women in this position advise on. See for example Hemat Gryffe’s webpage (available at: <https://www.hematgryffe.org.uk/no-recourse-to-public-funds/>); Shakti Women’s Aid’s Support for Migrant Victims (available at: <https://shaktiedinburgh.co.uk/services/>); Amina – The Muslim Women’s Resource Centre have a specialist immigration law helpline (available at: <https://mwrc.org.uk/helpline/>).

⁶⁸ Domestic Abuse Commissioner, “Safety Before Status”, (2021) (available at: <https://domesticabusecommissioner.uk/wp-content/uploads/2021/10/Safety-Before-Status-Report-2021.pdf> at p 5).

⁶⁹ Domestic Abuse Commissioner, “Safety Before Status”, (2021) (available at: <https://domesticabusecommissioner.uk/wp-content/uploads/2021/10/Safety-Before-Status-Report-2021.pdf> at p 3).

leaves the victim/survivor trapped in the relationship for fear of being deported if they bring themselves to the attention of the authorities. In the context of Gypsy/Traveller⁷⁰ domestic abuse victim/survivors, the Domestic Abuse Commissioner for England and Wales has stated that: “A fear of their data being shared with immigration enforcement also prevents many Roma victims and survivors from reporting abuse and reaching out for support from public services”.⁷¹

5.56 There is specific guidance produced by the Home Office for victim/survivors of domestic abuse, which allows settlement for a person and dependent children “where a person has, or was last granted, permission as a partner on a specified route and the relationship has permanently broken down due to domestic abuse. The applicant must be in the UK, unless the applicant is overseas because they have been abandoned overseas”.⁷² The Domestic Abuse Commissioner has recommended a range of reforms to UK immigration policy, to put “safety before status”. These recommendations include amending the statutory criteria for awarding indefinite leave to remain due to domestic violence/abuse (known as “DVILR”), and that victim/survivors with particularly complex cases should have extended access to the destitution domestic violence concession (known as “DDVC”), which allows those on a UK partner visa to claim benefits while applying to settle in the UK because of domestic violence.⁷³

5.57 While UK immigration policy is beyond the scope of this project, it is possible to provide an increased focus on and awareness of victim/survivors of immigration abuse within the civil justice system simply by explicitly naming and identifying immigration abuse as one form of domestic abuse. Including immigration abuse within a civil definition of domestic abuse allows victim/survivors, their legal advisors, and the judiciary to recognise this as a form of domestic abuse and to make appropriate civil protection orders where sought.

5.58 We therefore propose that a statutory definition of domestic abuse in the civil context should acknowledge that domestic abuse can be perpetrated through immigration abuse: where the perpetrator uses the insecure immigration status of an individual (or their dependents) to threaten, coerce, exploit and/or subjugate them (or their dependents) as part of a pattern of abuse, including threats connected to the consequences for the victim/survivor or dependents as a result of reporting any domestic abuse. We seek views:

28. Do you support the inclusion of immigration abuse as one element of abusive behaviour in a statutory definition of domestic abuse as a delict, and if so, what factors should be included?

⁷⁰ The Scottish Government uses this terminology in its policy on Gypsy/Travellers (available at: <https://www.gov.scot/policies/gypsy-travellers/#:~:text=The%20term%20%27Gypsy%2FTravellers%27%20refers%20to%20distinct%20groups%20%E2%80%93%20of%20Scotland%27s%20Gypsy%2FTravellers%2C%20a%20particularly%20marginalised%20group.>). The term 'Gypsy/Travellers' refers to distinct groups – such as Roma, Romany Gypsies, Scottish and Irish Travellers – who consider the travelling lifestyle part of their ethnic identity.

⁷¹ Traveller Movement Good Practice Guide: Improving service provision for Gypsy, Roma and Traveller domestic abuse survivors, p 3 (available at: <https://women.travellermovement.org.uk/wp-content/uploads/2022/12/2022.02.25-DA-Good-Practice-Guide.pdf>). The Domestic Abuse Commissioner supports the Traveller Movement's call for a firewall between police and immigration enforcement, to help migrant victims report domestic abuse without fear of immigration consequences.

⁷² Available at: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-victim-of-domestic-abuse> (last updated 10 April 2024).

⁷³ Domestic Abuse Commissioner, “Safety Before Status: The Solutions” (2022) (available at: <https://domesticabusecommissioner.uk/wp-content/uploads/2022/12/Safety-before-status-The-Solutions.pdf> at p 25).

Economic abuse

5.59 Economic abuse occurs when the perpetrator controls the victim/survivor's access to resources.⁷⁴ It includes financial abuse, but it is wider than that: economic abuse extends to any abuse or control of the victim/survivor's resources, including food, possessions, heating, transport, accommodation, maintaining a job and income, or pursuing education, and even coerced debt.⁷⁵ The list of resources is potentially endless, and it is arguably not necessary to identify the resources in question. Moreover, it has been recognised that the ways in which economic abuse is perpetrated can vary depending on cultural differences.⁷⁶ Individual instances on their own are not necessarily abusive, but they become abusive in combination, when perpetrated as part of a pattern of coercive and controlling behaviour. What is central to each case is the power and control exerted by the perpetrator in respect of the victim/survivor's resources, and the consequent denial of the victim/survivor's freedom and agency.⁷⁷ Thus, economic abuse has been defined by Adams et al as:

“behaviours that control a woman's ability to acquire, use, and maintain economic resources, thus threatening her economic security and potential for self-sufficiency.”⁷⁸

5.60 Given the extensive reach of economic abuse, and the wide range of resources it may impact upon, it is unsurprising to find that a very high proportion of victim/survivors of domestic abuse report economic abuse: a study conducted by Adams et al found it was a near-universal experience for the women they interviewed:

“... an astounding 99% of the women were subjected to some form of economic abuse at some point during their relationships. In other words, almost every woman had been involved with a partner who controlled her use of or access to economic resources and/or took advantage of her economically. These findings provide evidence that economic abuse is a distinct yet common form of harm experienced by women in abusive relationships.”⁷⁹

5.61 One consequence of economic abuse is that the victim/survivor may lack the resources to leave the perpetrator, or afford legal representation for legal protection or to seek a divorce.⁸⁰

⁷⁴ For an explanation of the interaction between economic abuse and criminal law, please see the factsheet produced by the Scottish Women's Rights Centre and Dr Gliniski: (available at: <https://www.scottishwomensrightscentre.org.uk/resources/Economic-Abuse-Factsheet-November-2023.pdf>).

They have also authored a list of recommendations as to improvements which could be made to responses to economic abuse: (available at: <https://www.scottishwomensrightscentre.org.uk/resources/Economic-Abuse-recommendations-November-2023.docx.pdf>).

⁷⁵ For a detailed account of all these abuses of resources and control of access to resources, see AE Adams et al, “Development of the Scale of Economic Abuse,” (2008) 14(5) *Violence against Women* 563, at 565-567.

⁷⁶ S Singh, “Economic Abuse and Family Violence Across Cultures: Gendering Money and Assets through Coercive Control”, in M McMahon and P McGorrery (eds) *Criminalising Coercive Control* (Springer, 2020), at 53, and further at pp 61 et seq.

⁷⁷ S Singh, “Economic Abuse and Family Violence Across Cultures: Gendering Money and Assets through Coercive Control”, in M McMahon and P McGorrery (eds) *Criminalising Coercive Control* (Springer, 2020), at 53, and further at 67.

⁷⁸ AE Adams et al, “Development of the Scale of Economic Abuse” (2008) 14(5) *Violence against Women* 563 at 564. The authors define economic abuse in gendered terms, but as a definition of economic abuse, it could apply in any relationship context.

⁷⁹ AE Adams et al, “Development of the Scale of Economic Abuse” (2008) 14(5) *Violence against Women* 563, at 580.

⁸⁰ Economic abuse can also be perpetrated in respect of financial provision on divorce, for example through hiding assets, failing to disclose them, moving them offshore, or developing complex asset structures to obscure resources. The history of abuse and the victim/survivor's fear can also make it difficult for them to negotiate a fair financial settlement on divorce. At present, there is no explicit obligation on the court to take account of domestic

This may be especially the case if they have taken on coerced debt (that is, where debt is built up under the victim/survivor's name, at the instigation of the perpetrator, and typically spent by the perpetrator, which may only be discovered at the point of or after separation), and therefore have a bad credit rating or are unable to borrow more funds for housing.⁸¹ This can cause or compound other problems for the victim/survivor at the point of leaving: for example some councils will not provide individuals with temporary accommodation if they are in council tax arrears.

5.62 Again, lack of explicit definition in Scots law means that, despite its potentially pervasive nature, economic abuse may go unrecognised, especially as it can affect such a wide range of resources. The perpetrator may be able to explain individual instances away, thereby obscuring the pattern of control and abuse which underlies each instance. Additionally, it has been noted by stakeholders that economic abuse is not widely understood and many victim/survivors are unaware that it constitutes abuse. We are also conscious that economic abuse is considered sufficiently serious and pervasive that it is included in the definition of domestic abuse in England and Wales, in the Domestic Abuse Act 2021. Section 1(4) defines economic abuse as:

- any behaviour that has a substantial adverse effect on B's ability to—
- (a) acquire, use or maintain money or other property, or
- (b) obtain goods or services.

5.63 The Explanatory Notes to the Domestic Abuse Act 2021 provide further detail on this definition:

"The purpose of including the qualification "substantial and adverse effect" is to ensure that isolated incidents, such as damaging someone's car, or not disclosing financial information, are not inadvertently captured. "Property" would cover items such a mobile phone or a car and also include pets or other animals (for example agricultural livestock). "Goods and services" would cover, for example, utilities such as heating, or items such as food and clothing."⁸²

5.64 We think there is considerable merit in including a definition of economic abuse within any statutory definition of a delict of domestic abuse in Scotland. As with tech abuse and immigration abuse, there is power in naming and identifying such conduct as abusive. This helps victim/survivors and anyone involved in the legal system to identify the abusive conduct and ensure that remedies can protect the victim/survivor from further harm and offer redress for the harm caused.

5.65 It is important to emphasise that conduct would only constitute economic abuse where it was perpetrated with the intention of harming the victim/survivor, or where the perpetrator was reckless as to the harm caused: consequently, one partner giving financial advice entirely

abuse in making an order for financial provision on divorce, although s 11(7) of the Family Law (Scotland) Act 1985 provides that conduct is not to be taken into account unless (a) the conduct has adversely affected the financial resources available; or (b) it would be manifestly inequitable to leave the conduct out of account. Whether the 1985 Act should include specific reference to domestic abuse is a matter for separate consideration.

⁸¹ AE Adams et al, "Development of the Scale of Economic Abuse" (2008) 14(5) Violence against Women 563, at 568.

⁸² Available at: <https://www.legislation.gov.uk/ukpga/2021/17/notes/division/6/index.htm>.

in good faith would not be caught, for example. Moreover, the defence of reasonableness would also be available, so that taking control of the family finances on behalf of a partner who lacks capacity would also not constitute abuse.

5.66 Economic abuse continues, and is often exacerbated, or may even begin post-separation. Economic abuse can include failing to pay, delaying, or underpaying spousal support or household contributions.⁸³ Similarly, economic abuse in relation to children, can include refusing or failing to pay child maintenance, making late payments or under-payments, refusing to pay for basic needs, or stopping payment of school fees. Given the significance of post-separation economic abuse, it is even more critical that victim/survivors can access appropriate remedies for protection and redress. The wheel also captures the fact that perpetrators are able to manipulate and exploit institutions in order to perpetrate abuse. Vexatious, lengthy and costly litigation, which they may seek to delay or stall, is one such example, where the court system is used to further the perpetrator's abuse and deplete the victim/survivor's resources.

5.67 We therefore ask consultees:

- 29. Do you support the inclusion of economic abuse as one element of abusive behaviour in a statutory definition of domestic abuse as a delict, and if so, should it be modelled on the definition in the Domestic Abuse Act 2021?**

Part 2: Remedies and Enforcement

Remedies

5.68 If a statutory delict of domestic abuse were introduced in Scotland, the same statute could also make provision for appropriate remedies. Remedies for delictual wrongs typically comprise damages and – where the conduct is ongoing or likely to (re)occur – an interdict to prevent future wrongdoing.⁸⁴ As Professor Reid explains:

“It is competent for the pursuer to seek interdict alone, but in practice a conclusion or crave for interdict often accompanies another remedy or remedies, commonly declarator or damages. Interdict is a ‘preventative’ measure, applicable to delictual wrongdoing that is continuing or that is apprehended as likely to occur, but inapplicable where the wrong has already been completed. It must be shown, therefore, that the defender’s activities are wrongful and ongoing, or that there are reasonable grounds to believe that wrongdoing will be perpetrated at a future point.”⁸⁵

⁸³ See for example this account of post-separation abuse continuing in relation to the joint mortgage of the parties, more than a decade after the relationship ended: (available at: <https://www.bbc.co.uk/news/articles/cged39yw3y9o>).

⁸⁴ Reparation – or damages – was recognised as the remedy for delictual wrongdoing at least from the seventeenth century, whereas a “fully-fledged right to obtain an interdict against the continuation of an existing delict, or the commission of a future delict, did not become general throughout Scots law until the twentieth century.” See D Visser and N Whitty, “The Structure of the Law of Delict in Historical Perspective”, in K Reid and R Zimmermann (eds), *A History of Private Law in Scotland*, (OUP, 2000), at p 470.

⁸⁵ EC Reid, *The Law of Delict in Scotland*, para 31.72, references omitted.

5.69 This framework of remedies works well for domestic abuse, where an interdict could be sought to protect the victim/survivor against ongoing or future conduct, together with, where appropriate, an award of damages to recognise the harm caused by the past wrongdoing.

5.70 However, specific additional remedies may also be required in cases of domestic abuse, to safeguard not only the victim/survivor, but also children, property, and pets. We therefore propose that a statute creating a delict of domestic abuse should also set out the relevant remedies that can be granted by the court. This provides an opportunity to consider the exact nature of remedies that would offer support and protection to victim/survivors. In this part of the chapter, we set out the remedies which we propose should be available where the victim/survivor establishes that the perpetrator has committed the statutory delict of domestic abuse.

5.71 We set out our proposed scheme in detail, before seeking consultees' views.

A Domestic Abuse Civil Protection and Redress Order

5.72 Where the pursuer establishes that the defender's conduct amounts to domestic abuse in terms of the statutory definition, we propose that the pursuer should be able to seek a court order to offer redress for the abuse that has happened and protection against the risk of future abuse. We provisionally call this a "Domestic Abuse Civil Protection and Redress Order", or "DACPRO". This is an umbrella term which would cover a range of different orders, to reflect the specific needs of the victim/survivor. Thus, in raising one single action, the victim/survivor would be able to ask the court for a range of different protective and compensatory measures, to ensure the maximum possible legal safeguarding. The measures would cover both personal safety and property orders, any or all of which could be sought, in any combination. The non-availability of one component would not preclude the pursuer seeking any of the other component orders. For the avoidance of doubt, as a statutory remedy, the DACPRO would be limited to the statutory delict of domestic abuse, in the same manner as a non-harassment order is only a remedy for harassment.

5.73 From discussions with stakeholders during this project to date, we understand that the following component orders would be beneficial to victim/survivors:

- i) A protection order to prohibit any future abusive conduct towards the pursuer and anyone else named in the order, such as children;
- ii) A redress order, to compensate the victim/survivor for losses by way of an award of damages;
- iii) A barring order, to exclude the perpetrator from the home for a fixed period;
- iv) An order for the delivery of specified documents, including for example passports, birth certificates, and the lease or title deeds or other paperwork relating to the property;
- v) An order for the return of specified moveable property, for example personal effects and jewellery, property required for work, and children's possessions; and
- vi) An order regulating the care of and responsibility for a pet, or for the delivery of a pet.

5.74 To give an example, one victim/survivor might seek a DACPRO which comprises a protection order, to protect them against future abusive behaviour, together with a barring order to exclude the perpetrator from the home, and an order for the delivery of the passports of the children. Another victim/survivor may seek a DACPRO comprising a protection order and a redress order for damages, together with an order for the delivery of the family cat. As an umbrella term, the Domestic Abuse Civil Protection and Redress Order allows a single action to be raised, so the pursuer can seek tailored remedies, within the scope of the statutory orders, to ensure that the civil protection and redress they receive meets their needs appropriately.

5.75 In this section, we use the terms “pursuer” and “defender” to refer to the parties. The victim/survivor would be the pursuer, being the person who raises the legal action to pursue the remedy sought. The perpetrator of the abuse would be the defender, against whom the action is raised.

5.76 We discuss first the availability of these orders as final orders. We then consider which of these orders should be available on an interim and an ex parte basis, in paragraphs 5.120 to 5.124. We set out the consultation questions on these remedies at paragraph 5.125.

Personal safety – a protection order

5.77 It is envisaged that the primary order to be made as part of a DACPRO would be a protection order, to prevent future wrongful conduct being perpetrated by the defender. This would be in effect a statutory interdict, prohibiting the defender from committing domestic abuse in respect of the pursuer. (For the avoidance of doubt, even if the pursuer does not seek a protection order, or it is not granted by the court, that would not affect the availability of any of the other component remedies sought as part of a DACPRO.)

5.78 When a pursuer seeks a protection order, it seems appropriate to align the statutory test for this with that for the making of a non-harassment order in the 1997 Act. Thus, we propose that the court should make a protection order if it is satisfied that it is appropriate for it to do so in order to protect the pursuer from further domestic abuse. Such order should require the defender to refrain from conduct in relation to the pursuer as may be specified in the order, and the protection order should last for the period specified in the order (which includes an indeterminate period).⁸⁶ A protection order could be varied or revoked, on the application of either the pursuer or defender, if the court considers it appropriate to do so.⁸⁷

5.79 In seeking a protection order, the pursuer could also seek to include other family members within the scope of protection, most obviously children. Where the pursuer lives with children, there is a strong rationale for including them in a protection order as part of the DACPRO. Where a protection order is made which covers children then, if required by the UNCRC as incorporated in Scots law, the court will need to take account of the best interests of the child and the views of the child. We discuss the specific interaction of civil protection orders with child contact in Chapter 7.

⁸⁶ See the wording in the 1997 Act, s 8(5)(b)(ii): “the court may... if it is satisfied that it is appropriate for it to do so in order to protect the person from further harassment, an order, to be known as a “non-harassment order”, requiring the defender to refrain from such conduct in relation to the pursuer as may be specified in the order for such period (which includes an indeterminate period) as may be so specified”.

⁸⁷ This power is also in the 1997 Act, in respect of non-harassment orders: s 8(7).

5.80 In the case of other children who do not live with the pursuer, or any adults, such as the pursuer's new partner, it will be a question for the court to determine each time as to whether the protection order should extend protection to these individuals.⁸⁸ It is perfectly possible for abusive conduct directed at one victim to impact on others, most notably other family members such as parents and siblings. This can be seen in decided cases⁸⁹ and in protection orders made in other jurisdictions. For example, the Stalking Protection Order in Northern Ireland has been used to prohibit the stalker from contacting the victim or her family,⁹⁰ while in New Zealand applications for a protection order can direct that another additional person should also benefit from protection under the order (for example the applicant's new partner).⁹¹

5.81 A protection order should therefore be introduced, to protect the victim/survivor from ongoing harm or the risk of future harm, together with any children of the household or other named children or adults affected by the perpetrator's abuse of the victim/survivor.

Damages – a redress order

5.82 Damages – or reparation – for the wrong is the primary remedy for delictual conduct in Scots law. The principle is that the wrongdoer should make good losses sustained by the victim:

“A wrongdoer is liable to make good all loss caused naturally and directly by his wrongful act. An award of damages should, as nearly as possible, amount to the sum of money which will put the injured party in the position which he would have occupied if he had not sustained the wrong.”⁹²

5.83 While the effectiveness of this remedy will depend on the financial resources of the perpetrator, we see no principled basis to exclude it. During the course of this project, we have heard from stakeholders who have said that, on occasion, the only thing that has stopped the abusive conduct is seeking damages: this may be the only legal threat the perpetrator takes seriously. Perpetrators who have the financial means to pay damages should be required to do so, if the court makes an award of damages against them. Such a remedy may be particularly important where the victim/survivor has suffered economic abuse, including coerced debt.

5.84 Scots law recognises damages that can be claimed under a number of different heads, including injury to the person and damage to property. Where the pursuer suffers injury as a result of the wrongful conduct, they are entitled to claim compensation⁹³ for their pain and suffering: “The effects of injury which are thereby compensated are: (1) pain and suffering; (2) loss of faculties and amenities; and (3) shortened life expectancy”.⁹⁴ The Damages (Scotland)

⁸⁸ In the case of children, an order could be sought by any person who has parental responsibilities and rights in respect of the child (under ss 1 and 2 of the Children (Scotland) Act 1995) or by any adult who has “care and control” of the child, in terms of s 5 of the Children (Scotland) Act 1995. The need for protection of children in domestic abuse situations is discussed further in Ch 7.

⁸⁹ *AS v SB* 2010 WL 3765973, as discussed in Ch 6.

⁹⁰ Available at: <https://www.belfasttelegraph.co.uk/news/northern-ireland/man-issued-with-first-stalking-protection-order-in-northern-ireland/a1465739409.html> (March 2024).

⁹¹ The New Zealand Family Violence Act 2018, s 61.

⁹² Gloag and Henderson, 15th ed, para 25.24.

⁹³ Traditionally referred to in Scots law as reparation.

⁹⁴ Gloag and Henderson, 15th ed, para 25.24.

Act 2011 applies in respect of any damages claims for personal injury or death, and makes provision for various matters, such as claims where the victim suffers a shortened life expectancy,⁹⁵ and for claims to transmit or be transferred to the victim's executors, that is to permit the claim for damages to be made (or continued) even after the victim dies.⁹⁶ Other claims that can be made include for loss of wages and pension rights, and for medical expenses reasonably incurred.⁹⁷

5.85 In respect of damage to property, Scots law recognises a range of heads of damages, including “repair of a damaged article plus the cost of hiring a replacement pending repair and, in the case of destruction, the market value of that article less its scrap value plus the cost of hire for a reasonable period pending the acquisition of a replacement”.⁹⁸ Where the pursuer loses items of property as a result of the defender's conduct, then they should be able to seek a financial award to compensate them for this loss. The specific risk of losing property as a result of domestic abuse was raised in a petition to the Scottish Parliament, which has been under consideration since April 2023. The petitioner stated:

“The perpetrator's family emptied the marital home of all furniture, fixtures and fittings, and again the police could do nothing to prevent this. Furthermore, my sister had to pay legal costs to divorce him and start over having left the home with only the clothes and possessions on her person.”⁹⁹

5.86 The petition seeks (amongst other things) to ensure that “victims are financially compensated for loss of the marital home, including loss of personal possessions and furniture left in the property”.¹⁰⁰ We note that, where the victim/survivor has owned or co-owned the home, then property law should ensure that it is not sold without their consent and, as owner or co-owner, the victim/survivor would be legally entitled to their share of the sale proceeds. The same should be true of personal possessions and furniture, although it is of course much easier to sell and profit from moveable property without owning it, given the lack of title deeds or evidence of ownership. It is not clear from this petition to the Scottish Parliament whether the petitioner seeks financial compensation from public funds or from the perpetrator of the abuse. Any redress from public funds would be a policy matter for the Scottish Government to determine. However, it is certainly the case that any loss of or damage to property resulting from wrongful conduct should be capable of being recovered through an award of damages under Scots law. A statutory delict of domestic abuse could recognise this expressly.

5.87 A comparable statutory delict is created by the 1997 Act, which provides for damages to be available,¹⁰¹ including damages for anxiety caused by the harassment, and for any financial loss which results from the harassment.¹⁰² These seem equally relevant measures for victim/survivors of domestic abuse.

5.88 Accordingly, we propose that a pursuer should be able to claim damages for any personal loss, including for pain and suffering, and for any anxiety caused by the abusive

⁹⁵ Damages (Scotland) Act 2011, s 1.

⁹⁶ This includes a claim for harassment under ss 8 or 8A of the 1997 Act: see the Damages (Scotland) Act 2011, s 2.

⁹⁷ Gloag and Henderson, 15th ed, para 25.25.

⁹⁸ Gloag and Henderson, 15th ed, para 25.25.

⁹⁹ Available at: <https://petitions.parliament.scot/petitions/PE2025>.

¹⁰⁰ Available at: <https://petitions.parliament.scot/petitions/PE2025>.

¹⁰¹ 1997 Act, s 8(5)(a).

¹⁰² 1997 Act, s 8(6).

behaviour, together with damages in respect of any property or financial loss (such as loss of earnings) suffered, when seeking a redress order as part of a DACPRO. As with any claim for redress in delict, there would need to be a causal link shown between the wrongful conduct and the loss suffered.

Excluding the perpetrator from the home – a barring order

5.89 As we set out in Chapter 2, Article 52 of the Istanbul Convention provides that States must ensure:

“... that competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence or contacting the person at risk”.¹⁰³

5.90 These are known as “emergency barring orders”. It is a matter for each State to determine the framework for these orders, and in Scotland, Article 52 is currently fulfilled by arrest and bail conditions.¹⁰⁴ Once in force, the Domestic Abuse (Protection) (Scotland) Act 2021, will also enable emergency barring orders to be made, in the form of Domestic Abuse Protection Notices and Domestic Abuse Protection Orders.¹⁰⁵

5.91 Although Scots law does make provision for orders which act to bar the perpetrator from the property in terms of the criminal law, through arrest and bail conditions, there is no option for the victim/survivor to seek such an emergency order in the civil law. If the police do not act, or the court does not impose bail conditions that operate to bar the perpetrator from the house, then the victim/survivor has no recourse to emergency protection. This leaves them with the option of remaining in the property with the perpetrator or leaving the house and attempting to find alternative accommodation. We are aware that refuge space is very limited and, in the case of male victim/survivors, is non-existent in Scotland.¹⁰⁶ Being unable to stay in the home risks rendering the victim/survivor homeless, and it is well documented that one of the main reasons for homelessness is domestic abuse. In 2010, the Scottish Government published a report on “Domestic Abuse, Housing and Homelessness”, stating that: “There is a large body of evidence, both in Scotland and elsewhere in the UK, which positions domestic abuse as a major contributory factor to homelessness”.¹⁰⁷

¹⁰³ Istanbul Convention, Article 52.

¹⁰⁴ See UK Baseline compliance report, p 49.

¹⁰⁵ See paras 4.94 to 4.96 of Ch 4 for a discussion of domestic abuse protection notices and orders.

¹⁰⁶ AMIS have reported that there are no male refuges in Scotland, meaning male victim/survivors must travel to England or Wales for refuge accommodation, with the attendant upheaval in their lives, not least in relation to children and employment. The Irving Report notes that the Istanbul Convention suggests a target of 1 refuge space per 20,000 of the population, but that this is not being met across Scotland (available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/independent-report/2023/06/violence-against-women-girls-independent-strategic-review-funding-commissioning-services-report/documents/independent-strategic-review-funding-commissioning-violence-against-women-girls-services/govscot%3Adocument/independent-strategic-review-funding-commissioning-violence-against-women-girls-services.pdf> (2023), at p 52).

¹⁰⁷ Scottish Government, Domestic Abuse, Housing and Homelessness in Scotland: An Evidence Review, (1 November 2010) (available at: <https://www.gov.scot/publications/domestic-abuse-housing-homelessness-scotland-evidence-review/pages/4/>). The most recent Scottish Government statistics, for the year to end September 2023, show that 12% of homelessness applications were made as a result of violence or abuse within the household (available at:

5.92 In the absence of bail conditions, the only option for the victim/survivor to seek protection in respect of the home is to seek an exclusion order under the 1981 Act/2004 Act. However, this does not function as an “emergency barring order” as the process for obtaining it cannot conceivably be described as speedy, so it does not enable the victim/survivor to obtain protection on an emergency basis. Further, the court cannot make an exclusion order on an ex parte/without notice basis: whether interim or final, the perpetrator must be afforded an opportunity of being heard or represented before the court.¹⁰⁸ This can give rise to increased risk for the victim/survivor, as the perpetrator is given notice of the intention to seek an exclusion order while still entitled to occupy the home, and consequently victim/survivors may need to leave the home during the period in which they are seeking an exclusion order. Moreover, an exclusion order can be refused if it would be “unjustified or unreasonable” or if the home is part of an agricultural holding or occupied as an incident of employment¹⁰⁹ – all factors which mean the exclusion order may not be made and the victim/survivor may not receive the protection they need. A final hurdle for a pursuer seeking an exclusion order is that the pursuer must have occupancy rights in the property. Although spouses and civil partners have occupancy rights by operation of statute on entering into the marriage or civil partnership, cohabitants who are not entitled to live in the property can only get occupancy rights through a court order,¹¹⁰ adding to delay and expense when seeking an exclusion order.

5.93 The lack of an effective emergency barring order means that victim/survivors will often report the matter to the police (often with the encouragement of their legal advisor) for the primary purpose of seeking bail conditions, to give them the protection they need. This results in the matter entering the criminal justice system, where the attrition rate for domestic abuse cases is particularly high. The implication is that victim/survivors may not actually wish to, or be ready to, engage with the criminal justice system, but end up doing so as the only way to get the emergency protection they need. Once bail conditions are in place, giving them the required protection, victim/survivors often do not wish to take the matter further. This has considerable adverse consequences for the criminal justice system in terms of time and resources, which could potentially be tackled by improving the efficiency of the civil justice system instead.

5.94 There is therefore clear evidence that victim/survivors need to have access to a straightforward procedure to exclude the perpetrator from the house in an emergency situation. However, where the situation involves urgent and direct risk to the victim/survivor, this is a matter for police protection and the criminal law. Requiring a victim/survivor who is facing a grave imminent risk to safety to seek legal advice and engage with the civil court process is unlikely to provide protection in an emergency situation.

5.95 Any emergency order would also typically need to be sought ex parte (that is, without giving notice to the other party). However, we have heard concerns from solicitors that the

<https://www.gov.scot/binaries/content/documents/govscot/publications/statistics/2024/02/homelessness-in-scotland-update-to-30-september-2023/documents/tables-to-homelessness-in-scotland-update-to-30-sep-2023/tables-to-homelessness-in-scotland-update-to-30-sep-2023/govscot%3Adocument/Homelessness%2Bin%2BScotland%2Bupdate%2Bto%2B30%2Bsep%2B2023%2B-%2BFinal.xlsx>.

¹⁰⁸ 1981 Act, s 4(6) and 2004 Act, s 104(7).

¹⁰⁹ 1981 Act, s 4(3).

¹¹⁰ 1981 Act, s 18. See Ch 3, paras 3.19 to 3.28 for a discussion of a possible change to this aspect of the law.

introduction of an emergency civil action on an ex parte basis could be abused by the perpetrator, to seek the emergency exclusion of the victim/survivor from the house.

5.96 Taking these points together, it seems that the proper solution here is that offered in the 2021 Act, through the system of Domestic Abuse Protection Notices and Domestic Abuse Protection Orders. Once in force, the 2021 Act will make provision for emergency barring orders in the form of DAPNs and DAPOs. The stakeholders we have spoken to are very positive about this protection. It offers the safest and most direct route to emergency protection for victim/survivors.

5.97 However, we are also aware from stakeholders that there is still a gap in the available protection in relation to housing, arising from the problems in practice of seeking an exclusion order. As discussed in Chapter 4, these include the need for the non-entitled party to have occupancy rights, and the high test for securing a final exclusion order. In order to ensure that Scots law provides the most effective protection for victim/survivors, we propose that a victim/survivor should be able to seek a barring order as a civil order, as part of a DACPRO. This would not affect the current availability of arrest and bail conditions, nor the implementation of the 2021 Act, nor the ongoing existence of exclusion orders under the 1981 and 2004 Acts.

5.98 In terms of the scope of a barring order sought by a victim/survivor, we think there is merit in modelling the scheme on Domestic Abuse Protection Orders (but not Notices) as envisaged by the 2021 Act. Under that Act (once in force), the sheriff may make the Domestic Abuse Protection Order if satisfied that person A has engaged in behaviour which is abusive of person B, there is an immediate or imminent risk of person A engaging in further behaviour which is abusive of person B, and it is necessary to make the order for the purpose of protecting person B from abusive behaviour by person A.¹¹¹ The order can require person A to do, or prohibit person A from doing, a thing or things described in the order. These things include (but are not limited to) an order in the following terms:

- requiring person A to leave any place where person B lives (whether or not it is also a place where person A lives, and even if it is person A's only or main place of residence),
- requiring person A to surrender keys to any such place,
- prohibiting person A from entering any such place,
- prohibiting person A from coming within such distance of any such place as is specified in the notice,
- prohibiting person A from excluding person B from any such place,
- prohibiting person A from approaching or contacting, or attempting to approach or contact, person B,
- prohibiting person A from approaching or contacting, or attempting to approach or contact, any child usually residing with person B.¹¹²

¹¹¹ 2021 Act, s 8(2).

¹¹² 2021 Act, s 9(2) provides that the requirement and prohibitions in a Domestic Abuse Protection Order may include (but are not limited to) any requirement or prohibition which could be imposed by a Domestic Abuse Protection Notice (see s 5(1)).

5.99 A Domestic Abuse Protection Order can be made for up to two months, or such shorter period as specified in the order.¹¹³ The sheriff may specify different periods for which different requirements or prohibitions have effect.¹¹⁴

5.100 Under the 2021 Act, a Domestic Abuse Protection Order can be made on a final or interim basis. An interim order can be made where the sheriff considers, on the balance of convenience, that it is just to do so,¹¹⁵ and can last for up to three weeks.¹¹⁶

5.101 One concern is that seeking to remove the perpetrator from the house under such an order could result in increased violence towards the pursuer, potentially endangering the pursuer's life.¹¹⁷ Sutherland makes the point (in relation to exclusion orders but also applicable here) that "as tools to combat domestic abuse, occupancy rights and exclusion orders are useful but of limited effect, not least because an abusive spouse, civil partner or cohabitant who has been excluded from the home knows exactly where to find the other".¹¹⁸ Pursuers may therefore choose not to seek a barring order in some cases, and instead seek refuge elsewhere: safety is the paramount consideration. However, stakeholders have also emphasised the importance of the victim/survivor and children being able to remain in the family home, with the perpetrator removed. Choice is therefore important. One advantage of introducing a civil barring order would be that the decision to seek it lies in the hands of the victim/survivor, as pursuer: if an individual pursuer does not think it is the right course of action for them, then they do not need to apply for a barring order. This is in contrast to DAPNs and DAPOs, where the views of the victim can be taken into account but are not determinative.¹¹⁹

5.102 We therefore propose that a victim/survivor should be able to seek a civil barring order on a similar basis to a DAPO. This would offer a number of advantages over an exclusion order under the 1981 and 2004 Acts. In the first place, exclusion orders rely on occupancy rights, whereas a barring order under the 2021 Act, and as envisaged as part of a DACPRO, simply requires the parties to be living together some or all of the time. Secondly, as stakeholders have informed us, the test for an exclusion order is often perceived as being too high, and there has been, over the years, judicial reluctance to grant a final exclusion order. Moreover, the court has discretion to refuse an exclusion order where the home is required as part of the perpetrator's job, for example, or if it would be "unreasonable", despite otherwise being "necessary" for the protection of the applicant or children. Cumulatively, these have hindered the utility of exclusion orders.

5.103 In terms of human rights, barring orders are in principle compatible with property rights protected by Article 1, Protocol 1 of the ECHR.¹²⁰ In terms of Article 8, barring orders and emergency barring orders are, in principle, ECHR compliant. As discussed in Chapter 2, the Istanbul Convention, which mandates emergency barring orders, is part of the Council of

¹¹³ 2021 Act, s 9(5)(a).

¹¹⁴ 2021 Act, s 9(5)(b).

¹¹⁵ 2021 Act, s 10(2) and (3).

¹¹⁶ 2021 Act, s 10(7).

¹¹⁷ Although not a domestic abuse situation, the eviction of a council tenant by the City Council resulted in the evicted tenant murdering their neighbour, who they blamed for their eviction: *Mitchell v Glasgow City Council* [2009] UKHL 11.

¹¹⁸ E Sutherland, *Child and Family Law*, (3rd edn, 2023) para 4-060.

¹¹⁹ Domestic Abuse (Protection) (Scotland) Act 2021, s 4(4)(a), s 4(5); and s 8(7).

¹²⁰ As discussed in Ch 2, the Istanbul Convention obliges States to create such orders, and this Convention is part of the Council of Europe's rights protection apparatus, so it can be inferred that emergency barring orders are in principle compliant with Article 1 Protocol 1, ECHR. See J Murdoch, Reed and Murdoch, *Human Rights Law in Scotland*, 4th edn, 2017, at p 974, para 8.18, citing *Raimondo v Italy* (1994) A 281-A, para 29.

Europe's rights infrastructure, which is designed to complement and harmonise with the ECHR.¹²¹

5.104 In the civil law context, we therefore propose that a civil barring order could be sought by a pursuer to require or prohibit certain conduct of the defender on the same terms and for the same durations as set out above. Thus, an interim barring order could be made for up to three weeks, while a final one could extend for up to two months, or a shorter period as specified by the sheriff in the order. These periods would mirror those in the 2021 Act, but we are interested in consultees' views on this. We therefore seek views on the appropriate periods for interim and final barring orders, below. The barring order (whether interim or final) could require or prohibit conduct by the defender in line with the conduct listed above, including the requirement to leave a specified place and a prohibition against returning there. These measures would create a civil barring order which could be sought by the victim/survivor as part of a DACPRO.

Return of documents

5.105 In speaking to those who work to support victim/survivors of domestic abuse, including lawyers and third sector organisations, we have heard of the very real distress and practical inconvenience that can arise when the perpetrator controls and retains important documentation relating to the family and home. This includes passports for the victim/survivor and any children of the relationship (including both UK and overseas passports, given that adults and children may have more than one valid passport), leading to concern and anxiety that the perpetrator might remove the children from the jurisdiction. The protection offered by section 2(3) of the Children (Scotland) Act 1995 (which prevents a parent with parental responsibilities and rights in respect of a child from removing the child from the UK without the consent of the other parent) should offer the required protection to the pursuer, but where the defender is determined to remove the child then it may be that only the removal of the children's passports can ensure that they are not wrongfully removed from the UK.

5.106 Other significant documents that give control to the perpetrator include the birth certificates of the victim/survivor and any children, and the marriage or civil partnership certificate of the parties. Likewise, any paperwork in relation to ownership, borrowing, or tenancy of the house, if retained by the perpetrator, can result in economic abuse, or the potential for such abuse.

5.107 Control of passports, birth certificates and marriage certificates is also a key factor in immigration abuse, as discussed above,¹²² where "[o]ne of the key signifiers of immigration abuse is the inability of victims and survivors to explain their immigration status or be able to access their documentation".¹²³ This causes particular problems: "[a]n inability to access documentation because of immigration abuse can create further barriers to accessing support in practice, particularly where statutory services require high levels of documentary evidence".¹²⁴ Thus, retention of passports and identification documents by the perpetrator can

¹²¹ See Ch 2 para 2.21.

¹²² See paras 5.52 to 5.58 above.

¹²³ Domestic Abuse Commissioner, "Safety Before Status", (2021) (available at: <https://domesticabusecommissioner.uk/wp-content/uploads/2021/10/Safety-Before-Status-Report-2021.pdf> at p 6).

¹²⁴ Domestic Abuse Commissioner, "Safety Before Status", (2021) (available at: <https://domesticabusecommissioner.uk/wp-content/uploads/2021/10/Safety-Before-Status-Report-2021.pdf> at p 6).

effectively block victim/survivors from seeking support from government agencies, which further exacerbates the harm and abuse.

5.108 It may be possible for victim/survivors to seek the recovery of important identification and property documentation which they own or are entitled to possess from the perpetrator, by means of a civil action in the sheriff court for an order of delivery of the documentation.¹²⁵ Currently the summary cause procedure in the sheriff court is available for such an action.¹²⁶

5.109 During, or even in advance of, a civil action for delivery the pursuer can seek an ancillary order from the court for the immediate photographing, preservation or recovery of the documentation and its delivery to the court for safe keeping until the court makes its final order for delivery.¹²⁷ Such an ancillary order does not go so far as to enable the court to transfer the documents (or other property) to the other party to the litigation, and there must be a reason to require their production and recovery. Nevertheless, this could be a starting point under the current legal regime to attempt to retrieve and protect documents such as passports, birth certificates, and property documentation.¹²⁸

5.110 While this is a starting point, it is not a remedy which is designed to support victim/survivors of domestic abuse, and may not be effective in all cases. A more effective remedy may be found in the 1981 Act/2004 Act in relation to occupancy and related rights. Section 3 of the 1981 Act (in relation to spouses and cohabitants) and section 103 of the 2004 Act (in relation to civil partners) provide that the court can regulate occupancy rights. This is separate from the suspension of occupancy rights, which is done through an exclusion order under section 4 of the 1981 Act/section 104 of the 2004 Act. An order under section 3/section 103 can declare, enforce, restrict, regulate or protect occupancy rights in the home and, alongside that, can also grant the right to use furniture or furnishings in the home. Section 3(4)/section 103(4) also makes express mention of the personal effects of either spouse/civil partner or any children, as part of an interim order which can be made pending the making of the section 3/section 103 order to declare, enforce, restrict, regulate or protect occupancy rights:

Pending the making of an order under subsection (3) above, the court, on the application of either [spouse, cohabitant or civil partner], may make such interim order as it may consider necessary or expedient in relation to—

¹²⁵ Viscount Stair, *Institutions of the Law of Scotland* (2nd edn, 1681); Gretton and Steven, *Property Trusts and Succession* (5th edn, 2024). In the case of children's passports, an action for delivery of the children's passports could be raised as seeking a "specific issue order" under s 11(2)(e) of the Children (Scotland) Act 1995 based on the victim/survivor's entitlement to act as the children's legal representative under s 2(1)(d) of the Children (Scotland) Act 1995.

¹²⁶ Act of Sederunt (Summary Cause Rules) 2002 (SSI 2002 No. 132), sch 1, form 1c. The summary cause procedure is due to be replaced by the simple procedure by virtue of s 72(3)(e) of the Courts Reform (Scotland) Act 2014. Style claims are set out in Dobie's *Sheriff Court Styles* at 124 to 130 (documents, clothes). The claim for an order for delivery should be accompanied by a claim for a warrant to sheriff officers to open lockfast places to allow the order to be enforced (See eg *Moneybarn No. 1 Ltd v Harris* [2022] SAC (Civ) 11; 2022 SCLR 99).

¹²⁷ Administration of Justice (Scotland) Act 1972, s 1(1) and Act of Sederunt (Summary Cause Rules) 2002 (SSI 2002 No. 132), sch 1, rule 18.3. In principle the ancillary order can be made *ex parte* if the documentation is at risk of destruction or concealment: *The British Phonographic Industry Ltd v. Cohen, Cohen, Kelly Cohen & Cohen* 1983 SLT 137.

¹²⁸ Practically, it may be cheaper and easier for victim/survivors to seek new copies of certain documents – for instance birth certificates, passports, title deeds and drivers licences – however, this would still leave the originals in the perpetrator's control, which may be a source of concern and anxiety in itself. It is therefore important that the law recognises the right to recover these documents from the perpetrator and provides a route to this.

- (a) the residence of either [spouse, cohabitant or civil partner] in the home to which the application relates;
- (b) the personal effects of either [spouse, cohabitant or civil partner] or of any child of the family; or
- (c) the furniture and plenishings.

5.111 This would allow the pursuer to seek an order in relation to their personal effects, or those of children. However, there are a number of problems. “Furniture and plenishings” is a defined term, meaning anything owned or acquired by hire-purchase by either party which is “reasonably necessary to enable the home to be used as a family residence”.¹²⁹ There is no definition of “personal effects”. It is therefore not clear that the remedy would cover passports and other documentation. A further issue is that the only reference to “personal effects” is in the context of an interim order under section 3(4)/section 103(4), pending the final order to declare, enforce, restrict, regulate or protect occupancy rights. It is not clear what happens when the final order is made, where there is no express provision for an order relating to “personal effects”. Finally, perhaps reflecting these uncertainties, it appears that section 3/section 103 is not widely used. Thus, even if it did extend to passports or other identity or property documentation, this statutory measure does not appear to be providing an effective remedy in practice, particularly if the victim/survivor has had to leave the home and does not seek to re-enter by means of an exclusion order.

5.112 We therefore think that there is a case to introduce a specific remedy designed to address these concerns relating to documents held by a perpetrator in an abusive relationship, the retention of the documents being a consequence or manifestation of the abuse. We propose that a pursuer should be able to seek a specific order as part of a DACPRO for the delivery of documents specified in the order, and that the court should be able to direct that these documents are either delivered to the pursuer or to a named person or to the court itself, if this is the safest option to prevent either party using the passports to remove children from the jurisdiction, for example. This measure will also offer a more effective remedy for those suffering from immigration abuse as a specific form of domestic abuse.

5.113 For the avoidance of doubt, where the recovery of documents concerns passports or identity documentation, it relates *only* to the passports or identity documentation of the pursuer who makes the application, and any children in respect of whom the pursuer would be entitled to hold the passports or identity documentation. It does not extend to seeking the delivery of passport or identity documentation of the defender. It is not to be confused or conflated with applications to seize the passport of the other party, which the Domestic Abuse Commissioner in England and Wales has observed can be used by perpetrators to further perpetrate abuse:

“With respect to migrant victims and survivors, emergency applications to seize their passports and/or prohibit them from travelling emerged as a consistent narrative. These applications are made even when a victim or survivor lacks sufficient funds to travel, has no intention of travelling and/or requires the presence of the non-resident parents to obtain permission for the child to travel to certain countries. The

¹²⁹ 1981 Act, s 22(1); 2004 Act, s 135(1).

unnecessary nature of these applications is highly indicative of the aggressive and abusive approach adopted by perpetrators in the Family Court system”¹³⁰

Return of property

5.114 In much the same way as we have heard of serious concerns where the perpetrator retains passports and other documents, we are also aware that the perpetrator may retain items of property (especially if remaining in the family house, while the victim/survivor and any children move out). These items can include personal property of the victim/survivor, toys and precious belongings of children (including those with sentimental value, such as soft toys), work property of the victim/survivor, and also highly valuable items, such as gold jewellery sets given to the victim/survivor in respect of marriage. In the haste and urgency to leave the perpetrator, the victim/survivor may leave many items behind, and it may never be safe to return to the property to recover them. In our discussions with stakeholders, we have specifically heard of children’s video games consoles, the victim/survivor’s work laptop, and valuable jewellery sets being left behind in the hands of the perpetrator, causing distress and inconvenience, as well as significant financial loss. The perpetrator’s retention of property belonging to the victim/survivor or to children perpetuates the domestic abuse, and the victim/survivor is entitled to legal protection from this ongoing abuse.

5.115 Again, we note that the existing civil action for an order of delivery, and its ancillary order for photographing, preservation or recovery of the items through their delivery to the court pending the final order of delivery might offer some assistance.¹³¹ However relying on this type of ancillary order does not get to the heart of the particular problem in relation to domestic abuse cases. If the items to be delivered appear clearly to belong to the victim/survivor or their children, the sheriff court’s power to make such interim (ancillary) order as it thinks fit in relation to the possession of any movable property to which a civil action relates may offer a more practicable and better solution.¹³²

5.116 The 1981 Act/2004 Act provision¹³³ in respect of an interim order for furniture and furnishings or personal effects is certainly of greater relevance here than in relation to documentation. Laptops, toys, jewellery and other items are likely to constitute personal effects of one party or children, and in the case of sofas or televisions, for example, would be likely to constitute furniture and furnishings, being “reasonably necessary to enable the home to be used as a family residence.”¹³⁴ Again, however, it appears to be of limited utility, in that it is not used, and can only be used (in relation to personal effects) as an interim order as part of an application to regulate occupancy rights in the home. It cannot form part of an exclusion order, which is the order that specifically targets abusive behaviour. Nor would it apply where

¹³⁰ Available at: https://domesticabusecommissioner.uk/wp-content/uploads/2023/10/DAC_Family-Court-Report_Oct-2023.pdf at p 21. The Domestic Abuse Commissioner also notes and distinguishes such abusive applications from the entirely legitimate need to seek a passport order in international child abduction proceedings, at fn 63 of her Report.

¹³¹ See para 5.109 above. In the case of property belonging to children, the Children (Scotland) Act 1995 may provide one route to recovery.

¹³² Courts Reform (Scotland) Act 2014, s 88(1).

¹³³ Discussed at paras 5.110 and 5.111 above.

¹³⁴ 1981 Act, s 22(1); 2004 Act, s 135(1). A sofa may not constitute “furniture and furnishings” however, despite clearly being furniture, if it is not “reasonably necessary to enable the home to be used as a family residence”. Thus, where the sofa was one of four in a house, it may not be “reasonably necessary” in order to use the home, and therefore it would not meet the statutory definition of “furniture and furnishings.”

the victim/survivor did not wish to exercise their occupancy rights. Therefore it is unlikely to reflect the nature of the wrong suffered by the victim/survivor, or the help they need.”

5.117 We therefore propose that a specific order should be included in the DACPRO, to provide for the return of property. It could be sought in court by a pursuer in relation to specified property owned by the pursuer or any children who live with them, including work equipment, toys, jewellery, and any other possessions and personal effects, as well as furniture and furnishings.

An order regulating the care of and responsibility for a pet, or for the delivery of a pet

5.118 The safety of family pets is a matter of serious concern when domestic abuse is perpetrated. There is a link between abuse of animals and domestic abuse,¹³⁵ and perpetrators can use animals to perpetrate the abuse itself. There are animal charities which recognise this and offer protection to pets when families have to leave the house because of domestic abuse. Cats Protection, a cat welfare charity, has a specific arm called Lifeline, which offers “a free and confidential fostering service for cats whose families are fleeing domestic abuse so they can rest assured their cat will be taken care of until they can be safely reunited”.¹³⁶ Likewise, Freedom is the arm of the Dogs Trust which provides a similar service in relation to dogs, providing a free rehoming service while the owner moves to safety. As their website notes: “Many refuges can’t accept pets, meaning in many cases people experiencing domestic abuse can’t leave their home until they know their dog is somewhere safe”.¹³⁷ Concern for the safety of pets should not be a factor which stops a victim/survivor from leaving an abusive relationship.

5.119 As in the case of the victim/survivor’s personal belongings, there already exists the remedy of a civil action for an order to deliver a pet to the victim/survivor, where it is owned by them.¹³⁸ However, as far as we are aware, this is not well-known of or used in domestic abuse cases. If the pet is co-owned by the victim/survivor and the perpetrator, matters are more difficult. It is a general principle of common ownership that no co-owner can take exclusive possession of the property without the consent of the other.¹³⁹ In some circumstances, the court may be able to regulate the use made of common property,¹⁴⁰ although there is no reported case in which this (rarely used) power has been exercised in relation to pets. With

¹³⁵ The National Centre for Domestic Violence reports research from 2021 by Refuge4Pets and the Dogs Trust, which found that “almost 9 in 10 households who experienced domestic abuse... said that their animals were also abused by the perpetrator: (available at: <https://www.ncdv.org.uk/the-correlation-between-animal-abuse-and-domestic-abuse/>).

¹³⁶ Available at: <https://www.cats.org.uk/what-we-do/cp-lifeline>; Lifeline currently operates in the South East of England, Yorkshire, the Midlands, and East Anglia. Their website states that they will launch in Scotland and Wales in 2024.

¹³⁷ Available at: <https://www.cats.org.uk/what-we-do/cp-lifeline>.

¹³⁸ Viscount Stair, *Institutions of the Law of Scotland* (2nd edn, 1681); Gretton and Steven, *Property Trusts and Succession* (5th edn, 2024). See Dobie’s *Sheriff Court Styles* at 456 (delivery of a dog). The availability of an ancillary order for the photographing, preservation or recovery of an item of moveable property (Administration of Justice (Scotland) Act 1972, s1(1): see para 5.109 above) is likely to be of limited assistance: the court cannot look after the pet pending its final order on the issue of delivery. The sheriff court’s statutory power to make an interim order in relation to movable property to which the action relates might be capable of being used to transfer the pet on a temporary basis to an animal charity pending a final order of where it is to go (Courts Reform (Scotland) Act 2014, s 88(1)).

¹³⁹ *Stair Memorial Encyclopaedia Vol 18*, para 24.

¹⁴⁰ *Menzies v Wentworth* (1901) 3 F 941, 954 & 955 (Lord President Balfour and Lord Adam), 958-959 (Lord McLaren and Lord Kinnear) (fishing rights of co-owners of a loch can be regulated to prevent destruction or abuse of right).

regard to a pet owned wholly by the perpetrator, the law gives no rights to anyone else over the pet, except under an agreement with the owner. We therefore think that there is a clear basis for introducing statutory rules to allow the court to make, as part of a DACPRO, an order (i) prohibiting harmful treatment of any pet owned or co-owned by the victim/survivor; and/or (ii) regulating the care of a pet, including requiring the pet to be delivered to the victim/survivor, or to a named individual or organisation (such as Lifeline or Freedom, where available and appropriate). This could potentially extend to a pet owned solely by the perpetrator.¹⁴¹ The creation of a specific civil order to regulate the care of pets in the context of domestic abuse would sit alongside the Animal Health and Welfare (Scotland) Act 2006, which makes it an offence to cause a protected animal “unnecessary suffering”.¹⁴²

Interim DACPROs

5.120 When a pursuer wishes protection or redress against domestic abuse, they may need to seek an initial order on an interim basis. This would allow an order to be made to protect the pursuer, pending the making of a final order.

5.121 We propose that any element of a DACPRO should be available on an interim basis. This ensures that immediate protection is available to secure the safety of the pursuer, or any documents or property, and pets. It also ensure that interim redress, by way of damages, is available where necessary, for the pursuer. The test for an interim order should be the standard test for an interim civil action, being the balance of convenience.

Ex parte DACPROs

5.122 The court will usually require both parties to have an opportunity to be heard before making any order. However, in some cases, it is possible to seek a civil order “ex parte”, where the court considers the application from the pursuer without the defender being given an opportunity to defend the action. This is most commonly required where the pursuer’s safety requires it, for example in relation to an interdict.

5.123 In relation to the orders available as part of a DACPRO, it is important to strike the right balance between ensuring the pursuer is appropriately protected from the risk of domestic abuse, and ensuring the defender has an opportunity to be heard or represented in court.

5.124 We propose that an interim protection order should be available on an ex parte basis, in the same way that a pursuer can seek an interim interdict on an ex parte basis, to ensure that civil protection is in place before any court documents are served on the defender. This is particularly necessary since the service of such documents could well lead to further or more severe domestic abuse of the pursuer. In relation to passports, property, or pets, where there is a risk that the property in question could be destroyed or damaged or hidden, then an interim order should also be available on an ex parte basis. We do not think there is any need for a redress order to be made on an ex parte basis. In respect of barring orders, we accept that there may be a need for victim/survivors to seek them on an ex parte basis, but, as outlined

¹⁴¹ However given that this would amount to an interference with the perpetrator’s exclusive right to enjoy possession of the pet under Article 1, Protocol 1 of the ECHR, the court’s powers would have to include the suspension of care and responsibility for the pet under any law (including animal welfare law¹⁴¹) and a means of time-limiting the order.

¹⁴² S 19 of the Animal Health and Welfare (Scotland) Act 2006, while s 17 defines a “protected animal” as an animal of a kind which is commonly domesticated in Britain or living under the control of man or not wild.

at para 5.95 above, there are very real concerns that a barring order could be abused by perpetrators, to seek to exclude victim/survivors from the home. Where the victim/survivor needs emergency protection, we think that is best achieved through police protection and bail conditions (or, once in force, through the system of DAPNs and DAPOs under the 2021 Act), as discussed above.¹⁴³ We therefore think that barring orders should not be available on an ex parte basis. However, we seek views on this point.

Consultation questions on remedies

5.125 Taking the above discussion into account, we seek consultees' views on the remedies that should be introduced as part of a statutory delict of domestic abuse:

- 30. Should the following (final) orders be available to a pursuer in respect of the delict of domestic abuse, as part of a “Domestic Abuse Civil Protection and Redress Order”:**
- (a) A protection order to:**
 - (i) Prohibit any future abusive conduct towards the pursuer; and**
 - (ii) An extension of that order to protect other named people (including children of the household or other children or adults)?**
 - (b) A redress order, to compensate the pursuer by way of an award of damages for losses suffered as a result of the abusive behaviour;**
 - (c) A civil barring order, to exclude the defender from the home for a fixed period;**
 - (d) An order for the delivery of specified documents;**
 - (e) An order for the delivery of specified property and personal effects;**
 - (f) An order regulating the care of and responsibility for a pet, or for the delivery of a pet; and**
 - (g) Should any other order be included and, if so, what?**
- 31. Should each element of a DACPRO be available as an interim order, on the balance of convenience?**
- 32. Should an interim civil barring order last for three weeks and a final one for two months, or what other periods would you propose?**
- 33. Should protection orders be available ex parte (without notice), and should orders for the protection of documents, property, and pets be**

¹⁴³ See discussion at paras 5.95 – 5.96.

available ex parte where there is a risk the subject of the order will otherwise be destroyed or damaged or hidden?

34. Should a barring order be available only on notice, and not ex parte?

Enforcement of a DACPRO

5.126 One problem with the current remedy of an interdict for abuse (as discussed in Chapter 4) is that breach of the interdict leaves the successful pursuer with no protection other than to return to court, to petition the court to “to inflict such punishment by way of imprisonment or fine, as the court deems appropriate”.¹⁴⁴ This requires the pursuer to raise a separate action and bring evidence that the interdict was breached. This is an expensive, stressful, and onerous route for a victim/survivor of domestic abuse. If they wish more practical protection, they must expressly seek to attach a power of arrest under the Protection from Abuse (Scotland) Act 2001 and, in order for breach to give rise to criminal law consequences, the interdict must also be determined as a domestic abuse interdict under the Domestic Abuse (Scotland) Act 2011.¹⁴⁵ This complex process has been highlighted as a considerable weakness in the current regime, which serves to prolong the fear victim/survivors suffer:

“While a civil order, when attached with a power of arrest that is properly enforced, should provide a victim with sufficient protection, in practice this is rarely the case. Victims themselves have expressed the belief that civil orders are “just a bit of paper”... As a result, even when afforded civil remedies, victims of domestic abuse continue to fear for their safety.”¹⁴⁶

5.127 We therefore propose that breach of an order, whether interim or final, made as part of a DACPRO should constitute a criminal offence (and therefore be subject to the criminal standard of proof, beyond reasonable doubt), which would mean that the person in breach of the order could be arrested and charged. There would be no need for the pursuer to raise a separate action for enforcement after the event, or to seek a power of arrest or determination in respect of domestic abuse when applying for a DACPRO. There is precedent for this in relation to another statutory delict, harassment, where the Protection from Harassment Act 1997 stipulates that breach of a non-harassment order is a criminal offence.¹⁴⁷

5.128 However, there are two exceptions to this proposal. First, breach of a redress order, whether interim or final, should not carry criminal penalties. Secondly, an interim order would

¹⁴⁴ As per a recent petition for breach of interdict, in a non-domestic abuse case: *Easdale and Easdale v Hendry* [2024] CSOH 17, at para 1. In his judgment, the Lord Ordinary emphasised that “what falls to be punished is not the making of defamatory statements [ie the interdicted conduct]... but the flagrant and repeated disregard of an order of this court.” (para 23). This may be unexpected to the victim of the abuse, although the Lord Ordinary did also note: “That said, it is relevant to have regard to the consequences of the offending behaviour on those persons who were supposed to have the protection of the interdict.” (para 23). Having found the defender in breach of the terms of the interdict, constituting “contempt of such severity” the Lord Ordinary outlined that a prison sentence, fine, or deferment of sentence for good behaviour would all be possible outcomes, and fixed a later hearing for the defender to address him on what disposal is appropriate (para 24). Such a protracted process would not necessarily serve the interests of a victim/survivor of domestic abuse, making the option for a power of arrest and determination of domestic abuse particularly important under the current regime.

¹⁴⁵ See paras 4.52 – 4.74.

¹⁴⁶ A Howells, “Out with the Old, in with the New”: Remedies for Domestic Abuse in Scotland in Need of Reform?” *Edinburgh Student Law Review*, 2021, Vol IV, Issue 2, p 70.

¹⁴⁷ 1997 Act, s 9.

not be a criminal offence where it was granted ex parte. Breach of an order should only carry criminal consequences where the defender has had a chance to be heard by the court.

5.129 In order to recognise that there may be circumstances where the defender cannot comply with the DACPRO, it would of course be possible for the defender to show that their breach was reasonable or justified. Thus, if there is a property return order but, before it can be complied with, the item of property is destroyed, entirely by accident, then failure to return the property would not breach the order. If the property was intentionally destroyed by the defender after the order was made, that would constitute a breach, since the failure to comply with the order could not be justified by the defender.

5.130 We seek consultees' views on these points:

- 35. Should breach of an interim or final DACPRO (excluding redress orders) constitute a criminal offence?**
- 36. Should breach of an ex parte (without notice) order be excluded from criminal sanction?**
- 37. In your experience, are there any other measures relating to enforcement which could provide the necessary protection?**

Post mortem orders

Seeking a DACPRO after the death of the perpetrator

5.131 Where the wrongdoer in any delictual conduct dies before a civil action is raised or is resolved, the pursuer is entitled to continue the action against the wrongdoer's estate.¹⁴⁸ This means that any award of damages by the court would be met by the wrongdoer's estate, and paid to the pursuer. For example, if a passenger is injured in a road traffic accident caused by the driver of the car, and the driver is killed in the accident, the passenger can seek damages from the driver's estate.

5.132 In light of our proposal to create a statutory delict of domestic abuse, we see no reason why the usual right to claim compensation against a deceased's estate should not also apply here. A victim/survivor would therefore be able to make a claim for damages from the perpetrator for the wrongdoing, and, in the event of the perpetrator's death, against their estate. Obviously, some elements of the DACPRO would no longer be available, such as a protection order. However, a redress order, together with orders in respect of the delivery of documentation, property, or pets would all still be competent against the deceased's estate.

Seeking a DACPRO after the death of the victim/survivor

5.133 Where a victim dies (of any cause) before a civil action is raised or is resolved, the right to pursue the action typically passes to their executor: "If the injury causes patrimonial loss, the right to sue therefor passes, on the death of the injured party, to his executor".¹⁴⁹ The Damages (Scotland) Act 2011 specifically provides for claims for damages to transmit to the

¹⁴⁸ DM Walker, *Principles of Scottish Private Law*, Vol II, Obligations, 4th ed (OUP, 1988), p 583, citing Erskine III, I, 15; Bell's *Principles*, para 544.

¹⁴⁹ Glog and Henderson, 15th ed, para 25.20.

victim's executors.¹⁵⁰ This includes the right to solatium (compensation for emotional harm) and any claim in respect of any patrimonial loss (loss or damage to property) sustained during the victim's life, but not losses attributable to the period after the victim's death: "The effect is that the executor's rights are restricted to recovery of solatium and patrimonial loss attributable to the period before death".¹⁵¹

5.134 There seems no reason why the Damages (Scotland) Act 2011 should not also operate for a statutory delict of domestic abuse, and we therefore propose that a claim should be capable of being raised or continued by the victim's executor, after the death of the victim, for losses sustained in the period before death.

Protection from the perpetrator's associates

5.135 Domestic abuse arises in the context of an intimate relationship, but it can be carried out not only by the partner or ex-partner of the victim/survivor, but also by their friends or family. We have heard of victim/survivors who have secured an interdict against a spouse or partner to stop the abuse, only to find that friends and/or family members of the partner (who are not covered by the interdict) continue to harass and intimidate them. This is not separate abuse, but is associated with, and engendered by, the primary domestic abuse.

5.136 Two recent cases provide examples of associates of the perpetrator also carrying out the abuse, one from the criminal sphere, and one in a dispute relating to child contact. In *Miller v HM Advocate*,¹⁵² a father and two adult daughters were initially charged with 14 offences, including assault, abduction, and stalking against the estranged wife/mother. Most of these charges were later withdrawn, leaving a charge of assault and a charge of stalking against the father and a charge of stalking against one of the daughters,¹⁵³ both stalking charges being in terms of section 39 of the Criminal Justice and Licensing (Scotland) Act 2010.¹⁵⁴ Although only the father's assault conviction was upheld on appeal, this case nevertheless provides an example of how abuse in an intimate relationship can engender abuse from other family members.

5.137 *AS v SB*¹⁵⁵ was a child contact dispute between the parents of a child, with the father seeking contact. Contact was refused and the sheriff also terminated the pursuer's parental responsibilities and rights.¹⁵⁶ The evidence established abusive behaviour perpetrated by the father which left the mother "terrified" of him.¹⁵⁷ Although the case focused on child contact, rather than civil protection orders, the evidence disclosed that SB (the mother) and her wider family had been threatened and abused by the father's sister, MS. For example, one of the sheriff's findings in fact was that: "the pursuer's sister, MS, threatened the defender that she and her family would 'get it.'"¹⁵⁸ The sheriff also observed that: "The pursuer's sister, MS, and her partner, DW, denied making threats to, or towards the defender and her family, and denied

¹⁵⁰ This includes a claim for harassment under ss 8 or 8A of the 1997 Act: see the Damages (Scotland) Act 2011, s 2.

¹⁵¹ Gloag and Henderson, 15th ed, para 25.21.

¹⁵² 2021 WL 04481185.

¹⁵³ At the close of the Crown case all three charges were withdrawn against the second daughter.

¹⁵⁴ Engaging in a course of conduct which causes fear or alarm to the other person, and they intend to cause fear or alarm or know or ought to know that engaging in the course of conduct would be likely to cause the person to suffer fear or alarm.

¹⁵⁵ *AS v SB* 2010 WL 3765973.

¹⁵⁶ *AS v SB* 2010 WL 3765973 at p 3.

¹⁵⁷ *AS v SB* 2010 WL 3765973 at p 2.

¹⁵⁸ *AS v SB* 2010 WL 3765973 at p 2.

being involved in any vandalism or assaults. I do not accept these accounts”.¹⁵⁹ The abusive behaviour perpetrated by the father here was supplemented by abuse and threats from his sister and her partner. Whether the perpetrator encouraged or promoted this conduct is not known, but nevertheless, the abuse of the victim by the perpetrator’s sister and her partner stemmed from the intimate relationship between the victim and perpetrator.

5.138 In some cases, victim/survivors can seek protection from abuse carried out by friends and family of the perpetrator through a common law interdict or a non-harassment order under the 1997 Act. However, requiring the victim/survivor to seek separate interdicts or non-harassment orders has a number of disadvantages, not least the stress and expense inherent in each action. An interdict against non-partners would not fall within the scope of the 2011 Act in relation to a “domestic abuse interdict determination”, meaning that breach of the interdict would not be a criminal offence, thus leading to problems in enforcement. More fundamentally, however, treating abuse perpetrated by friends and family as separate abuse fails to recognise the cause of the abuse in the first place, being the intimate relationship. Only by recognising this abuse as associated with the primary perpetrator can the law provide a meaningful remedy. One way to do this is through a single application for protection.

5.139 An example of this can be found in New Zealand’s Family Violence Act 2018 (the “2018 Act (NZ)”). The 2018 Act (NZ) provides that in or after making a protection order against a respondent, the court may also direct that the order apply against a person whom the respondent is encouraging, or has encouraged, to engage in behaviour against a protected person, where (i) that behaviour, if engaged in by the respondent, would amount to family violence, and (ii) the order is necessary for the protection of the applicant or a child of their family.¹⁶⁰ Once it is established that a protection order is required against the respondent, then an associate can be added to the protection order. This enables a single order sought by the victim/survivor to offer protection against abuse carried out not only by the primary perpetrator, but also by associates. If the protection order against the respondent is discharged, then the order in respect of any associates also ends.

5.140 We propose that this approach should also be available in Scotland, to offer protection from abuse where it is carried out on behalf of the defender. This would be consistent with the general principle of accessory liability which operates in relation to delictual wrongs.¹⁶¹ Where a pursuer seeks a protection order as part of a DACPRO in respect of the defender, the court should be able to extend the protection order to apply to an associate (or associates) of the defender, if the associate(s) commits abusive behaviour on behalf of, or with the encouragement of, the primary perpetrator. If the civil definition of abusive behaviour were to mirror that in the 2018 Act,¹⁶² this would have the advantage that coercive control perpetrated by others on behalf of the primary perpetrator could also be caught. (At present, coercive

¹⁵⁹ *AS v SB* 2010 WL 3765973 at p 5.

¹⁶⁰ 2018 Act (NZ), s 89. See also s 61 which provides that any application for a protection order may seek a direction under s 89 that the order apply against a particular person, being a person whom the respondent has encouraged to engage in behaviour that, if engaged in by the respondent, would amount to family violence against the applicant, a child of the applicant’s family, or a person referred to in para (a). (Para (a) is a particular person with whom the applicant has a family relationship).

¹⁶¹ See the discussion of this in EC Reid, *The Law of Delict in Scotland*, paras 2.42 – 2.44. Reid discusses the decision of the Court of Session in *Frank Houlgate Investment Co Ltd v Biggart Baillie LLP* [2014] CSIH 187, which “shows that the accessory to an intentional delict may be held jointly and severally liable with the principal for wrongdoing where the accessory has deliberately engaged in conduct that foreseeability facilitated the primary wrong, even if that conduct was not unlawful in itself and the accessory had no wish that the primary wrong should occur.” (EC Reid, *The Law of Delict in Scotland*, para 2.44).

¹⁶² For further discussion of this, see paras 5.27 to 5.38 above.

control is only recognised (in the criminal context) where it is committed by an intimate partner or ex-partner.)

5.141 As in New Zealand, we propose that a protection order could only be extended to an associate where it is granted against a perpetrator. Where the protection order against the defender is discharged or terminated, it would also end in respect of an associate. However, for the avoidance of doubt, where a protection order was extended to apply to an associate, it could be breached by the associate even if the defender did nothing to breach the terms of the order as it extended to them. It would also be possible for breach of a protection order by the associate to constitute a criminal offence. The associate would be given notice of the DACPRO, and the opportunity to be heard and to defend the action in the same manner as the primary defender, in respect of the order against the associate.

5.142 We therefore think that recognising associates who perpetrate abuse with the encouragement of or on behalf of the perpetrator would help ensure meaningful protection for victim/survivors, through being able to seek a single remedy against both/all those individuals. We would be grateful for consultees' views on the following:

- 38. Should it be possible for a protection order to be made in relation to an associate of the defender, where the domestic abuse is carried out by the associate on behalf of or with the encouragement of the defender?**
- 39. If so, should breach of a protection order by an associate constitute a criminal offence?**

Jurisdiction

5.143 An action for a DACPRO should be competent in the Court of Session or in the sheriff court with jurisdiction.¹⁶³ However, one concern is that, under the current regime, an interdict granted by a sheriff will typically be restricted to conduct in that sheriffdom. For example, a crave for an interdict might be framed as follows:

“For interdict of the Defender from molesting the Pursuer by abusing [him/her] verbally, by threatening [him/her], by putting [him/her] into a state of fear, alarm or distress and by using violence towards [him/her] within the Sheriffdom of North Strathclyde.”

5.144 The resulting interdict, if granted, will reflect the terms of the crave. Accordingly, conduct which happens outwith North Strathclyde would not breach that interdict. However, it is competent for a crave to seek protection outwith the sheriffdom, across Scotland.¹⁶⁴ Likewise, in the 2021 Act, there is specific provision for a sheriff to make a Domestic Abuse Protection Order which extends beyond the sheriffdom. Section 9(4) of the 2021 Act provides that the sheriff “has competence to make provision in a domestic abuse protection order having effect in relation to conduct at places outside the sheriff’s sheriffdom as well as at places within the sheriff’s sheriffdom”.¹⁶⁵

¹⁶³ In terms of the Courts Reform (Scotland) Act 2014, ss 40 and 43.

¹⁶⁴ *McKenna v McKenna* 1984 SLT 92.

¹⁶⁵ The Courts Reform (Scotland) Act 2014, s 84, provides that a sheriff has competence to grant an interdict (including interim interdict) which has effect both within and outwith the sheriff’s sheriffdom “an extended interdict”. S 85 makes provision for the enforcement of an extended interdict.

5.145 We propose that it should be competent for a sheriff to make any order under a DACPRO, including a protection order, which extends furth of the sheriffdom.¹⁶⁶ We therefore ask:

40. Should it be possible for a DACPRO to extend beyond the sheriffdom in which it is granted?

Third parties seeking a DACPRO

5.146 It is an important part of respecting a victim/survivor's autonomy – especially in the face of domestic abuse which is aimed at subverting that autonomy and stripping the victim of control over all areas of their life – that any decision to seek a civil protection order should rest with the victim/survivor. If the victim/survivor does not wish to seek a DACPRO, then the law should ordinarily respect that decision. (This can be contrasted with the criminal justice system, where the victim/survivor, as complainer, does not determine whether to prosecute, and that decision will be taken by COPFS, taking into account wider considerations of the public interest.) However, there can be situations where it may be necessary or appropriate for someone else to seek a DACPRO on behalf of a victim/survivor. We outline three such situations, before seeking views on the most appropriate way forward here.

5.147 In the first place, the victim/survivor may be so exhausted by the abuse they have suffered, or so terrified of the perpetrator, that they do not wish to be the one raising the action, but they do wish civil protection, in respect of their safety, or perhaps return of documents or property, for example. In this situation, it might help a victim/survivor if a DACPRO could be sought by someone else on their behalf, whether a friend or a support organisation. This would be highly unusual in civil litigation, but it may be justified by the need to seek protection in the face of domestic abuse. A second example might be where the victim/survivor is under the control of the perpetrator and has no autonomy and no ability to raise an action. Concerned family or friends, possibly working with a support agency, may wish to try to seek civil protection for the victim/survivor in this situation. A third scenario would be where the victim/survivor lacks capacity: in that case, it may be appropriate for their guardian, if they have one,¹⁶⁷ to seek a DACPRO.

5.148 We can see the attraction in making provision for a third party to seek a DACPRO, but we are also conscious that it would be a relatively unusual step in civil proceedings, and it may risk undermining the victim/survivor's autonomy. Any action by a third party would of course not preclude a separate and subsequent action by the victim/survivor, and it would be possible to provide that any ongoing protective measures granted at the instance of the third party come to an end at the conclusion of the victim/survivor's action.

5.149 We therefore seek views on the general principle of whether action should ever be possible by another party, on behalf of a victim/survivor:

¹⁶⁶ The Courts Reform (Scotland) Act 2014 makes provision for "all-Scotland" jurisdiction in the sheriff court for certain cases: ss 40, 41 and 42.

¹⁶⁷ Guardians can be appointed by a sheriff, on application, in relation to the adult's property, financial affairs or personal welfare, where the sheriff is satisfied that the adult is incapable and that no other means under the Act could safeguard the adult's welfare: see ss 57 and 58 of the Adults with Incapacity (Scotland) Act 2000.

41. Should it be possible for a third party to seek a DACPRO on behalf of a victim/survivor?

42. If so, should they need the victim/survivor's consent to do so?

Orders sought by the perpetrator

5.150 Where the defender is banned from entering their house as part of a DACPRO sought by a pursuer, this may mean the defender is unable to access clothes and personal effects, including work property, without being in breach of the DACPRO. This position is covered to some extent in relation to exclusion orders under the 1981 Act/2004 Act, whereby section 4(5)/section 104(5) provide that the court can "give directions as to the preservation of that [party's] goods and effects which remain in the... home", where the warrant for summary ejection of the non-applicant party has been granted in their absence.

5.151 Where the consequence of a protection order or barring order granted as part of a DACPRO is that a defender cannot access clothes or personal effects or work property, then we propose that the court should be able to give directions either as to the preservation of the defender's goods and effects or for their delivery to the defender. The defender can seek such directions from the court, specifying the goods or effects sought.

5.152 To prevent the defender from making repeated applications to court for such an order, thereby perpetrating further abuse towards the pursuer, we propose that such an application should only be permitted within 21 days of the intimation to the defender of the DACPRO which gives rise to the need for such an application.¹⁶⁸

5.153 Accordingly, we seek consultees' views as follows:

43. Should defenders be able to seek the preservation or delivery of their specified possessions, where it is not possible for the defender to access them without being in breach of a DACPRO?

44. Are there any other orders which a defender should be able to seek, and if so what?

Rationalising the current regime

5.154 Depending on consultees' views in respect of the new statutory delict proposed in this chapter, we need to determine what to do with the existing regime of civil remedies as outlined in Chapter 4.

5.155 One critical factor is that the current regime (as set out in Chapter 4) is not solely devised to protect against domestic abuse, and applies in a wider range of circumstances and to a wider range of parties. Thus, a non-harassment order under the 1997 Act is not specifically to protect against domestic abuse, and can be used in any case of harassment. Occupancy rights can be of relevance between spouses, civil partners or cohabitants, even absent domestic abuse. A power of arrest can be attached to *any* interdict for the protection of abuse, in terms of the 2001 Act. These statutory measures therefore cannot be repealed or replaced

¹⁶⁸ Any existing common law remedies would remain available, and unaffected by this.

by a regime with the sole purpose of protecting pursuers from domestic abuse, and they must remain in place for the protection of parties who need them, beyond domestic abuse.

5.156 If a comprehensive regime of civil protection against domestic abuse (as set out in this chapter) were to be introduced, the only two measures which we think could be repealed, to be replaced by the new regime, are (i) section 8A of the 1997 Act, which makes specific provision for domestic abuse protection in the context of harassment;¹⁶⁹ and (ii) the power to determine an interdict as a domestic abuse interdict under the 2011 Act. Even then, there may be merit in retaining the domestic abuse interdict determination so that it could still be used if a pursuer chose to seek a common law interdict with power of arrest to protect against domestic abuse. There may also be merit in retaining other routes to redress, at least in the short to medium term, and for the Scottish Government to monitor their use, alongside any reformed system. Any future reform could therefore be informed by empirical evidence.

5.157 Against this background, we see two main options for reform:

- a) introducing a new civil regime comprising a delict of domestic abuse and the suite of remedies proposed, as outlined in this chapter, while retaining the existing regime, subject to (i) repeal of domestic-abuse-specific measures which would be duplicated, together with (ii) reforms to the existing regime as proposed in Chapters 3 and 4 (if those reforms are supported by consultees), with some consolidation where possible; or
- b) if there is insufficient support for a new delict of domestic abuse and associated remedies as outlined in this chapter, reforming and improving the existing regime, insofar as we can, as primarily outlined in Chapters 3 and 4, with some consolidation where possible.

5.158 Which option is adopted will depend in part on the preferred options for reform throughout this Discussion Paper.

¹⁶⁹ S 8A of the 1997 Act can be engaged after only a single act, rather than requiring a course of conduct, although stakeholders have informed us that the impact in practice is minimal, as victim/survivors only seek legal assistance after more than one incident.

Chapter 6 Defining Domestic Abuse: The Parties

Introduction

6.1 The current civil law regime of protection orders for domestic abuse (like its criminal law counterpart) focuses on domestic abuse between partners or ex-partners. During the scoping and research phase of this project, we heard differing views from Advisory Group members and stakeholders on whether civil remedies for domestic abuse should continue to be available to partners and ex-partners only, or whether they should be extended more widely to encompass other domestic or family relationships. These differing views have persuaded us to explore this issue further in our Discussion Paper.

6.2 These different views are also reflected in the consultations on the proposals which led to the 2018 Act¹ and the 2021 Act,² where the Scottish Government received conflicting responses from consultees in relation to who should be protected from domestic abuse under criminal and civil law respectively.³ In particular, the question of whether a criminal offence of domestic abuse and civil protection orders should protect partners and ex-partners (“intimate partners”), or include family members, was divisive. There was also disagreement about whether children who experience domestic abuse should be identified as victims under the legislation.

6.3 In Part 1 of Chapter 6, we consider the current policy and legislative position on who is protected by civil orders for domestic abuse in Scotland, before exploring the approach taken in a number of comparative jurisdictions. We then consider the arguments for and against recognising domestic abuse being perpetrated not only between partners/ex-partners, but also in wider family relationships. Part 1 also includes a discussion of intersectionality and how domestic abuse increases where a victim/survivor belongs to one or more marginalised groups. Part 2 considers the issue of honour based abuse, and whether honour based abuse should be encompassed within civil remedies for domestic abuse.

Part 1: The Parties

6.4 It is essential to emphasise at the outset that the question is not whether some people are entitled to protection from abuse while others are not: it is fundamental that anyone who

¹ Scottish Government, *A criminal offence of domestic abuse: Scottish Government Consultation Paper* (Scottish Government, 2016) (available at: https://consult.gov.scot/criminal-law-and-sentencing-team/criminal-offence-domestic-abuse/user_uploads/00491481.pdf-1).

² Scottish Government, *Consultation on protective orders for people at risk of domestic abuse*, Published Responses (available at: https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/consultation/published_select_respondent).

³ Scottish Government, *Protective orders for people at risk of domestic abuse: consultation analysis* (31 July 2020) (available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2020/07/protective-orders-people-risk-domestic-abuse-analysis-consultation-responses2/documents/protective-orders-people-risk-domestic-abuse-analysis-consultation-responses/govscot%3Adocument/protective-orders-people-risk-domestic-abuse-analysis-consultation-responses.pdf>). See Ch 7, Part 1 for further discussion of this.

suffers abuse should be protected through the criminal and civil law. The question for this project is whether abuse perpetrated between adult siblings or against elderly parents, for example, is properly seen as domestic abuse, or whether it requires to be categorised differently. Abuse of children should always be treated as child abuse. We consider separately (in Chapter 7) whether children should be recognised as victim/survivors of domestic abuse where they experience it in the family, for example where it is perpetrated by one parent against another. In this chapter, we examine whether the definition of domestic abuse should extend beyond intimate partners/ex-partners, to include wider family relationships.

6.5 If a new delict of domestic abuse, with associated remedies, was to be introduced as outlined in Chapter 5, then it could apply to all relationship types identified in the statute. The question of which relationships are covered by domestic abuse is separate from the legal protection offered to them. Accordingly, the focus of this chapter will inform the scope of the delict proposed in Chapter 5, but it does not alter the substance of that proposal.

Background

The policy approach

6.6 The policy approach to date in Scotland limits the definition of domestic abuse to abuse between partners and ex-partners. Scottish Government guidance states: “Domestic abuse is carried out by *partners or ex partners*.”⁴ The Scottish Government positions domestic abuse as part of gender-based violence, which explicitly recognises domestic abuse as both a cause and a consequence of gender inequality.⁵

6.7 The Joint Protocol between Police Scotland and the Crown Office and the Procurator Fiscal Service (“COPFS”) outlines the procedures and practices that will be followed by the Police and COPFS in the investigation, reporting, and prosecution of domestic abuse allegations.⁶ For the purposes of the Protocol, domestic abuse is defined as:

“Any form of physical, verbal, sexual, psychological or financial abuse which might amount to criminal conduct and which takes place within the context of a relationship. The relationship will be between *partners* (married, cohabiting, civil partnership or otherwise) or ex-partners. The abuse can be committed in the home or elsewhere including online.”⁷

⁴ Available at: <https://www.mygov.scot/domestic-abuse/what-is-domestic-abuse>. (Emphasis added).

⁵ Stark and Hester note that: “The Scottish definition was based on General Recommendation No. 19 adapted by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1992. CEDAW defined gender violence as a violation of human rights and linked gender equality and the elimination of violence against women (VAW) by recognizing that rape and domestic violence are causes of women’s subordination rather than simply its consequences and that, therefore, gender violence was a form of discrimination that ‘seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men’”: E Stark and M Hester, “Coercive Control: Update and Review”, (2019) *Violence Against Women* 25(1), 81-104, fn 5.

⁶ First published 1 May 2019, last updated 12 June 2023 (available at: <https://www.copfs.gov.uk/publications/joint-domestic-abuse-protocol/html/>).

⁷ Joint Protocol, section 1, para 4 (available at: <https://www.copfs.gov.uk/publications/joint-domestic-abuse-protocol/html/>) (last updated 12 June 2023).

The legislative approach

6.8 The legislative approach in Scotland is similar. Most statutory civil remedies for domestic abuse are available to partners and ex-partners only.⁸ As discussed in Chapter 4, the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Civil Partnership Act 2004 make provision for occupancy rights, exclusion orders and matrimonial, domestic and relevant interdicts for spouses, cohabitants, and civil partners respectively. The Domestic Abuse (Scotland) Act 2011 provides for an interdict to be recognised as a domestic abuse interdict where it concerns abuse between spouses, civil partners, cohabitants or those in an intimate personal relationship.⁹

6.9 Recent legislation in Scotland also confines the availability of civil remedies for domestic abuse to partners and ex-partners. The Domestic Abuse (Protection) (Scotland) Act 2021, which (once in force) will make provision for civil domestic abuse protection notices and domestic abuse protection orders, restricts the availability of these to partners and ex-partners.¹⁰ However, there were conflicting views as to who should be protected from domestic abuse in responses to the consultation for the Bill which became the 2021 Act.¹¹ 28 out of 59 respondents¹² thought that the protections should be available to partners and ex-partners only; 9 thought protection should extend to any family members in the same household; 14 thought protection should extend to cohabitants or anyone living in a shared home; and 8 respondents did not know.¹³

6.10 The Domestic Abuse (Scotland) Act 2018 introduced a criminal offence of abusive behaviour, in respect of behaviour which is abusive of a partner or ex-partner.¹⁴ Thus, in both civil and criminal spheres, Scots law recognises domestic abuse as that perpetrated against a partner or ex-partner.

Comparative law

6.11 The comparative jurisdictions we have considered all differ to a greater or lesser degree from the position in Scotland. England and Wales, Northern Ireland, Ireland, Canada, Australia and New Zealand all recognise a broader category of relationships for the purposes

⁸ With the exception of powers of arrest, which may be attached to a common law interdict the purpose of which is protection from abuse (2001 Act, s 1(2)), and non-harassment orders (1997 Act, ss 8 and 8A). See Ch 4.

⁹ 2011 Act, s 3(2). Para 17 of the Explanatory Notes to the 2011 Act states that “intimate personal relationship” includes “relationships between boyfriends and girlfriends (including same-sex relationships), although the relationship need not be sexual” (available at: <https://www.legislation.gov.uk/asp/2011/13/notes/contents>).

¹⁰ 2021 Act, s 1(1). See Ch 4, paras 4.94 to 4.96.

¹¹ Available at: <https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/>.

¹² Question 8. Of the 78 respondents to the consultation, 59 answered this question (47% thought it should be partners and ex-partners only, 15% thought any family members in the same household should be covered, 24% thought anyone living in a shared home should be within the scope of the protection, 14% did not know) (available at: <https://sp-bpr-en-prod-cdneq.azureedge.net/published/2020/12/9/9aebc876-0895-11eb-83ec-000d3a23af40-1/SB%2020-79.pdf>).

¹³ Scottish Government, *Protective orders for people at risk of domestic abuse: consultation analysis* (31 July 2020) (available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2020/07/protective-orders-people-risk-domestic-abuse-analysis-consultation-responses2/documents/protective-orders-people-risk-domestic-abuse-analysis-consultation-responses/protective-orders-people-risk-domestic-abuse-analysis-consultation-responses/govscot%3Adocument/protective-orders-people-risk-domestic-abuse-analysis-consultation-responses.pdf> at para 4.2).

The criminal law (2018 Act, s 1(1)) which creates the criminal offence of abusive behaviour towards a partner or ex-partner, similarly restricts domestic abuse to partners/ex-partners, see Ch 4, paras 4.100 to 4.101.

¹⁴ Domestic Abuse (Scotland) Act 2018, s 1(1)(a).

of protection from domestic abuse. In this section, we focus on the approaches taken in England and Wales, Ireland, Canada and New Zealand.

England and Wales

6.12 Most of the relevant legislation in England and Wales was not enacted specifically to deal with domestic abuse; rather, criminal, civil and family law is applied where relevant in domestic abuse cases.¹⁵

6.13 Part IV of the Family Law Act 1996 (“the 1996 Act (E&W)”), provides for home rights,¹⁶ rights to occupy the family home (occupation orders),¹⁷ and for orders for protection from domestic abuse (non-molestation orders).¹⁸ The protections are therefore akin to the occupancy rights and exclusion orders set out in the 1981 Act and 2004 Act. Non-molestation orders are not restricted to partners and ex-partners. In terms of section 62, a person is either an ‘associated’ or a ‘non-associated’ person: if the victim/survivor of abuse is not associated with the perpetrator, they cannot make any application for protection under the Act.¹⁹

6.14 Section 62(3) provides that a person is associated with another person if:

- they are or have been spouses, civil partners, cohabitants;
- they live or have lived in the same household,²⁰ otherwise than merely by reason of one of them being the other’s employee, tenant, lodger or boarder;
- they are relatives;²¹
- they have agreed to marry or enter into a civil partnership agreement with one another (whether or not the agreement has been terminated);
- they have or have had an intimate personal relationship with each other;²²
- they are the parent of the child or have (or have had) parental responsibility in relation to the child;²³ or
- they are parties to the same family proceedings other than under Part IV of the 1996 Act.²⁴

6.15 The category of people covered by the 1996 Act (E&W) is therefore far broader than those protected by exclusion orders and ancillary interdicts in Scotland.

¹⁵ Domestic Abuse Act 2021, Explanatory Notes at para 67 (available at: <https://www.legislation.gov.uk/ukpga/2021/17/notes/division/1/index.htm>).

¹⁶ 1996 Act (E&W), s 30(2) & (8) (for spouses and civil partners).

¹⁷ 1996 Act (E&W), s 33.

¹⁸ 1996 Act (E&W), ss 42 to 42A.

¹⁹ However, they may be able to apply for a non-harassment order under the Protection from Harassment Act 1997.

²⁰ The term “household” is not defined in the 1996 Act (E&W).

²¹ 1996 Act, s 63(1): relative means the father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, grandmother, grandfather, grandson or granddaughter of that person or of that person’s spouse, cohabitant, former spouse or former cohabitant; or the brother, sister, uncle, aunt, niece or nephew (whether of full blood or half blood or by affinity) of that person or of that person’s spouse, cohabitant, former spouse or former cohabitant.

²² S 4 of the Domestic Violence, Crime and Victims Act 2004 amended s 62(3) of the 1996 Act (E&W) to extend the class of associated persons to include those in “an intimate personal relationship” with the applicant, in order to give non-cohabiting couples access to protection (Official Report (HC) Standing Committee 22 June 2004 cols 54 and 55 (available at: <https://publications.parliament.uk/pa/cm200304/cmstand/e/st040622/pm/40622s04.htm>).

²³ 1996 Act, s 62(3)(f) and (4).

²⁴ 1996 Act, s 62(3)(g).

6.16 The Domestic Abuse Act 2021, which makes provision for domestic abuse protection notices and orders, also extends the availability of these orders more widely than to partners and former partners. Section 1(2) of the Domestic Abuse Act 2021 provides that: “behaviour of a person (“A”) towards another person (“B”) is domestic abuse if A and B are aged 16 or over and are *personally connected to each other*, and the behaviour is abusive”. Two people are “personally connected” to each other if:

- they are, or have been, married to each other;
- they are, or have been, civil partners of each other;
- they have agreed to marry one another (whether or not the agreement has been terminated);
- they have entered into a civil partnership agreement (whether or not the agreement has been terminated);
- they are, or have been, in an intimate personal relationship with each other;
- they each have, or there has been a time where they each have had, a parental relationship in relation to the same child;
- they are relatives.²⁵

6.17 “Relative” includes a wide range of people, including, in relation to a person:

“(a) the father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, grandmother, grandfather, grandson or granddaughter of that person or of that person’s spouse, former spouse, civil partner or former civil partner, or

(b) the brother, sister, uncle, aunt, niece, nephew or first cousin (whether of the full blood or of the half blood or by marriage or civil partnership) of that person or of that person’s spouse, former spouse, civil partner or former civil partner,

and includes, in relation to a person who is cohabiting or has cohabited with another person, any person who would fall within paragraph (a) or (b) if the parties were married to each other or were civil partners of each other.”²⁶

6.18 However the Domestic Abuse Act 2021 does not go as far as to make protection notices and orders available to those living in the same household, if they are *not otherwise* “personally connected” to the perpetrator in terms of the 2021 Act (E&W). Equally, the legislation does not require the parties to be living in the same household in order for the protection to be available:

“Our concern was that including ‘household’ in the definition may have the unintended consequence of diverting people’s attention from those relationships where people do not live together. I am sure we can all think of examples of incredibly abusive relationships in which the two people in that relationship do not happen to live together

²⁵ Domestic Abuse Act 2021, s 2.

²⁶ “Relative” here uses the definition in s 63(1) of the Family Law Act 1996 (Domestic Abuse Act 2021, s 2(3)).

... I am anxious that we do not inadvertently, with absolutely the right intentions, divert people's attention away from the central purpose of the Act."²⁷

6.19 Therefore, the categories of persons that may obtain the protections available under the 1996 Act (E&W) and the Domestic Abuse Act 2021, while differing slightly, are both wider than the category of persons entitled to the equivalent protections in the 1981 and 2021 Acts in Scotland.²⁸

6.20 In relation to protection under the criminal law, the Serious Crime Act 2015 introduced an offence of coercive or controlling behaviour in an "intimate or family relationship".²⁹ This offence can be committed where the perpetrator and victim are "personally connected"³⁰ and, again, this is defined widely, to include not only partners or ex-partners in intimate relationships, but also "relatives".³¹ Relatives are defined in accordance with the 1996 Act (E&W), and include siblings, parents and grandparents.³²

Ireland

6.21 In Ireland, the Domestic Violence Act 2018 (the "2018 Act (Ireland)") provides civil remedies for domestic abuse.³³ Its purpose was to amend and consolidate the law in relation to domestic violence,³⁴ and to introduce the offence of coercive control and express consideration of the victim's psychological and emotional welfare.³⁵ It provides for five different civil remedies: safety orders, protection orders, barring orders, interim barring orders, and emergency barring orders.³⁶

6.22 A safety order and a protection order³⁷ may prohibit the respondent from doing a number of things, including using or threatening to use violence against, molesting or putting in fear the applicant or a dependent person (child of the applicant and/or respondent³⁸).³⁹ These protection orders can be sought by: a spouse or former spouse, a civil partner or former civil partner, a person who lived with the respondent in an intimate relationship,⁴⁰ a parent of

²⁷ The then Parliamentary Under-Secretary of State for the Home Department, Victoria Atkins MP, HC Deb (9 June 2020) on the Domestic Abuse Bill, Bill 96 col. 115 (available at: https://publications.parliament.uk/pa/cm5801/cmpublic/DomesticAbuse/PBC096_Domestic%20Abuse%20Bill_1st-12th_Compilation_17_06_2020_REV.pdf).

²⁸ Family Law Act 1996, s 62 and Domestic Abuse Act 2021, s 2.

²⁹ Serious Crime Act 2015, s 76.

³⁰ Serious Crime Act 2015, s 76(6).

³¹ Serious Crime Act 2015, s 76(6)(g).

³² Serious Crime Act 2015, s 76(7), referring to the 1996 Act E&W, s 63.

³³ Available at: <https://www.oireachtas.ie/en/bills/bill/2017/13/>.

³⁴ Available at: <https://data.oireachtas.ie/ie/oireachtas/bill/2017/13/eng/memo/b1317s-memo.pdf>. The 2018 Act repealed the Domestic Violence Act 1996 (the "1996 Act") and the Domestic Violence (amendment) Act 2002 (the "2002 Act"), which previously contained provisions related to civil remedies for domestic abuse.

³⁵ The 2018 Act (Ireland), s 5(2)(o). It also contains provisions required to ratify the Council of Europe's Convention on preventing and combating violence against women and domestic violence ("Istanbul Convention") which Ireland signed in November 2015, see 2018 Act (Ireland), ss 6, 7, 8 and 9 and paragraph 1 of the explanatory memorandum (available at: <https://data.oireachtas.ie/ie/oireachtas/bill/2017/13/eng/memo/b1317s-memo.pdf>).

³⁶ Breach of any of these orders is a criminal offence, 2018 Act (Ireland), s 33.

³⁷ The court may make a protection order where it has or is considering making a safety order, or a barring order (1998 Act (Ireland), s 10(1)).

³⁸ 2018 Act (Ireland), s 2 defines "dependent person".

³⁹ 2018 Act (Ireland), s 6(2)(a), s 10(1)(a).

⁴⁰ In contrast to the provision made by the 1996 Act, all partners in an intimate relationship are eligible to apply for a safety order, with no need for previous or continuing cohabitation (Women's Aid, *Guide on the new Domestic Violence Act 2018* (available at: <https://www.womensaid.ie/get-help/your-rights-options/domestic-violence-orders/#:~:text=There%20are%20different%20groups%20of%20people%20who%20can%20apply%20for>).

an adult respondent (provided that the respondent is not dependent on the parent), a person who lives with the respondent in a primarily non-contractual relationship,⁴¹ or by a person who has had a child with the respondent.⁴²

6.23 A barring order requires a respondent, if living at a place where the applicant resides, to leave that place (and whether residing with the applicant or not, prohibits the respondent from entering that place).⁴³ A barring order may be applied for by the spouse or former spouse, civil partner or former civil partner of the respondent, a person who lived with the respondent in an intimate relationship, or by a parent of an adult child (who is not dependent on the parent).⁴⁴ Interim barring orders may be made by the court for situations where there is a more immediate risk of significant harm to the applicant or a dependent person, and are available to the same person as barring orders.⁴⁵ An emergency barring order is available to a person who lived with the respondent in an intimate relationship (not spouses or civil partners) and a parent of the respondent (where the respondent is an adult child, not dependent on the parent).⁴⁶ The applicant need not have a legal or beneficial interest in the property to which the order relates.⁴⁷

6.24 The Child and Family Agency⁴⁸ may also apply for a safety order, protection order, barring order or emergency barring order in certain circumstances,⁴⁹ including for example, if the Agency becomes aware of an alleged incident or series of incidents which in its opinion puts into doubt the safety or welfare of a person.

6.25 Therefore, civil remedies for protection from domestic abuse in Ireland offer protection to a wider category of persons than in Scotland.

New Zealand

6.26 The Family Violence Act 2018 (“the 2018 Act (NZ)”) contains a range of civil and quasi-criminal remedies for domestic abuse in New Zealand.⁵⁰ These include protection orders, immediate temporary exclusion orders, occupancy orders, tenancy orders, and ancillary and non-ancillary furniture orders. Orders can be made against perpetrators of family violence.

A relationship does not cease to be an intimate relationship for the purposes of the Act by reason only that it is no longer sexual in nature (2018 Act, s 2(3)).

⁴¹ In deciding whether or not a person lives with the respondent primarily in a non-contractual relationship, the court shall have regard to: the length of time those persons are residing together; the nature of any duties performed by either person for the other person or any kindred person of that other person; the absence of any profit or of any significant profit made by either person from any monetary or other consideration given by the other person in respect of residing at the place concerned; and any other matters the court considers appropriate in these circumstances (2018 Act (Ireland), s 6(1)(b)).

⁴² 2018 Act (Ireland), ss 6(1)(a).

⁴³ 2018 Act (Ireland), s 7(2)(a).

⁴⁴ 2018 Act (Ireland), s 7(1). In relation to a person who lived with the respondent in an intimate relationship, and a person who is parent of an adult child (who is not dependent on the parent), the court may not grant a barring order, if the applicant has no legal or beneficial interest in the property (or their interest in the property is less than the respondent's) (s 7(6)(a)).

⁴⁵ 2018 Act, s 8.

⁴⁶ 2018 Act (Ireland), s 9.

⁴⁷ 2018 Act, s 9(2). Domestic Violence Bill 2017 Explanatory and Financial Memorandum at pp 2 and 3 (available at: [b1317s-memo.pdf \(oireachtas.ie\)](#)).

⁴⁸ The Child and Family Agency is the dedicated State agency in Ireland responsible for improving wellbeing and outcomes for children. It operates under the Child and Family Agency Act 2013 (available at: <https://www.tusla.ie/about/>).

⁴⁹ 2018 Act (Ireland), s 11.

⁵⁰ Cabinet Social Policy committee Reform of Family Violence Law Paper 1 para 34 (available at: [fv-reform-paper-1-context.pdf \(justice.govt.nz\)](#)).

“Family violence” is defined as “violence inflicted against that person by any other person with whom that person is, or has been, in a family relationship”.⁵¹ A “family relationship” includes: a spouse or partner, family members (see paragraph 6.27), persons who ordinarily share a household, or persons who have a close personal relationship.⁵² Whether a relationship falls within the definition of a close personal relationship is a question for the court, and is determined with regard to the nature and intensity of the relationship, and in particular the amount of time spent together, the place or places where that time is ordinarily spent, the manner in which that time is ordinarily spent, and the duration of the relationship.⁵³

6.27 A “family member” is defined as anyone who is or has been related to the person by blood, by or through marriage, a civil union, or a de facto relationship, by adoption or any other person who is a member of the person’s whānau or other culturally recognised family relationship.⁵⁴ As the New Zealand Cabinet Social Policy Committee notes, the notion of family is deliberately wide to cater for the fact that family violence disproportionately affects Māori people, who have a different concept of family to the western one.⁵⁵

6.28 As can be seen, the emphasis in the 2018 Act (NZ) is on family violence. The legislation is not therefore limited to domestic abuse between partners or former partners. There is also a particular focus on the impact of violence on children and on the vulnerability of other minority groups. The protections in New Zealand apply to a wider category of persons than in Scotland and the other comparative jurisdictions considered.

Canada

6.29 The provinces and territorial governments in Canada have their own civil laws in relation to domestic abuse. Therefore civil protection orders are issued on a provincial level, and these are designed to complement the protections in Canada’s federal Criminal Code.⁵⁶ The law is not however consistent between the various provinces and territories:

“Addressing intimate-partner violence in Canada is made particularly complex by the Canadian federal and provincial systems...in short, the provinces are responsible for

⁵¹ The 2018 Act (NZ), s 9(1). Violence refers to physical, sexual, or psychological abuse (s 9(2)), and includes a pattern of behaviour that is made up of a number of acts that may be coercive or controlling and/or, causes the person, or may cause the person, cumulative harm. Violence against a person may also be dowry related violence, (s 9(4)).

⁵² The 2018 Act (NZ), s 12. Sharing a household in and of itself does not create a “family relationship” for the purposes of the Act, where there is a landlord-tenant, employer-employee, or employee-employee relationship between individuals who share a dwellinghouse (s 13). Likewise, an employer-employee and employee-employee relationship does not in and of itself constitute a close personal relationship (s 14(1)). However, where one individual is a caregiver for another, the relationship is not precluded from falling within the definition of a “close personal relationship” (s 14(2)).

⁵³ 2018 Act (NZ), s 14(3). However, a relationship need not be sexual in nature in order to fall within the definition. (s 14(4)).

⁵⁴ 2018 Act (NZ), s 8.

⁵⁵ Māori are significantly over-represented as perpetrators and victims of family violence. Between 2010 to 2014, Māori comprised 34 to 38 percent of all protection order respondents, and over 50 percent of all people charged with, or convicted of, a breach of a protection order. Cabinet Social Policy Committee, Reform of Family Violence law, paper one p 5, para 31 (available at: <https://www.justice.govt.nz/assets/fv-reform-paper-1-context2.pdf>).

⁵⁶ Available at: <https://laws-lois.justice.gc.ca/eng/acts/C-46/index.html>; available at: <https://justice.gc.ca/eng/cj-jp/fv-vf/laws-lois.html>). There is no offence specific to domestic abuse in the Criminal Code, however, acts of domestic violence could be captured by the provisions on assault and/or sexual assault and offences against an intimate partner or family member will often lead to more severe sentencing (para 3.1), *Fighting Domestic Violence: Canada*, Baker MacKenzie (available at: <https://resourcehub.bakermckenzie.com/en/resources/fighting-domestic-violence/north-and-central-america/canada/topics/1legal-provisions>).

delivering services across the health, justice and social services sectors in their respective province and the federal government is responsible for providing national guidance, leadership and coordination across the jurisdictions. This results in a patchwork of solutions that vary significantly between the provinces and territories.”⁵⁷

6.30 A number of provinces have legislation which makes provision for civil protection orders in relation to domestic abuse between intimate partners only. In Ontario, the Family Law Act 1990 (as amended),⁵⁸ provides that the court may make an interim or final restraining order against a spouse/former spouse, or cohabitant/former cohabitant, if the applicant has reasonable grounds to fear for his or her own safety or for the safety of any child in his or her lawful custody.⁵⁹ A restraining order may provide for a number of things, including restraining the respondent, in whole or in part, from directly or indirectly contacting or communicating with the applicant or any child in the applicant’s lawful custody, or from coming within a specified distance of one or more location.⁶⁰

6.31 The position is similar in Nova Scotia, where the Domestic Violence Intervention Act 2001 (as amended),⁶¹ provides that an application for an emergency protection order⁶² in respect of domestic violence⁶³ may be made by a person who is or was cohabiting with the respondent in a conjugal relationship, or who shares a child with the respondent: ““victim” means a person who is at least sixteen years of age and has been subjected to domestic violence by another person who (i) has cohabited or is cohabiting with the victim in a conjugal relationship, or (ii) is, with the victim, the parent of one or more children, regardless of their marital status with respect to each other or whether they have lived together at any time.”⁶⁴ The position is also similar in Newfoundland and Labrador, where the Family Violence Protection Act 2005 restricts applications for an emergency protection order⁶⁵ in respect of “family violence”⁶⁶ to those in or formerly in a conjugal relationship, and those who are or have been in an intimate relationship if they share a child: “(a) a person who resides with or has resided with the respondent in a conjugal relationship, whether within or outside marriage; or

⁵⁷ *Fighting Domestic Violence: Canada*, Baker MacKenzie, para 1.

⁵⁸ Family Law Act 1990 (As amended) (available at: <https://www.ontario.ca/laws/statute/90f03>).

⁵⁹ Family Law Act 1990 (As amended), s 46.

⁶⁰ Family Law Act 1990 (As amended), s 46(3).

⁶¹ Domestic Violence Intervention Act 2001 (As amended) (available at: <https://www.canlii.org/en/ns/laws/stat/sns-2001-c-29/latest/part-1/sns-2001-c-29-part-1.pdf>).

⁶² An emergency protection order may provide for a number of things including granting the victim or other family members exclusive occupation of the victim’s residence for defined period regardless of any legal rights of possession or ownership and direct a peace officer to remove the respondent from the victim’s residence immediately (Domestic Violence Intervention Act 2001, s 8).

⁶³ “Family Violence” is defined as acts or omissions committed against a victim including “an assault that consists of the intentional application of force that causes the victim to fear for his or her safety, but does not include any act committed in self-defence, and an act or omission or threatened act or omission that causes a reasonable fear of bodily harm or damage to property (Domestic Violence Intervention Act 2001, s 5).

⁶⁴ Domestic Violence Intervention Act 2001, s 2.

⁶⁵ Family Violence Protection Act 2005, ss 4 and 5 (where the judge determines on a balance of probabilities that (a) family violence has occurred; and (b) by reason of seriousness or urgency the emergency protection order should be made without delay to ensure the immediate protection of the applicant who is at risk of harm or the property that is at risk of damage).

⁶⁶ Family Violence Protection Act 2005, s 3. An emergency protection order may contain a number of different provisions, including provision directing a police officer to remove the respondent from the residence and restraining the respondent from directly or indirectly communicating with the applicant or another specified person (s 6).

(b) a person who is, together with the respondent, a parent of one or more children, regardless of their marital status or whether they have lived together”.⁶⁷

6.32 However, the legislation in relation to civil protection orders in Alberta and British Columbia extends more widely to protection of family members from another family member. In Alberta, applications for emergency protection orders may be made by “family members”, defined in the Protection Against Family Violence Act 2000,⁶⁸ as spouses/former spouses, those who are/were adult interdependent partners, or who are/were living together in an intimate relationship, parents of one or more children, those related by blood, marriage, adoption, or by virtue of an adult interdependent relationship (including any children in the care and custody of such persons), and those residing together where one of the persons has care and custody over the other pursuant to an order of the court. In British Columbia, an application for a family law protection order may be made by “family members” defined in the Family Law Act 2011,⁶⁹ as a spouse/former spouse, person with whom the person is/was living in a marriage like relationship, a parent or guardian of the person’s child, a person who lives with and is related to the person or any of the above persons, or the person’s child (including a child who is living with, or whose parent or guardian is, a person referred to above).

6.33 As noted above, the difference in treatment of domestic abuse between the various provinces and territories makes for a complicated picture in Canada, but several provinces, including Ontario, like Scotland, restrict the availability of civil protection orders for domestic abuse to those in intimate partner relationships and former intimate partner relationships.

Extending civil protection for domestic abuse beyond partners and ex-partners

6.34 There are several arguments for and against extending civil remedies for domestic abuse beyond partners and ex-partners to wider family members. In this section of the chapter, we examine the continuing debate as to which categories of person should be able to seek civil protection orders for domestic abuse in Scotland. As noted previously, the question here is whether a wider category of persons should be recognised as victim/survivors of *domestic* abuse, rather than as victim/survivors of abuse more generally.

6.35 The principal arguments for and against extending the categories of those who can seek remedies, to include abuse perpetrated against a victim/survivor by a family member are as follows:

- a) Whether domestic abuse should be understood as a ***gendered issue***, and how that impacts on the perpetrator/victim relationship;
- b) Whether abuse perpetrated by a partner or ex-partner has a ***different dynamic*** from abuse perpetrated by family members;
- c) The ***impact of any change to the definition*** of domestic abuse in relation to the existing legal and policy framework in Scotland, and the internal consistency of our understanding of domestic abuse;

⁶⁷ The Family Violence Protection Act 2005, s 4 (available at: <https://www.canlii.org/en/nl/laws/stat/snl-2005-c-f-3.1/latest/snl-2005-c-f-3.1.html>).

⁶⁸ Protection Against Family Violence Act 2000, s 1 (available at: <https://www.canlii.org/en/ab/laws/stat/rsa-2000-c-p-27/latest/rsa-2000-c-p-27.html>).

⁶⁹ Family Law Act 2011, s 1 (available at: https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/11025_01).

- d) Whether there are **alternative remedies** available to protect those experiencing abuse perpetuated by family members.

6.36 Before considering these arguments in more detail, it is helpful to have in mind the categories of family relationship in which abuse can occur. These include, but are not limited to: adolescent to parent violence (“APV”⁷⁰), child to parent abuse (“CPA”⁷¹), elder abuse by a family member such as an adult child to a parent,⁷² and abuse between adult siblings.

Domestic abuse as gender based abuse

6.37 Some argue that defining domestic abuse to include abuse perpetrated by family members would dilute the understanding of domestic abuse as a gendered issue, which would result in a less effective identification and response. To frame domestic abuse as a gendered issue does *not* mean that it only happens in the context of male abuse of women. Recognising domestic abuse as gendered means that it can happen in any relationship (whether male-to-female abuse, female-to-male, or within a same-sex relationship), but the abuse is perpetrated against a background which imposes gender norms on intimate relationships, to the detriment of all vulnerable parties. These imposed gender norms⁷³ are a significant factor in intimate partner relationships.

6.38 The Scottish Government adopted a gendered definition of domestic abuse in its National Strategy on preventing domestic abuse as early as 2003:

“Domestic abuse (as gender based abuse) can be perpetrated by partners and ex-partners and can include physical abuse (assault and physical attack involving a range of behaviour), sexual abuse (acts which degrade and humiliate women and are perpetrated against their will, including rape) and mental and emotional abuse (such as threats, verbal abuse, racial abuse, withholding money and other types of controlling behaviour such as isolation from family and friends).”⁷⁴

6.39 The National Strategy also notes that while domestic abuse is most commonly perpetrated by men against women:

⁷⁰ “APV” has been defined as: “... an abuse of power perpetrated by adolescents against their parents, carers and/or other relatives including siblings. It occurs when an adolescent attempts to physically or psychologically dominate, coerce or control others in their family” (J Howard and H Rottem, *It all starts at home: Male Adolescent Violence to Mothers* (Inner South Community Health Service) at p 10 (available at: <https://apo.org.au/node/3995>).

⁷¹ “CPA” has been defined as: “a pattern of behaviour...which involves using verbal, financial, physical and/or emotional means to practise power and exert control over a parent...such that a parent unhealthily adapts his/her own behaviour to accommodate the child. Commonly reported abusive behaviours include name-calling, threats to harm self or others, attempts at humiliation, damage to property, theft and physical violence”. (A Holt (2016) *Working with adolescent violence and abuse towards parents: Approaches and contexts for intervention*. London, Routledge).

⁷² “Elder abuse” has been defined by the World Health Organisation as “a single or repeated attack, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to the older person.” (available at: <https://www.who.int/news-room/fact-sheets/detail/abuse-of-older-people>).

⁷³ The European Institute for Gender Equality defines gender norms as “ideas about how women and men should be and act. Internalised early in life, gender norms can establish a life cycle of gender socialisation and stereotyping” (available at: <https://eige.europa.eu>).

⁷⁴ Scottish Executive, *Preventing Domestic Abuse: A National Strategy* (Scottish Executive, Edinburgh 2003) p 4 (available at: <https://webarchive.nrscotland.gov.uk/20190127020652/http://www2.gov.scot/Publications/2003/09/18185/26445>).

“The existence of violence against men is not denied, nor is the existence of violence in same sex relationships, nor other forms of abuse, but abuse requires a response which takes account of the gender specific elements and the broader gender inequalities which women face.”⁷⁵

6.40 Some respondents to the Scottish Government’s Consultation on the Criminal Offence of Domestic Abuse,⁷⁶ raised concerns about the risk of minimising the importance of gender and patriarchy in understanding and responding to domestic abuse, if the meaning of domestic abuse was extended to include familial abuse. As the Scottish Government noted in their report on the Consultation exercise as to whether a specific offence should be created, a number of respondents felt it important to continue with the current understanding and definition of domestic abuse, including by keeping:

“...a clear focus on domestic abuse within the broader understanding of gender inequality and gender-based violence and coercive control. The particular concern was that extending the legislation to cover other familial relationships could lead to a dilution and diminution of the understanding of and response to domestic abuse.”⁷⁷

This view was echoed in a response to the Scottish Government’s consultation on the Bill which became the 2021 Act:

“We would be concerned if protective orders where [sic] extended to include other forms of abuse [in wider familial relationships] best met through other legislative responses. Failure to do this would result in the focus of this targeted response to domestic abuse being diluted.”⁷⁸

6.41 Professor Herring considers that patriarchy and domestic abuse are symbiotic: domestic abuse maintains patriarchy through the subordination and control of individual women whilst normalising the mistreatment of women generally:

“... emotional abuse echoes the calls of street harassment, the objectification of sexual relations will reflect the presentation of women in the violence of pornography, and controlling rules will match the messages sent through the patriarchy about the expected roles of women.”⁷⁹

⁷⁵ Scottish Executive, *Preventing Domestic Abuse: A National Strategy* (Scottish Executive, Edinburgh 2003) p 2 and 3 (available at: <https://webarchive.nrscotland.gov.uk/20190127020652/http://www2.gov.scot/Publications/2003/09/18185/26445>).

⁷⁶ Scottish Government, *A criminal offence of domestic abuse: Scottish Government Consultation Paper* (Scottish Government, 2016) (available at: https://consult.gov.scot/criminal-law-and-sentencing-team/criminal-offence-domestic-abuse/user_uploads/00491481.pdf-1).

⁷⁷ Scottish Government, *A criminal offence of domestic abuse: Scottish Government Consultation Paper* (Scottish Government, 2016) at para 2.7 (available at: https://consult.gov.scot/criminal-law-and-sentencing-team/criminal-offence-domestic-abuse/user_uploads/00491481.pdf-1).

⁷⁸ Response to Question 8 from Renfrewshire Gender-based Violence Strategy (available at: https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/consultation/published_select_respondent?_b_index=0).

⁷⁹ J Herring, *Domestic Abuse and Human Rights* (Intersentia, 2020) at p 36.

However, the ‘gendered approach’ does not demand that the perpetrator of domestic abuse is a man and the victim a woman.⁸⁰ Instead, as Herring explains, it involves understanding how gender norms and patriarchy underpin abuse:

“[S]upporters of a gendered approach are not claiming that violence outside the context of patriarchal abuse is not serious; it is just significantly different from patriarchal domestic abuse. The ‘woman-specific’ frame does not deny the experience of other victims any more than targeting child abuse denies adults victims of abuse; it simply identifies a particular wrong which is not present in non-patriarchal domestic abuse... To say that domestic abuse is gender-based is simply to recognise that the socially attributed norms, roles and expectations of masculinity and femininity which affect intimate relationships and family structures are integral to the use and experience of violence and abuse, whether perpetrated by men or women.”⁸¹

6.42 In this way, gender norms and patriarchy play a role in the dynamics within abusive relationships, regardless of whether the relationship is between a man and woman, two men, or two women.

6.43 However, it can also be argued that some forms of familial abuse, most notably “adolescent-son to adult-mother” abuse, is also strongly gendered:

“In cases involving single mothers and adolescent sons, the power relations reflect traditional gendered attitudes, that is the male is the ‘man of the house’ with sons seeing themselves as in charge of the household.”⁸²

6.44 Herring similarly explains that domestic abuse and APV both involve behaviour that “interacts with, reinforces and reflects broader social harms” with the “attitude of adolescent male abusers towards women generally” being reflected in the way they treat their mothers.⁸³ The statutory guidance on the Domestic Abuse Act 2021 also notes that “child-to-parent abuse” appears gendered, with the majority of cases being perpetrated by sons against their mothers, although men can be victims too.⁸⁴

6.45 In contrast, whilst elder abuse shares some characteristics with abuse perpetrated by intimate partners (including power, control, isolation and dependency):

“gender differences are less clear-cut than in intimate partner abuse, with both men and women responsible for and experiencing elder abuse.”⁸⁵

⁸⁰ L Orr, *The Case for a gendered analysis of violence against women* (Scottish Government, 2007) at p 1.

⁸¹ J Herring, ‘The Nature of Domestic Abuse’ in J Herring, *Domestic abuse and human rights* (Intersentia, 2020) at p 47.

⁸² V Bettison and C Quinlan, ‘Decriminalising Adolescent to Parent Violence under s 76 Serious Crime Act 2015 (c.9)’ (2020) 84(1) *Journal of Criminal Law* 3 at p 8, quoting J Tew and J Nixon, ‘Parent Abuse: Opening up a discussion of a complex instance of family power relations’ (2010) 9(4) *Social Policy and Society* 579 at p 584.

⁸³ J Herring, ‘The abuse of parents by children’ in A Diduck, N Peleg and H Reece (eds) *Law in Society: Reflections on Children, Family, Culture and Philosophy* (Brill, 2015) at p 475.

⁸⁴ Available at: <https://www.gov.uk/government/publications/domestic-abuse-act-2021/domestic-abuse-statutory-guidance-accessible-version#chapter-5--different-experiences-needs-and-related-considerations>, para 182.

⁸⁵ A Hayden et al. (eds) *A Restorative Approach to Family Violence* (Routledge 2016) at p 54; P Fallon, *Elder Abuse and/or Neglect Literature Review* (Wellington: Centre for Social Research and Evaluation, Ministry of Social Development) (available at: <https://www.msdc.govt.nz/about-msdc-and-our-work/publications-resources/research/scale-nature-family-violence/>).

6.46 It therefore seems that there is scope for gender norms to play a role in familial abuse, but that this is not inevitably the case. In intimate partner relationships, the influence of the patriarchy and gendered beliefs adversely affects all victim/survivors, for example by justifying domestic abuse perpetrated against women, or by hampering attempts by male victims to seek help. In recent research published by the Scottish Government, male victim/survivors reported that they had experienced police officers reinforcing gendered stereotypes, being biased towards women as victim/survivors and failing to take action on reports of domestic abuse made by men, instead assuming that they were the perpetrator.⁸⁶ Whilst this research supports the concern that gender stereotypes inhibit male victim/survivors from seeking help, this may not justify a move away from understanding domestic abuse in a gendered way. Recent research suggests that a gendered perspective is in fact critical to understanding men's experience of domestic abuse:

“Societal and self-perceptions of masculinity and a desire to maintain a masculine identity were closely linked with men's internal pressures, fear of disclosure and reluctance to seek help.”⁸⁷

“The men reported common forms of psychological aggression inflicted by their female partner included humiliating and belittling their masculinity, implying that they were less of a man ... Occasionally participants proposed that their female partner attempted to sabotage their employment to undermine their masculine identity as a ‘breadwinner’ and maintain control of their behaviour.”⁸⁸

This research suggests that the role of gender and patriarchy must be considered in developing effective support mechanisms for male victims and may be relevant in terms of developing effective legal protection:

“Interventions need to consider the impact of masculinity and gender identity on men's willingness to access support.”⁸⁹

6.47 To this end, taking a gendered approach to domestic abuse, and limiting the scope to intimate partners, is not in and of itself exclusive of men and LGBTQI+ people as victim/survivors of domestic abuse. The existing laws around domestic abuse are drafted in gender neutral language; male victim/survivors and victim/survivors in relationships with women are equally as entitled to remedies. Any new remedies suggested by this Commission would also be equally open to be pursued by victim/survivors regardless of their gender or that of the perpetrator.

⁸⁶ Scottish Government, *The Domestic Abuse (Scotland) Act 2018: emerging findings of male victims' experiences of the Criminal Justice System* (Scottish Government, 2023) at p 7 (available at: <https://www.gov.scot/publications/domestic-abuse-scotland-act-2018-emerging-findings-male-victims-experiences-criminal-justice-system/> at p 15).

⁸⁷ K Hogan, V Clarke and T Ward, ‘The Impact of Masculine Ideologies on Heterosexual Men's Experiences of Intimate Partner Violence: A Qualitative Exploration’ (2022) *Journal of Aggression, Maltreatment and Trauma* 1 at p 3 (available at: <https://www.tandfonline.com/doi/full/10.1080/10926771.2022.2061881>).

⁸⁸ K Hogan, V Clarke and T Ward, ‘The Impact of Masculine Ideologies on Heterosexual Men's Experiences of Intimate Partner Violence: A Qualitative Exploration’ (2022) *Journal of Aggression, Maltreatment and Trauma* 1 at p 7.

⁸⁹ K Hogan, V Clarke and T Ward, ‘The Impact of Masculine Ideologies on Heterosexual Men's Experiences of Intimate Partner Violence: A Qualitative Exploration’ (2022) *Journal of Aggression, Maltreatment and Trauma* 1 at p 14; L Liddon et al. ‘What are the factors that make a male-friendly therapy?’ in J Barry et al (eds) *The Palgrave Handbook of Male Psychology and Mental Health* (Palgrave Macmillan, 2019) at pp 671-694.

Different dynamics

6.48 Some argue that intimate partner abuse is different from abuse perpetrated by a family member and therefore that it should be treated differently in law. This issue was considered recently in relation to the 2021 Act, where the Scottish Government concluded that Domestic Abuse Protection Notices and Domestic Abuse Protection Orders should only apply to partners and ex-partners:

“The Scottish Government recognises that abuse can be committed by people who are not a person's partner or ex-partner, including by other family members. However, in line with the views of the majority of stakeholders who responded to Scottish Government consultations that led to the development of recent legislation concerning domestic abuse, the Scottish Government considers that it is appropriate that this legislation applies specifically to partners and ex-partners. This is because abuse committed by a person's partner or ex-partner typically has a *dynamic that differs* from violence or abuse more generally, including where this abuse occurs within a family between, for example, siblings or parents and their adult children. There is a range of existing legislation that can be used to address familial abuse.”⁹⁰

In contrast, one housing sector respondent commented, in response to the consultation on the Bill which became the 2021 Act, that:

“Domestic abuse does not just happen between partners, therefore all vulnerable persons/victims should be protected from abuse in and around their home, no matter the relationship to the abuser.”⁹¹

6.49 As noted above, a wide category of ‘associated persons’ are protected from domestic abuse under the 1996 Act (E&W), and similarly in New Zealand and Ireland. The definition of ‘associated persons’ stems from recommendations made by the Law Commission of England and Wales (“LCEW”) in its 1992 Report: Domestic Violence and Occupation of the Family Home.⁹² The LCEW explained that family members share several features with spouses and cohabitants, who were already protected by the legislation:

“Family relationships can ... be appropriately distinguished from other forms of association. In practice, many of the same considerations apply to them as to married or cohabiting couples. Thus the proximity of the parties often gives unique opportunities for molestation and abuse to continue; the heightened emotions of all concerned give rise to a particular need for sensitivity and flexibility in the law; there is

⁹⁰ The Scottish Government (Keith Brown, the then Cabinet Secretary for Justice and Veterans) response to a Parliamentary Question on 11 March 2022 which asked the Scottish Government “what assessment it has made of the definition of domestic abuse in England and Wales in relation to how it differs from the definition in Scotland and how this could be reviewed and changed.” Parliamentary news (Scotland) 2022 11 SLT 55 at pp 59 and 60.

⁹¹ Consultation analysis, para 4.4 (available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/research-and-analysis/2020/07/protective-orders-people-risk-domestic-abuse-analysis-consultation-responses2/documents/protective-orders-people-risk-domestic-abuse-analysis-consultation-responses/protective-orders-people-risk-domestic-abuse-analysis-consultation-responses/govscot%3Adocument/protective-orders-people-risk-domestic-abuse-analysis-consultation-responses.pdf>).

⁹² Law Com No. 207, 1992 (available at: <https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2016/07/LC.-207-FAMILY-LAW-DOMESTIC-VIOLENCE-AND-OCCUPATION-OF-THE-FAMILY-HOME.pdf>).

frequently a possibility that their relationship will carry on for the foreseeable future and there is in most cases the likelihood that they will share a common budget, making financial remedies inappropriate.”⁹³

6.50 However, this position has been challenged in academic commentary. Helen Reece argued that the UK Government’s original decision to legislate for special protections from domestic abuse was primarily informed by the need to protect women. She also suggested that the characteristics identified by the LCEW are not reflective of how women experience domestic abuse, arguing that for women, the need for protection from domestic abuse is:

“... associated with proximity only when coupled with isolation, controlled rather than heightened emotions in the context of unequal power, barriers to leaving the relationship rather than the mere possibility that the relationship would continue and financial dependence as opposed to a common budget.”⁹⁴

6.51 Reece acknowledged that some associated persons may require protection, citing the example of elder abuse perpetuated by an adult child. However, she agrees with Professor Hayes, that as a whole, there is nothing about the category of ‘relatives’ which is “unique in relationship terms ... despite the fact that the Commission would have us believe that the listed relationships have special attributes and merit particular attention”.⁹⁵ Reece also commented that there is no logic in drawing the line in the place that the 1996 Act (E&W) does, in section 62(3) (the definition of associated person), but that allowing everyone to apply for non-molestation orders would take the law further in the direction of abolishing the special category of domestic violence, which would remove the distinction between Part IV of the 1996 Act (E&W) and the Protection from Harassment Act 1997.⁹⁶

6.52 A similar view was expressed by the Council of Europe Committee on Crime Problems, in their feasibility study for what would become the Istanbul Convention. They noted:

“Most importantly, the violence differs in relation to gender. Physical and psychological violence against children or against parents or grandparents in the home has no clear correlation with gender. In other words, domestic violence directed at victims of a different generation – against children, parents or grandparents – victimises both genders, and it is perpetrated more or less to an equal degree by fathers and mothers, by sons and daughters, or by stepparents or stepchildren of either gender.”⁹⁷

The study generally takes the stance that intimate partner domestic violence is unique and requires different responses to other forms of violence within familial or household relationships.

⁹³ Law Com No. 207, 1992 at p 25, para 3.19.

⁹⁴ H Reece, ‘The End of Domestic Violence’ (2006) 69(5), *The Modern Law Review* at p 782.

⁹⁵ H Reece, ‘The End of Domestic Violence’ (2006) 69(5), *The Modern Law Review*, at p 787, citing M Hayes, ‘Non-molestation Protection: Only Associated Persons Need Apply’ (1996) 26 *Fam Law* 134 at p 135.

⁹⁶ H Reece, ‘The End of Domestic Violence’ (2006) 69(5), *The Modern Law Review* at p 791.

⁹⁷ Council of Europe, ‘Committee on Crime Problems, “Feasibility Study for a Convention against Domestic Violence”’ (2007) 09 rev (available at:

https://ravnopravnost.gov.hr/UserDocImages/arhiva/preuzimanje/dokumenti/ve/eng/Feasibility_study_romkens.pdf).

6.53 Others argue that the only requirement necessary to warrant protection from domestic abuse is that an abuse of trust has occurred within an *intimate relationship*, and that both familial and partner relationships are intimate relationships. For example, Herring, while viewing domestic abuse as gender based violence, states:

“[R]elationships may be central to a person’s well-being, even outside of the traditional cohabitation context. It might also include an older person and a primary carer, or a disabled person and a personal assistant... Intimate relationships typically involve not only trust but also commitment. The individuals invest more in the relationship and commit resources, making the losses that would arise from ending the relationship higher. This can make it harder to leave an abusive relationship. All of these factors combine to explain why the existence of an intimate relationship is a key factor in domestic abuse.”⁹⁸

6.54 A number of respondents to the Scottish Government’s consultation on the Bill which became the 2021 Act, shared the view that, while individuals should be protected from abuse by family members, this should be explored separately from domestic abuse:

“It [the definition of domestic abuse recognised in Scotland] does not include abuse from other family members including adult children or extended family members. This is a challenging and complex issue and the dynamics should be explored in a separate consultation.”⁹⁹

“We do recognise that abuse and violence does happen within wider familial relationships however we recognise there are particular dynamics of coercive control that tend to be seen only in intimate partner relationships”.¹⁰⁰

“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.”¹⁰¹

6.55 With reference to abuse between the generations, Jurgita Bukaskaite argues that:

“... conflating intimate partner violence with intergenerational violence under the single heading of domestic violence is flawed. Such an approach not only fails to distinguish between different causes and forms of domestic violence but also implies that such violence is symmetrical in nature. A gender-based approach, on the other hand, focuses on the substantive causes of domestic violence between intimate partners

⁹⁸ J Herring, ‘The Nature of Domestic Abuse’ in J Herring, *Domestic Abuse and Human Rights* (Intersentia, 2020) at p 33.

⁹⁹ Response to Question 8, Mhairi McGowan, ASSIST (available at: https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/consultation/published_select_respondent? b index=0).

¹⁰⁰ Response to Question 8, Renfrewshire Gender-based Violence Strategy (available at: https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/consultation/published_select_respondent? b index=0).

¹⁰¹ Response to Question 8, Scottish Women’s Rights Centre (available at: https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/consultation/view_respondent? b index=0&uuld=777541547).

rather than on formalistic and neutral identification of the subject, which might be virtually anyone who happens to reside under one roof.”¹⁰²

The argument for consistency

6.56 As discussed above, in Scotland, both the Scottish Government’s policy and legal understanding of “domestic abuse” is abuse perpetrated by one partner or ex-partner against the other. The Scottish Government acknowledges that abuse can occur in the domestic setting, including abuse of an elderly person, sibling or vulnerable adult by a family member who cares for them.¹⁰³ However, in its analysis of the responses to the “Consultation Paper on a criminal offence of domestic abuse”, the Scottish Government noted an interest in restricting protection from domestic abuse to partners and ex-partners, consistent with other legislation and policy in this area.¹⁰⁴

6.57 Several respondents to the Scottish Government’s Consultation for the Bill which became the 2021 Act, also raised concerns that the introduction of a new definition of domestic abuse, such as one which encompasses abuse by non-partners, might cause confusion.

“To change the definition may muddy the water and delay the progression of this legislation.”¹⁰⁵

“In general, it may be helpful to have consistency across legislation relating to domestic abuse.”¹⁰⁶

6.58 The effect of multiple legal understandings and definitions of domestic abuse has also been highlighted by academics, albeit in the criminal law context, in relation to the Bill that became the 2018 Act:

“... introducing a new and broader definition of domestic abuse into Scots law could cause confusion, leading to less focussed and effective criminal justice responses.”¹⁰⁷

Alternative existing remedies

6.59 There is a range of alternative existing remedies that can be used to address intra-family abuse, both in the civil and criminal sphere, which offer protection to family members, and it could therefore be argued that there is no need to extend civil remedies for domestic abuse to family members. We set out here the relevant criminal and civil law.

Criminal law

¹⁰² J Bukauskaite, *Understanding Domestic Violence as a Gender-based Human Rights Violence* (Routledge 2023) at p 76.

¹⁰³ Parliamentary news (Scotland) 2022 11 SLT 55 at p 59.

¹⁰⁴ Scottish Government, *Criminal offence of domestic abuse: Analysis of Consultation Responses* (Scottish Government, August 2016) at p 5 (available at: <https://www.gov.scot/publications/criminal-offence-domestic-abuse-analysis-consultation-responses/>).

¹⁰⁵ Response to Question 8, Lynn Maclachlan, Stirling Council (available at: https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/consultation/published_select_respondent? b_index=0).

¹⁰⁶ Response to Question 8, the Law Society of Scotland (available at: https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/consultation/view_respondent? b_index=0&uuld=924264029).

¹⁰⁷ I Cairns, ‘What Counts as Domestic: Family Relationships and the Proposed Criminalisation of Domestic Abuse in Scotland’ (2017) 21 *Edinburgh Law Review* 262 at p 266.

6.60 The criminal law is clearly relevant in situations of abuse and violence, with both common law and statutory offences available to address/prosecute such behaviour which might take place between family members. The common law offence of assault is possibly the most obvious, which involves an attack on another person with evil intent.¹⁰⁸ Intent to do bodily harm or to place someone in a state of fear of bodily harm is required.¹⁰⁹ The common law offence covers a wide variety of harm, but does not require that bodily injury actually takes place. However there has been “no precedent in Scotland for an assault to injury recognising any mental harm or distress”.¹¹⁰

6.61 In terms of statutory offences, section 38 of the Criminal Justice and Licencing (Scotland) Act 2010 (the 2010 Act), is also relevant as it criminalises threatening or abusive behaviour. Section 38 provides that a person “A” commits an offence if A behaves in a threatening or abusive manner, the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.¹¹¹ The offence applies to behaviour of any kind including, in particular, things said or otherwise communicated as well as things done, and behaviour consisting of a single act, or a course of conduct.¹¹² This could therefore address any ongoing threatening or abusive behaviour of one family member towards another, which causes that other person fear or alarm.

6.62 Section 39 of the 2010 Act provides for the criminal offence of stalking. This applies where a person engages in a course of conduct which causes another person to suffer fear or alarm.¹¹³ While stalking can be carried out by strangers or persons unknown to the victim/survivor, it can also be carried out by family members:

“A stalking or harassment suspect may weigh up the relative benefits and costs of pursuing abusive actions. This may involve taking several steps to minimise the likelihood of detection and punishment. In many of these cases the suspect may have already formed an association with the victim. **They may be ex-partners, family members, work colleagues or friends.** Information that they have gained as part of this connection may increase their access to the victim, their family or other friends and enable them to manipulate activity to maximise the impact on the victim.”¹¹⁴

6.63 The 2010 Act contains a lengthy list of what conduct is captured by the offence, including: following a person; contacting, or attempting to contact a person; monitoring the use by a person of the internet, email or any other form of electronic communication; entering any

¹⁰⁸ I Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, (1867) Edinburgh: W Paterson.

¹⁰⁹ *Atkinson v. HM Advocate* [1987] SCCR 534.

¹¹⁰ E Forbes, “The Domestic Abuse (Scotland) Act 2018: the whole story?” (2018) 22(3) *Edinburgh Law Review*, pp 406-411.

¹¹¹ 2010 Act, s 38(2) provides that it is a defence for a person charged with an offence under subsection (1) to show that the behaviour was, in the particular circumstances, reasonable.

¹¹² 2010 Act, s 38(3). Subsection (4) provides that A person guilty of an offence under subsection (1) is liable (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine, or to both, or (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both.

¹¹³ And where A engages in the course of conduct with the intention of causing B to suffer fear or alarm, or where A knows, or ought in all the circumstances to have known, that engaging in the course of conduct would be likely to cause B to suffer fear or alarm (s 2(2) to (4)).

¹¹⁴ The Crown Prosecution Service, *Legal Guidance on Stalking or Harassment*, 24 April 2023 (available at: <https://www.cps.gov.uk/legal-guidance/stalking-or-harassment>).

premises; watching or spying on a person; acting in any other way that a reasonable person would expect would cause a person to suffer fear or alarm, and “course of conduct” involves conduct on at least two occasions.¹¹⁵

Civil remedies

6.64 There are also civil remedies available to family members subject to abusive behaviour from other family members. The 1997 Act offers protection to individuals from harassment by any person. It is an offence to pursue a course of conduct which amounts to harassment of another person, which is intended to amount to harassment of that person, or if it occurs in circumstances where it would appear to a reasonable person that it would amount to harassment of that other person.¹¹⁶ It can therefore be used to seek recourse against an individual known to the victim if their abusive behaviour constitutes harassment and applies where there is a course of conduct. Harassment includes causing the person alarm or distress and “conduct” includes speech. The remedies for harassment are damages, an interdict or a non-harassment order.¹¹⁷

6.65 Cases where a family member has successfully sought a remedy under the 1997 Act against another family member include: the case of *M v D*, where it was held that an individual’s step-nephew did not amount to an “associated person” for the purpose of obtaining a non-molestation order under section 42 of the Family Law Act 1996,¹¹⁸ but the judge pointed out that the individual could seek protection under the 1997 Act instead.¹¹⁹ A further case involved a woman successfully bringing a case for damages for harassment against her former mother-in-law in terms of the 1997 Act.¹²⁰ Although these cases are English, Professor Reid notes that the provisions detailing what constitutes harassment in England and Wales are equivalent to those in Scotland.¹²¹

6.66 An interdict can be sought at common law for molestation. The conduct required for this common law interdict can include “...assault, nuisance or any other obviously vexatious conduct... [including] verbal abuse or physical threats”.¹²² A power of arrest can also be

¹¹⁵ It is a defence for a person charged with stalking to show that the course of conduct was authorised by virtue of any enactment or rule of law, was engaged in for the purpose of preventing or detecting crime, or was, in the particular circumstances, reasonable (s 39(5)). A person convicted of the offence is liable (a) on conviction on indictment, to imprisonment for a term not exceeding 5 years, or to a fine or to both, (b) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both. Where, in a trial of a person charged with stalking, the jury or, in summary proceedings, the court is not satisfied that the accused committed the offence, but is satisfied that the accused committed an offence under s 38(1), the jury or court may acquit the accused and, instead, find the accused guilty of an offence under s 38(1).

¹¹⁶ 1997 Act, s 8.

¹¹⁷ As is the case for when there is harassment in a domestic abuse context. The main difference between the two is that a non-intimate would rely on s 8 of the 1997 Act whereas an intimate would rely on s 8A, meaning that a non-intimate requires harassment on more than one occasion/the threat of future harassment. In practice, it is known that victims of domestic abuse rarely seek protection after a single incident and therefore the difference in protection between domestic abuse victims and other victims is minimal. See Ch 4, paras 4.81 to 4.87 for details on non-harassment orders.

¹¹⁸ “Associated person” is defined in s 62(3) of the 1996 Act, and if this definition is not met, the person cannot obtain a non-molestation order.

¹¹⁹ *M v D* (meaning of associated person) [2021] EWHC 1351 (Fam).

¹²⁰ *Singh v Bhakar* [2007] 1 FLR 880/ [2006] 7 WLUK 624 (Nottingham CC). The case reporting is limited, but it seems to bear some hallmarks of HBA. Forms of harassment including forcing the victim (of Sikh faith) to cut her hair and wear jewellery with Hindu symbols on, as well as verbal and physical abuse and forced labour. As the couple had divorced and the claimant had left the home of the defendant no non-harassment order or Injunction was sought.

¹²¹ EC Reid, *The Law of Delict in Scotland*, at 1023.

¹²² EC Reid, *The Law of Delict in Scotland*, at 1033.

attached to a common law interdict in terms of the 2001 Act.¹²³ A power of arrest is available to all those who have an interdict the purpose of which is protection against abuse.¹²⁴ It is therefore open to a family member to obtain an interdict against another family member who is subjecting them to abuse. An example of a successful application for an interdict for molestation between family members, is the case of *Sinclair v Sinclair and Others*,¹²⁵ where the pursuer sought to interdict his father and two brothers from molesting him by threatening him, from putting him in a state of fear and alarm or distress by using or threatening violence towards him, and from approaching him at various addresses or elsewhere within the sheriffdom. The pursuer was successful in obtaining the interdict and also in obtaining a power of arrest in terms of the 2001 Act.¹²⁶

6.67 A forced marriage protection order as provided for in Part 1 of the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011¹²⁷ may also be relevant in the context of intra-family abuse.¹²⁸ A forced marriage protection order may contain such prohibitions, restrictions or requirements, and other terms as the court considers appropriate.¹²⁹ Examples include a requirement on a person: to take the protected person to a place of safety; to refrain from violent, threatening or intimidating conduct (whether against the protected person or any other person), and to submit to the court such documents (including passports, birth certificates or other documents identifying the person and travel documents) as the court may specify.¹³⁰ The courts are therefore empowered to include a wide range of requirements in a forced marriage protection order, far beyond the requirement to cease a specific plan to force an individual to marry another person.

6.68 In the case of *AB v CD and DD and EF*,¹³¹ the pursuer, an Indian woman of Catholic faith, was the subject of intense family pressure to accept a marriage proposal, being told by her mother that her refusal would bring shame on the family and her father may be murdered as a result. After repeated harassment, the pursuer attempted suicide and fled to Glasgow where she was placed in a psychiatric hospital and eventually housing for asylum seekers. Her parents, brother and another relative made extensive efforts to find her, including turning up at known addresses. The pursuer obtained forced marriage protection orders against her

¹²³ 2001 Act, s 1.

¹²⁴ However those who are married to or in a civil partnership with the abuser, who have obtained an exclusion order in terms of the 1981 and 2004 Acts, are entitled to have a power of arrest attached to their interdict in terms of the 2001 Act as of right (2001 Act, s 1(1A)) whereas cohabitants, non-intimate partners and any other individual (including a family member), must meet an additional test – that the interdicted person has been given an opportunity to be heard by, or represented before the court; and that attaching the power of arrest is necessary to protect the applicant from a risk of abuse in breach of the interdict (2001 Act, s 1(2)).

¹²⁵ *Kenneth Sinclair v John Sinclair, John William Sinclair and Morris Sinclair (Unreported)*. Grampian Highland and Island ShCt at Dingwall 18/02/2005. The dispute arose in relation to a tenancy of a series of adjacent crofts, which were owned by the father but occupied by the pursuer who was the legal tenant despite his father's wishes.

¹²⁶ 2001 Act, s 1(2).

¹²⁷ This Act has recently been the subject of a research report assessing the current legal framework in Scotland in respect of forced marriage protection orders: JM Carruthers and FA Belton, 'Combating Forced Marriage: Strengthening Protection in Scots Law' (July 2024) (available at: <https://scj.h.org.uk/2024/07/combating-forced-marriage-strengthening-protection-in-scots-law-publication-of-research-report/%20>).

¹²⁸ The Children's Hearings (Scotland) Act 2011 also establishes a ground upon which a child may be referred to a children's hearing, if the child has been, is being, or is likely to be forced into marriage, or is, or is likely to become, a member of the same household as such a child (s 67(2)(q)).

¹²⁹ Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011, s 2(1). S 2(2) also provides that that the terms of any such order may, in particular, relate to (a) conduct outwith (as well as, or instead of, conduct within) Scotland, (b) persons who force or attempt to force, or may force or attempt to force, a protected person to enter into a marriage, and (c) persons who are, or may become, involved in other respects.

¹³⁰ S 2(3).

¹³¹ *AB v CD and DD and EF*, [2021] Sh Ct at Glasgow 15 7/4/17.

parents, her brother gave an undertaking not to aid or abet any marriage plans, and another relative gave an undertaking not to contact the pursuer. The case demonstrates the effectiveness of forced marriage legislation in protecting a vulnerable person from some of the most coercive and damaging forms of intra-family abuse. However, this legislation cannot be relied on by those suffering from abuse which is not related to forced marriage.

Property remedies

6.69 There are no statutory occupancy rights for non-owners/tenants, and there is no equivalent of a “non-entitled” spouse or partner for other family members or flatmates. An adult family member who is not the owner or tenant may only live in the home with the consent of the owner or tenant, rather than by virtue of their own occupancy rights. This also means that there is no statutory or common law remedy which allows a family member (who is not the owner or tenant) to remove the owner or tenant from the family home. Similarly, if both family members are entitled, one could not seek to have the other removed from the property.

6.70 There are also practical considerations, for example the criminal law can serve to protect individuals in the most severe situations of abuse (through arrest and the imposition of bail conditions), which is generally the approach taken in urgent domestic abuse cases in intimate partner relationships, where the conduct reaches a criminal standard. Services can also be provided, such as alternative accommodation to victims of familial violence or other violence in the home without a legal right of occupancy in that home. It is also worth noting that there is provision for the protection of children through exclusion orders under the Children (Scotland) Act 1995.¹³²

Other relevant legislation

6.71 Based on a report of this Commission in 1997,¹³³ the Adult Support and Protection (Scotland) Act 2007 provides local authorities (“councils”) with powers and responsibilities to intervene in the affairs of “adults at risk”.¹³⁴ Adults at risk are adults who: “(a) are unable to safeguard their own well-being, property, rights or other interests, (b) are at risk of harm, and (c) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected”.¹³⁵ It requires councils to make inquiries and investigate risks of harm.¹³⁶ A number of public authorities, including the police have a duty to co-operate with councils making inquiries under the Act.¹³⁷ The Act also allows for a number of court orders to be made: assessment orders, removal orders and banning orders. Assessment orders require the council to determine whether an individual is an ‘adult at risk’ and whether measures are needed to protect them.¹³⁸ Removal orders allow for an at risk person to be removed to a specified location for a period

¹³² S 76. However, we understand that this provision is rarely used.

¹³³ Report on Vulnerable Adults, Scot Law Com No. 158, 1997.

¹³⁴ 2007 Act, s 3.

¹³⁵ An adult is at risk of harm if (a) another persons’ conduct is causing (or likely to cause) the adult to be harmed, or (b) the adult is engaging (or is likely to engage) in conduct which causes (or is likely to cause) self-harm (s 3(2)).

¹³⁶ 2007 Act, s 4. The investigating authority has the power to visit, interview and medically examine the at-risk person (ss 7 to 9).

¹³⁷ 2007 Act, s 5; police s 5(1)(e).

¹³⁸ 2007 Act, s 11.

of up to 7 days.¹³⁹ A banning order bans a specified person from a specified place,¹⁴⁰ where an adult at risk is being, or is likely to be seriously harmed by the specified person and the adult at risk's wellbeing/property is better served by the banning of that person than their own removal.¹⁴¹ An application may be made only by or on behalf of an adult whose well-being or property would be safeguarded by the order, by any other person who is entitled to occupy the place concerned, or by the council.¹⁴² Banning orders may also be made against children,¹⁴³ and are not restricted to residential property.¹⁴⁴ Powers of arrest can be attached to banning orders, though breach of the order is not necessarily a criminal offence.

6.72 Intra-family abuse could result in significant risk of harm to an adult, in which case seeking a banning order under this legislation may be an option. However, this protection can only be accessed where the person subjected to abuse otherwise meets the definition of an adult at risk. It is nevertheless a useful tool for the protection of a vulnerable adult, particularly as it is one way of removing an abusive individual from a shared home. It also has the advantage of being able to be sought by a third party (the local authority).

Discussion

6.73 As this part of Chapter 6 shows there are a number of arguments both for and against extending civil protection for domestic abuse more widely than to partners and ex-partners, and this is a topic on which there is a considerable amount of debate. We have also seen that civil protection orders are available to a wider category of persons in other jurisdictions, including England and Wales, Ireland, and New Zealand, but this is not exclusively the case, as can be seen in a number of Canadian provinces.

6.74 Persuasive arguments in favour of extending civil protection more widely to family members include that: all vulnerable people should be protected from abuse from those they are related to or live with; in practice, many of the same considerations apply to family relationships as to spouses, civil partners and cohabiting couples; abuse and violence does happen within wider familial relationships; and some forms of family abuse can also involve a gendered dynamic (such as APV involving an adolescent son abusing his mother).

6.75 Persuasive arguments against extending civil protection more widely include that: abuse by a partner or ex-partner has a different dynamic from abuse perpetrated by family members; domestic abuse is a gendered issue which is exacerbated by the gender norms which underlie intimate relationships; including familial abuse within the definition would

¹³⁹ 2007 Act, s 14, the order may be granted if there is a serious risk of harm to the adult at risk if they are not removed to the specified place (s 15(1)(a)).

¹⁴⁰ 2007 Act, s 19, it may also ban the individual from the vicinity of that place, eject them and prevent them from removing property from that place and require the individual to do or refrain from doing anything the sheriff deems necessary for the enforcement of the order. Orders last up to 6 months.

¹⁴¹ 2007 Act, s 20(a) and (b). The order may also be made, where the court is satisfied that either- (i) the person at risk is entitled or permitted by a third party, or (ii) neither the adult at risk nor the person to be specified by the banning order is entitled or permitted by a third party, to occupy the place from which the person is to be banned. 2007 Act, s 20(c).

¹⁴² 2007 Act, s 22. "The council must apply for a banning order if it is satisfied— (a) as to the matters set out in section 20, (b) that nobody else is likely to apply for a banning order in respect of the circumstances which caused the council to be satisfied as to those matters, and (c) that no other proceedings (under this Part or otherwise) to eject or ban the person concerned from the place concerned are depending before a court." (s 22(2)). An applicant for a banning order may also apply for a temporary banning order in respect of the same case (s 22(3)).

¹⁴³ N Smith and NR Young, *Adult Protection and the Law in Scotland*, 2nd Edn 2016, para 12.32.

¹⁴⁴ N Smith and NR Young, *Adult Protection and the Law in Scotland*, 2nd Edn 2016, para 12.33.

reduce the efficacy of the legal identification and response to it; and it would be inconsistent with existing legal and policy framework in Scotland. Moreover, there already exists a wide range of existing legislation which can be used to address abuse between family members, as set out in paragraphs 6.60 to 6.72.

6.76 We acknowledge that arguments can be made both ways, and we are particularly conscious that the approach taken in other jurisdictions typically extends “domestic abuse” to wider family relationships. On balance, however, we think that the arguments for extending the understanding of domestic abuse in Scotland to include wider familial relationships do not outweigh the arguments for maintaining the current position. In particular, the abuse of trust and intimacy and the use of coercive control at the heart of partner/ex-partner abuse gives rise to a different dynamic to that usually found in intra-family abuse.

6.77 Extending civil remedies for domestic abuse to those experiencing intra-family abuse would amount to a significant departure in terms of the current policy and legislative understanding of domestic abuse in Scotland, and would potentially have wider, significant ramifications, for example for the criminal law, for the police, and for the support and services available for victim/survivors. We would be grateful for consultees’ views on the following question:

- 45. Should civil remedies for domestic abuse remain focused on partners and ex-partners (that is, current and former spouses, civil partners, cohabitants and those in an intimate partner relationship)?**

Domestic abuse and intersectionality

6.78 Domestic abuse can affect individuals regardless of their background. The available evidence tends to show that the risk of domestic abuse increases where a victim/survivor belongs to one or more marginalised groups, affecting gender, sexuality, ethnicity, immigration status, and people with disabilities.

6.79 We recognise that domestic abuse is gendered, and is most commonly perpetrated by men against women.¹⁴⁵ We also recognise that men can be victims of domestic abuse perpetrated by women, and that people do experience domestic abuse from partners with the same gender as themselves. In same sex relationships, the rate of domestic abuse is similar to that in mixed sex relationships.¹⁴⁶ Additionally, consultation by LGBT Youth Scotland shows that up to 74% of transgender people have experienced domestic abuse.¹⁴⁷ We also are aware

¹⁴⁵ Statistics demonstrate this both in Scotland, and globally (Scottish Government Statistics are available at: <https://www.gov.scot/collections/domestic-abuse-in-scotland-statistics/>). The statistics from 2022/23 demonstrate that 81% of domestic abuse incidents were perpetrated by men against women, a further 16% were perpetrated by women against men, the remaining 3% of incidents involved a victim and perpetrator of the same gender. See J Herring, *Domestic abuse and Human Rights*, (Intersentia 2020) pp 19-20 for a precis of global statistics.

¹⁴⁶ Scottish Government Domestic Abuse Statistics from 2022/23 demonstrate that 3% of domestic abuse incidents reported to police took place between partners of the same gender (available at: <https://www.gov.scot/publications/domestic-abuse-statistics-recorded-police-scotland-2022-23/pages/4/>). Given that 3.3% of the UK population identify as Lesbian, Gay or Bisexual, the rate of domestic abuse in same sex relationship is proportionate (available at: <https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/sexuality/bulletins/sexualidentityuk/2021and2022#sexual-orientation-in-the-uk>).

¹⁴⁷ Available at: <https://lgbtyouth.org.uk/wp-content/uploads/2023/12/voices-unheard-consultation-e-use.pdf> p 8, Stonewall’s 2017 UK wide ‘Trans Report’ found that more than a quarter of trans people had experienced domestic abuse from a partner in the past year (available at: <https://www.stonewall.org.uk/resources/lgbt-britain-trans-report-2018>).

that factors such as a person's ethnicity, immigration status, gender identity, sexuality or disability may affect the type and the intensity of abuse which they suffer.¹⁴⁸ For example, an LGBTQI+ person may be abused by their partner due to their identity; an abuser may, for instance, threaten to 'out' a victim. Likewise, migrants may have their immigration status weaponised against them as part of the abuse, when the abuser tells them that they cannot speak to the police or leave the relationship as they will be deported.¹⁴⁹

6.80 An individual's background or identity can also make it more difficult for them to seek and receive help and support. For example, individuals from some minority ethnic groups may feel less confident in seeking help from the police and other service providers.¹⁵⁰ Likewise LGBTQI+ people may feel less comfortable speaking to police.¹⁵¹ Individuals who do not speak English may also find it difficult to access support.¹⁵² In the Gypsy/Traveller community, some women who seek to leave an abusive relationship can face shaming and be ostracised from their own community: "Isolation, minimising and shaming of survivors can be used by the whole community as a way to police so-called 'unacceptable' behaviour".¹⁵³ In this sense, it is more difficult for individuals from marginalised backgrounds to access help and support, both in general and specifically with regard to domestic abuse. Overall, an individual's background or identity, or the unique dynamics of their community, may impact the likelihood of suffering domestic abuse, the type and intensity of abuse they may suffer, and the availability and type of help and support they need. As the Scottish Government has recognised:

"This is due to 'intersectional discrimination', whereby structural and social inequalities (such as poverty, gender, immigration status) and socio-cultural norms (embedded in patriarchal and/or honour-based systems) compound minoritised ethnic women's experiences of abuse and make it harder to disclose abuse and seek help. The most

¹⁴⁸ Bukauskaite writes that 'In sum...gender, intersected with other social variables intensifies the occurrence of domestic violence. If not challenged, these intersections will continue to reinforce patriarchal gender roles through tools such as gender based violence.' J Bukauskaite, *Understanding domestic violence as a gender-based human rights violation*. P 64. See pp 59-64 for commentary on the intersection of different social variables and domestic abuse.

¹⁴⁹ E McLaughlin et al. Honour-Based Abuse in Scotland; Evidence and pathways to strengthen protection for victims, SUII Knowledge Exchange Program Summary Report (available at: <https://www.scottishinsight.ac.uk/Portals/80/SUIIProgrammes/Honour-Based%20Abuse/SUII%20Honour-Based%20Abuse%20Final%20Report%20-%20Apr%202023.pdf>). We discuss immigration abuse in Ch 5.

¹⁵⁰ A SafeLives Spotlight Report noted that 'SafeLives' National scrutiny panel on cases involving victims who are minority ethnic found that isolation was a common theme. This was exacerbated by 'factors such as a lack of knowledge of available services, reluctance to engage with services for cultural reasons or because of lack of trust, language barriers and insecure immigration status.' SafeLives Spotlight on HBV, Forced Marriage and domestic abuse (available at: <https://safelives.org.uk/sites/default/files/resources/Spotlight%20on%20HBV%20and%20forced%20marriage-web.pdf> citing SafeLives (2017) Guidance for Maracs: Cases involving victims who are black or minority ethnic at Marac [online] (available at: <https://safelives.org.uk/wp-content/uploads/National-Scrutiny-Panel-Guidance-Black-Asian-Racially-Minoritised-clients.pdf>)).

¹⁵¹ Available at: <https://lgbtyouth.org.uk/wp-content/uploads/2023/12/voices-unheard-consultation-e-use.pdf> p 8.

¹⁵² E McLaughlin et al write that 'Language was mentioned by almost all women as being a barrier to seeking support as it relates to understanding and communication. It was evident that some women had minimal English when they arrived in Scotland, so it is likely they may also find it challenging to read signs too. As such, they quickly become reliant on their husbands and therefore relying on all forms of communication through them. This made accessing support particularly challenging and goes beyond just seeking support for the abuse...' Honour-Based Abuse in Scotland; Evidence and pathways to strengthen protection for victims, SUII Knowledge Exchange Program Summary Report p 11 (available at: <https://www.scottishinsight.ac.uk/Portals/80/SUIIProgrammes/Honour-Based%20Abuse/SUII%20Honour-Based%20Abuse%20Final%20Report%20-%20Apr%202023.pdf>).

¹⁵³ Traveller Movement Good Practice Guide: Improving service provision for Gypsy, Roma and Traveller domestic abuse survivors, p 13 (available at: <https://women.travellermovement.org.uk/wp-content/uploads/2022/12/2022.02.25-DA-Good-Practice-Guide.pdf>).

commonly identified barriers were: immigration policies (e.g. fear of deportation, No Recourse to Public Funds), social-cultural issues (e.g. social norms informed by honour and shame), monitoring and surveillance / lack of social networks; and racism and cultural insensitivity which (UK) evidence suggests can lead to a lack of trust in the police and public services and a poor understanding of minoritised ethnic women's circumstances and needs."¹⁵⁴

6.81 From stakeholder engagement, it is clear that different approaches at the level of service delivery are required to ensure that all victim/survivors of domestic abuse receive the protection and support they need. However, our project is concerned with making recommendations to the Scottish Government in relation to law reform (and specifically in relation to civil law reform). We therefore do not propose that there should be substantive law reform specifically to address these concerns around the intersectionality of domestic abuse. This is because the content and availability of legal protection needs to be the same for all victim/survivors of domestic abuse, in order to ensure that everyone has access to protection. The principle of formal equality in law means that it is important that laws apply in the same way to everyone, regardless of their background and identity. An example of this can be seen in current domestic abuse law, where the civil protection orders are available equally to men and women, even though the majority of victim/survivors of domestic abuse are women.

6.82 However, we envisage that some of our proposals for reform, if supported by consultees, will have a positive impact for individuals from certain backgrounds. For instance, our proposal to include immigration abuse in the civil definition of domestic abuse, discussed in Chapter 5, aims to ensure that abuse based on migration status is recognised and taken into account. We also know that individuals from some minority ethnic backgrounds are more likely to suffer abuse from multiple perpetrators, and our proposal to enable Domestic Abuse Civil Protection and Redress Orders to be sought against associates of the primary perpetrator¹⁵⁵ will offer greater protection to victim/survivors from these communities. Likewise, the ability to seek a civil order for the return of passports and identity documentation¹⁵⁶ may well offer greater protection to those at risk of immigration abuse. In all cases however, our proposals would be available equally, to all victim/survivors of domestic abuse, thereby ensuring equality in the legal protection available. As regards other, non-legal, support to victim/survivors of domestic abuse who are from marginalised or minority backgrounds, we recognise that often the most meaningful support comes from service provision focused on the specific needs of the victim/survivors, and we acknowledge the invaluable work done here by many charities and third sector organisations.

Part 2: Honour Based Abuse

6.83 This part of Chapter 6 discusses honour based abuse, sometimes referred to as honour based violence. We have chosen to refer to "honour based abuse", rather than "honour based violence", in recognition of the fact that some of the conduct or behaviour covered by the term does not amount to physical violence, but the term can cover both physical and non-

¹⁵⁴ The Scottish Government's Report on Minoritised Ethnic Women's Experiences of Domestic Abuse and Barriers to Help-Seeking: A Summary of the Evidence, p 9, August 2024 (available at: <https://www.gov.scot/publications/minoritised-ethnic-womens-experiences-domestic-abuse-barriers-help-seeking-summary-evidence/documents/>).

¹⁵⁵ See Ch 5, paras 5.135 to 5.142.

¹⁵⁶ See Ch 5, paras 5.52 to 5.58.

physical abuse, in much the same way as the term “domestic abuse” encompasses both physical and non-physical abuse. However, we will also be referring to and quoting from articles and publications which use the term “honour based violence”.

6.84 A number of support organisations we have met with¹⁵⁷ raised the issue of honour based abuse (“HBA”), which is experienced predominantly by women and girls in certain communities, although it can be experienced by men and boys too.¹⁵⁸ It is typically more prevalent in some minority ethnic groups, although it is not associated with particular religions: it has been recorded across Christian, Jewish, Sikh, Hindu and Muslim communities.¹⁵⁹ HBA can also be part of the abuse experienced by some Gypsy/Traveller victim/survivors of abuse.¹⁶⁰ Support organisations have told us that HBA can involve multiple perpetrators, including people from the wider community, some of whom may be strangers to the victim/survivor (where the only link between them might be a shared religion), as well as family members, and extended family members.¹⁶¹

6.85 Equally Safe, the joint Scottish Government and COSLA strategy to prevent and eradicate violence against women, defines HBA as “dowry related violence, female genital mutilation, forced and child marriages, and ‘honour’ crimes”.¹⁶² SafeLives, a UK wide charity

¹⁵⁷ AMINA the Muslim Women’s Resource Centre, Hemat Gryffe Women’s Aid, Shakti Women’s Aid.

¹⁵⁸ The most recent statistics from the UK Government’s Forced Marriage Unit (“FMU”) show that of the cases in which the FMU provided advice or support in England and Wales in 2023, 195 cases (69%) involved female victims and 88 cases (31%) involved male victims. A significant area where the number of male victims outnumbered those of female victim/survivors were in relation to mental capacity concerns (42 (63%) males to 25 (37%) females) (available at: <https://www.gov.uk/government/statistics/forced-marriage-unit-statistics-2023/forced-marriage-unit-statistics-2023#key-points>). In Scotland, for the 11.5 year period they reviewed, Carruthers and Belton report that “22 cases involving a FMPO were registered on the SCTS case management system in the period between 1 March 2011 and 24 August 2022. SCTS reported, however, that this figure does not include any case in which a FMPO was made by the sheriff ex proprio motu. Further, SCTS reported that this figure may include multiple cases against the same defender. No cases for breach of a FMPO were registered on the SCTS case management system in the period 2011 – 2022”: JM Carruthers and FA Belton, ‘Combating Forced Marriage: Strengthening Protection in Scots Law’ (July 2024) at p 69 (available at: <https://scih.org.uk/2024/07/combating-forced-marriage-strengthening-protection-in-scots-law-publication-of-research-report/>). There are no published statistics as to the incidence of use of forced marriage protection orders in Scottish courts.

There is some literature on male victims of HBA mainly in relation to mental capacity and sexuality, for example: M Mahil, ‘A Day in the life of a Police Officer Working with Male Victims of HBA and Forced Marriages – Some Reflections’ in MM Idriss, *Men, Masculinities and Honour-Based Abuse*. (2020 Routledge) Ch 2. Khan R (2017) ‘Honour’ abuse: the experience of South Asians who identify as LGBT in Northwest England.’ HARM Network Report for Lancashire Constabulary UK (available at: <https://clok.uclan.ac.uk/20996/7/20996%20LGBT%20Honour%20Report%20-%20Final%20%282018%29.pdf>); R Clawson, ‘Forced Marriage of Men with Learning Disabilities Risks Reasons and Responses’ in MM Idriss, *Men, Masculinities and Honour-Based Abuse*. (2020 Routledge) Ch 5. A Dutt, “‘Seeing the Unseen’ Male victims of forced marriages” in MM Idriss, *Men, Masculinities and Honour-Based Abuse* (2020 Routledge) Ch 2; R Khan & M Lowe, “Homophobic ‘Honour’ Abuse experienced by South Asian Gay Men in England” in MM Idriss, *Men, Masculinities and Honour-Based Abuse*. (2020 Routledge) Ch 6.

¹⁵⁹ House of Commons, Home Affairs Committee, Sixth Report of Session 2007 – 2008, Volume 1 (13 June 2008) *Domestic Violence, Forced Marriage, and “Honour”-Based violence* p 13 (available at: <https://publications.parliament.uk/pa/cm200708/cmselect/cmhaff/263/263i.pdf>).

¹⁶⁰ Traveller Movement Good Practice Guide: Improving service provision for Gypsy, Roma and Traveller domestic abuse survivors, p 5 (available at: <https://women.travellermovement.org.uk/wp-content/uploads/2022/12/2022.02.25-DA-Good-Practice-Guide.pdf>).

¹⁶¹ This is also noted in a recent Scottish Government’s Report, What Works to Prevent Violence Against Women: A Summary of the Evidence (available at: <https://www.gov.scot/publications/works-prevent-violence-against-women-girls-summary-evidence/pages/4/>), Scottish Justice & Analytical Services, Scottish Government, 2020, p 73.

¹⁶² Available at: <https://www.gov.scot/publications/equally-safe-scotlands-strategy-prevent-eradicate-violence-against-women-girls/>.

dedicated to ending domestic abuse, uses the following definition in their recent report into honour based violence, forced marriage and domestic abuse:

“... normally a collective and planned crime or incident, mainly perpetrated against women and girls, by their family or their community, who act to defend their perceived honour, because they believe that the victim(s) have done something to bring shame to the family or the community. It can take many forms including: ‘honour’ killing, forced marriage, rape, forced suicide, acid attacks, mutilation, imprisonment, beatings, death threats, blackmail, emotional abuse, surveillance, harassment, forced abortion and abduction.”¹⁶³

6.86 Research for the SafeLives’ Report found that over half (54%) of domestic abuse victim/survivors at risk of HBA were abused by multiple people, compared to only 7% of those not identified as at risk of HBA. This wider network of abusers is often in addition to partners or family members.¹⁶⁴ SafeLives also note that refuge is an important resource for those at risk of HBA, due to the prevalence of multiple perpetrators and danger of staying in the community even if the risk from the primary perpetrator has been removed.¹⁶⁵

6.87 Guidance published by SafeLives for professionals working in the MARAC process¹⁶⁶ notes that those who had fed into the preparation of the guidance emphasised that “honour” can mean different things to different families and in different contexts:

“... but ‘honour’-based abuse should be understood as any act and/or behaviour by the victim that is perceived as bringing shame to the family or community.”¹⁶⁷

6.88 The concept of honour was explained in a recent research report into the interaction of Police Scotland police officers with South Asian women who contacted them as a consequence of domestic abuse:

“The honour code operates within a patriarchal ideology where women are shunned, ostracised and may be killed for failing to conform to the expectations of, and behave in a manner acceptable to, the family and community. Women are silenced and rendered incapable of speaking about abuse and mistreatment. Family honour is a concept that has severely negative connotations for those who do not adhere to it, as it imposes a level of fear. It controls women emotionally. Women who fail to adhere to

¹⁶³ SafeLives (2017) *Your Choice: ‘honour’-based violence, forced marriage and domestic abuse*, p 15 (available at: <https://safelives.org.uk/sites/default/files/resources/Spotlight%20on%20HBV%20and%20forced%20marriage-web.pdf>).

¹⁶⁴ Available at:

<https://safelives.org.uk/sites/default/files/resources/Spotlight%20on%20HBV%20and%20forced%20marriage-web.pdf> p 7 and 37. The Report notes that it uses SafeLives’ Insights national dataset to help understand the extent of the domestic abuse that those at risk of HBV and forced marriage can suffer. The dataset is collected by specialist domestic abuse services who support people aged 16 and over, including services that provide specialist support to ethnic minority women and are experienced in responding to HBV (p 5).

¹⁶⁵ Available at:

<https://safelives.org.uk/sites/default/files/resources/Spotlight%20on%20HBV%20and%20forced%20marriage-web.pdf> p 57.

¹⁶⁶ Multi-Agency Risk Assessment Conference (a meeting where information is shared on the highest risk domestic abuse cases between representatives of local police, health, child protection, housing practitioners, Independent Domestic Violence Advisors (IDVAs), probation and other specialists from the statutory and voluntary sectors).

¹⁶⁷ Available at: https://safelives.org.uk/sites/default/files/resources/Honour-based_abuse_Marac_guidance_0.pdf. This guidance also notes that it uses the term ‘honour’-based abuse rather than violence, in recognition of this term encompassing a range of behaviours not limited to physical violence, and in line with the Scottish understanding of domestic abuse.

the norm are criticised, shamed and ostracised from the family and community, irrespective of what might have caused them to rebel. In the worst-case scenarios, the women are in danger and will suffer harm.¹⁶⁸

Is HBA a form of domestic abuse?

6.89 There are different views as to whether HBA is a form of domestic abuse and whether it should be treated as such in legislation. Some argue that HBA should be treated as a distinct form of abuse, because it has a different motivation and because it can be carried out by multiple perpetrators.¹⁶⁹

6.90 The SafeLives Report (while not arguing for or against) notes that:

“‘Honour’-based violence (HBV) is distinct from domestic abuse in many ways, and some do not believe the two should be considered within the same domain.¹⁷⁰ HBV is defined in relation to the motive of the abuse (to defend perceived ‘honour’) and unlike domestic abuse the perpetrators of HBV can involve community members who may be extended family or strangers to the victim.”¹⁷¹

6.91 This may be particularly relevant in relation to female genital mutilation where women can be the perpetrators within a patriarchal structure.¹⁷²

6.92 Dr Mohammad Mazher Idriss argues that HBA is different from domestic abuse:

“... based on three main strands of argument: (a) the involvement of the community in deciding on ‘punishment’; (b) the involvement of third parties in meting out violence; and (c) the longevity of the desire to mete out punishment.”¹⁷³

6.93 Key agents working in various roles which deal with domestic abuse and HBA interviewed by Idriss note that: “HBV is more public than private because it involves multiple

¹⁶⁸ Available at: <https://forcedmarriagecommission.co.uk/wp-content/uploads/2020/11/E.-McLaughlin-South-Asian-Women-Domestic-Abuse-Police-Scotland-.pdf> p 6. For a discussion of South Asian Women’s experience of domestic abuse by their mothers-in-law see N Mirza, (2017) South Asian Women’s experiences of abuse by female affinal kin: a critique of mainstream conceptualisations of domestic abuse, *Families, Relationships and Societies*, 6(3), p 393-409.

¹⁶⁹ See also R Khan: (2017) (available at: <https://safelives.org.uk/news-views/3-myths-about-honour-based-violence/>).

¹⁷⁰ MM Idriss, (2017) “Not domestic violence or cultural tradition: is honour-based violence distinct from domestic violence?”, *Journal of Social Welfare and Family Law*, 39:1, 3-21 (available at: <https://e-space.mmu.ac.uk/617601/8/Not%20Domestic%20Violence%20Or%20Cultural%20Tradition%20-%20ARTICLE%20JSWFL%20%285%29.pdf>).

¹⁷¹ SafeLives (available at: <https://safelives.org.uk/sites/default/files/resources/Spotlight%20on%20HBV%20and%20forced%20marriage-web.pdf>, p 17).

¹⁷² See for example, Kakela, E et al. (2021) *Falling Between the Cracks: Contradictions in Approaches to Protecting Girls and Women from Female Genital Mutilation (FGM) in Scotland*. University of Strathclyde (available at: https://strathprints.strath.ac.uk/78721/1/Kakela_et_al_2021_Contradictions_in_approaches_to_protecting_girls_and_women_from_female_genital_mutilation.pdf), and Stevenson, R. Final report June 2021: Evaluation of The Challenging Violence Against Women Project (available at: http://www.infosource.org.uk/uploads/5/5/0/8/55086457/evaluation_report_cvaw_june21.pdf).

¹⁷³ MM Idriss, (2017) “Not domestic violence or cultural tradition: is honour-based violence distinct from domestic violence?”, *Journal of Social Welfare and Family Law*, 39:1, 3-21.

perpetrators who may not necessarily have a domestic relationship with the victim”.¹⁷⁴ Idriss points out that some of the accounts of the key agents he interviewed, demonstrate the level of organisation and premeditation involved in cases of HBA:

“It would, therefore, not be an exaggeration to label some cases of HBV to be a form of community/gang-related violence (including one Crown Prosecutor who characterised HBV as a form of ‘organised crime’).”¹⁷⁵

6.94 Citing empirical research, Idriss argues that HBA is ‘a distinct phenomenon existing within its own parameters’:

“This is because of differences in motivation and premeditation, the wider planning and community involvement and the ‘presumed audience’. The presumed audience argument reveals that restoration of name and status needs to be enacted for a ‘double audience’ – members of the community aware of the transgressions must be reassured of the worthiness of the family and women in the community must also be ‘terrorised’ against committing any similar transgression (Elden, 2004; Payton, 2010: 73-74; Keeping, 2012: 15). The presumed audience argument is a feature of HBV that it is used to intimidate all women who belong to that community. A wider message is thus sent to silence women and to inform them that violence will be used to modify transgressive behaviour (Wilson, 2006: 33-34), helping to demonstrate the very public nature of HBV and how it differs from DV [domestic violence].”¹⁷⁶

6.95 This view is shared by others. For example, Darlington Safeguarding Partnership has stated:

“Honour crimes differ significantly from other forms of domestic abuse; while typical incidents of domestic violence involve perpetrators using force against their partners, honour-based abuses regularly involve a victim’s own parents, sons, brothers and sisters, as well as members of their extended family and in-laws and the wider community. Honour based abuse often involves multiple perpetrators and the abuse is usually committed with some degree of approval and/or collusion by family members or the wider community.”¹⁷⁷

6.96 Some respondents to the Scottish Government consultation on the Bill which became the 2018 Act suggested that the offence of engaging in an abusive course of conduct against a current or ex-partner should be extended to include HBA, as well as other abuse between other family relationships, and where there is a dynamic of an abusive relationship between a

¹⁷⁴ Idriss interviewed 30 “key agents” comprising those involved in refuge and support work (some of whom were also survivors of HBV and domestic abuse, employed by the criminal justice system as serving police officers, solicitors/legal workers in the Crown Prosecution Service; and local authority employees (MM Idriss, (2017) “Not domestic violence or cultural tradition: is honour-based violence distinct from domestic violence?”, *Journal of Social Welfare and Family Law*, 39:1, 3-21 p 9).

¹⁷⁵ MM Idriss, (2017) “Not domestic violence or cultural tradition: is honour-based violence distinct from domestic violence?”, *Journal of Social Welfare and Family Law*, 39:1, 3-21, p 19.

¹⁷⁶ MM Idriss, (2017) “Not domestic violence or cultural tradition: is honour-based violence distinct from domestic violence?” *Journal of Social Welfare and Family Law*, 39:1, 3-21, p 24.

¹⁷⁷ Darlington Safeguarding Partnership (an organisation made up of the police, and health and local authorities, to work together to safeguard and promote the welfare of children in Darlington, in accordance with the Children Act 2004) (available at: <https://www.darlington-safeguarding-partnership.co.uk/media/2036/honour-based-violence-february-2021-dsp-21.pdf>, p 7).

couple, to other family members, who are involved in or cover up the abuse. However, the Policy Memorandum for the 2018 Act notes that the majority of respondents considered that the offence should be restricted to partners and ex-partners.¹⁷⁸

6.97 The Scottish Government's 2024 Report on "Minoritised Ethnic Women's Experiences of Domestic Abuse and Barriers to Help-Seeking: A Summary of the Evidence", found that:

"Some of the evidence distinguishes HBA from domestic abuse on the basis of the perpetrator (which in the case of HBA can include members of the family and community) and the motive (punishment for bringing shame to an individual, family or community)... Overall, however, the literature reviewed for this report suggests that the nature of abuse which some minoritised ethnic women experience is complex and does not fit neatly into categories of crime or mainstream understandings of domestic abuse."¹⁷⁹

6.98 The opposing view is that HBA falls within the broad spectrum of domestic abuse. Some consider that it should fall within the domestic abuse framework because it is also gendered and centres on control. For example:

"HBV is a patriarchal form of violence and relates to male domination over women (Sen, 2005: 50; Reddy, 2014: 31). It acts as a method to police the behaviour of women and their sexual autonomy, thereby allowing men to exercise control (Ortner, 1978: 23). A central component is the ability to protect male honour by forcing women to comply with acceptable norms of behaviour as set and controlled by men (Sen, 2005: 50). HBV also disproportionately targets women more so than men and so should be subsumed under DV [domestic violence] because it is an example of female oppression and gender inequality (Reddy, 2014: 31-32; Aujla and Gill, 2014: 154-155). If men are targeted, it is usually because they are seen to have dishonoured a female."¹⁸⁰

6.99 Rupa Reddy argues that two examples of alleged honour killings cases in England strengthen arguments that HBA is a sub-species of broader gender based violence, such as

¹⁷⁸ Policy Memorandum, para 65 (available at: <https://www.parliament.scot/-/media/files/legislation/bills/previous-bills/domestic-abuse-bill/introduced/policy-memorandum-domestic-abuse-scotland-bill.pdf>).

¹⁷⁹ The Scottish Government's Report on Minoritised Ethnic Women's Experiences of Domestic Abuse and Barriers to Help-Seeking: A Summary of the Evidence, p 8, August 2024 (available at: <https://www.gov.scot/publications/minoritised-ethnic-womens-experiences-domestic-abuse-barriers-help-seeking-summary-evidence/documents/>).

¹⁸⁰ MM Idriss, (2017) "Not domestic violence or cultural tradition: is honour-based violence distinct from domestic violence?", *Journal of Social Welfare and Family Law*, p 4. However, the view that, if men are targeted, it is usually because they are seen to have dishonoured a female might not be widely shared. Other commentators consider that the man's sexuality or mental capacity (particularly if their ability to consent to marriage is questionable) are more likely to result in them being targeted. See for example: M Mahil, "A Day in the life of a Police Officer Working with Male Victims of HBA and Forced Marriages – Some Reflections" in MM Idriss, *Men, Masculinities and Honour-Based Abuse*. (2020 Routledge) Ch 2; Khan R (2017) "Honour' abuse: the experience of South Asians who identify as LGBT in Northwest England." HARM Network Report for Lancashire Constabulary UK (available at: <https://cllok.uclan.ac.uk/20996/7/20996%20LGBT%20Honour%20Report%20-%20Final%20%282018%29.pdf>); R Clawson, "Forced Marriage of Men with Learning Disabilities" in MM Idriss, *Men, Masculinities and Honour-Based Abuse* (2020 Routledge); A Dutt, "Seeing the Unseen' Male victims of forced marriages" in MM Idriss, *Men, Masculinities and Honour-Based Abuse*. (2020 Routledge); Khan R & Lowe M, "Homophobic 'Honour' Abuse experienced by South Asian Gay Men in England" in MM Idriss, *Men, Masculinities and Honour-Based Abuse*. (2020 Routledge).

domestic violence, rather than a separate species of violence.¹⁸¹ She notes that, while the “‘cultural differential’ issue of involvement of the wider family and community in the enforcement of ‘honour’ codes, are important factors”, the cases demonstrate “the common control of female behaviour, especially female sexual autonomy”.¹⁸² She argues that the alleged honour killings are “ultimately a form of gender based violence, albeit it one which presents certain specific features that are less common in wider domestic violence.... the presence of the latter features are nonetheless continually linked with issue of gender-based violence”.¹⁸³

6.100 Others consider that treating HBA as domestic abuse will ensure that victim/survivors can receive appropriate support from service providers:

“Allowing HBV to be subsumed under the DV framework also ensures victims can still receive appropriate support from DV agencies – it allows existing resources to be pooled and integrated; avoids the duplication of work; avoids diverting staff unnecessarily; aids in signposting to other specialist service providers; and minimises the cost on the criminal justice system as the DV framework is already established and in operation (Aujla and Gill, 2014: 160; Eshareturi et al, 2014: 374-376).”¹⁸⁴

6.101 The debate as to whether HBA should be considered as part of, or separate from, domestic abuse provision and legislation was considered in the Home Office, Home Affairs Committee Report into “Domestic Violence, Forced Marriage, and so-called ‘Honour’-Based violence”, published in 2008, which found that there were different views about this within different communities:

“On the whole South Asian women’s groups agree that policies to address so-called ‘honour’-based violence and forced marriage should be integrated into broader domestic violence policy as this allows the issues to benefit from the resources and best practice developed in this area and can help to prevent the development of ‘differential policies which negatively impact on minority communities, such as racist immigration controls’. This approach also stresses that, although the term ‘honour’-based violence describes a particular motive for violence, whatever the background the result is still domestic violence.

Middle Eastern women’s groups, however, have expressed the view that so-called ‘honour’-based violence and forced marriage should be considered separately in order to make sense of and deal with the issues in a targeted way. Such groups also doubt that so-called ‘honour’-based violence and forced marriage fit the core [UK] Government definition of domestic violence, as many of those forced into marriage are

¹⁸¹ R Reddy, “Domestic Violence or Cultural Tradition? Approaches to ‘Honour Killing’ as Species and Subspecies in English Legal Practice”, in AK Gill, C Strange, and K Roberts (eds), *Honour Killing and Violence: Theory, Policy and Practice*, (2014 Palgrave MacMillan), pp 27-45.

¹⁸² R Reddy, “Domestic Violence or Cultural Tradition? Approaches to ‘Honour Killing’ as Species and Subspecies in English Legal Practice”, in AK Gill, C Strange, and K Roberts (eds), *Honour Killing and Violence: Theory, Policy and Practice*, (2014 Palgrave MacMillan), p 36.

¹⁸³ R Reddy, “Domestic Violence or Cultural Tradition? Approaches to ‘Honour Killing’ as Species and Subspecies in English Legal Practice”, in AK Gill, C Strange, and K Roberts (eds), *Honour Killing and Violence: Theory, Policy and Practice*, (2014 Palgrave MacMillan), p 39.

¹⁸⁴ MM Idriss, (2017) “Not domestic violence or cultural tradition: is honour-based violence distinct from domestic violence?”, *Journal of Social Welfare and Family Law*, p 6.

children, and perpetrators of so-called ‘honour’-based violence may be members of the extended family or wider community, rather than intimate partners.”¹⁸⁵

6.102 Aside from the question of whether or not HBA is sufficiently distinct to be considered separately from domestic abuse, there is also an argument that existing legislation may be sufficient to address HBA. SafeLives guidance for professionals involved in the MARAC process, while not arguing one way or another, notes that:

“... ‘honour’-based abuse perpetrated by family members, or the wider community will be dealt with using existing legislation, for example threatening or abusive behaviour (section 38 of Criminal Justice & Licensing (Scotland) Act 2010) or assault.”¹⁸⁶

6.103 Section 39 of the Criminal Justice and Licensing (Scotland) Act 2010 might also be relevant where a person engages in a course of conduct, which causes or is intended to cause another person to suffer fear or alarm (and which the former knows or ought to know that engaging in the course of conduct would be likely to cause the other person to suffer fear or alarm).

6.104 There is also specific legislative protection from female genital mutilation and forced marriage, which are widely regarded as forms of HBA. Female genital mutilation (FGM) has been a specific criminal offence in the UK since the Female Circumcision Act 1985 (“the 1985 Act”). The Prohibition of Female Genital Mutilation (Scotland) Act 2005 repealed and reenacted for Scotland the provisions of the 1985 Act, giving those provisions extra-territorial effect and increasing the maximum penalty for FGM from 5 to 14 years’ imprisonment.¹⁸⁷ It also made additional forms of FGM unlawful, and allowed the Scottish Ministers to modify the procedures which are offences and added offences under the 2005 Act to Schedule 1 to the Criminal Procedure (Scotland) Act 1995 (offences against children under 17 to which special provisions apply). The 2005 Act was then amended by the Female Genital Mutilation (Protection and Guidance) (Scotland) Act 2020, which introduced female genital mutilation protection orders: a form of civil order which can impose conditions or requirements upon a person for the purpose of protecting a person from FGM, safeguarding them from harm if FGM has already occurred, or for the general purpose of reducing the likelihood that FGM offences will occur (for example, requiring a person to give up their passport or restrict them from taking a protected person to a specified place, including outwith Scotland).¹⁸⁸ The Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011, introduced Forced Marriage Protection Orders to protect people from being forced to marry, or who are already in a forced marriage.¹⁸⁹

¹⁸⁵ House of Commons Home Affairs Committee, “Report on Domestic Violence, Forced Marriage and “Honour”-Based Abuse”, Vol I, 2007-08 (available at: <https://publications.parliament.uk/pa/cm200708/cmselect/cmhaff/263/263i.pdf>) p 15.

¹⁸⁶ “‘Honour’-based abuse and forced marriage cases at Marac in Scotland: Current and Best Practice Responses” 2023 (available at: https://safelives.org.uk/wp-content/uploads/Honour-based_abuse_Marac_guidance.pdf). See also paras 6.64 to 6.72 of Ch 6, Part 1, for further discussion of alternative remedies.

¹⁸⁷ Prohibition of Female Genital Mutilation (Scotland) Act 2005, ss 1 to 5.

¹⁸⁸ 2005 Act, ss 5A and 5B. See also the Policy Memorandum for the Bill which became the Female Genital Mutilation (Protection and Guidance) (Scotland) Act 2020, paras 20 to 26 (available at: <https://www.parliament.scot/-/media/files/legislation/bills/s5-bills/female-genital-mutilation-protection-and-guidance-scotland-bill/introduced/policy-memorandum-female-genital-mutilation-protection-and-guidance-scotland-bill.pdf>).

¹⁸⁹ See the recent Report into the operation of this Act: JM Carruthers and FA Belton, ‘Combatting Forced Marriage: Strengthening Protection in Scots Law’ (July 2024) (available at: <https://scj.h.org.uk/2024/07/combating-forced-marriage-strengthening-protection-in-scots-law-publication-of-research-report/%20>). See also para 6.68 above, for a discussion of specific case law under the Act.

6.105 As well as the above alternatives, some existing civil remedies for domestic abuse may be available to address HBA, but with certain limitations. An exclusion order is available for example, but only if the abuse experienced is between spouses, cohabitants or civil partners.¹⁹⁰ Therefore, a victim/survivor would not be able to obtain an exclusion order to exclude other family members from the home – and an exclusion order against a partner might be of limited value if other (abusive) family members continue to live there. A victim/survivor could obtain a common law interdict for the protection against abuse against their partner, any other family member, and any member of the community, but a domestic abuse interdict determination (which would mean any breach was an automatic criminal offence), is only available where the subject of the interdict is the spouse, civil partner, cohabitant or is in an intimate personal relationship with the victim/survivor.¹⁹¹ A victim/survivor could also seek the attachment of a power of arrest to an interdict the purpose of which is protection from abuse, against a partner, family member or any other person, but other than in the case of a spouse or civil partner who has an interdict ancillary to an exclusion order, only once the interdicted person has been given an opportunity to be heard by, or represented before, the court and if the court is satisfied that attaching the power of arrest is necessary to protect the victim/survivor from a risk of abuse in breach of the interdict.¹⁹² It might also be possible for a victim/survivor of HBA to seek remedies under the 1997 Act, if the conduct amounts to harassment, as these remedies are not restricted to harassment carried out by a partner or ex-partner.¹⁹³

6.106 The discussion above provides an overview of some of the arguments for and against recognising HBA as a form of domestic abuse. From this commentary, and from the stakeholders we have spoken to, it seems that there is no clear consensus as to whether HBA should be treated in law as a form of domestic abuse and therefore whether extending civil protection orders for domestic abuse to those experiencing HBA is the most appropriate way of addressing this problem.

6.107 Our research has shown that this is an important yet complicated social, cultural, and policy area which merits further study, to determine how it should be addressed in both policy and legal terms, particularly given, as noted in a recent Report into HBA:

“There is a dearth of research in Scotland in relation to violence against women, children, and young people in minority ethnic communities (McLaughlin, 2017) and more specifically in relation to the impact of honour-based abuse (HBA) upon women.”¹⁹⁴

However, proper consideration of HBA and the remedies required to address it would require a significant level of research which is outwith the capacity of this current project. It would also necessitate significant changes in policy and service provision, which would be matters for the

¹⁹⁰ 1981 Act, s 4 (spouses and cohabitants); 2004, s 104 (civil partners). If it appears to the court that the making of the order is necessary for their protection or the protection of their child, from any conduct or threatened or reasonably apprehended conduct of the perpetrator which is or would be injurious to the physical or mental health of the victim/survivor or child. See also Ch 4, paras 4.13 to 4.42.

¹⁹¹ 2011 Act, s 3(2); see also Ch 4, paras 4.68 to 4.74.

¹⁹² 2001 Act, s 1(2); see also Ch 4, paras 4.52 to 4.62.

¹⁹³ 1997 Act, s 8; see also Ch 4, para 4.81 to 4.84.

¹⁹⁴ E McLaughlin, S Grant, M McGowan, E Gilchrist, R Wheate, “Honour-based abuse in Scotland: Evidence and Pathways to strengthen protection for victims”, April 2023 (available at: <https://www.scottishinsight.ac.uk/Portals/80/SUIIProgrammes/Honour-Based%20Abuse/SUII%20Honour-Based%20Abuse%20Final%20Report%20-%20Apr%202023.pdf>).

Scottish Government to take forward.¹⁹⁵ For these reasons and given the lack of consensus noted above, we have reached the conclusion that this is a matter beyond the scope of our project.

6.108 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.

¹⁹⁵ The UK Government rejected calls for a legal definition of honour-based abuse for England and Wales in September 2023 (available at: <https://www.bbc.co.uk/news/uk-66812636>).

Chapter 7 Domestic Abuse and Children

7.1 Children and young people are affected by domestic abuse: it is a “widespread, chronic and serious social problem” and “[t]he numbers are alarmingly high”.¹ One criticism we have heard emphatically from stakeholders is that there is insufficient recognition of the impact of domestic abuse on children and young people in the civil protection legislation. This is a concern in a number of different ways: (i) in relation to children and young people who experience domestic abuse perpetrated in their household; (ii) as regards children and young people who are abused within their own intimate/romantic relationships; and (iii) in relation to child contact, and the risk that insufficient account is taken of the effect of domestic abuse in relation to the making of orders under section 11 of the Children (Scotland) Act 1995.²

7.2 In this chapter, we discuss these three separate issues. First, we ask whether children should be recognised as victim/survivors of domestic abuse perpetrated against their parent, carer or an adult they are connected with, and if so, what legal consequences should flow from this. Secondly, we set out the protection currently available to children and young people who are victims of domestic abuse in their own relationships, at the hands of abusive partners. Thirdly, we explore the question of what legal impact, if any, domestic abuse perpetrated by a parent should have in relation to contact and residence with their child. While this chapter explores these three issues, as previously noted, the scope of our project is restricted to civil remedies for domestic abuse and it does not extend to child law more generally. Therefore any proposals we make for change must be similarly restricted in their scope.

Part 1: Children who Experience Domestic Abuse within their Family Environment

7.3 In this part, we examine the question of whether children who experience domestic abuse perpetrated against an adult in their lives should be recognised as victim/survivors of that abusive behaviour.

7.4 This is a different question from the issue considered in Chapter 6, which looks at whether a wider range of people could be victim/survivors of domestic abuse, or whether it should be restricted to intimate partner abuse. Regardless of the answer to that question, a separate issue arises, namely whether children who live in a household where domestic abuse is perpetrated against an adult member of the family should be recognised in law as victim/survivors of that abuse.

7.5 Where children are subjected to physical, emotional or sexual abuse by a parent or other adult, that is child abuse and the child protection regime should offer the required

¹ C Humphreys and C Houghton, “The Research Evidence on Children and Young People Experiencing Domestic Abuse”, in C Humphreys, C Houghton and J Ellis, “Literature Review: Better Outcomes for Children and Young People Experiencing Domestic Abuse”, The Scottish Government, 2008, at p 14 (available at: <https://dera.ioe.ac.uk/id/eprint/9525/1/0064117.pdf>).

² Section 11 makes provision for court orders relating to parental responsibilities and parental rights, including orders to regulate contact and residence.

protection and support.³ We recognise that witnessing domestic abuse as a child can be seen as child abuse in itself,⁴ in which case specific child protection measures would be appropriate. Our focus is whether a specific legal response is required in respect of children who experience domestic abuse perpetrated against someone in their household.

7.6 We refer in this part to the perpetrator and the victim/survivor as parents of the child, but they could equally be other carers or adults with whom the child lives or is closely connected. One example might be where the perpetrator is not a parent, but is the new partner of the child's parent, who is the victim/survivor. The child may not even live with the victim/survivor parent and abusive partner all the time, if the child's residence is divided between separated parents. We do not seek to distinguish between the many domestic and family circumstances that children may experience. Our focus is on any situation where children experience domestic abuse within the household in some way, directed at an adult in their lives, and on the protection that they might need in these circumstances.

7.7 Before exploring whether specific legal protection is required, we first set out evidence of the harm caused to children living in an environment where domestic abuse is perpetrated.

The impact of domestic abuse on children

7.8 Where a child lives with or experiences domestic abuse in their family life, the impact can be highly damaging.⁵ In addition to experiencing domestic abuse perpetrated against a parent, the child may also be involved, if the perpetrator uses them to further the abuse and control,⁶ or threatens to take the child away or harm them.⁷ However it is perpetrated, domestic abuse can adversely impact the child's day-to-day life in myriad ways. The Domestic Abuse Commissioner for England and Wales,⁸ has reported that:

“Children who are exposed to domestic abuse experience increased levels of fear, inhibition, anxiety and depression compared to their peers.⁹ Increased risk of mental

³ For a discussion on child protection in Scotland, see K McK Norrie, *The Law Relating to Parent and Child in Scotland* (SULI, 3rd ed, 2013) chapters 15-20.

⁴ See for example: M Burman, R Friskney, J Mair, and R Whitecross, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings”, 2022, at p 15 (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>); the NSPCC's information on domestic abuse and children (available at: <https://learning.nspcc.org.uk/child-abuse-and-neglect/domestic-abuse>) (accessed 20 June 2024); Barnardo's information (available at: <https://www.barnardos.org.uk/get-support/support-for-parents-and-carers/child-abuse-and-harm/children-affected-domestic-abuse-violence>) (accessed 20 June 2024).

⁵ For a detailed literature review of the impact of domestic abuse on children, see C Humphreys, C Houghton and J Ellis, *Literature Review: Better Outcomes for Children and Young People Experiencing Domestic Abuse*, The Scottish Government, 2008 (available at: <https://dera.ioe.ac.uk/id/eprint/9525/1/0064117.pdf>); and more recently M Burman, R Friskney, J Mair, and R Whitecross, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings”, 2022 (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>).

⁶ Discussed in the Justice Committee Stage 1 Report of the Domestic Abuse (Scotland) Bill, published 17 September 2017: see in particular para 7 (available at: [https://bprcdn.parliament.scot/published/J/2017/9/21/Stage-1-Report-on-the-Domestic-Abuse--Scotland--Bill/Stage%201%20Report%20on%20the%20Domestic%20Abuse%20\(Scotland\)%20Bill.pdf](https://bprcdn.parliament.scot/published/J/2017/9/21/Stage-1-Report-on-the-Domestic-Abuse--Scotland--Bill/Stage%201%20Report%20on%20the%20Domestic%20Abuse%20(Scotland)%20Bill.pdf)).

⁷ See the examples given in interviews with children cited in C Houghton, “Participation of Children and Young People Experiencing Domestic Abuse”, in C Humphreys, C Houghton and J Ellis, *Literature Review: Better Outcomes for Children and Young People Experiencing Domestic Abuse*, The Scottish Government, 2008, at pp 34-35 (available at: <https://dera.ioe.ac.uk/id/eprint/9525/1/0064117.pdf>).

⁸ The first Domestic Abuse Commissioner was appointed in 2019, and exercises statutory powers in terms of Part 2 of the Domestic Abuse Act 2021.

⁹ KM Kitzmann, NK Gaylord, AR Holt, ED Kenny, (2003) “Child witnesses to domestic violence: a meta-analytic review”, cited in Barnardo's (2020), *Not just collateral damage: the hidden impact of domestic abuse on children*.

and physical health problems continues into adulthood.¹⁰ Exposure to domestic abuse can severely impact a child's neurological development, speech, language and communication and result in behavioural issues, including aggressive behaviours.¹¹ Domestic abuse can undermine the relationship between children and the parent who is also the victim of abuse. Victims' parenting of their child may be controlled or undermined by the perpetrator, while their usual parenting capacity and emotional availability can be eroded by mental ill health and trauma resulting from abuse."¹²

7.9 Children who experience domestic abuse in the household may face difficulties with their emotional, social and cognitive development.¹³ Some may experience general anxiety and unhappiness, whereas others may develop traumatic stress disorders or severe attachment disorders.¹⁴ There is incontrovertible evidence of the harm suffered by children in these situations: "The international research evidence is clear that domestic abuse is harmful to children and that the harm is not limited to situations where children 'witness' domestic abuse but rather that they actively experience domestic abuse with the non-abusing parent".¹⁵

7.10 Moreover, the harm suffered by children is not restricted to the experience of violent incidences of domestic abuse. Focusing only on violence perpetrated by one parent against the other fails to recognise that children are also harmed when they live with coercive control:

"The children and domestic violence field tends to be grounded in the physical incident model of domestic violence... This framing renders invisible children's experiences of non-violent, control-based abuses in their homes."¹⁶

7.11 Where children experience coercive control alongside one parent, the harmful impacts can be extensive, including psychological harm, together with: restrictions on their time, movement and activities within the home, restricted freedom to do or say things; isolation from

See also: C Diez, et al, "Adolescents at serious psychosocial risk: what is the role of additional exposure to violence in the home?" (2018) *Journal of Interpersonal Violence*, 33(6): 865-888, cited in NSPCC (2021) *Protecting children from domestic abuse*.

¹⁰ From the Office of the Domestic Abuse Commissioner, "The Family Court and Domestic Abuse: achieving cultural change", 23 July 2023, at p 22 (available at: https://domesticabusecommissioner.uk/wp-content/uploads/2023/10/DAC_Family-Court-Report_Oct-2023.pdf quoting from: Barnardo's (2020), *Not just collateral damage: the hidden impact of domestic abuse on children*).

¹¹ From "The Family Court and Domestic Abuse: achieving cultural change", 23 July 2023, at p 22, quoting from: James (1994), *Domestic violence as a form of child abuse: identification and prevention*. Australian Institute of Family Studies and Hester (2007), *Making an impact: children and domestic violence: a reader*, cited in Barnardo's (2020), *Not just collateral damage: the hidden impact of domestic abuse on children*. Royal College of Speech and Language Therapists, (2021), *RCSLT welcomes Domestic Abuse Bill receiving Royal Assent Policy statement - 29 April 2021* (available at: <https://www.rcslt.org/wp-content/uploads/2021/04/Domestic-Abuse-Act-Royal-Assent-Statement-April-2020.pdf>).

¹² Domestic Abuse Commissioner, "The Family Court and Domestic Abuse: achieving cultural change", 23 July 2023, at p 22.

¹³ M Tagg, 'Psychological Impact on Children in Domestic Abuse Situations' in H Hughes, *Domestic Abuse and Scots Law* (Bloomsbury, Edinburgh 2011) at p 183. See also the NSPCC information on domestic abuse and children and the research cited there (available at: <https://learning.nspcc.org.uk/child-abuse-and-neglect/domestic-abuse>).

¹⁴ M Tagg, 'Psychological Impact on Children in Domestic Abuse Situations' in Helen Hughes, *Domestic Abuse and Scots Law* (Bloomsbury, Edinburgh 2011) at p 183.

¹⁵ M Burman, R Friskney, J Mair, and R Whitecross, "Domestic Abuse and Child Contact in Scotland: The Perspectives of Family Law Practitioners", (2023) *Journal of Social Welfare and Family Law*, 45:3, 234-248, at 235.

¹⁶ E Katz, "Beyond the Physical Incident Model: How children living with domestic violence are harmed by and resist regimes of coercive control", (2016) *Child Abuse Review*, 25(1) 46-59.

support; and restrictions on activities outside the home, including meeting friends or family, or attending after school activities, leading to further isolation.¹⁷

7.12 As with adult victims, the impact on the child varies depending on a number of risk factors, such as their age, the severity of the abuse, and the strength of the child's support network.¹⁸

7.13 Research shows that a child's emotional welfare is intrinsically connected to that of their parents.¹⁹ In some cases, a child may build strong bonds with the victim/survivor parent, as they attempt to navigate the abuse, provide each other with emotional support, and protect each other from coercive control and physical violence.²⁰ In other cases, children may respond to "admirable parenting" by the abusive parent, where the abuser "plays a role" of a caring, concerned and/or vulnerable parent, and children may end up feeling responsible for the abuser's health or happiness.²¹ This may result in the child expressing a wish to live with the abusive parent,²² and the perpetrator may be perceived by the police and the court as 'the good parent' with whom the child should continue to have contact or even residence.²³

7.14 A further complication for children who experience domestic abuse within the household, or alongside a parent, is that their ability to seek help or access protection independently is often limited, curtailed by factors such as age and access to financial resources.²⁴

7.15 Abuse perpetrated by one parent against the other represents "a very serious and significant failure in parenting".²⁵ Seeking to separate the perpetrator's conduct into "partner conduct" and "parenting conduct" creates a false dichotomy between partner and parent, resulting in a "false perception that perpetrators of domestic abuse can be 'poor partners' but

¹⁷ E Katz, "Beyond the Physical Incident Model: How children living with domestic violence are harmed by and resist regimes of coercive control", (2016) *Child Abuse Review*, 25(1) 46-59; M Tagg, 'Psychological Impact on Children in Domestic Abuse Situations' in H Hughes, *Domestic Abuse and Scots Law* (Bloomsbury, Edinburgh 2011) at p 181.

¹⁸ M Tagg, 'Psychological Impact on Children in Domestic Abuse Situations' in H Hughes, *Domestic Abuse and Scots Law* (Bloomsbury, Edinburgh 2011) at p 183; and C Humphreys and C Houghton, "The Research Evidence on Children and Young People Experiencing Domestic Abuse", in C Humphreys, C Houghton and J Ellis, *Literature Review: Better Outcomes for Children and Young People Experiencing Domestic Abuse*, The Scottish Government, 2008, at pp 19-20 (available at: <https://dera.ioe.ac.uk/id/eprint/9525/1/0064117.pdf>).

¹⁹ M Tagg, 'Psychological Impact on Children in Domestic Abuse Situations' in H Hughes, *Domestic Abuse and Scots Law* (Bloomsbury, Edinburgh 2011) at p 188.

²⁰ E Katz, "Beyond the Physical Incident Model: How children living with domestic violence are harmed by and resist regimes of coercive control", (2016) *Child Abuse Review*, 25(1) 46-59, in particular the sections on resisting coercive control and abuse, which demonstrates the agency that children can have in domestic abuse situations.

²¹ E Katz, A Nikupeteri, and M Laitinen, "When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking, and Domestic Violence", (2020) *Child Abuse Review*, 29(4): 310 – 324, especially the section on "Admirable Fathering."

²² E Katz, A Nikupeteri, and M Laitinen, "When Coercive Control Continues to Harm Children: Post-Separation Fathering, Stalking, and Domestic Violence", (2020) *Child Abuse Review*, 29(4): 310 – 324, especially the section on "Admirable Fathering."

²³ M Tagg, 'Psychological Impact on Children in Domestic Abuse Situations' in H Hughes, *Domestic Abuse and Scots Law* (Bloomsbury, Edinburgh 2011) at p 194.

²⁴ F Morrison and C Houghton, "Children's human rights in the contexts of domestic abuse and COVID-19", (2023) *International Journal of Children's Rights*, 27(9-10): 1353-1368.

²⁵ C Sturge and D Glaser (2000), *Contact and Domestic Violence – The Experts' Court Report*, cited by the Domestic Abuse Commissioner in the Family Court Report, at p 23 (available at: https://domesticabusecommissioner.uk/wp-content/uploads/2023/10/DAC_Family-Court-Report_Oct-2023.pdf).

‘good fathers’ simultaneously”.²⁶ Abuse of a partner also impacts on the child, creating a “spectrum of interrelated harms,”²⁷ such that the experiences of the adult victim/survivor and the child are “interwoven yet distinct,”²⁸ and children are “integrally involved”²⁹ in the abusive relationship along with the parent who is a victim.³⁰ The impact this has on children should not be underestimated.

Current legal treatment

7.16 It is clear that children who live with domestic abuse can suffer serious emotional and psychological harm from the conduct of the perpetrator and the impact it has on the victim/survivor parent. However, at present, children are only recognised as victim/survivors of abuse if they are victims of child abuse. There is some limited protection available to them in relation to certain civil orders. For example, a court can make an exclusion order in terms of section 4(2) of the 1981 Act/section 104(2) of the 2004 Act to protect a child of the family:

“...the court shall make an exclusion order if it appears to the court that the making of the order is necessary for the protection of the applicant **or any child of the family** from any conduct or threatened or reasonably apprehended conduct of the non-applicant [party] which is or would be injurious to the physical or mental health of the applicant or child.”

7.17 Therefore, an exclusion order can be granted if the risk of harm, whether physical or mental is solely to the child. Similarly, a spouse, civil partner, or cohabitant may obtain an interdict which restrains or prohibits any conduct of one towards the other, or a child of the family.³¹ However, unlike the 1981 Act/2004 Act, there is no statutory provision in the 1997 Act or the 2011 Act which would allow the victim/survivor to seek to extend a non-harassment order or domestic abuse interdict determination to protect a child of the family. Child protection laws could offer some protection to a child who experiences domestic abuse in the home. For example, it is a ground of referral to the Scottish Children’s Reporter under section 67 of the Children’s Hearings (Scotland) Act 2011 where the child “has, or is likely to have, a close connection with a person who has carried out domestic abuse”. This does not recognise the child as a victim/survivor, but does accept that legal protection for a child experiencing domestic abuse in the household may be necessary, through the involvement of the Reporter. In 2022-23, there were 2,036 referrals to the Children’s Reporter on this ground, out of a total of 10,748 referrals. Thus, 19%, or nearly one in every five referrals, were domestic abuse

²⁶ I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) *Social and Legal Studies* 914 at p 920, citing S Heward-Belle (2017), “Exploiting the ‘good mother’ as a tactic of coercive control: Domestically violent men’s assaults on women as mothers”, *Affilia* 32(3): 374–389.

²⁷ I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) *Social and Legal Studies* 914 at p 920, citing E Stark and M Hester, (2019) “Coercive control: Update and review,” *Violence Against Women* 25(1): 81–104.

²⁸ F Morrison and C Houghton, “Children’s human rights in the contexts of domestic abuse and COVID-19”, (2023) *International Journal of Children’s Rights*, 27(9-10): 1353-1368.

²⁹ C Houghton, “Participation of Children and Young People Experiencing Domestic Abuse”, in C Humphreys, C Houghton and J Ellis, *Literature Review: Better Outcomes for Children and Young People Experiencing Domestic Abuse*, The Scottish Government, 2008, at p 29 (available at: <https://dera.ioe.ac.uk/id/eprint/9525/1/0064117.pdf>).

³⁰ M Burman, R Friskney, J Mair, and R Whitecross, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings”, 2022, at p 15 (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>).

³¹ The option of seeking an interdict which restrains or prohibits conduct toward a child of the family is referred to in the 1981 Act, s 14(2)(a) and in the 2004 Act, s 113(2)(a). S 18A(2)(a) is the equivalent provision for cohabitants, but it refers to “any child in the permanent or temporary care of the pursuer” as opposed to “child of the family”.

related.³² A further measure which is available where a child is at risk of “significant harm” is in section 76 of the Children (Scotland) Act 1995, which enables a local authority to seek an exclusion order in respect of a person whose conduct is the cause (or likely cause) of the significant harm to the child.³³ This allows the person causing the harm to be removed from the house the child lives in, rather than removing the child who is at risk of harm. While there are no published statistics on the use of section 76, it appears to be little used.

7.18 Although these civil measures do offer protection to children, there is no legal response which specifically recognises children as victim/survivors of domestic abuse targeted at a parent. This was the subject of considerable debate in the criminal law context during the passage of the Bill which became the Domestic Abuse (Scotland) Act 2018 (the “2018 Act”).³⁴ The outcome there was that, where abusive behaviour concerned or affected a child, that was an aggravating factor to be taken into account at sentencing.

7.19 Under section 5 of the 2018 Act,³⁵ the offence of abusive behaviour³⁶ by person A is aggravated in the following circumstances:

- If, at any time in the commission of the offence, A directs behaviour at a child;³⁷
- If, at any time in the commission of the offence, A makes use of a child in directing behaviour at B;³⁸
- If a child sees or hears, or is present during, an incident of behaviour that A directs at B as part of the course of behaviour;³⁹

³² Official statistics for 2022-23 (available at: <https://www.scra.gov.uk/wp-content/uploads/2023/07/SCRA-full-statistical-analysis-2022-23.pdf>).

³³ K McK Norrie, *The Law Relating to Parent and Child in Scotland*, (SULI, 3rd ed, 2013), para 16.38 et seq.

³⁴ Discussed in the Justice Committee Stage 1 Report of the Domestic Abuse (Scotland) Bill, published 17 September 2017: see in particular paras 78-80 (available at: [https://bprcdn.parliament.scot/published/J/2017/9/21/Stage-1-Report-on-the-Domestic-Abuse--Scotland--Bill/Stage%201%20Report%20on%20the%20Domestic%20Abuse%20\(Scotland\)%20Bill.pdf](https://bprcdn.parliament.scot/published/J/2017/9/21/Stage-1-Report-on-the-Domestic-Abuse--Scotland--Bill/Stage%201%20Report%20on%20the%20Domestic%20Abuse%20(Scotland)%20Bill.pdf)).

³⁵ Extract from s 5 of the 2018 Act:

(1) This subsection applies where it is, in proceedings for an offence under section 1(1)—

(a) specified in the complaint or libelled in the indictment that the offence is aggravated by reason of involving a child, and

(b) proved that the offence is so aggravated.

(2) The offence is so aggravated if, at any time in the commission of the offence—

(a) A directs behaviour at a child, or

(b) A makes use of a child in directing behaviour at B.

(3) The offence is so aggravated if a child sees or hears, or is present during, an incident of behaviour that A directs at B as part of the course of behaviour.

(4) The offence is so aggravated if a reasonable person would consider the course of behaviour, or an incident of A’s behaviour that forms part of the course of behaviour, to be likely to adversely affect a child usually residing with A or B (or both).

(5) For it to be proved that the offence is so aggravated, there does not need to be evidence that a child—

(a) has ever had any—

(i) awareness of A’s behaviour, or

(ii) understanding of the nature of A’s behaviour, or

(b) has ever been adversely affected by A’s behaviour.

(6) Evidence from a single source is sufficient to prove that the offence is so aggravated.

³⁶ 2018 Act, s 1(1).

³⁷ 2018 Act, s 5(2)(a).

³⁸ 2018 Act, s 5(2)(b).

³⁹ 2018 Act, s 5(3).

- If a reasonable person would consider the course of behaviour, or an incident of A's behaviour that forms part of the course of behaviour, to be likely to adversely affect a child living with A or B (or both).⁴⁰

7.20 A child under this section is anyone under the age of 18.⁴¹ Importantly, there does not need to be any evidence to show that the child was aware of, or understood, A's behaviour, or has actually been adversely affected by A's behaviour.⁴² As the Explanatory Notes state: "This ensures that the aggravation can be proven in cases where, for example, the child is too young to understand the perpetrator's behaviour, or where it is not possible to prove that behaviour likely to adversely affect a child actually had such an adverse effect".⁴³

7.21 Where the offence of domestic abuse is aggravated under section 5, the court must take the aggravation into account in determining the appropriate sentence.⁴⁴ The aggravation also enables the court to make a non-harassment order in respect of the child, as well as the victim/survivor, if satisfied that it is appropriate for the child to be protected by the order.⁴⁵

7.22 The Scottish Government decided against recognising children as victim/survivors of domestic abuse in the 2018 Act on the basis that "the way that the offence has been developed to address psychological abuse and coercive control of a person's partner or ex-partner would require considerable adaptation if it were to be considered as a template for use in dealing with psychologically abusive behaviour directed towards a child",⁴⁶ and that abuse of a child is already a criminal offence in terms of section 12 of the Children and Young Persons (Scotland) Act 1937.⁴⁷

7.23 Instead, the Scottish Government was of the view that the aggravation element was appropriate, as it "reflects the harm that can be caused to a child who grows up in an

⁴⁰ 2018 Act, s 5(4).

⁴¹ 2018 Act, s 5(11).

⁴² 2018 Act, s 5(5).

⁴³ Explanatory Notes to the Domestic Abuse (Scotland) Act 2018, para 37 (available at: <https://www.legislation.gov.uk/asp/2018/5/notes/contents>).

⁴⁴ 2018 Act, s 5(7)(c).

⁴⁵ Criminal Procedure (Scotland) Act 1995, s 234AZA(3)(b). It is also possible for the court to make a non-harassment order in respect of a victim and any child usually residing with the offender or the victim, irrespective of whether there was an aggravator: s 234AZA(3)(a).

⁴⁶ Scottish Government, *Policy Memorandum to the Domestic Abuse (Scotland) Bill* (Scottish Government, 2017) at para 98 (available at: <https://www.parliament.scot/-/media/files/legislation/bills/previous-bills/domestic-abuse-bill/introduced/policy-memorandum-domestic-abuse-scotland-bill.pdf>). Further, the list of "effects" of abusive behaviour contained within the offence was crafted with relationships between partners and/or ex-partners in mind: "Therefore applying the list of "effects" in a different context may be seen as inappropriate. For example, it might be seen as reasonable, for a parent or carer to control, regulate or monitor the day-to-day activities of a child, or to punish the child for misbehaviour" (para 99).

⁴⁷ Scottish Government, *Domestic Abuse (Scotland) Bill: Policy Memorandum* (Scottish Government, 2017) at pp 20-22 (available at: <https://www.parliament.scot/-/media/files/legislation/bills/previous-bills/domestic-abuse-bill/introduced/policy-memorandum-domestic-abuse-scotland-bill.pdf>). See also I Cairns and I Callander, 'Gold Standard Legislation for Adults Only: Reconceptualising Children as 'Adjoined Victims' under the Domestic Abuse (Scotland) Act 2018' (2022) 31(6) *Social and Legal Studies* 914 at p 923.

⁴⁷ I Cairns and I Callander, 'Gold Standard Legislation for Adults Only: Reconceptualising Children as 'Adjoined Victims' under the Domestic Abuse (Scotland) Act 2018' (2022) 31(6) *Social and Legal Studies* 914 at p 927. A consultation on reform of s 12 of the Children and Young Persons (Scotland) Act 1937 was published on 22 August 2018 (see Consultation Analysis available at: <https://www.gov.scot/publications/analysis-report-responses-scottish-government-consultation-protecting-children-review-section-12-children-young-persons-scotland-act-1937-section-42-sexual-offences-scotland-act-2009/>). Possible reforms include modernisation of the language, to ensure that it accurately reflects a modern understanding of the different ways that abuse and neglect of a child can be committed, and clarification as to whether the offence covers emotional harm.

environment where domestic abuse is taking place”.⁴⁸ There is therefore recognition in the 2018 Act that children need protection from abusive behaviour aimed at an adult in their life, although the 2018 Act stopped short of recognising them as victim/survivors of this abuse in their own right. COPFS statistics from 2023-24 show that a statutory child aggravation under section 5 of the 2018 Act was recorded against 382 (21%) of the charges under the 2018 Act reported for that year.⁴⁹

7.24 However, the section 5 aggravation has been criticised on the basis that it fails to properly reflect the harm caused to children by “perpetuat[ing] the notion that children’s experiences of coercive control are secondary to, and separate from, the adult victim”.⁵⁰

7.25 In its post-legislative scrutiny of the 2018 Act in 2023, the Justice Committee heard evidence that it was unclear whether the section 5 aggravation was being used in all of the circumstances where it was applicable, and that even if it were, it would not be sufficient:

“We are really concerned that, even if the aggravator were applied in all the cases in which it could be used – and we cannot get data on that because the Crown Office does not collect data in that way – it would not do the trick. It is clear to us, from multiple sources of evidence, that civil cases that follow criminal cases of domestic abuse are not reflecting the much broader understanding that we now have of the impact, harm and trauma that domestic abuse visits on children. We were unhappy about that issue when the bill was passed, and I think that it is really critical that it is taken up, possibly through an amendment process.”⁵¹

7.26 The question of children as victim/survivors and the extent of legal protection came up again in the Scottish Government consultation on protective orders, concerning Domestic Abuse Protection Notices (“DAPNs”) and Domestic Abuse Protection Orders (“DAPOs”), for the Bill which became the Domestic Abuse (Protection) (Scotland) Act 2021. The Scottish Government asked consultees:

“Should such protection [DAPNs and DAPOs] 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?”⁵²

7.27 Responses received were mixed as to how best children should be protected:

⁴⁸ Scottish Government, *Policy Memorandum to the Domestic Abuse (Scotland) Bill* (Scottish Government, 2017) at para 85 (available at: <https://www.parliament.scot/bills-and-laws/bills/domestic-abuse-scotland-bill#target2>).

⁴⁹ COPFS Domestic abuse and stalking charges in Scotland, 10 September 2024 (available at: <https://www.copfs.gov.uk/publications/domestic-abuse-and-stalking-charges-in-scotland-2023-2024/html/>).

⁵⁰ I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) *Social and Legal Studies* 914 at p 924.

⁵¹ Criminal Justice Committee, *Post-legislative scrutiny of the Domestic Abuse (Scotland) Act 2018* (Scottish Government, 4 May 2023) SP Paper 358 5th Report, 2023 (Session 6). Evidence from Dr Marsha Scott, Chief Executive Officer, Scottish Women’s Aid at para 59 (available at: <https://sp-bpr-en-prod-cdnp.azureedge.net/published/%20CJ/2023/5/4/dc22c15c-8bfa-4421-ad25-168abf3084ed/CJ062023R5.pdf>).

⁵² Scottish Government, *Scottish Government consultation on protective orders for people at risk of domestic abuse* (Scottish Government, December 2018) at p 13 (available at: <https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/#:~:text=The%20consultation%20seeks%20views%20on%20proposals%20to%20create.their%20partner%20to%20live%20in%20the%20family%20home.>)

“Children should also be protected by the order.”⁵³

“Children who live with the victim all or part of the time should automatically be granted protective measures using the terminology of the Domestic Abuse offence child aggravation as set out in the new Domestic Abuse (Scotland) Act 2018. While we acknowledge that provision exists to protect vulnerable adults, under the Adult Support and Protection legislation and to protect children under the Children (Scotland) Act 1995 and the Children’s Hearing (Scotland) Act 2014, we do have concerns that considerable gaps exist in relation to vulnerable people who are not covered by this legislation.”⁵⁴

“We also know that children can be profoundly affected by being exposed to domestic abuse but the dynamics of a child being abused by a parent or sibling are recognised as distinct from those of domestic abuse in Scotland.”⁵⁵

7.28 Notably, both Scottish Women’s Aid and LGBT Youth Scotland suggested that the Scottish Government should protect children from domestic abuse using something akin to the ‘child aggravation’ under section 5 of the 2018 Act.⁵⁶ Ultimately the Scottish Government decided against including a child aggravation in the 2021 Act, but the 2021 Act does require a senior police constable, before making a DAPN, to take into account the welfare of any child whose interests the constable considers to be relevant to the making of the notice.⁵⁷

7.29 As these responses show, while there is clear consensus that children need protection, there is no unanimity as to how best to achieve that.

Comparative law and international obligations

7.30 In England, as in Scotland, children are generally not recognised as victims, when domestic abuse is perpetrated against others in the household. Section 76 of the Serious Crime Act 2015 introduces the offence of coercive or controlling behaviour in an intimate or family relationship. Although children are included in the definition of “relative”,⁵⁸ this only protects them when they are the victim of abuse directed at them, as defined in section 76(1): “[Person] A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive”.

⁵³ Response 576479501 to Question 8 from Dumfries and Galloway Violence Against Women Partnership (available at: https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/consultation/published_select_respondent?_b_index=0).

⁵⁴ Response 415270998 to Question 8 from LGBT Youth Scotland (available at: https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/consultation/published_select_respondent?_b_index=0).

⁵⁵ Response 580237450 to Question 8 from Police Scotland (Gordon McCreadie) (available at: https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/consultation/published_select_respondent?_b_index=0).

⁵⁶ Response 948810609 to Question 8 from Scottish Women’s Aid (available at: https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/consultation/view_respondent?uuld=948810609); “child aggravation” refers to section 5 of the Domestic Abuse (Scotland) Act 2018.

⁵⁷ 2021 Act, s 4(4)(b)(ii).

⁵⁸ S 76(6)(g) includes “relatives” within the scope of the offence, and “relative” is defined in s 63(1) of the Family Law Act 1996 as including children and grandchildren.

7.31 However, children have been formally recognised as victim/survivors of domestic abuse perpetrated by person A against person B in England and Wales in a limited way, under section 3 of the Domestic Abuse Act 2021. Section 3 applies where the behaviour of person A towards person B is domestic abuse, and there is a child who: “sees, hears or experiences the effects of domestic abuse” and is also related to person A or B.⁵⁹ The child must be under 18.⁶⁰ The application is limited under the Domestic Abuse Act 2021, however:

“[Section 3] only treats children as victims of domestic abuse for the purposes of the free-standing provisions in the Act. The section does not apply in relation to amendments made by the Act to other enactments, or to references elsewhere in legislation to victims of domestic abuse. That said... this section is expected to be applied more generally, for example by public authorities and front-line practitioners.”⁶¹

7.32 In New Zealand, the Family Violence Act 2018 provides that it is psychological abuse of a child where a person causes or allows the child to see or hear the abuse of a person with whom the child has a family relationship, or puts, or allows the child to be put at real risk of seeing or hearing such abuse.⁶²

7.33 Article 19 of the UNCRC requires State Parties to protect children from “physical and mental violence, injury or abuse... while in the care of parent(s), legal guardian(s) or any other person who has care of the child”. As Professor Tobin and Professor Cashmore observe, “violence” is not restricted to physical violence: the Committee on the Rights of the Child has stressed that “the use of the term violence ‘must not be interpreted in any way to minimise the impact of non-physical and non-intentional forms of harm’ and that all forms of harm under article 19 ‘carry equal weight’.”⁶³ This, coupled with the recognition that “[v]iolence need not be directed at children specifically for it to fall within the scope of article 19”,⁶⁴ means that exposure to domestic abuse is a form of mental violence in terms of Article 19, and has been explicitly recognised as such by the Committee on the Rights of the Child.⁶⁵

7.34 The European Court of Human Rights has also recognised that domestic abuse against a parent can breach the child’s human rights. In *Eremia v Moldova*, two daughters who experienced domestic abuse perpetrated by their father against their mother successfully established that their Article 8 rights had been breached by the State’s failure to take action against their father:

⁵⁹ A child is related to a person if (a) the person is a parent of, or has parental responsibility for the child, or (b) the person and the child are relatives (s 3(3)). “Parental responsibility” has the same meaning as in the Children Act 1989; “relative” has the meaning given by s 63(1) of the Family Law Act 1996 (all per the Domestic Abuse Act 2021, s 3(4)).

⁶⁰ Domestic Abuse Act 2021, s 3(4).

⁶¹ Explanatory Notes to the Domestic Abuse Act 2021, para 81 (available at: <https://www.legislation.gov.uk/ukpga/2021/17/notes/division/1/index.htm>).

⁶² Family Violence Act 2018, s 11(2). Note that s 11(3) explicitly excludes a victim from causing this psychological abuse, that is, the victim is not regarded as having caused the child to see or hear such abuse.

⁶³ J Tobin and J Cashmore, “Article 19. The Right to Protection against All Forms of Violence” in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (OUP, 2019), at p 694, citing the CRC General Comment 13, “The Right of the Child to Freedom From All Forms of Violence” (18 April 2011), at para 4.

⁶⁴ J Tobin and J Cashmore, “Article 19. The Right to Protection against All Forms of Violence” in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (OUP, 2019), at p 696.

⁶⁵ J Tobin and J Cashmore, “Article 19. The Right to Protection against All Forms of Violence” in J Tobin (ed) *The UN Convention on the Rights of the Child: A Commentary* (OUP, 2019), at p 696, citing the CRC General Comment 13, “The Right of the Child to Freedom From All Forms of Violence” (18 April 2011), at para 21.

“In the present case, the [daughters’] psychological well-being has been adversely affected by repeatedly witnessing their father’s violence against their mother in the family home... In the Court’s view, this amounts to an interference with the second and third applicants’ right to private life and respect for their home”.⁶⁶

7.35 The Istanbul Convention also provides that measures should be taken to ensure that children are afforded protection and support when witnesses of domestic abuse of one of their parents.⁶⁷ Notably, the Convention does not recognise children subject to abuse between adults as victims of that abuse.

Should children be recognised in the civil law as victims of domestic abuse directed at a parent?

7.36 Given the evidence of the highly damaging impact on children of living in an environment where domestic abuse is perpetrated, it is important to consider whether the civil law should recognise children as victim/survivors of domestic abuse themselves, where the abuse is perpetrated against a parent or other adult in their lives.

7.37 The question of expanding the definition of domestic abuse to include other relationships is discussed in Chapter 6, and consultees’ views are sought there on that particular issue. However, that question remains separate from the present issue of whether children should be seen as victim/survivors of domestic abuse which is targeted at a parent. Dr Cairns and Dr Callander acknowledge that recognising children as victims of domestic abuse could have particular consequences for the definition of domestic abuse itself. In particular, while they concede that where to draw the line of “relationship applicability” is beyond the scope of their article, they highlight that recognising children as victims could be used in order to challenge the framing of domestic abuse as intimate partner abuse.⁶⁸ Accordingly, recognising children as victims could be perceived to:

“... undermine the argument that there is a particular dynamic to intimate partner relationships that justifies excluding other relationships, characterised by trust and interdependence, from the scope of the offence.”⁶⁹

7.38 However, they also put forward the case for recognising children as victim/survivors in the specific context of intimate partner abuse: domestic abuse perpetrated by one parent or adult against another inevitably involves and impacts on any children who live with them. Such abuse is, in Cairns and Callander’s words, “intrinsically triadic in nature, with the harms experienced by the adult and the child/children stemming from a single source”.⁷⁰

7.39 As noted above, children need protection from the effects of living in a household with domestic abuse, whether or not they are also victims of child abuse at the hands of the perpetrator. This harm permeates every aspect of their lives, both through the fear and stress of living in a house with the abuser and through the impact on the victim/survivor parent.

⁶⁶ *Eremia v The Republic of Moldova* Application No 3564/11 – 28 May 2013, para 74.

⁶⁷ See Istanbul Convention, Article 26.

⁶⁸ I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) *Social and Legal Studies* 914, at p 923.

⁶⁹ I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) *Social and Legal Studies* 914, at p 923.

⁷⁰ I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) *Social and Legal Studies* 914, at p 923.

Further, Cairns and Callander contend that recognising the harm to children in a separate legal framework would obscure the harm that arises from the parent-to-parent abuse: “Subsuming children’s experiences within a different legislative framework (and not the core offence) would weaken recognition of the triadic nature of intimate partner abuse and obscure their victimhood in that context”.⁷¹

7.40 Taking these arguments into account, Cairns and Callander put forward the proposal that children need to be identified as “adjoined victims”⁷² of domestic abuse, in order to properly recognise the harmful effect of abusive behaviour. Their work is in the specific context of children as adjoined victims in the 2018 Act, in the criminal context. However, their arguments carry equal weight in the civil sphere, where it is recognised that child victim/survivors need protection alongside their parent victim/survivor. Cairns and Callander outline the problems inherent in failing to recognise the harm to children:

“... a legislative approach that does not recognise the abused parent/caregiver and child as victims together and simultaneously, but is instead engineered to separate their experiences, is more likely to lead to a decontextualisation of the coercive control. **In doing so, it risks obfuscating the responsibility of the perpetrator and mutualising responsibility for the ‘cascading harm’ which results from domestic abuse, and may create more room for the abused parent to be held responsible, and potentially criminalised, for harm caused to a child living in an abusive home.**”⁷³

7.41 Given the approach adopted by both the UNCRC and the ECtHR in relation to children who experience domestic abuse, we are persuaded by Cairns and Callander’s conclusion that it is important to recognise both the harm to the parent and the harm to the child who lives with them. We think Scots law should ensure that the civil framework of remedies for domestic abuse provides protection for both. In light of the evidence above concerning the damaging impact on children’s mental health, and their increased levels of fear, inhibition, anxiety and depression as a result of experiencing domestic abuse perpetrated in their family life, recognising children as adjoined victim/survivors would help ensure Scots law is compatible with the UNCRC.

7.42 Although children have not so far been recognised as adjoined victim/survivors in civil law, as already noted, there is some existing precedent for children to be protected in a civil action, in the context of domestic abuse in the home, such as section 4 of the 1981 Act/section 104 of the 2004 Act, which allows a parent to seek an exclusion order to protect any child of the family from the conduct of the non-applicant parent.⁷⁴ We therefore propose that children who live with domestic abuse or experience domestic abuse perpetrated against a parent or adult in their lives should be recognised in civil law as an “adjoined victim/survivor”.

⁷¹ I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) *Social and Legal Studies* 914, at p 928.

⁷² This is the term that Cairns and Callander propose in their article: I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) *Social and Legal Studies* 914.

⁷³ I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) *Social and Legal Studies* 914, at p 930, emphasis added.

⁷⁴ See the discussion at paras 7.16 and 7.17 above.

7.43 There are two important points here: (i) a child could only be an adjoined victim/survivor where there is an adult who suffers domestic abuse as the (primary) victim/survivor;⁷⁵ and (ii) where children are victim/survivors of abuse directly perpetrated against them, this would continue to be recognised as child abuse, separate from (and concurrent with) any harm they suffer as an adjoined victim/survivor.

7.44 In order for children to fall within the scope of “adjoined victim/survivor” in relation to a civil protection order for domestic abuse, it would be necessary to define the context in which this could happen. Again, Cairns and Callander address this in their work:

“As a starting point, we would suggest that the conditions to be met in relation to the child would be that they a) usually reside with the adult victim (B) and/or b) are under the care of, or significantly dependent upon, B. Whatever the final precise terms of these conditions, the notions of dependency on, and connectedness to, the adult victim should be key to the drafting in order to capture the interconnectedness of the harms detailed in this article.”⁷⁶

7.45 This also reflects the approach in England and Wales in the Domestic Abuse Act 2021, which defines a child as a victim where they are under 18 and related to the victim/survivor, or indeed the perpetrator.⁷⁷

7.46 We think there is merit in an approach which identifies an adjoined victim/survivor based on their relationship with the adult victim/survivor, and which relies on the dependency and close nexus between adult and child, without limiting it to the parent/child relationship. However, as in England and Wales, it is also possible that the child’s relationship could be with the perpetrator, rather than the victim/survivor. For example, this might happen where the child usually lives with their father and his new partner, and the father abuses the new partner. The child might not be dependent on the new partner, or under their care, but nevertheless they live in a household where domestic abuse is a daily reality.⁷⁸ Accordingly, we propose that a child should be recognised as an adjoined victim/survivor where they have a family connection with either (or both) the victim/survivor and the perpetrator. This also reflects the approach taken in the Children’s Hearings (Scotland) Act 2011, where the grounds for referral refer to a “close connection” which arises where the child lives in the same household as the person or has significant contact with them.⁷⁹ We also think there is merit in defining a child as someone under the age of 18.⁸⁰

7.47 If children were to be recognised in civil law as adjoined victim/survivors, this could have a number of legal consequences.

⁷⁵ Cairns and Callander also make this point in the criminal context, noting that the offence “cannot be committed solely against them [children].”: I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) Social and Legal Studies 914 at p 931.

⁷⁶ I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) Social and Legal Studies 914 at p 931.

⁷⁷ Domestic Abuse Act 2021, s 3.

⁷⁸ This would be the case even where the child’s residence was split between two different households: when living with the father (in this example), the child would experience abuse, and the right to protection should not be defeated by the fact that the child also lives in another household on other days of the week.

⁷⁹ Children’s Hearings (Scotland) Act 2011, s 67(3).

⁸⁰ As per the Domestic Abuse (Scotland) Act 2018, s 5; and the Domestic Abuse Act 2021, s 3.

7.48 One would be that the victim/survivor could seek a civil protection order which also refers to and protects any adjoined victim/survivors. This could encompass a common law interdict. However, we would also propose that the statutory delict set out in Chapter 5 should make explicit reference to adjoined victims, and recognise that, where a party establishes that a child is an adjoined victim/survivor, they are entitled to the statutory remedies provided for. Thus, any element of a Domestic Abuse Civil Protection and Redress Order (“DACPRO”) (such as the civil protection order or an award of damages) could be made in respect of an adjoined victim/survivor, as part of or in addition to any order made in respect of the victim/survivor. However, the *ability* of a victim/survivor to seek a civil protection order which also protects an adjoined victim should not give rise to an *obligation* to do so. As is recognised in other jurisdictions,⁸¹ this should not place any obligation or responsibility on the victim/survivor to take any action, civil or criminal: the victim/survivor should never be held responsible for the abuse perpetrated by the wrongdoer.

7.49 A second possible consequence is that where a child has capacity (in terms of section 2 of the Age of Legal Capacity (Scotland) Act 1991), and is an adjoined victim/survivor, they could seek a civil protection order in their own name.⁸² Again, if a delict of domestic abuse is introduced, along with corresponding civil remedies, as set out in Chapter 5, an adjoined victim/survivor should be able to seek any of the orders available to a victim/survivor. Enabling a child to seek a civil remedy would recognise the capacity and autonomy of the child and would respect their rights under the UNCRC.⁸³ A number of those with whom we have engaged during this project have emphasised how important this is to children, to be able to take control.⁸⁴

7.50 We note that the Children (Scotland) Act 2020 imposes a duty on the Scottish Government to ensure that child advocacy services are available to children in relation to proceedings under section 11 of the Children (Scotland) Act 1995, and we support extending this to proceedings in respect of children as adjoined victim/survivors of domestic abuse.

7.51 The third possible consequence would be to allow a parent or guardian of an adjoined victim/survivor to seek a civil protection order in respect of the child, even without the victim/survivor taking any legal steps. This might be appropriate where, for example, the perpetrator is the child’s father and the victim/survivor is his partner, but she is not the mother of the child who experiences the abuse. In this situation, the victim/survivor may not wish to seek any civil order for herself, or for any children involved, and it is fundamental that she is not under any obligation to do so. However, the child’s mother may well wish to seek protection on behalf of her child, where the child is an adjoined victim/survivor. Again, if the proposed statutory delict recognised the existence of an adjoined victim/survivor, it would be possible

⁸¹ For instance, the Family Violence Act 2018 (NZ) s 11(3) makes clear that, while exposing a child to seeing or hearing instances of family violence is in and of itself family violence, victims of family violence cannot and should not be held responsible for exposing their children to it.

⁸² Questions of legal aid would be very important here and would need to be considered as part of the Government’s wider policy on access to legal aid.

⁸³ Including the Article 5 right to evolving capacity, allowing children to take decisions for themselves as they grow up.

⁸⁴ C Houghton, “Participation of Children and Young People Experiencing Domestic Abuse”, in C Humphreys, C Houghton and J Ellis, *Literature Review: Better Outcomes for Children and Young People Experiencing Domestic Abuse*, The Scottish Government, 2008, at pp 43-44 (available at: <https://dera.ioe.ac.uk/id/eprint/9525/1/0064117.pdf>).

for a parent or guardian to seek a DACPRO in respect of an adjoined victim/survivor. We seek views on all these options below.

7.52 As with most orders concerning children,⁸⁵ and to comply with the compatibility duty under the UNCRC (Incorporation) (Scotland) Act 2024,⁸⁶ when deciding whether to make civil protection orders in respect of adjoined victim/survivors under 18, the court would need to take into account the best interests of the child and the views of the child. This would enable the child to express the view that (for example) they do not wish to be recognised as an adjoined victim, and (as with orders made under s 11 of the Children (Scotland) Act 1995), the court would take their views into account when making any decision on this matter. While the child would be able to express a view, the ultimate decision would be one for the court, reflecting the concept of “a voice not a choice”. This ensures the child is protected from being put in a position where they are required to “choose” between parents, or take responsibility for being recognised as an adjoined victim. The court would of course also take into account any child contact orders which may be in place between the adjoined victim/survivor and the perpetrator. We discuss the interaction between civil protection orders and child contact orders in more detail in Part 3 of this chapter.

7.53 A further issue is the appropriate terminology. Should a child in this situation be referred to as an “adjoined victim/survivor”? In adopting (and adapting) Cairns and Callander’s terminology of “adjoined victims”, we are conscious that neither “co-victim” nor “primary/secondary victims” is appropriate. The parent is the victim/survivor of the domestic abuse: the child is the victim of experiencing (often intensely) that abuse perpetrated against a parent. The abuse they experience is different, and they are not co-victims in that sense. However, framing one as the primary (or direct) victim and one as the secondary (or indirect) victim risks diminishing the impact of the abuse on the child, and is therefore not appropriate terminology either.⁸⁷ Instead, the child is adjoined to the parent. In early discussions, some stakeholders expressed concerns that this made the child sound like the “property” of the parent.⁸⁸ It goes without saying that a child should never be treated in any way as the property of a parent, and we would certainly wish to avoid that connotation. We therefore propose to adopt Cairns and Callander’s terminology (modified to include “survivor”) for the reasons they give, especially the interconnectedness between the parent and the child as victims of the abuse:

“In adopting the term ‘adjoined victim’, we are not implying that a child’s victimhood is ‘collateral’ or an ‘add-on’, but rather that the harms experienced by the child and adult victim are inextricably connected. While the terms ‘distinct victim’ or ‘victim in their own right’ also have merit and appear, at first sight, to better recognise children’s autonomy

⁸⁵ For example, those under s 11 of the Children (Scotland) Act 1995.

⁸⁶ UNCRC (Incorporation) (Scotland) Act 2024, s 6.

⁸⁷ I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) *Social and Legal Studies* 914, at p 920.

⁸⁸ In subsequent correspondence, Cairns and Callander have emphasised that this is fundamentally at odds with their argument. The wording ‘adjoined victim’ was chosen in order to simultaneously recognise that a child is an identifiable and agentic victim of intimate partner domestic abuse where it occurs in their living environment, and that the child’s victim status (and consequent legal protection) can arise only where the adult victim experiences abuse and not in isolation. The term is intended to emphasise the shared experience of intimate partner domestic abuse and the connectedness of the harm experienced by adult and child. For a full explanation of why the term ‘adjoined victim’ was chosen and why they think it is more appropriate than other alternatives, see I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) *Social and Legal Studies* 914, at pp 920-921.

as victims, they risk implying that a child’s victim status can arise even if the adult victim did not experience abuse.”⁸⁹

7.54 We are aware that these proposals would mark a different approach in civil law to that in criminal law under the 2018 Act. However, the operation of the civil law here is not integrated with the criminal law at present. The criminal approach of a statutory “aggravation” (which results in a harsher sentence) could have no significance in the civil context, where the question is identifying who needs protection through a civil order. Accordingly, the purpose of recognising a child as an “adjoined victim” in the civil law would be to ensure that children can benefit from the appropriate protection by way of a civil protection order.

7.55 Taking all these points together, we therefore ask:

46. Should a child under 18 be recognised as an adjoined victim/survivor of abuse perpetrated by or against a parent or connected adult in their life?

47. Should a civil protection order be available for a child who is an adjoined victim/survivor:

(a) As part of a civil protection order/DACPRO sought by the victim/survivor;

(b) If sought by the adjoined victim/survivor themselves, where they have capacity;

(c) If sought by a parent/guardian on their behalf?

Part 2: Peer to Peer Abuse: Children and Young People who Experience Domestic Abuse within their own Relationships

7.56 Children and young people can and do experience abuse in their own relationships, at the hands of a boyfriend or girlfriend. A “Whole School Framework on Preventing and Responding to Gender Based Violence”, published by the Scottish Government in 2023, reported that 37% of girls and young women report experiencing sexual harassment in school, while 6% of boys and young men reported it.⁹⁰ In 2009, Barter et al., in partnership with NSPCC, conducted research on partner exploitation and violence in teenage intimate relationships.⁹¹ The study analysed 1,353 questionnaire responses from young people aged between 13 and 16 across eight secondary schools in the UK (four in England, two in Scotland

⁸⁹ I Cairns and I Callander, ‘Gold Standard Legislation for Adults Only: Reconceptualising Children as ‘Adjoined Victims’ under the Domestic Abuse (Scotland) Act 2018’ (2022) 31(6) Social and Legal Studies 914, at pp 920-921, reference omitted.

⁹⁰ The Framework, at p 7 (available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2024/03/preventing-responding-gender-based-violence-whole-school-framework/documents/preventing-responding-gender-based-violence-whole-school-framework/preventing-responding-gender-based-violence-whole-school-framework.pdf>).

⁹¹ C Barter et al., ‘Partner exploitation and violence in teenage intimate relationships’ (NSPCC, 2009) (available at: <https://library.nspcc.org.uk/HeritageScripts/Hapi.dll/filetransfer/2009PartnerExploitationViolenceTeenageIntimateRelationshipsReport.pdf?CookieCheck=45569.5941990741&filename=CC18C70DB7C8C3D49403BB94EB176F95207E5F66235DCA89651F5ED2BA5DA9311A3547010EB17451D2DDDA019569BD581EA0CD5852636BDD968745317A85651128D12EF22B1D8B23AA1CBDA84D84EB67F86B255BFB5E7792F07C29346AB0EACED89D912BBE005CFD3EA132874AE12EE97526F658D9A32AE351ECCF6FAE716321C872BCDD7695C70A451474B8274A369BCBCE81974DAB2300BAA0B2F01C&DataSetName=LIVEDATA>).

and two in Wales).⁹² In responses to the study, 25% of girls and 18% of boys reported experiencing some form of physical partner violence; and 72% of girls and 51% of boys reported some form of emotional partner violence (including shouting, screaming in their face, being called hurtful names and having negative things said about their appearance, body, friends and family).⁹³

7.57 Other research, conducted in 2017 by SafeLives, found that 49% of boys and 33% of girls aged 13 to 14 thought hitting a partner would be ‘okay’ in at least one of the 12 scenarios they were presented with.⁹⁴ Data collected by SafeLives shows that:

“... young people, including those below 16, can experience all forms of domestic abuse and the likelihood of experiencing high severity abuse is no different to adults. Indeed, the data suggests the levels of high severity abuse may be highest for the youngest age group.”⁹⁵

7.58 Recent Scottish research published in 2022, conducted by YWCA Scotland and Young Women Rise, and commissioned by Scottish Women’s Aid, collected data from 479 participants aged 12-25 across Scotland. Of these, 36% were in or had been in an intimate relationship with someone who was abusive or harmed them physically or emotionally, while 74% knew someone who had been in an intimate relationship with someone who had abused or harmed them.⁹⁶

7.59 There are unique risks associated with domestic abuse amongst young people: there can be a level of acceptance about abuse in young people’s relationships because it may be the first romantic relationship they have entered, so they are unaware of what is and is not normal or acceptable.⁹⁷ The statutory guidance on the Domestic Abuse Act 2021 (in England and Wales) notes that: “Young people may face barriers, relating to their age or another protected characteristic, in disclosing abuse or accessing services. They may also be inherently more vulnerable to abuse because it is harder for them to distinguish between

⁹² C Barter et al., ‘Partner exploitation and violence in teenage intimate relationships’ (NSPCC, 2009) (available at: <https://library.nspcc.org.uk/HeritageScripts/Hapi.dll/filetransfer/2009PartnerExploitationViolenceTeenageIntimateRelationshipsReport.pdf?filename=CC18C70DB7C8C3D49403BB94EB176F95207E5F66235DCA89651F5ED2BA5DA9311A3547010EB17451D2DDDA019569BD581EA0CD5852636BDD968745317A85651128D12EF22B1D8B23AA1CBDA84D84EB67F86B255BFB5E7792F07C29346AB0EACED89D912BBE005CFD3EA132874AE12EE97526F658D9A32AE351ECCF6FAE716321C872BCDD7695C70A451474B8274A369BCBCE81974DAB2300BAA0B2F01C&DataSetName=LIVEDATA> at pp 13 and 16).

⁹³ C Barter et al., ‘Partner exploitation and violence in teenage intimate relationships’ (NSPCC, 2009). (available at: <https://library.nspcc.org.uk/HeritageScripts/Hapi.dll/filetransfer/2009PartnerExploitationViolenceTeenageIntimateRelationshipsReport.pdf?filename=CC18C70DB7C8C3D49403BB94EB176F95207E5F66235DCA89651F5ED2BA5DA9311A3547010EB17451D2DDDA019569BD581EA0CD5852636BDD968745317A85651128D12EF22B1D8B23AA1CBDA84D84EB67F86B255BFB5E7792F07C29346AB0EACED89D912BBE005CFD3EA132874AE12EE97526F658D9A32AE351ECCF6FAE716321C872BCDD7695C70A451474B8274A369BCBCE81974DAB2300BAA0B2F01C&DataSetName=LIVEDATA>, at p 57).

⁹⁴ SafeLives, *Safe Young Lives: Young People and Domestic Abuse* (SafeLives 2017), at p 11 (available at: <https://safelives.org.uk/knowledge-hub/spotlights/spotlight-3-young-people-and-domestic-abuse>).

⁹⁵ SafeLives, *Safe Young Lives: Young People and Domestic Abuse* (SafeLives 2017), at p 7 (available at: <https://safelives.org.uk/knowledge-hub/spotlights/spotlight-3-young-people-and-domestic-abuse>).

⁹⁶ YWCA Scotland – the Young Women’s Movement and Scottish Women’s Aid, *The Rise Report Final*, 2022, at pp 8-10 (available at: <https://womensaid.scot/wp-content/uploads/2022/07/The-Rise-Report-Final.pdf>).

⁹⁷ Home Office, *Cross-government Definition of Domestic Violence: A Consultation, summary of responses* (Home Office, 2012) (available at: <https://www.gov.uk/government/consultations/cross-government-definition-of-domestic-violence-consultation>).

normal and abusive behaviours”.⁹⁸ There is also a risk that some victim/survivors may not identify as victims of domestic abuse, because they are not living with their abuser, so there is no “domestic” element.⁹⁹

7.60 In this Part of the chapter, we explore two separate issues in relation to young people and domestic abuse: (i) children or young people under 16 seeking a civil protection order to protect them from domestic abuse; and (ii) children and young people under 16 who are perpetrating domestic abuse being subject to a civil protection order. We refer to the person who has suffered the abuse as the victim/survivor, and the person who has perpetrated the abuse as the person who has caused hurt and harm.

7.61 Scots law has a range of different ages which determine when children are subject to certain responsibilities and benefit from certain rights. For example, the age of criminal responsibility is 12;¹⁰⁰ parental responsibilities and rights almost all fall away at 16;¹⁰¹ and the statutory aggravator under the Domestic Abuse (Scotland) Act 2018 applies in respect of children until they turn 18.¹⁰² In the civil context, the law is contained in the Age of Legal Capacity (Scotland) Act 1991, which sets the age of legal capacity at 16 years, before making specific provision for those under 16. Once a young person reaches the age of 16, they have legal capacity in relation to civil matters. For this reason, we focus on the rights and responsibilities of children under 16 years old.

Civil protection orders for victim/survivors under 16

7.62 The Age of Legal Capacity (Scotland) Act 1991 (the “1991 Act”) provides that a person under the age of 16 has legal capacity to instruct a solicitor, in connection with any civil matter, where that person has a general understanding of what it means to do so.¹⁰³ A person of 12 years or more is presumed to be of sufficient age and maturity to have such understanding.¹⁰⁴ The 1991 Act also states that where someone has capacity to instruct a solicitor, they also have capacity to sue in any civil proceedings.¹⁰⁵ Accordingly, where someone under the age of 16 is a victim/survivor of domestic abuse, and they have capacity in terms of the 1991 Act, they can seek a civil protection order, such as an interdict or non-harassment order, to protect them from that harm.¹⁰⁶ This also extends to an action for damages: “children aged 12 or over may raise an action for damages, obtain decree, and sign any discharge in an extra-judicial settlement”.¹⁰⁷ This is very much in keeping with the ethos of the UNCRC, which aims to respect the autonomy and capacity of children: Tobin and Cashmore state that children “must

⁹⁸ Home Office, Domestic Abuse: Statutory Guidance, July 2022 para 153 (available at: [https://assets.publishing.service.gov.uk/media/62c6df068fa8f54e855dfe31/Domestic Abuse Act 2021 Statutory Guidance.pdf](https://assets.publishing.service.gov.uk/media/62c6df068fa8f54e855dfe31/Domestic%20Abuse%20Act%202021%20Statutory%20Guidance.pdf)).

⁹⁹ The Rise Report noted that, while “whilst most respondents understood the term ‘domestic abuse’ there were misconceptions about who domestic abuse can affect. They described how domestic abuse is only when you live with your abuser, or that it can be any kind of abuse that happens in the home”: YWCA Scotland – the Young Women’s Movement and Scottish Women’s Aid, The Rise Report Final, 2022, at p 13 (available at: <https://womensaid.scot/wp-content/uploads/2022/07/The-Rise-Report-Final.pdf>). See also Ch 1, paras 1.42 to 1.43 above.

¹⁰⁰ Age of Criminal Responsibility (Scotland) Act 2019.

¹⁰¹ Children (Scotland) Act 1995, ss 1 and 2.

¹⁰² Domestic Abuse (Scotland) Act 2018, s 5.

¹⁰³ For a discussion of this provision, see K McK Norrie, *The Law Relating to Parent and Child in Scotland*, (SULI, 3rd ed, 2013), para 5.11.

¹⁰⁴ 1991 Act, s 2(4A).

¹⁰⁵ 1991 Act, s 2(4B).

¹⁰⁶ 1991 Act, s 2(4A) and (4B).

¹⁰⁷ A Paton, *McEwan and Paton on Damages for Personal Injuries in Scotland*, (Sweet and Maxwell, 2024), para 8-17.

be recognized as agents with evolving capacity whose expertise in their own lives must inform the measures to ensure their effective protection, consistent with their age and level of maturity”.¹⁰⁸

7.63 The position under the 1991 Act differs from the recently enacted (and not yet in force) Domestic Abuse (Protection) (Scotland) Act 2021. There, Domestic Abuse Protection Notices (DAPNs) and Domestic Abuse Protection Orders (DAPOs) may only be made in relation to a person who is aged 18 or over, to protect a person who is aged 16 or over.¹⁰⁹ The Scottish Government justified this approach on the basis that the specific purpose of DAPNs and DAPOs is to remove someone from their home, based on the risk they pose to their intimate partner with whom they are living.¹¹⁰ If a child under 16 is living with an intimate partner in a relationship, that is likely to give rise to urgent safeguarding and child protection concerns, which would necessitate state involvement and specific child protection measures,¹¹¹ such as a referral to the Children’s Reporter¹¹² or to the local authority social work department. In contrast, where a child under 16 is in an abusive relationship but not living with their partner, DAPNs and DAPOs will not be available, but civil protection orders may well be required to protect the child victim/survivor. There is no justification for depriving a victim/survivor, of any age, of the option to seek a private law remedy.

7.64 It is important to emphasise that having capacity in terms of the 1991 Act to seek civil protection orders enables children who are victim/survivors of domestic abuse in their own relationships to secure protection. It is distinct from any remedies and protections which may be appropriate where there is child abuse, and this remains a separate issue, unaffected by the protection available to children who are victim/survivors of domestic abuse. Moreover, the right of a child to seek a civil protection order for domestic abuse does not preclude separate child protection measures being taken by the state, if these are necessary, in addition to any private law action taken by the child.

Civil protection orders against persons under 16 who cause hurt and harm

7.65 The law currently recognises that a child under 16 who has legal capacity can defend a civil action. The 1991 Act states: “A person who by virtue of subsection (4A) above has legal capacity to instruct a solicitor shall also have legal capacity to sue, **or to defend**, in any civil

¹⁰⁸ J Tobin and J Cashmore, “Article 19. The Right to Protection against All Forms of Violence” in J Tobin (ed) *The UN Convention on the Rights of the Child : A Commentary* (OUP, 2019), at p 690. See also UNCRC, Article 5.

¹⁰⁹ 2021 Act, s 1(1).

¹¹⁰ 2021 Act, s 1(1)(b)(ii) specifically defines the victim of domestic abuse as someone “with whom [the perpetrator] lives some or all of the time.” See also the statement by Patrick Down MSP in the Stage 1 debate on the Domestic Abuse (Protection) (Scotland) Bill (First Meeting, 15 December 2020) (available at: <https://www.parliament.scot/bills-and-laws/bills/domestic-abuse-protection-scotland-bill#target2>): “The reason for having slightly different thresholds is that we did not think that it would be appropriate for the power to be used to require the removal of someone who is legally a child from their home. We have therefore set the age limit for the suspected perpetrator at 18. However, we recognise that a small number of 16 or 17-year-olds might live with abusive older partners. In such cases, we think it appropriate that the power should exist to provide protection for them. I expect that that would come into play in only a small number of cases”. If we were to be asked why the limit had been set at 16, we would say that that is the minimum age for marriage. It is unlikely that someone aged under 16 would be living with a partner or ex-partner, but in such cases other child protection measures might be more appropriate—for example, the power to refer cases to the children’s reporter.”

¹¹¹ While living together in an intimate relationship does not inevitably involve sexual intimacy, we also note that sexual activity by a person over 16 with a child under 16 is a criminal offence in respect of the person over 16, in terms of the Sexual Offences (Scotland) Act 2009, Part 4.

¹¹² In terms of the Children’s Hearings (Scotland) Act 2011.

proceedings”.¹¹³ Capacity is determined by whether the person has a general understanding of what it means to instruct a solicitor.¹¹⁴ A person who is 12 or over shall be presumed to be “of sufficient age and maturity to have such understanding”.¹¹⁵ Thus, a child over 12 is presumed to have capacity to defend a civil action which is raised against them, such as an action for an interdict or non-harassment order. The 1991 Act also emphasises that the capacity of children under 16 in relation to civil actions is separate from, and without prejudice to, their legal capacity in any criminal matter.¹¹⁶

7.66 Although this project concerns civil remedies, the prospect of criminalisation arises indirectly. If a power of arrest and a domestic abuse interdict determination is attached to a civil interdict then breach of that interdict is a criminal offence.¹¹⁷ Where a non-harassment order is made under the Protection from Harassment Act 1997, breach of that non-harassment order is a criminal offence.¹¹⁸ The proposed civil protection order set out in Chapter 5 would give rise to criminal offences if breached. There is therefore potential at present for a civil action sought against a child under 16 to give rise to criminal law consequences.

7.67 In respect of the Domestic Abuse (Protection) (Scotland) Act 2021, evidence to the Scottish Parliament from the Children and Young People’s Commissioner Scotland was strongly in favour of not introducing criminal liability for those under 18 years:

“... [it is] important to recognise the additional protections all children under 18 are entitled to under the UNCRC. We therefore believe it is proportionate that Person A [the perpetrator under the 2021 Act] must be at least 18 years of age.”¹¹⁹

7.68 The Children and Young People’s Commissioner also noted that “we would stress that this should not mean no action is taken to protect the rights of both child perpetrators and child victims of domestic abuse”.¹²⁰

7.69 In England and Wales, the Justice Committee considering Domestic Abuse Protection Notices and Domestic Abuse Protection Orders under the Domestic Abuse Act 2021 found it difficult to decide on an age limit, but concluded on balance that an age limit of 16 should apply, because of the risk of criminalising those under 16.¹²¹ Separately, a recent English

¹¹³ 1991 Act, s 2(4B), emphasis added. See also K McK Norrie, *The Law Relating to Parent and Child in Scotland*, (SULI, 3rd ed, 2013), para 5.11.

¹¹⁴ 1991 Act, s 2(4A).

¹¹⁵ 1991 Act, s 2(4A).

¹¹⁶ 1991 Act, s 2(4C).

¹¹⁷ A power of arrest can be attached under s 1 of the Protection from Abuse (Scotland) Act 2001, and a domestic abuse interdict determination can be made under s 2 of the Domestic Abuse (Scotland) Act 2011. Under s 3(2)(d) of the Domestic Abuse (Scotland) Act 2011, there is no need for the perpetrator and victim to be living together, so long as they are in an “intimate personal relationship”. For further detail on powers of arrest and domestic abuse interdict determinations, see further Ch 4, paras 4.52 to 4.60, and 4.68 to 4.74.

¹¹⁸ Protection from Harassment Act 1997, s 9, and see further Ch 4, para 4.87.

¹¹⁹ Children and Young People’s Commissioner Scotland, *Written Evidence Submission to the Justice Committee on the Domestic Abuse (Protection) (Scotland) Bill* (CYPC, December 2020) at p 2 (available at: https://yourviews.parliament.scot/session-5/domestic-abuse-protection-bill/consultation/published_select_respondent).

¹²⁰ Children and Young People’s Commissioner Scotland, *Written Evidence Submission to the Justice Committee on the Domestic Abuse (Protection) (Scotland) Bill* (CYPC, December 2020) at p 2 (available at: https://yourviews.parliament.scot/session-5/domestic-abuse-protection-bill/consultation/published_select_respondent).

¹²¹ House of Commons and House of Lords Joint Committee on the Draft Domestic Abuse Bill, *Draft Domestic Abuse Bill First Report of Session 2017-19* (HL and HC, 14 June 2019) HL Paper 378 HC 2075, at para 41 (available at: https://publications.parliament.uk/pa/jt201719/itselect/itddab/2075/207505.htm#_idTextAnchor007).

decision has recognised that a civil protection order is competent in respect of a person who causes hurt and harm under the age of 16,¹²² and breach of a non-molestation order is an offence under section 42 of the Family Law Act 1996.¹²³

7.70 There are strong arguments against criminalising children under 16,¹²⁴ and this issue has recently been raised by the United Nations Committee on the Rights of the Child, in its most recent Concluding Observations on the sixth and seventh periodic reports of the United Kingdom, published in 2023. The Committee expressed its “deep concern” about the low minimum ages of criminal responsibility and criminalisation of children in all jurisdictions in the UK.¹²⁵

7.71 Protecting the rights of children who cause hurt and harm has to be balanced against protecting the rights of the victim/survivors, including their right to seek protection through civil protection orders. To afford a victim/survivor less protection solely on the basis of the age of the person who causes hurt and harm risks minimising the harm to the victim/survivor. This may deter victim/survivors from reporting the domestic abuse or seeking help. Recognising that domestic abuse can happen in relationships between teenagers would also send a clear signal that domestic abuse should not be tolerated. This in turn may reduce any “normalising” of domestic abuse and abusive relationships, and instead promote positive and respectful relationships from a young age.

7.72 The Scottish Government has recently considered the age of criminal liability in general, concluding that the age of criminal responsibility in Scotland should be 12 years.¹²⁶ A further review is underway and due to report by December 2024 in respect of the operation of the legislation and to consider a future age of criminal responsibility.¹²⁷ Any decision as to the age of criminal responsibility for domestic abuse would therefore be a policy matter for the Scottish Government.

7.73 Moreover, any civil protection order which is made against a defender does not automatically give rise to criminal liability. It is only if that order is breached that there could be criminal liability. The 1991 Act currently allows a child under 16 to defend a civil action, including an interdict or non-harassment order in circumstances that could give rise to criminal liability. In the course of this project to date, no one has raised any concerns with us about the status quo.

¹²² *D (acting by her litigation friend) v T* [2023] EWFC 97.

¹²³ Family Law Act 1996, s 42A(1).

¹²⁴ See “Justice for Children and Young People: vision and priorities 2024-26”, published by the Scottish Government, June 2024, at pp 5-6 (available at:

<https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2024/06/justice-children-young-people-vision-priorities-2024-26/documents/justice-children-young-people-vision-priorities-2024-26/justice-children-young-people-vision-priorities-2024-26/govscot%3Adocument/justice-children-young-people-vision-priorities-2024-26.pdf>).

¹²⁵ Committee on the Rights of the Child, Concluding Observations, 2023, at para 53 (available at: <https://digitallibrary.un.org/record/4013807?v=pdf>). Concerns have also been expressed by the Children and Young People’s Commissioner Scotland (available at: <https://www.cypcs.org.uk/positions/age-of-criminal-responsibility/#:-:text=In%20May%202019%20the%20Scottish,force%20on%2017%20December%202021>).

¹²⁶ Age of Criminal Responsibility (Scotland) Act 2019.

¹²⁷ “Justice for Children and Young People: vision and priorities 2024-26”, published by the Scottish Government, June 2024, at p 8 (available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/strategy-plan/2024/06/justice-children-young-people-vision-priorities-2024-26/documents/justice-children-young-people-vision-priorities-2024-26/govscot%3Adocument/justice-children-young-people-vision-priorities-2024-26.pdf>).

Conclusion

7.74 In light of the fact that the current legal protection recognises the capacity of a child under 16 both to pursue and to defend a civil action, and that domestic abuse is known to be a significant issue in relationships at this age, we are of the view that the existing civil regime is appropriate. We propose no change. This would allow children under 16, who have capacity, to continue to pursue and defend civil actions in respect of domestic abuse, including (if introduced) in respect of the statutory delict of domestic abuse and the proposed statutory remedies in respect of that delict.

7.75 In addition to the current regime, there are two other options which are worth exploring.

Domestic abuse and education

7.76 If the person who causes hurt and harm and the victim/survivor attend the same school, the abuse is highly likely to adversely impact on the victim/survivor's education. We are aware from stakeholders of victims of domestic abuse in peer-to-peer relationships who have dropped out of school, rather than face the person who is causing hurt and harm in and around the building. Where domestic abuse occurs in a peer-to-peer relationship when both the victim/survivor and the person who is causing hurt and harm attend the same school, it is critical that the school addresses the domestic abuse and provides appropriate support to the victim/survivor. Failure to do so may well result in the victim/survivor dropping out of school, with the consequence that they are constructively excluded from school, and deprived of their education.

7.77 In 2023, the Scottish Government published guidance on gender based violence ("GBV") in schools: "Preventing and Responding to Gender Based Violence: A Whole School Framework" (the "Framework").¹²⁸ It defines gender based violence, including domestic abuse, specifying that this includes violence and abuse perpetrated within an intimate relationship where the parties are children or young people.¹²⁹ The Framework offers guidance as to how schools should offer support where they attend the same school. Importantly, this guidance emphasises that *all* children have a right to education and to a safe environment:

"Responses to incidents of GBV in schools should therefore be underpinned by the principle that all children and young people in a school community have the right to education, safety and justice, and that all children, young people, and staff have the right to learn and work in an environment free from violence and abuse."¹³⁰

7.78 The Framework notes that schools have an important role to play, with partners, in supporting children and young people who have experienced GBV, whether the abuse takes place within the school or outside it.

7.79 There are several checklists of what steps a school must consider and take, on being informed of an incident of GBV, in respect of: the incident itself; the person who has

¹²⁸ Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2024/03/preventing-responding-gender-based-violence-whole-school-framework/documents/preventing-responding-gender-based-violence-whole-school-framework/preventing-responding-gender-based-violence-whole-school-framework/govscot%3Adocument/preventing-responding-gender-based-violence-whole-school-framework.pdf>.

¹²⁹ The Framework, p 5.

¹³⁰ The Framework, p 24.

experienced the GBV, which would include domestic abuse; the person who perpetrated the GBV; and the wider school community.¹³¹ As well as providing guidance on responding to domestic abuse, as part of GBV, the Framework also includes guidance on how to prevent it, including the need for schools to have GBV policies and procedures which accord with legislation and the National Guidance for Child Protection, and which should be set within the framework of national education policy and GIRFEC, and underpinned by the principles of the UNCRC.¹³² Education on GBV is particularly important in challenging problematic views which normalise GBV and to enable children and young people to identify GBV if it occurs in their own relationships.¹³³

7.80 The Framework focuses on managing domestic abuse (and GBV more widely) within the school community. Where this is not possible, one option would be the exclusion of the person causing hurt and harm. The Framework does not discuss exclusion, but does refer to 2017 guidance published by the Scottish Government, “Included, Engaged and Involved Part 2: A Positive Approach to Preventing and Managing School Exclusions”.¹³⁴

7.81 Exclusion from school is only possible where the statutory test is met. Regulation 4 of the Schools General (Scotland) Regulations 1975¹³⁵ provides that an education authority shall not exclude a pupil from school unless the authority:

“are of the opinion that the parent of the pupil refuses or fails to comply, or to allow the pupil to comply, with the rules, regulations, or disciplinary requirements of the school”;

or

“consider that in all the circumstances to allow the pupil to continue his attendance at the school would be likely to be seriously detrimental to order and discipline in the school or the educational well-being of the pupils there.”

7.82 There is no explicit mention of domestic abuse. It would be a matter for the education authority to show that the conduct of the person who caused hurt and harm met either of these grounds of exclusion (specifically the second one, as the first is directed at the pupil’s parent). The duration of any exclusion is a matter for the education authority to determine, but “[i]t should be proportionate and take into account individual circumstances”.¹³⁶ The risks of exclusion must also be taken into account, including the evidence that exclusion impacts negatively on wellbeing, attainment, and later offending behaviour: “the negative impact of exclusion is cumulative. Children and young people can often become involved in a negative cycle of exclusion and non-attendance which are very likely to reduce social capital and significantly impact on later life chances”.¹³⁷ While the Scottish Government guidance rightly

¹³¹ The Framework, pp 26-28.

¹³² The Framework, p 13.

¹³³ The Framework, p 13.

¹³⁴ Available at: <https://www.gov.scot/binaries/content/documents/govscot/publications/advice-and-guidance/2017/06/included-engaged-involved-part-2-positive-approach-preventing-managing-school/documents/00521260-pdf/00521260-pdf/govscot%3Adocument/00521260.pdf>.

¹³⁵ SI No. 1135 (1975), as amended.

¹³⁶ Scottish Government, “Included, engaged and involved, Part 2: preventing and managing school exclusions”, (published 19 June 2017) at section 8 – Exclusions, management of, and ways forward.

¹³⁷ Scottish Government, “Included, engaged and involved, Part 2: preventing and managing school exclusions”, (published 19 June 2017) at section 5 – The impact of exclusion on children and young people. See further empirical research cited therein: (available at: <https://www.gov.scot/publications/included-engaged-involved-part-2-positive-approach-preventing-managing-school/pages/6/>).

highlights the negative impact of exclusion on the pupil who has caused hurt and harm, we also note that there is an equal risk to the pupil who has suffered the abuse: if they do not feel safe and supported at school, they are being constructively excluded, with the attendant consequences for wellbeing and attainment then potentially being experienced by them.

Referral to the Children’s Reporter

7.83 One route which might offer appropriate support to the person who caused hurt and harm would be to seek a referral to the Scottish Children’s Reporter.¹³⁸ A referral could be made at present under section 67(1)(j) of the Children’s Hearings (Scotland) Act 2011, which provides for a referral where the child has committed an offence, for example an offence under the Domestic Abuse (Scotland) Act 2018. Alternatively, section 67(1)(m) provides for a referral where “the child’s conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person”. Where a civil protection order is granted in relation to a child, we are of the view that would fulfil the ground of referral relating to the child’s conduct having a serious adverse effect on the health, safety or development of a child or other person.

7.84 It would also be open to the victim/survivor to be referred, or to self-refer, to the Children’s Reporter. For example, they may be able to establish a section 67 ground such as section 67(2)(e), that they are exposed to persons whose conduct means it is likely that the child will be abused or harmed, or their healthy safety, or development will be seriously adversely affected. However, due to the nature of the available outcomes, such as a compulsory supervision order, this route would not necessarily support a victim/survivor if such an outcome was not appropriate.

Conclusion

7.85 It is clear that there are particular sensitivities around domestic abuse perpetrated in relationships between young people, and these may best be addressed by education policies, such as the “Preventing and Responding to Gender Based Violence: A Whole School Framework,” and by child-centred measures such as the children’s hearings system. Any reform in these areas would be most appropriately undertaken in a project looking specifically at these issues. Accordingly, and in light of the availability of civil protection orders to those under 16 years who have capacity, we propose no reform here.

Part 3: Domestic Abuse and Child Contact

7.86 Where parents separate and there is a dispute about the contact and residence arrangements for their child, the courts can be asked to make a contact and/or residence order in terms of section 11 of the Children (Scotland) Act 1995 (the “1995 Act”). If domestic abuse has been, or is being, perpetrated by one parent against the other, this of course has a significant impact on their child’s wellbeing. The focus of this part is on contact and residence actions where there is or has been domestic abuse. Although we will refer generally to child

¹³⁸ For further detail on referrals to the Children’s Hearings System, see Kenneth McK Norrie, *The Law Relating to Parent and Child in Scotland*, (SULI, 3rd ed, 2013), chapter 17. Note that the Children (Care and Justice) (Scotland) Act 2024 will, once in force, raise the age of referral from 16 to 18, so that 16 and 17 year olds who commit offences, including domestic abuse, could be referred to the Scottish Children’s Reporter.

contact, this encompasses residence, and our discussion and proposals apply to any order under section 11 of the 1995 Act.

7.87 It is important to recognise that, in the context of domestic abuse, seeking contact orders may itself be part of the ongoing abuse: “child contact provides further opportunities for the perpetrator to continue their abuse of both the child and the non-abusing parent”.¹³⁹ Civil law responses to domestic abuse must therefore take into account the need to protect the child and the non-abusing parent in relation to child contact.

7.88 There are potentially three different scenarios where child contact is in issue and domestic abuse is present:

1. Where the perpetrator has a criminal conviction for abusive behaviour towards the other parent;
2. Where there is a civil protection order in respect of the perpetrator, such as an interdict or non-harassment order, or an exclusion order (or, if our proposals are taken forward, a DACPRO), which prevents the perpetrator from abusing the victim/survivor;
3. Where there is no criminal or civil order in place, but there are allegations of domestic abuse against one parent, or of abusive conduct between both parents.

Current law: section 11(7A)-11(7E) of the Children (Scotland) Act 1995

7.89 Contact and residence decisions (as well as other decisions which regulate the exercise of parental rights and responsibilities) are made under section 11 of the 1995 Act.¹⁴⁰ These decisions are made in accordance with the principles set out in section 11(7). First, the “best interests principle”, which requires the court to “regard the welfare of the child concerned as its paramount consideration”.¹⁴¹ Second, the “no order” principle states that the court “shall not make any order unless it considers that it would be better for the child that the order be made than that none should be made at all”.¹⁴² The third governing principle is that the views of the child must be taken into account where practicable in any decision made:

“[the court,] taking account of the child’s age and maturity, shall so far as practicable - give him the opportunity to indicate whether he wishes to express his views; if he does so wish, give him an opportunity to express them; and have regard to such views as he may express.”¹⁴³

Therefore, the decision to be made by the court is what is best for the welfare of the child, taking into account the child’s views, as opposed to preferring the views or wishes of one parent or the other.

¹³⁹ M Burman, R Friskney, J Mair, and R Whitecross, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings” (SCCJR, December 2022), at p 17, and references cited therein (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>).

¹⁴⁰ 1995 Act s 11(2). This Act is due to be amended by the Children (Scotland) Act 2020, which will (once in force) amend, amongst other things, s 6, regarding the views of the child, and s 11, regarding court orders in respect of parental responsibilities and rights. We discuss the likely impact of these reforms later in this chapter.

¹⁴¹ 1995 Act, s 11(7)(a).

¹⁴² 1995 Act, s 11(7)(a).

¹⁴³ 1995 Act, s 11(7)(b).

7.90 The Family Law (Scotland) Act 2006 introduced new subsections into section 11 of the 1995 Act, requiring the court to have regard to particular matters when considering the welfare of the child, in part, to ensure that domestic abuse is taken into account.¹⁴⁴ Section 11(7B) requires the court to have regard to the following matters:

- (a) the need to protect the child from—
 - (i) any abuse; or
 - (ii) the risk of any abuse,which affects, or might affect, the child;
- (b) the effect such abuse, or the risk of such abuse, might have on the child;
- (c) the ability of a person—
 - (i) who has carried out abuse which affects or might affect the child; or
 - (ii) who might carry out such abuse,to care for, or otherwise meet the needs of, the child; and
- (d) the effect any abuse, or the risk of any abuse, might have on the carrying out of responsibilities in connection with the welfare of the child by a person who has (or, by virtue of an order under subsection (1), would have) those responsibilities.

Section 11(7C) specifies that “abuse” includes “violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress”, abuse of a person other than the child, and domestic abuse.¹⁴⁵ Conduct is specified to include speech or presence in a specified place or area.

7.91 There is also specific provision concerning the need for “relevant persons”, such as parents, to cooperate. The 2006 Act inserted section 11(7D) into the 1995 Act, which provides that:

- Where—
- (a) the court is considering making an order under subsection (1) above; and
 - (b) in pursuance of the order two or more relevant persons would have to co-operate with one another as respects matters affecting the child,
- the court shall consider whether it would be appropriate to make the order.

7.92 It has been held that the need to consider any “cooperation” between the parents should be looked at more broadly, and goes beyond the bare minimum required for them to comply with the contact order, such as communication.¹⁴⁶

7.93 As Professor Norrie observes, the new provisions in section 11(7A)-(7E) are not “a stand-alone provision requiring the court in every case to consider whether there has been

¹⁴⁴ There was a view that the new statutory measures were more significant for their sign-posting value than for adding anything substantive to the current law. As Professor Whitecross reported: “For experienced family law practitioners, there was a shared belief that the provisions, as noted by Professor Norrie, added nothing new to established practice. However, it was acknowledged that having it set out in the legislation was important for making sheriffs, notably those with limited experience of contact actions, aware of the need to consider abuse amongst other factors when making a section 11 order.” R Whitecross, “Section 11 orders and the “abuse” provisions: family lawyers’ experience and understanding of section 11(7A)-(7E)” (2017) 21(2) Edin LR 269, at 273.

¹⁴⁵ 1995 Act, s 11(7C).

¹⁴⁶ *ID v KC* [2023] SAC Civ 30, para 24.

domestic abuse independently of its consideration of welfare, but [are] structured as an aspect of the welfare test in section 11(7)(a)".¹⁴⁷ The court should therefore consider domestic abuse as an integral part of assessing the best interests of the child. Importantly, the definition of "abuse" here is wide, and includes the risk of abuse, as well as abuse of others, thus extending to abuse perpetrated against other members of the child's family.¹⁴⁸ Where there is domestic abuse, this does not give rise to a presumption against contact with the perpetrator, but leaves the decision as to contact or residence as a matter for the court, taking into account that abuse.¹⁴⁹

7.94 Clearly, therefore, there is legislative provision to ensure that domestic abuse is given due consideration in the context of contact and residence decisions. Provision is made to ensure that the abuse by one parent of another is a matter to be considered, as well as the practicalities of cooperation between the parents (or other relevant adults).

Child contact and domestic abuse: good practice

7.95 As reported by Prof Burman et al, there have been few reported cases on section 11(7A)-(7E): "The low volume of child contact cases which proceed to proof in Scotland means that there are few reported judgments on which to base analysis of how domestic abuse is understood by the civil courts".¹⁵⁰ However, some case law from the Court of Session, the Sheriff Appeal Court, and the Sheriff Court demonstrates good practice as regards consideration of domestic abuse in the context of contact and residence decisions. For example, in *A v A*,¹⁵¹ the court found that the defender had behaved in an abusive, aggressive and controlling manner towards the pursuer, and was verbally abusive and aggressive towards the pursuer in the presence of their child. The defender was convicted of assaulting the pursuer during their relationship and was subsequently subject to a non-harassment order. Sheriff Andrew Mackie held as follows:

"In terms of section 11(7)(a) of said 1995 Act, the welfare of the said child is the court's paramount consideration. ... Granting any order for contact between the defender and the said child would place the said child at significant risk of being adversely affected by abuse perpetrated by the defender against the pursuer. In the event of the pursuer being caused fear and distress by the defender, then it is likely that the said child will also be adversely affected by such fear and distress.

... There is no presumption that contact between a child and his or her parent is in the best interests of the child. ... In this case it is not in the best interests of the said child for a contact order to be granted in favour of the defender for the reasons set out above. In so deciding, I have taken into account that it would, generally, be in the best interests of the said child to have contact with both of his parents to give him a fuller understanding of his own identity. Unfortunately, for the reasons set out above, it would

¹⁴⁷ AB Wilkinson and KM Norrie, *The Law Relating to Parent and Child in Scotland*, 3rd ed, (SULI, 2013), para 9.18.

¹⁴⁸ S 11(7B) and 11(7C). See also AB Wilkinson and KM Norrie, *The Law Relating to Parent and Child in Scotland*, 3rd ed, (SULI, 2013), para 9.18.

¹⁴⁹ AB Wilkinson and KM Norrie, *The Law Relating to Parent and Child in Scotland*, 3rd ed, (SULI, 2013), para 9.18.

¹⁵⁰ M Burman, R Friskney, J Mair, and R Whitecross, "Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings" (SCCJR, December 2022), at p 16 (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>).

¹⁵¹ *A v A* [2021] SCGLW 018, 2020 WL 08910985. See also *R v R* 2010 Fam LR 123 and *AS v SB* 2010, GWD 32 - 663.

not be in the best interests of the said child for any contact to be allowed with the defender, in the particular circumstances of this case.”¹⁵²

7.96 In the decision, Sheriff Mackie balanced the general view “of it almost always being conducive to the welfare of the child that parental contact is maintained,”¹⁵³ with the specific dangers to the wellbeing of the child from the risk of further abuse of one parent by the other.

7.97 In the case of *LRK v AG* the Sheriff Appeal Court overturned the decision of a sheriff who had failed to take due account of domestic abuse in a child contact case. In this case, one parent had been convicted of domestic abuse and sentenced to twelve months imprisonment, and a further five months for breach of a non-harassment order. Despite these two custodial sentences for domestic abuse, the sheriff noted that the parents had separated and there was no question of the child being exposed to further domestic abuse. The Sheriff Appeal Court quoted the sheriff’s conclusion that there was:

“... no longer any need... to protect her from domestic abuse or the effects of it at the hand of the [respondent]. Some damage may have been done and that is greatly to be regretted, but domestic abuse is no longer a factor in relation to [the child], and the historical abuse is not, in my view, sufficient to prevent an award of contact being made.”¹⁵⁴

The Sheriff Appeal Court held that the sheriff had erred. In dismissing the abuse as historical, the sheriff failed to take into account the link between domestic abuse and the risk to the child, and had failed to address the matters in section 11(7B) and the need for the parties to cooperate under section 11(7D).¹⁵⁵ The failure to take into account relevant considerations resulted in the sheriff’s decision being overturned, and the case remitted to another sheriff.¹⁵⁶

7.98 Lady Carmichael has also provided helpful guidance on how section 11(7A)-(7E) should be applied in practice. It is not sufficient simply to make reference to the relevant section, and instead Counsel must seek to apply the statutory provision to the facts of the case:

“Counsel referred to section 11(7A)-(7E) of the 1995 Act. There was, however, little focus in submissions on the application of those provisions in the context of the potential outcomes in this case as to where and with whom the children might come to reside, and in relation to the risks that might arise in the context of allegations of domestic abuse that the court might find to have been proved.....An early focus in case management as to what allegations, if any, require judicial determination in order to allow a proper determination of what will serve the welfare of the child or children concerned is required.”¹⁵⁷

¹⁵² *A (Assisted person) v A* [2021] SCGLW 018, 2020 WL 08910985, at [86 to 92].

¹⁵³ *J v M* [2016] CSIH 52, per Lord Malcolm, at para 11(2).

¹⁵⁴ *LRK v AG* [2021] SAC (Civ) 1, para 4.

¹⁵⁵ *LRK v AG* [2021] SAC (Civ) 1, para 5.

¹⁵⁶ *LRK v AG* [2021] SAC (Civ) 1, paras 6 and 13.

¹⁵⁷ *M v A* [2024] CSOH 38, para 237.

7.99 However, while these cases show what is possible within the terms of the current legislative framework, stakeholders have made us aware that rigorous application of section 11(7A)-(7E) is the exception rather than the rule.

Current practice: the criticisms

7.100 Despite the clear statutory requirement to take abuse into account when determining the best interests of the child, there is extensive evidence that domestic abuse can be marginalised, overlooked, or dismissed in child contact cases. The lack of coherence between different legal responses to domestic abuse and children, in particular in relation to child contact, has been explored by Professor Hester, who identified the “three planet model.” This results in “systemic contradictions” between legal and policy responses to the three “planets” of domestic violence, child protection, and child contact, exposing women and children to the risk of further harm through child contact.¹⁵⁸

7.101 In 2017, the Justice Committee of the Scottish Parliament expressly noted “troubling evidence of the often problematic interaction between decisions made by courts in domestic abuse cases and decisions in the civil courts on child contact”, before asking the Government to review this area of law.¹⁵⁹ In 2019 the Scottish Government carried out a consultation on a review of Part 1 of the 1995 Act¹⁶⁰ which found that: “... in practice, domestic abuse continued to be disregarded in court decisions relating to contact and the welfare of the child”.¹⁶¹

7.102 The evidence from Scotland and elsewhere regarding the recognition of domestic abuse in contact and residence cases is not encouraging. Research carried out by Professor Whitecross also found that the provisions in section 11(7A-E) were “not widely used, and that concerns centred round judicial attitudes to, and understanding of, domestic abuse:

“A majority of the lawyers interviewed argued that a significant barrier to raising concerns about domestic abuse is the attitudes and understanding of some sheriffs. Training was viewed as a first step to remedying these concerns, and to challenging understandings of domestic abuse (for example that it is “more than a black eye”). Until then, judicial attitudes appear to remain a barrier to implementing fully the intentions underlying section 11(7A)-(7E).”¹⁶²

7.103 Research in Scotland has repeatedly shown that in practice, the courts are unlikely to attach significant weight to a parent’s history of domestic abuse in determining the child’s best interests.¹⁶³ In 2011, Dr Kirsteen Mackay conducted a systematic review of 208 child contact

¹⁵⁸ M Hester, “The Three Planet Model: Towards an Understanding of the Contradictions in Approaches to Women and Children’s Safety in Contexts of Domestic Violence”, (2011) 41(5) *The British Journal of Social Work* 837.

¹⁵⁹ Discussed in the Justice Committee Stage 1 Report of the Domestic Abuse (Scotland) Bill, published 17 September 2017: see in particular para 7 (available at: [https://bprcdn.parliament.scot/published/J/2017/9/21/Stage-1-Report-on-the-Domestic-Abuse--Scotland--Bill/Stage%201%20Report%20on%20the%20Domestic%20Abuse%20\(Scotland\)%20Bill.pdf](https://bprcdn.parliament.scot/published/J/2017/9/21/Stage-1-Report-on-the-Domestic-Abuse--Scotland--Bill/Stage%201%20Report%20on%20the%20Domestic%20Abuse%20(Scotland)%20Bill.pdf)).

¹⁶⁰ Review of Part 1 of the Children (Scotland) Act 1995 and Creation of a Family Justice Modernisation Strategy: Analysis of Consultation Responses: Final Report. Edinburgh: Scottish Government (available at: <https://www.gov.scot/publications/analysis-consultation-responses-consultation-review-children-scotland-act-1995/documents/>) [Accessed 8 October 2023].

¹⁶¹ M Burman, R Friskney, J Mair, and R Whitecross, “Domestic abuse and child contact in Scotland: the perspectives of family law practitioners”, (2023) *Journal of Social Welfare and Family Law*, 45:3, 234-248, at 236.

¹⁶² R Whitecross, “Section 11 orders and the “abuse” provisions: family lawyers’ experience and understanding of section 11(7A)-(7E)” (2017) 21(2) *Edin LR* 269, at 274.

¹⁶³ KM Mackay, “The approach in Scotland to child contact disputes involving allegations of domestic abuse” (2018) 40(4) *Journal of Social Welfare and Family Law* 477.

cases¹⁶⁴ across two sheriff courts in Scotland.¹⁶⁵ The findings revealed that half of these cases involved allegations of domestic abuse (of a physical or sexual nature). However, interdicts against removal of the child were only sought in respect of 54 children; non-harassment orders were requested in two cases and exclusion orders in only four cases. The review found that these orders were only granted in cases of “extreme violence” and that the courts were “reluctant to grant the protective orders unless significant risk to life and limb existed”.¹⁶⁶ It is generally accepted by the courts that contact with both parents is in a child’s best interests, and the weight given to a parent’s abusive behaviour in assessing the child’s best interests is at the discretion of the decision maker.¹⁶⁷ The Inner House reaffirmed this approach in the case of *J v M*:

“This approach is reflective of the general background of it almost always being conducive to the welfare of the child that parental contact is maintained.”¹⁶⁸

7.104 These findings are echoed in research by Professor Burman, Dr Friskney, Professor Mair, and Professor Whitecross in 2022:¹⁶⁹ “While in Scotland there is no formal, legal presumption in favour of contact (*Sanderson v McManus* 1997 SLT 629; *White v White* 2001 SLT 485), it has been observed that there is a general presumption ‘in favour of contact as being in a child’s best interests’”.¹⁷⁰ As a result of this research, Burman et al made a number of recommendations for future reform, including recommendation 10: “Exposure to DA can have a severe effect on the child’s well-being. Courts should seek risk assessments from those individuals and organisations with specialist knowledge and experience around domestic abuse to assess the complex risks to children presented by domestic abuse before making decisions about contact”. Separately, recommendation 8 concludes: “Where the parent has been found to be abusive there needs to be specific deliberation as to why contact is in the child’s interests”.¹⁷¹

7.105 The research carried out by Burman et al also brought out the problems that can arise when solicitors fail to understand the impact of domestic abuse in relation to child contact:

¹⁶⁴ Involving 299 children.

¹⁶⁵ KM Mackay, “The approach in Scotland to child contact disputes involving allegations of domestic abuse” (2018) Vol 40(4) *Journal of Social Welfare and Family Law*, 477; KM Mackay, *The Treatment of the views of children in private law child contact disputes where there is a history of domestic abuse: a report to Scotland’s commissioner for children and young people* (Edinburgh, SCCYP 2013) (available at: <https://www.research.ed.ac.uk/en/publications/the-treatment-of-the-views-of-children-in-private-law-child-conta>).

¹⁶⁶ KM Mackay, “The approach in Scotland to child contact disputes involving allegations of domestic abuse” (2018) Vol 40(4) *Journal of Social Welfare and Family Law*, 477, at p 483.

¹⁶⁷ KM Mackay, “The approach in Scotland to child contact disputes involving allegations of domestic abuse” (2018) Vol 40(4) *Journal of Social Welfare and Family Law*, 477; *White v White* (2001) SLT 485.

¹⁶⁸ *J v M* [2016] CSIH 52, per Lord Malcolm, at para 11(2).

¹⁶⁹ M Burman, R Friskney, J Mair, and R Whitecross, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings” (SCCJR, December 2022) (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>). See also M Burman, R Friskney, J Mair, and R Whitecross, “Domestic abuse and child contact in Scotland: the perspectives of family law practitioners”, (2023) *Journal of Social Welfare and Family Law*, 45:3, 234-248.

¹⁷⁰ M Burman, R Friskney, J Mair, and R Whitecross, “Domestic abuse and child contact in Scotland: the perspectives of family law practitioners”, (2023) *Journal of Social Welfare and Family Law*, 45:3, 234-248, at 241, citing F Wasoff, 2007, “Dealing with Child Contact Issues: A Literature Review of Mechanisms in Different Jurisdictions”, Edinburgh: Scottish Executive Social Research.

¹⁷¹ M Burman, R Friskney, J Mair, and R Whitecross, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings” (SCCJR, December 2022), at para 7.10 (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>).

“There were varying views [amongst solicitors interviewed] concerning the risk of harm posed to children by domestic abuse, with some respondents stating that children may not always be at risk of or impacted by domestic abuse, and that this was dependent on context. Generally, domestic abuse was only considered relevant to child contact if the child specifically witnessed domestic abuse or was the victim of abuse, as highlighted in the following response: ‘In my view domestic abuse is relevant to such cases where there is a risk to the child through the perpetrator’s behaviour or there has been an impact on the child because of such behaviour’. This is somewhat at odds with the widely held view in the research and practice literature that the potential harm to children is not limited to situations where children ‘witness’ domestic abuse.”¹⁷²

7.106 Similar findings emerge from research in England and Wales by Dr Adrienne Barnett.¹⁷³ Barnett noted that, despite ‘good practice guidelines’ set out by the Court of Appeal in *Re L, V, M, H*¹⁷⁴ regarding the approach to be taken England and Wales when domestic abuse is submitted as a reason for denying or limiting contact, this was not always the case:

“The post-*Re L* case-law and research revealed that the application of the guidelines was inconsistent and ‘patchy’ and that they were frequently ignored. Courts continued to minimise and ‘neutralise’ domestic violence, even in cases of extremely severe physical violence, and to focus instead on promoting contact.”¹⁷⁵

7.107 The qualitative research undertaken by Burman et al found that the general consensus amongst practitioners was that the court was more likely to consider domestic abuse as relevant to the child’s welfare where the child had witnessed, or been directly harmed, by the perpetrator. One participant in their research said:

“It was really extreme, extreme domestic abuse and still it had to go to appeal after a sheriff decided, well, this terrible abuse had happened, but the child hadn’t seen it, it hadn’t been against the child...”¹⁷⁶

7.108 Barnett’s data suggests that this issue is compounded by family solicitors who may encourage or advise, victim/survivors of domestic abuse to agree to child contact¹⁷⁷ (whether interim or permanent) in an effort to present the victim/survivor to the court as being “reasonable” and without “ulterior motives”.¹⁷⁸ In cases where a victim/survivor of domestic abuse is ‘encouraged’, or ‘advised’ to agree to contact in England and Wales, they may sign

¹⁷² M Burman, R Friskney, J Mair, and R Whitecross, “Domestic abuse and child contact in Scotland: the perspectives of family law practitioners”, (2023) *Journal of Social Welfare and Family Law*, 45:3, 234-248, at 240.

¹⁷³ A Barnett, ‘Contact at all costs? Domestic violence and children’s welfare’ (2014) 26(4) *Child and Family Law Quarterly* 439.

¹⁷⁴ *Re L, V, M, H (Contact: Domestic Violence)* [2000] 2 FLR 334.

¹⁷⁵ A Barnett, “Contact at all costs? Domestic violence and children’s welfare” (2014) 26(4) *Child and Family Law Quarterly* 439, at p 442, citing H.M. Inspectorate of Court Administration, *Domestic Violence, Safety and Family Proceedings* (HMICA, 2005).

¹⁷⁶ M Burman et al, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings”, (SCCJR, December 2022) at p 34 (available at: <https://www.sccir.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>).

¹⁷⁷ A Barnett, ‘Contact at all costs? Domestic violence and children’s welfare’ (2014) 26(4) *Child and Family Law Quarterly* 439, at p 447.

¹⁷⁸ A Barnett, ‘Contact at all costs? Domestic violence and children’s welfare’ (2014) 26(4) *Child and Family Law Quarterly* 439, at pp 447, 451 and 458.

a 'consent order' agreeing to the arrangements for contact;¹⁷⁹ Barnett's research suggests that, where such agreements are reached, consent orders are not adequately scrutinised by courts to ensure that the contact is safe and truly consensual.¹⁸⁰ In Scotland, it must be noted that it is very rare for no contact to be granted, and solicitors do advise their clients of this, which may lead to them to advise against seeking no contact, against the client's initial wishes. Due to the nature of proceedings in Scotland, where contact and residence cases are managed, and rarely go to proof (where findings of fact are made), and because it is more difficult to restart contact once it has lapsed, it is very rare for the court to make interim orders which suspend contact completely.

7.109 In October 2023, the Domestic Abuse Commissioner for England and Wales published a report on "The Family Court and Domestic Abuse: Achieving Cultural Change".¹⁸¹ This Report notes that the consequences of a court ordering unsafe contact with a perpetrator of domestic abuse in order to uphold parental 'contact' and the 'decision making rights', are considerable:

"There is repeated reference to a child's best interests requiring contact with both parents. However, given the high percentage of domestic abuse allegations in private law children proceedings, this approach fails to appropriately consider the impact of prioritising an alleged domestic abuser's parental rights over the welfare of both adult and child victims and survivors and overlooking, in particular the safety and voice of children. The most severe consequences are set out in the two Child Homicides Reports by Women's Aid, where perpetrators of domestic abuse killed their children during formal or informal child contact time. But where the Family Court has failed to screen domestic abuse effectively in private law children proceedings, there will be children also suffering emotional, physical and developmental harm from unsafe contact orders".¹⁸²

7.110 Evidence also suggests that the safety of both the child and the victim/survivor parent is not adequately considered by the courts when making any decision regarding contact, and there is not always due weight given to the impact of domestic abuse on children when balanced with a general starting point of ensuring that contact happens:

"the research revealed limited consideration given to how the safety of the child or the non-abusing parent or indeed other factors relating to the best interests of the child might be balanced in terms of child contact. There remains a distinctively pro-contact philosophy in Scotland".¹⁸³

¹⁷⁹ A 'consent order' is a legally binding agreement between parties which sets out the arrangements for contact, including where the child will live, when they spend time with each parent and when/what other types of contact might take place. Consent orders must be approved by the court (more information about them is available at: <https://www.gov.uk/looking-after-children-divorce/if-you-agree>).

¹⁸⁰ A Barnett, 'Contact at all costs? Domestic violence and children's welfare' (2014) 26(4) Child and Family Law Quarterly 439, at p 448.

¹⁸¹ The Family Court and Domestic Abuse: Achieving Cultural Change, July 2023 (available at: https://domesticabusecommissioner.uk/wp-content/uploads/2023/10/DAC_Family-Court-Report_Oct-2023.pdf).

¹⁸² The Family Court and Domestic Abuse: Achieving Cultural Change, July 2023, p 24 (available at: https://domesticabusecommissioner.uk/wp-content/uploads/2023/10/DAC_Family-Court-Report_Oct-2023.pdf).

¹⁸³ M Burman, R Friskney, J Mair, and R Whitecross, "Domestic abuse and child contact in Scotland: the perspectives of family law practitioners", (2023) Journal of Social Welfare and Family Law, 45:3, 234-248, at 245.

7.111 Failure to take safety into account when determining contact arrangements may endanger both the parent and the child, physically and emotionally.¹⁸⁴ Although any decision regarding contact must be made solely in the best interests of the child (including their safety), section 11(7D) does require the courts to consider the need for cooperation between the parents when making any order for contact. If one parent will be exposed to harm as a result of being ordered to facilitate contact, it is arguably not possible or reasonable to expect them to cooperate. Any arrangement which requires the victim/survivor to facilitate contact in a manner which puts that parent at risk, or which enables the perpetrator to continue the abuse, potentially fails to comply with section 11(7D). As the Domestic Abuse Commissioner in England and Wales has recognised, “Victims and survivors must rely on the Family Court to keep their children safe from perpetrators. Yet too often victims and survivors do not feel understood or taken seriously in the Family Court”.¹⁸⁵

7.112 The importance of considering domestic abuse between parents in the context of contact orders, has also been commented on by Lady Hale:

“Requiring that incidents of domestic violence are taken into account in deciding custody and visitation rights and that the exercise of such rights does not jeopardise the rights and safety of the victim or children: in other words, the parental rights of fathers must not trump the safety of victims or children (art 31) [of the Istanbul Convention].”¹⁸⁶

Child contact and the views of the child

7.113 Despite statutory requirements in section 11(7)(b) of the 1995 Act to take account of a child’s views, again, this is not happening consistently in practice. Research by Dr Mackay found that, in cases where children’s views were known, one third of those children were ordered into contact against their wishes.¹⁸⁷ One non-abusive parent recalled that her daughter began soiling herself due to the distress of contact with her abusive father and repeatedly expressed her wishes not to see him;¹⁸⁸ despite this, and the fact that the child had witnessed her father punch her mother in the head, the court ordered contact.¹⁸⁹ The research also indicated that the judicial decision was less likely to align with their views where children expressed a view that they did not want contact.¹⁹⁰

¹⁸⁴ M Burman, R Friskney, J Mair, and R Whitecross, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings” (SCCJR, December 2022), at p17 (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>).

¹⁸⁵ The Domestic Abuse Commissioner, “The Family Court and Domestic Abuse: Achieving Cultural Change,” July 2023, p 1.

¹⁸⁶ Lady Hale, then President of the Supreme Court of the UK. Grotius Lecture, Women’s Rights Worldwide, 12 June 2019, p 12 (available at: <https://www.supremecourt.uk/docs/speech-190612.pdf>).

¹⁸⁷ KM Mackay, “The approach in Scotland to child contact disputes involving allegations of domestic abuse” (2018) Vol 40(4) Journal of Social Welfare and Family Law, 477, at p 490; M Burman et al, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings”, (SCCJR, December 2022) (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>).

¹⁸⁸ KM Mackay, ‘The approach in Scotland to child contact disputes involving allegations of domestic abuse’ (2018) Vol 40(4) Journal of Social Welfare and Family Law 477, at p 490.

¹⁸⁹ KM Mackay, ‘The approach in Scotland to child contact disputes involving allegations of domestic abuse’ (2018) Vol 40(4) Journal of Social Welfare and Family Law 477, at p 490.

¹⁹⁰ KM Mackay, “The treatment of the views of children in private law contact disputes where there is a history of domestic abuse”, A report to Scotland’s Commissioner for Children and Young People (2013).

7.114 The Scottish Human Rights Commission’s Baseline Evaluation of the Implementation of the Istanbul Convention, entitled “It’s not a story, it’s what happened: Victims-survivors of Gender-based Violence: In our words”, includes similar testimony:

“The justice system at the moment still very much favours the rights of the father, even though the child (or teen) expresses that they are frightened of him and want no contact. I’ve had a few non-harassment orders, but my daughter was never included in them. Why can children be offered no protection?”¹⁹¹

7.115 Mackay’s research suggests that the lack of weight attached to children’s views in child contact cases involving domestic abuse can be attributed to: child welfare reporters, who may recommend contact based on subjective views about the impact of domestic abuse on children;¹⁹² and widespread belief that the child is too young to know what is best for them, or that they have been conditioned to fear contact by the non-abusive parent.¹⁹³ These findings are echoed in more recent research by Burman et al, which noted that “where the child’s view is heard, this is rarely described in terms of the children’s right to express their views or have those views considered but rather used as an investigatory option for the court, or as a test of the validity of arguments being made by parties.”¹⁹⁴ A comparable study conducted across England and Wales revealed similar attitudes towards non-abusive parents and children who oppose contact.¹⁹⁵ In any event, the research suggests that the impact of domestic abuse on children is minimised in decisions about contact with abusive parents. The research conducted by Burman et al concluded with a recommendation that:

“For child contact proceedings to operate in a way that realises children’s rights to participate, greater attention must be paid to facilitating the child’s right to express their views and have those views considered by the court.”¹⁹⁶

7.116 This may come down to practice and court process however, as individual decisions show that the statutory framework itself is capable of ensuring that the views of the child are heard. In *LRK v AG*, discussed above, the Sheriff Appeal Court took a robust stance. In assessing the demands of section 11 of the 1995 Act and Article 3 of the UNCRC, the court agreed with submissions from Counsel that “the sheriff misunderstood the duty upon the court: he was bound to ascertain the child’s views unless as a matter of practicability it was impossible to do so.”¹⁹⁷ The appeal sheriffs also emphasised that this duty to listen to the views

¹⁹¹ Available at: <https://www.scottishhumanrights.com/media/2590/istanbul-convention-lived-experience-report.pdf>, 2023, p 28.

¹⁹² KM Mackay, ‘The approach in Scotland to child contact disputes involving allegations of domestic abuse’ (2018) 40(4) *Journal of Social Welfare and Family Law* 477, at p 490.

¹⁹³ K Tisdall, F Morrison and J Warburton, ‘Challenging undue influence? Rethinking children’s participation in contested child contact’ (2021) 43(1) *Journal of Social Welfare and Family Law* 8 (available at: <https://www.research.ed.ac.uk/en/publications/challenging-undue-influence-rethinking-childrens-participation-in>); A Barnett, ‘Contact at all costs? Domestic violence and children’s welfare’ (2014) 26(4) *Child and Family Law Quarterly* 439, at p 451.

¹⁹⁴ M Burman, R Friskney, J Mair, and R Whitecross, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings” (SCCJR, December 2022), at p 52 (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>).

¹⁹⁵ G MacDonald, ‘Domestic Violence and Private Family Court Proceedings: Promoting Child Welfare or Promoting Contact?’ (2016) 22(7) *Violence Against Women* 832.

¹⁹⁶ M Burman, R Friskney, J Mair, and R Whitecross, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings” (SCCJR, December 2022), at p 52 (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>).

¹⁹⁷ *LRK v AG* [2021] SAC (Civ) 1, para 7. The court also noted that the “test of impracticability has been swept away” by the recent reforms to the 1995 Act, introducing s 11ZB – albeit not yet in force. (see para 12).

of the child is a duty imposed upon the court: “The fact that neither party raised the matter does not discharge the obligations upon the court”.¹⁹⁸

7.117 The Children (Scotland) Act 2020, when it comes into force, will require that children of all ages are given the opportunity to share their views (unless satisfied that the child is not capable of forming a view or the child cannot be found),¹⁹⁹ and clearly restates the position that domestic abuse is a factor in considering a child’s welfare when making a section 11 order.²⁰⁰ It is also necessary to give children of all ages the opportunity to share their views in order to comply with the UNCRC Act 2024.²⁰¹ However, as noted above, it is possible that recognising children as adjoined victim/survivors of domestic abuse for the purposes of civil remedies against such abuse could act as further impetus for the family courts to recognise domestic abuse as a critical factor in its assessment of the child’s best interests in decisions about contact.

Comparative law

7.118 We have considered how domestic abuse between parents is taken into consideration in relation to child contact cases in England and Wales and New Zealand.

England and Wales

7.119 The issue of post separation arrangements for children when domestic abuse has occurred between parents is also an area of law and practice that has been problematic in England and Wales. Professor Rosemary Hunter, Dr Adrienne Barnett and Professor Felicity Kaganas note that:

“In England and Wales domestic abuse was virtually ignored in legal and family law professional practice relating to post-separation child contact, jeopardising the safety and well-being of children and victim parents, until the landmark case of *Re L, V, M, H (Contact: Domestic Violence)* [2001] Fam 260, when the Court of Appeal laid down guidelines for courts in such cases. Since then, we have seen a ‘cycle of failure’ – demonstrable failure to apply the *Re L* guidelines, new practice provisions designed to strengthen the guidelines, continuing concerns about implementation of the new provisions prompting further reforms, followed by renewed concerns about implementation.”²⁰²

7.120 In England and Wales, family law cases involving post-separation arrangements for a former couple’s children are known as ‘child arrangements cases’.²⁰³ Child arrangements

¹⁹⁸ *LRK v AG* [2021] SAC (Civ) 1, para 8.

¹⁹⁹ Removing the presumption that a child aged 12 or over is considered mature enough to give their views in ss 6, 11 and 16 of the Children (Scotland) Act 1995, as well as in ss 14 and 84 of the Adoption and Children (Scotland) Act 2007 and s 27 of the Children’s Hearings (Scotland) Act 2011.

²⁰⁰ Children (Scotland) Act 2020, s 1 which amends ss 6 (views of children) and 11 (court orders relating to parental responsibilities etc.) of the Children (Scotland) Act 1995.

²⁰¹ Article 12 of the UNCRC (respect for the views of the child) provides that every child has the right to express their views, feelings and wishes in all matters affecting them, and to have their views considered and taken seriously. This right applies at all times, for example during immigration proceedings, housing decisions or the child’s day-to-day home life.

²⁰² R Hunter, A Barnett, F Kaganas, Introduction: Contact and Domestic Abuse, *Journal of Social Welfare and Family Law*, 40(4), 401 – 425 (available at: <https://www.tandfonline.com/doi/full/10.1080/09649069.2018.1519155>).

²⁰³ Replacing the previous statutory language of ‘custody’ and ‘access’, and subsequently ‘residence’ and ‘contact’.

orders are orders “regulating arrangements relating to...with whom a child is to live, spend time or otherwise have contact, and when a child is to live, spend time or otherwise have contact with any person”.²⁰⁴ Section 1 of the Children Act 1989 provides that the child’s welfare must be the paramount consideration when a court is considering making an order. There is a ‘welfare checklist’ in section 1(3) of that Act, which requires courts to ‘have regard in particular’ to a range of factors including the child’s wishes and feelings, their characteristics and needs, the capability of the parents in meeting those needs, and any harm which the child has suffered or is at risk of suffering.

7.121 The Family Justice Review conducted by an independent panel in 2011, with the aim of enhancing the family justice system in England and Wales, made various recommendations for change and improvement, including recommending against any change to the law to include a presumption.²⁰⁵ However, contrary to this recommendation, in April 2014, the UK Government amended section 1 of the Children Act 1989 to include a presumption that “unless the contrary is shown...involvement of [a] parent in the life of the child concerned will further the child’s welfare”,²⁰⁶ provided that parent “can be involved in the child’s life in a way that does not put the child at risk of suffering harm”.²⁰⁷ The intention of this was to create a balance so that one parent was not able to exclude their ex-partner from their child’s life, and to emphasise that both parents have equal status.

7.122 Many organisations, including Women’s Aid, subsequently raised concerns with the presumption. An All Parliamentary Group on Domestic Violence also noted that the presumption led to an attitude of contact at all cost without consideration of the risk of harm to the child as a result of domestic abuse.²⁰⁸

7.123 The 2020 Ministry of Justice Report also found that due to deep-seated and systemic failings, domestic abuse allegations and related risks to adult and child victim/survivors were not sufficiently taken into account by the Family Court when making contact arrangements for children, meaning that the courts were failing to adequately assess risks to children and protect them from harm.²⁰⁹ In response to these findings, the UK Government announced an urgent review of the legal presumption that continuing involvement with both parents is in a child’s welfare.²¹⁰

7.124 We understand that this review was due to complete in October 2023 but the findings are yet to be published.

²⁰⁴ Children Act 1989, s 8.

²⁰⁵ Family Justice Review, 2011 p 21 (available at: <https://www.gov.uk/government/publications/family-justice-review-final-report>).

²⁰⁶ Children Act 1989, s 1(2A) (subsection (2A) was added by the Children and Families Act 2014, s 11(2)).

²⁰⁷ Children Act 1989, s 1(6)(a).

²⁰⁸ All Party Parliamentary Group Report: Domestic Abuse, Child Contact and the Domestic Courts, 2016 (available at: <https://www.womensaid.org.uk/wp-content/uploads/2015/11/APPG-Inquiry-report-domestic-abuse-child-contact-and-the-family-courts.pdf>).

²⁰⁹ Ministry of Justice (June 2020), Assessing Risk of Harm to Children and Parents in Private Law Children Cases, 39. Family Court Report, p 14.

²¹⁰ The presumption was introduced and added to the Children Act 1989 in 2014. The review, as recommended in the aforementioned report was announced in 2020 by the then Parliamentary Under-Secretary of State for Justice, Alex Chalk, in a statement (available at: <https://questions-statements.parliament.uk/written-statements/detail/2020-11-09/hcws562>). The findings of the urgent review have not yet been published.

New Zealand

7.125 Professor Alison Perry notes that the issue of child contact where there has been domestic abuse between the child's parents is also one of the most challenging aspects of family law and policy in New Zealand:

“Among the many fraught issues that can arise around contact, the question of how to deal with cases in which the contact parent has used or is alleged to have used violence against his or her former partner, or child, or both, is one of the most problematic. In such cases, in addition to the usual considerations of whether contact is considered to be in the child's best interests, and how it should be put into practice, specific questions relating to the safety of the child and of the resident parent also arise.”²¹¹

7.126 The Care of Children Act 2004 (the 2004 Act (NZ)) amongst other things, “defines and regulates parents’ duties, powers, rights and responsibilities as guardians of their children”.²¹² It also provides a framework of principles that the Family Court must consider when making all decisions about children under the Act, including decisions on contact and residence.²¹³ In the administration and application of the 2004 Act, including in any proceedings involving the guardianship of, or the role of providing day-to-day care for, or contact with, a child: “the welfare and best interests of a child in his or her particular circumstances must be the first and paramount consideration”.²¹⁴ Any person considering the welfare and best interests of a child may also take into account the conduct of the person who is seeking to have a role in the upbringing of the child to the extent that that conduct is relevant to the child's welfare and best interests.²¹⁵

7.127 One of the principles to be taken into account in considering the welfare and best interests of a child is the protection of their safety, which is the only mandatory principle and likely to be decisive over the other principles listed in section 5.²¹⁶ In particular, a child must be protected from all forms of violence (as defined in sections 9(2), 10 and 11 of the Family Violence Act 2018) from all persons, including members of the child's family, family group, whānau, hapū, and iwi.²¹⁷ Therefore, a child's exposure to and experience of family violence is directly relevant to their safety.

7.128 In taking account of the principle that a child's safety must be protected and that a child must be protected from all forms of violence, the court must have regard in particular, to

²¹¹ Al Perry, *Safety First? Contact and Family Violence in New Zealand*, *Child and Family Law Quarterly*, March 2006, p 1 (available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1968538).

²¹² Care of Children Act 2004 s 3(2)(a).

²¹³ The 2004 Act (NZ), ss 4, 5, 5A and 6. Henaghan et al. *Family Law in New Zealand* (18th edn. LexisNexis 2017) at para 6.104.

²¹⁴ 2004 Act (NZ), s 4(1).

²¹⁵ 2004 Act (NZ), s 4(2)(b).

²¹⁶ *K v B* [2010] NZSC 112. The Supreme Court decision was prior to the Care of Children Amendment Act (No 2) 2013, which moved the principle of protection of a child's safety from s 5(e), to s 5(a) to give it greater prominence and underline the importance of child safety.

²¹⁷ 2004 Act (NZ), s 5(a).

whether a temporary or final protection order²¹⁸ is still in force, the circumstance in which that order was made and any written reasons for the decision.²¹⁹

7.129 Amendments were made to the 2004 Act (NZ) by the Family Violence (Amendments) Act 2018: to require more factors to be taken into account by the court when considering the safety of a child, including family violence offences (section 5A(3)); to allow courts to make a temporary protection order when considering applications under the Act if they have concerns about the safety of a child or an adult (section 57A); to empower courts to impose protective conditions for child handover arrangements if there has been family violence including psychological violence (section 51), and to require judges to consider the existence or breach of a protection order when they assess a child's safety (section 5A(3)(a)).²²⁰ In 2023, the 2004 Act (NZ) was amended to provide that in taking into account the principle of protection of a child's safety, the court must have regard to the purpose of the Family Violence Act 2018 under which a protection order was made against one of the parties, and its section 4 principles (which include the principle that "decision makers should, whenever appropriate, recognise that children are particularly vulnerable to family violence, including seeing or hearing violence against others"²²¹).²²²

7.130 As well as the 2004 Act (NZ) requiring the court to consider family violence offences and breach of protection orders when considering the protection of the safety of the child under the Act, the Family Violence Act 2018 allows the court in making an interim protection order, to make interim orders in relation to child access and child contact.²²³

7.131 The Family Violence Act 2018 also allows the court to convert police safety orders (civil orders issued by the police, similar to domestic abuse protection notices under the 2021 Act) into interim protection orders *ex officio* without the prior knowledge or consent of either the protected individual or the perpetrator.²²⁴ If there is a parenting/day to day care order or contact agreement in place between the person bound by the police safety order and a child ordinarily resident with the protected person, it is suspended for the duration of the police safety order.²²⁵

7.132 As can be seen therefore, the legislation in New Zealand goes much further in recognising and in some cases preventing contact between a child and a parent who has perpetrated family violence/domestic abuse against the other parent, than legislation in both Scotland and England and Wales.

Options for reform

7.133 As Burman et al conclude: "it seems evident to us as researchers that consideration needs to be given to the development of robust mechanisms which ensure the early

²¹⁸ A protection order is the primary long-term civil protection measure which can be sought by a victim/survivor against a perpetrator, they can also be used alongside a range of property orders to provide a range of protection (see Family Violence Act 2018, s 60(1)).

²¹⁹ 2004 Act (NZ), s 5A(2).

²²⁰ Available at: <https://www.justice.govt.nz/justice-sector-policy/key-initiatives/addressing-family-violence-and-sexual-violence/a-new-family-violence-act/>.

²²¹ Family Violence Act 2018, s 4(d).

²²² 2004 Act s 5A(1A), as inserted by the Family Court (Supporting Children in Court) Legislation Act 2021, s 5.

²²³ Family Violence Act 2018, s105. Applications for protection orders may be made by the person seeking to be protected, which can include a child, who can apply on their own behalf without a representative if they are over 16 years old or if authorised by the rules of court to do so, or a representative may apply on the child's behalf.

²²⁴ Family Violence Act 2018, s 46(2)(b).

²²⁵ Family Violence Act 2018, s 41.

identification of any prior or ongoing action or concerns relating to domestic abuse in child contact cases”.²²⁶ As has been clearly established, despite the statutory framework in the 1995 Act, there is no guarantee that the best interests of the child, their views, or their safety, or the safety of a parent who is a victim/survivor, will be protected in the context of child contact:

“This [research] suggests a likelihood that the risks to the child are being underplayed, because the nature and impact of abuse on children continues to be misunderstood. Moreover, it is concerning that there remains a prevailing understanding of domestic abuse as primarily an ‘adult matter’ and that, for the most part, child contact proceedings are conceptualised within the context of two opposing parties with domestic abuse considered as a point of contention between parties, and not as a (gendered) crime characterised by the imposition of power and control.”²²⁷

7.134 Clearly, steps need to be taken in order to address this although, as demonstrated by some of the cases cited above, such as *A v A*²²⁸ and *LRK v AG*,²²⁹ good practice is possible, and the current legislative framework itself can facilitate this.

7.135 We propose three reforms to law and practice. Our first proposal addresses the need for the court to have clear information about any history of domestic abuse, by requiring parties to civil proceedings (including child contact hearings) to disclose any previous criminal or civil litigation relating to domestic abuse. This is part of a wider proposal to improve information sharing in court, and we set out our analysis and proposal in more detail in Chapter 8, at paragraphs 8.37 to 8.40: see in particular Questions 54 and 55.²³⁰ This provision of information would ensure that the risk of harm stemming from the contact is considered, and would act as a signpost to judges and agents to consider these elements as pertinent to the matter of child contact/residence.

7.136 Our second proposed reform is that the 1995 Act should be amended to impose a duty on decision makers to give specific written reasons for their decision to allow contact or residence with the perpetrator, or in relation to any section 11 order, where there is a history of domestic abuse.²³¹ This would ensure that consideration of the domestic abuse was explicit, and the parties had a clear understanding of the reasons for the decision. Precedent for imposing such a duty on the court can be found in the Children (Scotland) Act 2020, in section 20(2), which (once in force) will insert a new section 11F to the 1995 Act, requiring the court to explain a decision in relation to contact to the child, in such a way that the child can understand it. Building on this measure, the 1995 Act could also explicitly require written

²²⁶ M Burman, R Friskney, J Mair, and R Whitecross, “Domestic abuse and child contact in Scotland: the perspectives of family law practitioners”, (2023) *Journal of Social Welfare and Family Law*, 45:3, 234-248, at 244.

²²⁷ M Burman, R Friskney, J Mair, and R Whitecross, “Domestic abuse and child contact in Scotland: the perspectives of family law practitioners”, (2023) *Journal of Social Welfare and Family Law*, 45:3, 234-248, at 245.

²²⁸ *A v A* [2021] SCGLW 018, 2020 WL 08910985.

²²⁹ *LRK v AG* [2021] SAC (Civ) 1, para 4.

²³⁰ This also reflects Recommendation 4 made by Burman et al: “Information about domestic abuse should be included in pleadings, Child Welfare Hearings (CWHs), and proofs in order to allow the court full information about the abuse and sufficient time to be able to consider the impact of DA on children”: M Burman, R Friskney, J Mair, and R Whitecross, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings” (SCCJR, December 2022), at para 7.10 (available at: <https://www.sccir.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>).

²³¹ Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993/1956 (s 223), Schedule 1, Chapter 12 makes general provision for a sheriff to give reasons for decisions in some instances.

reasons for any decision in relation to any section 11 order to be provided to the parties where there is a history of domestic abuse, especially if the court decides that the domestic abuse is not relevant to a section 11 order.

7.137 Thirdly, we consider that reform to section 11 of the 1995 Act would be helpful, to ensure that the safety of victim/survivors is taken into consideration by the court. As seen from the comparison with the legislation in New Zealand, it is possible to balance the rights of the child to family life, and consideration of their views, with the interests of both parents and their safety. Burman et al point to the risks to both parent and child if safety is not taken into account,²³² and make a formal recommendation that child contact arrangements “should protect the safety of the child and the parent with whom the child is living. In particular the court should clarify how the requirements of supported or supervised contact will ensure the child and the parent’s safety. The court should ensure that the arrangements do not expose either to the risk of further harm and keep the arrangements under review”.²³³ The safety of the parent is directly related to the safety and wellbeing of the child as acknowledged by Sheriff Mackie in *A v A*.²³⁴ On this basis, we propose that an amendment is made to the 1995 Act to require the court to consider not only the need for cooperation between the parents or relevant adults (as currently required by section 11(7D)), but also their safety.

7.138 We therefore think that the legislation needs to include a specific reference to the safety of the parents, as well as the child, when it comes to child contact and residence arrangements, and in requiring the court to consider the existence of any protection orders in place and any criminal convictions relating to domestic abuse in respect of one or both parents of the child. This would also meet the requirements of the Istanbul Convention: Article 31 places a requirement on States to ensure that domestic abuse (and gender based violence) is taken into account when determining child custody and visitation, to ensure that any such arrangements do not jeopardise the safety of children or victims.²³⁵

7.139 Any changes made to the current regime as a result of future reforms, must be accompanied by robust efforts to ensure that practitioners and the judiciary have a full understanding of the interrelation between domestic abuse and child welfare. Ensuring there is comprehensive judicial and practitioner training provided by the relevant bodies on the impact of domestic abuse on children and the consequences of that for child contact is essential. We are aware that several organisations have already provided valuable training in this area (for example training given to the judiciary by Scottish Women’s Aid and to practitioners by the Scottish Women’s Rights Centre), and would hope that would continue and reflect any future reforms.²³⁶

7.140 It has been suggested to us by some stakeholders that, where domestic abuse is perpetrated, there should be a presumption against any contact between the perpetrator and the children, or that contact with the perpetrator should automatically come to an end. However, having a presumption based approach, or an automatic rule about contact, would

²³² M Burman, R Friskney, J Mair, and R Whitecross, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings” (SCCJR, December 2022), at p 17 (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>).

²³³ M Burman, R Friskney, J Mair, and R Whitecross, “Domestic Abuse and Child Contact: The Interface between Criminal and Civil Proceedings” (SCCJR, December 2022), at para 7.10 (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2023/01/SCJH-Report-January-2023.pdf>).

²³⁴ *A v A* [2021] SCGLW 018, 2020 WL 08910985. See para 7.95 above.

²³⁵ See further Ch 2, para 2.20.

²³⁶ We discuss the need for professional training further in Ch 8: see paras 8.42 to 8.46.

not be in line with the fundamental principles of child law: that the paramount consideration must be the best interests of the child, and the child's views should be heard in any decisions made about them. An approach based on a presumption would not necessarily leave room for due consideration of the child's best interest, or leave scope for the child's views to be heard.²³⁷ Instead, domestic abuse must be recognised as relevant in any question of contact and residence, but each case must be decided on its own facts, taking into account the best interests of that individual child, and their views. We do not therefore propose introducing any presumptions in relation to child contact.

7.141 On the basis that proposals to reform communication between civil and criminal courts are considered further in chapter 8, we would be grateful for consultees' views on the following:

- 48. Do you agree that the Children (Scotland) Act 1995 should be amended so that:**
- (a) the court is required to provide written reasons for making an order under section 11 (such as a contact or residence order), where there is a history of domestic abuse?;**
 - (b) the safety of the parents should be considered by the court as part of the consideration of the child's welfare?**
- 49. Are there any other ways of ensuring the safety of the child and of the victim/survivor is considered by the court in making orders under section 11 of the 1995 Act?**

²³⁷ 1995 Act, s 11(7). See also the UNCRC, Articles 3 and 12.

Chapter 8 Access to Justice

8.1 In the preceding chapters of this Discussion Paper, we have examined the substantive issues with the law of civil remedies for domestic abuse and put forward proposals for reform. However, seeking to improve civil remedies will only achieve meaningful change if the process for obtaining those remedies is accessible and safe for victim/survivors. Engagement with stakeholders has shown that the process of obtaining civil remedies for domestic abuse can be so difficult and traumatic that it can act as a barrier to victim/survivors gaining the protection they need. Issues raised include the process of attending court, the need for special measures, and practical issues around safe access to the court building. We have also heard about problems arising from the (lack of) interaction between civil and criminal court proceedings, including the absence of information sharing between the two systems, the extent to which victim/survivors are forced to relive their abuse by giving evidence multiple times across multiple proceedings, and the risk that domestic abuse is taken – or perceived to be taken – less seriously in child contact/residence cases as opposed to criminal proceedings or actions for civil protection orders. In this chapter we explore issues relating to access to justice and whether reform is required.

Special measures

8.2 A criticism made of the current process for obtaining a civil remedy for domestic abuse is the lack of availability of special measures. “Special measures” refers to the various adjustments which can make it easier or feel safer for a person to give evidence in court.

8.3 The purpose of special measures is to facilitate the giving of the best possible evidence, and they are therefore designed to be used whilst the witness is giving evidence. The distinction between criminal and civil proceedings is very important at this point. In criminal trials, witnesses (including victim/survivors, who are referred to as complainers¹) are only required to be present in court while they are giving evidence. In contrast, in civil cases, the victim/survivor who requires special measures may be a party to the proceedings. A party to proceedings differs from a witness in that they actively pursue or defend the case, and may instruct a solicitor to represent them. Parties to proceedings may need to be present in court throughout the proceedings. Parties may become witnesses at certain points in proceedings, though this is not always the case, and they may have to be in attendance even when not giving evidence.

8.4 Special measures were introduced, in part, to fulfil an EU directive on the rights of victims of crime.² The civil law approach to special measures leans heavily on the approach taken in criminal proceedings, so it is helpful to start by setting out the provisions for special measures in the criminal system.

¹ The term “complainer” is used at this stage, because of the presumption of innocence until proof of guilt.

² Directive 2012/29/EU of the European Parliament and Council of 25th October 2012. See discussion in PR Ferguson, *Criminal Procedure* (SULI, 2024) at 19-026.

The criminal approach

8.5 In order to access special measures in criminal proceedings, a person must be deemed a vulnerable witness in terms of the Criminal Procedure (Scotland) Act 1995 (“the CPSA 1995”).³ Anyone under the age of 18 is automatically considered a vulnerable witness,⁴ as is a person over 18 in certain cases involving domestic abuse, stalking, sexual offences and trafficking offences.⁵ Otherwise, a person over 18 may be deemed a vulnerable witness by the court if: “there is a significant risk that the quality of evidence to be given by the person will be diminished by reason of... fear and distress in connection with giving evidence at the hearing”.⁶ Once a person has been deemed a vulnerable witness, they are entitled to the benefit of one or more of the special measures for the purpose of giving evidence.⁷

8.6 The special measures available under the CPSA 1995 are as follows:

- i) The taking of evidence by a commissioner,⁸ where evidence is taken in private before the trial by a commissioner and the accused is ordinarily not present.⁹
- ii) The use of a live television link.¹⁰
- iii) The use of a screen (partition), placed between the dock where the accused sits and the witness box from which the witness gives evidence.¹¹
- iv) The use of a supporter; an individual specified by the witness to be present alongside them as they give evidence.¹²
- v) The giving of evidence in the form of a prior statement.¹³
- vi) The exclusion of the public from the court.¹⁴

8.7 The party citing the witness to appear must lodge a ‘vulnerable witness notice’ specifying what measure(s) they think are appropriate and the witness’s views on the matter.¹⁵ The decision to use special measures must be in the best interests of the witness. However, where it would be substantially prejudicial to the interests of justice, and the fairness of the

³ S 271, as substituted into the CPSA 1995 by the Vulnerable Witnesses (Scotland) Act 2004.

⁴ CPSA 1995, s 271(1)(a).

⁵ CPSA 1995, s 271(1)(c). Complainers in sexual offences cases and various trafficking/exploitation cases are also automatically deemed vulnerable witnesses.

⁶ 1995 Act s 271(1)(b)(ii) (and also if a person has a mental disorder within the meaning of s 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (s 271(1)(b)(i)). In determining whether s 271(1)(b) applies the court must take into account a list of factors at s 271(2). These factors include the nature and circumstances of the offence, the nature of the evidence the person is likely to give, the relationship between the person and the accused, the person’s age and maturity and the conduct of the accused or their associates towards the person.

⁷ CPSA 1995, s 271A(1).

⁸ CPSA 1995, s 271H(1)(a). The rules for taking evidence by a commissioner are set out in s 271I of the same Act.

⁹ PR Ferguson, *Criminal Procedure* (SULI, 2024) at 19-031.

¹⁰ CPSA 1995, s 271H(1)(b). The rules for the use of a live television link are set out in s 271J of the same Act. This means that the witness gives live evidence during the trial but is not present in the courtroom.

¹¹ CPSA 1995, s 271H(1)(c). The rules for the use of screens are set out in s 271K. It must be placed so that the witness cannot see the accused, but the accused can still see the witness. In practice, the ability of the accused to see the witness may be facilitated by a television link.

¹² CPSA 1995, s 271H(1)(d). The rules for supporters are set out in s 271L. A supporter is an individual specified by the witness to be present alongside them as they give evidence. The supporter may not prompt the witness or influence the evidence they give (s 271L(3)).

¹³ CPSA 1995, s 271H(1)(e). The rules for the use of written statements are set out in s 271M. This means a written statement is given to the court in lieu of questioning by the party which cited the witness. The other party will still have opportunity to challenge this evidence.

¹⁴ CPSA 1995, s 271H(1)(ea). The rules for excluding the public are set out in s 271HB. This means that the witness gives evidence as normal aside from the fact that the general public are excluded from the court.

¹⁵ CPSA 1995, s 271A(2-3). However, if the witness requires only a ‘standard special measure, a statement of their views is not required (CPSA 1995, s 271A(3A)). The party who did not cite the witness has the opportunity to object to the use of special measures.

trial, special measures cannot be used.¹⁶ Additionally, the court can decide not to use special measures if the witness does not want them.¹⁷

The civil approach

8.8 The approach to vulnerable witnesses in civil matters is set out in the Vulnerable Witnesses (Scotland) Act 2004 (the “VWSA 2004”). Children under 18 are again considered vulnerable witnesses but only when giving evidence.¹⁸ However, unlike criminal proceedings, a victim/survivor of domestic abuse is not automatically deemed vulnerable in civil proceedings. They must first meet the statutory test, and even if the test is met and the court makes a vulnerable witness order, this applies to *evidential* hearings only (so not for example, in child welfare or case management hearings), and only where the victim/survivor is actually giving evidence. For the avoidance of doubt, even being identified as a vulnerable witness in civil matters does not entitle a party to proceedings to access special measures at all points in proceedings, and there is currently no statutory basis for them to be accessed outwith giving evidence.

8.9 The test for identifying a vulnerable witness is similar to the test in criminal proceedings: whether the quality of the evidence given by the person will be diminished by reason of for example fear and distress in connection with giving evidence in proceedings.¹⁹ The list of factors to consider when applying the test is the same as in criminal cases.²⁰

8.10 The party citing a person to appear (or a party appearing themselves) must provide the court with a vulnerable witness application, after which the court may order that an appropriate special measure may be used for the purpose of taking their evidence.²¹ When considering whether to make a vulnerable witness order, the court must take into account the effect on the witness of having to give evidence without the benefit of a special measure and whether it is likely that the witness will be better able to give evidence with the benefit of a special measure.²² The court must also give consideration to the views and best interests of the witness.²³ Both parties to the proceedings can be deemed vulnerable witnesses.²⁴ The special measures are set out at section 18 of the VWSA 2004²⁵ and largely mirror those available in criminal proceedings, including the use of a commissioner to take evidence, the use of a live television link, or use of screens and a supporter.²⁶

¹⁶ PR Ferguson, *Criminal Procedure* (SULI, 2024) at 19-030.

¹⁷ PR Ferguson, *Criminal Procedure* (SULI, 2024) at 19-030.

¹⁸ VWSA 2004, s 11(1)(a).

¹⁹ VWSA 2004, s 11(1)(b) (or if there is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of mental disorder (within the meaning of s 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or the person is of such description or is a witness in such proceedings as the Scottish Ministers may by order subject to the affirmative procedure prescribe).

²⁰ VWSA 2004, s 11(2).

²¹ VWSA 2004, s 12(6). If the witness is a child, a different process is set out in s 12(1-4) of the same Act, children are automatically treated as vulnerable witnesses, so their vulnerability need not be assessed, and certain special measures must be ordered if identified as appropriate.

²² VWSA 2004, s 12(7), the court must also take into account the factors used to determine if an individual is a vulnerable witness in s 11(2)(a-f) of the same Act.

²³ VWSA 2004, s 15, where the witness is a child, the views of the witness’ parent(s) should also be taken into account, though the views of the witness should be given greater weight where these diverge.

²⁴ VWSA 2004, s 16.

²⁵ The taking of evidence by a commissioner; use of a live television link; use of screen; use of a supporter; other measures prescribed by order.

²⁶ It is not possible to seek to exclude the public from the courtroom as a special measure in civil matters.

Domestic abuse and special measures

8.11 A victim/survivor of domestic abuse may have to participate in a number of different types of civil proceedings involving their perpetrator. For example, they may seek a civil protection order, or they may be involved in divorce proceedings, child welfare or child contact and residence hearings. However, currently, a victim/survivor is not automatically considered a vulnerable witness in civil cases, even when:

- a) the victim/survivor has obtained a non-harassment order, interdict or similar order in relation to domestic abuse against the other party to the proceedings (which might prevent the perpetrator from approaching them, or coming within a certain distance of them); or
- b) a domestic abuse offence has been committed against the victim/survivor and a party to the proceedings has been convicted of committing it/is being prosecuted for committing it, or
- c) the victim/survivor alleges that the other party has perpetrated domestic abuse against them, or they are seeking a civil protection order against that other party.

8.12 Stakeholders have raised concerns with us that this is unfair as a victim/survivor seeking a civil protection order or taking part in other family law cases will typically face many of the same fears and vulnerabilities as a complainer in a criminal case, in which they would automatically be considered vulnerable witnesses without having to make a full vulnerable witness application. Victim/survivors may have to attend proceedings involving their perpetrator, meaning that they have to sit down at the same table in the court as their perpetrator.

8.13 Even when a victim/survivor has the benefit of the civil protection order, a non-harassment order, or bail conditions, which require the perpetrator to stay away from the victim/survivor, this does not extend to the court building itself. The perpetrator is entitled to be in the court building, in the presence of the victim/survivor. As a result, some victim/survivors avoid attending court altogether, as the only way to avoid the perpetrator. Their attendance can be excused at the sheriff's discretion where there is cause shown,²⁷ and we understand that sheriffs generally would accept that an interdict or non-harassment order for domestic abuse would constitute cause shown, but there is no statutory basis for this. The effect of being excused is that the victim/survivor is excluded as a matter of fact from the hearing, which could be contrary to their preference, especially in child welfare hearings. In general, as a matter of law, parties have a right to be present in court in proceedings which concern them.²⁸ It could be therefore argued that the current position in Scotland results in unfairness towards the victim/survivor.

Evidential hearings

8.14 The primary problem in relation to civil evidential hearings is that victim/survivors are not automatically entitled to special measures when giving evidence. It is possible for a victim/survivor to seek to be recognised as a "vulnerable witness" which would entitle them to special measures while they are giving evidence, but they must first meet the test. However,

²⁷ Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993/1956, Schedule 1, Rule 33.36.

²⁸ Due to, among other things, Article 6 ECHR.

during other parts of the evidential hearing, the victim/survivor will not be entitled to special measures, even if they wish to or must be in attendance in their role as the pursuer or defender of the proceedings. A lack of automatic entitlement to special measures in civil evidential cases makes it more difficult for victim/survivors of domestic abuse to access justice. It can increase their anxiety around giving evidence and it can also be confusing if they have automatically been deemed vulnerable and had access to special measures when giving evidence in a criminal case. Victim/survivors often do not distinguish between criminal and civil proceedings, viewing all proceedings as “court” (especially when both criminal and civil proceedings take place, as often happens, in the same building and sometimes in front of the same sheriff), which can add to a lack of understanding as to why special measures are not available in civil proceedings.

Non-evidential hearings

8.15 The primary problem in relation to civil non-evidential hearings such as case management hearings, child welfare hearings, or other intermediate hearings, is that as victim/survivors are present as parties and not witnesses, there is no legislative route for them to access special measures at all. They cannot seek to be recognised as a “vulnerable witness”, as they are not a witness in non-evidential hearings. Again, this is the case even where there is a criminal conviction, special conditions of bail, or a civil protection order in place in respect of the other party to the proceedings. As a party to proceedings a victim/survivor will play an active role in pursuing or defending the action and will often instruct a solicitor to act for them, sitting with their solicitor, often at the same table in court as the perpetrator and their solicitor. For example, a victim/survivor may have to sit opposite their ex-partner against whom a non-harassment order has been issued for their protection, during a child welfare hearing where child contact is in dispute. While it is open to the sheriff to exempt a party from having to be present during these hearings, this is discretionary and leads to the victim/survivor being excluded from the process.

8.16 This difference in treatment of victim/survivors of domestic abuse between both criminal court proceedings and civil court proceedings, and between civil evidential hearings and civil non-evidential hearings, has been criticised by a number of stakeholders, including many domestic abuse support groups, for being unfair, complicated and a barrier to victim/survivors of domestic abuse accessing justice.

Forthcoming law reform: the Children (Scotland) Act 2020

8.17 The Scottish Government recently took steps to address some of these issues in the Children (Scotland) Act 2020 (“the 2020 Act”), although the relevant sections have yet to be commenced. When commenced, the 2020 Act will amend the provisions on special measures in the VWSA 2004, to assist vulnerable witnesses and parties in certain civil family law proceedings *relating to children*, in the following two main ways.

8.18 First, a person will automatically be deemed a vulnerable witness (i) in children’s hearings where it is alleged that a person is a victim/survivor of domestic abuse;²⁹ or (ii) in a

²⁹ Prospective s 11A(1)(b) of the VWSA 2004, as inserted by the 2020 Act, s 4(3). Vulnerable witness status will also automatically be conferred where a prospective forced marriage/civil partnership, or conduct amounting to certain sexual offences is alleged. This only applies to “relevant proceedings”, which are certain proceedings within

hearing where orders under section 11 of the 1995 Act are likely to be made (for example, contact and residence orders), where a party has a non-harassment order, or interdict in place prohibiting conduct towards them by a party to the proceedings, or there is an ongoing criminal case or previous conviction against them for committing certain offences against the witness (including domestic abuse).³⁰

8.19 Second, the 2020 Act introduces a new special measure into the VWSA 2004 in relation to court proceedings arising out of children’s hearings or where the court is considering making an order under section 11 of the 1995 Act.³¹ The new special measure will prohibit a party from conducting their own case in person beginning with the first evidential hearing in the proceedings. It will also be presumed that this special measure is appropriate whenever a witness is deemed vulnerable by virtue of there being an non-harassment order, conviction or ongoing criminal case between one party and the vulnerable witness, where the party intends to examine/cross-examine the witness.³² A party to whom the prohibition applies will be given a reasonable opportunity to appoint their own solicitor. Where they do not have or intend to appoint a solicitor, the court must appoint one from a register of solicitors maintained by the Scottish Ministers for that purpose (in accordance with section 7 of the 2020 Act).³³

The Victims, Witnesses and Justice Reform (Scotland) Bill

8.20 While the above provisions are not yet in force, some of what is provided for is likely to be amended by the Victims, Witnesses, and Justice Reform (Scotland) Bill (“VWJR Bill”) which was introduced in the Scottish Parliament on 25 April 2023 and is currently at Stage 2 of its Parliamentary process. The Bill is extensive, split into seven Parts, and covers a wide range of reforms to criminal process. However, Part 3, “Special Measures in Civil Cases” seeks to extend the provisions on special measures applicable in certain family law cases in the 2020 Act, to civil cases more generally.

8.21 The Bill provisions are technically complicated, as they amend changes due to be made to the VSWA 2004, by the as yet un-commenced 2020 Act. However, essentially, the Bill will extend the availability of special measures to all civil proceedings (both evidential and non-evidential, and both child and non-child related),³⁴ where there is non-harassment order, or interdict in place or a conviction or ongoing prosecution for domestic abuse or stalking against one party to the case. In such a case, the party who is the victim/survivor of that abuse will automatically be deemed a vulnerable party (whether giving evidence or not).³⁵ Other parties may be deemed vulnerable if they meet a statutory test.³⁶

the children’s hearings system. “Relevant proceedings” are defined by VWSA 2004, s 11(5) as prospectively amended by the 2020 Act, s 4(2).

³⁰ VWSA 2004, s 11B as prospectively inserted by the 2020 Act. Sexual offences, offences against children under 12, and stalking.

³¹ VWSA 2004, s 22B as prospectively inserted by the 2020 Act (s 4(5)).

³² By inserting prospective s 22D into the VWSA 2004. See Children (Scotland) Act 2020 s 4(5).

³³ S 7 of the 2020 Act is likely to be repealed and replaced by a new s 22E of the VWSA 2004: see s 32 of the VWJR Bill.

³⁴ By amending prospective s 11B of the 2004 Act, VWJR Bill, s 30(2).

³⁵ Amendments to the inserted s 11B of the VWSA 2004 by s 30 of the VWJR Bill. S 33(3) VWJR Bill will insert prospective s 22F(1)(a) into the VWSA 2004. For these parties, the court must order the use of special measures requested by the party, or measures it thinks appropriate giving reasons for using a measure other than those requested. The court may decline to use special measures but must give reasons for this.

³⁶ Whether the party will be caused distress by attending or participating in hearings, which would be reduced by the use of special measures and that the use of special measures would not give rise to significant risk of prejudice to the fairness of proceedings. S 33(3) VWJR Bill will insert prospective s 22F(1)(b) into the VWSA 2004. There is

8.22 Whether a party is automatically deemed vulnerable or meets the statutory test for being vulnerable, orders for special measures will be able to be made at any point in proceedings and without application from the party.³⁷ The available special measures will be the use of: a live television link, a screen, a supporter, or the prohibition on personal conduct of a case by a party.³⁸

8.23 The Bill will also extend the presumption that where a witness (whether party or not) is automatically deemed vulnerable (for example, due to a non-harassment order or an ongoing criminal case or conviction against a party), the prohibition of a party personally conducting their own case will be the most appropriate special measure, where the party intends to examine/cross examine the witness.³⁹

8.24 Therefore, the VWJR Bill if enacted in its current form, will go some way to addressing the concerns we have outlined above. The provisions on vulnerable parties would address the concerns that at present, (i) special measures are only available in civil evidential hearings and only when the victim/survivor is giving evidence, and (ii) victim/survivors are not automatically deemed vulnerable even where the perpetrator already has a criminal conviction in relation to domestic abuse, is on trial for a domestic abuse offence, or has bail conditions or a civil protection order in place.

8.25 However, there are some respects in which the Bill does not go far enough to address concerns expressed by stakeholders. Most pressingly, victim/survivors will not be deemed vulnerable parties without the perpetrator already having a criminal conviction or being on trial for domestic abuse, or having bail conditions or a civil protection order in place. Therefore, in cases where a victim/survivor is seeking a civil protection order for domestic abuse, they will not automatically be considered a vulnerable party until the civil protection order is granted. This also applies in actions relating to divorce, child welfare or child contact and residence hearings, where there are allegations of domestic abuse against the other party. Instead the victim/survivor would be required to make applications.

8.26 In oral evidence to the Criminal Justice Committee, during stage one of the VWJR Bill passage through Parliament, Stuart Munro of the Law Society of Scotland said that it was important to take the witness's views into account when determining what a witness's deemed vulnerable status should mean for the mechanics of how they should give evidence.⁴⁰ This point was emphasised when victim/survivors of sexual assaults gave oral evidence to Committee,⁴¹ with some noting that it was assumed they would want special measures when

a list of factors the court must take into account in determining whether attendance is or is likely to cause distress including the nature and circumstance of matters (likely to be) raised in proceedings, the relationship between the parties to the proceedings, the behaviour of parties and their associates and other relevant matters including personal characteristics of the person to be deemed a vulnerable party (s 33(3) VWJR Bill will insert prospective s 22F(8) into the VWSA 2004).

³⁷ S 33(3) VWJR Bill will insert prospective s 22F(5) into the VWSA 2004.

³⁸ Or any other measure prescribed by the Scottish Ministers by regulations: prospective s 22F(6) of the VWSA 2004 (to be inserted by S 33(3) of the VWJR Bill).

³⁹ S 31(4) of the VWJR Bill, amends prospective VWSA 2004 s 22D(1) (as introduced by s 4(5) of the 2020 Act) so as to apply it to proceedings both non-child and child-related.

⁴⁰ Official Report of the Criminal Justice Committee of the Scottish Parliament, 25th October 2023, pp 26 and 27 (available at: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=15507>).

⁴¹ Official Report of the Criminal Justice Committee of the Scottish Parliament, 17 January 2024, (available at: <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/%20CJ->

in fact some did not (screens were particularly mentioned in this context). Therefore it is important that any proposals for reform we make in relation to special measures should take account of the views of the victim/survivor.

Proposals for reform

8.27 As discussed above, victim/survivors of domestic abuse seeking civil remedies face many of the same vulnerabilities and anxieties around attending court as witnesses in criminal cases. When seeking civil protection orders for domestic abuse, or in other civil actions where a protection order is sought alongside other decrees, such as divorce, victim/survivors can be at their most vulnerable, as they do not yet have protection against the other party. This limits the effectiveness of the existing scheme of special measures for victim/survivors of domestic abuse. The proposals for reform currently before the Scottish Parliament in the VWJR Bill do not address this issue, because they do not automatically deem victim/survivors a vulnerable party (and therefore entitle them to special measures), when they are seeking a civil protection order, or taking part in other civil evidential or non-evidential hearings, including divorce, child welfare hearings, or contact or residence hearings. Accordingly, we propose that, subject to the victim/survivor's views, all victim/survivors seeking a civil protection order for domestic abuse should automatically be deemed a vulnerable party in both evidential and non-evidential hearings. For clarity, we propose that pursuers seeking interdicts ancillary to exclusion orders, interdicts as ancillary craves in divorce/dissolution of civil partnership proceedings, standalone interdicts against a partner or former partner for the purpose of protection from harassment or molestation by causing fear alarm or distress, or a non-harassment order against a partner or former partner, as well as the proposed DACPRO should automatically be deemed a vulnerable party and thus entitled to special measures.

50. Do you agree that a person seeking a civil protection order should be entitled to special measures as a party and while giving evidence during those proceedings?

8.28 We have also considered whether a victim/survivor who is involved in other civil proceedings, such as divorce proceedings, child welfare or child contact/residence hearings should automatically be deemed vulnerable where they allege the other party to the proceedings has subjected them to domestic abuse, and therefore entitled to special measures in both evidential and non-evidential hearings. We appreciate however that this goes significantly further than the proposal referred to in paragraph 8.27 above, and would therefore be grateful for consultees' views:

51. Do you think that a person who alleges they have been subjected to domestic abuse by the other party to the proceedings, should be entitled to special measures as a party and while giving evidence in civil proceedings?

8.29 We will be following the VWJR Bill's progress through Parliament during stages 2 and 3 to see if any further changes are made to the provisions on vulnerable parties that might have an impact on our project and the questions we have asked consultees above.

[17-01-2024?meeting=15662&iob=133611](#)). The evidence given was regarding giving evidence in criminal trials, but the issues are also relevant in the civil system.

Access to the court building

8.30 Even if special measures are in place in the courtroom, victim/survivors can still face problems physically accessing the court in civil cases.⁴² In criminal cases, the complainer has access to a witness room, away from the accused and their associates. In civil cases, the pursuer and defender (and family members) may have to wait in the same area, and arrive or leave at the same time via the same entrance and exit. This can be difficult and traumatising for victim/survivors of domestic abuse before the hearing begins, limiting the effectiveness of any special measures within the courtroom. As noted by Dr Forbes (albeit in the context of criminal cases):

“Waiting at court is inevitable and court practitioners relate their own common experiences of waiting as a mere inconvenience. However, for women who have been waiting a tortuous length of time for their case to come to court, waiting at court is a further trauma. There is a challenging power/control dynamic affecting women’s ability to wait without exposure to re-traumatisation. This goes beyond the known effects of secondary victimisation from giving evidence. The research found that this complex, additional layer of trauma was a form of tertiary victimisation, which impacts on victim’s ability to give evidence in the prescribed form and predicates much of their emotional response.”⁴³

8.31 One consequence of this is that victim/survivors of domestic abuse may again opt to stay away from court in civil matters where they are not required to give evidence.⁴⁴ This means that they are not in court to participate in the hearing or to give instructions to their solicitor. Failing to provide for a victim/survivor to access the building and the court room in a safe way potentially means that victim/survivors may feel constructively excluded from court. However, the age and design of many court buildings in Scotland mean that providing practical solutions here is not feasible.

8.32 In light of these access challenges, as well as the issues described above at paragraph 8.12, we propose that it should be possible to conduct any civil hearing remotely, by electronic means, as a standard special measure presumed to be available where sought in any case where domestic abuse is alleged. In any case where the measure is used, it should apply to all hearings related to that case. We understand that practitioners and the judiciary alike can find virtual hearings to be less effective than in-person hearings, particularly when a witness or party gives evidence at proof stage. Likewise, virtual hearings can be beset by technical issues. However, stakeholders have informed us that physically attending the court building is one of the most difficult things for victim/survivors, and can therefore operate as a significant barrier to justice. At present, there is provision for hearings to be held by electronic means,⁴⁵ though this is not available as a standard special measure and is available at the discretion of the sheriff. We also understand that some victim/survivors are allowed to attend by videolink

⁴² We are aware that there are a number of strategies in place to assist victims with access to the court building and measures including: pre litigation court visits, advocacy workers who accompany victims to court, and interpreters who are able to assist victims who do not speak English as their first language. Access to these services is a vital component of access to justice provision.

⁴³ E Forbes, “Beyond Glass Walls: How Domestic Abuse Victims Experience the Criminal Justice Process in Scotland”, p 7 (SCCJR), (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2021/02/Dr-Emma-E.-Forbes.pdf>).

⁴⁴ See para 8.12 above, which discusses this issue with reference to the court room itself.

⁴⁵ Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Cause Rules 1993 Amendment) (Attendance at Hearings) 2023 (SSI 2023 No. 168) chapter 12C.

but are required to do so from within the court building, which does not address the concerns referred to above about the difficulties of facing the perpetrator at the building's entrance and exit points, or in waiting areas. By making specific provision, it would be possible to ensure that victim/survivors do not have to attend the court building at all if they would prefer not to.

8.33 The alternative would be to enforce the terms of any interdict, non-harassment order, DACPRO or bail conditions against the perpetrator even in the court room, thereby excluding the perpetrator from court and permitting the victim/survivor to attend court in safety. However, it is unlikely that this would comply with the perpetrator's Article 6 ECHR rights to fair trial which would include being present in court. Accordingly, in order to respect the safety of the victim/survivor and the terms of any order in respect of the perpetrator, and both parties' Article 6 rights, we propose that both parties attend remotely. We understand that some practitioners and judges prefer evidential hearings in particular, to be held in person. Nevertheless, allowing all hearings to be remote will allow victim/survivors of abuse to be safe, and feel safe, especially while giving evidence, which is in keeping with the aims of special measures. It will also act to limit the trauma and anxiety inherently attached to attending court for the victim/survivor. Stakeholders have noted that perpetrators can also feel anxiety around attending court as they may accidentally breach protection orders in waiting areas or on their way into and out of the buildings. Accordingly, we ask:

52. Should remote hearings be available as a standard special measure?

Special measures and children

8.34 It is well established that attending court and giving evidence can be traumatising for children. Observations made by Children 1st demonstrates that children may be asked to recount traumatic events to up to fourteen people in the aftermath, which can be re-traumatising and lead to the child feeling unheard or frustrated.⁴⁶ Commentators have observed that the ability of children to give pre-recorded evidence on a single occasion to be used in all related cases would be preferable, provided that this is what children wish. For example, Dr Morrison and Dr Houghton note that:

“Practitioners hoped that the pivot to pre-recorded evidence in criminal proceedings would be accelerated and expanded through COVID-19 measures, but this did not prove to be the case in summary courts, where most domestic abuse criminal cases are heard. Such virtual and timely methods have potential to improve children's experience across the justice system. However, there is a need to evaluate this with children, to help understand what impact they have on children's inter-related rights to protection and participation.”⁴⁷

8.35 At present, children are automatically treated as vulnerable witnesses.⁴⁸ In practice, evidence given by children is taken by commission, unless the child wishes otherwise. However, this can still require the child to attend the court building, which can be traumatising in and of itself. The Barnahus model allows children to be interviewed, medically examined, and receive counselling and support in an inviting and comforting environment. The model has

⁴⁶ Children 1st, Case study, (available at: <https://www.children1st.org.uk/media/eqynl2fx/barnahaus-children-1st-diagram.png>).

⁴⁷ F Morrison and C Houghton (2022), “Children's human rights in the contexts of domestic abuse and COVID19”, International Journal of Human Rights, p 11.

⁴⁸ Vulnerable Witnesses (Scotland) Act 2004, s 11(1)(a).

been piloted in Scotland by Children 1st as the ‘Bairn’s Hoose’. The Bairn’s Hoose allows for the recording of evidence in a safe environment, away from the courtroom. Currently this facility is for criminal cases, though there would be clear advantages in using this pre-recorded evidence in civil cases or contact and residence decisions, where it is required. Additionally, the Bairn’s Hoose contains a justice suite, where live links to the court can be made, and evidence can be given by children from this environment, again keeping children out of the court environment. While making recommendations in relation to procedures for children to give evidence is beyond the scope of this project, we note that any participation in proceedings must comply with the UNCRC,⁴⁹ and that the Bairn’s Hoose is a clear example of good practice which could usefully be considered for wider adoption.

Party litigants

8.36 Another concern raised by stakeholders is that perpetrators may not be eligible for legal aid and may be unable to afford a solicitor otherwise, and so are required to (or may choose to) conduct their case personally. This can be highly distressing for victim/survivors of abuse. It can be traumatising for victim/survivors of abuse to have questions put to them by their abuser, and their distress in these situations is a barrier to their giving evidence fully and in a free and uninhibited manner. These situations also inhibit the effectiveness of standard special measures, as the measures are designed for situations where both parties are represented. As noted above,⁵⁰ the VWJR Bill will allow a party who would be a vulnerable witness to benefit from a prohibition of the perpetrator from conducting their case in person, if there is a non-harassment order or interdict in place against them, or a conviction or ongoing criminal case for domestic abuse.⁵¹ If the prohibition applies and it appears to the court they do not have or intend to appoint a solicitor, the court will be obliged to appoint one from a register of solicitors maintained by the Scottish Ministers for that purpose.⁵² However, we do not think that this protection is sufficient. In particular, for the prohibition to be automatically presumed to apply there must already be in place a non-harassment order or interdict protecting the victim/survivor (or a conviction of or ongoing criminal case for domestic abuse against the party to be prohibited). The prohibition would not apply where the non-harassment or interdict or civil protection order itself was being sought.⁵³ Thus we propose that the scope for the prohibition be extended to make it available in proceedings for civil protection orders without the need to demonstrate existing orders or criminal convictions or proceedings against the party who is to be prohibited. Accordingly, we ask:

- 53. Do you agree that personal conduct of cases by a party to proceedings should be prohibited where a civil protection order is sought against them, as well as in all civil cases where there is a civil protection order, conviction or bail conditions in place in respect of that party?**

Communication between the civil and criminal justice systems

8.37 One issue raised by many stakeholders is the lack of integration between the criminal justice system and the civil justice system when dealing with cases involving domestic abuse. For example, there is no standardised way of ensuring that a civil court making a

⁴⁹ United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, s 6.

⁵⁰ See paras 8.19, 8.22 and 8.23.

⁵¹ VWJR Bill, s 31.

⁵² VWSA 2004 s 22E to be introduced by s 32 of the VWJR Bill.

⁵³ Unless the party to be prohibited had a conviction or ongoing criminal case for, domestic abuse.

contact/residence decision in relation to a child is aware of special conditions of bail, a post-conviction non-harassment order, or a civil protection order obtained by one parent against the other parent (see the discussion on this point in Chapter 7, Part 3, especially para 7.135). Likewise, there is no uniform way for a court considering making a civil protection order to know whether there are special conditions of bail, or a non-harassment order as a result of a criminal conviction in place against the defender.⁵⁴ At present, the court relies on the victim/survivor informing their agent and their agent passing this information onto the court. However, victim/survivors often do not know the status of criminal cases, nor the details of the protection orders stemming from them, particularly if the case was some time ago.⁵⁵ As noted above, research has also demonstrated that victim/survivors do not always understand the distinction between the criminal and civil court, and therefore assume that “the court”, and by extension their solicitor already have this information.⁵⁶ Victim/survivors can find this frustrating and difficult as noted by Dr Emma Forbes:

“[The Interviewees] described a lack of consistency between the civil and criminal courts, particularly in relation to special measures, and could not understand why there was not a more joined-up justice response.”⁵⁷

Likewise, research by Burman, Friskney, Mair and Whitecross explains that this causes difficulties for practitioners:

“There is no formal mechanism by which practitioners are informed of criminal proceedings in relation to domestic abuse. Nor do most routinely enquire about domestic abuse as a factor when taking on a child contact case, although this may emerge as a case proceeds. Where such information flow is wholly dependent on the client, then there is a risk of partial or inaccurate information being conveyed or miscommunicated.. Importantly, lack of awareness of domestic abuse may compromise the safety of the child and non-abusive parent.”⁵⁸

8.38 Clearly, in the context of civil remedies being sought, and considering the impact of domestic abuse in contact/residence cases, a lack of communication between the civil and criminal courts is an issue. However, we have not elicited a clear view from stakeholders as to a solution. Discussions with relevant stakeholders have informed us of the operational and technological constraints which limit the possibility of reform in this area.

⁵⁴ This is one of the reasons why some stakeholders are keen on greater integration between criminal and civil courts in domestic abuse cases. The Scottish Government recently carried out a literature review on the concept of an integrated domestic abuse court, in its 2019 Report, Evidence on the Effectiveness of Integrated Domestic Abuse Courts (available at: <https://www.gov.scot/publications/evidence-effectiveness-integrated-domestic-abuse-courts/documents/>). The review looked at a number of different “One Family, One Judge” court models from the USA and Canada. One of the Report’s conclusions was that the evidence base on integrated domestic abuse courts is limited, and that there were a number of practical considerations for Scotland if integrated domestic abuse courts were to be considered, including costs, burdens of proof, rights of audience, and consent and information sharing.

⁵⁵ M Burman et al, (2023) “Domestic abuse and Child Contact in Scotland,” Journal of Social Welfare and Family Law 45:3 at 244.

⁵⁶ M Burman et al, (2023) “Domestic abuse and Child Contact in Scotland”, Journal of Social Welfare and Family Law 45:3 at 244.

⁵⁷ E Forbes, “Beyond Glass Walls: How Domestic Abuse Victims Experience the Criminal Justice Process in Scotland”, p 8 (SCCJR) (available at: <https://www.sccjr.ac.uk/wp-content/uploads/2021/02/Dr-Emma-E.-Forbes.pdf>).

⁵⁸ M Burman et al (2023), “Domestic Abuse and Child Contact in Scotland: The Interface Between Civil and Criminal Proceedings”, Journal of Social Welfare and Family Law p 244.

8.39 One option for reform would be to create a duty to disclose the existence of certain formal interventions in respect of both parties at the earliest possible instance in civil proceedings between parties who are, or have previously been in an intimate relationship.⁵⁹ This could be a requirement to disclose convictions, existing civil protection orders, orders or convictions from other jurisdictions, and the existence of bail conditions. Equally, the requirement of disclosure could be wider, such as general police involvement or disclosure of social work involvement. We envisage that the exact nature of what needs to be disclosed and when it would be disclosed would be matters for rules of court. However, this reform would not place the onus on the court to find and disclose this information; rather it would rely upon information being supplied by perpetrator of the abuse and their representative (as well as the victim/survivor). Consequently, there would be no reliable way to check that the information was being fully disclosed, or was accurate. A disclosure requirement would be an improvement on the current position where there is no means to obtain this information besides relying on the victim/survivor. Due consideration must be given to the types of issues which must be disclosed, and the types of proceedings in which they must be disclosed.⁶⁰ Accordingly we ask:

- 54. Should there be an obligation placed on parties who are (ex-)partners involved in civil proceedings, including those under section 11 of the 1995 Act, to disclose formal responses taken in respect of domestic abuse? If so, what should be disclosed?**

8.40 We recognise that the above proposal would not fully address the concerns identified by stakeholders surrounding information sharing between the civil and criminal courts. Accordingly, we ask:

- 55. How can the existence of criminal proceedings in relation to domestic abuse be effectively communicated to the court in civil proceedings, including those under section 11 of the 1995 Act?**

Statistics and data collection

8.41 At present, statistical data on the use of civil protection orders is limited in Scotland. Statistics are not available for interim orders, which, as discussed in Chapter 4, are often applied for, particularly in the case of exclusion orders.⁶¹ This is an issue because it prevents an understanding of the extent of the use of civil protection orders, and whether they are providing effective protection to victim/survivors. Additionally, Scotland has a requirement under the Istanbul Convention to collect disaggregated data on the instances of domestic abuse, and to support research on the efficacy of measures taken to implement the Convention.⁶² The Convention does not specifically mandate the collection of statistics for civil

⁵⁹ This proposal is in line with recommendation 1 of the SCJH/SCCJR report. See M Burman et al, "Domestic Abuse and Child Contact: The Interface Between Criminal and Civil Proceedings" (SCCJR) p55.

⁶⁰ Any provision on disclosure would be a matter for court rules, and these are usually made as rules of court by Act of Sederunt, which are a special form of secondary legislation made in the name of the Lord President, as opposed to primary legislation made by the Scottish Ministers. Therefore, it may be that any recommendation we make on this matter is not one that can be implemented by primary legislation, but would be a matter for an Act of Sederunt.

⁶¹ See para 4.58 and 4.59.

⁶² Istanbul Convention, Article 11(1); the Explanatory Report to the Istanbul Convention notes that 'as a minimum requirement, recorded data of victim and perpetrator should be disaggregated by sex, age, type of violence, as

remedies for domestic abuse, although it would be in line with the values and spirit of the Convention to do so. A recent proposal for a private members bill to set up a domestic abuse register, which would require reporting by Scottish Government on access to domestic abuse services (with these statistics disaggregated by protected characteristics) received a high level of support from consultees.⁶³ Additionally, Burman et al make a recommendation that the collection of statistical data as regards domestic abuse and child contact ought to be reviewed.⁶⁴ Accordingly, we propose that there is a legislative requirement that *disaggregated* statistics are collected as to the use of civil protection orders relating to domestic abuse. This will allow the Scottish Government, non-governmental organisations, academics and others to research and assess the usage of civil protection orders for domestic abuse to ensure as many people as possible get the protection they need. We ask:

56. Should there be a statutory requirement for the Scottish Government to collect disaggregated statistics on the number of civil protection orders sought and granted in relation to domestic abuse?

Training of solicitors and the judiciary: trauma informed practice

8.42 One issue raised by stakeholders and members of our Advisory Group is that, due to the complexity of the legislative landscape, combined with the specific circumstances of domestic abuse, some practitioners are not sufficiently equipped to represent victim/survivors of domestic abuse. Stakeholders have noted that practitioners may have different conceptions as to what constitutes domestic abuse, of the long-term trauma it can cause, or be unaware of the full extent of available protective measures. Research by Burman et al demonstrates that many practitioners view domestic abuse as discrete incidents of physical violence; a stance irreconcilable with Scottish Government policy and the legislative definition of domestic abuse as a criminal offence, and the consensus view of the modern understanding of domestic abuse.⁶⁵ This research also demonstrated that some practitioners did not necessarily grasp the effect of domestic abuse on children.⁶⁶

8.43 This issue may be due to a lack of appropriate training for practitioners in dealing with cases involving domestic abuse. In order to be recognised by the Law Society of Scotland as an accredited family law specialist, solicitors are not required to be ‘trauma informed’ or to have expertise in dealing with domestic abuse cases.⁶⁷ To achieve family law specialist accreditation, solicitors must demonstrate high levels of expertise across *most* of eight specified areas of family law, one of which is proceedings in relation to domestic abuse. Thus, it would be possible to demonstrate high levels of expertise in other areas, without doing so in relation to domestic abuse, and to still meet the Law Society of Scotland’s standard for

well as the relationship of the perpetrator to the victim, geographical location, as well as other factors deemed relevant by Parties [to the Convention]’... (p 76).

⁶³ Available at: <https://www.parliament.scot/-/media/files/legislation/proposed-members-bills/consultation-summary-domestic-abuse-final.pdf> p 41.

⁶⁴ M Burman, R Friskney, J Mair and R Whitecross (2022), *Domestic Abuse and Child Contact: The Interface Between Civil and Criminal Proceedings*, p 55.

⁶⁵ M Burman, R Friskney, J Mair and R Whitecross (2022), *Domestic Abuse and Child Contact: The Interface Between Civil and Criminal Proceedings*, at para 7.2.

⁶⁶ M Burman, R Friskney, J Mair and R Whitecross (2022), *Domestic Abuse and Child Contact: The Interface Between Civil and Criminal Proceedings*, at para 7.2. See also the discussion in chapter 7 above.

⁶⁷ Available at: <https://www.lawscot.org.uk/members/career-growth/specialisms/areas-of-specialism/family-law-accreditation/>.

accreditation as a family law specialist. There are continuing professional development courses available for solicitors providing legal advice in relation to domestic abuse, though again, these are not mandatory.⁶⁸ In response to two public petitions to the Scottish Parliament on responses to domestic abuse, the Law Society of Scotland noted that;

“...training is a key issue here, with judicial training considered a vital component. Increasing awareness of the effect of domestic abuse on children should enable practitioners and the court to respond to the particular circumstances of each case.... A better understanding by lawyers of the effects of domestic abuse (including more nuanced issues like financial control) might be relevant to how, for example, a Solicitor frames a letter, so that in representing their client’s interests they are not corresponding in an unduly aggressive or confrontational manner.”⁶⁹

8.44 Stakeholders have commented that the level of understanding of domestic abuse varies between civil and criminal practitioners, and that the understanding amongst criminal practitioners has greatly improved in the wake of the Domestic Abuse (Scotland) Act 2018.

8.45 In addition to the training of civil practitioners, stakeholders have commented that different members of the judiciary may have different conceptions of, and approaches to, cases involving domestic abuse. Stakeholders have noted that, on the civil side, there is not necessarily always an understanding of the coercive and controlling nature of domestic abuse, nor a recognition that conduct which may seem innocuous or is not criminal in nature – such as repeatedly contacting and sending flowers for example, to the victim/survivor – can cause fear or distress. There may also be a perception that domestic abuse between adults is not relevant in relation to child contact proceedings, or that once the parties have separated domestic abuse is now “in the past”, in contrast to the lived experiences of victim/survivors and children.⁷⁰ We note that the Judicial Institute training programme plan for 2023-2025 notes that the ‘Resource Kit’ on domestic abuse and trauma will be reviewed.⁷¹ Additionally, the most senior judges, the Senators of the College of Justice, receive training on trauma informed

⁶⁸ The Scottish Women’s Rights Centre maintains a list of solicitors who have undertaken their approved training (available at: https://www.scottishwomensrightscentre.org.uk/support-find-solicitor/#rslider_71).

⁶⁹ Response of the Law Society of Scotland (available at: https://www.parliament.scot/-/media/files/committees/citizen-participation-and-public-petitions-committee/correspondence/2022/pe1981/pe1968_g--pe1981_e.pdf) to Petitions PE1968/G: Restrict the perpetrators of domestic abuse from using family court proceedings to continue tormenting their victims (available at: <https://www.parliament.scot/get-involved/petitions/view-petitions/pe1968-restrict-perpetrators-of-domestic-abuse-from-using-family-court-proceedings>) and PE1981/E: Ensure perpetrators of domestic abuse, who have been excluded from the matrimonial home, cannot force the sale of the property (available at: <https://www.parliament.scot/get-involved/petitions/view-petitions/pe1981-ensure-perpetrators-of-domestic-abuse-who-have-been-excluded-from-the-matrimonial>).

⁷⁰ Although applying to England and Wales, the Ministry of Justice’s Report into Assessing the Risk of Harm to Children and Parents in Private Law Cases (‘the Harm Panel Report’), in June 2020 notes that: “The panel received a number of submissions from individual lawyers about their experiences in child contact cases. Some of these submissions indicated that lawyers have advised their clients not to raise domestic abuse because it would ‘anger’ the courts or be ‘counter-productive’. This evidence suggests that some lawyers do encourage their clients towards settlement in such a way that minimises or dismisses domestic abuse. For example, one lawyer who made a submission to the panel said: ‘Victims are often persuaded by their lawyers not to mention abuse, being told the courts don’t like it and it will harm their case. If it is raised, victims are often told by the courts that it’s ‘all in the past’ or, in one case I had been ‘too confrontational’, or that it’s not relevant” (p 62) (available at: <https://assets.publishing.service.gov.uk/media/5ef3dcade90e075c4e144bfd/assessing-risk-harm-children-parents-pl-childrens-cases-report.pdf>).

⁷¹ Judicial Institute for Scotland, Training Plan 2023-2025 para 4.2 (available at: https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/ii-training-plan-2023-25.pdf?sfvrsn=b9498e_1).

judging.⁷² The ‘Trauma Informed Judging Resource-Kit’ contains material focused specifically on civil cases. Further, since 2019, the induction course for new sheriffs involves consideration of the topic of domestic abuse with input from external contributors such as Scottish Women’s Aid.

8.46 While recommending changes to the training of practitioners or the judiciary is beyond the scope of our project, our proposals, if implemented, would result in the need for training for practitioners and the judiciary in relation to these changes to the law. For example, the introduction of a definition of domestic abuse in the civil context would help mitigate any disparate conceptions of abuse held by various practitioners and members of the judiciary. Tying this to the existing criminal definition, as we propose, would allow the positive development of awareness and understanding observed in criminal practice⁷³ to be emulated in the civil sphere. Enhanced training would also be in line with the recommendations made by Burman et al in their 2022 report.⁷⁴

Legal aid

8.47 Stakeholders have consistently raised the point that lack of legal aid provision and also legal aid representation is a very significant barrier to the effectiveness of civil remedies for domestic abuse. Many victim/survivors are not entitled to legal aid, which can be a barrier to them seeking help. Additionally, legal aid may be restricted to “assistance by way of representation,” meaning that initial consultation and advice from a practitioner may not be covered. We are also aware that there has been a decrease in the number of legal aid practitioners, meaning that even a victim/survivor who does qualify for legal aid may still be unable to find a solicitor to represent them. Stakeholders note that this issue is not specific to domestic abuse, and is caused by the rate of pay available to legal aid solicitors, which can make legal aid work unfeasible. The Scottish Women’s Rights Centre noted, in their response to a public petition before Holyrood, that:

“We strongly support that legal aid should be made available for victim/survivors of domestic abuse where they require to raise related legal proceedings. We are currently facing a legal aid crisis in Scotland. We have seen an increase in enquiries to our services from survivors of GBV who are unable to obtain legal aid funded representation. It has been reported to us by our service users that they have contacted anywhere between 30-50 solicitors to seek legal representation. We have seen a steady increase in the number of survivors self-representing in civil cases due to the legal aid crisis and the decrease in solicitors willing to provide legal aid funded work, due to inadequate remuneration.”⁷⁵

8.48 However, where legal aid solicitors are available, the legal aid regime can support victim/survivors of domestic abuse to access justice. Our stakeholders have noted that where

⁷² Judicial Institute for Scotland, Training Plan 2023-2025 para 1.3 (available at: https://www.judiciary.scot/docs/librariesprovider3/judiciarydocuments/judicial-institute-publications/i-training-plan-2023-25.pdf?sfvrsn=b9498e_1.)

⁷³ Burman et al (2023) Domestic Abuse and Child Contact in Scotland, Journal of Social Welfare and Family Law p 245.

⁷⁴ M Burman, R Friskney, J Mair and R Whitecross (2022), *Domestic Abuse and Child Contact: The Interface Between Civil and Criminal Proceedings*, at p 55.

⁷⁵ Scottish Women’s Rights Centre, response to petition PE2025, p 2 (available at: <https://www.scottishwomensrightscentre.org.uk/resources/SWRC-PE2025-response.pdf>).

a solicitor intends to seek an interdict with a power of arrest attached, there is automatic “Special Urgency” legal aid available, meaning that the solicitor can take on the work without first consulting the legal aid board. However, if the victim/survivor is not seeking a power of arrest, the prior consent of the legal aid board must first be obtained.⁷⁶

8.49 Additionally, it must be noted that children can pursue or defend civil actions, and this includes civil protection orders for domestic abuse.⁷⁷ Currently, the eligibility of children for legal aid is contingent upon the resources of individuals with an obligation of aliment to the child, which in most cases means their parents.⁷⁸ This means that the ability of children to seek a civil protection order for domestic abuse, or to defend an action for a protection order brought against them, will often require their parents to be willing to finance it. The UNCRC provides that children should be able to have their views heard through means of a representative,⁷⁹ which may mean that a system of entitlement based on aliment obligations may not be compliant.

8.50 Many stakeholders have noted that the single best way to improve the regime of civil remedies for domestic abuse would be to make legal aid for civil protection orders automatic and non means-tested. However, legal aid and funding for legal aid provision is a matter for the Scottish Government, as part of the wider provision of domestic abuse services. We therefore make no proposal here.

Rural and island communities

8.51 Particular difficulties with accessing justice can be faced by victim/survivors of domestic abuse in rural and island communities.

8.52 An Island Studies Journal article published in 2023⁸⁰ noted that there have been a limited number of studies exploring the nature of domestic abuse in rural and island areas,⁸¹ despite the fact that 9.7 million British people, and 17 percent of the Scottish population, live in rural areas.⁸² It also notes that domestic abuse in rural areas is typically underestimated and might be more hidden and underreported, in comparison to abuse in towns and cities:

“This has been attributed to the character of gender relations in such areas, which can remain particularly conservative and patriarchal (Terry, 2020) ... In addition, domestic abuse and violence by men have been linked to the decline in farming and other rural

⁷⁶ The Civil Legal Aid Regulations (Scotland) 2002/494, Regulation 18.

⁷⁷ Age of Legal Capacity (Scotland) Act 1991 s 2(4A) and (4B), children over 12 are presumed to have capacity in this regard, whereas younger children may also have capacity. See the discussion of this in Ch 7.

⁷⁸ Civil Legal Aid (Scotland) Regulations 2002 reg 11A, “child” is defined as any person under 18 or under 25 where they are ‘reasonably and appropriately undergoing instruction at an educational establishment, or training for employment or for a trade, profession or vocation. See the Family Law (Scotland) Act 1985 s 1(5).

⁷⁹ United Nations Convention on the Rights of the Child, Article 12(2).

⁸⁰ S Pedersen, N Mueller-Hirth, & L Miller, Supporting Victims of Domestic Violence in Rural and Island Communities during COVID-19: The Impact of the Pandemic on Service Providers in North East Scotland and Orkney (2023), *Island Studies Journal*, 18(2) (available at: <https://islandstudiesjournal.org/article/84765-supporting-victims-of-domestic-violence-in-rural-and-island-communities-during-covid-19-the-impact-of-the-pandemic-on-service-providers-in-north-east>).

⁸¹ As well as exploring the article’s particular focus, how the COVID-19 pandemic might have impacted the experience of victims/survivors living in rural and island locations.

⁸² The article footnotes the Department for Environment, Food & Rural Affairs, 2021; Scottish Government, 2021 for these statistics.

industries and the concomitant loss of traditional rural masculinity (Carrington & Scott, 2008; Little, 2017). ... The close-knit and usually supportive relations that characterise many rural and island communities can in fact obscure the recognition of violence and inform whether it is likely to be challenged (Little, 2020; Terry & Williams, 2021). The close interrelations typical of such environments can increase surveillance of domestic violence victims by perpetrators, as well as shaping the experience of young people, who can experience a sense of scrutiny and lack of privacy (Little, 2017).⁸³

8.53 The article points out that the likelihood of police, health professionals and domestic and family violence workers knowing both the perpetrator and the victim/survivor is high and that recent research has highlighted how the intimacy of small towns also affects women's experiences of court: "The public visibility of courts in small towns, for example, results in women and their children feeling unsafe and exposed to their perpetrators".⁸⁴

8.54 A number of additional specific challenges have been documented in relation to domestic abuse and support for victim/survivors in small islands: shelters are less likely to remain hidden; a lack of specialist facilities and limited resources mean that victim/survivors of sexual offences have to travel to the mainland for examination; adverse weather increases the vulnerability of remote islands and can curtail the ability of islanders to travel to the mainland to access support services; and the need to keep living with the friends and families of abusers. There can even be a distinctive approach to policing in island communities, as Dr Souhami's research revealed: .

"... policing in a remote island setting such as Shetland has been argued to have a distinctive mode that emphasises under-enforcement and discretion, due to the isolation of island police officers and the complexity of their relationships with local communities."⁸⁵

8.55 In 2019, the National Rural Crime Network published a Report which set out the results of an 18 month intensive research project on domestic abuse in rural areas.⁸⁶ It found that women experiencing domestic abuse in rural areas are half as likely as victim/survivors in urban areas to report the domestic abuse; that abusers are protected by the isolation of the countryside and traditional patriarchal attitudes, and that close knit rural communities can facilitate abuse which can last, on average, 25% longer than in urban areas.⁸⁷ It also found that perpetrators can be shielded by rural communities:

⁸³ S Pedersen, N Mueller-Hirth, & L Miller Supporting Victims of Domestic Violence in Rural and Island Communities during COVID-19: The Impact of the Pandemic on Service Providers in North East Scotland and Orkney (2023), *Island Studies Journal*, 18(2).

⁸⁴ S Pedersen, N Mueller-Hirth, & L Miller, Supporting Victims of Domestic Violence in Rural and Island Communities during COVID-19: The Impact of the Pandemic on Service Providers in North East Scotland and Orkney, (2023), *Island Studies Journal*, 18(2).

⁸⁵ A Souhami, "Weather, light and darkness in remote island policing: Expanding the horizons of the criminological imagination" (2022) *British Journal of Criminology*, 63(3), 634–650.

⁸⁶ Captive and Controlled, Domestic Abuse in Rural Areas, National Rural Crime Network (available at: <https://www.northyorkshire-pfcc.gov.uk/wp-content/uploads/2019/07/Domestic-Abuse-in-Rural-Areas-National-Rural-Crime-Network.pdf>).

⁸⁷ Captive and Controlled, Domestic Abuse in Rural Areas, National Rural Crime Network (available at: <https://www.northyorkshire-pfcc.gov.uk/wp-content/uploads/2019/07/Domestic-Abuse-in-Rural-Areas-National-Rural-Crime-Network.pdf>, p 8).

“It is almost impossible for a victim to seek help without it being known to others, call the police without further community questioning or even share their fears with others in confidence. Without knowing it, the community is facilitating the abuse, allowing the abuser to act almost with impunity. There is also evidence that abusers deliberately ‘recruit’ the community to their cause, which unwittingly becomes a mechanism for controlling and isolating the victim yet further.”⁸⁸

8.56 As can be seen from the above therefore, those experiencing domestic abuse in rural and island areas can face even more challenges in accessing justice. However, the difficulties they face are principally related to the provision of services. We do not think that any proposal for law reform could address those service provision difficulties, but we do think that our proposal to extend special measures to victim/survivors of domestic abuse who are seeking civil protection orders will go some way in assisting to protect them in the court setting, in particular the option of conducting hearings by video link or by WebEx. We therefore make no proposal in relation to law reform here, but we seek views from consultees:

57. Are there any civil law reform measures which could help support victim/survivors of domestic abuse in rural and island areas?

⁸⁸ Captive and Controlled, Domestic Abuse in Rural Areas, National Rural Crime Network (available at: <https://www.northyorkshire-pfcc.gov.uk/wp-content/uploads/2019/07/Domestic-Abuse-in-Rural-Areas-National-Rural-Crime-Network.pdf>, p 36).

Chapter 9 Impact Assessment

9.1 The Report which will follow this Discussion Paper will be accompanied by a Business and Regulatory Impact Assessment (“BRIA”) outlining and assessing the probable impact, particularly the economic impact, of any reform proposals we might eventually recommend.

9.2 To assist us in this evaluation we would be grateful for any responses to this paper which provide evidence on, or otherwise address, either the economic impact of the present law or the anticipated economic impact of our proposals or both. We are very conscious that the primary benefits of reform here cannot be measured in numbers: the safety and protection of victim/survivors is not primarily an economic gain. Nevertheless, there are also economic benefits to ensuring that people are not victims of domestic abuse, and can be protected from its harms. We would be especially grateful for any evidence with which we can begin to quantify the issues raised. Clearly, assessment of the likely economic impact of a possible reform depends substantially on the economic impacts of the present law. Information on costs associated with advice and actions for civil protection orders currently available under the common law (interdicts) and under the 1981 Act and 2004 Act (exclusion orders), the 2001 Act (powers of arrest), the 2011 Act (domestic abuse interdict determinations), and the 1997 Act (non-harassment orders), including for example court fees and legal aid costs, would be extremely helpful.

9.3 Similarly any views on possible costs associated with any proposals for new measures, such as advising on and raising an action for the proposed DACPRO (see Chapter 5), or implementing special measures (see Chapter 8), would be welcome. We appreciate that this will be a best guess at this stage however.

9.4 If the proposal for the DACPRO is supported and ultimately implemented by the Scottish Government, one possible consequence of reform is that there may be an increase in court actions, in part due to the greater simplicity of the legislation which would provide for the DACPRO, but also because of the suite of remedies available as part of this new order (a protection order, damages, return of documents etc.), some of which are new or at least bespoke in the context of domestic abuse remedies. That said, there may be a resulting decrease in the number of actions for civil protection orders available under the current legislation.

9.5 The protection order element of the DACPRO could also be obtained against associates of the perpetrator of domestic abuse, which again might result in an increase in court actions.

9.6 If reforms do result in greater recourse to the courts, the Scottish Courts and Tribunals Service (SCTS) and the Scottish Legal Aid Board (SLAB) budgets and resources are likely to be impacted.

9.7 If our proposal to allow children to become adjoined victim/survivors of domestic abuse is supported and implemented, this may also increase the number of court actions with an associated impact on the SCTS and SLAB budgets and resources.

9.8 To assist us in our task of law reform as well as impact assessment, we therefore ask:

58. What information or data do consultees have on:

(a) the economic impact of current civil protection remedies sought under the common law and under the 1981 and 2004, 2001, 2011 and 1997 Acts?;

(b) the potential economic impact of any option for reform discussed in Chapter 5 of this Discussion Paper (in particular advice relating to, and the raising of an action for, a DACPRO)?;

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, in particular those discussed in Chapter 8?

Chapter 10 List of Questions

1. Does the current law, requiring cohabitants to apply to court for occupancy rights, cause problems for cohabitants, and if so, can you provide more detail?

(Paragraph 3.22)
2. Should the court, at its discretion, be able to make an order for occupancy rights for up to 12 months, rather than the current maximum of six months?
3. What specific factors, if any, should the court take into account when exercising its discretion?
4. Do you support any other way of reforming occupancy rights for cohabitants, and if so what?

(Paragraph 3.29)
5. Does the definition of “cohabiting couple” in the 1981 Act give rise to any concerns in practice?

(Paragraph 3.32)
6. Should the court be required to consider making an exclusion order to suspend the occupancy rights of an entitled or non-entitled party, where that party is convicted of an offence under the 2018 Act or an offence which is aggravated in terms of section 1 of the 2016 Act?

(Paragraph 3.40)
7. Can you provide details of any case(s) where cohabitants have suffered because of a lack of statutory protection in relation to division and sale?
8. Should cohabitants (who meet the definition in the 1981 Act) benefit from the same statutory protection in relation to division and sale that spouses and civil partners do?
9. Should cohabitants (unlike spouses and civil partners) be able to contract out of any statutory protection in relation to division and sale?

(Paragraph 3.46)
10. Do you support the inclusion of a definition of “dealing” being a legal act in respect of the home, carried out by an entitled party, which may adversely affect occupancy rights?

(Paragraph 3.51)
11. Can you provide details of any case(s) where the entitled party, who is the tenant, has attempted to transfer the tenancy or sub-let it, in order to defeat the occupancy rights

of a non-entitled party; or where one party has refused to consent to the other party giving notice to leave? Do you think reform is required to prevent this?

(Paragraph 3.61)

12. Can you provide details of any case(s) where an entitled party (whether acting in bad faith or not) has sold the property, in spite of a non-entitled party's occupancy rights?

13. What legal measures do you think could prevent this happening?

(Paragraph 3.70)

14. Should it be possible, as part of an exclusion order or any other civil protection order, for the court to require any communication between the perpetrator (or anyone acting on their behalf), and the victim/survivor, to be addressed only to the victim/survivor's solicitor or named contact?

(Paragraph 3.76)

15. In your experience, as a practitioner or otherwise, is it an issue that interdicts ancillary to exclusion orders fall at the point of divorce or dissolution, and if so, why?

(Paragraph 4.21)

16. Should statutory provision for an exclusion order for cohabitants expressly include parties who were cohabiting, so long as both parties have occupancy rights?

(Paragraph 4.43)

17. Is the statutory test of necessity for an exclusion order too high?

18. What changes, if any, would you suggest to the statutory test for an exclusion order?

(Paragraph 4.48)

19. Do you agree that terminology should, where possible, be simplified, so that there is no longer any distinction based solely on the different type of relationship?

(Paragraph 4.51)

20. Should cohabitants with an interdict ancillary to an exclusion order be entitled to a power of arrest when craved, in terms of section 1(1A) of the 2001 Act, in the same way as spouses and civil partners?

(Paragraph 4.62)

21. In the case of interdicts for the purpose of protection from domestic abuse, should the length of the power of arrest attached be the same as the length of the interdict?

(Paragraph 4.64)

22. Is the test for attachment of a power of arrest to an interdict in relation to domestic abuse too high, and if so, what should the test be?

(Paragraph 4.67)

23. Do you support the introduction of a new statutory delict of domestic abuse?

24. Should the delict of domestic abuse be defined in terms of “abusive behaviour”, as in the 2018 Act?

25. If not, what definition do you propose instead?

26. Should the defence recognise behaviour which was reasonable in the particular circumstances, as in the 2018 Act?

(Paragraph 5.39)

27. Do you support the inclusion of tech abuse as one element of abusive behaviour in a statutory definition of domestic abuse as a delict, and if so, what factors should be included?

(Paragraph 5.51)

28. Do you support the inclusion of immigration abuse as one element of abusive behaviour in a statutory definition of domestic abuse as a delict, and if so, what factors should be included?

(Paragraph 5.58)

29. Do you support the inclusion of economic abuse as one element of abusive behaviour in a statutory definition of domestic abuse as a delict, and if so, should it be modelled on the definition in the Domestic Abuse Act 2021?

(Paragraph 5.67)

30. Should the following (final) orders be available to a pursuer in respect of the delict of domestic abuse, as part of a “Domestic Abuse Civil Protection and Redress Order”:

(a) A protection order to:

(i) Prohibit any future abusive conduct towards the pursuer; and

(ii) An extension of that order to protect other named people (including children of the household or other children or adults)?

(b) A redress order, to compensate the pursuer by way of an award of damages for losses suffered as a result of the abusive behaviour;

(c) A civil barring order, to exclude the defender from the home for a fixed period;

(d) An order for the delivery of specified documents;

- (e) An order for the delivery of specified property and personal effects;
 - (f) An order regulating the care of and responsibility for a pet, or for the delivery of a pet; and
 - (g) Should any other order be included and, if so, what?
31. Should each element of a DACPRO be available as a interim order, on the balance of convenience?
 32. Should an interim civil barring order last for three weeks and a final one for two months, or what other periods would you propose?
 33. Should protection orders be available ex parte (without notice), and should orders for the protection of documents, property and pets be available ex parte where there is a risk the subject of the order will otherwise be destroyed or damaged or hidden?
 34. Should a barring order be available only on notice, and not ex parte?
(Paragraph 5.125)
 35. Should breach of an interim or final DACPRO (excluding redress orders) constitute a criminal offence?
 36. Should breach of an ex parte (without notice) order be excluded from criminal sanction?
 37. In your experience, are there any other measures relating to enforcement which could provide the necessary protection?
(Paragraph 5.130)
 38. Should it be possible for a protection order to be made in relation to an associate of the defender, where the domestic abuse is carried out by the associate on behalf of or with the encouragement of the defender?
 39. If so, should breach of a protection order by an associate constitute a criminal offence?
(Paragraph 5.142)
 40. Should it be possible for a DACPRO to extend beyond the sheriffdom in which it is granted?
(Paragraph 5.145)
 41. Should it be possible for a third party to seek a DACPRO on behalf of a victim/survivor?
 42. If so, should they need the victim/survivor's consent to do so?
(Paragraph 5.149)

43. Should defenders be able to seek the preservation or delivery of their specified possessions, where it is not possible for the defender to access them without being in breach of a DACPRO?
44. Are there any other orders which a defender should be able to seek, and if so what?
(Paragraph 5.153)
45. Should civil remedies for domestic abuse remain focused on partners and ex-partners (that is, current and former spouses, civil partners, cohabitants and those in an intimate partner relationship)?
(Paragraph 6.77)
46. Should a child under 18 be recognised as an adjoined victim/survivor of abuse perpetrated by or against a parent or connected adult in their life?
47. Should a civil protection order be available for a child who is an adjoined victim/survivor:
- (a) As part of a civil protection order/DACPRO sought by the victim/survivor;
 - (b) If sought by the adjoined victim/survivor themselves, where they have capacity;
 - (c) If sought by a parent/guardian on their behalf?
- (Paragraph 7.55)
48. Do you agree that the Children (Scotland) Act 1995 should be amended so that:
- (a) the court is required to provide written reasons for making an order under section 11 (such as a contact or residence order), where there is a history of domestic abuse?;
 - (b) the safety of the parents should be considered by the court as part of the consideration of the child's welfare?
49. Are there any other ways of ensuring the safety of the child and of the victim/survivor is considered by the court in making orders under section 11 of the 1995 Act?
(Paragraph 7.141)
50. Do you agree that a person seeking a civil protection order should be entitled to special measures as a party and while giving evidence during those proceedings?
(Paragraph 8.27)
51. Do you think that a person who alleges they have been subjected to domestic abuse by the other party to the proceedings, should be entitled to special measures as a party and while giving evidence in civil proceedings?
(Paragraph 8.28)
52. Should remote hearings be available as a standard special measure?

(Paragraph 8.33)

53. Do you agree that personal conduct of cases by a party to proceedings should be prohibited where a civil protection order is sought against them, as well as in all civil cases where there is a civil protection order, conviction or bail conditions in place in respect of that party?

(Paragraph 8.36)

54. Should there be an obligation placed on parties who are (ex-) partners involved in civil proceedings, including those under section 11 of the 1995 Act, to disclose formal responses taken in respect of domestic abuse? If so, what should be disclosed?

(Paragraph 8.39)

55. How can the existence of a criminal proceedings in relation to domestic abuse be effectively communicated to the court in civil proceedings, including those under section 11 of the 1995 Act?

(Paragraph 8.40)

56. Should there be a statutory requirement for the Scottish Government to collect disaggregated statistics on the number of civil protection orders sought and granted in relation to domestic abuse?

(Paragraph 8.41)

57. Are there any civil law reform measures which could help support victim/survivors of domestic abuse in rural and island areas?

(Paragraph 8.56)

58. What information or data do consultees have on:

(a) the economic impact of current civil protection remedies sought under the common law and under the 1981 and 2004, 2001, 2011 and 1997 Acts?;

(b) the potential economic impact of any option for reform discussed in Chapter 5 of this Discussion Paper (in particular advice relating to, and raising of an action for, a DACPRO)?;

(c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, in particular those discussed in Chapter 8?

(Paragraph 9.8)

Appendix A

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