The Domestic Abuse (Scotland) Bill is a Members’ Bill introduced by Rhoda Grant MSP on 27 May 2010.

This briefing provides some background information on domestic abuse in Scotland. It also examines the outcome of the consultation which preceded the introduction of the Bill and describes the main provisions of the Bill.
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INTRODUCTION

The Domestic Abuse (Scotland) Bill is a Members’ Bill and was introduced by Rhoda Grant MSP on 27 May 2010. It has two main policy objectives—

I. to increase access to justice for victims of domestic abuse; and

II. to enable police and prosecutors to provide a more robust response to breached civil protections orders.

To achieve these objectives, the Bill removes the requirement to show a course of conduct for a non-harassment order to be granted in domestic abuse cases (section 1). The Bill also removes the means test for legal aid applications in respect of certain domestic abuse-related proceedings (section 2) and creates a new criminal offence of breaching a domestic abuse related interdict (section 3). The Bill also provides a statutory definition of domestic abuse (section 4).

BACKGROUND

Before considering the provisions of the Bill in greater detail, the following paragraphs provide a brief introduction to the issue of domestic abuse in Scotland.

WHAT IS DOMESTIC ABUSE?

Scotland’s National Strategy to Address Domestic Abuse defines domestic abuse as follows:

“Domestic abuse (as gender-based abuse), can be perpetrated by partners or 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 or friends).” (Scottish Executive 2003, page 3)

As this definition demonstrates, the range of offences associated with domestic abuse varies from less serious breach of the peace offences to murder. However, not all forms of domestic abuse constitutes a criminal offence (for example, withholding money and other forms of controlling behaviour, such as isolation from family or friends etc, are unlikely to result in criminal prosecution).

Domestic abuse is more commonly, but not always, committed by men against women (see below under heading ‘Domestic Abuse – Gender’).

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1 The term “civil protection order”, in the current context, is used to refer to the various civil court orders that are available to victims of domestic abuse through the civil courts. These are described more fully from page 6 below.

2 It is calculated that over 150 people are killed every year in Britain by a current or former partner (Connelly 2010, page 111)
In 2008-09, 53,681 cases of domestic abuse were reported to the police in Scotland. This is an 8% increase on the 2007-08 figure of 49,655. This increase is consistent with the steady rise in incidents of domestic abuse reported since 1999-00, the first year for which data is available (Scottish Government 2009a) (see figure 1 below).

Figure 1 – Reported incidents of domestic abuse in Scotland

![Incidents of domestic abuse graph](image)

DOMESTIC ABUSE – GENDER

As noted above, domestic abuse is typically seen as perpetrated by men against women. While the vast majority of reported incidents of domestic abuse are perpetrated by men against women, 14% of reported domestic abuse incidents in Scotland in 2008-09 involved a male victim and female perpetrator (see figure 2 below). In total, nearly 8,000 men reported domestic abuse to the police in Scotland in 2008-09. Of these incidents, the majority (7,336) were perpetrated by a woman. Reported incidents involving same-sex domestic abuse represent only 2% of all incidents. However, it is thought that under-reporting may be a particularly issue within this category of victim/perpetrator.

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3 It should be noted that not all incidents of domestic abuse come to the attention of the police and domestic abuse, in all its forms, is generally thought to be under-reported to authorities such as the police, social services and health services (Scottish Government 2008, page 1).
There is a small but vocal body of research and opinion which argues that women’s violence against men is significantly under reported and equivalent to, or even greater than, men’s violence to women (Scottish Executive 2003a). The Scottish Crime & Justice Survey Partner Abuse Module, published in December 2009, identified roughly equivalent levels of some forms of abuse perpetrated by men and by women (Scottish Government 2009b). However, partner abuse is not necessarily the same as domestic abuse, as it can involve either or both partners using violence throughout the relationship, while domestic abuse is characterised by one partner using abuse against the other. In June 2010, the Scottish Parliament debated violence against men, the first time Parliament had specifically debated the issue (Scottish Parliament 2010).

DOMESTIC ABUSE - IMPACT

Evidence suggests that domestic abuse can have serious and long-lasting consequences for the health and well-being of victims and their families. In addition to physical injuries, victims of domestic abuse are more likely to suffer from emotional and psychological problems and children who witness domestic abuse have an increased risk of experiencing mental health problems, developing alcohol problems and entering abusive relationships themselves (Scottish Government 2008).

Aside from the impact on victims and their families, tackling domestic abuse through the criminal justice system places significant demands on the time and resources of the police, procurator

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4 For more on the impact of domestic abuse on children see, for example, Sutherland 2008, paras 6.177 – 6.184. For more on the wider impact of domestic abuse, including the cost to society and the economic costs, see, for example, Sutherland 2008, paras 13.138 – 13.140.
fiscal and prison services. The Scottish Government has suggested that domestic abuse could cost the Scottish public purse £2.3 billion per year (Scottish Government 2009, page 12).

TACKLING DOMESTIC ABUSE

Both the criminal justice system and the civil justice system are employed in tackling domestic abuse in Scotland.

Criminal justice system

The joint protocol between ACPOS and the Crown Office and Procurator Fiscal Service commits the police to treating all incidents of domestic abuse as high priority (Scottish Police Service/COPFS 2008). However, Connelly, a leading Scottish academic on domestic abuse, has recently suggested that inappropriate leniency is being bestowed on perpetrators of domestic abuse (Connelly 2010).

There is no specific crime of domestic abuse in Scots law. Rather, incidents involving domestic abuse are recorded by the police and prosecuted under a range of crimes and offences, from homicide and serious assault to minor assault and breach of the peace. Although breach of the peace is one of the offences traditionally used to prosecute aspects of domestic abuse such as threatening behaviour, recent case law clarifying the scope of the offence of breach of the peace has emphasised the importance of there being a ‘public element’ to the crime. Often, victims of domestic abuse do not tell anyone about the abuse and, depending on the nature of the abuse, there can be very little supporting evidence. This can present difficulties for the prosecution of such cases. Other crimes recorded in relation to domestic abuse include sexual assault, vandalism and ‘crimes against public justice’ (typically bail offences or resisting arrest).

In 2008-09, 55% (29,283) of incidents of domestic abuse recorded by the police led to a crime or offence being recorded, the most common of which was minor assault which accounted for 23% (12,518) of all incidents recorded. Breach of the peace accounted for 18% (9,650) of all incidents (Scottish Government 2009).

In October 2004, a Pilot Domestic Abuse Court was established in Glasgow. The court offers fast-track domestic abuse prosecutions as well as a support network for victims.

Civil justice system

Civil remedies can also be used to tackle domestic abuse, particularly those cases that do not constitute criminal offences (for example mental or emotional abuse).

A victim of abuse must make their own application when seeking a civil remedy and the burden of proof lies with the victim. In contrast, in the criminal justice system the prosecutor (i.e. the Lord Advocate or the procurator fiscal) is responsible for determining whether a case is to be prosecuted and for bringing it to court.

There are three types of civil protection order available to victims of domestic abuse in Scotland:

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5 This figure is extrapolated from a 2004 study (Walby) into the cost of domestic abuse in England and Wales (estimated at £23 billion). The figure includes estimated costs to the criminal justice system, the NHS, social services, housing, civil legal services, lost economic output, as well as the human and emotional costs.

6 For an evaluation of the court see Scottish Executive 2007.

7 Burden of proof is the obligation of a party on one side of a dispute or issue to provide sufficient evidence in support of their position. The civil standard of proof is on the balance of probabilities, whereas the criminal standard is beyond reasonable doubt and requires corroboration in the form of two independent pieces of evidence.
I. interdict with no power of arrest
II. interdict with a power of arrest
III. non-harassment order

These civil remedies are considered in greater detail below.

**Interdict**

An interdict is a judicial remedy granted by the courts that prohibits the commencement or continuation of a certain act or activity.\(^8\) However, civil protection orders can be difficult to obtain, either because of a lack of access to legal aid/prohibitive costs or the evidential burdens encountered (Connelly 2010). Furthermore, in its written response to the consultation\(^9\), Caithness and Sutherland Women's Aid argued that the existing civil protection orders “give little or no reassurance of protection to women and children who have experience of Domestic Abuse or other forms of Violence Against Women”.

**Breach of interdict and power of arrest**

An interdict may prohibit specific actions by a named individual. However, breaching such an interdict is not a criminal offence and the police have no power to arrest someone who breaches the terms of an interdict (unless the behaviour complained of is itself a criminal offence). Instead, an individual who is granted an interdict must raise a further action in the civil court for breach of interdict. Raising such an action can be cumbersome, ineffective and, for many, unaffordable Strathclyde Police Domestic Abuse Coordination Unit, in its written response to the consultation, observed that:

“Where a perpetrator behaves in a way that breaches interdict but does not commit a crime, the current consequences are very limited”.

Strathclyde Police Domestic Abuse Coordination Unit also observed that the current process for dealing with a breach of interdict can be very lengthy and that it is very rare that imprisonment is used as a disposal in such cases. Criminalising the offence of breach of interdict (as proposed by section 3 of the Bill), it argued, would allow the police and the courts to tackle any such offences more robustly and increase the range of sentencing options available to the court.

Interdicts may have a power of arrest attached to them. A power of arrest means that the police may arrest the subject of an interdict without a warrant if they have reasonable cause to suspect that the person is in breach of the interdict. If someone is arrested in such circumstances, they will appear before a sheriff who has the power to remand them in custody for a maximum of two days.

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\(^8\) An interim interdict is a temporary judicial remedy granted by a court as a provisional and protective measure for a limited period until both sides can be heard and the rights of parties determined on a permanent basis by, if necessary, a perpetual interdict. A court can grant interim interdict without requiring to give the party against whom interdict is sought the opportunity to contest the application. Circumstances in which interim interdict might be sought include neighbour disputes (noise or other nuisance), family disputes (to prevent a child being removed from its mother/father), dealing with antisocial behaviour or to prevent something being published or broadcast, as well as in relation to domestic abuse.

\(^9\) All forty written responses to the consultation accompanying the draft proposal for the Civil Protection Orders and Access to Justice (Scotland) Bill (as the Bill was then called) are available from SPICe. A summary of consultation responses was produced by the Member which is available on the Scottish Parliament’s website.
Sources of interdict

In relation to domestic abuse cases, interdicts originate from 3 primary sources:

- the common law
- the Protection from Harassment Act 1997
- family law legislation

Common law interdicts

Common law interdicts are widely regarded as ineffective due to problems enforcing them when they are unsupported by powers of arrest. (Scottish Executive 2003). However, interdicts can have powers of arrest attached to them by virtue of the Protection from Abuse (Scotland) Act 2001.

Unlike interdicts sought under the family law legislation, common law interdicts are available to those that are not married or in a civil partnership or cohabitants.

Protection from Harassment Act 1997

The Protection from Harassment Act 1997 ("the 1997 Act") made harassment a statutory offence in England and Wales (it was argued at the time that the common law crime of breach of the peace was sufficient to cover such behaviour in Scotland). The 1997 Act also included provisions relating specifically to Scotland. In particular, the 1997 Act provides that every individual has a right to be free from harassment and prohibits a person from pursuing a course of conduct which amounts to or is intended to amount to harassment.

The 1997 Act allows a victim of abuse to apply for a civil non-harassment order ("an NHO"). Two different occasions of harassment (a "course of conduct") need to be shown before such an order can be granted. Breach of a NHO is, of itself, a criminal offence punishable by up to five years in prison (unlike breach of interdict which is not a criminal offence). The Criminal Justice (Scotland) Bill, currently before Parliament, amends the Criminal Procedure (Scotland) Act 1995 to remove the precondition for a course of conduct to be demonstrated in the consideration of criminal non-harassment orders.

In its response to the consultation, Dundee Violence Against Women partnership argued that "we should not require anyone to be abused multiple times before protection is offered". The Scottish Police Federation, on the other hand, argued that the proposal to remove the course of conduct requirement was at odds with other legislation and would potentially be open to abuse.

Family law legislation

The Matrimonial Homes (Family Protection) (Scotland) Act 1981 gave spouses certain rights in relation to their matrimonial home. In particular, it created occupancy rights in the matrimonial home, giving a spouse the right to live in the family home even if they are neither the owner nor
the tenant. The 1981 Act also created ‘exclusion orders’, which exclude an abusive spouse from the family home, even if that spouse is the legal owner or tenant, and ‘matrimonial interdicts’ with a new statutory power of arrest. However, interdicts under the 1981 Act terminated on divorce (a time when protection might most be needed) and provided no protection for same-sex or unmarried couples.

The Civil Partnership Act 2004 replicated the provisions of the 1981 Act for civil partners. The 1981 Act was further amended by the Family Law (Scotland) Act 2006, which created the ‘domestic interdict’ - the equivalent to a matrimonial interdict for unmarried cohabitants (either opposite-sex or same-sex).

The Protection from Abuse (Scotland) Act 2001 was introduced to offer increased protection for those experiencing domestic violence and abuse. In particular, it was introduced because many of those who were vulnerable to domestic violence and abuse were not protected by the Matrimonial Homes Act 1981 (i.e. those victims that weren’t married or cohabiting). The power of arrest that can be attached to an interdict granted under the 2001 Act allows the police to arrest an individual without a warrant where breach of the interdict is reasonably suspected and where the officer considers there is a risk of abuse or further abuse. Research in 2003 found that women were the pre-eminent users of the 2001 Act and related legislation (Scottish Executive 2003b).

Rehabilitative programmes

Re-education programs for abusive men and/or drug/alcohol counselling are used in conjunction with probation orders to tackle domestic abuse. Diversion programmes (as alternatives to imprisonment) have been criticised as a soft option (and for sending out the message that partner abuse is less serious than abuse of a stranger), but effective programmes may prevent future abuse, either of the partner who has been abused or a future partner (Sutherland 2008, para 13-162).

Funding has recently been provided to four Community Justice Authorities (CJAs) to run the Caledonian System, an integrated approach to tackling male domestic abuse offenders’ behaviour with associated support services for the women and children affected by their abuse. The Caledonian System will be available as a sentencing option in Lothian & Borders, South West Scotland, Forth Valley and Northern CJAs, and is intended to help manage the risk to the women and children while challenging the men on their attitudes and actions (Scottish Government 2009c).

LEGAL AID

Unless they qualify for legal aid, victims of domestic abuse are generally required to meet the costs of any civil proceedings themselves. “Legal aid” is help towards the costs of legal advice and representation paid out of public funds so that people on low or modest income can gain access to the legal system. Where the victim is eligible for legal aid, they may still be required to make a contribution towards the costs of the case, depending on their levels of income and capital.

In relation to civil cases, two types of financial legal help are available: “advice and assistance”\textsuperscript{11} and “civil legal aid”. Together they are called “civil legal assistance”. Advice and assistance

\textsuperscript{11} Assistance by Way of Representation (ABWOR) is a form of advice and assistance which allows a lawyer to represent a client in specified civil and criminal proceedings in certain courts and tribunals. Regulations limit the proceedings in which ABWOR is available to a relatively narrow range of proceedings.
helps pay for advice from a solicitor on any matter of Scots law (civil or criminal), for example to try to settle a dispute without going to court. Advice and assistance does not generally cover “representation” – (putting a case in court). Civil legal aid helps pay for a solicitor to act for an applicant in court. It covers the preparation work, as well as the hearing itself, and can provide funding for advocates and experts if needed. Some people need just advice and assistance, and others just civil legal aid. Many people start with advice and assistance and then move on to civil legal aid.

The Scottish Legal Aid Board (SLAB) assesses applications for legal aid. It assesses all applications in the same way following rules set down by Parliament. In order to grant civil legal assistance, SLAB must be satisfied that:

- the applicant qualifies financially
- it is ‘reasonable’ to grant the applicant legal aid
- the applicant has a legal basis for the case (probable cause)
- financial help is not available to the applicant from another source (i.e. trade union, insurance company or professional body).

In determining whether the applicant qualifies financially, on 7 April 2009, the Scottish Government increased the annual disposable income limit for civil legal aid from £10,306 to £25,000. In its response to the consultation, Strathclyde Police Domestic Abuse Coorordination Unit argued that, while this increase has “undoubtedly improved the position of many who seek protection from abuse”, some victims will “continue to encounter financial barriers when seeking protection from abuse”, and that the increase did not address the imbalance between the access to justice afforded to the perpetrator and that available to the victim. In its response to the consultation, North Ayrshire Violence Against Women Forum argued that “unless women are eligible for legal aid, they normally find it difficult to afford interdicts” and that “local solicitors are refusing to take on women seeking interdicts who are not entitled to legal aid”. The Family Law Association, in its response to the consultation, suggested that there should be equal access to legal aid for both parties to an action, arguing that in the event of a victim of domestic abuse being granted legal aid, the abuser could argue that his/her right to a fair hearing had been breached unless he/she also received legal aid. The Family Law Association also observed that, due to the extensive work involved and low rates of remuneration, it can be difficult to find a solicitor willing to undertake an action for interdict under legal aid and that removing the means test would have limited impact on this.

THE CONSULTATION

A consultation accompanying the draft proposal for the Civil Protection Orders and Access to Justice (Scotland) Bill (as the Bill was then called) was issued on 1 December 2009 and ran until 26 February 2010. Forty responses were received to the consultation. A summary of consultation responses was produced by the Member which is available on the Scottish Parliament’s website. The summary calculates that 90% of respondents to the consultation supported the proposals, with only 5% against. In addition, the summary found:

- strong support for removing the “course of conduct” requirement
- significant benefits to removing means testing in relation to legal, but also some disadvantages (such as the increased burden on the legal aid budget)
THE BILL

The following paragraphs describe the provisions of the Bill and the Scottish Government's position, where it has been expressed, on each of the sections (see Scottish Government 2010).

Section 1 of the Bill introduces a new section into the Protection from Harassment Act 1997. The purpose of this new section is to remove the requirement to show a “course of conduct” before a non-harassment order can be granted in civil proceedings involving domestic abuse. Instead, the Bill makes it competent for the court to grant a non-harassment order after one instance of harassing behaviour.

The Scottish Government is generally supportive of removing the need to demonstrate a “course of conduct” in relation to non-harassment orders in domestic abuse cases (Scottish Government 2010).

Section 2 of the Bill amends the Legal Aid (Scotland) Act 1986. In particular, it removes the means test in respect of all applications for interdict with power of arrest or non-harassment order in cases involving domestic abuse.12

The Scottish Government opposes section 2 of the Bill, arguing that the legal aid budget is already under considerable pressure and that recent changes to the disposable income limit have already increased access to justice (Scottish Government 2010).

Section 3 of the Bill makes it a criminal offence to breach an interdict with a power of arrest in domestic abuse cases. The offence created by the Bill is punishable on summary conviction to imprisonment for a term not exceeding 6 months or to a fine not exceeding the statutory maximum or to both. On conviction on indictment, such an offence is punishable by imprisonment for a term not exceeding 5 years or to a fine or to both.

The Scottish Government is generally supportive of criminalising breaches of interdict with power of arrest where domestic abuse is involved but considers that section 3 of the Bill requires amendment to reflect previous changes to the existing legislation in this area (Scottish Government 2010).

Section 4 of the Bill provides the following statutory definition of domestic abuse:

“any abuse perpetrated against a person who—

(a) is (or was formerly)—

(i) married to or the civil partner of, or

(ii) a partner in an established relationship of any length with,

the person who carried out the abuse (“the perpetrator”), or

12 If the financial eligibility test was removed, the legal merits test of probable cause and reasonableness would still be applied by the Legal Aid Board before an application for civil legal aid could be granted.
(b) is the perpetrator’s parent, child, grandparent or grandchild (whether by blood or by adoption)."

In this definition, the Bill provides 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. The Bill provides that “established relationship” includes, but is not limited to, a sexual relationship. Section 4 also provides that the Scottish Ministers may, by order made by statutory instrument, amend the definition of relationship to include other types of relationships not currently included in the Bill.

The Memorandum by the Scottish Government on the Domestic Abuse (Scotland) Bill did not include the government’s views on section 4 of the Bill (Scottish Government 2010).

FINANCIAL IMPACT OF THE BILL

The most significant direct costs arising from the Bill are likely to fall to the legal aid budget. The Scottish Government’s Memorandum on the Domestic Abuse (Scotland) Bill also suggests that there will be costs for the police, the Scottish Prison Service, the Crown Office and the Scottish Court Service. Beyond that, it is difficult to accurately predict the financial impact of the Bill.

Applications for interdict in cases of domestic abuse are often complex and, the Scottish Government has suggested (Memorandum by the Scottish Government on the Domestic Abuse (Scotland) Bill, para 16-17), those seeking such an interdict are often also seeking other orders (such as divorce, residence, contact and financial craves on separation). The effect of the Bill, therefore, could be to require separate court actions for each order sought, which would incur further potential costs, not least to the victim.

The Family Law Association, in its written response to the consultation, argued that the Bill would lead to a substantial increase in civil legal aid costs because legal aid would have to be made available to both parties on the same conditions and that a higher percentage of cases would be defended if criminal liability were to be attached to any breach of the protective measures granted.
ASSOCIATION OF CHIEF POLICE OFFICERS IN SCOTLAND AND CROWN OFFICE AND PROCURATOR FISCAL SERVICE.


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