

## **Briefing for the Citizen Participation and Public Petitions Committee on petition [PE2025](#): Improve the support available to victims of domestic violence, who have been forced to flee their home**

### **An overview of issues raised by the petition**

#### **The current system**

In Scots law, both the criminal law and the civil law contain legal measures which relate to domestic abuse.

#### **Protections under the criminal justice system**

The criminal law sets out various relevant criminal offences in the context of domestic abuse, including an offence under the [Domestic Abuse \(Scotland\) Act 2018](#).

In the context of criminal investigations and prosecutions related to relevant offences, the police and the criminal courts have various powers to remove a suspected perpetrator of domestic abuse from the home of a person at risk and to prevent them from returning to it. For example, special bail conditions may apply to someone accused of an offence relating to domestic abuse.

#### **Civil protection orders**

Separately, there are also a range of **civil protection orders**, which can be applied for through the Scottish courts with the aim of protecting a person at risk against abuse or a risk of abuse, including domestic abuse. This application can be as part of other court proceedings (e.g. divorce proceedings) or as a standalone court action.

A **non-harassment order** (NHO), mentioned by the petitioner in the background information to the petition, is one such civil protection order, but there are a range of other ones too.

An NHO, unlike other types of civil protection order, can be applied for by the prosecutor in the **criminal court** at the end of a successful criminal case (as well as through the civil courts at the person at risk's own initiative).

However, most civil protection orders must be applied for through the civil courts, by the person at risk. There are legal costs associated with this, unless that person qualifies to have their expenses wholly met out of the legal aid budget (see later in the briefing on legal aid). There is also typically an element of delay associated with a civil court application, even where it is ultimately successful.

Most civil protection orders (intended to have medium or long-term effect) currently do not address the specific issue of a home which the person at risk and perpetrator co-own or co-occupy. Most civil protection orders are designed to prohibit contact in other settings.

One current exception is the **exclusion order** under the [Matrimonial Homes \(Family Protection\) \(Scotland\) Act 1981](#) ('the 1981 Act'). Applications for exclusion orders are not thought to be particularly common in practice.

In 2018, the Scottish Government [consulted on a package of measures aimed at improving legal protections against domestic abuse](#). Part 2 of the consultation paper (which has never been implemented) identified policy issues associated with exclusion orders and proposed a range of measures designed to improve their effectiveness in practice.

### **Domestic Abuse (Protection) (Scotland) Act 2021**

The [Domestic Abuse \(Protection\) \(Scotland\) Act 2021](#) ('the 2021 Act') is an important recent legislative initiative.

Part 1 of the 2021 Act, **not yet in force**, introduced two short-term civil protection orders, both of which could exclude a perpetrator from where the person at risk lives.

The two new measures are a **Domestic Abuse Protection Notice** (DAPN) and a **Domestic Abuse Protection Order** (DAPO).

This power to exclude under both DAPNs/DAPOs would extend to a property where the person subject to the measure is the (sole or joint) owner or tenant.

The police would have a key role in relation to DAPNs/DAPOs, so civil court action on the person at risk's own initiative would not be required.

One key policy aim of the 2021 Act is to give a person at risk space to consider their housing options, reducing the chance they would have to leave the family home for their own safety.

### **Legal aid**

[For certain situations under the criminal justice system, there is something known as 'automatic legal aid'](#). For these situations, there are no financial eligibility test or other tests applied by the [Scottish Legal Aid Board](#) before legal aid is granted.

There is no equivalent of automatic legal aid for cases heard under the civil court system, including in divorce cases where domestic abuse is a factor. There will be an assessment of financial resources and the strength of the case in almost all cases. Depending on circumstances, a person in a civil case might be eligible for two types of legal aid - [Advice and Assistance](#) and [Civil Legal Aid](#).

Someone on a very low income or receiving certain social security benefits can access legal aid in civil cases without paying a contribution from their own income. However, in most cases, recipients of legal aid will pay some contribution, which increases as their income increases.

The current legal aid system depends on there being available solicitors willing to offer services in family law cases via legal aid. There are tensions in relation to rates of pay and working hours thought to be affecting current availability.

## **Ownership of a couple's property**

In terms of how a couple's property is owned, family law distinguishes between the position during marriage and the situation on divorce.

### **During a marriage**

The [Family Law \(Scotland\) Act 1985](#) (section 24) ('the 1985 Act') says that marriage, of itself, does not affect the ownership rights of spouses.

How a **matrimonial home** is to be owned is decided by the individuals concerned and ownership is reflected in the registered [title documents](#) of the property. Possibilities include co-ownership of the family home by a couple (in equal or other shares) or ownership by one person in the couple.

For **household goods**, there is a specific statutory presumption (i.e. a starting point for the courts) that those goods are owned equally by the couple (1985 Act, section 25), unless evidence shows otherwise in an individual case.

The ownership of household goods – whether owned by just one of the former couple or owned jointly – will be relevant in determining whether it is possible for an owner of those goods to seek a court order through the civil courts for either the return of those goods, or financial compensation for their loss.

Separately, ownership of household goods will also be a relevant factor when considering the application of the criminal law (e.g. whether or not there has been theft).

### **On divorce**

On divorce, a separate part of the 1985 Act applies to determine how spouses' **matrimonial property** should be divided up (sections 8-16).

Matrimonial property is all property **belonging to the two people, or to either of them**, at the “relevant date.” The property must be acquired during the marriage, or before the marriage for use as a family home. The relevant date is usually the date when the couple stop living together.

The 1985 Act contains a number of principles relating to how matrimonial property should be divided up between the couple. One key principle of the 1985 Act is fair sharing of the net value of matrimonial property, which usually means equal sharing, unless special circumstances apply.

The court can make a variety of court orders to give effect to the principles in the 1985 Act in practice. For example, it can order the payment of a financial sum from one person to the other or make a court order requiring one person to transfer their share of a house to the other person.

## **Current policy work**

### **PE1981: forcing the sale of the matrimonial home**

The Citizen Participation and Public Petitions Committee (‘the Committee’) is currently considering a petition ([PE1981](#)) on various provisions of the 1981 Act, including those relating to exclusion orders.

[At a committee meeting on 23 February 2023](#), the Committee agreed to write to various stakeholders and these stakeholders have now responded to the Committee.

### **The work of the Scottish Law Commission**

Separately, the [Scottish Law Commission](#) (‘SLC’) the independent public body, which makes recommendations to Scottish Ministers on law reform, intend to carry out a review of the civil law remedies in relation to domestic abuse during the period covered by its [Eleventh Programme of Law Reform 2023-2027](#) (see paras 2.14-2.20 of the Programme for more details).

### **Housing policies**

In December 2020, a Scottish Government working group report was published, entitled [Improving housing outcomes for women and children experiencing domestic abuse](#). The group was co-chaired by Scottish Women’s Aid and the Chartered Institute of Housing.

A key recommendation was the development of a homelessness prevention duty. The idea was that a range of public sector partners (social services; police; education) would work together to identify and refer those at risk of domestic abuse and homelessness.

In its [Housing to 2040 policy document](#), published in March 2021, the Scottish Government sets out its commitment to implementing the recommendations in the working group report. It is expected that homelessness prevention duties

will be included in a housing bill due to be introduced sometime after the summer recess.

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The purpose of this briefing is to provide a brief overview of issues raised by the petition. SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However, if you have any comments on any petition briefing you can email us at [spice@parliament.scot](mailto:spice@parliament.scot)

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