

# **DOMESTIC ABUSE (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Domestic Abuse (Scotland) Bill introduced in the Scottish Parliament on 27 May 2010. It has been prepared by Clare Connelly, legal academic and solicitor and James Clark LL.B. (Hons), Dip. L.P. on behalf of Rhoda Grant, the member in charge of the Bill, to satisfy Rule 9.3.3A of the Parliament's Standing Orders. The contents are entirely the responsibility of the member and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 45–EN.

### **POLICY OBJECTIVES OF THE BILL**

2. The Bill 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 protection orders which in turn may deter abusers from further abusive action.

3. The Bill will amend the current legislation relating to civil protection orders and legal aid and introduce a new criminal offence in order to achieve these policy aims.

4. The amendments will be made in the following areas:

- (a) to improve access to justice, the Bill will introduce a new section into the Protection from Harassment Act 1997 which removes the requirement to show a course of conduct before a non-harassment order can be granted in civil proceedings involving domestic abuse; only one incident of harassing behaviour would be required in these circumstances.
- (b) to further improve access to justice, the Bill will also make amendments to the Legal Aid (Scotland) Act 1986 to make legal aid available without means testing in respect of all applications for an interdict with a power of arrest or a non-harassment order where domestic abuse is involved.

5. To improve the ability of interdicts to deter abusers and provide greater protection to victims of abuse, the Bill will make it a criminal offence to breach an interdict with a power of arrest where domestic abuse is involved.

6. Finally, the Bill will provide a statutory definition of domestic abuse.

7. These measures will send a clear message to those who commit domestic abuse that such behaviour will not be tolerated. It will also demonstrate to victims of abuse that Scotland takes seriously its duty to protect them from further abusive behaviour.

## **BACKGROUND**

### **Domestic abuse in Scotland**

8. Since devolution, domestic abuse has been at the forefront of national debates within parliamentary and governmental bodies in Scotland. The first Bill proposed by a subject committee of the Scottish Parliament was the Protection from Abuse (Scotland) Bill. This has since been enacted as the Protection from Abuse (Scotland) Act 2001, increasing accessibility to the more robust interdict with a power of arrest. The joint protocol between the Association of Chief Police Officers in Scotland (ACPOS) and the Crown Office and Procurator Fiscal Service (COPFS)<sup>1</sup> and the rolling out of a specialist response to domestic abuse<sup>2</sup> in the courts also present a great step forward in how abuse is tackled by the criminal justice agencies in Scotland.

9. Scotland also has a National Strategy to Address Domestic Abuse, which 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).<sup>3</sup>

10. This definition highlights the fact that domestic abuse covers a wide range of behaviours. This is one of the factors that has contributed to the difficulties encountered by the criminal justice process in responding effectively to the abuse. As there is no distinct crime of domestic abuse, it is only behaviour that falls within the existing definition of a crime that can be prosecuted. Whilst this covers many of the actions contained in the definition above, it does not apply to mental and emotional abuse.

11. A record 53,681 cases of domestic abuse were reported in Scotland in the last year, representing an increase of 8% on the previous year and showing a steady increase in the number of incidents reported since 1999-2000.<sup>4</sup> In the 12 months to March 2008, 5,029 people were convicted of offences related to domestic abuse. Approximately 50% of those convicted received either a fine or were admonished and 11.5% of offenders received a custodial sentence.<sup>5</sup> The use of fines or admonishment as a disposal is regarded as unsuitable for cases involving domestic abuse<sup>6</sup>. These disposals provide little, if any effective sanction and will not serve to increase the

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<sup>1</sup> Scottish Police Service/COPFS (2008) In Partnership, Challenging Domestic Abuse V3/12/08 (ACPOS and COPFS)

<sup>2</sup> Connelly, C. (2008), Handling Domestic Abuse Cases, (Edinburgh, The Scottish Government)

<sup>3</sup> <http://www.scotland.gov.uk/library3/law/stra-01.asp>

<sup>4</sup> Scottish Government Statistical Bulletin, *Domestic Abuse as Recorded by the Police in Scotland 2008-09* (2009)

<sup>5</sup> Parliamentary Question – S3W - 28829

<sup>6</sup> For further discussion see Connelly, C., (2010), “Still Just “A Domestic”, *Scottish Criminal Law*, January pp 111-112 (Edinburgh, W. Green)

safety of victims which is better achieved by probation orders combined with rehabilitation programmes.<sup>7</sup>

12. Particular attention must be paid to the fact that, in recent years, research findings have revealed that one of the most “dangerous” times for a victim of abuse is at the point of separation or after leaving a violent partner.<sup>8</sup> Research by Wilson and Daly has shown, for example, not only that victims are more likely to be subjected to violence and abuse when they flee a violent relationship but also that they may be more likely to be killed by their partner.<sup>9</sup> The Scottish Executive Statistical Bulletin reports that over half (53%) of all female victims of homicide and 6% of all male victims recorded in the last 10 years were killed by a current or former partner.<sup>10</sup> The most recent statistics show that in 40% of cases of domestic abuse, the victim and perpetrator were ex-partners or ex-spouses.<sup>11</sup>

13. These figures contradict the common myth that when an abusive relationship ends the violence and abuse will also end.

### **The use of civil protection orders**

14. Many jurisdictions have made use of civil protection orders to help protect victims of abuse. The main benefit is that civil protection orders, in addition to prohibiting future criminal actions such as assaults, are useful in curtailing behaviour which does not amount to a crime, such as an abuser following a victim or loitering at their workplace or home. As can be seen from the definition provided in the National Strategy, domestic abuse can include mental and emotional abuse, actions which do not fall within the definition of any existing crime. Such behaviour can be very threatening and may be a pre-cursor to more serious criminal behaviour in the future. This is recognised by Strathclyde Police Domestic Abuse Coordination Unit who stated that “There are many forms of domestic abuse that are not considered “criminal” and so civil protection is vital for victims in this position.”<sup>12</sup>

15. Those who have obtained a civil protection order in response to domestic abuse reported many benefits.<sup>13</sup> 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. It is for this reason that, when an order is breached, it is of paramount importance this is treated seriously and is met with a robust response.

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<sup>7</sup> Connelly, C., (2010), “Still Just “A Domestic”, *Scottish Criminal Law*, January, pp 111-112 (Edinburgh, W. Green)

<sup>8</sup> Lees, S. “Marital rape and marital murder” in Hamner, J. and Itzen, K. (eds), *Home Truths about Domestic Violence* (2000) 57-73

<sup>9</sup> Wilson, M. and Daly, M. “Till death do us part”, in Radford, J. and Russell, D. (eds), *Femicide The Politics of Woman Killing* (1992), 83-98

<sup>10</sup> Scottish Government Statistical Bulletin, *Homicide in Scotland, 2006- 07*, (2007) 10

<sup>11</sup> Scottish Government Statistical Bulletin, *Domestic Abuse as Recorded by the Police in Scotland 2008-09* (2009) <http://www.scotland.gov.uk/Resource/Doc/292984/0090391.pdf>

<sup>12</sup> Strathclyde Police Domestic Abuse Coordination Unit, Consultation Response 20

<sup>13</sup> Connelly, C. & Cavanagh, K. (2007) “Domestic abuse, civil protection order and the “new criminologies”: is there any value in engaging with the law?”. *Feminist Legal Studies*, 15: 259-287

16. These orders are an important part of a robust legal response to domestic abuse which sends a clear message of intolerance to perpetrators.

### **The current law on civil protection orders in Scotland**

17. Before a civil protection order can be granted, the civil standard of proof (the “balance of probabilities”) is used to decide the application, rather than the criminal standard (“beyond reasonable doubt” which requires two independent pieces of evidence for corroboration). This reflects the fact that civil protection orders are intended to *protect victims* from *future* behaviour, rather than *punish abusers* for the wrongs of the *past*. Unlike complaints made through the criminal process, an abuser does not face consequences simply because their victim has applied for an order. Any further action will only arise if the abuser then breaches the civil order.

18. In Scotland, there are three kinds of civil protection order available to victims of abuse. These are an interdict with no power of arrest, an interdict with a power of arrest and a non-harassment order.

#### *Interdict with no power of arrest*

19. This order is obtained to prohibit specific actions by a named individual. Such an order can be used to prohibit any behaviour which amounts to domestic abuse.

20. An interim interdict may be granted very rapidly, but its effectiveness is limited by the fact that the police have no power to arrest someone who breaches its terms. There is no power of arrest attached and breach is not a crime unless the behaviour which constituted the breach was in itself criminal behaviour. Where, for example, an abuser loiters outside their victim’s home or workplace, although this may breach the interdict, this behaviour will not amount to a crime.

21. The only remedy for the individual who has the interdict is to return to court, possibly at their own expense, to raise a civil action for breach of interdict.

#### *Interdict with power of arrest*

22. The Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Protection from Abuse (Scotland) Act 2001 (as amended by the Family Law (Scotland) Act 2006) allow a power of arrest to be attached to an interdict. The power of arrest allows the police to arrest the abuser if the interdict is breached.

23. However, the breach in itself is not a criminal offence and a prosecution can only take place if the actions of the abuser also amount to a crime for which there is sufficient evidence. If no prosecution is to take place, the arrested person will appear before a sheriff who has the power to remand them in custody for a maximum of two days. This detention is not deemed to be a punishment. Regardless of what, if any, criminal proceedings take place, the individual in possession of the interdict can raise an action in the civil court for breach of interdict, as outlined above. This is both time consuming and can be prohibitively expensive if the individual does not qualify for legal aid.

*Non-harassment order*

24. The Protection from Harassment Act 1997 (“the 1997 Act”) allows a victim of abuse to apply for a civil non-harassment order. The order will be granted where there is evidence of a “course of conduct” involving at least two separate occasions of harassment.<sup>14</sup> A procurator fiscal is also able to apply for a non-harassment order at the sentencing stage, following an accused being convicted of an offence where there is evidence of a course of conduct of harassment of the victim.

25. Breach of a non-harassment order is a criminal offence punishable by up to five years imprisonment. This sends the correct message to perpetrators that breached orders will be treated seriously as a crime and avoids the expense and stress which may accompany pursuing breached civil protection orders in the courts.

26. There is anecdotal evidence that a course of conduct requirement has severely restricted the number of orders being sought following successful prosecutions in domestic abuse cases, which rarely involve conduct on two separate occasions, and an opportunity to protect vulnerable people is therefore lost. Should the Criminal Justice and Licensing (Scotland) Bill, currently before the Scottish Parliament, become law this will be amended.

## **THE CURRENT LAW: PROBLEMS AND PROPOSED SOLUTIONS**

27. The problems with the current law on civil protection orders in Scotland, alluded to briefly above, were identified in an evaluation of all Scottish civil protection orders that was carried out in 2003 (“the Scottish study”)<sup>15</sup> and fall broadly into two main areas: access to justice<sup>16</sup> and a failure to provide a robust response to breached orders<sup>17</sup>. These problems, and how they will be tackled by the Bill, will now be considered in more detail.

### **Problem 1: Access to justice – non-harassment orders and legal aid**

#### *Non-harassment orders: the “course of conduct” requirement*

28. In the civil court, a victim of abuse must make their own application for an order to be protected from further abuse or harassment. The burden of proof rightly lies with the victim.

29. When a victim of abuse applies for a non-harassment order, two different occasions of harassment need to be shown in the civil court. This is because a “course of conduct” must be established before an order can be granted. The Scottish study has shown that the victim’s statement about the abuse is often not enough to meet this evidential requirement.<sup>18</sup> Eyewitness

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<sup>14</sup> This includes: conduct amounting to harassment; conduct intended to amount to harassment or conduct occurring in circumstances where it would occur to a reasonable person that it would amount to harassment

<sup>15</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), An Evaluation of the Protection from Abuse (Scotland) Act 2001, (Edinburgh, Scottish Executive Social Research). <http://www.scotland.gov.uk/Publications/2003/11/18560/29451>

<sup>16</sup> Connelly, C., (2010), “Institutional Failure, Social Entrapment and Post-Separation Abuse”, *Juridical Review*, pp 43-64

<sup>17</sup> Connelly, C. & Cavanagh, K. (2007) “Domestic abuse, civil protection order and the “new criminologies”: is there any value in engaging with the law?”. *Feminist Legal Studies*, 15: 259-287

<sup>18</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), An Evaluation of the Protection from Abuse (Scotland) Act 2001, (Edinburgh, Scottish Executive Social Research). <http://www.scotland.gov.uk/Publications/2003/11/18560/29451>

accounts and the evidence of professionals, particularly doctors, are preferred, for each of at least two separate incidents of harassment.

30. Providing this evidence is problematic as many victims do not tell anyone about the abuse they are suffering.<sup>19</sup> It can be even more difficult for black and ethnic minority victims of abuse due to the barriers they face in accessing professional services, which include language barriers and lack of means to contact service providers.<sup>20</sup> As a consequence of these factors, the required supporting evidence of a course of conduct may not be available. Many of the responses to the consultation reported that this requirement acts as a barrier to justice for some who suffer abuse.

31. Given the rights enshrined in the European Convention on Human Rights (ECHR) Article 3, namely “no one shall be subjected to torture or to inhuman or degrading treatment or punishment”, it may be the case that the need to have two incidents of abuse proven before a protection order can be granted by a civil court would breach the Article.

#### *How the Bill will tackle this problem*

32. The Bill addresses these issues by amending the 1997 Act<sup>21</sup> – where the conduct complained of in an action of harassment falls within the definition of domestic abuse, the decision on whether to grant a non-harassment order will be made without reference to a course of conduct. Further, the definition of conduct makes it clear that the harassing behaviour need only occur on one occasion. This ensures that it is competent for a court to grant remedies for an action of harassment, where domestic abuse has occurred, after evidence of only one occasion of harassing behaviour is brought before it.

33. The purpose of a protection order is to protect against future abuse. If the perpetrator is of good behaviour, their liberty is not infringed. It is only if the person continues to flout the criminal law that they will be subject to trial and punishment. However, if further abuse is intended, the order may either prevent it or allow swift police action resulting in criminal proceedings. This is supported both by Strathclyde Police Domestic Abuse Coordination Unit, who wish to see increased use of non-harassment orders<sup>22</sup>, and ACPOS, who noted that “The current system is wholly unacceptable”.<sup>23</sup>

34. This measure will not make any changes to the law of evidence. The burden of proof in the civil proceedings to obtain the order remains with the victim of abuse. Should the order be breached, the burden and standard of proof rests with the Crown. The only thing that will change is the amount of evidence a victim of abuse will be required to show before they receive a non-harassment order. This will bring the order in line with other civil protection orders. After all, breach of an interdict with a power of arrest, for example, may result in a criminal penalty and yet evidence does not have to be given of two occasions of behaviour before it will be

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<sup>19</sup> Mirrlees-Black, C. (1999) Domestic Violence: Findings from a New British Crime Survey Self-completion Questionnaire, Home Office Research Study 191.; Walby, S. and Allen, J. (2004) Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey, Home Office Research Study 276

<sup>20</sup> Shakti Women’s Aid, Consultation Response 35

<sup>21</sup> Section 1 Domestic Abuse (Scotland) Bill

<sup>22</sup> Strathclyde Police Domestic Abuse Coordination Unit, Consultation Response 20

<sup>23</sup> Association of Chief Police Officers, Consultation Response 39

granted. The course of conduct requirement currently acts as a *de facto* corroboration requirement and this is out of step with other civil orders.

35. While some of the consultation responses flagged up the issue that removing the “course of conduct” requirement might leave non-harassment orders open to abuse, it is very unlikely that this will be borne out in reality. As has been stated, court practice expects eye-witness accounts and evidence from professionals before an order will be granted and the statement of the victim, on its own, will not be sufficient to justify granting the order.

#### *Access to legal aid*

36. When a person is charged with a criminal offence arising from domestic abuse they will get non-means tested legal aid to engage a solicitor to represent them when they appear in court from custody. The joint protocol between police and prosecutors means that there is an assumption that suspected perpetrators of domestic abuse will be remanded in custody.<sup>24</sup> Following this first appearance, legal aid is means-tested<sup>25</sup>, however, the test includes issues other than merely income including interests of justice, loss of livelihood etc. As a result of these wider factors, there is anecdotal evidence from solicitors in the Scottish study that perpetrators of abuse will secure legal aid more often than victims of abuse seeking protection.

37. Victims of domestic abuse are likely, therefore, to be required to finance expensive applications for civil protection orders (interdict with a power of arrest or a non-harassment order) to protect themselves from future abuse.<sup>26</sup> Black and ethnic minority victims of abuse may again face additional barriers including lack of understanding of the system and the immigration restriction of having “no recourse to public funds”.<sup>27</sup>

38. Even where the victim is eligible for civil legal aid, they will be means tested. As many victims seek civil protection orders after leaving an abusive partner or spouse, the calculation of their assets and income is done at a time of flux: they will often have left their own home, are seeking alternative accommodation, and do not yet have welfare benefits or a right to the shared assets of their relationship secured.<sup>28</sup>

39. If a victim is faced with paying legal aid contributions, this will be made more difficult if they have left their home and assets to flee violence and in the interim before they can access their share of matrimonial property. Such a scenario is not an unusual narrative of those who are fleeing violence. As a result, many victims may face prohibitive contribution levels that can lead to an abandonment of the action.<sup>29</sup> The overwhelming majority of consultation responses supported this point – one respondent admitted to regularly advising victims of abuse to give up

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<sup>24</sup> Scottish Police Service/COPFS (2008), In Partnership, Challenging Domestic Abuse V3/12/08, (ACPOS and COPFS) <http://www.copfs.gov.uk/Resource/Doc/13547/0000559.pdf>

<sup>25</sup> Special arrangements in the dedicated Domestic Abuse Courts in Glasgow Sheriff Court allow accused to access non-means tested legal aid for all subsequent court diets

<sup>26</sup> Connelly, C., (2010), “Institutional Failure, Social Entrapment and Post-Separation Abuse”, *Juridical Review*, pp 43-64. The exception is where non-harassment orders are sought by prosecutors following conviction, which is rare.

<sup>27</sup> Shakti Women’s Aid, Consultation Response 35

<sup>28</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), An Evaluation of the Protection from Abuse (Scotland) Act 2001, (Edinburgh, Scottish Executive Social Research). <http://www.scotland.gov.uk/Publications/2003/11/18560/29451>

<sup>29</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), An Evaluation of the Protection from Abuse (Scotland) Act 2001, (Edinburgh, Scottish Executive Social Research). <http://www.scotland.gov.uk/Publications/2003/11/18560/29451>

work and go into temporary accommodation in order to secure a civil protection order and also wrote about one victim of abuse who sought and obtained a civil protection order even though she knew she could not afford it because “she was less afraid of Sheriff Officers (when she didn’t pay) when they came to the door than her ex partner...”<sup>30</sup>

40. In the Scottish study almost three-quarters (72%) of the victims interviewed had applied for a civil protection order and of those, over half (52%) were not eligible to obtain legal aid.<sup>31</sup> Nine (39%) found it “difficult” to obtain orders because they struggled to pay the financial contribution required by the Legal Aid Board. Solicitors identified contribution levels as prohibitive for some clients and also referred to the difficulty of calculating contribution levels at a time when the victim may be leaving their partner and as a result would be homeless, seeking new accommodation or staying with friends.

41. Interviews with victims conducted as part of the Scottish study demonstrate that access to justice is a real issue for some who are seeking protection from domestic abuse. Solicitors said:

Solicitor 1: “They are having to pay a significant amount of money that basically should come from the basic legal aid system...lots of people don’t go ahead because of the level of contributions..”

42. The Scottish study revealed that the strict criteria for obtaining legal aid resulted in only those on a full complement of state benefits qualifying for full legal aid.<sup>32</sup> The majority of women in the study were either required to make a substantial financial contribution or were refused legal aid. In 2003, the average contribution of £849 was payable by 30% of those in receipt of legal aid in up to twenty monthly instalments and in 2007 this figure had increased to £1027 payable by 23% of applicants.<sup>33</sup>

43. The findings from the Scottish study are supported by subsequent research conducted by the Law Society of Scotland.<sup>34</sup> This research was informed by 105 responses to a questionnaire comprised of 14 questions about civil legal aid. 41% of respondents reported that they no longer offered civil legal aid work in respect of interdicts.<sup>35</sup> A further 40% indicated that they were considering ceasing to represent legally aided clients who were seeking interdicts.<sup>36</sup> The reason for ceasing to offer these services included the fact that they were financially unviable (91% of those who offered civil legal aid) and the bureaucracy involved in securing legal aid from the Scottish Legal Aid Board (72% of those who offer civil legal aid).

44. The difficulties reported by the Law Society in respect of the lack of financial viability of civil legal aid work and the prohibitive bureaucracy of the Scottish Legal Aid Board (SLAB)

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<sup>30</sup> Domestic Abuse Unit Lothian and Borders Police, Consultation Response 23

<sup>31</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), An Evaluation of the Protection from Abuse (Scotland) Act 2001, (Edinburgh, Scottish Executive Social Research). <http://www.scotland.gov.uk/Publications/2003/11/18560/29451> pp. 67-69

<sup>32</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), An Evaluation of the Protection from Abuse (Scotland) Act 2001, (Edinburgh, Scottish Executive Social Research). <http://www.scotland.gov.uk/Publications/2003/11/18560/29451>

<sup>33</sup> Scottish Legal Aid Board, Annual Report (2007-08) 39

<sup>34</sup> The Law Society of Scotland, Civil Legal Aid Research (2007)

<sup>35</sup> The Law Society of Scotland, Civil Legal Aid Research (2007) p.6

<sup>36</sup> The Law Society of Scotland, Civil Legal Aid Research (2007) p.6

mirror the findings of the Scottish study. Both studies suggest that the consequence of these difficulties is that solicitors are no longer willing to represent legally aided clients who are seeking a civil protection order in response to domestic abuse. It is suggested in the Law Society report that the consequence of this is “the creation of advice deserts”.<sup>37</sup> This is further supported by the decrease in the number of law firms registered with SLAB for civil legal assistance which dropped from 756 in 2005 to 676 in 2007. Figures from other sources, e.g., Women’s Aid or Strathclyde Police show an increase in the number of incidents of domestic abuse year on year, yet the numbers of applications being made for legal aid to obtain an interdict or non-harassment order dropped from 6,190 in 2006/07 to 4,917 in 2007/08. Whilst all of the reasons for this decline are not transparent, the financial limits applicable to legal aid eligibility and the number of solicitors now willing to do this type of work, must have some bearing on the decline.<sup>38</sup>

45. On 7th April 2009, the Scottish Government increased the annual disposable income limit for civil legal aid from £10,306 to £25,000.<sup>39</sup> This will improve the position of many who seek protection from abuse. Of greatest importance, however, is the fact that even with the new increase of annual disposable income to £25,000, some victims will continue to encounter financial barriers when seeking protection from abuse.

46. The increase does not address the imbalance between the access to justice afforded to the perpetrator and that available to the victim of abuse, as described above.

#### *How the Bill will tackle this problem*

47. The Bill would address the issues raised above by making amendments to the Legal Aid (Scotland) Act 1986.<sup>40</sup> These amendments make legal aid available without means testing or the levying of a contribution to all of those who seek an interdict with a power of arrest under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 or the Protection from Abuse (Scotland) Act 2001 or a non-harassment order for the purpose of protection against domestic abuse.

48. The effect of the amendment is to increase access to justice for those subjected to domestic abuse and make this on a par with those who perpetrate abuse. In absence of this, civil protection orders will remain inaccessible to some victims of abuse. This measure ensures that victims would no longer have to pay for their own protection.

49. There may be some concern that removing the financial means test will result in abuse of the legal aid system, however, it must be remembered that SLAB currently apply the legal merits tests of probable cause and reasonableness before an application for civil legal aid will be granted. As the Family Law Association has noted, “the number of trivial cases would not be

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<sup>37</sup> The Law Society of Scotland, Civil Legal Aid Research (2007) p.4

<sup>38</sup> Connelly, C., (2010), “Institutional Failure, Social Entrapment and Post-Separation Abuse”, *Juridical Review*, pp 43-64

<sup>39</sup> The Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2009, SI 2009/143 s 4(5)

<sup>40</sup> Section 2 Domestic Abuse (Scotland) Bill

significant as competent solicitors will only take actions to court if the evidence they can present is sufficient to support the application for legal aid to the court”.<sup>41</sup>

50. The cost of providing this protection on a non-means tested basis should be offset by a reduction in the costs generated by domestic abuse in society. The Scottish Government document “Safer Lives: Changed Lives” estimates that domestic abuse costs the Scottish public purse £2.3 billion.<sup>42</sup> By allowing access to orders which emphasise early intervention and prevent repetition of the abuse, while there may be short term costs from this proposal, allowing non-means tested legal aid will result in long term benefits in terms of a reduction in the cost of domestic abuse which will be experienced across legal, housing, health and education services. ACPOS agreed, arguing that “any and all additional costs can be factored and will be a fraction in comparison to the emotional and financial costs required to investigate further abusive incidents”.<sup>43</sup>

## **Problem 2: Failure to provide a robust response to breached orders**

51. The breach of a non-harassment order is a crime. Breach of an interdict with a power of arrest may involve behaviour which is criminal (such as a breach of the peace or assault), but a breach of interdict is not, in itself, a crime.

52. Where the abuser behaves in a way that breaches the interdict but does not commit a crime (for example loitering outside the victim’s home), the consequences are very limited. The breach is a form of contempt of court and, although the power of arrest allows the police to remove the person from the scene, no prosecution can be brought if no crime has been committed and the maximum possible outcome, from criminal proceedings, is a remand in custody for up to two days. Breach of the interdict is not a crime. As noted above, actions for breach of interdict in the civil courts are costly, lengthy and rarely have any punitive outcome.

53. Due to the method of recording prosecutions of breached civil protection orders, limited information is available. The Scottish study did examine the available evidence of breached civil protection orders and found that there were rarely criminal proceedings that resulted in conviction and punishment. Interdicts with a power of arrest were more frequently dealt with under the alternative procedure where a prosecution does not proceed and, as a result, the perpetrator appears before a sheriff in a criminal court who is empowered to order their detention for up to two days.<sup>44</sup> As noted above, this detention is not deemed to be a punishment for breaching the interdict. Instead this time is to allow parties to “cool off” and potentially allow the victim to make decisions and arrangements to increase their safety.

54. The breach is often part of an ongoing series of abusive behaviour, and so can be particularly distressing and frightening for victims (and, often, their children). Meanwhile, the message to the perpetrator is that they may show contempt for the law without sanction:

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<sup>41</sup> Family Law Association, Consultation Response 30

<sup>42</sup> COSLA/Scottish Government (2009) *Safer Lives: Changed Lives A Shared Approach to Tackling Violence Against Women in Scotland* (Edinburgh: Scottish Executive)

<sup>43</sup> Association of Chief Police Officers in Scotland, Consultation Response 39

<sup>44</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), *An Evaluation of the Protection from Abuse (Scotland) Act 2001*, (Edinburgh, Scottish Executive Social Research). <http://www.scotland.gov.uk/Publications/2003/11/18560/29451>

“The seriousness of this behaviour and the effect on the recipient can only be fully appreciated if it is viewed against the background of violence the woman has suffered, the threats she may have received and the unpredictability of the man’s future actions.”<sup>45</sup>

55. The holder of the interdict is left with only one way to address the breach of the order: to bring an action for breach of interdict, in effect a contempt of court, by lodging a fresh initial writ in the civil court. They are responsible for paying the costs of this, unless they can secure legal aid, and the same issues about prohibitive contribution levels apply as were described in the section on “Access to legal aid”.

56. Where a civil action for breach of interdict is raised, the lodging of the initial writ results in a hearing before a civil court. The perpetrator is ordered to appear in the civil court and if the breach is admitted or proved, the court can impose a fine or a maximum of three months imprisonment. However, the process can be very lengthy if the perpetrator does not turn up, or if they deny any aspect of the alleged breach. As this is a civil procedure, the imposition of imprisonment for breach of interdict is rare<sup>46</sup>, as it is deemed to be inappropriate for such a disposal to be used in the civil process.

57. The current position results in the onus often being on the victim to initiate and fund an action for breach of interdict which can be onerous, prohibitively expensive and, often, without satisfactory conclusion.

#### *How the Bill will tackle this problem*

58. The Bill addresses this problem by making it a criminal offence to breach an interdict with a power of arrest where domestic abuse is involved.<sup>47</sup> This offence is punishable (a) 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 (b) 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.

59. Such an approach was considered by the Justice and Home Affairs Committee during the passing of the Protection from Abuse Bill but it ultimately decided against criminalisation in order to avoid compromising the chance of reconciliation and also to avoid the situation where Sheriffs were unwilling to grant the order for behaviour which they felt was “trivial”.<sup>48</sup> The Scottish study and other analysis suggests that the priority should be the safety of victims and their children who have been subjected to domestic abuse rather than reconciliation of abusive relationships.<sup>49</sup> The former is best achieved by robust civil protection orders being readily available which are treated as crimes if breached. The rolling out of a specialist response to domestic abuse in the courts will increase understanding of abuse and the fact that even “trivial”

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<sup>45</sup> Connelly, C. & Cavanagh, K. (2007) “Domestic abuse, civil protection order and the “new criminologies”: is there any value in engaging with the law?”. *Feminist Legal Studies*, 15: 259-287

<sup>46</sup> Macphail, I. (2006), *Sheriff Court Practice*, (3<sup>rd</sup> edition) edited by Welsh T. (Edinburgh: W. Green).

<sup>47</sup> Section 3 Domestic Abuse (Scotland) Bill

<sup>48</sup> See Maureen Macmillan, Consultation Response 19

<sup>49</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), *An Evaluation of the Protection from Abuse (Scotland) Act 2001*, (Edinburgh, Scottish Executive Social Research). <http://www.scotland.gov.uk/Publications/2003/11/18560/29451>

behaviour, as part of a history of abuse, may be a precursor to more serious conduct. For these reasons, it is felt that criminalisation of the order is now appropriate.

60. The new offence is intended to replace the existing mechanisms for dealing with breach of an interdict with a power of arrest i.e. two days detention after appearing before a Sheriff where no criminal proceedings are to take place. It is not, however, meant to replace the option of pursuing a civil hearing for contempt of court. For this reason, sections 3(5) and 3(6) are included in order to deal with the issue of double jeopardy. Where an abuser is convicted for breaching the interdict in a criminal court, the breach will not be punishable as a contempt of court and vice versa.

61. This new criminal offence would enable a more effective response by police and prosecutors to ongoing domestic abuse and would also allow the order to act as a strong deterrent to the abusive person. ACPOS agreed with this statement and added that such a measure would also allow police officers to “gather intelligence and create meaningful profiles of serious/serial offenders and therefore contribute to the management of future risk of harm.”<sup>50</sup> Further, as noted by the majority of the consultation responses, this will send a message that breach of interdict and abusive behaviour will not be tolerated in Scotland.

## **THE DEFINITION OF DOMESTIC ABUSE**

62. Throughout the sections of the Bill, reference has been made to “domestic abuse”. This has necessitated the provision of a statutory definition of domestic abuse. This has been provided in section 4 of the Bill. This provides that any behaviour will be considered to be domestically abusive where it falls within the definition of abuse and occurs in any of the specified relationships in section 4(1). This list of relationships may be amended by subordinate legislation in order to add new categories of relationship.

63. Particular attention should be paid to the words “established relationship” in section 4(1)(a)(ii). These words are intended to cover those couples who are not married or in a civil partnership but who would still be considered to be in a relationship, whether they are or are not cohabiting. In order to avoid confusion, it has been specified that the length of time that the parties have been in the relationship is not a factor which is relevant to assessing whether such a relationship is “established”. Further, as per the definition in section 4(3), this definition includes (but is not limited to) those who have entered into a sexual relationship.

## **ALTERNATIVE APPROACHES**

64. Varying approaches have been adopted in other jurisdictions in respect of access to justice and civil protection orders.

65. In some jurisdictions, such as Australia, civil protection orders can be applied for by the police.<sup>51</sup> In other jurisdictions, e.g. in some parts of the USA, women can apply for an order by

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<sup>50</sup> Association of Chief Police Officers in Scotland, Consultation Response 39

<sup>51</sup> Despite the empowerment of police to apply for orders on behalf of victims of domestic the limited evidence available suggests the police practices vary amongst States. Whilst police in South Australia applied for 97% of civil

visiting a court house and completing a form. Neither of these jurisdictions requires that the woman has independent legal representation before they can obtain an order. In both jurisdictions breach of a civil protection order is a crime.

66. In England and Wales, the Domestic Violence, Crime and Victims Act 2004 (“the 2004 Act”) made the breach of a non-molestation order an offence (s.1). It is also possible for a civil protection order to be granted after an unsuccessful prosecution. Section 12 of the 2004 Act states that where “(a) court before which a person (“the defendant”) is acquitted of an offence may, if it considers it necessary to do so to protect a person from harassment by the defendant, make an order prohibiting the defendant from doing anything described in the order”.

67. It is clear that international approaches have made civil protection orders more accessible to those subjected to domestic abuse although the approach adopted in Australia has been criticised as resulting in many “cross applications” as the police are unable to distinguish between perpetrators and victims. The ability to grant orders in England and Wales following an unsuccessful prosecution will increase the protection available to victims of abuse without having recourse to the civil courts. This Bill seeks to improve access to justice and in particular protection orders, via improved access to legal representation and easing of evidential burdens by removing the need to prove a course of conduct. The criminalisation of breached orders has been recorded as having an increased deterrent effect and an improved sense of safety of those subjected to abuse<sup>52</sup>. For these reasons, the criminalisation of all breached civil protection orders has been introduced in this Bill.

## **CONSIDERATION OF OTHER POLICY ISSUES**

### **Joint Protocol on Domestic Abuse between ACPOS and COPFS<sup>53</sup>**

68. The joint protocol between ACPOS and COPFS commits the police to treating all incidents of domestic abuse as high priority. The Protocol sets out a presumption that all cases in which there are sufficient corroborative evidence of a crime will be reported to the Procurator Fiscal and there is also a presumption that, save in exceptional circumstances, alleged offenders will be detained in custody pending appearance at court. Where there is sufficient evidence in cases involving violence against the victim there is a presumption in favour of prosecution and, where a decision is taken to prosecute, these cases will proceed in the Sheriff or High Court.

69. The presumption in favour of prosecution is recognition of the fact that domestic abuse must be taken seriously. This approach is, however, weakened by the fact that not all behaviour which is considered domestic abuse will amount to a crime. Actions which constitute mental and emotional abuse do not fall within present definitions of criminal behaviour.

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protection orders few cases are initiated by police in Tasmania and the Northern Territory and only 15% of cases in Victoria are initiated by the police. R Alexander, *Domestic Violence in Australia*, (2002), at 140, 154, 123, 164

<sup>52</sup>M Chaudhuri and K Daly, “Do Restraining Orders Help? Battered Women’s Experiences with Male Violence and Legal Process” in E S Buzawa and C G Buzawa (eds), *Domestic Violence: The Changing Criminal Justice Response*, (1992); C Connelly and K Cavanagh, Domestic Abuse, Civil Protection Orders and the “New Criminologies”: Is There Any Value in Engaging With The Law?, (2007) 15 *Feminist Legal Studies* 259-287

<sup>53</sup> Scottish Police Service/COPFS (2008), In Partnership, Challenging Domestic Abuse V3/12/08, (ACPOS and COPFS) <http://www.copfs.gov.uk/Resource/Doc/13547/0000559.pdf>

70. In order to address this problem, and recognise the seriousness of mental and emotional abuse, the criminalisation of breach of interdict with a power of arrest allows a robust response to abusive behaviour and also communicates to offenders that abusive behaviour is taken seriously and will not be tolerated. The provisions of the Bill, therefore, complement the approach taken in the joint protocol and create a more robust legal response to domestic abuse.

### **The specialist response to domestic abuse in the courts<sup>54</sup>**

71. The specialist response to domestic abuse in the courts has been successful in providing a more effective forum and greater success in prosecuting perpetrators and supporting victims of domestic abuse, which has led to a reduction in case attrition as more victims are willing and able to support prosecutions. A central recommendation of the “Toolkit” used to implement the specialist response is the use of probation orders combined with re-education programs for abusive men, such as the CHANGE program and/or drug/alcohol counselling.

72. It would be fitting that the “rolling out” of the specialist response to criminal prosecutions involving domestic abuse is accompanied by a more accessible and robust system of civil protection orders which should be achieved by this Bill. Those abusers who undertake repeated abuse in contravention of civil orders would be channelled into the rehabilitative programmes offered by the Specialist Response and this change should, in coming years, offer improved safety for victims of abuse and their children.

### **Scottish Government commitment to tackling domestic abuse**

73. The Bill also supports the Scottish Government commitment to tackle Domestic Abuse as expressed in the National Domestic Abuse Delivery Plan in respect of children and Young People and “Safer Lives: Changed Lives A Shared Approach to Tackling Violence Against Women in Scotland (June 2009).

## **IMPLEMENTATION**

74. This act will come into force three months after Royal Assent. This will allow the provisions to be implemented as soon as possible whilst allowing time for knowledge of the provisions to be disseminated amongst the general public and relevant practitioners.

## **CONSULTATION**

75. The consultation for this Bill was carried out by Rhoda Grant MSP and ran from 1 December 2009 until 26 February 2010. A number of late submissions were accepted and considered.

76. As well as being made available on the Scottish Parliament’s website, 225 consultation documents were sent out to organisations and individuals with an interest in the issue and recipients were encouraged to bring the consultation to the attention of others. There was also a link to the document on the member’s website. Further copies were issued on request as well as being downloaded from the Scottish Parliament website.

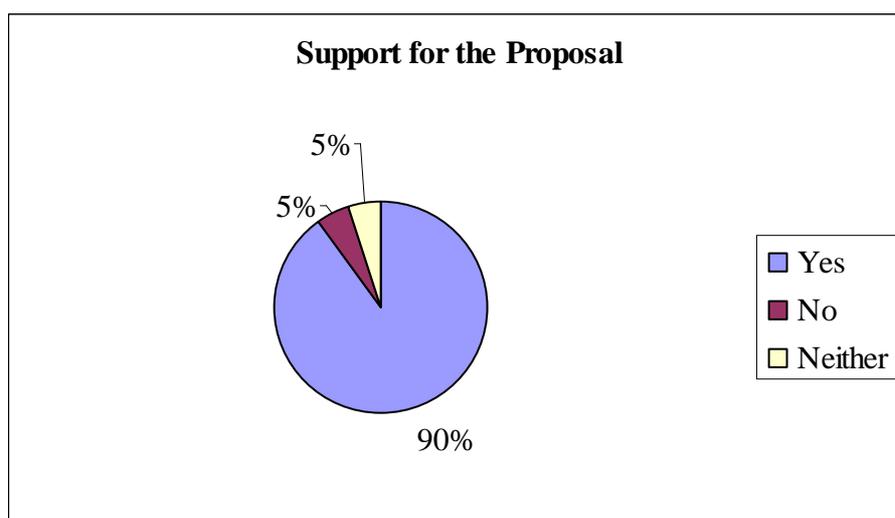
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<sup>54</sup> Connelly, C. (2008), Handling Domestic Abuse Cases, (Edinburgh, The Scottish Government)

77. The consultation sought views on changing the law to provide greater protection and access to justice to victims of domestic abuse. In total, there were 40 responses to the consultation document. These can be categorised into the following groups:

<b><i>From</i></b>	<b><i>Number</i></b>
Voluntary Sector	16
Local Authorities	9
Professional Bodies	5
Individuals	4
Police Bodies	3
Campaign Groups	1
Unions	1
Public bodies	1

78. Of the responses, 36 (90%) supported the proposal, 2 (5%) expressed opposition to the proposal and 2 (5%) neither opposed nor supported the proposal. Support for the proposal was drawn from across all groups – the most common feature of the general comments to the responses was the strong support for the proposal and the support for increasing access to justice and protection for victims of domestic abuse.



79. Respondents to the consultation document were invited to submit their own general comments and/or answers to the following seven questions:

*What advantages or problems might arise as a result of removing the course of conduct requirement?*

80. This was addressed by 33 responses and was universally welcomed and support “without reservation” was offered by the Association of Chief Police Officers.<sup>55</sup> The majority of respondents to this question explored the advantages of the measure, which included the fact that victims would no longer have to wait to be subjected to further abuse to receive protection, that it would give victims greater confidence to report domestic abuse and that it would increase the availability of protection to victims.

<sup>55</sup> Association of Chief Police Officers in Scotland, Consultation Response 39

*What are the main benefits of making it easier to obtain a non-harassment order?*

81. There were 24 responses to this question and the majority highlighted that this would result in increased protection both for victims of domestic abuse and their children. ACPOS argued that such a measure would empower the police to come forward at an earlier stage in the abusive relationship and protect the victim.<sup>56</sup>

*What advantages or problems might arise with the removal of means testing?*

82. There were 26 responses to this question, all of which intimated that there would be significant benefits to removing means testing in this regard. Some disadvantages were highlighted, but there was a general consensus that these would be outweighed by the advantages. Many responses highlighted that victims of abuse should not have to pay for their own protection and also pointed to the fact that, when a victim of abuse leaves the relationship, they can incur significant costs causing financial hardship which is only exacerbated by the need to pay for a protection order. One respondent noted that removing means testing of legal aid was necessary to comply with obligations under the European Convention on Human Rights and another suggested that both pursuers and defenders would have to receive non means-tested legal aid in order to comply with Article 6 ECHR (see section on “Human rights” for a response to these points). It was also recognised that, while there may be an initial cost in terms of legal aid, this would be offset by the savings that would be made due to the robust way in which repeated abuse could be tackled.

*What are the main benefits of removing means testing?*

83. A variety of benefits that would result due to the removal of means testing were identified. These included greater access to justice, the fact that victims would no longer have to make a choice between seeking protection and having enough money to live on and that victims of abuse may be instilled with greater confidence to leave their partners following the change.

*What are the advantages and problems that might arise from making it a criminal offence to breach an interdict with a power of arrest?*

84. This aspect of the Bill was welcomed by all 26 who responded to this question and received strong support. There was recognition that the measure would show that domestic abuse is taken seriously and that the change would give weight to the interdicts. One respondent also noted that this change would lessen the onus and pressure on the victim to pursue a case for breach of the interdict.

*What do you see as the main benefits of making it a criminal offence to breach an interdict with a power of arrest?*

85. The responses to this question identified three main benefits: the change (i) provided a heightened deterrent, (ii) offered greater protection for victims of domestic abuse and (iii) showed how serious a breach is and how seriously domestic abuse is taken. ACPOS contended that it would give the police the power to properly respond to a breach.<sup>57</sup>

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<sup>56</sup> Association of Chief Police Officers in Scotland, Consultation Response 39

<sup>57</sup> Association of Chief Police Officers in Scotland, Consultation Response 39

*What costs would be associated with all of the proposals contained in the Bill?*

86. There was recognition amongst the 19 respondents to this question that the proposal would precipitate increased costs, but that this was outweighed by the benefits the Bill would bring to victims of domestic abuse and wider society. Likely additional costs in terms of legal aid and financial pressure on the courts and the police were identified but one respondent drew attention to the Scottish Government's document Safer Lives: Changed Lives which suggests that £2.3 billion is spent responding to domestic abuse. It was therefore argued that this Bill could precipitate significant savings. A further four respondents recognised short term costs, but in the long term suggested there might be savings, with a reduction in re-victimisation and reduced societal costs in terms of re-housing, placing of children and health costs.

87. The member very much welcomes and appreciates the interest that has been demonstrated in her proposal. The responses to consultation have affirmed many of the member's concerns about the prevalence of domestic abuse and the appropriate responses to such abuse. These responses will be used to take forward the Bill and provide greater protection and justice to victims of domestic abuse.

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

### **Equal opportunities**

88. This Bill has a positive effect on equality. By removing the means testing for legal aid, it allows all victims of abuse, regardless of their economic background, to have equal access to protection orders. It also addresses the discrepancy that exists in access to justice between those who perpetrate abuse and those who suffer abuse.

89. The Bill will also bring an improvement to the quality of life of all those who suffer from domestic abuse. By enhancing the range of measures available to robustly tackle legal abuse, it will send a clear message that this kind of behaviour will not be tolerated in Scotland.

### **Human rights**

90. It is considered that the provisions in the Bill are compatible with the European Convention on Human Rights.

#### *Human rights and the abuser*

91. Section 2 of the Bill provides for the granting of non-means tested legal aid to any person who seeks either an interdict with a power of arrest or a non-harassment order for protection from domestic abuse. The granting of non-means tested legal aid, under this provision, is not extended to the defender in such an action. Consideration was given as to whether this provision would be compatible with Article 6(1) ECHR, which entitles an individual involved in civil proceedings a right of access to the court, a right to present an effective defence and the right to a fair trial.

92. Article 6(1) provides that the rights to fairness specified above only apply in the determination of “civil rights and obligations” or of any “criminal charge”.

93. The granting of a civil protection order can not be said to involve the determination of a criminal charge. In deciding what amounts to a criminal charge, a court will consider the classification of the “offence” in domestic law, the nature of the offence and the severity of the penalty.<sup>58</sup> Case law in the United Kingdom has emphasised that proceedings cannot be said to be criminal where they do not involve any penal sanction.<sup>59</sup> As already stated, there is no criminal consequence as a result of the granting of a civil protection order. It is only when the order is breached that criminal proceedings take place. Further, in the case of *R (McCann) v Manchester Crown Court*<sup>60</sup> it was held that the restrictions placed on a person when an ASBO – a civil order with criminal consequences upon breach – was granted against him did not constitute a penalty. This would presumably also apply to the civil protection orders covered by the Bill.

94. In determining whether a case contains an issue which affects “civil rights and obligations”, there are four conditions which must be satisfied:

- (a) there must be a genuine claim or dispute
- (b) this dispute must relate to a right or obligation in domestic law
- (c) this right or obligation must be broadly civil in character and
- (d) the outcome of the dispute must be directly decisive for the right or obligation<sup>61</sup>

95. Point (ii) above requires that any dispute is based upon a right that is recognised by a national legal system.<sup>62</sup> When a victim of abuse seeks a civil protection order, they are seeking a determination from the court that requires their abuser to keep away from them and to stop any threatening behaviour. This is not the determination of a right or obligation which exists in domestic law. There is no right of access to a spouse. At common law in Scotland, there once existed a duty of adherence between spouses, however, when desertion was abolished as a ground of divorce or dissolution<sup>63</sup>, it was thought that this right ceased to exist.<sup>64</sup> It is important to remember that the granting of a civil protection order does not affect the legal status or relationship of the parties and a distinction can be drawn with, for example, an action for divorce or an exclusion order to remove an entitled spouse from the family home. Therefore, where a civil protection order is sought for the protection of a spouse or partner, the action falls out-with the scope of Article 6.

96. Should a civil protection order also cover any children, this may also raise issues under Article 6. Orders have been granted which require an abuser to keep away from both their partner and children. However, these are usually granted where the abuser did not have parental

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<sup>58</sup> *Engel and Others v Netherlands* (1976) A 22

<sup>59</sup> See, for example, *R v H* (Fitness to Plead) [2003] 1 WLR 411, HL; *S v Miller* (No 1) 2001 SC 977; *B v Chief Constable of Avon and Somerset Constabulary* [2001] 1 WLR 340

<sup>60</sup> *R( McCann) v Manchester Crown Court* [2003] 1 AC 787

<sup>61</sup> Reed, R. and Murdoch, J. (2008) *A Guide to Human Rights Law in Scotland* (2<sup>nd</sup> edn). (Edinburgh: Tottel)

<sup>62</sup> *Zander v Sweden* (1993) A 279-B at para 22

<sup>63</sup> Abolished by the Family Law (Scotland) Act 2006 ss 12 and 45 and Sch 3

<sup>64</sup> Thomson J. (2006) *Family Law in Scotland* (5<sup>th</sup> edn). (Haywards Heath: Tottel) at 56

rights or responsibilities in respect of the children (eg. where the children were from a previous relationship of the abused party). In this case, the granting of the order would still not concern a “civil right or obligation” – in the case of *McMichael v United Kingdom* it was held that, where a father had not applied to the court for parental rights (as was required by his particular situation), care proceedings which had arisen did not involve the determination of civil rights and obligations as there was no legal recognition of his status as a father. Therefore, where a civil protection order covers children who have no legal relationship with the abuser, there will be no dispute concerning a civil right and obligation and Article 6 will not be engaged.

97. Where an order covers children who do have a legal relationship with the abuser, it is arguable that this involves a civil right or obligation recognised in domestic law. While there is no mention in Article 6 of a specific right to legal aid in order to have practical and effective access to a court failure to provide legal aid may constitute a breach of the Article where the complexity of a case makes this indispensable<sup>65</sup>. This is determined on the specific facts and circumstances of each case and the European Court of Human Rights (henceforth “the Court”) will give consideration to, *inter alia*, the importance of what is at stake for the applicant in proceedings, the complexity of the relevant law and procedure and the applicant’s capacity to represent himself or herself effectively.<sup>66</sup> Further, in order for an individual to have a fair hearing in a civil court, there must be an equality of arms – each of the parties in the case must not be placed at a substantial disadvantage *vis-à-vis* his or her opponent when presenting a case.<sup>67</sup> With regard to legal aid, however, there is no obligation upon a State to ensure a total equality of arms through the use of public funds so long as each side in the dispute is not placed at a substantial disadvantage<sup>68</sup>. Equality of arms is, also, only one factor which must be considered in terms of the overall fairness of proceedings.<sup>69</sup>

98. While it is recognised that removing means testing benefits one party in proceedings when compared to another, it is submitted that this will not amount to a “substantial disadvantage”. The granting of legal aid to victims of abuse will not be automatic and will still depend on the ability of an applicant to meet the legal merits test. Further, it would be inaccurate to say that every case where one party was granted legal aid and the other was not was a breach of the right to a fair trial – there are many cases, including those related to domestic abuse, where one party has been granted legal aid and the other has not. For these reasons, there is still no breach of Article 6 even where a civil right or obligation recognised by domestic law exists.

99. Therefore, where a civil protection order is sought in order to provide protection to a partner or spouse of an abuser, or where the order would also protect children with whom the abuser has no legal relationship, Article 6 would not be engaged at all. Where the order covers children who have a legal relationship with the abuser, there is still no breach of Article 6 because the provision in the Bill would not amount to a substantial disadvantage.

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<sup>65</sup> *Airey v Ireland* (1979-80) 2 EHRR 305

<sup>66</sup> *Steel and Morris v United Kingdom* (2005) 41 EHRR 22

<sup>67</sup> *Bonisch v Austria* (1985) A 92

<sup>68</sup> *Steel and Morris v United Kingdom* (2005) 41 EHRR 22

<sup>69</sup> *Ruiz-Mateos v Spain* (1993) 16 E.H.R.R. 505

### *Human rights and the victim*

100. Further, after considering Articles 2, 3, 6 and 8 ECHR it is submitted that the Bill will bring Scotland into line with its obligations owed to victims of abuse – the current situation may constitute a breach of the Convention and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

101. In the case of *Opuz v Turkey*<sup>70</sup> the Court recognised that domestic violence is a wide ranging problem throughout all member states and that States may have to respond to it in a special way as the Court will consider the “gravity of the problem” when examining issues which arise as a result.<sup>71</sup> This was a landmark case which places strong positive obligations upon member states to take robust measures to tackle abuse.

102. Consideration was given to Article 2 ECHR, which ensures the right to life and places positive obligations upon a State to take appropriate steps to safeguard the lives of those people within its jurisdiction.<sup>72</sup> In *Opuz*, in finding a breach of Article 2, the Court drew attention to the fact that authorities failed to take action even though they had been repeatedly alerted to the violent behaviour on the part of the abuser and also failed to consider that further violence was foreseeable. As has already been mentioned, mentally and emotionally abusive behaviour would not fall within the definition of a crime in Scots law. Contact facilitating such abuse, however, can be prohibited by a civil protection order. Due to this, victims of abuse must rely on civil protection orders to protect them from such behaviour and to empower criminal justice agents to intervene should the aforementioned kinds of abusive behaviour continue. Taking this into consideration along with the financial and evidential barriers that victims of abuse may encounter when trying to obtain a civil protection order the current situation may continue to expose victims of abuse to further abusive behaviour even if authorities had been alerted repeatedly. Should this lead to fatal violence this could constitute a breach of Article 2 which enshrines a right to life.

103. Consideration was also given to Article 3 ECHR, which places positive obligations upon a State to prevent a person within its jurisdiction from suffering torture or inhuman or degrading treatment or punishment. This duty extends to providing protection to a person from such treatment at the hands of another private individual.<sup>73</sup> This should be read in conjunction with Article 8 ECHR, which protects the private life of an individual and extends to “*psychological integrity...a right to personal development and the right to establish and develop relationships with other human beings and the outside world*”.<sup>74</sup> This places obligations upon a State to protect individuals from both physical violence and also psychological abuse which would hinder their personal development.<sup>75</sup>

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<sup>70</sup> *Opuz v Turkey* (33401/02) (2010) 50 EHRR 28

<sup>71</sup> *Opuz v Turkey* at para 132

<sup>72</sup> Cf *Osman v United Kingdom* (2000) 29 E.H.R.R. 245 where it was held that there was a duty upon a State to act where there was a *real and immediate risk to a person through the criminal conduct of another person who is known to the authorities and their powers can reasonably be used to avoid that risk* as long as this *does not impose an impossible or disproportionate burden* upon authorities.

<sup>73</sup> *E v United Kingdom* 2003 36 EHRR 31

<sup>74</sup> *Pretty v UK* (2002) 12 EHRC 149 para 61

<sup>75</sup> Choudry S. and Herring J. (2006) “Domestic Violence and the Human Rights Act 1998: a new means of legal intervention?” *Public Law*, Win, 752-784

104. Read together, both Articles form the basis of a positive duty upon States to protect people from inhuman or degrading treatment by others. If the conduct does not meet the minimum level of severity demanded by Article 3, Article 8 protections may be triggered. A state must balance the rights under Article 8 with the rights of other interested parties, but it is submitted, due to the well documented effects of abuse and the fact that the Court has identified that is a pressing social problem, that the interests of the victim will almost always win out.<sup>76</sup>

105. Abusive behaviour can be included in the definition of inhuman and degrading treatment and therefore any State does have a positive duty to take steps to protect those who suffer from this treatment.<sup>77</sup> If civil protection orders are rendered inaccessible to those who suffer from abuse, and authorities are unable to act in answer to mental and emotional abuse, then Scotland would fail in its positive obligations to provide protection and this would constitute a breach of the Article.

106. The considerations in this section regarding Articles 2, 3 and 8 would not apply to the abuser.

107. Further, in making determinations on ineffective responses to domestic abuse under CEDAW, the CEDAW Committee has taken a strong approach when considering domestic violence. In two cases where the Committee was presented with arguments that the measures which could have stopped the abuse (in these cases, the issuing of arrest warrants) would be disproportionately invasive, it contended that “the perpetrators rights cannot supersede women’s human rights to life and to physical and mental integrity”.<sup>78</sup> This powerful statement makes it clear that much will be expected from States under CEDAW to ensure that robust measures are in place to tackle domestic abuse.

108. The positive obligations placed upon States by the Convention and CEDAW in cases of domestic abuse are new and emerging areas. Nevertheless, it is clear that anything less than a robust response to abuse will not be acceptable and victims must be given proper recourse to protection and must not be subjected to repeated abuse. This Bill affords the Scottish Parliament the chance to build upon the existing good practice and be at the forefront of a rights based approach to tackling domestic abuse.

### **Island communities**

109. The issues mentioned above in respect of the demise of practitioners willing to act on behalf of those who need a civil protection order have implications for more remote communities where there will be fewer practitioners available.

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<sup>76</sup> Ibid.

<sup>77</sup> CF Choudry and Herring at 768 “it can be seen that, within the context of domestic abuse, the state may be required to intervene in order to protect the family lives of the abused parent and any children under both its Article 3 and Article 8 obligations. If the relationship between the child and parents is being severely disrupted by any violence...there is a strong case for claiming that both the child’s and the abused parent’s right to family life is being interfered with.”

<sup>78</sup> Communication 5/2005 para 12.1.5.; For more information see Murdoch J (2010) “Unfulfilled expectations: the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women”. *European Human Rights Law Review*, 1, 26-46

### **Local government**

110. None of the consultation responses suggested that the Bill contained any particular issues for local government and it is not anticipated that this Bill will have any differential impact in this area.

### **Sustainable development**

111. The primary aim of sustainable development is to ensure a better quality of life for all, now and in the future. This Bill will contribute towards this aim as it will improve the safety of victims of abuse by removing the barriers they face in trying to obtain civil protection orders and also by providing a more robust response to breaches of these orders.

112. By sending a clear message to those who commit abuse that such behaviour will not be tolerated and by also demonstrating to victims of abuse that Scotland takes seriously its duty to protect them from further abusive behaviour the measures in the Bill will increase public confidence in the justice system.

113. By targeting those abusers who repeatedly flout the law with a robust response, over time the Bill will also minimise the costs to police, courts, housing, education and health care services.



*This document relates to the Domestic Abuse (Scotland) Bill (SP Bill 45) as introduced in the Scottish Parliament on 27 May 2010*

# **DOMESTIC ABUSE (SCOTLAND) BILL**

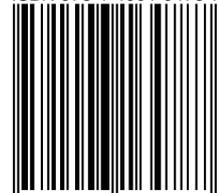
## **POLICY MEMORANDUM**

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