



Scottish Women's Rights Centre

Response to the Scottish Government's Proposed Stalking Protection (Scotland) Bill

21 July 2019

The Scottish Women's Rights Centre (SWRC) is a unique collaborative project that provides free legal information, advice and representation to women affected by violence and abuse. The SWRC exists because of abuses of power and because a gap persists between women's experience of violence and abuse and their access to justice.

The SWRC strives to fill these gaps by working with specialist solicitors and experienced advocacy workers. Informed by our direct work with victims/survivors of violence and abuse, we seek to influence national policy, research and training to improve processes and systems, and ultimately to improve the outcomes for women who have experienced gender-based violence.

1. Which of the following best expresses your view of increasing protections for victims of stalking by giving police the power to apply for Stalking Protection Orders on behalf of victims? *

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for your response, including any advantages and/or disadvantages of the proposed Bill.

The Scottish Women's Rights Centre (SWRC) welcomes the opportunity to respond to the Scottish Government consultation to introduce Stalking Protection Orders (SPOs) to enhance the protection of victims/survivors of stalking. We are responding to this consultation by drawing on our longstanding experience and expertise in providing information, advice and representation and advocacy support to women affected by gender

based violence, including victim/survivors of stalking.

Stalking is a serious crime which can have a devastating effect on victims/survivors who experience it. Failure to identify and address stalking can lead to escalation of risk (to the victim/survivor and people linked to them, such as children, friends and other family members). We believe that the current measures for protection of victim/survivors are inadequate for a number of reasons, some of which are highlighted below.

In our experience, stalking is an underreported and often poorly understood crime. Many of the women who approach our Centre who have been affected by stalking struggle to have their experiences recognised. The very nature of stalking means that individual acts viewed in isolation and taken at face value can sometimes present as non-criminal. As an example, loitering outside someone's house can often be dismissed as innocuous behaviour, yet it can cause significant fear, alarm and restriction of movement to the victim/survivor and any children they may have. Incidents which are not perceived to cause immediate risk can similarly be overlooked, such as social media posts which do not contain overt threats, or purport to come from someone else. Adequate resourcing and training for police and criminal justice professionals will, therefore, be essential to ensure that stalking is identified at the earliest opportunity, and for the potential impact of SPOs to be fully achieved.

Many individuals may not be aware that what they are experiencing is indeed stalking. There continue to be misconceptions about this crime, and many may think "stranger stalking" is the only form. However, we frequently speak to women who describe conduct of an ex-partner which would appear to constitute stalking offences, and, according to the Suzy Lamplugh Trust, in 40-50% of stalking cases there has been an intimate relationship between the victim and the perpetrator, meaning that a high proportion of stalking victims are being stalked by a partner or ex-partner.¹ The creation of SPOs will assist with this, by sending a clear message of intolerance; however, work is still required in raising awareness, tackling behavioural and cultural norms and creating positive social change. Law is one tool in this process.

Criminal NHOs (Non Harassment Orders) can only be granted once a conviction has been secured. This can be a lengthy process and, as a result, it leaves a gap in protection for victim/survivors during the period before a conviction is secured. The SWRC acknowledges that there can be significant barriers to reporting in the first place (e.g. fear of not being believed, difficulty gathering evidence due to the nature of the offence, concern for impact on self and others, a lack of information about the process or not wanting to engage with the criminal justice process). There can be further barriers in securing a criminal conviction in relation to stalking. The introduction of SPOs is a welcome development, as they would enable the police to seek an order where they identify that an individual is at risk but do not yet have sufficient evidence to meet the standard required for a criminal prosecution. To seek to improve access to justice for victims/survivors of stalking, the SWRC has created FollowItApp, a mobile app for smartphones that enables service users to record and store information about stalking incidents securely.

¹ Briefing for MPs, Briefing in Advance of the Second Reading of the Stalking Protection Bill 2017-19, 19 January 2019: <https://www.suzylamplugh.org/Handlers/Download.ashx?IDMF=60d42209-f9b5-47e9-b912-d0c05490efc6>.

Seeking a NHO through the civil courts requires a victim/survivor to (a) be aware of their right to do this (b) access a solicitor who is able to represent them and (c) be able to fund such an action (and potentially bear the risk of expenses). This can be a costly process and not all victims/survivors will be eligible to claim legal aid or access funded services like the SWRC. There is a lack of specialist solicitors undertaking this type of work. It is also a stressful and intimidating process at a time when the victim/survivor is in a vulnerable situation. They may feel unable to take such an action due to fear of reprisals from their stalker. As such, we welcome the introduction of SPOs and the proposed mechanism that these be applied for by the police on behalf of the victim/survivor. We believe that shifting the financial and administrative burden to the state could increase access to protection for victims/survivors. The SWRC submitted a response to a Scottish Government consultation on 'Protective Orders for People at Risk of Domestic Abuse'², in which we considered the importance of shifting this burden in greater detail. Much of our response in that consultation is relevant here as it relates to the barriers to obtaining protective orders, and due to the prevalence of stalking as part of domestic abuse.

We would encourage provisions being made for the victim/survivor to be represented in the proceedings (should they wish) in relation to a request for an SPO, and for access to non-means tested legal aid to be made available for this (such as the process for complainers to be represented in relation to an application for recovery of sensitive medical records, following the case of *WF v Scottish Ministers* [2016] CSOH 27). At a minimum, the views of the victims/survivors must be sought and taken into account by the police before making a decision to apply for an SPO. We believe that it would be best practice for the victims/survivors consent to be obtained, and that applications for an SPO without the consent of the victim/survivor should only be pursued in exceptional circumstances. However, care must be taken to ensure that this does not result in pressure being placed on the victim/survivor to retract through fear of retribution, as this would remove a key benefit of these orders being sought by the police.

Guidance can be taken from the framework for Forced Marriage Protection Orders (FMPOs). The Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 provides that the views of the protected person must be taken into account, if they are reasonably ascertainable, and as the court considers appropriate on the basis of the person's age and understanding (section 1(3)). It is possible for the protected person to enter proceedings when an FMPO is being sought by a third party on their behalf. However, in our experience, there can be a number of barriers that make it difficult for this to happen in practice. The statutory guidance produced by the Scottish Government in respect of Forced Marriage Protection Orders sets out requirements for seeking the views of the protected person, which includes access to interpretation services and an independent advocate, where needed. We believe that there should be a clear mechanism prescribed for ensuring that the informed views of the victim/survivor are obtained by the police and considered by the Sheriff when applying for SPOs.

² SWRC's response to the Scottish Government consultation on Protective Orders for People at Risk of Domestic Abuse: <https://www.scottishwomensrightscentre.org.uk/resources/20190329PO-Consultation-Response-Final.pdf>.

The following issues also require consideration:

- There are two elements to the proposed test: that stalking has occurred and that there is a risk to the person. Risk must be appropriately defined, understood and assessed for these orders to be effective, and must include psychological as well as physical risk. Trauma, fear and alarm require to be understood as fundamental measurements of risk, rather than focusing on immediate risks of physical violence.
- Circumstances where both parties are simultaneously recorded as the victim and perpetrator of the same incident (known as dual reporting) require rigorous investigation to identify the primary perpetrator and ensure that victims of stalking are not themselves receiving SPOs when they have been accused by the stalker of the very behaviours which they seek protection from. This may be of further relevance in relation to the notification requirements where it is possible that failure to detect the primary perpetrator could result in the safety of the victim/survivor being further compromised.
- Third parties who are affected by the stalking behaviour should be able to be included in SPO provisions, such as children, other family members and friends.
- Consideration should be given to victims/survivors experiencing cross-border stalking, where the residence of the victim/survivor and the perpetrator become relevant to where and how orders are applied for.
- The investigation of stalking incidents must acknowledge the criminal nature of a course of conduct which causes fear and alarm. While SPOs can introduce an additional tool for victim survivors of stalking, they must not replace the full investigation and prosecution of this crime.

In relation to the proposal that the Bill would contain notification provisions, consideration should be given to any implications on people's rights under Article 8 of the European Convention on Human Rights to ensure that such provisions would be implemented in a proportionate manner and that there are sufficient checks and balances (such as having a specified duration or a mechanism for review). As noted above, this could potentially place a victim/survivor at greater risk if they were incorrectly identified as a perpetrator of stalking and if an SPO was granted against them, again highlighting the importance of rigorous investigation of stalking allegations and the correct identification of victims/survivors of stalking.

Access to civil protective orders (and access to legal aid to seek them) must not be undermined by the introduction of SPOs. Negative inferences should not be drawn from a victim/survivor declining to report to the police or because the police do not pursue an SPO, due to the barriers noted above.

2. Which of the following best expresses your view of limiting Stalking Protection Orders to a maximum duration of two years, with the possibility of renewal by the court?

- Fully supportive
- Partially supportive

- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reason for your response.

The SWRC considers that the duration of SPOs should be in line with those of NHOs. That is, the duration should be as the court sees fit. We note that NHOs are, in our experience, generally granted for 3 years initially. It is not clear how long the process of applying for an SPO will take or how long it will take to put the order in place. Nevertheless, if the timescale exceeds that of seeking an interim interdict, which we assume it will, then the inclusion of interim orders should be possible for circumstances in which bail conditions are not put in place, to prevent there being a gap in protection. We do not consider that the proposal for SPOs to be up to a maximum of 2 years negates the need for interim orders to be available. Interim orders prove useful where there is an immediate danger to the protected person and, because of their interim nature, the application process is considerably faster. We would, therefore, encourage the inclusion of a mechanism for interim SPOs.

We welcome the provision for renewal by the court, so long as it is only granted when required and that it is proportionate. We presume this will include the completion of a further risk assessment to identify any additional incidents of stalking and the risk posed by the accused person. We strongly suggest that this assessment should be trauma-informed, robust and effective in identifying the particular risk factors and informing safeguarding measures. Ideally, the protected person should be able to be represented at any hearing relating to the extension or recall of the order should they wish.

3. Which of the following best expresses your view of making the breach of a Stalking Protection Order a criminal offence, with a maximum sentence of up to 6 months imprisonment and/or a fine on summary conviction, and up to 5 years imprisonment and/or a fine for conviction on indictment?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reason for your response.

We consider that a breach of a SPO should be viewed as equivalent to the breach of a NHO and should, therefore, carry the same penalty.

4. Which of the following best expresses your view of allowing a Stalking Protection Order to be made against a child (i.e. under the age of 16 and above the age of criminal responsibility in Scotland)?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Unsure

Please explain the reasons for this response.

This question falls outwith the remit and expertise of the SWRC.

5. Taking account of both costs and potential savings, what financial impact would you expect the proposed Bill to have on:

	Significant increase in cost	Some increase in cost	Broadly cost-neutral	Some reduction in cost	Significant reduction in cost	Unsure
(a) Government and the public sector, including the police and courts	<input type="radio"/> (a) Government and the public sector, including the police and courts Significant increase in cost	<input type="radio"/> (a) Government and the public sector, including the police and courts Some increase in cost	<input type="radio"/> (a) Government and the public sector, including the police and courts Broadly cost-neutral	<input type="radio"/> (a) Government and the public sector, including the police and courts Some reduction in cost	<input type="radio"/> (a) Government and the public sector, including the police and courts Significant reduction in cost	<input type="radio"/> (a) Government and the public sector, including the police and courts Unsure
(b) Businesses	<input type="radio"/> (b) Businesses Significant increase in cost	<input type="radio"/> (b) Businesses Some increase in cost	<input type="radio"/> (b) Businesses Broadly cost-neutral	<input type="radio"/> (b) Businesses Some reduction in cost	<input type="radio"/> (b) Businesses Significant reduction in cost	<input type="radio"/> (b) Businesses Unsure
(c) Individuals	<input type="radio"/> (c) Individuals Significant increase in cost	<input type="radio"/> (c) Individuals Some increase in cost	<input type="radio"/> (c) Individuals Broadly cost-neutral	<input type="radio"/> (c) Individuals Some reduction in cost	<input type="radio"/> (c) Individuals Significant reduction in cost	<input type="radio"/> (c) Individuals Unsure

Please explain the reasons for your response.

Our Centre is unable to comment on the financial implications of the proposed bill in relation to government, public sector, police, courts and business. We are, however, concerned about ensuring that the introduction of SPOs is adequately resourced.

We do anticipate that there will be a reduction in the financial burden on victims/survivors and we welcome this move. We know that there has been limited use of civil NHOs and we believe that the financial cost of making these applications is one of the biggest barriers for

victims/survivors seeking protection. Many victims/survivors of stalking will not be eligible for legal aid or be able to access a funded service like the SWRC, and they may therefore not be able to afford the costs associated with applying for an NHO. Victims/Survivors of stalking often incur costs directly as a result of the experience by having to move home, reduce their hours at work or stop working altogether, or they may have exited an abusive relationship that included financial abuse, which can often result in the victim/survivor incurring significant debt or appearing to have financial means (preventing them accessing legal aid) which in fact are not available to them. We strongly welcome the proposal to remove financial barriers from victims/survivors as, in our view, this will widen access to justice and improve safety.

6. What overall impact is the proposed Bill likely to have on equality, taking account of the following protected characteristics (under the Equality Act 2010): age, disability, gender re-assignment, maternity and pregnancy, marriage and civil partnership, race, religion or belief, sex, sexual orientation?

- Positive
- Slightly positive
- Neutral (neither positive nor negative)
- Slightly negative
- Negative
- Unsure

Please explain the reasons for your response.

In the SWRC's experience, stalking is a prevalent but underreported crime that constitutes a form of gender based violence (GBV). Indeed, some reports have shown that stalking is also prevalent alongside other types of GBV. For instance, in 2017 the Suzy Lamplugh Trust published research which found that, out of 350 femicides studied, stalking was present in 94% of the cases in the year leading to the murder³.

It is our experience that stalking is disproportionately committed by men against women and, consequently, the introduction of SPOs could have a positive impact on women's safety, including for those with protected characteristics who may already experience specific barriers to access justice after experiencing abuse.

However, as the Suzy Lamplugh Trust note, there is considerable academic research⁴ that shows that stalking perpetrators have a fixation/obsession with their victims, which restraining orders or even imprisonment do nothing to address. As noted above, SPOs must not be viewed as a solution to addressing stalking behaviour, but one tool which may be utilised to assist in creating immediate safety.

7. In what ways could any negative impact of the Bill on equality be minimised or avoided?

No comment.

³ Suzy Lamplugh Trust, "Pushing boundaries on the fifth anniversary of the stalking laws", <https://www.suzylamplugh.org/news/pushing-boundaries-on-the-fifth-anniversary-of-the-stalking-laws>.

⁴ See publications by members of the Fixated Research Group: Mullen, P.E., James, D.V., Meloy, J.R., Pathé, M.T., Farnham, F.R., Preston, L., Darnley, B, McEwan, T.E., MacKenzie, R.D.

8. Do you consider that the proposed Bill can be delivered sustainably, i.e. without having likely future disproportionate economic, social and/or environmental impacts?

- Yes
- No
- Unsure

Please explain the reasons for your response.

No comment.

9. Do you have any other comments or suggestions on the proposal?

The Stalking Protection Act 2019 in England and Wales appears to provide a helpful framework and we suggest this is looked to for guidance.

In the consultation on the draft Bill, the Suzy Lamplugh Trust recommended that courts should have the power to impose a positive obligation on perpetrators to undergo a mental health assessment and attend a treatment programme carried out by specialist mental health practitioners.⁵

The Bill was passed in England and Wales and received Royal Assent on 15 March 2019. The Act includes broad powers for courts to include a prohibition or requirement in a stalking protection order, meaning that courts have wide discretionary powers in either prohibiting a perpetrator from behaving in a particular way or by imposing a positive obligation on the perpetrator to, for example, attend programmes which address obsessive behaviour. In our view, the possibility of this should be considered in Scotland to enable the courts to make orders that are tailored to the circumstances of each case. However, in order to be effective, there would require to be sufficient resources to ensure that the orders made by the court are enforceable and practicable, for example to enable access to specialist perpetrator assessment and management.

⁵ Suzy Lamplugh Trust SPO consultation response: <https://www.suzylamplugh.org/what-is-the-stalking-protection-bill>, p. 6.