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Scottish Women's Rights Centre Response to the Scottish Law Commission Discussion Paper on Civil Remedies for Domestic Abuse

About the Scottish Women's Rights Centre

The Scottish Women's Rights Centre ("SWRC") is a collaboration between Rape Crisis Scotland, JustRight Scotland and the University of Strathclyde Law Clinic. The SWRC works with self-identifying women who have been affected by abuse and violence in Scotland with the aim of improving their access to justice and experience of the justice system.

The SWRC strives to fill the gaps that exist between women's experiences of gender-based violence and their ability to access justice 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 justice outcomes for women who have experienced gender-based violence.

Our Response

Our response to the Scottish Law Commission Discussion Paper on Civil Remedies for Domestic Abuse.

Introduction

We welcome the opportunity to respond to this consultation and we have done so by drawing on our practical experience and expertise in providing legal advice and representation to self-identifying women affected by gender-based violence, particularly domestic abuse. We provide free legal advice surgeries and information helplines to survivors of gender-based violence. Through our outreach we speak directly to victims/survivors and gain insight into the issues they face.

We recognise that people of any gender can be affected by abuse and violence. However, statistics¹ show that these crimes are predominantly committed by men against women. Also, as the SWRC specifically supports women aged 16 and over,

¹ <https://www.gov.scot/publications/women-justice-system/pages/7/>



when we talk about survivor/survivors in this response, we will generally refer to women. Despite this, we are aware – and do acknowledge that – any person can be subjected to these crimes.

We have carefully considered the questions of this consultation and have answered those where we consider we can input from our expertise.

Question 2 Should the court, at its discretion, be able to make an order for occupancy rights for up to 12 months, rather than the current maximum of six months?

We support the proposal for maximum length of an order for occupancy rights to be extended for up to 12 months. The period of 6 months is too short to be effective at providing protection to victims/survivors. We note that where a victim/survivor does not have automatic occupancy rights, they will be unable to seek an exclusion order. Therefore, it is important that occupancy rights provide sufficient coverage to allow for appropriate protection to be sought.

Divorce and separation negotiations can take well over a year, and should matters require to proceed to court, proceedings can take years. On that basis, where a victim/survivor is seeking occupancy rights to allow them to remain within the family home during separation discussions, 6 months is too short.

Short periods for occupancy rights orders, are prohibitive towards victims/survivors who are experiencing ongoing abuse and harassment. We have heard from victims/survivors that when they are faced with having to return to court to have their order extended, they either decide not to seek these orders in the first place or will fail to obtain an extension.

Victims/survivors of domestic abuse are often experiencing continued economic abuse from their abuser and in addition may have financial issues following separation and engagement of legal services. Being faced with having to re-instruct their solicitor may become a financial barrier to accessing justice. We have recently published our report "*No Cost Barriers: Protective Orders in the Legal Aid system*"² which discusses the legal aid crisis which Scotland is currently facing³, with particular focus on seeking protective orders within the legal aid system. We highlight that victims/survivors are having to contact anywhere between 30-50

² Please see our report here: https://www.justrightscotland.org.uk/wp-content/uploads/2024/12/24.12.03-SWRC-report_No-Costs-Barriers-Protective-Orders-in-the-legal-aid-system-FINAL.pdf you can also read our blog launching the report here: [Why we need a legal aid reform. Victim/survivors of abuse should not have to pay for their own protection](#)

³Please see <https://www.slab.org.uk/app/uploads/2024/11/SLAB-Annual-Report-2023-24-news-release.pdf> The Scottish Legal Aid Board's (SLAB) 2023-24 report which highlights significant declines in legal aid support. The total number of cases funded dropped to 134,900, a 1% decrease from last year and a sharp 29% decline from 191,256 cases in 2016-17.



solicitors to seek legal representation. We have seen a steady increase in the number of victims/survivors self-representing in civil cases due to the legal aid crisis and a decrease in solicitors willing to provide legal aid funded work, due to inadequate remuneration. The Scottish Human Rights Commission have recently published their State of the Nation Report⁴. The report states that “*Legal Aid in Scotland is chronically underfunded against demand.*”⁵ Concerningly, we hear from victims/survivors that they are not seeking the protective orders that they require due to financial burdens when not qualifying for legal aid and, when they do qualify for legal aid, issues with finding solicitors who will represent under legal aid. ***On that basis, we are calling for a reform of the legal aid system and for the removal of means testing and a simplification of the application process in protective order cases.***

Furthermore, where a victim/survivor has been faced with the burden of applying for occupancy rights, it can be extremely re-traumatising for them to have to re-enter the civil justice system to seek to have these orders extended. If the orders were granted for 12 months at a time, this would be a more reasonable time frame for victims/survivors to deal with issues following separation and ensure security of housing for themselves and their children.

Where a victim/survivor is left without occupancy rights, their place of safety is at risk, and they are faced with having to uproot their children, to relocate, often with little financial resources and faced with mounting pressure from the perpetrator. Without occupancy rights, a victim/survivor is unable to apply for an exclusion order and this places them at serious risk of harm. It is important that applications for occupancy rights and exclusion orders are complimentary processes to secure protection and safe accommodation for a victim/survivor and their children.

Issues related to the definition of ‘cohabitant’ to enjoy occupancy rights also constitute a barrier for victims/survivors to access safety. In fact, they could have a very short timeframe after the separation to still fit the definition of being a cohabitant and be able to apply for occupancy rights/ exclusion orders. Victims/survivors can miss out on being able to apply for occupancy rights due to the length of time since the separation and the time required to find a solicitor to take on their case and raise the court action.

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

Our SWRC Project remit focuses on the civil justice system and therefore we are unable to comment on the implications when seeking protective orders through the

⁴ Please see <https://www.scottishhumanrights.com/media/2916/mainreport-otherdomesticmonitoring-stateofthenation-2024.pdf>

⁵ Ibid at p22



criminal justice system. However, if seeking such an order following a criminal conviction under the 2018 Act or an offence which is aggravated in terms of section 1 of the 2016 Act would be possible through the criminal justice system, we consider that this would be a welcome protective measure for victims/survivors. Advice should be taken from criminal justice experts in terms of the practical implications of such a measure.

We consider that the proposal would be helpful for victims/survivors to avoid them having to apply for their own civil protective orders. Where there is a successful prosecution, bail conditions may be put in place which exclude the perpetrator from the family home, however, a criminal Non-Harassment Order (NHO) cannot exclude the perpetrator from the family home. This means that if a victim/survivor does not seek their own protective orders during the life of the criminal prosecution, when the bail conditions fall, despite a NHO being put into place, they will be left unprotected from the perpetrator returning to the family home, should they have occupancy rights. As discussed in our answer to question 1, above, divorce and separation negotiations can be protracted and therefore matters around the family home may not be resolved prior to the conclusion of the criminal justice process. This leaves the victim/survivor, and their children, unprotected should there not be a custodial sentence imposed.

Question 14 Should it be possible, as part of an exclusion order or any other civil protection order, for the court to require any communication between the perpetrator (or anyone acting on their behalf), and the victim/survivor, to be addressed only to the victim/survivor's solicitor or named contact?

We consider that this would be a useful measure to impose. Specifically in situations where there is ongoing child contact, where parties require to communicate regarding contact and issues relating to the child. This is an area of concern with current child contact processes and when seeking protective orders. There are issues around the interplay between these processes which cause issues for victims/survivors seeking to enforce protective orders. For e.g. where a victim/survivor is granted a protective order, and there is ongoing child contact, the police are often reluctant to enforce the protective order due to the requirement of the parties to communicate to facilitate contact. Perpetrators often use the child contact process to continue to perpetrate abuse. Discussions around child contact and the child are often used to continue to manipulate and degrade the victim/survivor. However, it can be difficult to untangle legitimate and proportionate communication relating to children with abusive communication. Often the perpetrator knows how to upset and control the victim/survivor without using overtly abusive language. Introducing a measure which stops direct communication, in certain circumstances, would ensure the protection of the victim/survivor.

However, thought would require to be given to how these measures can be enforced. As highlighted in our answer to question 1, above, there is a legal aid crisis



and so access to legal representation under legal aid is sparse. This means that, if a victim/survivor did not have a named contact willing to facilitate communication, they may be faced without the option of seeking legal representation. This further supports our call for reform of the legal aid system. We would also propose that consideration be given to the funding of such measures in the contemplation of any Bill. For victims/survivors who are privately paying their legal fees, many will have incurred significant legal fees at the end of court proceedings. They will often be concerned about incurring any further legal costs, which could also be significant in terms of further communications with their ex-partner or ex-partner solicitor. Therefore, the benefit of such an order where the party has to pay these costs may be limited. This further highlights the difficulties with victim/survivors having to pay for their own protection as already discussed in answer 1 and our report “*No Cost Barriers: Protective Orders in the Legal Aid system*”⁶.

Furthermore, when considering a ‘named contact,’ it would be important to ensure that they are consenting and willing to facilitate that communication. For e.g. placing this burden upon support services or other agencies is unfair without adequate funding or resources, where these services are already chronically underfunded and resourced. There could also be concerns around the sharing of information between the ‘named contact’ and the survivor. For e.g. if the ‘named contact’ did not share communications with the survivor or it was delayed, should there be any court deadlines or requirement for a response this could lead to risk for the victim/survivor and liability concerns for the named contact. We would also submit that it would be important for any proposals to define ‘named contact,’ and those that can act as a ‘named contact.’

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

Yes, we agree that for interdicts of this nature it should be possible to apply for power of arrest. Without power of arrest attached the effectiveness of the order is diminished. Power of arrest affords the victim/survivor protection from the criminal justice system and increases the deterrent nature of the order. Where power of arrest is not attached the only remedy which the victim/survivor has is to bring the matter back to the civil court. This is time intensive and can lead to further legal costs. Furthermore, in the case of a breach of an interdict and if the victim/survivor requires legal aid, they would need to find legal representation under legal aid and submit a fresh civil legal aid application to start new proceedings. As highlighted in our answer to question 1, above, there is a legal aid crisis and so access to legal representation under legal aid is sparse. The victim/survivor would potentially struggle to find a solicitor to represent them under legal aid and jeopardise the only remedy available

⁶ Please see: https://www.justrightscotland.org.uk/wp-content/uploads/2024/12/24.12.03-SWRC-report_No-Costs-Barriers--Protective-Orders-in-the-legal-aid-system-FINAL.pdf



to them – i.e. starting new proceedings in the civil court – in the absence of a power of arrest. This further supports our call for a reform of the legal aid system.

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

Yes, as discussed in our answer to Question 20, above, without power of arrest attached, the effectiveness of an interdict is diminished. Should the power of arrest run out before the end of the life of the interdict, then not only is the deterrent nature of the order reduced, but it also leaves the victim/survivor at risk from the perpetrator without the protection of the criminal justice system. As above, where power of arrest is not attached the only remedy which the victim/survivor has is to bring the matter back to the civil court. This is time intensive, re-traumatising and can lead to further legal costs.

Question 23 Do you support the introduction of a new statutory delict of domestic abuse?

We support the introduction of the new statutory delict of domestic abuse, which aims to bridge the gaps in the current civil remedies available. We note that the current remedies available are spread across multiple statutory frameworks and that these often require to be merged to ensure adequate protection for victims/survivors. We often hear from victims/survivors that they are unsure what protection is available, and we are also aware from our work with the legal profession that awareness of the civil remedies available is patchy. For e.g. the making of interdicts, domestic abuse interdicts, through declarator, which is spread across multiple statutes, is often not used, despite making the breach of such an interdict an automatic criminal offence. We welcome the introduction of a remedy which offers a full suite of protection to victims/survivors, streamlining the process and hopefully minimising disparity of legal advice and representation received by victims/survivors.

The Scottish Human Rights Commission's recently published 'State of the Nation Report' states that "*Our input to the baseline evaluation of the Istanbul Convention, especially speaking directly to victim-survivors of gender-based violence, highlighted the many ways that women and children find the current criminal justice process harmful and traumatic.*"⁷ It is clear that there are issues with the effectiveness of the criminal justice system and the civil justice system when considering remedies for victims/survivors of domestic abuse. Scottish Domestic Abuse statistics recently released by Police Scotland⁸ show that for the period 2023-2024 there was a 3% rise in domestic abuse incidents reported in Scotland, with 63,867 cases recorded during

⁷ [State of the Nation report 2024: Civil and Political Rights in Scotland](#) at p25

⁸ [Incidents of domestic abuse - Domestic abuse: statistics recorded by the police in Scotland, 2023 to 2024 - gov.scot](#)



this period. During the period 2023-24, only 38% of domestic abuse incidents recorded by the police in Scotland led to the recording of at least one crime or offence, and only 5% of the crimes/offences recorded were recorded under the Domestic Abuse (Scotland) Act 2018⁹.

Victims/survivors are being faced with a failing criminal justice system and many barriers to accessing civil protective orders, as highlighted in the discussion paper by the Scottish Law Commission for this consultation. Thought should be given to streamlining the civil measures available and so we welcome this proposal. However, this goes against a backdrop of legislation being passed and not implemented – causing confusion and overlap of legislation. We hold some concerns with regards to the prompt implementation and resourcing of introducing new legislation in this area.

We submitted in our recent response, to the Equalities, Human Rights and Civil Justice Committee (on the impact of the Non-implementation of Acts of the Scottish Parliament) that the delay in implementation of the Domestic Abuse (Protection) (Scotland) Act 2021 remedies (i.e. domestic abuse protection notice (DAPN) and domestic abuse protection order (DAPO)) has had a significant impact on the availability of protection for victims/survivors¹⁰. Such orders are necessary for the interim protection of victims/survivors and specifically in bridging the gap in protection to remove the perpetrator from the family home. This will support victims/survivors to remain in the family home and may reduce the economic burden which follows separation in abuse situations.

Around two thirds of the reports of domestic abuse do not result in the recording of a crime or offence¹¹. The impact of this for victims/survivors is that, not only are they not receiving justice for their experiences of domestic abuse, but they are also left without protection from the criminal justice system in the form of bail conditions and criminal Non-Harassment Orders. We hear from our service users that they are often told by Police Scotland that they should seek civil protective remedies such as interdicts, Non-Harassment Orders and Exclusion Orders. We submit that this demonstrates that there is a gap in the protection available to victims/survivors. The failure to implement the 2021 Act since its introduction in 2021 has meant that this gap continues, and victims/survivors continue to be left without adequate protection from their abuser.

We therefore submit that it is vital that the Scottish Government stand by their commitments and introduce legislation which has been passed. The introduction of any further legislation should be considered alongside any other outstanding legislation to ensure that they do not overlap nor contradict each other. When

⁹ [Domestic Abuse Recorded By The Police In Scotland, 2021-22 P2](#)

¹⁰ Please see our response to the Equalities, Human Rights and Civil Justice Committee on the Non-implementation of Acts of the Scottish Parliament here: [1733226669_Final-EHRCJ-Committee-Response---Dec-24-PDF.pdf](#)

¹¹ [Incidents of domestic abuse - Domestic abuse: statistics recorded by the police in Scotland, 2023 to 2024 - gov.scot](#)



considering the introduction of new legislation thought should also be given to ensuring that adequate resourcing and funding follows to allow the legislation to be implemented.

Without addressing the issues with provision and access to legal aid, the new statutory delict could increase potential rights and remedies, however victims/survivors will be unable to access them for the reasons already discussed in our answer to Question 1. The provisions proposed are not the kind of action that victims/survivors should be expected to be self-representing in, however issues with obtaining a legal aid solicitor and the cost of private legal fees mean very few victims/survivors would be able to utilise these remedies without addressing the access issues.

Question 24 Should the delict of domestic abuse be defined in terms of “abusive behaviour”, as in the 2018 Act?

We agree that the delict of domestic abuse should be defined in terms of “abusive behaviour”, as in the 2018 Act. The 2018 Act provides a comprehensive definition of domestic abuse which, at the time, was consulted upon with domestic abuse organisations to ensure that it was reflective of the experiences of victims/survivors. There are notable difficulties with the implementation of the 2018 Act and specifically with Police Scotland recognising certain forms of domestic abuse such as economic abuse and psychological abuse as a crime under the Act. We therefore agree that the broadening of the definition to include, economic, tech and immigration abuse will be helpful. We also submit that there must be consideration to awareness raising and training for legal professionals, and any other service or agency, involved in the implementation of the proposals to ensure that there is sufficient understanding of the principles and nature of domestic abuse.

Question 27 Do you support the inclusion of tech abuse as one element of abusive behaviour in a statutory definition of domestic abuse as a delict, and if so, what factors should be included?

We support the inclusion of tech abuse as one element of abusive behaviour in a statutory definition of domestic abuse as a delict. The SWRC as part of our Sexual Harassment Service, for which funding has now concluded, produced a series of legal education documents to highlight issues around tech abuse. We have produced a guide on Revenge Porn¹², Voyeurism and Upskirting¹³ and a blog on Intimate Image Based Abuse¹⁴. We are aware of victims/survivors increasingly experiencing tech

¹² Please see: [“Revenge porn” - image-based sexual abuse](#)

¹³ Please see: https://www.scottishwomensrightscentre.org.uk/resources/1696931549_Voyeurism-legal-guide.pdf

¹⁴ Please see: [5 things you should know about Scotland’s new law on image based abuse | News/Blog | Scottish Women’s Rights Centre](#)



abuse and the ever evolving nature of this form of abuse. We regularly require to signpost victim/survivors to Refuge Tech Safety website¹⁵.

This form of abuse remains prevalent after separation with the perpetrator and may also be committed by family and/or friends of the perpetrator. We are aware of victims/survivors having intimate images published online and on social media with identifying content which puts the victims/survivor's safety at risk. Victims/survivors are often also subject to online harassment by anonymous online accounts or receive phone calls/messages from withheld/unknown numbers. Victims/survivors will often require to report these incidents to social media companies and/or telephone providers however the response and action taken can vary greatly from one company to another as they will depend on the individual companies' policies. The inconsistency of responses and actions taken by companies continues to place the burden in tackling such behaviour and removing the online content on the victim/survivor. The victims/survivors will need to identify the account themselves, take action in gathering evidence and reporting it, whilst also having to separately report the incidents to the police.

Victims/survivors often become aware that their ex-partner has been accessing and monitoring their devices such as phones or laptops, personal accounts including social media, email accounts and bank accounts¹⁶. Victims/survivors will also often have issues with joint accounts or linked accounts which were shared with the perpetrator who can then continue to control the victim/survivor through the accounts without their knowledge. In some cases, the perpetrator will cancel or transfer the account to themselves, leaving the victim/survivor without access; they can also refuse to consent to cancelling or transferring the account to the victim/survivor when requested to do so. We are aware that when victims/survivors report such incidents of tech abuse to the police, they rarely result in further action being taken by the police against perpetrators. Victims/survivors have disclosed to us that they are told by Police Scotland and other agencies that there are insufficient resources to investigate these crimes and that there is insufficient evidence available. We are also aware of instances where survivors have been told by the police that such behaviour does not fall under the Domestic Abuse (Scotland) Act 2018, which is very concerning.

We submit that it is essential that greater resources are allocated to the investigation of these crimes, as well as training of police officers and legal professionals on tech abuse to increase awareness and understanding of this type of abuse. By including this form of abuse within the definition for the proposed law, it will ensure that it is not missed or brushed off, and it will ensure that victims/survivors have greater access to justice.

¹⁵ [Supporting survivors of tech abuse | Refuge Tech Safety](#)

¹⁶ We are aware of abuse perpetrated through technology from our experience of delivering our FollowIt App. Please see more here: <https://followitapp.org.uk/>



Question 28 Do you support the inclusion of immigration abuse as one element of abusive behaviour in a statutory definition of domestic abuse as a delict, and if so, what factors should be included?

We support the inclusion of immigration abuse as one element of abusive behaviour in a statutory definition of domestic abuse as a delict.

Where immigration issues are present, victims/survivors will often be dependent from the outset on their spouse/ex-partner's visa as well as being financially dependent on them. Many victims/survivors will be subject to No Recourse to Public Funds (NRPF)¹⁷ which also increases their dependency on the perpetrator. Furthermore, we have also seen cases where the perpetrator would pressure the victim/survivor to change their visa to make it dependent on the perpetrator's own visa. This then puts pressure on the victim/survivor to remain in the abusive relationship as their status would become insecure should they decide to leave the relationship.

Victims/survivors experiencing immigration abuse will often have to obtain urgent legal advice regarding their immigration status as well as separate advice from a family solicitor regarding separation in relation to divorce, cohabitation, children, and/or protective orders. Victims/survivors who require this urgent legal advice under legal aid are even more impacted by the ongoing legal aid crisis as they will face many barriers when it comes to accessing such legal advice and finding solicitors willing to take on their case under legal aid. Victims/survivors who are in need of immigration advice often require the use of an interpreter to ensure they understand the legal advice correctly and are able to participate effectively which may further discourage solicitors from taking on these cases due to the increased time and effort. This is particularly the case in legal aid cases where the extra time and effort will not be fully compensated or reflected in the legal aid rates. There is also often added complexity in relation to these matters if the parties have connections with other jurisdictions outside Scotland which may impact any proceedings raised in Scotland.

We are also aware of perpetrators cancelling the victim/survivor's visa upon separation often without the victim/survivor's knowledge because the perpetrator has sole access to the immigration/visa account. Victims/survivors who are dependent on their ex-partner's visa are more vulnerable to this type of immigration abuse. Perpetrators can also threaten to or provide false or malicious information to the Home Office which jeopardizes the victim/survivor's immigration status or actively hinder the victim/survivor from obtaining a more secure and settled immigration status by cancelling immigration-related appointments for example.

The control and threat over immigration status, and related documentation, can cause significant fear and stress to a victim/survivor. We hear from victims/survivors that these threats can cause them to remain in the abusive relationship or to return when

¹⁷ Please see our NRPF guide for more information:
<https://www.scottishwomensrightscentre.org.uk/resources/No-Recourse-to-Public-Funds---English.pdf>



they have left. Such abuse can have a significant impact on the wellbeing of the victim/survivor and their children, as well as impacting their economic status through impacting their employment and social engagement.

Question 29 Do you support the inclusion of economic abuse as one element of abusive behaviour in a statutory definition of domestic abuse as a delict, and if so, should it be modelled on the definition in the Domestic Abuse Act 2021?

We are fully supportive of the inclusion of economic abuse as one element of the statutory definition of domestic abuse as a delict.

Economic abuse happens when a person interferes with their partner's ability to acquire, use and maintain economic resources. It can include the restriction, exploitation or sabotage of a person's housing, food, clothing, transportation, employment, and education. Economic abuse can take many forms including: retaining the victim's salary or giving her an 'allowance', forbidding her from accessing work or education, restricting access to her private and shared bank accounts, and convincing or forcing her to take on debt on behalf of the abuser, among many others.

Economic abuse is a harmful form of coercive control that seeks to control and isolate victims economically, making it harder to leave the abusive situation and to be financial independent after separation.

We are strongly in favour of the specific inclusion of economic abuse under the statutory definition. We hear from victims/survivors that they are often not heard when they make reports regarding economic abuse and that this form of abuse is disregarded in both the criminal and civil justice systems.

The SWRC have produced an Economic Abuse Guide¹⁸ in which we outline all the forms economic abuse can take and explain how they constitute coercive control. Further we have co-produced a factsheet regarding the interplay between economic abuse and the 2018 Act¹⁹ and further published our recommendations for improving the systemic responses to complaints of economic abuse²⁰, alongside economic abuse expert, Jenn Glinski. As such, we consider it imperative that economic abuse is specified to afford this life altering form of abuse the recognition that victims/survivors deserve.

We regularly hear from victims/survivors that they have reported economic abuse to the police and this has been disregarded or they are told that the behaviours do not constitute a criminal offence. It often appears that there is a lack of understanding and awareness of economic abuse and its interplay with the 2018 Act. This is why we

¹⁸ Please see: [Economic abuse](#)

¹⁹ Please see <https://www.scottishwomensrightscentre.org.uk/resources/Economic-Abuse-Factsheet-November-2023.pdf>

²⁰ Please see [Economic Abuse recommendations.docx](#)



published our policy recommendations for improving the systemic responses to complaints of economic abuse²¹. We therefore are supportive of the specific inclusion of economic abuse within the proposals for the domestic abuse definition, as with our answers at Questions 27 and 28, this will allow legal professionals, the court and those enforcing the orders to recognise this form of abuse and ensure that it is given appropriate regard.

Question 30 Should the following (final) orders be available to a pursuer in respect of the delict of domestic abuse, as part of a “Domestic Abuse Civil Protection and Redress Order”:

We support the inclusion of all the orders proposed from (a) – (f).

Question 31 Should each element of a DACPRO be available as an interim order, on the balance of convenience?

Yes, we consider that each element of the DACPRO should be available as an interim order. This is vital for the victims/survivor’s safety and protection from the perpetrator. When seeking a protective order, it is imperative that an interim order is also sought, where possible. When raising an action for a protective order, and specifically where bail conditions are not in place, the perpetrator will be made aware of the orders being sought and this increases the risk to the victim/survivor. We are aware that for many perpetrators the threat of civil action does not always act as a deterrent and therefore they may seek to retaliate to any threat against them. Seeking interim orders provides a level of protection to the victim/survivor and should be sought at pre-service hearings (prior to the perpetrator being served).

Furthermore, it is imperative that interim orders are available when seeking orders such as for: delivery of specified documents, property and pets. The perpetrator may seek to continue their abuse and retaliate towards the victim/survivor by destroying or removing the property. Having interim orders in place may help to avoid this.

The length of civil proceedings is another reason why interim orders are required. In the civil courts currently, to get to final orders will generally take several months (we often hear from victim/survivors that these processes can take anywhere from 3-6 months). These processes can be further delayed when actions are defended by the perpetrator or there are ongoing adjoining proceedings (criminal and family). Therefore, it is very important that any remedy for a victim/survivor can be accessed on an interim basis to provide protection and be effective.

²¹ Please see [Economic Abuse recommendations.docx](#)



Question 32 Should an interim civil barring order last for three weeks and a final one for two months, or what other periods would you propose?

We consider that the time periods being proposed are too short to be effective.

If there is no criminal prosecution of the perpetrator, and therefore no bail conditions or criminal Non-Harassment Order, we would submit that the victim/survivor requires more comprehensive and long-standing protection than that of 2 months. It is often mistakenly thought that abuse will stop once the relationship ends, however it has been found that post separation, abuse often persists or intensifies for women and children²². Particularly in child contact negotiations which can be prolonged, often lasting for well over two months, and are used by perpetrators to continue the abuse²³. The purpose of seeking a civil barring order is to exclude the perpetrator from the family home for a fixed period of time. This is to allow the victim/survivor to make alternative arrangements or to secure their safety within their home. Depending on the circumstances, this could involve moving home, pursuit of an exclusion order, non-harassment order or interdict or steps to remove a person from shared tenancy.

If it is proposed that a short-term order would allow the victim/survivor time to make alternative arrangements, then we would argue that a 2 month period is insufficient to do so.

The intention of the proposed delict is to provide victim/survivors with a suite of remedies which are available in one place and avoid the need to seek multiple protective orders. However, should the civil barring order be restricted to only 2 months, we would propose that it would lead to victims/survivors requiring to seek further protection by way of exclusion orders, should matters not be resolved. This then negates the benefits of the suite of remedies proposed.

Furthermore, the nature of civil court protection orders, and the legal tests which are associated, mean that in most circumstances there must be recent and ongoing harassment or abuse. If the victim/survivor takes the 2-month reprieve offered by the civil barring order, prior to seeking an exclusion order, and there is no further abusive behaviour during this time, they may encounter difficulties with meeting the legal test required to satisfy the need for such protective orders, dependant on the individual circumstances of the case. The victim/survivor may then find themselves without protection for a period of time, until such point as there may be further incidents of abuse.

²² Thiara, R. and Harrison, C. (2016) 'Safe not sorry: supporting the campaign for safer child contact. Key issues raised by research on child contact and domestic violence.' Women's Aid. https://www.researchgate.net/publication/291341994_Thiara_RK_and_Harrison_C_University_of_Warwick_Safe_not_sorry_Supporting_the_campaign_for_safer_child_contact_Bristol_Women's_Aid_2016

²³ Ibid.



It is further submitted that if the intention is that victim/survivors should be, during the life of the civil barring order, taking steps to secure civil protective orders, this would lead to confusion and multi-loading of court processes, which the new law seeks to avoid. The victim/survivor should not be required to engage with 2 court processes at the same time or one straight after the other as this is not trauma-informed practice, or an effective use of the civil justice system.

We would propose that the life of a Civil Barring Order would have to be longer for a period of 6 months to 1 year.

We appreciate that with regard to the shorter time period proposed, part of the rationale behind this will be the lower evidential burden required to secure such an order. We would therefore submit that more consideration should be given to the evidential burden required at this stage.

When considering the time for the interim orders, 3 weeks, we would question whether the courts will have final orders dealt with within this time period. Given current court demands, we consider that would be unlikely. Therefore, the victim/survivor would either be left without interim protection or would require to return to court to have the interim orders extended. This then leads to further traumatising through the court process, along with additional legal fees. Any requirement to continually apply to renew such interim orders is potentially very costly for victim/survivor if privately paying legal fees. Should the interim orders be longer, for a period of for e.g. 2-3 months, there would be an option to go back to court to request to vary/recall if there was a material change in circumstance.

We submit that the length of time of the civil barring order should be sufficient to offer the appropriate protection to the victim/survivor.

Question 33 Should protection orders be available ex parte (without notice), and should orders for the protection of documents, property and pets be available ex parte where there is a risk the subject of the order will otherwise be destroyed or damaged or hidden?

We support that certain protective orders should be available ex parte and that orders for the protection of documents, property and pets be available ex parte where there is a risk the subject of the order will otherwise be destroyed or damaged or hidden.

In other protective order actions, such as those for interdict, it is possible to seek certain orders at pre-service hearings and therefore ex parte. This is an important protective measure of these orders. Without the ability to seek these interim protective measures ex parte, it leaves the victim/survivor vulnerable and at risk. When a court action is raised against a defender, the action must be served upon the defender and they are then afforded the opportunity to respond. In cases of domestic abuse, should an action be served upon the defender, without first seeking protective measures ex



parte, then the victim/survivor will not be afforded any protection from the court until the case calls and therefore they are left vulnerable from harm from the defender. We are aware that loss of control of a situation can cause perpetrators of abuse to intensify their behaviour towards the victim/survivor and should they become aware that the victim/survivor is taking steps to protect themselves and to tell authorities about the abuse, this could escalate the perpetrators actions. The risk is further intensified if there are no bail conditions in place, leaving the victim/survivor alone to deal with any abuse.

As we have raised previously in this response, we consider that orders for the return of documents, property and pets should be available in interim orders and we further agree that these orders should be available ex parte. There is serious risk that the perpetrator would destroy, damage or hide property, once it is known that the victim/survivor is seeking their return. It is therefore important that steps can be taken urgently to allow for their safe return.

However, it is important that any orders that can be sought ex parte, are done so proportionately and that they do not infringe the rights of the other party unnecessarily. This can be done by limiting the orders that can be sought ex parte to only those which are necessary and by requiring levels of evidence at pre-service hearings.

Question 38 Should it be possible for a protection order to be made in relation to an associate of the defender, where the domestic abuse is carried out by the associate on behalf of or with the encouragement of the defender?

We consider that any interdict or order in relation to a third party should reflect those which can currently be sought through a Non-Harassment Order. We have concerns if orders were made directly against a third party, should they not be a party to the action. We would have concerns about breaching of the third parties' rights, and their right to a fair hearing. Furthermore, it would be concerning if the other party was to be made liable for breach of an order, either civilly or criminally, without being afforded the opportunity to defend the action.

As with Non-Harassment Orders, the perpetrator/defender, can be held in breach of the order should they encourage or incite another third party to contact/abuse the victim/survivor (if this is a term of the Non-Harassment Order). Such terms could be placed within the suite of remedies available to victim/survivor in the current proposals.

Should a victim/survivor be concerned that a third party would actively abuse/harass them, then they can raise a protective action against that person. However, they would require to evidence said abuse/harassment in order for any orders sought to be proportionate and necessary.



Question 40 Should it be possible for a DACPRO to extend beyond the sheriffdom in which it is granted?

Yes, we agree that it should be possible for a DACPRO to be extended beyond the Sheriffdom in which it is granted. Victim/survivors will often have had to flee abuse or relocate. We hear from victim/survivors that, not only do they have to flee domestic abuse, but they also often have to relocate multiple times to avoid the perpetrator and their continued abuse. They may have to relocate after seeking a protective order changing their location which can affect the effectiveness of the protection.

Many victim/survivors will also want to protect their new address from the perpetrator or not be aware of the perpetrators new address if they have moved and may reside within different sheriffdoms. To restrict a DACPRO to only within the sheriffdom it is granted would significantly limit the effectiveness and protection offered by the order, particularly where it is common that the parties after separation may not reside within the same sheriffdom as highlighted above and that abusive behaviour can take place in another sheriffdom, for example if the victim/survivor worked in a different sheriffdom, or travelled to another sheriffdom to visit family/friends etc to where they resided.

Furthermore, tech abuse can be committed by the perpetrator from their own home, anywhere within Scotland or in other jurisdictions if the perpetrator has travelled or resides there. There are unavoidable jurisdictional limitations to the scope of an order however covering all of Scotland is particularly important for this type of abuse to ensure potential breaches can be covered and to increase the protection and enforceability of the order.

Question 50 Do you agree that a person seeking a civil protection order should be entitled to special measures as a party and while giving evidence during those proceedings?

We strongly agree that a person seeking a civil protection order should be entitled to special measures as a party and while giving evidence during those proceedings.

We note that the Victims, Witnesses and Justice Reform Bill proposes to improve the provisions within the Vulnerable Witnesses (Scotland) Act 2004. We note that consideration should be given to the overlap of any other proposed legislation to ensure that any measures proposed are complimentary and do not duplicate provisions. However, we are also concerned for the time taken to pass and implement legislation by the Scottish Government and do not consider that any further delay is beneficial for victims/survivors. At present, Part 2 of the Vulnerable Witnesses (Scotland) Act 2004 does not include provision of special measures for witnesses giving evidence at non-evidential hearings and does not prohibit cross examination of a witness by a perpetrator of abuse.



The SWRC is regularly involved in civil proceedings where issues of gender-based violence are at the core of the case, these include family, protective orders and civil damages cases. These clients are often vulnerable because of the abuse they have experienced and often experiencing continued abuse by the perpetrator/defender. We have had examples of cases where we have found it challenging to convince the court to grant special measures even where the content of the case involved such abuse.

The SWRC also has experience of representing vulnerable parties where special measures have been refused despite there being ongoing allegations of serious domestic abuse and this being the core purpose of the court to determine them. In one instance where special measures were not granted and the witness was told to attend court, she was forced to accept a very reduced settlement to avoid doing so.

We agree that the proposals in the Victims, Witnesses and Justice Reform Bill (VWJRB) does not go far enough to offer protection to all victim/survivors of gender based violence. We note that the proposals in the VWJRB would exclude some survivors we support from being 'deemed' vulnerable and we note that under these provisions the survivor in the Miss M case (and cases of that kind) would not have been automatically entitled to special measures. The Miss M case involved civil proceedings to claim damages against her rapist. The requirement that to be 'deemed' vulnerable there must be a court order, conviction or ongoing prosecution presents a considerable barrier to justice for many of the survivors we support in civil cases. We would stress that conviction rates for these types of offences are considerably lower compared to the number of cases reported to the police and that many more go unreported to the police.

In our response to the VWJRB, Miss AB noted that, having received special measures, *'they should be offered automatically then the survivor could decide²⁴.'* Any legal proceedings which involve the survivor having to face their perpetrator in court deserves the use of special measures. They should be deemed vulnerable and entitled to special measures, these should be in the form that the survivor feels most comfortable with and will assist them to give their best evidence

If it is recognised that special measures should be provided after the granting of a civil protection order, surely it should also be recognised that the same concerns and difficulties will apply to a victim/survivor who is going through the process of obtaining the civil protection order, as they would in any subsequent court action. For a civil protection order to be granted, the Pursuer will have to satisfy the relevant legal tests, depending on which order is sought and in doing so will be expected to outline the relevant incidents/behaviour by the perpetrator/perpetrators concerned which gives rise to the application. Although at the time of raising a court action for a civil protective order there will have been no determination of the facts, the underlying purpose behind applying for a civil protection order is to obtain protection for a victim/survivor from a

²⁴ Please see: <https://www.scottishwomensrightscentre.org.uk/resources/230907-Victims-Bill-consultation---final---with-references-EL.pdf> at p7



perpetrator. If there is concern about granting special measures in circumstances where such allegations have not yet been determined, consideration is required as to what prejudice or unfairness the granting of such special measures would have on the Defender. It is submitted that the range of special measures currently available in civil cases and as proposed within the Victims, Witnesses and Justice Reform (Scotland) Bill have been included and are designed to ensure that witness can provide their best evidence, whilst balancing the interests of fairness and potential prejudice to the Defender. For example, the special measures still allow for a witness's evidence to be tested and challenged through cross examination, with a view to balancing all of these considerations. If there is no harm or prejudice to the Defender in allowing special measures, there does not appear to be a justification to not allow them.

The requirement for the victim/survivor to be able to decide if they wish to use the special measures which are available remains important, as some survivors do not wish to use these and their decision should be respected. The key issue is to improve the accessibility of these measures and in allowing survivors the autonomy to decide to use them or otherwise. Particularly in cases of domestic abuse, where autonomy and control has often been removed from the victim/survivor by the perpetrator.

If it was considered there was a need to allow provision for a Defender to challenge the automatic availability of special measures in the interests of justice, any test to challenge the provision of special measures should focus on a requirement to show that special measures would be substantially prejudicial to the interests of justice and the fairness of the proceedings. This would therefore allow a Defender to raise any specific challenges in relation to the requested special measures arising from the facts of the case, but should require more than just a generic challenge of unfairness or prejudice which it is submitted has already been taken into consideration in determining what special measures are available.

Question 51 Do you think that a person who alleges they have been subjected to domestic abuse by the other party to the proceedings, should be entitled to special measures as a party and while giving evidence in civil proceedings?

For the same reasons as outlined in our response to Question 50, special measures should be available to parties who allege domestic abuse. It remains important that the usage of special measures is at the victim/survivors discretion and accordingly it is important consideration is given as to the process for obtaining / and or what stage special measures would be available, for example consideration could be had at any post-service hearing, where the defender has a chance to respond, or at a later stage as requested by the victim/survivor.

As suggested above, if it was considered there was a need to allow provision for a Defender to challenge the automatic availability of special measures in the interests of justice any test to challenge the provision of special measures should focus on a



requirement to show that special measures would be substantially prejudicial to the interests of justice and the fairness of the proceedings.

It is also noted that greater training and understanding of domestic abuse as previously mentioned is required for legal professionals and judges in relation to the impact of domestic abuse in relation to other civil proceedings such as divorce and child contact/residence.

Question 52 Should remote hearings be available as a standard special measure?

We consider that remote hearings should continue to be available but there remains a requirement to take account of specific circumstances of parties and witnesses within individual cases and their requirements and preferences to be balanced. There is also a need to further invest and improve technology and facilities within the court system for hearings to ensure they are facilitated effectively across Scotland. We have heard from victims/survivors, who have experienced difficulties with the remote facilities and have not been able to participate fully or effectively within the hearing. The difficulties appear to be due to the audio recording facilities within some courts, demonstrating the extent of these issues within courts throughout Scotland is unknown. Where there are technological difficulties or accessibility issues for any of the parties, remote hearings could lead to issues around fairness or lack of a fair hearing. Therefore, it is crucial that the benefits of a remote hearing are balanced against any difficulties the parties may have to ensure that barriers are addressed.

We have also heard from victims/survivors that they have been placed in virtual waiting rooms with their perpetrators and also that the defender is on screen, although with their camera off. This may lead to the victim/survivor feeling unsafe and could also impact the effectiveness of their evidence/input to the hearing. Thought should be given to how remote hearings can be safely and effectively used.

We note however, that there can be clear benefits to remote hearings, especially for those living in rural areas and for those who have required to instruct a solicitor out with their jurisdiction due to legal aid crisis.

Question 53 Do you agree that personal conduct of cases by a party to proceedings should be prohibited where a civil protection order is sought against them, as well as in all civil cases where there is a civil protection order, conviction or bail conditions in place in respect of that party?

We consider that there should be an automatic prohibition on cross examination by a perpetrator in these cases. We consider that this should follow the same requirements as discussed above for special measures to be granted, which again causes significant barriers to justice for some survivors.

The survivors bringing these cases and engaging in the civil justice system need to be afforded protections to ensure they can effectively participate. This should include



ensuring that there are no circumstances where the defender in such an action would be able to cross-examine the survivor, they would not be able to conduct their own defence in this regard and would be required to instruct a solicitor or the court would be required to appoint one for them. Is it worth

We note in our response to the VJWRB that “*Miss M highlighted that at the start of the civil case she was advised that her rapist could potentially represent himself, and this was a real concern for some time. She had to factor that into her decision to continue with the case, and whilst she chose to proceed, we are concerned that many other women, in a similar position, might choose not to, for this reason alone*²⁵.”

Survivors could find the experience of being cross-examined by their abuser intimidating and extremely traumatising and it could place them at a significant disadvantage. This process could also give an alleged abuser the means to further control and/or commit further abuse. The civil justice process should seek to carefully balance the rights of victims and alleged perpetrators; an important part of striking this balance, must be consideration of circumstances in which seemingly neutral court processes could be used as a means of abuse. Any protections which are developed to support victims and witnesses, in these circumstances, should be obvious from the start and clearly explained to all parties.

A victim/survivor should not have to face their perpetrator personally conducting a case against them. However, the reality is that perpetrators who are personally conducting their own case may be doing so as they are unable to find a solicitor to take their case on due to the legal aid crisis, or if they are not eligible for legal aid due to the unaffordability of private legal fees. Just as many victim/survivors are forced to self-represent for the same reasons. There is a requirement to address these issues to ensure all parties have access to appropriate and affordable legal representation. This further highlights our concerns with the legal aid crisis and the availability of solicitors providing legal aid work²⁶.

Should a perpetrator be prohibited from self-representing throughout the life of a case, there would require to be some provision for court appointed representation for the perpetrator to ensure a fair hearing and access to justice. There would then be a concern in relation to unfairness in circumstances where a perpetrator and victim/survivor were both self-representing, which we are aware through our outreach is becoming increasingly common. The perpetrator would potentially be eligible to have an appointed solicitor, but a victim/survivor would not have access to this and may have to continue to conduct the case, including potentially cross-examining the perpetrator themselves. Should any such provisions be proposed, thought would have

²⁵ Please see: [230907 Victims Bill consultation - final - with references EL p8](#)

²⁶ The Law Society of Scotland in their “Legal Aid Matters” Campaign has highlighted that “*The most deprived 100,000 people in Scotland are served by just 29 civil legal aid firms. And for nearly 90,000 individuals, there is no local legal aid firm at all.*” Please see: <https://www.lawscot.org.uk/members/journal-hub/articles/legal-aid-matters/>



to be given to the fairness of such measures, and protection that can be put in place for the victim/survivor when self-representing.

Question 55 How can the existence of a criminal proceedings in relation to domestic abuse be effectively communicated to the court in civil proceedings, including those under section 11 of the 1995 Act?

We consider that there requires to be better interplay between the criminal and civil justice systems in these cases. Specifically, where a perpetrator is proceeding through the criminal justice system, and has a connected civil proceeding raised against them (or by them), both courts should be aware that there are potentially connected proceedings.

We are aware from our work with victim/survivors, that often there are connected proceedings within the same court building and yet neither court is aware of the connected proceeding. This is extremely concerning and then reliance is upon the victim/survivor to share details of the connected proceedings, or with the perpetrator. We are aware that updates on criminal proceedings, are not always forthcoming to victims/survivors. Criminal cases are often continued or dismissed and the victim/survivor may not be aware. Furthermore, the perpetrator may have been released on an undertaking or similar. These rely upon the perpetrator being forthcoming with the outcome, or the victim/survivor requesting this information from the court. This places the onus heavily upon the victim/survivor.

We have further heard from victims/survivors that the courts are not always aware that trials have been set in criminal proceedings and evidential hearings are then set in civil proceedings which conflict. This is concerning for a number of reasons; it can lead to evidence being taken from the witnesses/defendants in a criminal case prior to the criminal trial impacting the evidence, it can cause further re-traumatisation of the victim/survivor and could lead to the validity of the subsequent criminal proceedings being questioned. Being a witness in a criminal trial is also extremely traumatising for a victim/survivor, or other witnesses involved such as their children, and therefore it is important that the systems around this communicate effectively to reduce the stress and trauma for those involved.

It would be hoped that the court would be able to implement a process within their system for which a connected case is flagged to the Sheriff. This would then allow the Sheriff to follow that case and align both cases to ensure that there is no overlap.

Question 56 Should there be a statutory requirement for the Scottish Government to collect disaggregated statistics on the number of civil protection orders sought and granted in relation to domestic abuse?

Yes, it would be extremely helpful if the Scottish Government would collect disaggregated statistics on the number of civil protection orders sought and granted in



relation to domestic abuse. This would allow services, such as our own, to research and formulate our responses to important policy considerations for victims/survivors and would flag any trends or concerns in relation to these orders. Further, it would highlight the need in this area and allows for further consideration of measures required for victims/survivors and their protection.

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