

# Consultation Response

## Scottish Law Commission – Civil Remedies for Domestic Abuse

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## Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful, and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the Scottish Law Commission consultation: Civil Remedies for Domestic Abuse.<sup>1</sup> We have the following responses to put forward for consideration.

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<sup>1</sup> [Discussion Paper on Civil Remedies for Domestic Abuse \(DP No. 178\)](#)



## Questions

Does the current law, requiring cohabitants to apply to court for occupancy rights, cause problems for cohabitants, and if so, can you provide more detail?

Yes, it does.

Does the current law, requiring cohabitants to apply to court for occupancy rights, cause problems for cohabitants, and if so, can you provide more detail?

Yes.

What specific factors, if any, should the court take into account when exercising its discretion?

- (i) School;
- (ii) Adaptations to the property;
- (iii) Local market;
- (iv) Local connections;
- (v) Costs of moving

Do you support any other way of reforming occupancy rights for cohabitants, and if so what?

No comments.

Does the definition of “cohabiting couple” in the 1981 Act give rise to any concerns in practice?

There had been some discussion around what is meant by “married”, and whether that term should be looked at. There was a comment about aligning the 1981 Act definition with the 2006 Act definition, but I have no detail on this.

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?

Yes.



Can you provide details of any case(s) where cohabitants have suffered because of a lack of statutory protection in relation to division and sale?

No.

Should cohabitants (who meet the definition in the 1981 Act) benefit from the same statutory protection in relation to division and sale that spouses and civil partners do?

Yes, on balance, however, there are concerns that the 'protections' could be misused by one spouse/cohabitant against another.

Should cohabitants (unlike spouses and civil partners) be able to contract out of any statutory protection in relation to division and sale?

Yes.

Do you support the inclusion of a definition of "dealing" being a legal act in respect of the home, carried out by an entitled party, which may adversely affect occupancy rights?

Consideration should be given to a remortgage of a property as has become a more significant event than it was previously, particularly due to changing interest rates. A remortgage is, of course, not a change of ownership of property.

We would suggest expanding 'adversely affect occupancy rights' to include the quality of occupation, not just the right of occupation.

Can you provide details of any case(s) where the entitled party, who is the tenant, has attempted to transfer the tenancy or sub-let it, in order to defeat the occupancy rights of a non-entitled party; or where one party has refused to consent to the other party giving notice to leave? Do you think reform is required to prevent this?

We have no examples readily available, although we do consider that some reform is required in this area.



Can you provide details of any case(s) where an entitled party (whether acting in bad faith or not) has sold the property, in spite of a non-entitled party's occupancy rights?

We have no examples readily available.

Changing this position would risk adding additional costs and administrative requirements to transactions. Consideration would also need to be given to the rights of a purchaser in good faith to ensure these rights were maintained.

What legal measures do you think could prevent this happening?

No comments.

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 agree this is a sensible proposition. Consideration would need to be given to situations where one party is unrepresented.

Consideration should also be given as to how to ensure that those acting on behalf of the perpetrator have notice of the prohibition on contacting the other party.

There could be a risk that a solicitor acting for the opponent of an unrepresented party could be vulnerable if the named contact of an unrepresented party failed to pass on information to that party, particularly considering deadlines or other pertinent information. If a named contact is to be used, it would be helpful for this to be formalised somehow, perhaps within the Order.

In your experience, as a practitioner or otherwise, is it an issue that interdicts ancillary to exclusion orders fall at the point of divorce or dissolution, and if so, why?

No comments.

Should statutory provision for an exclusion order for cohabitants expressly include parties who were cohabiting, so long as both parties have occupancy rights?

No comments.



Is the statutory test of necessity for an exclusion order too high?

No comments.

What changes, if any, would you suggest to the statutory test for an exclusion order?

No comments.

Do you agree that terminology should, where possible, be simplified, so that there is no longer any distinction based solely on the different type of relationship?

No comments.

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?

No comments.

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?

No comments.

Is the test for attachment of a power of arrest to an interdict in relation to domestic abuse too high, and if so, what should the test be?

No comments.

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

Yes. The existing statutory framework is complicated and cumbersome. It would assist the courts, solicitors and clients to have a single statute regulating the civil law in relation to domestic abuse. That statute should include all relevant definitions and remedies.

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

Yes.

If not, what definition do you propose instead?

N/A

Should the defence recognise behaviour which was reasonable in the particular circumstances, as in the 2018 Act?

Potentially, although there may not be a requirement for a 'defence' as such. It will be for the pursuer to prove, on the balance of probabilities, that domestic abuse has occurred.

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?

Yes. Also see responses to 28 and 29. Online abuse/abuse via use of technology is prominent and requires to be included in any definition to be included in any new legislation.

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?

A person can be the victim of domestic abuse and the basis upon which they are abused could be anything. Whilst it may be appropriate to include abuse based on 'immigration' or 'visa-status' etc in a definition, the definition should not be an exhaustive list.

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?

Yes. However, as mentioned in answer 28, there are a variety of forms of domestic abuse. Whilst it would be appropriate to include 'financial' or 'economic' abuse etc in a definition, the definition should not be an exhaustive list.

The 2021 Act defines 'economic abuse' as: (4)“*Economic abuse*” means any behaviour that has a substantial adverse effect on B's ability to—

(a) *acquire, use or maintain money or other property, or*





*(b) obtain goods or services.*

However, in our experience, economic abuse could also include refusal to permit the sale of something; the unreasonable scrutiny of accounts/use of money or the excessive spending of money by A to the detriment of B. There are also situations of chronic, low-level behaviours which may not, in isolation, appear to be abusive but which cumulatively cause distress to B.

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”:

- (a) A protection order to:
  - (i) Prohibit any future abusive conduct towards the pursuer; and
  - (ii) An extension of that order to protect other named people (including children of the household or other children or adults)?
- (b) A redress order, to compensate the pursuer by way of an award of damages for losses suffered as a result of the abusive behaviour;
- (c) A civil barring order, to exclude the defender from the home for a fixed period;
- (d) An order for the delivery of specified documents;
- (e) An order for the delivery of specified property and personal effects;
- (f) An order regulating the care of and responsibility for a pet, or for the delivery of a pet; and
- (g) Should any other order be included and, if so, what?

Yes. The proposed final orders should be available to a pursuer in respect of the delict of domestic abuse as part of a DACPRO. However, there are concerns about (b) being the "redress order". Further clarity is necessary as to how this would work in terms of information/evidence required and how the redress would be quantified. As far as we are aware, there does not seem to be anything similar to this that currently exists within a family law context and, as such, most, if not all, family lawyers would be unfamiliar with how to handle this if it were to form part of the statutory framework.

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

There are merits in a Protection order. Order for delivery or delivery of specified property and an Order regulating the care and responsibility for pets being available as an interim order. We suspect that if money was required regarding the animal, a redress order would have to be looked into a bit more thoroughly and a hearing would require to take place. As stated above, this might be similar to a child welfare hearing but called a Domestic Abuse Hearing, which would cover all of the above matters.

[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 have concerns around a barring order being available on an ex parte basis and lasting for three weeks. It may be preferential to be on an interim basis lasting for three weeks and with hearing perhaps on the second week. We suspect that two months is not enough with regard to rehousing and, although we suspect emergency legal aid might be available if it can be obtained, the current legal aid issues might mean that all of the parties here may not be able to get representation. Therefore, if an initial order has been granted after a hearing that it might need to be 3 months with the provision for extension.

[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?](#)

These could be available ex parte with a provision for a hearing within seven days or if a domestic abuse order hearing takes place within two weeks this could deal with the ancillary orders. If ex parte orders have been granted re passport etc then this could be dealt with right away.

[Should a barring order be available only on notice, and not ex parte?](#)

We would suggest that this should only be available on notice, although it should be a shortened period of notice given that you are dealing with parties accommodation. Both parties will need to have checked the effect a barring order will have and obtained legal representation. With one of the parties having to find alternative accommodation.

[Should breach of an interim or final DACPRO \(excluding redress orders\) constitute a criminal offence?](#)



We do not suggest a breach of either of the orders should be a criminal offence. We assume that a Barring Order is likely to be a police matter and be dealt with accordingly, the other ancillary matters we do not feel should attract criminal sanctions but possibly an automatic amount of redress if not complied with.

### Should breach of an ex parte (without notice) order be excluded from criminal sanction?

We would suggest that this would be the most appropriate way of dealing with matters with the exception of a Protective Order to which could be added something similar to a power of arrest. Given that in most circumstances a party would be allowed the opportunity of being heard. We do however feel that it should not constitute a criminal offence but simply be left with simplified enforcement procedure.

### In your experience, are there any other measures relating to enforcement which could provide the necessary protection?

See above. We would question whether, if the matter is being dealt with by the civil courts that there could be certain instances where a POA under a different name is automatically added to the Order, on the basis that the defender has been given the opportunity of being heard.

### 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?

Yes, this has probable deterrent value but it also assumes that there is sufficient information and evidence available to support the Order being sought against such an associate.

We suspect it could be very difficult to link an associate with the defender. In the cases mentioned, the matter had gone to proof. If after proof, it can be stated that a third party was involved and this has been proved to be the case, then perhaps there would be the possibility of attaching the order to the associate. However, this would not appear to work on interim orders. Or ex parte statements.

As with the previous matter where the protective order was discussed about orders being granted against third parties, it would be very difficult as you are adding a third party to the action and the third party would need another solicitor, would potentially need legal aid and it would make the matter very complex. There would be a conflict of interest were the same solicitor to be used. There are

concerns that any potential increase of the order wider than the immediate family would result in difficulties in the Order.

[If so, should breach of a protection order by an associate constitute a criminal offence?](#)

We do not suggest a breach of either of the orders should be a criminal offence. We accept that this would act as a deterrent and allow for the new law to have the desired effect, although there are similarities to a 'breach of the peace' which would be dealt with as a criminal matter by the police.

[Should it be possible for a DACPRO to extend beyond the sheriffdom in which it is granted?](#)

Yes. The conduct complained of does not necessarily fall within the jurisdictional boundaries of a Sheriffdom. Therefore, for any new Law to have the desired effect, it should be possible for a DACPRO to extend beyond the Sheriffdom in which it is granted. This is in-keeping with the 2021 Act which is not yet in force. It is also in-keeping with section 84 of the Courts Reform (Scotland) Act 2014.

[Should it be possible for a third party to seek a DACPRO on behalf of a victim/survivor?](#)

It is not considered to be appropriate that a third party be in a position to seek a DACPRO on behalf of a victim/survivor. Empowering the victim/survivor is key, not empowering others to do what they consider to be in the victim's best interests. With appropriate legal advice, the victim should be in a position to make an informed choice herself about seeking such an Order.

[If so, should they need the victim/survivor's consent to do so?](#)

Yes, undoubtedly, if it were possible for a third party to obtain a DACPRO, the victim/survivor's consent should be required before they do so.

[Should defenders be able to seek the preservation or delivery of their specified possessions, where it is not possible for the defender to access them without being in breach of a DACPRO?](#)

Yes.

Are there any other orders which a defender should be able to seek, and if so what?

This is a matter that may be required on a case-by-case basis. The purpose of the legislative changes however is to provide greater protection to victim/survivor. Provided that any Order that may be sought relates to something which is affected by their exclusion from the premises which cannot be acted upon remotely, there should be no reason to limit the scope of Orders that may be sought on a “cause shown” basis.

Should civil remedies for domestic abuse remain focused on partners and ex-partners (that is, current and former spouses, civil partners, cohabitants and those in an intimate partner relationship)?

No. It is important to maintain consistency of approach across the numerous pieces of legislation in both the criminal and civil law spheres. This is not to deny that other forms of abuse take place but there are other means of dealing with this which are readily available.

Should a child under 18 be recognised as an adjoined victim/survivor of abuse perpetrated by or against a parent or connected adult in their life?

Yes, recognising a child under 16 as an adjoined victim/survivor would help ensure Scots Law is compatible with UNCRC.

Should a civil protection order be available for a child who is an adjoined victim/survivor:

- (a) As part of a civil protection order/DACPRO sought by the victim/survivor;
- (b) If sought by the adjoined victim/survivor themselves, where they have capacity;
- (c) If sought by a parent/guardian on their behalf?

Civil protection should be available to a child who is an adjoined victim/survivor.

Do you agree that the Children (Scotland) Act 1995 should be amended so that:

(a) the court is required to provide written reasons for making an order under section 11 (such as a contact or residence order), where there is a history of domestic abuse?;

(b) the safety of the parents should be considered by the court as part of the consideration of the child's welfare?

Yes.

Are there any other ways of ensuring the safety of the child and of the victim/survivor is considered by the court in making orders under section 11 of the 1995 Act?

No comments.

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?

Yes.

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?

No comments.

Should remote hearings be available as a standard special measure?

It's possible that ensuring that remote hearings should be available as a standard special measure.

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?

There are concerns over the practicality of prohibiting personal conduct cases.

Should there be an obligation placed on parties who are (ex-) partners involved in civil proceedings, including those under section 11 of the 1995 Act, to disclose

formal responses taken in respect of domestic abuse? If so, what should be disclosed?

Yes, there should be an obligation on parties who are party to civil proceedings to divulge formal responses to domestic abuse.

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 agree that better connections are required between civil and criminal courts to ensure that all relevant information is being shared.

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, the Scottish Government should be obliged to collect disaggregated statistics on number of civil protection orders sought and granted in relation to domestic abuse.

Are there any civil law reform measures which could help support victim/survivors of domestic abuse in rural and island areas?

Better legal aid fees would go somewhere to help the provision of the support to victims/survivors in the rural and island areas.

What information or data do consultees have on:

- (a) the economic impact of current civil protection remedies sought under the common law and under the 1981 and 2004, 2001, 2011 and 1997 Acts?;
- (b) the potential economic impact of any option for reform discussed in Chapter 5 of this Discussion Paper (in particular advice relating to, and raising of an action for, a DACPRO)?;
- (c) the potential economic impact upon the SCTS and legal aid budgets of any option for reform discussed in this Discussion Paper, in particular those discussed in Chapter 8?

No comments.



## General Comments on the Discussion Paper

No comments.





For further information, please contact:

Terri Cairns  
Policy Team  
Law Society of Scotland  
DD: 0131 476 8172  
[terricairns@lawscot.org.uk](mailto:terricairns@lawscot.org.uk)