



Evidence submitted by Chartered Institute of Housing Scotland: 26 March 2019

About CIH

The Chartered Institute of Housing (CIH) is the independent voice for housing and the home of professional standards. Our goal is simple – to provide housing professionals with the advice, support and knowledge they need to be brilliant. CIH is a registered charity and not-for-profit organisation. This means that the money we make is put back into the organisation and funds the activities we carry out to support the housing sector. We have a diverse membership of people who work in both the public and private sectors, in 20 countries on five continents across the world including over 2,000 in Scotland.

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Protective orders for people at risk of domestic abuse



1. Overview

The Scottish Government should introduce new legislation to protect victims from domestic abuse and ensure abusers can be temporarily removed from a domestic setting according to the Chartered Institute of Housing (CIH) Scotland.

We believe that if someone is at risk of domestic abuse then immediate action should be taken to stop the perpetrator from entering the home and gaining access to the victim, regardless of tenure. We also note that any remedy is not in itself a complete response to domestic abuse but should be the beginning of a process to develop a civil or criminal response that allows for the permanent removal of an abuser.

We also recommend that the police are given the power to issue the emergency barring order before making a longer-term application to a court to protect a person at risk. In addition, they note that victims should be able to approach the police to request they use their powers to issue an EBO and that this process will require the police to be well trained to understand the change in the law under the Domestic Abuse Act 2018.

And in conclusion CIH Scotland recommended that there is a need to review and update the Matrimonial Homes (Family Protection) (Scotland) Act 1981 to allow social landlords to protect victims and end a joint tenancy for only one party where that person has breached their tenancy through an act of domestic abuse.

2. Consultation Questions

Part 1: Measures to protect those at risk of domestic abuse

Questions 1 to 4:

Do you think the police should have the power to bar a person from a home that they share with a person at risk of domestic abuse for a period of time and prohibit them from contacting that person, without the need to obtain court approval?

If the police are given a power to put in place measures to protect a person at risk of domestic abuse for a period of time, we would welcome views on how long that period should be.

Do you agree that the courts should be given powers to make an order to protect a person at risk of domestic abuse by prohibiting the person posing the risk from returning to the person at risk's home while the order is in force?

If the courts are given a new power to impose measures to protect a person at risk of domestic abuse, we would welcome views on whether there should be a maximum period of time beyond which such measures would not apply and, if so, what that period should be.

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As noted in the consultation, the Istanbul Convention places a clear requirement on the Scottish Government to ensure that if a victim is at risk of domestic abuse, immediate action should be taken to stop the perpetrator from entering the home and gaining access to the victim.

However, we would stress that such a remedy is the beginning of a process to develop a civil or criminal response that allows for the permanent removal of an abuser and is not in itself a complete response to domestic abuse.

The current legislative framework does allow for civil remedies where a victim makes an application to a court, as well as criminal remedies where police place a suspected perpetrator of domestic abuse on an 'undertaking' not to return to their home after being charged. However, these remedies do not provide a quick and emergency response to a dangerous situation for victims. Applications to a court do not currently provide immediate responses and the police response requires the alleged perpetrator to be charged with an offence.

Emergency barring orders (EBOs) allow the police to make a quick determination without needing court oversight, which can be particularly crucial at times when a court is not in session or immediate action is required. However, we believe that the 48 hour limit used in England and Wales before a barring order expires could present a problem in allowing agencies to prepare a case for court and understand that the short duration of the DVPN's in England may be a contributory factor in their underuse. We note the recommendation from Scottish Women's Aid that a period of around 21 days strikes a reasonable balance between the right of the accused and giving the appropriate authorities time to prepare a case for court for a longer term order.

We further note these orders are intended to deal with victims who are in a crisis. However, as noted above, an appropriate criminal response must have primacy and the use of arrest and prosecution should be sought where appropriate. EBOs should not be seen as a substitute for existing criminal pathways but as a mechanism that facilitates access to civil and criminal response and support for victims.

One of the real strengths of the proposals is that they ensure that victims, no matter what type of home they live in, can be protected in the short term.

Questions 5 to 7:

We would welcome views on which bodies and/or people should be able to make an application to a court to impose measures to protect a person at risk of domestic abuse.

Do you think a criminal court should be able to impose measures to protect a person at risk of domestic abuse that would bar a perpetrator from a shared home for a period of time, when sentencing the offender?

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Where an application is made to the court for measures to protect a person at risk of domestic abuse by someone other than the person at risk, should the consent of the person who may be at risk be required for such an order to be made?

We believe that the police should be able to issue an EBO and are well placed to make a longer-term application to a court to protect a person at risk. However, we also believe victims should be able to approach the police to request they use their powers to issue an EBO. This will require the police to be well trained and given the change in the law under the Domestic Abuse (Scotland) Act 2018, police and all public agencies should be better informed about the scope and reality of domestic abuse.

Indeed, research conducted by Scottish Women's Aid highlights the powerless nature of many victims and that decisions are made about them, without them. While it is vital to ensure that the person at risk is not being placed under undue pressure by the abuser or other family members, it is an important principle that the person at risk of abuse should give their consent to an order being made. This principle is vital in giving victims control over their own lives.

Question 8: We would welcome views as to which persons should be capable of being made subject to measures to protect a person at risk of domestic abuse. Should such protection be limited to providing protection from abuse by a partner or ex-partner. If not, what other relationships or circumstances should be covered by such provisions?

Domestic abuse occurs when a partner or an ex-partner behaves in a way that inflicts physical, mental or emotional damage. As such, we do not support extending this order to those who fall outwith that existing relationship definition, except for children living in the house. We would expect that any children in such circumstances would also be protected by the legislation and we suggest that other circumstances should be addressed in separate legislation.

Questions 9-11:

We would welcome views on what you think the test should be for deciding whether to impose measures to protect a person at risk of domestic abuse. In particular, do you think it should be a requirement that the person against whom the order is sought must have used or threatened violence against the person to be protected by the order, or do you think a wider test covering our modern understanding of what constitutes domestic abuse (i.e. behaviour likely to cause psychological, as well as physical, harm) should be used?

We would welcome views as to whether, as well as prohibiting the subject of the order from entering the person at risk's home, it should also be possible to impose conditions on the subject of the order to prevent them from contacting or approaching the person at risk, or prohibiting them from entering other specified locations (such as the person at risk's place of work or relatives' homes).

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Do you agree that, as well as enabling measures to be imposed to protect the person at risk, it should also be open to the police and courts to impose conditions requiring the subject of the order not to approach or contact any children living with the person at risk?

As noted above, the test for deciding to impose protection orders must go beyond those exposed to or at risk of physical violence. The new Domestic Abuse (Scotland) Act definition now includes:

- Behaviour that is violent, threatening or intimidating.
- Behaviour whose purpose is one of the following:
 - making a partner dependent or subordinate;
 - isolating a partner from friends, relatives or other sources of support;
 - controlling, regulating or monitoring a partner's day-to-day activities;
 - depriving a partner of, or restricting, freedom of action; and
 - frightening, humiliating, degrading or punishing a partner.

The offence is aggravated if any of the behaviour is directed at a child or witnessed by them.

We would expect the police, courts and all relevant authorities to use the accepted, updated definition of domestic abuse in Scotland in making a determination to use/approve an EBO. We note that despite its name, domestic abuse does not take place exclusively in the home. While the use of barring orders is likely to have most impact in a domestic setting, we believe there are grounds for this to be extended to other settings where the accused could have access to victims such as schools and work places, and limiting access to any children under 18 so they are not used to put pressure on the victim.

Part 2: Exclusion Orders

Question 16: Should the Scottish Government produce both public facing and professional facing information on exclusion orders?

We would encourage the communication of information that helps landlords support victims of abuse. Exclusion orders have not been widely publicised and we would support any efforts to provide women with greater information on their housing rights and what steps can be taken.

Part 3: Additional questions on issues concerning equal opportunities, financial implications and other impacts

Question 27: Do you have any other comments about the content of this paper?

We believe there are inherent contradictions in the law as it stands and that measures should be taken to make the law fit for purpose so that abusers can be legally moved from their home.

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We believe that to allow social landlords to protect victims and safeguard their rights, a review of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 is required.

This legislation was designed to provide for the transfer of a tenancy of a matrimonial home between spouses in certain circumstances during marriage as well as by cohabiting couples. We recognise that some local authorities consider the existing framework sufficient to remove domestic abusers with a joint tenancy from a home. We believe this premise is untested and that new legislation will be required so that abusers can be moved out of homes, while having their right to a home elsewhere unabridged.

Scottish Women's Aid research on the use of [Matrimonial Homes Act](#) sets out some of the difficulties and limitations of these orders in enabling a woman to remain safely in her home. This includes:

- Women's ineligibility – dependent on marital status or civil partnership;
- Ability to access legal advice and finding solicitors prepared to do this work;
- Eligibility for legal aid;
- Women have to take and pay for legal action – not the landlord;
- Breaches, where abusers return to the home, are often unenforced; and
- At the point of crisis, accessing homelessness services can be quicker than approaching a court.

We would welcome the government's consideration of amendments to this effect when bringing forward legislation. Indeed, we note that the recent HARSAG recommendations called for:

“All social landlords to have clear policies on domestic abuse, and ensuring that experience of abuse or violence does not lead to someone losing their tenancy –for example, arrangements should be put in place so that tenancies can transfer seamlessly to the person who has experienced abuse, and reciprocal arrangements should be put in place to ensure people who experience domestic abuse can move to a safer place and have continuity of tenancy.”