

Domestic Abuse & Forced Marriage - Legal Issues Information Book



Droch Dhìol
san Dachaigh &
Pòsadh Èignichte
Leabhar Fiosrachaidh

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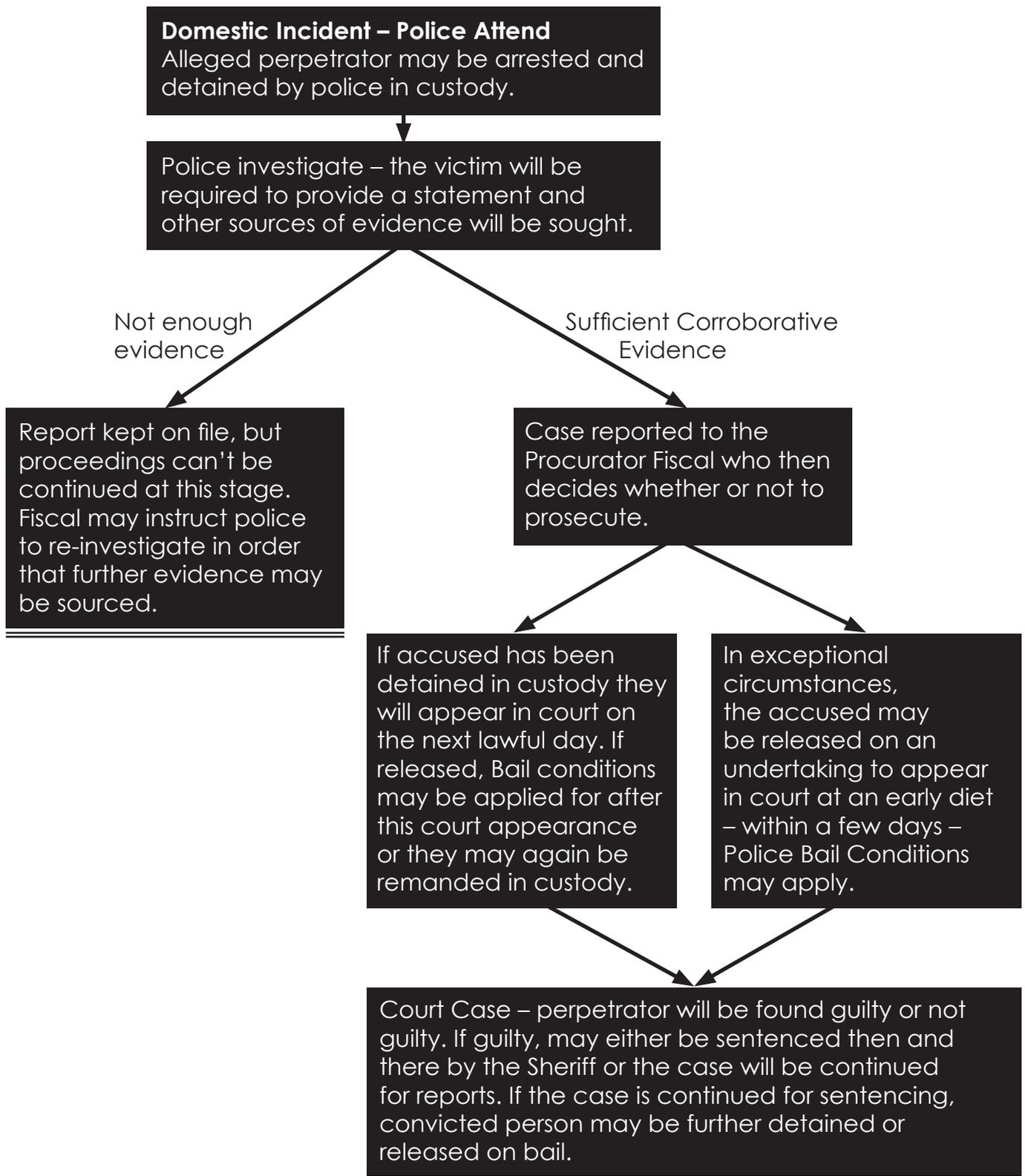
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Please note – this booklet does not qualify workers to give legal advice – it contains only basic information.

If in doubt, for information on specific topics speak to your local Police Officer, Procurator Fiscal, VIA representative, Housing or Benefits Advisor but if someone needs legal advice, they must be referred to a solicitor.

Flow Chart of possible proceedings & options

Domestic Incident



Flow Chart of possible proceedings & options

Legal Advice

Person seeks Legal Advice to protect themselves from Domestic Abuse. May obtain Legal Aid to fund this advice or may have to pay personally. After receiving advice, person decides to go to court to obtain a protective order (Interdict with a power of arrest attached, Exclusion Order, Non- Harassment Order, Domestic Abuse Interdict) and they have the funding to do so, either via Legal Aid or if they are not eligible for Legal Aid, through their own finances. Breaching a domestic abuse interdict is itself a crime. Other interdicts need separate enforcement if breached.

Applicant for protective order must be able to produce evidence and statements (affidavits) from witnesses to satisfy the court of the need for the order. Non Harassment Order complicated – must be at least two incidents – note that Procurator Fiscals can also ask for this in criminal cases against the offender.

Interdict granted - a court granted order preventing behaviour by a person it is granted against, e.g. approaching an address/person

Court grants protective order.

In the case of an interdict, there may be more than one hearing if the applicant requires a Power of Arrest to be attached. Power of Arrest is important as there is no need for person to have committed a criminal act to be arrested and detained if they breach the interdict. The order is only effective when served personally on the perpetrator by sheriff officers.

Where there is a power of arrest a copy of Protective Order should be sent to relevant Chief Constable and local police station for the power of arrest to be effective. If the Order is breached then the accused may be arrested and kept in custody for court appearance on the next lawful day.

What is Domestic Abuse

The Highland Community Planning Partnership has adopted the Scottish Government's gender-based definition of domestic abuse. This means that domestic abuse must be understood within the context of gender inequality, where women are generally given less value, status and power in society compared to men; this can be identified in a number of forms in Scotland, including domestic abuse which is overwhelmingly experienced by women and perpetrated by men.

The definition of domestic abuse adopted by the Partnership is:

Domestic abuse (as gender based abuse) can be perpetrated by partners or ex-partners and can include physical abuse (assault and physical attack involving a range of behaviour), sexual abuse (acts which degrade and humiliate women and are perpetrated against their will, including rape) and mental and emotional abuse (such as threats, verbal abuse, racial abuse, withholding money and other types of controlling behaviours such as isolation from family and friends).

This definition does not exclude domestic abuse in same sex relationships or the abuse of men by women because it is "gender-based".

Although Police Scotland and the Area Procurator Fiscal in Highland acknowledge the definition cited above, the definition adopted by the Crown Office and Procurator Fiscal Service (COPFS) and Police Scotland is:

Any form of physical, sexual or mental and emotional abuse which might amount to criminal conduct and which takes place within the context of a close relationship. The relationship will be between partners (married, cohabiting or otherwise) or ex-partners. The abuse can be committed in the home or elsewhere.

Domestic Abuse as a Crime

Introduction

The extent of domestic abuse in Scotland is well known. There are numerous sources of research which reveal that between 1 in 5 and 1 in 3 women in Scotland will experience domestic abuse in their lifetime. For some women, domestic abuse can have fatal consequences – two women a week are murdered in the UK by their current or former male partners.

The police in the UK also deal with one 999 call a minute that relates to domestic abuse. In the Highlands in 2009/10, 879 domestic abuse incidents were reported to the police – over 80% of cases involved a female victim and a male perpetrator.

Criminal Proceedings

In Scotland there is not yet a specific criminal offence of “Domestic Abuse”. What differentiates domestic abuse from other criminal behaviour and forms of violence is the context in which domestic abuse occurs. Domestic Abuse is about misuse of power - behaviour, action and coercion used to gain control over someone. This will form a pattern of behaviour and are not simply ‘one-off’ incidents. However, because only individual acts can be prosecuted, when police are called to domestic incidents the accused could be charged with specific Common Law crimes relating to their conduct, e.g.:

- Assault (for physical violence)
- Serious Assault (a more serious physical attack)

- Attempted Murder
- Murder
- Rape
- Stalking
- Assault with intent to ravish (this means an intention to rape)
- Threats
- Breach of the peace (e.g. verbal abuse, stalking, etc)

The abuser could also be charged with other, statutory offences, e.g. sending threatening messages via a telephone (landline or mobile phone) could result in the abuser being charged with an offence under the Telecommunications Act 2003.

Stalking Criminal Justice & Licensing (Scotland) Act 2010

The law defines stalking as being where a person carries out an unreasonable course of conduct, e.g. following, monitoring, contacting or attempting to contact another person. This behaviour is with the intention of causing, or would be likely to cause, fear or alarm. Course of conduct means two or more occasions. This legislation makes stalking a criminal offence.

How is someone charged?

When the police are called to a domestic abuse incident they will treat the allegations seriously and conduct a full investigation. As part of this investigation the alleged victim will be interviewed separately from the alleged abuser and required to provide a statement.

If there is enough evidence to arrest the perpetrator, the police will do this – even if the victim does not want this to happen. In Scotland, a victim of crime never has the decision as to whether an arrest should take place and cannot “drop” or “press charges” – only the attending police officers can make this decision. Ultimately, the Procurator Fiscal make's the decision about whether there is enough evidence for the case to proceed – more information is included below.

How much evidence is needed before someone can be charged with a crime?

In order to establish that a crime was committed and that the accused was the perpetrator evidence from at least two different sources is required under Scots Law. This is called “corroborative evidence”. If the police are able to gather sufficient corroborative evidence, the case will be reported to the Procurator Fiscal.

Note that Corroborative evidence does not necessarily mean that two eye witnesses are required. Corroboration can be established in a number of ways, but is often difficult to establish sufficient evidence in domestic abuse cases, as the incidents most often occur behind closed doors, with only the woman and the perpetrator present.

Corroborative Evidence

What counts as evidence?

- The victim's account or statement.
- House to house enquiries and statements obtained as a result.
- Statements from other witnesses (including children where appropriate).
- Disturbance at the scene of the incident, e.g. furniture/windows smashed – additional evidence that can be provided by photographs.
- Medical evidence, such as injuries, which should be photographed as soon as possible.
- Forensic evidence.
- 999 recordings.
- If the perpetrator admits to the crime when questioned under caution.

What happens to the Perpetrator after arrest?

The person accused with the offence will be detained in custody before appearing in court the next “lawful day” – that means the next day the court is sitting, e.g. if arrested on a Monday, they would appear in court on Tuesday and if it was a Friday the accused would be held in the cells over the weekend and they would appear on Monday, as the court does not sit on a Saturday.

Under exceptional circumstances, the accused may be released and given a specific date and time to appear and court (this is called an “early diet”).

If the accused is not traced at the time of the incident, the Police will report the circumstances to the Procurator Fiscal

within the same timescales as if the accused was detained in custody and, if appropriate, a warrant will be issued for them. The Procurator Fiscal deals with any requests for warrants as a matter of priority.

The victim should always be kept informed about the progress of the investigation and must be notified as soon as possible, either by the Crown Office's Victim Information and Advice Service ("VIA") attached to the criminal courts, or by the Police, when the perpetrator is being released from custody.

Will the perpetrator be given bail?

When the accused appears at court from police custody, the Sheriff will decide whether he should be remanded in custody pending a trial or if they should be released on bail.

The police will request that a special condition be attached to the bail conditions. This is that the accused cannot approach the woman and her children, or enter the family home. Standard bail conditions are:

- Appears at future court diets.
- Doesn't offend while on bail.
- Does not interfere with witnesses (which includes the woman) or obstruct the course of justice.
- Makes himself available for enquiries or reports to assist the court in dealing with the offence.

What should a woman do if the special bail condition is lifted or about to be lifted?

Note that the accused can apply to the Sheriff at any time in the proceedings to have the special condition taken away. If the woman becomes aware that the special bail condition is about to be lifted she should contact a solicitor to go to court to get an interdict with powers of arrest against the perpetrator. An accused who has pled not guilty can change his plea to guilty and, through his solicitor, arrange for the case to be brought forward and dealt with earlier than anticipated. This sometimes happens where an accused has several cases on the go, and wants them all dealt with together, but it can happen where there is only one active case. Where a guilty plea is tendered, unless there is a deferred sentence with bail continued, if the court imposes a punishment, thereby bringing the case to an end, it means that the bail order ends too. Attention should always be paid to any likelihood of the bail ending or changing, for whatever reason, and if bail conditions are about to, or likely to end or change, then the victim can go to a solicitor to see about getting an interdict and power of arrest in place before the bail order ends.

What if the accused breaks the bail conditions?

If the man approaches the woman and/or children or contacts them in any way when there is a bail condition imposed, this is a criminal offence and should be reported to the police immediately for the safety of the women and children involved. There could be a separate charge of breach of bail if there is enough evidence.

Regardless of whether there is corroborative evidence of such conduct,

the police have the power to arrest the perpetrator in such circumstances on the basis of the woman's statement only, in order that the Fiscal can seek a review of the accused's bail conditions.

Note that a review of bail conditions can be sought by the Fiscal at any time if there are concerns about the woman and/or children's safety due to the accused not being in custody. Any concerns as to safety, or intimidation, of the woman and/or children or any witnesses should be reported to the Fiscal as a matter of urgency.

What if the woman has given a statement to the police but decides she doesn't want to give evidence in court?

Women who have experienced domestic abuse can sometimes retract their original statements or can be reluctant to give evidence for a number of reasons (including previous experience of the accused's conduct following a court case). Where this happens, the Procurator Fiscal must consider the particular circumstances of the case carefully and may decide to meet with the victim or to instruct the police to interview the victim to explore, sensitively, the reasons for the retraction or reluctance. Importantly, it must be established whether the reason for the retraction is a result of threats or pressure from the accused or any other person.

The perpetration of domestic abuse is a matter which is taken very seriously by the Police, Procurator Fiscal service and the courts. They consider it vital that the public and the accused understand that such offending behaviour will not be tolerated and consequently, the importance of perpetrators being held publicly accountable and facing the criminal consequences of their abuse.

The final decision to continue or discontinue proceedings is for the Procurator Fiscal alone and in domestic abuse cases, the presumption will be to continue with prosecution as it is in the "public interest". Therefore, to achieve this, in a few cases, women may even be compelled to attend court to give evidence; if this occurs, it is crucial that the woman be offered support in giving her evidence. This support can be accessed through the VIA service, the Witness Service, or through other support organisations such as Women's Aid or advocacy services.

What will happen when the case finally comes to court?

The Sheriff will hear the evidence presented by the Fiscal and the accused's defence lawyer and come to a decision as to whether the accused is guilty or not guilty.

If the perpetrator is found guilty, then he may be sentenced immediately or the Sheriff may delay sentencing and continue the case in order to obtain background reports, usually obtained from Social Work which assist the Sheriff in their sentencing decision. The Sheriff may also defer sentencing for a period of time in order to consider the perpetrator's behaviour during that period, which will then determine the sentence.

If the perpetrator is found not guilty, he will be free to leave court. This can be a very risky time for the woman if she is not aware of the outcome of the case. VIA or the police should contact her as soon as possible to make her aware of what has happened in the court case and whether the perpetrator is being held in custody or is free and could be heading home.

Civil Measures

Those experiencing abuse can apply for court orders to protect them. The most common measures used are **interdicts** and, more rarely, **non-harassment orders**, which have, historically, been less straightforward to obtain (although recent changes in law mean that some of these will now be easier to get). Spouses, registered civil partners and cohabiting couples (whether same sex or heterosexual) are also able to seek **exclusion orders** in certain circumstances. All civil remedies have in common that the victim requires to take the step of raising court action and it does not take effect until the perpetrator is made aware of it.

All interdicts and non-harassment orders granted in an abuse context, potentially guard against further molestation, harassment and abuse.

What benefit is an Interdict?

It is important to understand that an interdict on its own is simply an order from the court requiring a person not to do something which, usually, they should not be doing anyway. An interdict on its own is not a powerful remedy against a determined abuser. An interdict on its own can work if the person who is targeted by the interdict is responsible enough to respect the court order. But some people targeted by interdicts do not respect the court order on its own. Interdicts are not criminal law remedies, and so where there is only an interdict in place, someone breaching that interdict does not engage police involvement unless the conduct is also criminal behaviour (see previous sections). The

traditional and standard remedy where someone has breached an interdict is for the holder of the interdict to raise a second court action for breach of interdict. While this still remains a primary means of enforcement, over the years, a recognition that more was needed to help victims of wrongful behaviour to have more potent protection led to development of a number of additional remedies. These have tended to fall under two types:

- Additional features applicable to some interdicts, e.g:
 - Powers of arrest
 - Matrimonial and domestic interdicts
 - Domestic abuse interdicts – available since 2011
- Separate protective orders, e.g. non-harassment orders, exclusion orders, etc

Since 2011 there are also better protections available in some circumstances for interdicts to protect against domestic abuse. In this guidance an interdict obtained with the benefit of the new law is referred to as a Domestic Abuse Interdict to distinguish it from other interdicts, but this is not an official term – it is simply a particular form of interdict that meets certain qualifying conditions. Not every interdict granted where a person is experiencing domestic abuse will be a Domestic Abuse Interdict.

Where a person is able to get an interdict, but not a Domestic Abuse Interdict (see later for the difference) a non-harassment order may be a more effective alternative remedy than the interdict. Where a person can

obtain a Domestic Abuse Interdict, a non harassment order is no longer a more effective measure. In reality the practical effects and protections of both are similar.

Proceedings for Breach of Interdict

In the event of a breach of interdict, if there is reason to do so¹, and sufficient supporting evidence, the person holding the interdict can raise breach of interdict proceedings. If the court holds that there is a breach of interdict, a punishment will be imposed. There is no need for corroboration for a breach of interdict action, although a victim still needs reliable evidence to persuade a sheriff that the breach occurred². Breach of interdict proceedings are a useful way of enforcing a breach of a Domestic Abuse Interdict if there is insufficient evidence (by virtue of a lack of corroboration) to prosecute the offence of breach of a Domestic Abuse Interdict.

1 There may not be reason to do so if there has been a separate prosecution and punishment imposed on the perpetrator (i.e. because their conduct was already a criminal offence and they are to be prosecuted for that) and it is unlikely that breach of interdict proceedings would achieve anything further.

2 The standard of proof required in breach of interdict cases is beyond reasonable doubt which is the same as criminal cases, but more onerous than the normal civil standard of "on the balance of probabilities". Thus breach of interdict is arguably a higher standard than other civil cases (including interdict and non-harassment orders, etc.) but by not requiring corroboration as a matter of law, there will be situations where breach of interdict is possible, when prosecution is not.

Interdicts under the Protection from Abuse (Scotland) Act 2001

The Protection from Abuse (Scotland) Act 2001 allows the court to grant wide protection from abusers. The Act is useful because:-

- It extends the opportunity to get an interdict with powers of arrest to anyone, regardless of their relationship to the abuser or where they live. Previously powers of arrest were only available on "matrimonial interdicts" (see later). A "Power of Arrest" gives the police discretionary powers to arrest and detain the person in breach of the interdict without a warrant, and without the need for that person to have committed a separate criminal offence. The power of arrest is not a punishment. It is a protective measure that removes the abuser/harasser to a police cell until the next court date when they will be taken to the Sheriff Court, providing that the person holding the interdict has indicated a wish to raise proceedings for breach of interdict. If the person holding the interdict does not take such proceedings, the arrested person is simply released unless the Sheriff considers the steps outlined below
- It gives Sheriffs powers to detain the person in breach at a police station for a further two days after the arrest
- The test which has to be met before getting a power of arrest is that the Sheriff views it as necessary to protect against breach of interdict by the person interdicted. A power of arrest is not granted automatically.
- Any powers of arrest attached to an interdict under this Act don't disappear when divorce is granted.

continues overleaf

Interdicts can be applied for by:

- Married women, partners of abusers or ex-partners
- Children
- Co-habiting couples
- Same sex couples
- Cohabitees without relevant occupancy rights
- Other family members
- Neighbours of the abuser

Children & Interdicts

Each individual at risk of abuse should apply themselves, and children can apply on their own behalf if of sufficient age (technically known as having “legal capacity”). This means that children of twelve years or older can apply on their own for an interdict. For children under twelve years of age, a parent or guardian can apply on behalf of the child. The child will still be the applicant, because they are applying for their own protection and they will be regarded as the person who has obtained the Power of Arrest.

How long does “Power of Arrest” under this Act last?

It can last for any period specified, up to three years. It’s important to keep in mind the date that the Power of Arrest expires at the end of the period specified and the person who obtained the interdict may then need to reapply if they want these powers of arrest extended further. They should therefore seek advice from a solicitor before the date on which the power of arrest is due to expire.

Definition of Abuse from the 2001 Act

Abuse is defined in the Act extremely widely to include:

violence, harassment, threatening conduct and any other conduct giving rise or likely to give rise to physical or mental injury, fear, alarm or distress.

This ensures that psychological as well as physical abuse is covered.

Conduct, within the definition of the abuse above is stated as including:

speech and presence in a specific area or place,

as well as the obvious acts of violence or threatening behaviour.

By defining conduct as ‘presence’ this makes it clear that conduct does not have to be active for it to be abusive.

Interdicts and the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (as amended).

If the woman wishes to exclude the abusive partner from the home and get an interdict she should get advice about using this legislation. Her solicitor will advise about which law to use, depending on the circumstances. Note that the courts will not grant an interdict under this Act which effectively bans an abusive partner or spouse from entering or remaining in the matrimonial/shared home **UNLESS** the interdict comes with an Exclusion Order/Interim Exclusion Order

In terms of interdicts available under the 1981 Act, the new Family Law (Scotland) Act 2006 has strengthened the terms of these protective orders.

Matrimonial Interdicts:

The Act amends section 14 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 by extending the scope of the existing matrimonial interdict under the Act (a matrimonial interdict being one which restrains the conduct of one spouse towards another, or towards a child in the family) beyond the matrimonial home to include the applicant's place of work, home, any other residence or the child's school.

Also, powers of arrest attached to matrimonial Interdicts under the 1981 Act now last for a period of up to three years and not, as before, until divorce

Domestic Interdicts:

The Act introduces a new "Domestic Interdict"³, which can only be obtained by couples living together (including same sex couples). These new interdicts will **only** apply to couples living together, either opposite-sex or same-sex. You **must** be **cohabiting** to obtain this interdict. If you are not living with your partner, you can only apply for an interdict under the Protection from Abuse (Scotland) Act 2011 but you do not lose out in protection as you can still ask the court to prevent your partner from entering or remaining in the same places that the Domestic Interdict covers.

Domestic Interdicts will have much the same effect in relation to cohabitants as matrimonial interdicts have for married couples and will cover the same areas. However, the courts have complete discretion as to whether a power of arrest can be attached to a Domestic Interdict.

3 "Domestic Interdict" does not mean "Domestic Abuse Interdict" -see "Limitations of Interdicts" on next page for explanation.

Interdicts under the Domestic Abuse (Scotland) Act 2011

Unlike an ordinary interdict, a breach of a Domestic Abuse Interdict is in itself a criminal offence, which can immediately be prosecuted by the police and procurator fiscal. So from the enforcement perspective a breach of a Domestic Abuse Interdict is just as effective as that of a non-harassment order – if there is enough evidence, they can both be enforced by reporting the matter to the police, and the police then starting a prosecution.

The same 2011 legislation that brought in Domestic Abuse Interdicts made it easier to get a non harassment order where there was domestic abuse. Accordingly both these remedies are available to persons who have suffered domestic abuse at the hands of their partners or ex-partners.

Domestic Abuse Interdicts - Interdicts under the Domestic Abuse (Scotland) Act 2011

The legislation uses the phrase that an interdict can be deemed a domestic abuse interdict if it has been made against a person who is, or was, in an intimate personal relationship with the applicant, i.e. partner or ex-partner (see the definitions of domestic abuse at the beginning of this booklet for more information).

There is no change in the law in relation to abuse by other "non-partners". Abusive family members who are not partners or ex-partners, whether or not they normally live in the victim's home, will not be subject to this improved level of enforcement.

Limitations of Interdicts

Ultimately, an interdict is a court order on a piece of paper, and it is not total protection against a truly determined abuser who cares nothing for the consequences of breaching a court order, however the Domestic Abuse (Scotland) Act 2011 has significantly improved the protection to be had for interdicts that qualify as Domestic Abuse interdicts.

Please note and bear in mind that **Domestic Abuse Interdicts** under the 2011 Act means something different from Domestic Interdicts under the 2006 Act, and confusingly an interdict could be one, or the other, or both!

A further limitation of interdict is that it specifies very clearly to the abuser what it is that he or she must not do. Some abusers are sometimes motivated enough, usually with the help of others not covered by the interdict, to continue molestation but in ways, or by people, not covered by the interdict.

Non Harassment Orders

A person being harassed or stalked can use the Protection from Harassment Act 1997 to apply to court for a Non Harassment Order. These are much more difficult to obtain than interdicts because the applicant must prove to the court that there has been what is referred to as a "course of conduct" constituting harassment. A "course of conduct" means that there must have been at least two incidents. The Procurator Fiscal can ask for a non harassment order in the criminal case against the offender.

If you are advising women, check whether there is a criminal case pending against the abuser and ask if the Procurator Fiscal intends to seek a Non-Harassment Order. This is useful because it means that the woman does not need to incur the cost of obtaining one herself.

Why get a Non Harassment Order?

Although it is likely that someone experiencing domestic abuse would see a Domestic Abuse Interdict, there may be times when they would wish to get a Non Harassment Order. It may be useful to get a non harassment order because:

- Breach of the order is a criminal offence
- It is punishable by up to 5 years imprisonment or an unlimited fine

There are, however, specific issues relative to using a non harassment order. Any breach of the order must be reported by the woman and the standard of proof required by the court to prove that a breach did indeed occur is the more exacting criminal standard that the breach must be proved beyond reasonable doubt. The standard of proof used in breach of interdict cases is the less complicated standard of proving that the breach, on the balance of probabilities, did likely occur.

Interdicts under the Domestic Abuse (Scotland) Act 2011

This Act changes the Protection from Harassment Act 1997, by making provision in relation to harassment amounting to domestic abuse and to make breach of an interdict relating to domestic abuse with a power of arrest attached a criminal offence. It doesn't hugely change legal protection available - rather it aims to remove some barriers within previous legislation to securing legal protection against on-going harassment (this Act removes the need to evidence "a course of conduct"). The legislation also states

that an interdict can be deemed a domestic abuse interdict if it has been made against a person who is, or was, in an intimate personal relationship with the applicant.

Exclusion Orders

Exclusion orders can be granted in a situation where either one or both parties in a relationship have the right to occupy a house (whether by ownership or lease). The exclusion order is a suspension of the occupancy rights of a person to live in the house. The test to be met is that it is necessary for the physical or mental health or well-being of the applicant partner. This is quite a high test, and legal advice will always be required on circumstances where someone wishes to know whether the test will be met. There can be limitations to exclusion orders.

Actions of Harassment

In an action seeking interdict and or non-harassment orders, a victim can also claim damages for compensation for loss, injury and damage sustained as a result of abuse, (this is separate from any right to use the Criminal Injuries Compensation Scheme on which separate advice should be taken). Legal advice should be sought on the issues involved, which can be very complicated. It is worth indicating, however, that a claim for damages, even if theoretically possible, may be pointless if the perpetrator has no resources from which any award could be paid.

Action of Lawburrows

This is an ancient Scottish remedy which is still technically competent, in which an unruly, violent and abusive person can be forced to find monetary security for his behaviour and risk forfeit that money in the event of further behaviour. Although still competent and quite regularly referred to as an option, it is uncommon, and doesn't offer anything that can't be better obtained under the process mentioned above (Actions of Harassment).

Forced Marriage Legislation

Legislation exists to help protect those who are threatened with a forced marriage. For example it may be necessary to consider criminal offences of assault, unlawful imprisonment, theft (e.g. of a passport).

Since September 2014 a specific criminal offence has been created in Scotland of forcing someone to marry.

Civil legislation can be used to help protect those at risk of a forced marriage and can help if a forced marriage has already taken place.

What is a Forced Marriage?

The definition of a forced marriage will depend on whether civil or criminal law is being considered.

For the purposes of the civil law and Forced Marriage Protection Orders the appropriate legislation is The Forced Marriage, etc (Protection and Jurisdiction) (Scotland) Act 2011. A forced marriage is a marriage in which one or both spouses do not (or in the case of children/young people/adults at risk, cannot) consent to the marriage, and duress is involved. Duress can include physical, psychological, financial, sexual and emotional pressure, threatening conduct, harassment, threat of blackmail, use of deception and other means. It is also 'force' to knowingly take advantage of a person's incapacity to consent to, or understand the nature of, the marriage. Duress may be from parents, other family members and the wider community.

Forced marriage is a form of violence against women/gender based violence and, where children are involved, child

abuse. It is often associated with other forms of domestic abuse and 'honour based' violence.

The Difference between Forced and Arranged Marriage

Forced marriage is different from arranged marriage. In an arranged marriage, the families of both spouses take a leading role in arranging the marriage but the choice whether or not to accept the arrangement remains with the prospective spouses.

The 2011 Act covers both heterosexual marriage and same sex civil partnerships and can protect those who are already in a forced marriage or are being threatened with one. These are:

- clarifying the position of Sheriffs in relation to annulling forced marriages;
- introducing Forced Marriage Protection Orders; and
- making it a criminal offence to breach a Forced Marriage Protection Order.

Forced Marriage Protection Orders (FMPO)

A Forced Marriage Protection Order is granted by a court. A victim of Forced.

Marriage can apply for one as can a 'relevant third party', such as a local authority (this would be similar to a local authority applying for other legislation, i.e. an anti-social behaviour order).

A court itself can also grant a FMPO if it believes a person is a risk and that a FMPO would protect them. The order can be issued against someone who is believed to be trying to force someone into marry and can compel them to do certain things, such as surrender their passport or present with the victim at a police station, in order to protect the victim and to stop the forced marriage taking place.

For the purposes of the criminal law the appropriate definition is provided by the Anti-social Behaviour, Crime and Policing Act 2014

It will be an offence if a person "(a) uses violence, threats or any other form of coercion for the purpose of causing another person to enter into a marriage and (b) believes, or ought reasonably to believe, that the conduct may cause the other person to enter into the marriage without free and full consent."

A Criminal investigation doesn't prevent a protected person or third party from applying for a Forced Marriage Protection Order or any other civil or criminal protection or assistance

Differences between legislation in Scottish and in the rest of the UK

The main difference between the Scottish legislation and that for England and Wales is that in Scotland a breach of a FMPO is automatically a criminal offence. In England and Wales it may not be, if a power of arrest has not originally been attached to the FMPO. In these cases, a person would have to go back to court to ask for a warrant for the arrest of the person who breached the order.

It is important when giving information on Forced Marriage legislation that guidance issued in Scotland is used.

More information

The Scottish Government has issued guidance on Forced Marriage.

The Summary of "**Responding to Forced Marriage: Multi-Agency Practice Guidelines**" is available at:

www.scotland.gov.uk and includes information on how to react when someone discloses an actual or potential forced marriage and options for support.

Finding a Solicitor

If a woman wishes to apply for a protective order, she needs to get a solicitor and should look for one who does family law. Most solicitors who practice civil law also do family law.

The woman may also need to check that the solicitor's firm will carry out the work under Legal Aid funding. If a woman needs help identifying a solicitor she can contact The Law Society of Scotland (0131 226 7411). Personal recommendation by word of mouth is another way of finding a good solicitor and advisors may wish to contact organisations such as Women's Aid for names of solicitors either themselves or women have had a good service from.

The Civil Legal Assistance Office – Highland & Islands ("CLAO") has been set up by the Scottish Legal Aid Board to assist people resident in the Highlands and Islands who have difficulty finding a solicitor or who have unmet civil (not criminal) legal need. As it is part of the Scottish Legal Aid Board, CLAO is a public service. The CLAO operates a referral system for people eligible for civil legal aid, and will first try to find an appropriate solicitor in private practice, able and willing to take the case on under legal aid. If such a solicitor cannot be found, CLAO's own solicitors will usually be able to take the case on themselves subject only to the type of case and the capacity in the office workload at the time, but cases relating to the sorts of issues covered in this guidance are usually able to be taken on.

The **Civil Legal Assistance Office** in Inverness can be contacted on:
0845 123 2353

Legal Aid

Legal Aid can be an important factor in being in a position to pursue a legal remedy for women experiencing domestic abuse. Legal Aid is basically the way that the state pays for legal services to be provided to individuals, and usually, if Legal Aid is not available, legal services will require to be paid for privately. Legal services, especially if a court action is involved, can be expensive.

There are a number of types of Legal Aid, but only two are relevant and considered here. The different forms of Legal Aid not only apply to different types of work done by legal services, but there are also different eligibility criteria and it is not at all uncommon to find that a person is eligible for one form of Legal Aid, but not for another.

Although you can gauge eligibility for Legal Aid before applying for it, you cannot actually make an application until you have found a lawyer able and willing to undertake the work you seek done on a Legal Aid basis. Finding a lawyer who does Legal Aid work can be difficult in some parts of the country but not in others. Finding a solicitor who does Legal Aid work and who also has got the ability to reorganise their other work so as to be able to handle the significant work involved in an interdict case at short notice is much more difficult.

The two types of legal aid usually relevant in the current context are:

- **Advice & Assistance** – this covers preliminary work with a lawyer including meetings, correspondence, advice and preparing an application for Civil Legal Aid, but Advice & Assistance stops short of covering the work required for a court action.
- **Civil Legal Aid** – the form of Legal Aid required for a court action.

Advice & Assistance is granted by the solicitor based on information given to the solicitor and is available quickly. Civil Legal Aid requires an application to be submitted to the Scottish Legal Aid Board (SLAB) in Edinburgh and the application process has a number of steps which means that it can take up to several weeks to prepare and lodge an application for Civil Legal Aid, and several more for it then to be processed. There are however special urgency steps that can be taken in emergency situations where urgent court action is required but Civil Legal Aid has not yet been granted.

Information on the financial aspects of eligibility is available in leaflets which are widely available, and online at the SLAB website (www.slab.org.uk) or from the Citizens' Advice Bureaux (CABx) and other advice agencies. Either form of Legal Aid can involve payment of a contribution, although for those with very low or core benefit income, there is usually no or a small contribution.

Advice & Assistance in relation to cases involving abuse, harassment or molestation is generally granted subject only to the means test applicable. For Civil Legal Aid, as well as a means test, the Scottish Legal Aid Board are also required to consider whether there is a state-able case, and that it is reasonable to grant legal aid.

A solicitor will explain to a client the full details of Legal Aid.

Housing & Domestic Abuse

Getting a court order to keep the abuser away from the home - Exclusion Orders

Cohabiting Women

The woman is not married to the abuser but they are living together as husband and wife.

1) The woman is the tenant / joint tenant, or is the owner/ joint owner of the family home.

Because of her owner or tenant status, the woman has automatic occupancy rights. This means that she has the right to stay in the home and not be put out by her partner.

If her abusive partner is a joint tenant or owner, or has applied to, and been granted occupancy rights by the court, then she needs to apply to the Sheriff Court to get an order known as an **Exclusion Order** to keep him out of the home.

If her abusive partner is not a joint tenant or owner, or has not been granted occupancy rights by the court, she has no need to apply for an Exclusion Order, because he has no legal right to reside in the property. She can tell him to go and has the right to change the locks on the property after giving him reasonable notice to leave and remove his property. If the abuser refuses to leave, she can apply for an Order for Summary Ejection, enforceable by Sheriff Officers, to forceably remove him.

2) The woman is not the tenant / joint tenant, or is not the owner/ joint owner of the family home.

In this case, the woman does not have automatic occupancy rights but can apply to the Court to get occupancy rights. At the same time as applying for her occupancy rights, she can apply to get the abuser excluded

Married Women

1) The woman is married and is the tenant/joint tenant, or owner / joint owner of the family home.

All married women have an automatic right to stay in the family home. If she wants to get the abuser excluded, she needs to apply for an Exclusion Order.

2) The woman is married but is not the tenant or joint tenant, nor does she own or jointly own the family home.

Being married, the woman still has an automatic right to stay in the family home. Again, if she wants to get the abuser excluded, she needs to apply for an Exclusion Order.

Other Orders

A woman can also apply to court for orders to do with the family home:

- An order to get the tenancy put into her name.
- An order to be able to use the furniture in the house.
- An order so that the abusive partner has to contribute to certain household costs, for example, hire purchase costs for a household item.

What if you own your home and can't pay the mortgage?

If there are mortgage arrears, caused by your partner leaving the home, and the lender raises a court action against you, you can lodge a defence to the action in terms of the Mortgage Rights Act 2001.

You can make an arrangement to repay the arrears at a reasonable rate, along with your monthly mortgage.

Your lawyer will tell the court that the reason for the arrears was that your income has changed/reduced because your partner has left (or you had to get them excluded).

What if you don't own the house but there are mortgage arrears?

If the lender raises an action in terms of the standard security over the house due to arrears, even if you don't own the house, you are still entitled to be notified about such an action. You can lodge a Mortgage Rights defence, but you must seek legal advice. If you qualify for income support, you may qualify for help with your mortgage payments from the Department of Work and Pensions. See a welfare rights officer or other welfare benefits advisor.

Homelessness

A woman fleeing domestic abuse may find herself homeless. This section is about her rights to housing. The main legislation she can use is:

- Housing (Scotland) Act 1987
- Housing (Scotland) Act 2001
- Homelessness, etc (Scotland) Act 2003
- Matrimonial Homes (Family Protection) (Scotland) Act 1981, as amended (information on this legislation is included in the 'Civil Measures' section of this booklet)

The 2001 Act places a duty on local authorities to ensure that advice on homelessness and the prevention of homelessness is available free of charge to anyone who wants it. It also places certain duties on local authorities in terms of access to and provision of temporary and permanent accommodation. This gives women and their children certain rights when they are fleeing domestic abuse.

What Rights to Housing does the Woman Have?

If a woman has to leave the home because of domestic abuse, and it is not safe for her to return, she is by definition homeless and in priority need in terms of the 2001 Act. It is necessary for a Local Authority to make a formal assessment of this status, following which there is a right to a permanent housing outcome.

A woman is homeless even if she has accommodation and:

She cannot secure entry into the house.

Or

There is a threat of domestic abuse if she continued living there, from a partner or ex-partner.

She should contact her nearest local authority housing office or service point to make a homelessness application. An assessment of homelessness will be made as soon as possible and if out of hours an assessment can still be made by calling the Housing Out of Hours Service on 0845 700 2005.

Is the woman entitled to any help while the Council is making enquiries about the application?

Yes. There is a duty on the council to provide temporary accommodation to all homeless persons, while they progress enquiries, where there is no other accommodation available.

Did the woman become intentionally homeless?

If a woman has to give up a house due to domestic abuse or because of the risk of domestic abuse then the local authority cannot decide she is intentionally homeless.

Is there a right to appeal against a decision not to treat someone as homeless?

There is a right to an internal review of the decision not to accept someone as homeless. There are time limits for making the review (within 21 days) and the review should be made in writing. Seek advice from a housing advisor in those circumstances.

If the review is unsuccessful, there may be scope for bringing a Judicial Review case.

The circumstances in which someone can raise a Judicial Review are limited but the woman should take advice from a solicitor about this.

Other Help

Money and Benefits

Women who leave an abusive partner, may be eligible for a number of benefits and other financial assistance in their own right. The Highland Council's Welfare Team provides professional advice and support regarding benefits and some other money related matters for anyone living in the Highlands. They also produce a guide about benefits that you may be entitled to and their service is free and highly confidential.

The Highland Council's Welfare Team

The aim of the team is to put more money in your pocket so that you can pay your bills, heat your home and have a better quality of life. The Welfare Team do this by ensuring you receive quality and timely support to secure everything you are entitled to. They undertake benefit checks to ensure you are not missing out on any benefits and complete benefit forms on your behalf. The Team will even challenge and appeal decisions about your claims and help you to budget and to deal with other money matters.

Many benefits take your income into account. However some are based on your individual circumstances. For example, if you need help to look after yourself because of physical or mental disabilities you may qualify for benefits known as Personal Independence Payment or Attendance Allowance. If either of these benefits are awarded to you, they can help to obtain additional benefit for you and may also qualify you for concessions on public transport,

exemption from road tax, the Blue Badge Scheme, and the Motability Scheme.

Don't miss out, find out.

Getting in touch with the Welfare Team is the first step to maximising your potential income and managing your money well.

You can contact The Highland Council's Welfare Team:

Phone: **0800 090 1004** (there may be a charge from mobile phones)

or complete their secure online request form for advice at:

www.highland.gov.uk/welfareadvice

Other sources of help:

You can also get help and advice on Benefit and Money Advice issues from your local Citizens' Advice Bureau (CAB).

Support Services

Advocacy Highland	01463 233460
Amina Muslim Women's Helpline	0808 801 0301
Caithness & Sutherland Women's Aid	0845 408 0151
Domestic Abuse and Forced Marriage Helpline	FREEPHONE 0800 027 1234
Duty Social Work office (Emergency out of hours)	01463 252999 0845 601 813
Forced Marriage Unit	020 7008 0151
Hemat Gryffe Women's Aid Glasgow Asian, black minority ethnic women and children	0141 353 0859
Housing Department and emergency out of hours	01349 886691
Inverness Women's Aid	01463 220719
Lochaber Women's Aid	01397 705734
Police	101
Police in an emergency	999
Ross-shire Women's Aid	01349 863568
Rape & Sexual Abuse Services Highland (RASASH)	03330 066909
Shakti Women's Aid Edinburgh Black and minority ethnic women and children	0131 475 2399
Victim Support Highland	01463 258834

