

## RESPONSE FORM

### DISCUSSION PAPER ON CIVIL REMEDIES FOR DOMESTIC ABUSE.

We hope that by using this form it will be easier for you to respond to the proposals or questions set out in the Discussion Paper. Respondents who wish to address only some of the questions and proposals may do so. The form reproduces the proposals/questions as summarised at the end of the paper and allows you to enter comments in a box after each one. At the end of the form, there is also space for any general comments you may have.

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In order to access any box for comments, press the shortcut key F11 and it will take you to the next box you wish to enter text into. If you are commenting on only a few of the proposals, continue using F11 until you arrive at the box you wish to access. To return to a previous box press Ctrl+Page Up or press Ctrl+Home to return to the beginning of the form.

Please save the completed response form to your own system as a Word document and send it as an email attachment to [info@scotlawcom.gov.uk](mailto:info@scotlawcom.gov.uk). Comments not on the response form may be submitted via said email address on our website. If you prefer you can send comments by post to the Scottish Law Commission, Parliament House, 11 Parliament Square, Edinburgh, EH1 1RQ.

We ask for responses to be submitted by **22 January 2025**.

**Name:**

Claire Kettlewell, Head of Service on behalf of the solicitor team at The Civil Legal Assistance Office who have directly contributed to this collective response across our three offices.

**Organisation:**

The Civil Legal Assistance Office (CLAO).

**Address:**

1. CLAO Highlands and Island's Office: 2 Castle Wynd, Inverness, IV2 3EB
2. CLAO Aberdeen Office: Annexe, Migvie House, 23 North Silver Street, Aberdeen, AB10 1RJ
3. CLAO Edinburgh Office: 4th Floor, Thistle House, 91 Haymarket Terrace, Edinburgh, EH12 5HE.

**Email address:**

kettlewellcl@clao.org.uk.

# Summary of Proposals

## 1. 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?

### Comments on Proposal 1

In short, yes. In our experience, initial difficulties arise due to a lack of understanding of victims'/survivors' rights in this context and of the importance of seeking early legal advice.

For example, we have encountered cases where victims/survivors have erroneously been told that they cannot remain in the property without the permission of the entitled party. Or, where victims/survivors have left the shared home to reside in a women's refuge, temporary or homelessness accommodation and are unaware of their right to apply for occupancy rights at the point of separation. By that stage, it can be difficult to persuade a Sheriff of the need to grant occupancy rights when the victim/survivor has already secured alternative accommodation albeit it may not be suitable for the needs of the household. Once victims/survivors do become aware of their rights, they sometimes do not seek to utilise these as they believe it will provoke retaliation from the perpetrator. There may have been incidents of previous domestic abuse where Police have been called to the home for disturbances and have told victims/survivors that they cannot remove the perpetrator because they have a legal right to reside in the property and cannot be removed.

Further difficulties arise because of the process itself. Applying to the court for occupancy rights can be an onerous burden to place on victims/survivors who ultimately need time and support to secure suitable alternative accommodation. It requires finding and instructing a solicitor, which can be difficult in practice, and have financial implications even where legal aid is available. The prospect and act of raising a court action to seek occupancy rights can also be intimidating, especially where the proceedings are defended by the perpetrator. Victims/survivors requiring urgent protection can also experience delays with the court process.

We acknowledge the difficulties highlighted within the discussion paper in relation to the possibility of cohabitants acquiring occupancy rights automatically where they are they in fact the perpetrator, ensuring that interference into the entitled occupant's property rights is proportionate and recognising the different legal regimes for spouses/ civil partners. We would nevertheless suggest, particularly in light of the growing prevalence of cohabitation, that more needs to be done to improve awareness of "non-entitled" cohabitee rights, the ability to access early legal advice and assistance, and the court process to make it less burdensome on victims/survivors and allow greater flexibility in terms of, for example, duration of orders conveying occupancy rights.

## 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?

### Comments on Proposal 2

Yes, as noted in the discussion paper, returning to court at regular intervals to request an extension can be time-consuming, costly, stressful, risk unnecessary re-escalation in a domestic abuse situation and potentially be unsafe. Reform to allow the courts flexibility to determine the appropriate amount of time for occupancy rights to be given in each case, beyond the standard six months, would therefore be welcome.

Whilst we understand the need to strike a balance between the entitled and non-entitled party's respective positions, we would suggest that setting a strict upper statutory limit, such as the 12 months proposed, could still give rise to the issues highlighted above. There can be reasons that are

clear at the outset of a case why a period longer than six or even 12 months is required, for example the needs of any children in the home or lack of available suitable housing options in certain geographic locations where accommodation shortages are a particularly acute issue. Allowing Shrieval discretion to determine the most appropriate duration of 12 months or longer would in our view, afford better protection to victims/survivors and their families.

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

#### **Comments on Proposal 3**

Whilst in our view the court should continue to consider a variety of factors relevant to the specific circumstances of each case and that any list should therefore not be exhaustive, some factors that may assist exercise of the court's discretion include:

- the circumstances and resources of each party, including parties' housing needs and availability of suitable alternative accommodation
- the circumstances, welfare and views of the parties' children (e.g. nature of the care arrangements, health and education)
- impact (for example financial, health, safety, employment, homelessness) on parties' and any children if the order is not granted
- parties' conduct, including the perpetration of domestic abuse and related convictions.

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

#### **Comments on Proposal 4**

As highlighted within Chapter 5 of the discussion paper, inclusion and definition of the term "domestic abuse" that applies across the relevant legislative regime and in this specific context would enhance protections for victims/survivors.

Also, as referenced in our response at Proposal 1, work to generate better understanding of cohabitants' rights among the public including the statutory, advice and support agencies that have direct contact with victims/survivors (for example a public campaign or national training) is needed to promote informed decision-making and exercise of rights. Access to early and holistic legal assistance, irrespective of the victim/survivor's geographic location, is also needed.

As a victim/survivor non-entitled cohabitant may need to seek civil protective orders in addition to occupancy rights, we would also support reform to ensure that the legislative regime for protective orders applies equally to cohabitee victims/survivors as it does to spouses and civil partners. For example, see our response to Proposal 20.

### **5. Does the definition of "cohabiting couple" in the 1981 Act give rise to any concerns in practice?**

#### **Comments on Proposal 5**

There should in our submission be consistency in the definition of a "cohabiting couple" across the legislative framework. We would suggest that whether there are children of a cohabitant relationship, whilst this should be a factor when considering the granting of occupancy rights, the presence of

children should not be a factor in defining a cohabitant relationship. Whilst we note the comments within the discussion papers, this would help consistency and clarity across the piece, which would presumably be a key aim of any reform in this area. We would therefore support the definition being brought in line with the 2006 Act.

**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?**

**Comments on Proposal 6**

Yes. This would enhance protection of victims/survivors and of any children in the home impacted by the perpetrator's conduct as well as remove the need in the most serious cases for a non-entitled victim/survivor to raise civil proceedings seeking occupancy rights (with all the difficulties that process entails as referenced in our response to Proposals 1 and 2). The courts can already consider certain protective measures and orders (for example special bail conditions or Non-Harassment Orders) in this context and so it would make sense and better protect victims/survivors if Sheriffs presiding in criminal cases also have the power to suspend a party's occupancy rights when it has been established that party has committed serious domestic abuse offences.

**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?**

**Comments on Proposal 7**

N/A.

**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?**

**Comments on Proposal 8**

Yes, and for the reasons referenced within the discussion paper. This will provide equal protection in a broader range of situations and allow the Court to take account of certain relevant factors, including the availability of suitable alternative accommodation for the impacted party and any children involved. Parties should have the option to "contract out" of this statutory protection however, for example, via a cohabiting agreement.

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

**Comments on Proposal 9**

Yes, this recognises the election not to formalise the relationship by marriage or civil partnership. However, protections should be in place in line with the usual rules that apply to contract law in Scotland to ensure that due regard is made to any arguments that the contract was signed under duress, undue influence, coercion, forged signatures, and so on.

**10. 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?**

**Comments on Proposal 10**

Yes, to provide greater clarity of the scope of acts covered and to mitigate the risk of an entitled party’s abusive conduct undermining the protection of the victim/survivor’s occupancy rights.

**11. 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?**

**Comments on Proposal 11**

N/A.

**12. 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?**

**Comments on Proposal 12**

N/A.

**13. What legal measures do you think could prevent this happening?**

**Comments on Proposal 13**

N/A.

**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?**

**Comments on Proposal 14**

Yes, requiring communication to be via the victim/ survivor’s agent would provide some measure of protection from situations where the perpetrator is using the legal process to exert control. It is not uncommon in cases involving domestic abuse for perpetrators to use communications related to the legal case (for example solicitor’s letters, court documents) to intimidate and overwhelm victims/survivors. This option would enable the victim’s representative to relay the information contained in the perpetrator’s communication in a safe environment, with the appropriate supports in place.

**15. 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?**

**Comments on Proposal 15**

Yes. As noted in the discussion paper, the protections offered by interdicts ancillary to exclusion orders may continue to be relevant post-divorce/dissolution. For example, an ancillary interdict preventing entry to the matrimonial home. The home may no longer be matrimonial property, but we have encountered cases where perpetrators continue to feel entitled to enter the former matrimonial home despite cessation of their legal right to the property. There should be discretion to continue interdicts previously granted post-divorce where reasonable and justified for the victim/survivors ongoing protection.

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

**Comments on Proposal 16**

Yes. Having this expressly included would help clarify the parameters of the available legal protections to, for example, victims/survivors who may have had to leave the property urgently for their own safety but require to return, and/or exclude a perpetrator who had left the home but is threatening to return.

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

**Comments on Proposal 17**

Whilst experience throughout the Sheriffdoms and Sheriff Courts varies, overall, we agree that the statutory test can be interpreted as creating a high threshold and evidential burden for victims/survivors seeking to remove an entitled perpetrator. We would refer to our comments at at Proposal 1.

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

**Comments on Proposal 18**

N/A.

**19. 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?**

**Comments on Proposal 19**

Yes, unification and simplification of the terminology would promote clarity and be more reflective of modern society and relationships.

**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?**

**Comments on Proposal 20**

Yes. We see no practical or legal basis for the current distinction. Aligning the process to that which applies to spouses and civil partners would better protect victims/survivors irrespective of their relationship status.

**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?**

**Comments on Proposal 21**

Yes. This would improve protections for victims/survivors and enforcement of interdict. It would also avoid the need for the victim/survivor to return to court during the lifetime of the interdict to seek renewal of the power of arrest (PoA) and bear the potential cost and distress associated with this. This change would be proportionate given the available mechanism for the defender to apply to the court to have the PoA recalled.

**22. 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?**

**Comments on Proposal 22**

CLAO's experience is that the test for attaching a PoA is applied appropriately and is not too high. Difficulty can sometimes arise in respect of how the term "necessary" is interpreted by different courts and sheriffs. This can be for various reasons but having greater consistency in how this is applied would be appropriate. Guidance for parties on the court's expectations with regards to the information that would help support such an application, for example reports from experts or affidavits from witnesses, would be helpful.

In practice, and as noted in the discussion paper, we would agree that it is less cumbersome to apply for an interim interdict followed by a Non-Harassment Order. Non-Harassment Orders are more readily understood by clients and police implementing them as they are commonly granted in criminal proceedings.

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

**Comments on Proposal 23**

Yes, we strongly support this for the reasons outlined in paragraphs 5.23 and 5.24 of the discussion paper. The proposed reform would far better promote access to justice for victims/survivors than the current overly complex regime.

**24. Should the delict of domestic abuse be defined in terms of "abusive behaviour", as in the 2018 Act?**

**Comments on Proposal 24**

Yes. This definition is well understood by statutory agencies and the courts and if made applicable to the civil context, would support a consistent response across the justice system to this form of abuse, which often raises civil and criminal law elements. It would also allow the victim/survivor and

perpetrator to have greater awareness of the situations that could and should be considered domestic abuse, including coercive control.

**25. If not, what definition do you propose instead?**

**Comments on Proposal 25**

N/A.

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

**Comments on Proposal 26**

Yes, although consideration and guidance would be required on how this term is to be interpreted and applied by the courts in a civil context.

**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?**

**Comments on Proposal 27**

Yes. This is a growing form of abuse. In our experience, victims/survivors can be subjected to ongoing monitoring and abuse by perpetrators who have access to devices and/or software even after the relationship ends. For example, a family computer, gaming devices, or via online banking where small deposits such as five pence can allow the perpetrator depositing money to the victim's bank account to leave them abusive/controlling/coercive messages. This can prevent the victim/survivor from feeling secure in locations where they are meant to be safe and/or anonymous.

Including specific protections would help ensure that this method of abuse is appropriately recognised and that suitable protections, to prevent escalation of offences, can be put in place.

Factors that could be included: specific orders on removal of devices from perpetrators, restricting use of specific Apps or access to devices where this is part of a course of abusive conduct. We would also agree with the comments at paragraph 5.51 that any definition would need be "future-proofed" due to the evolving nature of technology.

**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?**

**Comments on Proposal 28**

Yes, given the vulnerabilities and susceptibility to exploitation of this group of victim/survivors. Specific inclusion of this type of abuse would help those statutory agencies and support organisations that have direct contact with victims/survivors to recognise this form of abuse and better support/signpost victims/survivors to sources of help and legal assistance.

Factors that could be included are orders requiring the return of immigration papers and/or passports, and/or dispensation of the need for the perpetrator's consent to matters such as passport

application or travel for a child where it is evidenced that the perpetrator's conduct in this regard is part of a course of abusive behaviour.

**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?**

**Comments on Proposal 29**

Yes. We are aware from our casework that most domestic abuse cases feature some form of economic abuse perpetrated against victim/survivors. This should be recognised and included in any definition to ensure that it can be appropriately protected against and/or to ensure recompense in any delict damages actions.

We also agree that the definition of "economic abuse" should be modelled on the definition contained within the Domestic Abuse Act 2021 for reasons that we have highlighted elsewhere in our responses related to promoting consistency, clarity and access to justice.

**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":**

- (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?**

**Comments on Proposal 30**

Yes. We support all elements of the proposed Domestic Abuse Civil Protection and Redress Order.

In terms of an additional order, a provision that would allow the Sheriff to make any other order they deem appropriate to prevent ongoing abuse of the applicant or any child of the relationship, may be beneficial to ensure courts can put in place adequate and tailored protections in each individual case.

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

**Comments on Proposal 31**

Yes. This is essential in our view to secure immediate protection, relief and prevent any prejudice to the victim/survivor arising from further abuse, pending the Court's determination of the full order.

We would also agree that the test for each element of the DACPRO should be on the balance of convenience. This is the current test for an interim non-molestation interdict, and any reform should not make obtaining orders on an interim basis more difficult than it is at present.

**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?**

**Comments on Proposal 32**

We can understand the rationale for mirroring the scheme within the 2021 Act, however the time limits of three weeks for an interim order and two months for a final order may not allow sufficient time to progress matters. We would refer to the risks highlighted in our response at Proposal 2 where parties require to apply to the Court to seek extensions. We would suggest that overall Shrieval discretion to determine the duration and allow for a longer period, based on the individual facts and circumstances of the case, would better protect and support victims/survivors and any children involved.

**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?**

**Comments on Proposal 33**

Yes. This is in our view necessary for the safety of victims/survivors and any children, including preservation of documents, property and pets, pending determination of the full order. As highlighted in the discussion paper, interim interdicts can already be sought for a similar purpose on an ex parte basis. Moreover, we know from our casework that service of court papers on perpetrators can lead to further abuse.

**34. Should a barring order be available only on notice, and not ex parte?**

**Comments on Proposal 34**

We note the concerns raised within the discussion paper regarding potential for the barring order process being open to abuse by the perpetrator for the purposes of excluding the victim/survivor. We do however also anticipate cases where victim/survivor clients at imminent risk would have a genuine need to seek a barring order ex parte. Therefore, if barring orders are only to be available on notice, it would be important for victims/survivors to have the reassurance and protection from other emergency mechanisms and measures (for example police protection, the 2021 scheme) for those cases where there is an imminent risk.

**35. Should breach of an interim or final DACPRO (excluding redress orders) constitute a criminal offence?**

**Comments on Proposal 35**

Yes. This is key to ensuring protection of victims/survivors and providing a deterrent against non-compliance by perpetrators.

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

**Comments on Proposal 36**

Whilst we acknowledge the need for the defender to be properly heard and the importance of a fair process, on balance we do not think that breach of ex parte orders should be excluded from criminal sanction. A scheme of protection that enables breaches of interim orders to go effectively unsanctioned, in our view defeats the purpose of that scheme, or at the very least, undermines it.

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

**Comments on Proposal 37**

Further to paragraph 5.70, and similar to the enforcement measures available under the Protection from Abuse (Scotland) Act 2001, Power of Arrest and police detention powers can in practice can be critical to both victim/survivor and children's immediate safety. We would therefore support explicit reference to these and the option for these to be included in any DACPRO.

**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?**

**Comments on Proposal 38**

Yes, for the reasons outlined in paragraph 5.138 of the discussion paper. Our casework rarely features abuse of a victim/survivor by the perpetrator acting in isolation. Indeed, almost all casework involves clients seeking further advice on abuse/threats from other family members. Whilst a protection order may not be required in all such cases, it certainly would be in others.

**39. If so, should breach of a protection order by an associate constitute a criminal offence?**

**Comments on Proposal 39**

Yes.

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

**Comments on Proposal 40**

Yes, we would strongly support this.

**41. Should it be possible for a third party to seek a DACPRO on behalf of a victim/survivor?**

**Comments on Proposal 41**

Yes, but subject to limitations on when this can be done. We can see merit in this proposal where either the victim/survivor lacks capacity and their guardian seeks to obtain a protection order on their behalf, or, where, an appropriate regulated body, such as a local authority, is satisfied that an order is required but the victim/survivor is unable to apply for this themselves, For example, because they cannot source or fund a solicitor to help them with this, the victim/survivor would be at imminent risk or feels too unsafe to raise the action in their name. In the latter case, we would suggest that the local authority should only be able to act with the victim's consent. Maintaining the distinction between the civil and criminal approach in terms of victim/survivor consent and autonomy would in our view remain important not just as a matter of principle, but for practical purposes with regards to the victim/survivor's willingness/ability to engage with any protective planning put in place for them.

**42. If so, should they need the victim/survivor's consent to do so?**

**Comments on Proposal 42**

See our answer at Proposal 41.

**43. 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?**

**Comments on Proposal 43**

Yes, for the reasons detailed in paragraph 5.150 and subject to the safeguard limiting the number of applications that can be made by the defender set out in paragraph 5.152.

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

**Comments on Proposal 44**

N/A.

**45. 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)?**

**Comments on Proposal 45**

N/A.

**46. 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?**

**Comments on Proposal 46**

Yes, recognition of the far-reaching impact of domestic abuse on children and their resultant victimisation is to some extent already reflected in both criminal law and the children's hearing system. Recognising children as adjoined victims/survivors in the civil context would create greater

consistency across the justice system and generally improve legal protection for children where there are currently gaps in protection.

**47. 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?**

**Comments on Proposal 47**

Yes.

**48. 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?**

**Comments on Proposal 48**

- (a) Yes, we agree with the premise of this proposal and that this should also apply (for the reasons highlighted within the discussion paper) to cases where parties have reached consensus and seek to have this reflected in the order. This would ensure overarching judicial scrutiny of the care arrangements and that these are in the child's best interests considering the history.
- (b) Yes, this makes sense given the interconnectedness of the child's welfare to that of their parent's circumstances and safety. This would promote a more trauma-informed and child-centred approach by the courts and legal representatives instructed in these cases.

We would suggest that consideration should be given to amending the Ordinary Case Rules in line with the above proposals.

**49. 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?**

**Comments on Proposal 49**

We would support more input from and effective information sharing with relevant statutory agencies (for example, provision of relevant background information including previous domestic abuse related convictions, pending criminal court proceedings/charges, outcome of past and pending referrals to the Children's Reporter, timeline of formal child protection proceedings/statutory meetings), and better statutory mechanisms than exist currently for the court to request this information from agencies. This would provide the Sheriff with a reliable and rounded view of the domestic abuse history and potential risks.

**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?**

**Comments on Proposal 50**

Yes, we would strongly support this and believe there should be a presumption that special measures will be put in place in these cases. Our experience has highlighted the insufficiency in current protections. We have acted for victim/survivors who have decided not to give evidence, particularly where defenders are self-representing, due to the risk of cross-examination by the defender/perpetrator. Even when their attendance has been excused by Sheriffs and they do not intend to give evidence as a witness, the victim/survivor is still a party to the action and should be afforded the same protections so that they can effectively participate in the proceedings.

**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?**

**Comments on Proposal 51**

Yes, such persons should be entitled to apply to the court for special measures both as a party and while giving evidence.

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

**Comments on Proposal 52**

Yes, this should be available and there should in our view be provision within the Ordinary Court Rules requiring this to be actively considered by the Court as part of case management processes at an early stage and throughout the course of proceedings.

**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?**

**Comments on Proposal 53**

Yes. This would bring the civil justice system more in line with the approach and robust protections available in certain criminal cases. Our solicitors have reported a significant increase in defender party litigants in protective order cases and family court actions, often because they have been refused legal aid due to poor prospects. They have observed the detrimental impact unrepresented defender/perpetrator party litigants have on the victim/survivor's experience of the court process and on their wellbeing. It can prevent victim/survivor from raising necessary proceedings altogether. Preventing personal conduct would therefore mean victim/survivors are protected throughout court proceedings and that perpetrators cannot use the court process to further perpetuate abuse.

**54. 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?**

**Comments on Proposal 54**

Yes, but the Court should have the ability to order their own enquiries. See our response at Proposal 49. A disclosure requirement would be ineffective if wholly reliant on the perpetrator/defender being forthcoming. We have had recent experience of a case where the victim/survivor became aware through the criminal court rolls that their ex-partner, a Defender in an action for section 11 and protective orders in which we were instructed by the victim/survivor, was appearing in court for other matters. Had this client not been vigilant this information, which was relevant to the Court's determination in the civil case, would not have become known to agents and useful supporting evidence may have been lost.

**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?**

**Comments on Proposal 55**

See our answers at Proposals 49 and 54.

**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?**

**Comments on Proposal 56**

Yes. This data would assist with understanding of trends including demand/need and impact of the protection order scheme and inform future reform and decision-making relating to service and resource provision.

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

**Comments on Proposal 57**

We are aware from our casework which covers the Highland and Islands, Argyll and Bute, and Aberdeenshire, that victims/survivors in these rural and island areas face distinct challenges in their experiences of domestic abuse and access to protection. These unique challenges require to be addressed through tailored provision to meet the need of rural and island populations. In addition to the resource and practical barriers identified within the discussion papers, other areas requiring particular focus in our submission include:

- Further to Proposal 40, wider reform of protective orders so that they extend beyond the Sheriffdom in which they are granted, would be welcomed; this would ensure that rural and island victim/survivors are not “trapped” in their immediate locality/remote areas due to fear that leaving the area could result in resumption of abusive behaviour
- Access to legal representation can be particularly difficult for victims/survivors residing in remote and rural areas; we know that there can also be reluctance to seek assistance from solicitors who are either part of their communities or do not understand the unique pressures that these communities face
- Victims/survivors may not wish to pursue civil protective orders due to Court staff being members of the community and a perception that “everyone knows everyone’s business”, even where confidential information in private hearings would not be shared within the community – to alleviate this perception there could be an option on cause shown for another jurisdiction court to

deal with court actions and/or hearings and this distance may encourage those who experience this issue from seeking appropriate protections

- Additional special measures, such as remote hearings could also assist with privacy concerns, however we appreciate that this may not always be practical where rural communities do not have reliable access to technology.

**58. 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?

**Comments on Proposal 58**

- (a) Victims/survivors can face a significant financial burden, particularly if paying privately for a solicitor, to secure necessary protective orders in the Sheriff Court. An undefended action can cost in up to £2,000. Thereafter, they may require to meet additional costs if upon expiry of the order it requires to be renewed. Even when victims/survivors are eligible for legal aid, they may still under the current system require to pay a contribution towards the cost of their case/legal aid.

**General Comments on the Discussion Paper**

**General Comments**

N/A.

Thank you for taking the time to respond to this Discussion Paper. Your comments are appreciated and will be taken into consideration when preparing a report containing our final recommendations.