



## SCRA Consultation Response FULL VERSION

### SCRA Consultation Response to the Scottish Government Consultation on protective orders for people at risk of domestic abuse March 2019

#### SCRA Practice & Policy Team 2018

**Question 1: Do you think the police should have the power to bar a person from a home that they share with a person at risk of domestic abuse for a period of time and prohibit them from contacting that person, without the need to obtain court approval? If you wish, please give reasons for your answer.**

Yes.

In this response we are using the terms Domestic Violence Protection Notice (DVPN) and Domestic Violence Protection Order (DVPO) in order to explain our thinking – although this should not be the terminology adopted for protection orders in Scotland. The terms DVPN and DVPO are used in this response as they refer to orders existing in the UK and to the research and evaluation which has been done on the effectiveness of the orders elsewhere in the UK. The first version of our response was perhaps not clear enough and we would like to say that in Scotland the orders should refer to Domestic Abuse, not Domestic Violence, in line with Scotland’s strong domestic abuse legislation.

Although SCRA would normally want to see an underpinning factual or evidential basis for this kind of decision making, which would normally involve a Court, we are persuaded that there is a need for this approach.

We see this need existing within the current spectrum of decision making in relation to domestic abuse. We see the DVPN as an immediately available response to a situation where action requires to be taken. We think that the proposals as written can be interpreted differently though, and are not entirely clear about whether a protective order and related criminal proceedings could both be ‘live’ in respect of the same incident. Further clarity about this would be welcomed (and we will discuss this later as well).

As an immediate response to a situation of risk and in a situation where there is an absence of enough evidence for a criminal charge and protective bail conditions SCRA thinks that a domestic violence protection notice (DVPN) provide breathing space and additional protection for someone at risk.

This breathing space can make a real difference and as a result should be supported.

**Question 2: If the police are given a power to put in place measures to protect a person at risk of domestic abuse for a period of time, we would welcome views on how long that period should be. If you wish, please give reasons for your answer.**

SCRA thinks that a decision about the length of time the DVPN should have effect for should be determined primarily on the back of the research evidence.





We also think that there should be enough time for the Police or the Procurator Fiscal to properly apply for an application to court. We accept that 48 hours might not give the Police or the PF enough time, but we would question the rights implications of a DVPN issued by the Police lasting for more than 7 days.

**Question 3: Do you agree that the courts should be given powers to make an order to protect a person at risk of domestic abuse by prohibiting the person posing the risk from returning to the person at risk's home while the order is in force?**

**If you wish, please give reasons for your answer.**

Yes

SCRA thinks that a Court issued Domestic Violence Protective Order should follow on from any initial order (DVPN) issued by the Police.

We also think that there needs to be some thought given as to whether the DVPO HAS to follow a DVPN – or whether a DVPO could be applied for in cases where, for example, A DVPN would have been appropriate, but the Police did not apply for one.

SCRA think it is important that the evidence in relation to the ongoing risk of domestic abuse, as distinct from the fact and circumstances faced by Police Scotland Officers during an incident response, is assessed and determined by a decision maker, rather than an investigator. Therefore an application for a DVPO would need to be made to a Court and determined by a Sheriff (or a Justice of the Peace) – SCRA would ask that further consideration is given to jurisdiction for this decision making, as this will also impact on any appeal provisions developed in relation to the DVPN / DVPO decisions.

In order for victim-survivors to get the most out of the breathing space afforded to them by the order it needs to last for enough time to enable them to make any changes they feel they need to make; and even if they decide not to make changes the order needs to last long enough for a situation to calm and for additional protective measures to be put in place.

The crucial aspect of the DVPO is the 'safe space' it affords a victim-survivor.

**Question 4: If the courts are given a new power to impose measures to protect a person at risk of domestic abuse, we would welcome views on whether there should be a maximum period of time beyond which such measures would not apply and, if so, what that period should be.**

**If you wish, please give reasons for your answer.**

SCRA thinks that research evidence should be used as the basis for determining the maximum length of any order.





SCRA would be keen that the length of any DVPO is proportionate given that it is based on an assessment of risk, rather than on firm evidence of abuse.

We think that the length of the DVPN and DVPO should be clear and transparent for perpetrator and victim-survivor. It may be that the DVPN and DVPO have proscribed time limits OR that there are maximum time limits for each order and decisions about how long an order should last for could be taken on a case by case basis. SCRA thinks further scoping work on the time limits would be useful.

**Question 5: We would welcome views on which bodies and/or people should be able to make an application to a court to impose measures to protect a person at risk of domestic abuse.**

**If you wish, please give reasons for your answer.**

SCRA thinks that the Police should be responsible for a DVPN and that an application following on from that for a DVPO should be the responsibility of the Procurator Fiscal.

SCRA thinks that 3<sup>rd</sup> parties could be able to refer to the Police for consideration of a DVPN but we have some concern that this takes away from the immediate protection which is the strength of the order. We don't think it would be helpful for there to be a process whereby people other than the Police or the PF apply for protective orders. We think that the assessment of risk and any order which follows from that should be the responsibility of a professional body.

We also think that the process of risk assessment should be proscribed and should be consistently applied, so that the same framework and thresholds are applied whenever a DVPN is considered. The same approach should be developed for a DVPO. It would be very difficult to operate this consistent framework approach to thresholds if applications could be made by anyone.

**Question 6: Do you think a criminal court should be able to impose measures to protect a person at risk of domestic abuse that would bar a perpetrator from a shared home for a period of time, when sentencing the offender.**

**If you wish, please give reasons for your answer.**

Yes and No

This question is quite different - and isn't requiring an answer in relation to a DVPN / DVPO.

In relation to sentencing for domestic abuse offences or a domestic abuse aggravator then there is a clear argument for extending a 'safe space' to a victim-survivor as well as directing a perpetrator and victim-survivor towards professional interventions which could help.





In relation to sentencing for other offences it is more difficult to see how a case for affording protection to a 'victim-survivor' can be made – particularly when the details of the offence in question do not identify a victim-survivor or apply to an incident of domestic abuse.

**Question 7: Where an application is made to the court for measures to protect a person at risk of domestic abuse by someone other than the person at risk, should the consent of the person who may be at risk be required for such an order to be made?**

**If you wish, please give reasons for your answer.**

No

SCRA understand that one of the difficulties in relation to existing DVPN / DVPO legislation is the issue of consent. We think that if we were to open up the possibility of 3<sup>rd</sup> party or family members applying for protective measures then consent would be more problematic.

However, we are persuaded that consent is not necessarily required in order to give a person at risk breathing space. We make this statement as we firmly believe that the DVPN should be applied for by the Police and that the DVPO should be applied for by the PF – so that professional decision making in relation to the risks is at the heart of each application.

We also believe strongly that the protective order should not exist in isolation – it should form part of a package of support including referral to interventions like MARAC or the Caledonian System and should be monitored on an ongoing basis by an appropriate public body. We will expand on this later.

We also think that there should be a clear appeals process with proscribed timescales - so that perpetrators or victim-survivors are able to challenge the DVPN / DVPO.

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

**If you wish, please give reasons for your answer.**

No

SCRA thinks that the operation of the DVPN / DVPO in the first instance should be focussed on domestic abuse and the risk posed by a partner or ex-partner.

SCRA have had some discussion about whether the risk posed by stalking should also be included but we think that the kinds of protections which would be most relevant in relation to stalking are not the kind of protections which would be relevant to a DVPN / DVPO (for example, prohibiting access to a home where a 'stalker' might be a stranger or someone with no access to the home). We think there is the potential to





develop the approach – but would like to see more work done in order for it to apply fully to other circumstances.

If this approach is successful then we would ask that the legislation is able to develop to include a wider circle of at risk people and could include people at risk from a family member or from some other person.

**Question 9: We would welcome views on what you think the test should be for deciding whether to impose measures to protect a person at risk of domestic abuse. In particular, do you think it should be a requirement that the person against whom the order is sought must have used or threatened violence against the person to be protected by the order, or do you think a wider test covering our modern understanding of what constitutes domestic abuse (i.e. behaviour likely to cause psychological, as well as physical, harm) should be used?**

**If you wish, please give reasons for your answer.**

SCRA think that any test should be based on Scotland’s progressive domestic abuse legislation and should go beyond physical violence.

**Question 10: We would welcome views as to whether, as well as prohibiting the subject of the order from entering the person at risk’s home, it should also be possible to impose conditions on the subject of the order to prevent them from contacting or approaching the person at risk, or prohibiting them from entering other specified locations (such as the person at risk’s place of work or relatives’ homes).**

**If you wish, please give reasons for your answer.**

SCRA thinks that the provisions of any protective order should allow for a safe space to be created for the victim-survivor – and this may go beyond the confines of a home.

However, we are conscious that the order will prevent a perpetrator from accessing at least one address and we would ask that caution is taken to ensure that a perpetrator is not placed at significant risk because of a protective order preventing them having a safe address themselves.

**Question 11: Do you agree that, as well as enabling measures to be imposed to protect the person at risk, it should also be open to the police and courts to impose conditions requiring the subject of the order not to approach or contact any children living with the person at risk?**

Yes.

If there is a need to create a safe breathing space, then any victim-survivor having to manage contact between the perpetrator and the children is unlikely to be conducive to maintaining the safe space.





Contact is likely to be very controversial though – and contact decisions are difficult and nuanced decisions to make. Contact decisions may also be subject to appeal and to further scrutiny.

It may be that Police Scotland Officers attending to an incident of domestic abuse and applying a DVPN are not in a position to make an immediate decision which goes beyond the prohibition of contact for a specified period.

It may be that a prohibition on contact is all that is required for the DVPN / DVPO. Or it may be that the DVPO application / decision maker could be asked to consider contact in more detail or it may be that a decision making body like the Children’s Hearing are better placed to make those decisions.

SCRA thinks that some more work focussed on contact and contact decisions would be useful in determining whether such powers would be well placed in a DVPN / DVPO.

**Question 12: We would welcome views on whether it should be a criminal offence to breach measures put in place to protect a person at risk of domestic abuse. If you wish, please give reasons for your answer.**

SCRA thinks that the orders need to be have clear consequences for non-compliance, but we are not convinced that breach of an order should be a criminal offence. The order itself exists on the basis of risk assessment, not criminal behaviour and as one element of a range of responses which can be taken to a family situation.

It may be that a victim-survivor does not want a perpetrator to be prosecuted but that the space afforded by this interim intervention is positive.

Other organisations working directly with women and children affected by domestic abuse may be better placed to indicate what kind of consequence for non-compliance with the orders would be effective.

**Question 13: If you think breach of such measures should be a criminal offence, we would welcome views on what you think the maximum penalty should be. If you wish, please give reasons for your answer.**

No answer given.

**Question 14: We would welcome views on whether there should be a statutory duty on the police, when making an application to the courts, or putting in place protective measures, to refer a person at risk to support services and, if so, how this should operate. If you wish, please give reasons for your answer.**

SCRA thinks that there should be a statutory duty to refer both the perpetrator and victim-survivor to appropriate support services.





This could happen at the point the Police issue a DVPN – which we view as a significant intervention – and in order for any breathing space to have maximum effect the support services should be involved as soon as possible. However, we recognise that this may place some considerable time pressures on Police Scotland and further work may be required so that Police Scotland are appropriately resourced and able to issue the DVPN and refer for support.

If referral to support occurred when the DVPO was issued by the court, this would give enough time for the PF to get enough information together to progress a referral – but time would have been lost.

This approach can only succeed if there are appropriate support services available.

It will be incumbent on the Scottish Government to ensure that this is the case across the whole country.

**Question 15: Do you have any other comments you wish to make regarding the introduction of protective orders for people at risk of domestic abuse?**

We think that this could complement the existing supports available in Scotland – but that the approach will not work on its own. The protective order should be supported by referral to supports which can help, and should also be monitored whilst it is in force. Referral to the Caledonian System could be built into the approach – or consideration / monitoring of the situation by a multi-agency risk assessment / intervention meeting (MARAC).

It may also be appropriate to include a debrief or orientation interview in the week before the order ceases to have effect – to ensure that the victim-survivor has a safety plan and is aware that the order will cease to have effect and also to ensure that the perpetrator is aware the order will cease and what the consequences of that cessation are.

We think that the Courts should also have an eye on where a perpetrator will reside if an order prohibits them from entering an address. As mentioned previously in response to Q10 it is going to be critical for Police Scotland and the Court to have an eye on the circumstances of a perpetrator.

If a perpetrator is made immediately ‘homeless’ upon the issue of a DVPN there are logistical considerations in relation to immediate accommodation which may need to be provided by a local authority and in retrieving personal items from the home, which may require negotiation and / or professional support. In addition consideration may need to be given to supporting families where such an order creates an additional financial burden which may impact on how successful the ‘safe breathing space’ is on changing any dynamics within the home.

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

**If you wish, please give reasons for your answer.**

Yes.





Clear and comprehensive information in relation to exclusion orders may make the approach a more reasonable one for some people to take. We would support the development of this information.

**Question 17: Should any changes be made to section 4(3) of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and section 104(3) of the Civil Partnership Act 2004?**

**If you wish, please give reasons for your answer.**

Don't know.

We are not entirely clear what changes are proposed and would prefer to see the potential changes in more detail before providing any comment on this.

**Question 18: Should the law be amended to give the court wider powers on granting interdicts when the court is granting an exclusion order?**

**If you wish, please give reasons for your answer.**

If the clear and comprehensive information detailed above (question 16) also included information on exclusion orders it may be that this would have a positive effect and no legislative change would be required.

**Question 19: Should cohabitants without title to the family home be given the same occupancy rights as spouses and civil partners without title?**

**If you wish, please give reasons for your answer.**

If these changes were to be made to occupancy rights then perpetrators could also gain rights which they previously did not have. We think further work on the benefits for women and children of any change in relation to occupancy rights to the family home would be useful.

**Question 20: Do you have any other suggestions for changes in relation to exclusion orders?**

**If yes, please outline these suggested changes.**

We would be pleased to respond once further suggestions have been gathered. We have no further suggestions to add.

**Question 21: Do you have any comments on the Scottish Government's intention to amend section 18(3)(a) of the Civil Jurisdiction and Judgments Act 1982 so that orders made by Magistrates' Courts can be enforced in Scotland?**







No.

We would comment that it might make sense to have legislation which transfers any DVPN / DVPO issued in another UK jurisdiction into a live Scottish order. We think that any order issued in Scotland should be through application to the Sheriff court in the area where a family resides – and that any appeal of an order should also be to the Sheriff court which issued the order.

**Question 22: Do you have any comments on factors to take into account in any longer-term review of civil protection orders to protect against domestic abuse?**

Yes.

SCRA would ask that the DVPN / DVPO is considered alongside other interventions in relation to domestic abuse, particularly for SCRA in relation to the s67 (f) ground for referral to the Children’s Hearing, from the Children’s Hearings (Scotland) Act 2011 – that the child has, or is likely to have, a close connection with a person who has carried out domestic abuse.

It may be appropriate to give consideration to how and when a DVPO should also form the basis for a referral to the Children’s Reporter from the court issuing the order. It may be that a requirement on the court to consider referral would be an appropriate approach and that DVPN / DVPO proceedings could be added to the list of relevant proceedings in the Children’s Hearings (Scotland) Act 2011 s62. Alternatively it could be that the DVPN process would involve Police Scotland referring to the Reporter at the point any DVPN is issued.

**Equal Opportunities**

**Question 23: Do you consider that any of the reforms proposed in this paper will have a particular impact - positive or negative - on a particular equality group (e.g. gender, race, disability, sexual orientation)**

Don’t know.

As outlined above we would ask that the court is required to consider the wider impact of any protective order it is asked to issue – particularly in relation to any additional burden or stress the order itself would impose on a family.

**Question 24: Are there any other issues relating to equality which you wish to raise in relation to the reforms proposed in this paper?**

Yes.





As outlined above there are potential consequences for children in relation to a DVPN / DVPO in relation to contact particularly but also in relation to any household financial impact the order may have (for example additional housing costs for a perpetrator).

We would ask that the court is required to consider the impact of any protective order it is asked to issue on children and to consider whether there is any way to minimise that impact. We would anticipate that this would form part of the response of any parties in any DVPO Court hearing in any event.

### **Financial implications**

**Question 25: Do you have any comments or information on the likely financial implications of the introduction of protective orders for the Scottish Government (Police Scotland, Scottish Courts and Tribunals Service, Scottish Prison Service, COPFS), local government or for other bodies, individuals and businesses?**

No.

### **Other impacts**

**Question 26: Do you consider that the any of the proposals would have an impact on island communities, human rights, local government or sustainable development?**

Yes.

A scoping of available support provisions will be essential to ensure that Island and remote rural communities are not adversely affected by this approach to protection.

If the scoping indicates a lack of support services then work will be required to ensure that support within these communities is on a par with support available elsewhere in Scotland – or the approach will not work.

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

No.

**Melissa Hunt**  
**Policy & Public Affairs Manager**  
**Scottish Children's Reporter Administration**  
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