FACULTY OF ADVOCATES

Response by the Faculty of Advocates

to the

Scottish Law Commission Consultation:

Discussion Paper on Civil Remedies for Domestic Abuse

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?**

We consider that the requirement for cohabitants to apply for occupancy rights can cause delays in securing urgent protections, and financial barriers to accessing legal support.

If the non-entitled partner faces delay in securing urgent protections, it can increase the risk to them and to any children in their care. This could be, for example, by remaining in the home with their abusive partner whilst any application is made to the court or alternatively, having to vacate the home with or without the children. This may exacerbate trauma and make it even more difficult to engage with court proceedings.

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?**

Yes, we agree that extending the maximum duration that a court can make an order for occupancy rights from 6 to 12 months provides greater stability and security for cohabitants and their children and narrows the gap between the automatic rights afforded to spouses and civil partners and the court ordered rights awarded to cohabitants.

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This period aligns with the time parties often need to secure long-term housing and legal remedies, especially given delays in court processes. We agree that such orders are normally where other orders are sought such as exclusion orders, as well as orders relating to finances and children.

Allowing a longer maximum would take the pressure off the more vulnerable party allowing them to engage with negotiating any settlements or the court process without fear that they and potentially their children will become homeless.

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

Courts should consider each case on its own circumstances; however, we consider that any inexhaustive list of factors could include the following:

- The financial and housing needs of both parties and any children who live in the home or have contact within the home
- The availability of suitable alternative housing
- The conduct of the parties
- The severity and pattern of domestic abuse, which is proven or alleged, the impact that the domestic abuse has had/ and may continue to have on the victim and the child/children
- The immediate safety and well-being of the applicant and any children involved and whether any protective measures are required.

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

We consider that there needs to be clear and updated definitions of domestic abuse, as the occurrence of domestic abuse is a factor that should be considered (see answer 3 above) when the court is deciding whether to grant occupancy rights to a cohabitant.

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It is important to recognise the impact of psychological abuse and controlling and coercive behaviour within the home; particularly on children who can be exposed to a stressful and toxic environment or to their primary carer being subject to high levels of stress and anxiety.

Alongside the factors to be considered, there should be a definition of domestic abuse including coercive and controlling behaviours. This ensures that the focus is on all forms of abuse, not just physical violence.

It should also be made explicitly clear, when considering the 'impact' to the victim and child/ren, and any 'risk' to them, that this is a subjective test rather than an objective 'reasonable person' test. This reflects the interpretation of the test set out in s11 (7A) to (7D) of the Children (Scotland) Act 1995.

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

No. The definition is fit for purpose.

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?**

Yes, we agree that this requirement prioritises the safety of the victim and any children.

Automatic consideration of exclusion orders alongside non-harassment orders following relevant convictions would ensure consistency and prevent further victimisation.

7. **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?**

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Faculty is unable to assist with providing examples of specific cases.

8. **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?**

   Faculty is unable to assist with providing examples of specific cases.

9. **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?**

   Faculty is unable to assist with providing examples of specific cases.

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

    N/A

11. **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?**

    Yes. We have encountered instances where perpetrators have used legal communication, including solicitors' letters, to harass victims/survivors. Requiring communication to be indirect, with a named contact (but not necessarily a solicitor) is an appropriate measure and should be available to those who would benefit from it.

12. **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?**

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Faculty is unable to assist with providing examples of specific cases.

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

Yes, it should. We consider that there is a lack of clarity within the current legislation which can lead to misunderstanding . Although there has been some clarification in section 18 of the 1981 Act relating to occupancy rights being granted, it is still slightly ambiguous and difficult to follow in respect of exclusion orders.

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

In *Bell v Bell* 1983 SLT 245, the court emphasized the necessity threshold and the importance of balancing the rights of all parties. However, on balance, we agree that the test of necessity sets too high a bar in the context of domestically abusive relationships. Domestic abuse is largely committed behind closed doors and as a result, collating evidence to meet the high test of necessity is often impossible. Lowering the test could align civil remedies with the preventive intent of the Domestic Abuse (Scotland) Act 2018, which criminalises coercive control. A more flexible test would allow courts to address nuanced situations where harm may not be imminent but is likely.

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

We consider that a shift in focus from a 'necessity' test to a 'risk' based test could provide a better balance between the rights of individuals and the need to protect victims and children from harm. This would provide a more consistent approach that integrates with existing protections: for example 2018 Act, Section 5, which recognizes the impact of domestic abuse on children. A consistent risk-based approach when considering all protective measures would arguably simplify judicial considerations as the criteria would be the same. This means that guidance on evidential standards when

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assessing risk would be applicable in respect of all the protective measures that are subject to consideration by a court.

16. **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?**

We agree that a simplified terminology in respect of exclusion orders would provide clarity and reflect modern relationships. A unified approach acknowledges the modern diversity of family structures and means that once occupancy rights have been established for a cohabitant, they will not face further barriers due to their relationship status.

17. **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?**

Yes. There appears to us nothing in the legal distinctions between the types of relationship that justifies the imposition of a further test for cohabitants but not spouses or civil partners.

18. **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?**

Yes. We think this is an effective and efficient means of ensuring victims/survivors are protected where that need has been judicially determined, without further procedure. The opportunity for a party to recall the power of arrest is an adequate safeguard.

19. **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?**

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No. Arrest is a serious interference with the rights of the defender. The test of necessity is appropriate and proportionate. It properly reflects the gravity of the power and the potential severity of its consequences.

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

Yes. We agree that the complexity of the current regime merits this reform. The clarity afforded by having all civil remedies available for domestic abuse in the one statute would benefit practitioners as well as victims/survivors. It would make it easier for victims/survivors to understand their rights and for lawyers to advise them on their remedies. Codifying and updating the existing law in one statute would also afford the opportunity to address deficiencies in the current regime so that a sufficient range of remedies will in future be available including orders affording immediate protection and other specific orders that victims/survivors may require. We agree that the availability of appropriate civil remedies (in addition to the existing criminal law) respects the autonomy of victim/survivors by enabling them to seek the remedies that work best for them.

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

We agree that it's important to provide a definition of domestic abuse and we support the proposed adoption of the definition of "abusive behaviour" in the 2018 Act for the reasons outlined by the Commission at paras 5.30 and 5.32. We note that the Commission states that it is not aware of any significant criticism being made of the definition in the 2018 Act. We also agree that it is important for coercive control to be recognised as abusive behaviour in the civil context and to provide a remedy for it.

22. If not, what definition do you propose instead?

Not applicable. See above.

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23. <u>Should the defence recognise behaviour which was reasonable in the particular circumstances, as in the 2018 Act?</u>

Yes. As the Commission correctly identifies, liability in delict is not usually strict and a defence generally exists if the conduct is justified. Such defences are afforded in other statutory delicts, for example, the Protection from Harassment Act 1997. Such a defence is also necessary to comply with Article 6 and Article 8 rights under the ECHR.

24. <u>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?</u>

Yes. Modernisation of the law should include a recognition of the prevalence of this harmful conduct in domestic abuse contexts for the reasons outlined by the Commission in para 5.48. We agree that any definition of tech abuse introduced in a civil law definition of domestic abuse would need to meet the definition of abusive behaviour in the 2018 Act in order to be included. This would mean that conduct would only constitute tech abuse where it was carried out with the intention and consequence of harming the victim/survivor or where the perpetrator was reckless as to the harm caused. We also agree that such a definition would ideally need to be future-proofed, and as such cannot be exhaustive due to the evolving nature of technology.

25. <u>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?</u>

Yes**.** The use of an individual's insecure immigration status to threaten, coerce, exploit and/or subjugate them as part of a pattern of domestic abuse is well recognised from a socio-economic perspective. The law needs to catch up. Current UK immigration policy means that "Victims and survivors with insecure immigration status are currently shut out of vital routes to safety and security"[1] and are "without recourse to public

[1] *Domestic Abuse Commissioner, "Safety Before Status", (2021) (available at: https://domesticabusecommissioner.uk/wp-content/uploads/2021/10/Safety-Before-Status-Report-2021.pdf at p 3)* – taken from Law Commission Discussion paper at para 5.54

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funds"[2]. As the Commission correctly observes it would be possible to provide an increased focus on and awareness of victims/survivors of immigration abuse within the civil justice system simply by explicitly naming and identifying immigration abuse as one form of domestic abuse. We agreed that to do so would enable victims/survivors, their legal advisors, and the judiciary to recognise this as a form of domestic abuse and to make appropriate civil Protection Orders where sought.

26. Do you support the inclusion of economic abuse as one element of abusive behaviour in a statutory definition of domestic abuse as a delict, and if so, should it be modelled on the definition in the Domestic Abuse Act 2021?

Yes. Modernisation of the law should include a recognition of the prevalence of this harmful conduct in domestic abuse contexts for the reasons outlined by the Commission in paras 5.62 and 5.64. We agree that any definition of economic abuse introduced in a civil law definition of domestic abuse should be modelled on the definition in the Domestic Abuse Act 2021 for the reasons set out in the Explanatory Notes to that Act (see para 5.63).

27. 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;**

[2] As above.

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f. **An order regulating the care of and responsibility for a pet, or for the delivery of a pet; and**

g. **Should any other order be included and, if so, what?**

Yes.

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

Yes. This is vital for immediate protection and redress. The balance of convenience is the standard test for an interim civil order in Scots law and we see no reason to depart from it.

29. Should an interim civil barring order last for three weeks and a final one for two months, or what other periods would you propose?

We appreciate that these periods reflect current practice for Domestic Abuse Protection Orders under the 2021 Act. However, we think consideration should be given to allowing Shrieval discretion to grant both the interim and final orders for longer periods where there is justification for so doing.

30. 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?

We agree that it is important to strike the right balance between ensuring the pursuer is appropriately protected from the risk of domestic abuse, and ensuring the defender has an opportunity to be heard or represented in court.

Accordingly, we agree that an interim protection order should be available on an ex parte basis in the same way that a pursuer may currently seek an interim interdict on an ex parte basis in order to ensure that civil protection is in place before any court

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documents are served on the defender. We agree that this is particularly necessary because the service of such documents often leads to further or more severe domestic abuse of the pursuer. In relation to passports, property, or pets, we agree that where there is a risk that the property in question could be destroyed or damaged or hidden, then an interim order should also be available on an ex parte basis. We agree that there is no need for a redress order to be made on an ex parte basis.

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

Yes. In respect of barring orders, we agree that there may be a need for victims/survivors to seek them on an ex parte basis, but we recognise the very real concerns that a barring order could be abused by perpetrators, to seek to exclude victim/survivors from the home. Therefore, we agree that where the victim/ survivor requires emergency protection that is best achieved through police protection and bail conditions (or, once in force, through the system of DAPNs and DAPOs under the 2021 Act).

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

Yes. We consider that, as the decision to grant an interim DACPRO will have been subject to scrutiny by the Court, and the Order will have been made for the protection of the pursuer, a breach of the Order should constitute a criminal offence. The rights of the defender to be heard in respect of the grant of the Order, and in respect of the alleged criminal offending protects their rights, and provides the balance required in the interests of justice.

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

Yes, we believe it should be excluded. An ex parte order is granted without the defender having an opportunity to be heard. An ex parte order is granted for limited means, it is primarily granted to enable documents to be served on the defender. It would not be equitable to criminalise a defender for breaching an order granted without the defender

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having had an opportunity to respond to the case against them. Whilst protection of victims/survivors is a key objective of the DACPRO proposals, the requirements of equality of arms and the interests of justice should prevail.

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

In our opinion, civil remedies such as the power of arrest being attached to Orders should be considered for adoption by the DACPRO scheme. Power of arrest being attached to interdicts is currently available as a remedy in civil law, and there appears to be no reason this could not be explicitly incorporated into DACPRO legislation.

35. Should it be possible for a protection order to be made in relation to an associate of the defender, where the domestic abuse is conducted by the associate on behalf of or with the encouragement of the offender?

No. The definition of domestic abuse proposed in the DACPRO consultation mirrors that set out in the Domestic Abuse (Scotland) Act 2018. That Act limits the definition of a perpetrator of domestic abuse to "a partner or ex-partner." In our opinion the criminal scheme works well using the definition contained therein. Other parties who conduct abuse on behalf of the partner or ex-partner can be dealt with using existing criminal sanctions. We consider that the same ethos should be applied to the DACPRO scheme. Allowing domestic abuse legislation to be used as a mechanism to sanction third parties could potentially dilute the focus of the proposed legislation and potentially weaken the focus overall. Where third parties are identified as facilitating or conducting domestic abuse on behalf of others, they should be dealt with using existing civil sanctions.

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

See answer 35. In our opinion actions by associates should be excluded from DACPRO legislation.

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37. <u>Should it be possible for a DACPRO to extend beyond the sheriffdom in which it is granted?</u>

Yes. Once the Order is granted there is no reason to restrict it to a particular geographic area within Scotland. The protection of victims requires a wide geographic application. The criminal scheme is not so restricted.

38. <u>Should it be possible for a third party to seek a DACPRO on behalf of a victim/survivor?</u>

No, third parties should not, as a general rule, be entitled to seek a DACPRO on behalf of the victim/survivor. The only circumstance which would enable a third party to seek an Order would be if the victim/survivor did not have legal capacity and the third party has been granted legal authority to act for them. DACPRO provisions require to recognise the personal autonomy of victims/survivors of domestic abuse. In our opinion, allowing a third party to seek an Order on behalf of the victim/survivor creates a risk that the victim/survivor could feel disenfranchised by virtue of important decisions being taken without their involvement and/or consent. A trauma informed approach recognises that the victim/survivor should be at the centre of the DACPRO scheme.

39. <u>IF so, should they need the victim/survivor's consent to do so?</u>

N/A – see answer to question 38. The victim/survivor should seek the DACPRO. It is open to them to seek assistance from third parties as required.

40. <u>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?</u>

Yes. A defender can face considerable practical difficulty where they cannot recover important possessions (such as identity documents and electronic devices) due to the

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terms of an order. As well as inconvenience, that is likely to increase tensions between parties. It is appropriate that defenders have an opportunity to seek preservation or delivery of specified possessions to mitigate those difficulties and associated risks.

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

No, not that we are aware of.

42. 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)?

In line with the proposed definition of domestic abuse, restriction of the civil remedies to partners/ex-partners provides a consistent approach. To extend the parties to which civil remedies would be applicable would require extension of the definition. The proposed definition is in line with that used in the criminal courts, and as specified above, this is a definition which Faculty supports.

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

Yes, impact upon children can be as damaging as it is to those who are the 'direct' victim of domestic abuse. By extending the provisions to include children, this would ensure adequate protection and recognition of the impact upon children.

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

Yes. In criminal proceedings, in circumstances of domestic abuse, the court can include children in a non-harassment order where they usually reside with the victim of

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domestic abuse as per Section 234AZA(3), Criminal Procedure (Scotland) Act 1995. On this basis, Faculty would support children being able to be included in a civil protection order or DACPRO to ensure necessary protections are put in place for both the victim and wider household.

45. <u>Do you agree that the Children (Scotland) Act 1995 should be amended so that:</u>

a. <u>(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?</u>

We agree in principle with the proposal; however, the scope of the obligation must be clear as decisions for children may be delayed if the obligation is interpreted as requiring a full written judgment for every section 11 order that is made within a case where domestic violence is alleged. We consider that a minute of proceedings or a note on the interlocutor would suffice in all contact decisions that are interim and made by consent. We consider that where the court gives an extempore judgment, written reasons should follow.

Having regard to the court's overriding duty to ensure any orders made are in the best interests of children and better for the child than no order at all, we consider that the need for written reasons must also apply in situations where a contact agreement is agreed by consent and the court is asked to make an order reflecting the agreement.

We consider that writing detailed reasons for every section 11 order involving a history of domestic abuse may extend court proceedings and place additional administrative demands on judges, potentially delaying other cases in the family courts.

b. <u>the safety of the parents should be considered by the court as part of the consideration of the child's welfare?</u>

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Yes, we agree that the safety of the parents should be considered by the court as part of the consideration of the child's welfare in cases involving domestic abuse.

The well-being of a child is closely linked to the safety and stability of their primary caregiver. Children exposed to domestic abuse, whether directly or indirectly, can experience significant psychological harm. Ensuring the safety of the abused parent helps minimize the risk of further exposure to violence.

We consider that by explicitly requiring the court to consider parental safety, courts will be prompted to adopt a trauma-informed approach. This ensures that the impact of abuse on both the parent and the child is fully considered when making section 11 orders.

This approach aligns with international instruments such as the **Istanbul Convention** and the **United Nations Convention on the Rights of the Child (UNCRC)**, which emphasize the importance of addressing the safety of all family members in cases involving domestic abuse.

However, Courts would need to ensure that safety concerns are substantiated with evidence to prevent misuse of this provision in adversarial disputes. There is a need for timely resolution of any disputed allegations of domestic abuse.

46. <u>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?</u>

We consider the system of disclosure in Scotland in family law actions relating to children is not fit for purpose. There is no obligation on the parties to disclose previous convictions, police reports or the involvement of the local authority or any other services that the family may be known to.

At present, if a party refuses to disclose such information voluntarily then the other party can seek a commission and diligence by way of a specification of documents.

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This system is outdated, slow and the prohibition on fishing expeditions cannot be said to be in the best interests of the child subject to litigation.

Such a system prioritises the rights of the parents over the welfare of the child. Courts are often being asked to make decisions on contact without access to vital information regarding a child's welfare. This is particularly exacerbated when the parties are unrepresented.

When an action is raised in the Family Court of England and Wales for orders relating to children under section 8 of the Children Act 1989, on allocation of the case, Children and Family Court Advisory and Support Service (Cafcass) are instructed by the court to investigate matters and provide a safeguarding letter. This is a brief preliminary report which is aimed to identify at the first stage any potential safeguarding issues or risk of harm to the child. The letter will be sent to the court and the parties within 20 days of the order or at least three clear days before the first hearing.

As part of the enquires, a Cafcass Officer will interview the parties via telephone or video, undertake safeguarding checks with police, health and social work and thereafter report to the court the results of those enquiries and identify any risk of harm and provide appropriate recommendations to the court for procedure.

We acknowledge that Scotland does not have an organisation to undertake this work such as Cafcass. This does not mean that the protections that are available through Cafcass to children and families south of the border should not be available to children in Scotland by another means.

We consider that where domestic violence or child abuse is alleged in a Summons or Initial Writ or if the court having read the Summons or Initial Writ considers that safeguarding or welfare issues may arise, disclosure from the relevant authorities directly to the court must be obtained at the earliest opportunity.

The following rules could provide a mechanism, but it may need to be simplified and brought together so that the power of the court and obligation on any havers is clear.

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RCS 49.11 provides:

> (3) In any family action, the court may, if it thinks fit, order intimation to a local authority, and such intimation shall be in Form 49.8-H.
>
> (4) Where, by virtue of paragraph (3) of this rule or rule 49.8(1)(g), 49.8(4) or 49.15(3), intimation of an application for a section 11 order is to be made to a local authority, intimation to that local authority shall be given within seven days after the date of signeting or order for intimation, as the case may be; and a notice in Form 49.8-H shall be attached to the copy of the summons intimated to that local authority

And further RSC 49.15 provides:

> Except in relation to intimation to a child in Form 49.8A, in any family action, the court may, at any time
>
> - order intimation to be made to such person as it thinks fit;
> - postpone intimation, where it considers that such postponement is appropriate and, in that case, the court shall make such order in respect of postponement of intimation as it thinks fit; or
>
> (c) dispense with intimation, where it considers that such dispensation is appropriate.

These provisions could be used to intimate the summons on Local Authorities' Children and Families Social Work Departments, Police Scotland and the Crown Office and Procurator Fiscal Service in cases where safeguarding concerns are identified as a feature. When notified of the action, such organisations are invited to make any representations to the court.

We consider that it was Parliament's intention to allow courts a wide range of case management powers in relation to family law actions. For example, under RCS49.32A (4) (c) at a case management hearing and under RSC49.32B (4)(g) at a Pre Proof

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Hearing, the court has the power to "make such other orders as it considers appropriate to secure the expeditious progress of the cause."

An order for disclosure to the court of any relevant matters pertaining to the welfare of a child from Police Scotland, Crown Office and Procurator Fiscal Service (COPFS) and the Local Authorities of the Child's and Parties' places of residence is an order made *"to secure the expeditious resolution of the case"*.

Considering those points together we consider that it would be sensible that either there is a specific case management power in the same terms as in 49.32A (4) (c) and 49.32B (4) (g) amended into the rules relating to intimation in 49.11 and 49.15. or that there is a specific power amended into the rules directing that the court may order disclosure from those authorities, perhaps with 14 days of intimation of the summons.

For brevity, the above also applies to the Sheriff Court. OCR 33.12 provides:

> (1) In any family action where the pursuer craves a residence order in respect of a child, the sheriff may, if the sheriff thinks fit, order intimation to the local authority in which area the pursuer resides; and such intimation shall be in Form F8.

Therefore, it is only where a residence order is craved by the pursuer. However, this can be overcome with reference to OCR 33.15 which is in the same terms as RCS49.15.

The Sheriff Court has the same case management power for all types of case management hearings and pre proof hearings to "make such other orders as it considers appropriate to secure the expeditious progress of the cause."

Early disclosure ensures the court has comprehensive information to assess risks to the child and determine the child's welfare, as required by **section 11(7A)-(7E) of the 1995 Act**, without being subject to any filter placed upon it by a party to the litigation. Such an approach ensures the welfare of the child is the paramount consideration and goes

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some way to preventing inequality between the parties as a result of their background, financial means and ability to secure representation.

47. <u>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?</u>

Yes, special measures have been proven to be effective in criminal procedure and begun to be utilised more in family law proceedings too. This ought to be replicated in civil protection/DACPRO proceedings.

When an individual is a 'party' to proceedings, this involves time in court (and engaged in the court process) beyond their time giving evidence. It is important to acknowledge that facing an abusive partner as a party to the case should also attract the option for special measures to provide the individual with the necessary protections to enable them to fully engage in the court process.

48. <u>Do you think that a person who alleged they have been subject 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.</u>

Yes. A person who alleges they have been subject to domestic abuse should be entitled to apply to the Court for special measures. The determination of whether they are entitled to special measures should be a matter of statute/consideration by the Court. The entitlement to special measures as set down in sections 271 to 271M of the Criminal Procedure (Scotland) Act 1995 would form a useful framework that could be developed and incorporated into proposed DACPRO legislation. The criminal scheme recognises those who are entitled to special measures and the basis on which they are entitled to special measures, either by being held to be vulnerable or by being deemed vulnerable according to criteria set down in the Act. An accused/defender can also be vulnerable or deemed vulnerable. Any scheme should consider the needs of all witnesses.

49. <u>Should remote hearings be available as a standard special measure?</u>

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Yes, remote hearings should be available. A witness identified by the Court as vulnerable should be entitled to give evidence remotely.

When remote evidence is authorised the issue of how the perpetrator is to be identified may arise. Criminal law provisions require that accused persons attend at an identification parade if ordered to do so by the Court and given notice to do so. Whilst evidence of identification of the perpetrator of abuse may be less likely to be contentious in civil proceedings, consideration should be given as to how this issue may be dealt with in a civil context.

Criminal law also contains provision for uncontentious evidence to be agreed. Failure to agree such evidence can be challenged, and the matter determined by the Court. Similar civil provisions should be considered as part of the DACPRO legislation.

50. 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?

Yes. Conduct of the case by a party to proceedings should be prohibited. Section 288C of the Criminal Procedure (Scotland) Act 1995 prohibits the personal conduct of defence in cases of certain sexual offences. The terms of this section could be adopted to provide a framework extending the prohibition to apply in cases involving allegations of domestic abuse in the civil courts. Section 288d of the 1995 Act allows the court, at its own hand, to appoint a solicitor for the purpose of conducting proceedings. These provisions might usefully be considered for inclusion in the civil scheme.

51. 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?

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We refer to the answer provided to question 46. We consider that there needs to be better information sharing between the various stakeholders in respect of cases involving children and domestic abuse.

We consider that placing a duty on parties to disclose formal responses taken in respect of domestic abuse may be a first step but that the courts are more likely to receive full and accurate information if disclosure is obtained directly from the relevant agencies.

52. How can the existence of 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?

A legal obligation should be placed on parties engaged in civil proceedings to disclose to the Court that criminal proceedings have commenced. The date of commencement can be identified via the definitions (for solemn and summary proceedings) set down in the Criminal Procedure (Scotland) Act 1995. Consideration should also be given to placing an obligation on parties to make disclosure to the Court where parties are aware that criminal proceedings are "in contemplation". Proceedings being in contemplation can be evidenced by a variety of circumstances, such as (i) the accused being arrested in respect of charges involving domestic abuse or (ii) a report of allegations involving domestic abuse being sent to the Procurator Fiscal.

53. Should there be a statutory requirement for the Scottish Government to collect disaggregated statistics on the number of civil protection orders sought and granted in relation to domestic abuse?

Yes. The collation of accurate data is necessary for knowledge of societal trends to be identified and, if necessary, policies enacted to reflect societal norms which change over time. Such data would also give an indication of the impact of a DACPRO scheme and could provide information about any requirements to revise the scheme going forward. The law is not static, and accurate information is required to ensure legal development is supported by accurate data.

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

Were a statutory scheme to be identified enabling witnesses to give evidence remotely, resource issues may arise in respect of availability of suites/locations for them to give evidence. This is a matter of policy which does not affect the underlying legal imperative.

55. 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?

Faculty is unable to assist with providing data.

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