

QUESTIONNAIRE



décembre / December 2012

**RECONNAISSANCE ET EXÉCUTION DES ORDONNANCES DE PROTECTION RENDUES  
PAR DES JURIDICTIONS CIVILES ÉTRANGÈRES :  
QUESTIONNAIRE À L'ATTENTION DES ORGANISATIONS NON GOUVERNEMENTALES**

*établi par le Bureau Permanent*

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**RECOGNITION AND ENFORCEMENT OF FOREIGN CIVIL PROTECTION ORDERS:  
QUESTIONNAIRE FOR NON-GOVERNMENTAL ORGANISATIONS**

*drawn up by the Permanent Bureau*

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## INTRODUCTION TO THE QUESTIONNAIRE

In 2011 the topic of “the recognition of foreign civil protection orders made, for example, in the context of domestic violence cases”<sup>1</sup> was added as a new item to the work programme of the Hague Conference on Private International law (< [www.hcch.net](http://www.hcch.net) >). The Permanent Bureau of the Hague Conference has conducted preliminary background research on this topic<sup>2</sup> with a view to begin an assessment as to whether a new international treaty (*i.e.*, a new Hague Convention) or other instrument should be developed in order to ensure the recognition and enforcement of civil protection orders across international borders. Civil protection orders may include, for example, “no contact” and housing exclusion orders in cases of domestic violence, “stay-away” orders in cases of stalking, and other injunctions to protect victims or potential victims from crime or other harmful interpersonal behaviour.<sup>3</sup>

The Permanent Bureau has circulated a [Questionnaire](#) to Members of the Organisation in order to obtain further information on legislation and to assess the need for and feasibility of an international instrument in this area. The input of non-governmental organisations which might have experience in this field would also be very beneficial. Your responses to this Questionnaire, sharing any information you may have based on expertise you or your organisation may have, would be a valuable contribution to the current assessment.

The Permanent Bureau kindly requests that your answers be submitted (in either English or French) as soon as possible, but in any case by **1 February 2013**, in order to allow the Permanent Bureau sufficient time to analyse information received for the attention of the governing Council of the Hague Conference that will meet in early April 2013. Responses should be sent by e-mail to < [secretariat@hcch.net](mailto:secretariat@hcch.net) > with the following heading and indication in the subject field: “NGO Questionnaire concerning the recognition and enforcement of foreign civil protection orders — [name of non-governmental organisation].”

Should you have any questions about this Questionnaire, please do not hesitate to contact Philippe Lortie, First Secretary, or Maja Groff, Senior Legal Officer, at < [secretariat@hcch.net](mailto:secretariat@hcch.net) >. We are grateful for your time and assistance on this important project.

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<sup>1</sup> Conclusion and Recommendation No 23 of the 5-7 April 2011 Meeting of the Council on General Affairs and Policy of the Conference (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Work in Progress” then “General Affairs”).

<sup>2</sup> “Recognition and Enforcement of Foreign Civil Protection Orders: A Preliminary Note,” Prel. Doc. No 7 of March 2012 for the attention of the Council of April 2012 on General Affairs and Policy of the Conference (available on the Hague Conference website at < [www.hcch.net](http://www.hcch.net) > under “Work in Progress,” then “General Affairs”).

<sup>3</sup> Please see Prel. Doc. No 7, *ibid.*, for examples of common protection order legal regimes and variations of these regimes in a variety of jurisdictions.

**Identification**

**Name of your organisation:**

Country / Countries where based:

Website of organisation, if applicable:

**Scottish Women's Aid**

**Scotland, United Kingdom**

[www.scottishwomensaid.org.uk](http://www.scottishwomensaid.org.uk)

**For follow-up purposes:**

Name and title of contact person :

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## Part I. National protection order legislation

**1. Please briefly describe any civil protection order regime(s) in your jurisdiction, and describe, in your view / the view of your organisation, its / their main positive and negative features, as applicable (Please attach another sheet, if necessary).**

Firstly, we are concerned that the paper fails to recognise that Scotland has a different and distinct legal system from that of England and Wales, with entirely separate civil and criminal jurisdiction. This is a frustrating issue we routinely face when bodies outside the UK consult on issues of law within the UK because proposals are predicated on incorrect assumptions about legal remedies and jurisdiction.

There is no UK-wide application of the legislation attributed to the United Kingdom throughout the paper. Certain statutes which are not mentioned in the paper, such as the Protection from Harassment Act 1997 and Civil Partnership Act 2004, have specific parts and sections which specifically relate to Scotland. The legislation in Annexe 1 only applies to England and Wales; it is not applicable in Scotland, particularly the Domestic Violence Protection Orders specifically discussed in the paper and we have our own civil and criminal statutes and common law covering protective orders.

The law and legislation applicable in Scotland in relation to “no contact or stay-away orders” and “exclusion or eviction orders” applicable generally, and specifically to domestic abuse and stalking, are

- Matrimonial Homes (Family Protection)( Scotland) Act 1981
- Family Law (Scotland) Act 1985
- Children (Scotland) Act 1995
- Protection from Harassment Act 1997
- Civil Partnership Act 2004
- Domestic Abuse (Scotland) Act 2011
- Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011
- Criminal Procedure (Scotland) Act 1995
- Scottish Common law

### **Specific civil protection orders under Scots Law for protection from domestic abuse**

There are different types of order- those that regulate behaviour and conduct, those that regulate occupation of, and exclusion from, property and those that regulate contact with children. These are available to anyone, irrespective of gender but we refer to them in the context of protecting women.

#### **1) Orders regulating behaviour and conduct**

These in the main are orders referred to as “interdicts”, court orders instructing a person not to be in a place and/or, perpetrate certain behaviours and can generally act to prevent a person doing anything as set out in the order- e.g. refrain from

abusive or threatening behaviour towards the woman; not to approach a person in particular area, for instance a child's school or woman's workplace; to keep away from the woman's house, and in certain situations, another residence.

An interdict limits a person's freedom of action and therefore must be precise in its terms and no wider than is necessary, so the person subject to the interdict knows precisely what they are prohibited from doing.

Those generally used for protection against domestic abuse are available under certain statutes or under Scots Common law:-

- **Matrimonial and Domestic Interdicts granted under the Matrimonial Homes (Family Protection)( Scotland) Act 1981- ( As Amended) sections 14 and 18A, 18B-**
  - a) **Matrimonial Interdict (s.14)** prevents an abusing spouse only ( not available for cohabitants and divorcees )from entering or remaining in a matrimonial home, any other residence occupied by the woman, the woman's place of work or any school attended by her children. If a matrimonial interdict is granted along with an Exclusion Order, or an Interim Exclusion Order, the court must attach a power of arrest to the interdict- see below for an explanation of Exclusion Orders and Powers of Arrest
  - b) **Domestic Interdicts- s.18-** available only to cohabiting couples only (same or opposite sex).Can cover the same areas as a Matrimonial Interdict but the courts have complete discretion as to whether a power of arrest can be attached to a domestic interdict.
- **Interdicts under the Civil Partnership Act 2004- section 113 ( as amended)**

Available only to same-sex couples who have entered into a civil partnership and can cover the same areas as a Matrimonial Interdict . Again, the courts have complete discretion as to whether a power of arrest can be attached to a domestic interdict.
- **Interdicts granted under the Common Law- not derived from legislation**

Cover anyone not falling into the other categories- women who are divorced, or are not married, or not cohabiting or living with their partner. The applicant can ask the court for the order to contain the same prohibitions that are afforded by Matrimonial or Domestic Interdicts above. The court has discretion as to whether or not it will attach a power of arrest to these interdict

Note that all type of interdicts like these listed can last indefinitely. The courts will not grant either a Domestic Interdict or a Matrimonial Interdict banning an abusive partner or spouse from entering or remaining in the matrimonial/shared home unless the interdict comes with an Exclusion Order/Interim Exclusion Order, which suspends the abuser's legal rights to enter or occupy a matrimonial/shared home, or alternatively, the court refuses the abusive party the right to exercise their occupancy rights or recalls a court order already in force that granted them occupancy rights.

Breach of any of these interdicts is not a criminal offence in itself unless the interdict has been specifically "determined" by the court to be a "Domestic Abuse interdict"-

see below. If the interdict has not been so determined, the only remedy on breach is for the individual in possession of the interdict to raise an action in the civil court for breach of interdict. In doing so, they are likely to incur further costs and fees in pursuing the act unless they qualify for legal aid, the matter may take several months to be heard, and as the breach constitutes a contempt of court, there is no guarantee or clarity of outcome.

### **Powers of arrest**

The Protection from Abuse (Scotland) Act 2001 allows that any person, regardless of their status, residency position, occupancy rights and/or relationship with a person perpetrating abuse as defined by the Act, can apply to have an additional court order, called a “power of arrest”, attached to an interdict granted by the court for their protection.

Prior to this legislation coming into effect, divorcees, cohabiting couples without relevant occupancy rights, and same –sex cohabiting couples were effectively excluded from obtaining an interdict with a power of arrest under the Matrimonial Homes Act due to the occupancy qualifications of that legislation. Under the 2001 Act, occupancy rights are not a consideration and there is no need for the person applying for power of arrest to even share, or have shared, a home with the abuser.

- A power of arrest allows the police to arrest the person subject to the terms of the interdict for breaching the terms of the interdict e.g. being in a place they have been instructed to keep away from.
- This power of arrest does not operate in the same way as it does in relation to English protective orders, in that breach of a civil interdict in Scotland is not a criminal offence, unless it has been determined by the court to be a specific Domestic Abuse Interdict- see below. If the interdict has not been so designated, criminal proceedings can only take place if the actions of the abuser also amount to a crime for which there is sufficient evidence. If no such prosecution is to take place, the arrested person will appear before a sheriff who has the power to remand them in custody for a maximum of two days. This detention is not deemed to be a punishment
- Not restricted to domestic abuse- "*abuse*" includes "*violence, harassment, threatening conduct, and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm or distress*" and "*conduct*" includes speech and presence in a specified place or area
- A power of arrest can last for up to three years and be renewed on expiry and there is no cohabitation requirement whatsoever for these.

### **Domestic Abuse Interdicts under the Domestic Abuse (Scotland) Act 2011- s.2**

Prior to this Act coming into force on 20th July 2011, in situations where an interdicted abuser breached the order, unless the abuser has perpetrated a separate criminal offence during the breach, the police could only arrest the abuser and hold him overnight, to appear before the Sheriff the next day in terms of the breach.

If the person holding the interdict wished to take further action against the abuser for breach, their only option was to raise an action for breach in the civil courts. Abusers were aware of this situation and treated interdicts with a power of arrest

contemptuously, knowing that the penalties were minimal and that if they regularly breached the interdict and did not commit a criminal offence in doing so, they could continue to terrorise and abuse women, children and young people, leaving them in dangerous and in vulnerable situations.

- The Act provides that where an interdict has been “*determined*” by the court to be a “*domestic abuse interdict*” and the interdict has a power of arrest attached, which is still in effect, and then breach of that domestic abuse interdict will be a criminal offence.
- A “*domestic abuse interdict*” is an interdict granted for the protection of an applicant against the abuser who is, or was the applicant’s spouse, civil partner, living with the applicant as if they were husband and wife or civil partners, or in an intimate personal relationship with the applicant
- If the court is satisfied that the interdict already granted, or being applied, for is a domestic abuse interdict, then it will make the necessary determination by issuing a specific written decision ( “interlocutor”) to that effect.
- Penalties upon conviction range from imprisonment of up to 12 months and/or a fine if under summary procedure before a Sheriff sitting alone, or to up to 5 years and/or a fine if under indictment if prosecuted under solemn procedure before a sheriff and jury or a Judge in the High Court of Justiciary.

#### **Interdicts under the Children (Scotland) Act 1995- section 77**

Local authorities can themselves apply for an interdict under this Act

#### **Interdicts under the Protection from Harassment Act 1997**

An individual may raise an action of harassment and seek an interdict in addition to other orders under this legislation

#### **General Enforcement issues relating to interdicts**

- If the abuser in breach has left the area where the breach has been committed, the “power of arrest” becomes more difficult to enforce over the passage of time.
- The police have a discretionary power to arrest the interdicted person breaching the interdict, without a warrant, under the Protection from Abuse (Scotland ) Act 2001 -the Act says they “may “arrest, not “must” arrest and there is a two- step test before police can use this power .Police can only arrest for breach if they –
  - (A) Have reasonable cause to suspect that a breach of the interdict has occurred: and
  - (B) Must also be satisfied that if not arrested, the person in breach will continue to cause abuse, or further abuse, which will be in breach of the interdict.

This means that the police have to carry out a risk assessment on the spot. It is not enough for the police to suspect that the interdict has been breached; they must also be satisfied that there is a potentially abusive situation that the victim needs to be protected from and that this abuse would be in breach of the interdict. It is also not enough to satisfy this test for the police to suspect that the

interdicted person would be likely to be abusive if not arrested where the likely abusive behaviour is not prohibited by the interdict.

- Judiciary's perception of whether power of arrest or interdict needed under the "balance of convenience" test. *"In questions of interim interdict, the relative inconvenience resulting to either party from its grant or refusal is a dominating consideration and must fall upon one side or the other."* The Law of Interdict-2nd Edition, S Scott Robinson p179
- Court can allow the interdict to continue to see if further incidents occur before a power of arrest is attached.
- Court may decide not grant an interdict in situations where an abuser is also subject to bail conditions under concurrent criminal proceedings, despite the fact that the abuser can apply to have bail conditions changed and bail conditions fall when the criminal case is disposed of while an interdict can last indefinitely and a power of arrest can last up to 3 years. Also, civil legal aid may not be granted for an application if the Scottish Legal Aid Board considers that the bail conditions are sufficient
- Cost involved for the applicant. If the applicant is not eligible financially for civil legal aid without contribution towards the cost, the average contribution an applicant has to pay towards the cost is around £800, which can rise to £2000 if the action is defended. It has been suggested that the number of defended interdict actions will increase due to the availability of Domestic Abuse Interdicts, breach of which is a criminal offence, since abusers will resist these being brought against them.

### **Non Harassment Orders under the Protection from Harassment Act 1997**

- These are specifically intended to cover behaviour amounting to harassment and can prevent behaviour not always covered by an interdict, such as sending letters, flowers, phoning, and texting.
- Has the advantage that unlike a "basic interdict" discussed above, breach is always a criminal offence, even though the non-harassment order is granted via civil proceedings
- Generally available to anyone under section 8 of the Act and require a "course of conduct"
- However, under amendments to the 1997 Act brought about by the Domestic Abuse (Scotland) Act 2011, section 1, the "course of conduct" requirement, which specifies that normally two or more incidents of harassing behaviour have to be demonstrated, does not apply in actions of harassment brought due to domestic abuse
- If an action of harassment is raised and a non-harassment order specifically sought in relation to domestic abuse, under section 8A of the amended legislation, there is now no need to demonstrate a "course of conduct" and only one incident of harassing behaviour would be required in these circumstances
- Penalties upon conviction range from imprisonment of up to 6 months and/or a fine if under summary procedure before a Sheriff sitting alone, to a possible 5 years imprisonment and/or a fine if under indictment if prosecuted under solemn procedure before a sheriff and jury or a Judge in the High Court of
- .

### **Issues relating to enforcement**

- The issues relating to enforcement revolve around the general police response to breaches, and misinterpretation of whether police have the power to arrest on breach of a civil non-harassment order.

## **2- Orders regulating occupation of, and exclusion from the family home**

### **Exclusion Orders under section 4 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981**

An Exclusion Order is only available to, and enforceable against, those who have, or have been granted, “occupancy rights” as defined by the legislation. Occupancy rights are the legal rights of a person, along with any child of the family, to occupy a home, enter into it, and not be unlawfully ejected by any other party.

The Act allows a person with occupancy rights to seek an order from the court, called an Exclusion Order, suspending or removing the occupancy rights of another person entitled to live and enter the home, and is intended to seek to provide a safe living environment for the applicant.

#### **Occupancy rights**

- Married couples: both automatically have occupancy rights and are entitled to live in the matrimonial home. Neither can legally exclude other from the house except via an Exclusion Order. Spouses can be “entitled” or “unentitled”
- An “entitled spouse” is one who has legal title to the matrimonial home, as sole/ joint owner or tenant or is allowed to occupy the home by a third party.
- A “non-entitled” spouse is one who does not have any ownership or tenancy rights in the matrimonial home but, nonetheless, is given certain rights of occupation automatically under the Act, namely the right to continue to occupy the matrimonial home or to re- enter into and occupy the matrimonial home, together with any child of the family.
- If only one spouse is the owner or tenant and refuses the other occupation, the latter, known as the non-entitled spouse, can go to the court to obtain an order declaring and enforcing their occupancy rights.

#### **Cohabiting couples**

- joint owners or joint tenants: both have occupancy rights and are entitled to live in the family home. Both names would have to be on the mortgage, rent book, title deeds or lease. Neither can legally exclude other from the house except by way of an Exclusion Order.
- only one is the sole owner/tenant; in this situation, unless they have been granted occupancy rights by the court, the person who is not sole tenant or owner does not automatically have occupancy rights, regardless of how long they have lived there or been in the relationship. They have not rights to occupy or enter the property and can legally be asked to leave or ejected by the sole owner/tenant.

**Obtaining Occupancy Rights** - if a person has no occupancy rights, they can apply to the court to obtain them and then they only last for 6 months at a time. They can also be extended, but, again, only for period of up to six months at a time.

If an Exclusion Order is granted and an interdict with a power of arrest is asked for at the same time, the court must attach the power of arrest to the interdict, unless persuaded to the contrary. If no Exclusion Order is granted, then the court has discretion as to whether to attach a power of arrest to the interdict. An Exclusion Order can be applied for regardless as to whether the woman is living in matrimonial home but these Orders will fall if the parties divorce

### **Exclusion Orders under the Civil Partnership Act 2004**

- Civil partners have corresponding rights in terms of occupancy as “entitled” and “unentitled” partners of a family home under sections 101-116, Part 3, Chapter 3 of the Civil Partnership Act 2004
- Same sex cohabitants have protection under the Act, pursuant to section 34 of the Family Law (Scotland) Act 2006 and the provisions above, in relation to cohabitants with and without occupancy rights, apply

### **Exclusion Orders under Family Law (Scotland) Act 1985**

When raising an action for divorce, and heritable property is involved, it is possible for the woman to ask the court to make ancillary orders, including an Exclusion Order, under section 14 of the Family Law (Scotland) Act 1985.

### **General issues with enforcement of Exclusion Orders**

- Standard of evidence is high and affidavits are needed from the applicant and from supporting witnesses. The evidence must be of behaviour or threatened behaviour that is injurious to health (physical or mental) of the applicant and/her children and presents a danger of real harm to them. Where the abuse falls short of actual physical harm and relates to mental and emotional abuse, it becomes more difficult to persuade the court to grant an Exclusion Order, especially in terms of proving threatened behaviour.
- The court must consider it necessary that the order be granted before it will do so. As with interdicts, the court has discretion on whether or not to grant an Exclusion Order and they are easier to obtain in some Sheriff Courts than in others, due to a reluctance of the court to “put the abuser out of home”
- There are two tests for Exclusion Order- that it is “necessary for protection” against behaviour or threatened behaviour and that the making of an Order not “unreasonable or unjustified”. An existing interdict against the abuser is not regarded as being sufficient proof to fulfil the “necessary for protection” test.
- Also, the legal test under section 4(3) of the Act allows for consideration of factors other than the protection of the applicant when considering an exclusion order, which has been identified as a barriers to use
- Because their focus is the criminal and not civil law, police may not be clear as to when an abuser can be removed from a property. There can be confusion as to when an abuser does and does not have occupancy rights, based on irrelevant considerations such as the length of time the abuser had been living in the

property and the fact that he claims to have made contributions to the mortgage, rent and/or household expenses.

- Like general interdicts referred to above, where a woman obtains an Exclusion Order against her spouse or partner, the difficulty is in enforcing it. If the abuser will not leave, she has to go back to court to have him forcibly ejected by court officers, since the police will not intervene in a civil matter.

### **Exclusion Orders under the Children (Scotland) Act 1995**

Local authorities can themselves apply for Exclusion Orders for the protection of children, which can last up to six months, under section 76 of the Children (Scotland) Act 1995. These are not often used and there is little guidance provided to Local Authorities as to when it is more appropriate to apply for an Exclusion Order under this section, rather than a Child Protection Order (“CPO”) under section 57 of the Act which will remove the child from the home.

### **Issues with enforcement of Exclusion Orders under the Children (Scotland) Act 1995**

- Burden of proof with an EO under section 76 is higher than that required for a CPO, in that, for a section 76 order, there has to be actual, significant harm to the child, rather than the belief, required for a CPO, that the child is at risk of significant harm; the harm must be a matter of fact and more than just a belief or suspicion.
- The order has to be necessary and better for the child than the removal of the child from the home, for instance, under a CPO, which may result in a CPO being made in preference and thus, the child removed from the mother, as opposed to action being taken against the abuser.
- There are a number of circumstances that the Sheriff must take into account when considering granting an EO under section 76 that are not applicable in relation to a CPO. E.g. the financial resources of the family
- These Exclusion Orders place the burden of compliance and “policing” on the woman and she may be held to account for the abusive behaviour of her partner

### **Orders under the Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011**

- Act came into force on 28/11/11
- Enables a court in Scotland to make a Forced Marriage Protection Order (“FMPO”) for the purposes of protecting a person from being forced, or from any attempt to force the person, into a marriage, or protecting a person who has been forced into a marriage.
- In deciding whether to make such an order and, if so, what order to make, the court must have regard to all the circumstances including the need to secure the health, safety and well-being of the protected person and their wishes and feelings
- “Force” includes coerce by physical, verbal or psychological means, threatening conduct, harassment or other means, or knowingly take advantage of a person's incapacity to consent to marriage or to understand the nature of the marriage
- A FMPO will place prohibitions, restrictions or requirements, relating to conduct outwith (as well as, or instead of, conduct within) Scotland, on those

who force or attempt to force a person into marriage and can cover those not directly involved but who aid and abet.

- A FMPO can stay in force for a specific period of time or indefinitely
- The person at risk or a Relevant Third Party (defined as a Local Authority, the Lord Advocate or a person specified by Scottish Ministers) can apply to the court for a FMPO. Other people need permission from the court before it considers an application made by them. The court can also make a FMPO if the person at risk is already involved in other proceedings before that court and the court considers that a FMPO is necessary for the person's protection.
- Breach of a FMPO is a criminal offence, regardless of whether it was granted in a civil or criminal court. Penalties upon conviction for breach range from imprisonment of up to 12 months and/or a fine if under summary procedure before a Sheriff sitting alone, to a possible 2 years imprisonment and/or a fine if under indictment if prosecuted under solemn procedure before a sheriff and jury or a Judge in the High Court of
- The Act also makes clear that an action for Declarator of Nullity of marriage can be heard in the Sheriff Court. This is an important step for women who have been forced into marriage against their will. In contrast to a Decree of Divorce, a Declarator of Nullity dissolves the marriage as if it had never taken place. Previously, this could only be applied for at the Court of Session, which was very costly and lengthy procedure. Allowing applications to be made in the Sheriff Court will save considerable time and money.
- Only two orders have been sought and granted in Scotland since the commencement of the legislation.
- Problems with enforcement revolve around pressure put on the protected person not to report breaches of FMPO and possible pressure from the family and community to withdraw the order.
- For more information see the following publications from the Scottish Government
  - Multi-agency guidelines for practitioners supporting people affected by forced marriage  
<http://www.scotland.gov.uk/Publications/2011/12/22165750/11>
  - Statutory Guidance for Authorities  
<http://www.scotland.gov.uk/Publications/2011/12/22165750/11>
  - Forced Marriage Guidance for Legal Professionals  
<http://www.scotland.gov.uk/Resource/0040/00403036.pdf>

**2. Please briefly list any other protection order regimes (e.g., under criminal law, under police laws, etc.) in your jurisdiction which are important in your view / the view of your organisation.**

Section 234a of the Criminal Procedure (Scotland) Act 1995 enables a prosecutor to apply for a non-harassment order ("NHO") against a person convicted of an offence involving harassment towards a victim. The Act was amended and a NHO can now be applied for where a person is convicted of an offence involving "*misconduct*" towards a victim, which includes conduct that "*causes alarm or distress*". A NHO can now be made to prevent "*harassment*" rather than merely any "*further harassment*", meaning that

women do not have to endure repeated harassing behavior before the prosecutor can ask the court for an order.

**3. Have law reforms in this field been recently conducted or are they planned for the future in your jurisdiction? If so, please briefly describe.**

The Domestic Abuse (Scotland) Act 2011 and Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011 (see above) are the most recent pieces of Scottish legislation. No others are planned, as far as we are aware

**4. In the experience of your organisation / in your professional experience, what are the main issues which arise in your jurisdiction with respect to the enforcement of civil protection orders? (e.g., what is being done well in your jurisdiction and what could be improved?)**

- See above in relation to specific orders
- The interaction and granting of protective orders can clash with the making of contact orders regulating an abuser's right to have contact and residence with children where domestic abuse is an issue. This is discussed more fully below.

**5. Please briefly list the main national or regional support facilities for victims of domestic violence (and / or any crimes or behaviours described in Question 9, below).**

- **Scottish Women's Aid** - Scottish Women's Aid is the lead organisation in Scotland working towards the prevention of domestic abuse. At a Scottish and UK national, and also at an EU and international level, we lobby, inform policy and legislative development and work with government, statutory and other agencies to end domestic abuse and violence against women, children and young people, and to improve responses. Our members are 38 local Women's Aid groups across Scotland, including two groups specifically supporting BME women, children and young people. All groups provide specialist services, including safe refuge accommodation, information, advocacy and support to women, children and young people. Women, children and young people using our services may have, within the context of domestic abuse, experienced stalking, sexual assault, forced marriage, so-called "honour crimes" referred to in Question 9 below.
- **Individual support organisations across Scotland**- such as Women's Support Project, WISE Women, etc.
- **Scottish Domestic Abuse 24 hour Helpline**- offers information and support to anyone affected by domestic abuse
- **Men's Advice Line**- offers advice and support targeted at men experiencing and perpetrating domestic abuse
- **Rape Crisis Scotland**- operates the Scottish national helpline and supports a network of 12 local rape crisis centres across Scotland providing support and information for victims of rape and sexual assault
- **LGBT Scotland** – support, information and advice across Scotland for LGBT people experiencing violence, abuse, etc.

- **Victim Support Scotland**- Offers generic support to all victims and witnesses of crime.

## **Part II. Recognition and enforcement of foreign civil protection orders**

**6. In the experience of your organisation / in your professional experience, have you encountered problems of persons who are protected by a civil protection order in one State having this foreign protection order recognised and / or enforced in another State?**

Not in a position to know

## **Part III. Views on a potential international convention in this area**

**7. Are there other situations of which you are aware where a new international Convention, which may include an international co-operation system, may be helpful to victims or potential victims of behaviours commonly covered by civil protection orders (e.g., domestic violence, stalking, etc.), for instance, in order to share information among national authorities across international boundaries, to provide information to at-risk persons regarding international travel, to help ensure a civil protection order will be recognised and enforced abroad, etc.?**

YES

We note the discussions within the Hague Conference’s paper “Recognition and enforcement of foreign civil protection orders: a preliminary note”, in particular that the impetus behind this proposal relates to “... *the issuance of return orders for children, who might be accompanied by an at-risk parent. At the moment there is no specific international multilateral mechanism to assure that any protection order for the benefit of a returning accompanying parent of a child who is the subject of a Hague 1980 return order will be recognised and enforced in the country of return. The Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter the “1996 Hague Convention”) does not necessarily extend measures of protection to an accompanying parent..”*

Before considering the matter of a new international Convention, we would like to firstly, raise the relevant point that there is a wider issue underlying these discussions, in relation to both why women may flee to other jurisdictions with their children and in returning children to their home country for contact. Simply, courts are making contact and residence orders in cases involving domestic abuse that are not safe for either the child or the mother. Compliance with inappropriate and unsafe, court-ordered contact and residence orders by women experiencing domestic abuse will always remain an issue while such orders continue to be made.

In Scotland, this is an issue of great concern for us, since there is, across the UK, an increasing emphasis on shared parenting which, we believe, can often disregard or minimise the presence of domestic abuse. The insistence that children should have contact with both parents, regardless of the safety issues for the child in having contact with an abuser, and how appropriate and beneficial the contact with the abuser actually is to the child, compounds existing failures to recognise the extent and nature of domestic abuse, resulting in unsafe contact arrangements being made that are neither risk-assessed or monitored adequately.

Proper consideration is not routinely given to the welfare of the child and whether contact is safe, appropriate and of actual benefit to the child and also the presence of domestic abuse, or the threat of same, is not routinely taken into account when making these orders, despite the existence of specific legislation, the Children (Scotland) Act 1995, setting out these requirements.

Children's views are not always being taken into account and assumptions are made about undue influence if they are unhappy for contact arrangements to take place. Domestic abuse is often not disclosed by women and failure to pick up the indications of a power imbalance can result in women being forced into agreeing contact agreements which expose them and their children to further risk of abuse.

Those who prepare reports for the court, including representatives of statutory organisations, often fail to recognise the presence of domestic abuse or to take it into account. There are issues as to how they take evidence and from whom; how they take evidence from children; the investigatory process that must be undertaken when allegations of domestic abuse are present; a lack of understanding of the dynamics and effects of domestic abuse on women, children and young people and how to interact and work with women, children and young people who may be in crisis or afraid to speak.

In recognition of this fact, and to address problems identified with Court Bar Reporters, lawyers appointed by the court to prepare reports for their information, the Scottish Government has set up a Working Group to look at the issues of formal recruitment, guidance, experience, instructions, training and policy for the courts as to how a Court Reporter in a family law case should be appointed.

While this will contribute to making judicial decision-making more informed, it is only one strand and has to be accompanied by a training and awareness-raising for judiciary and family lawyers, along with a culture change in how domestic abuse and child welfare is perceived in these matters.

Turning to the need for a new international Convention, we would agree with the recommendations in paragraph 77 of the Preliminary Note that further general research in this area and on the feasibility of an international instrument on the topic must be undertaken, exploring the specific issues raised in the paragraph.

In this regard, it would be prudent to consider the issues raised in the discussions currently underway on the proposal for a Regulation of the European Parliament and of the Council on mutual recognition of protection measures in civil matters.

The issues of interest relating to the matter under discussion in this paper include:--

- A need for clarity on exactly who in the receiving state would carry out functions and act as a “Competent Authority”; if a protection measure is not known in the Member State of recognition, the competent authority is tasked with adapting the protection measure to one known under its own law.
- Consideration would need to be given to the interpretation of orders. The Member State of recognition has to assume that all correct procedures have taken place in the original Member State. Therefore, the issue is how the order is interpreted in the Member State of recognition, who will decide what type of order finally received and how this relates to the order they already have.
- Recognition of an order from another Member State, as recognition could be refused if the order is “irreconcilable with a decision taken in the Member State of recognition”. A conflict might occur, for example, if a parent had a contact order from Scotland but also had a prohibition order from another Member State.
- The grounds for non-recognition in the Regulation. There could be arguments for amending the Regulation to provide for public policy grounds for refusing recognition but this could lead to inconsistent decisions across the EU.
- EHRC concerns if the penalty for breaching an order would be higher in one member state than another, since breaches are dealt with under Member States’ national laws).
- ECHR concerns if someone causing risk had a civil order against them in one Member State and this would be recognised as a criminal order in another Member State.
- Limits on detention might impact on the effectiveness of mutual recognition.
- Concerns were raised about the onus imposed on individuals in obtaining and enforcing the orders
- Regulation could interact in a complex way with Brussels I and Brussels II A; possibility of different levels of protection depending on the Regulation that a request for protection falls under and how Member States decide under which Regulation the protection measures they issue will fall under
- Notification requirements on the person causing the risk and the protected person when issuing a protective order
- Costs falling on the protected person and what they would be required to action and pay for themselves.

**8. If the Hague Conference were to develop a new international Convention in this area, in your view what would be the most desirable features of this new instrument? (Please check all which apply.)**

a.  **Immediate, prima facie, enforceability of foreign civil protection orders by enforcement officials**

b.  **An international civil protection order multilingual certificate which must be applied for in the State of origin in order to be internationally enforceable**

c.  **Co-operative mechanisms including an international database registering enforceable civil protection orders**

d.  **A Convention which covers civil protection orders issued by courts and by administrative and other authorities**

- e.  **A Convention that provides that enforcement officers have liability protection for good faith actions**
- f.  **A Convention which addresses a broad scope of types of civil protection orders (e.g., including those addressing the types of behaviours listed in Question 9 below)**
- g.  **Other features. Please specify:**

Subject to our comments above in Question 7 on the Regulation currently under discussion:-

- **Immediate, prima facie, enforceability of foreign civil protection orders by enforcement officials-** this would be possibly subject to the domestic law of the country in which the holder of the protection order was now resident which may lead to inconsistencies in responses and penalties.
- **An international civil protection order multilingual certificate which must be applied for in the State of origin in order to be internationally enforceable-** there are issues as to who applies for this ( person at risk or state they are now in), the cost and who bears it (how the person at risk would pay if it was their responsibility)
- **Co-operative mechanisms including an international database registering enforceable civil protection orders-** co-operative mechanisms are certainly an appealing and practical suggestion but an international database will likely be limited by IT capacity and data protection/confidentiality/data security issues between states and jurisdictions and determining who holds the database and updates the information
- **A Convention which covers civil protection orders issued by courts and by administrative and other authorities-** again, orders not issued by courts may be difficult to enforce in foreign jurisdiction due to the domestic law of that country not recognising orders unless they originate from a court.

**9. If the Hague Conference were to develop a new international Convention in this area, in your view which behaviours / situations should be covered or targeted by such a Convention? (Please check all which apply.)**

- a.  Domestic violence
- b.  Sexual assault
- c.  Dating violence
- d.  Stalking
- e.  Forced marriage
- f.  So-called "honour crimes"
- g.  Human trafficking
- h.  **All of the above**
- i.  Other behaviours / situations. Please specify:

**10. Are you / is your organisation of the view that the Hague Conference should develop a new international Convention (or other mechanisms) for the recognition and enforcement of foreign civil protection orders (i.e., so that a person protected by a protection order in one State can quickly have that order recognised and enforced in a foreign State)?**

**X      YES**

We would support any mechanism that protects women, children and young people against domestic abuse, sexual assault, and stalking, forced marriage, so-called “honour crimes, dating violence (which falls under domestic abuse) and human trafficking

However, this is firmly subject to the caveat that any unforeseen consequences for the persons protected must be identified and rectified. This refers to technical and legal issues of recognition and implementation that may compromise or diminish the safety and security afforded by their order if it was implemented subject to the domestic laws of another country.

**11. If desired, please give any comments the models described in [Preliminary Document No 7](#) (Section 4)<sup>4</sup> or on any other existing model for a possible future Convention in this field (e.g., based on current national or regional instruments or otherwise):**

**12. Please attach any other information or resource documents to this Questionnaire which you consider may be useful for the current assessment.**

SWA welcomes the opportunity to contribute to the very welcome and important discussions on this matter and we look forward to actively participating in the further negotiations and consultations as this matter progresses.

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<sup>4</sup> See Permanent Bureau, Prel. Doc. No 7, *supra*, note 2.