



**Rhoda Grant MSP**



The Proposed **Civil Protection  
Orders and Access to Justice  
(Scotland) Bill**

**Consultation Document**  
December 1 2009



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## Foreword

The Scottish Parliament has made huge strides into tackling domestic abuse, however, we have some way to go before women, children and others who suffer abuse will be able to sleep safely in their beds without the fear of attack or intimidation.

As a society we have a duty to protect people from harm and that is what I am seeking to do through this Bill.

My former colleague Maureen Macmillan was instrumental in pushing domestic abuse up the list of priorities in the Scottish Parliament, and it was because of her that I began this process. She saw this as unfinished business.

The proposed Civil Protection Orders and Access to Justice (Scotland) Bill seeks to give people greater access to protection. While we do have interdicts and non-harassment orders, these are not always available due to financial or evidential constraints. Also, the response is not always effective when further abuse does occur and these orders are breached. It is unreasonable to expect people to have to pay for protection or to have to return to the civil courts, at their own expense, on numerous occasions to seek redress for breach of interdict. This proposed Bill seeks to improve access to protection and justice for anyone who is subjected to abuse and to ensure that if a protection order is breached that this is treated as a criminal offence.

While researching this proposal I have come to believe that there is still much to do to protect people from abuse. Every journey begins with one small step and I believe that this Bill would be a step in the right direction.

I wish to thank Clare Connelly, Senior Lecturer in Law, University of Glasgow and James Clark LL.B. (Hons), Dip.L.P. who worked with me to bring forward this consultation document; they jointly wrote the document and provided wonderful legal advice. Without their assistance this consultation document would not be published. I look forward to working with them as the Bill progresses.

I also wish to thank Unison for their support and Norman MacAskill for his design work.

## Introduction

There can be no doubt that protection from domestic abuse is needed by victims, both during the course of a relationship and often after it has ended. For some, permanent separation may bring an end to the abuse they have suffered whilst for others the abuse may continue or even escalate. The continuation of threats, harassment and/or violence by a former partner after separation contradicts the common myth that when an abusive relationship ends, the violence and abuse will also end. In recent years, research findings have revealed that one of the most 'dangerous' times for a victim of abuse is at the point of separation or after leaving a violent partner.<sup>1</sup> Research by Wilson and Daly has shown not only that victims are more likely to be subjected to violence and abuse when they flee a violent relationship but also that they may be more likely to be killed by their partner.<sup>2</sup> The Scottish Executive Statistical Bulletin reports that over half (53%) of all female victims of homicide and 6% of all male victims recorded in the last 10 years were killed by a current or former partner.<sup>3</sup>

One of the legal responses to domestic abuse and post-separation abuse is to increase the numbers and type of civil protection orders that are available. In Scotland, the Protection from Abuse (Scotland) Act 2001 has made interdicts with a power of arrest available to anyone subjected to domestic abuse. Another type of protection is also now available in the form of a non-harassment order under the Protection from Harassment Act 1997. Problems with obtaining these orders due to financial and legal aid constraints, evidential burdens and the fact that the breach of most orders is not criminalised are continuing barriers to those who seek protection from abuse.<sup>4</sup> These points are evidenced by the findings of an evaluation of all Scottish civil protection orders that was carried out in 2003 (the Scottish study).<sup>5</sup>

This consultation document begins by explaining the background to existing civil protection orders. It then moves on to detail how the proposed Bill would address these barriers, by increasing access to protection for those who are subjected to domestic abuse, and by appropriately punishing those who perpetrate it.

At the end of each section, the relevant aspect of the proposed Bill is shown, as well as the questions I would like you to answer. These questions are listed again after the summary section. See page 16 for information on how to respond to the consultation.

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<sup>1</sup> S Lees, 'Marital rape and marital murder' in J. Hamner and K. Itzen (eds), *Home Truths about Domestic Violence* (2000) 57-73.

<sup>2</sup> M Wilson and M Daly, 'Till death do us part', in J. Radford and D. Russell (eds), *Femicide The Politics of Woman Killing* (1992), 83-98.

<sup>3</sup> Scottish Government Statistical Bulletin, *Homicide in Scotland, 2006- 07*, (2007) 10.

<sup>4</sup> Connelly, C., "Institutional Failure, social entrapment and post-separation abuse" *Edinburgh Law Review* (Forthcoming).

<sup>5</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), *An Evaluation of the Protection from Abuse (Scotland) Act 2001*, (Edinburgh, Scottish Executive Social Research).

<http://www.scotland.gov.uk/Publications/2003/11/18560/29451>

## Objective of the Proposed Bill

As noted previously, the most recent evaluation of civil protection orders in Scotland identified a number of problems with those orders.<sup>6</sup> The main problems identified fall broadly into two main areas:

- Access to justice
- Failure to provide a robust response to breached orders

The purpose of this proposed Bill is to address these problems and provide more effective protection for victims of domestic abuse.

### How this would be achieved

The proposed Bill would:

**Remove the requirement to show a course of conduct before a non-harassment order could be granted by either the civil or criminal court, requiring only one incident of harassing behaviour.**

**Make legal aid free to all for an application to a civil court for an interdict with a power of arrest, or a non-harassment order, where domestic abuse is involved. This will allow all victims of domestic abuse, regardless of economic background, to access the protection afforded by these orders. Victims would no longer have to pay for their own protection.**

**Make it a criminal offence to breach an interdict with a power of arrest.**

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<sup>6</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), An Evaluation of the Protection from Abuse (Scotland) Act 2001, (Edinburgh, Scottish Executive Social Research).  
<http://www.scotland.gov.uk/Publications/2003/11/18560/29451>

## Background to Civil Protection Orders in Scotland

Domestic abuse includes a range of behaviour which varies in seriousness. It includes physical abuse (for example slapping or punching) and mental abuse (for example, threats against a victim or their children and keeping them short of money).

Civil protection orders aim to protect victims from future domestic abuse whereas a criminal prosecution seeks to punish those who perpetrate abuse. Orders can prohibit future criminal actions, such as assaults, but they are also useful in curtailing behaviour which does not amount to a crime, such as an abuser following a victim or loitering at the victim's workplace or home. Such behaviour can be very threatening and may be a pre-cursor to criminal behaviour in the future.

Civil protection orders can be obtained whilst a relationship is ongoing and also after a relationship has ended.

Before a civil protection order can be granted the civil standard of proof (the 'balance of probabilities') is used to decide the application, rather than the criminal standard ('beyond reasonable doubt' which requires two independent pieces of evidence for corroboration). This reflects the fact that civil protection orders are intended to *protect victims* from *future* behaviour, rather than *punish abusers* for the wrongs of the *past*. Unlike complaints made through the criminal process, an abuser does not face consequences simply because their victim has applied for an order. Any further action will only arise if the abuser then breaches the civil order.

## Civil Protection Orders: Interdicts and Non-Harassment Orders

### Interdict with no Power of Arrest

This order is obtained to prohibit a specific course of action by a named individual. An interim interdict may be granted very rapidly, but its effectiveness is limited by the fact that the police have no power to arrest someone who breaches its terms. Such an order can be used to prohibit any behaviour which amounts to domestic abuse but, as it does not have a power of arrest, nor is breach automatically criminal, police can only arrest where the 'breach' amounts to a crime. Where, for example, an abuser loiters outside their victim's home or workplace, although this may breach the interdict, this behaviour will not amount to a crime. The only remedy for the individual who has the interdict is to return to court, possibly at their own expense, to raise a civil action for breach of interdict.

### Interdict with Power of Arrest

The Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Protection from Abuse (Scotland) Act 2001 (as amended by the Family Law (Scotland) Act 2006) allow a power of arrest to be attached to an interdict. The power of arrest allows the police to arrest the abuser if the interdict is breached. However, the breach in itself is not a criminal offence and a prosecution can only take place if the actions of the abuser also amount to a crime for which there is sufficient evidence. Where this is not possible, the abuser will appear before a sheriff who has the power to remand them in custody for a maximum of two days. If the sheriff does not order this further detention, the only option is for the individual in possession of the interdict to raise an action in the civil court as outlined above.

### Non-Harassment Order

The Protection from Harassment Act 1997 allows a victim of abuse to apply for a civil non-harassment order. The order will be granted where there is evidence of a 'course of conduct' involving at least two separate occasions of harassment.<sup>7</sup> A procurator fiscal is also able to apply for a non-harassment order at the sentencing stage in criminal proceedings, following an accused being convicted of an offence where there is evidence of a course of conduct of harassment of the victim. Breach of a non-harassment order is a criminal offence punishable by up to five years imprisonment.

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<sup>7</sup> This includes: conduct amounting to harassment; conduct intended to amount to harassment or conduct occurring in circumstances where it would occur to a reasonable person that it could amount to harassment.

## The Proposed Bill

As stated, the three main problems with civil protection orders which the Bill would seek to address fall broadly into two main areas: access to justice and failure to provide a robust response to breached orders.

### 1. Access to Justice – Non-Harassment Orders and Legal Aid

#### Non-harassment orders: the ‘course of conduct’ requirement

##### Civil context

In the civil court, a victim of abuse must make their own application for an order to be protected from further abuse or harassment. The onus of proof lies with the victim.

When a victim of abuse applies for a non-harassment order two different occasions of harassment need to be shown in the civil court. This is because a ‘course of conduct’ must be established before an order can be granted. The Scottish study has shown that the victim’s statement about the abuse is often not enough to meet this evidential requirement.<sup>8</sup> Eyewitness accounts and the evidence of professionals, particularly doctors, are preferred, for each of at least two separate incidents of harassment. Providing this is problematic given substantial anecdotal evidence that many victims do not tell anyone about their abuse. As a consequence, the required supporting evidence of a course of conduct is simply not available.

##### Criminal context

During criminal proceedings, a procurator fiscal may apply for a non-harassment order where the accused has been convicted of offence(s) involving a ‘course of conduct’ of harassment of another person. In any criminal court case, a prosecution will normally focus on one incident of criminal behaviour and this reduces the chances that the crimes convicted of will amount to a course of conduct.

The Criminal Justice and Licensing Bill<sup>9</sup> seeks to address this by proposing that previous convictions can be taken into account in proving the course of conduct needed to secure a non-harassment order. However, no matter how serious the history of abuse, a victim will still have to wait until their abuser has been successfully prosecuted twice before the prosecutor can seek a protection order on their behalf. As a consequence, victims are unable to quickly secure a non-harassment order having to wait until serial abuse has occurred.

#### One incident should be enough

As the purpose of non-harassment orders is to protect against future abuse, in both civil and criminal proceedings, one incident should be sufficient to

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<sup>8</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), An Evaluation of the Protection from Abuse (Scotland) Act 2001, (Edinburgh, Scottish Executive Social Research).  
<http://www.scotland.gov.uk/Publications/2003/11/18560/29451>

<sup>9</sup> Introduced on 06/03/2009, <http://www.scottish.parliament.uk/s3/bills/24-CrimJustLc/index.htm>.

consider whether there is a risk of future harm that needs to be prohibited. If the perpetrator is of good behaviour their liberty is not infringed. The purpose of a protection order is to *protect* against future abuse. It is only if the person continues to flout the criminal law that they will be subject to trial and punishment. However, if further abuse is intended, the order may either prevent it or allow swift police action resulting in criminal proceedings.

Given the rights enshrined in the European Convention on Human Rights Article 3, namely 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment', it may be the case that the need to have two incidents of abuse proven before a protection order can be granted by a criminal court would breach the Article. A victim should not have to be abused twice before the state will step in to protect them.

My proposed Bill would provide that a non-harassment order could be granted after a conviction for a single incident of abuse. A single conviction should be adequate to entitle the victim to secure an order aimed at protecting them from further abuse.

**My Bill would remove the requirement to show a course of conduct before a non-harassment order could be granted by either the civil or criminal court, requiring only one incident of harassing behaviour.**

### Consultation Questions 1-2

**1. What advantages or problems might arise as a result of removing the course of conduct requirement?**

**2. What do you see as the main benefits of making it easier to obtain a non-harassment order?**

## Access to legal aid

*“Men are charged with assaulting their wife or whatever and even if they are working, they get legal aid...to defend themselves...and a woman doesn't get legal aid to protect herself.”<sup>10</sup>*

When a person is charged with a criminal offence arising from domestic abuse they will get non-means tested legal aid to engage a solicitor to represent them when they appear in court from custody. The joint protocol between police and prosecutors means that there is an assumption that suspected perpetrators of domestic abuse will be remanded in custody.<sup>11</sup> Following this first appearance legal aid is means tested, however, the test includes issues other than merely income including interests of justice, loss of livelihood etc. As a result of these wider factors, there is anecdotal evidence from solicitors in the Scottish study that perpetrators of abuse will secure legal aid more often than victims of abuse seeking protection.

Victims of domestic abuse are required to finance expensive applications for civil protection orders (interdict with a power of arrest or a non-harassment order) to protect themselves from future abuse.<sup>12</sup> Even where the victim is eligible for civil legal aid, they will be means tested and may face prohibitive contribution levels that can lead to an abandonment of the action.

Therefore not only is there an imbalance of access to justice between the perpetrator and the victim, but the protection provided by an order is less accessible to those who do not have the money to fund an application or to 'top-up' the legal aid.

In the Scottish study almost three-quarters (72%) of the victims interviewed had applied for a civil protection order and of those, over half (52%) were not eligible to obtain legal aid.<sup>13</sup> Nine (39%) found it 'difficult' to obtain orders because they struggled to pay the financial contribution required by the Legal Aid Board. Solicitors identified contribution levels as prohibitive for some clients and also referred to the difficulty of calculating contribution levels at a time when the victim may be leaving their partner and as a result would be homeless, seeking new accommodation or staying with friends. Interviews with victims conducted as part of the Scottish study demonstrate that access to justice is a real issue for some who are seeking protection from domestic abuse. Solicitors said:

*Solicitor 1: “They are having to pay a significant amount of money that basically should come from the*

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<sup>10</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), An Evaluation of the Protection from Abuse (Scotland) Act 2001, (Edinburgh, Scottish Executive Social Research). <http://www.scotland.gov.uk/Publications/2003/11/18560/29451> p.69

<sup>11</sup> Scottish Police Service/COPFS (2008), In Partnership, Challenging Domestic Abuse V3/12/08, (ACPOS and COPFS) <http://www.copfs.gov.uk/Resource/Doc/13547/0000559.pdf>

<sup>12</sup> Other than when non-harassment orders are sought by prosecutors following conviction

<sup>13</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), An Evaluation of the Protection from Abuse (Scotland) Act 2001, (Edinburgh, Scottish Executive Social Research). <http://www.scotland.gov.uk/Publications/2003/11/18560/29451> pp. 67-69.

*basic legal aid system...lots of people don't go ahead because of the level of contributions.."*

On 7th April 2009, the Scottish Government increased the annual disposable income limit for civil legal aid from £10,306 to £25,000.<sup>14</sup> This will improve the position of many who seek protection from abuse. Of greatest importance, however, is the fact that even with the new increase of annual disposable income to £25,000 some victims will continue to encounter financial barriers when seeking protection from abuse. The increase does not address the imbalance between the access to justice afforded to the perpetrator and that available to the victim of abuse, as described above.

**My Bill would make legal aid free to all for an application to a civil court for an interdict with a power of arrest, or a non-harassment order where domestic abuse is involved. This will allow all victims of domestic abuse, regardless of economic background, to access the protection afforded by these orders. Victims would no longer have to pay for their own protection.**

### Consultation Questions 3-4

**3. What advantages or problems might arise with the removal of means testing?**

**4. What do you see as the main benefits of removing means testing?**

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<sup>14</sup> The Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Regulations 2009, SI 2009/143 s 4(5).

## 2. Failure to Provide a Robust Response to Breached Orders

The breach of a non-harassment order is a crime. Breach of an interdict with a power of arrest may involve behaviour which is criminal (such as a breach of the peace or assault), but a breach of interdict is not, in itself, a crime.

Where the abuser behaves in a way that breaches the interdict but does not commit a crime (for example loitering outside the victim's home), the consequences are very limited. The breach is a form of contempt of court and, although the power of arrest allows the police to remove the person from the scene, the maximum possible outcome is a remand in custody for up to two days. Due to the method of recording prosecutions of breached civil protection orders, limited information is available. The Scottish study did examine the available evidence of breached civil protection orders and found that there were rarely criminal proceedings that resulted in conviction and charge. Interdicts with a power of arrest were more frequently dealt with under the alternative procedure of no charges being brought and the perpetrator appearing before a sheriff in a criminal court who then considered whether to detain the perpetrator for up to two days.<sup>15</sup>

The breach is often part of an ongoing series of abusive behaviour, and so can be particularly distressing and frightening for victims (and, often, their children). Meanwhile, the message to the perpetrator is that they may show contempt for the law without sanction:

*'The seriousness of this behaviour and the effect on the recipient can only be fully appreciated if it is viewed against the background of violence the woman has suffered, the threats she may have received and the unpredictability of the man's future actions.'*<sup>16</sup>

The holder of the interdict is left with only one way to address the breach of the order: to bring an action for breach of interdict, in effect a contempt of court, by lodging a fresh initial writ in the civil court. They are responsible for paying the costs of this, unless they can secure legal aid, and the same issues about prohibitive contribution levels apply as were described earlier at pages 10-11.

The lodging of the application results in a civil hearing process for breach of interdict. The perpetrator is ordered to appear in court to answer for the breach and on the charge being admitted, the court can sentence them to a fine or a maximum of three months imprisonment. However, the process can be very lengthy if the perpetrator does not turn up, or if they deny any aspect of the proceedings and imprisonment for breach of interdict is rare.<sup>17</sup>

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<sup>15</sup> Cavanagh, K., Connelly, C., Scoular, J., (2003), An Evaluation of the Protection from Abuse (Scotland) Act 2001, (Edinburgh, Scottish Executive Social Research). <http://www.scotland.gov.uk/Publications/2003/11/18560/29451>

<sup>16</sup> Connelly, C. & Cavanagh, K. (2007) 'Domestic abuse, civil protection order and the 'new criminologies': is there any value in engaging with the law?'. *Feminist Legal Studies*, 15: 259-287

<sup>17</sup> Macphail, I. (1998), *Sheriff Court Practice*, (2<sup>nd</sup> edition by Nicholson C. and Stewart, A.L.), Edinburgh: W. Green).

Breach of an interdict with a power of arrest should be treated as a crime to enable a more effective response by police and prosecutors to ongoing domestic abuse and to act as a deterrent to the abusive person. The current position results in the onus often being on the victim to initiate and fund an action for breach of interdict which can be onerous, prohibitively expensive and, often, without satisfactory conclusion.

Those who flout the law should be held fully to account. This requires that any breach of an interdict with a power of arrest is treated as a criminal offence.

**My Bill would make it a criminal offence to breach an interdict with a power of arrest.**

## Consultation Questions 5-6

**5. What are the advantages and problems that might arise from making it a criminal offence to breach an interdict with a power of arrest?**

**6. What do you see as the main benefits of making it a criminal offence to breach an interdict with a power of arrest?**

## Conclusion

The response of the justice agencies in Scotland to domestic abuse has greatly improved in the last ten years. Increased accessibility to more robust civil protection orders, the Joint Protocol on Domestic Abuse<sup>18</sup> and the rolling out of a specialist response to Domestic Abuse<sup>19</sup> in the courts all present a great step forward in how abuse is tackled in Scotland. While the criminal response has improved, victims still face unnecessary difficulties when they attempt to engage with the civil law.

- Many victims of abuse are denied access to justice through the lack of legal aid and are forced to pay for expensive civil protection orders while their abusers are provided with non-means tested legal representation at their first appearance in court and have greater access to free representation thereafter.
- Many victims are unable to obtain the valuable protection of a non-harassment order due to the 'course of conduct' requirement.
- Where victims are able to obtain an interdict with a power of arrest, in many cases, the criminal justice agencies will not be able to prosecute breaches. This forces victims to pay to bring an action for breach of interdict; a lengthy, complicated and potentially expensive process. The absence of the criminal justice agencies in this process means that the perpetrator will be liberated and the victim may be exposed to further abuse. The failure to criminalise breach of interdict with power of arrest diminishes the perceived importance of the court order itself and undermines the seriousness of the domestic abuse the interdict was intended to prohibit.

For these reasons, the effectiveness of civil protection orders is limited by the access to justice issues and the response to breached interdicts with a power of arrest outlined above. Despite the improvements, my Bill is necessary to further improve the protection offered to victims of domestic abuse.

The measures in my proposal, when combined with the measures which are now being taken by the criminal justice agencies, would create a more robust response to domestic abuse. Victims of abuse would no longer have to pay for their own protection and they would not face restrictive evidential requirements which prevent them from obtaining an order designed to keep them safe. Scotland's response to abuse will be greatly strengthened by these changes.

## Consultation Question 7

### 7. What costs would be associated with all of the proposals contained in this Bill?

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<sup>18</sup> Scottish Police Service/COPFS (2008), In Partnership, Challenging Domestic Abuse V3/12/08, (ACPOS and COPFS)

<http://www.copfs.gov.uk/Resource/Doc/13547/0000559.pdf>

<sup>19</sup> Connelly, C, (2008), Handling Domestic Abuse Cases, (Edinburgh, The Scottish Government).

## Summary of the Proposed Bill

**My Bill would remove the requirement to show a course of conduct before a non-harassment order could be granted by either the civil or criminal court, requiring only one incident of harassing behaviour.**

**My Bill would make legal aid free to all for an application to a civil court for an interdict with a power of arrest, or a non-harassment order where domestic abuse is involved. This will allow all victims of domestic abuse, regardless of economic background, to access the protection afforded by these orders. Victims would no longer have to pay for their own protection.**

**My Bill would make it a criminal offence to breach an interdict with a power of arrest.**

## Summary of Consultation Questions

- 1. What advantages or problems might arise as a result of removing the course of conduct requirement?**
- 2. What do you see as the main benefits of making it easier to obtain a non-harassment order?**
- 3. What advantages or problems might arise with the removal of means testing?**
- 4. What do you see as the main benefits of removing means testing?**
- 5. What are the advantages and problems that might arise from making it a criminal offence to breach an interdict with a power of arrest?**
- 6. What do you see as the main benefits of making it a criminal offence to breach an interdict with a power of arrest?**
- 7. What costs would be associated with all of the proposals contained in the Bill?**

## How to respond

You are invited to read these proposals, and comment on any issues that you feel may be relevant. Responses must be submitted by 26th February 2010 and should be sent to the following address:

**Rhoda Grant** MSP  
The Scottish Parliament  
Edinburgh  
EH99 1SP

### Alternatively, please email responses to

Rhoda.grant.msp@scottish.parliament.uk  
Telephone: **0131 348 5766**  
Fax: **0131 348 5767**

Name:

Address:

Email address:

Please indicate whether you are responding as an individual member of the public or on behalf of an organisation

Member of the public

On behalf of an organisation

If you are responding on behalf of an organisation please give details below:

Name of Organisation:

Your title:

Address:

Telephone:

Email address:

In addition, please pass this consultation document on to any other interested parties that you may be aware of. Additional copies of the paper or alternative formats can be requested using the contact details above and calls via Typetalk are welcome. Further copies of this consultation paper are available from the above address. It can also be downloaded from the Scottish Parliament website at:

<http://www.scottish.parliament.uk/s3/bills/MembersBills/index.htm>

To help inform debate on the matters covered by this paper and in the interests of openness it is intended all the responses submitted on this consultation document will be made public. You should therefore be aware that by submitting this response you are indicating consent to the publication of all the material contained in your response. Unless you

indicate otherwise this will include your name and address and any other biographical information you have provided about yourself.

You should note that personal data referring to third parties included in the response cannot be accepted without explicit written consent from the third party. This consent should be provided with your response.

We are not entitled to process your personal data by publication without your consent. If therefore you want parts of your response to remain confidential please indicate which parts are not for publication. Similarly, if you wish all of the contents of your response to be treated in confidence and not made public then please indicate so.

All responses will be included in any summary or statistical analysis, which does not identify individual responses.





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