

Response to the Consultation Document on the proposed Civil Protection Orders and Access to Justice (Scotland) Bill on behalf of The Family Law Association.

Having considered the consultation document of 1st December 2009 in respect of the proposed Civil Protection Orders and Access to Justice (Scotland) Bill the Family Law Association would answer the questions raised by the consultation paper as follows:-

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

To obtain a Non Harassment Order under the present legislation it must be shown that there is a course of conduct involving two or more incidents. The Defender in an action must be given fair notice as to the behaviour complained of and the orders sought. The Court must be seen to give a fair hearing to both parties. A Non Harassment Order must specify precisely what conduct is to be prohibited by the order. The result of this is that a series of different behaviours, with no one type of behaviour being repeated could mean that no order was granted. Even if an order is granted it would prohibit only the specified conduct. For example one incident may be the Pursuer being followed home and the Defender watching her home. This one incident may justify an order preventing the Defender attending at the Pursuer's home. However it may not justify an order to prevent the Defender approaching the Pursuer in the street, at her place of work or telephoning her. Breach of a Non Harassment Order is a criminal offence. It must therefore be clear to a Defender what behaviour the order prohibits. The fact that breach will lead to criminal conviction seems to make courts more reluctant to grant these orders, in a civil court. As a result of this and the requirement for a course of conduct relatively few of these orders are sought.

If one incident is sufficiently alarming to the Pursuer to place her in a state of fear and alarm and make her reasonably apprehensive that the behaviour will be repeated the appropriate course of action would be to apply for a Non Molestation Interdict and to seek a Power of Arrest to be attached to that interdict. The terms of an interdict still require to give fair notice to the defender of the prohibited conduct but can be in broader terms. An example would be the prohibition of conduct which would cause the pursuer fear, distress or alarm.

Therefore the removal of the requirement for a course of conduct for an NHO should make it easier for the applicant to obtain such an order. We consider however that if the breach still constitutes a criminal offence sheriffs may, in practice continue to be reluctant to grant such orders. We have seen a similar effect when the Family Law (Scotland) Act changed the law with regard to powers of arrest being attached to interdicts. Following the Act, it is now necessary for the court to be satisfied that the power is necessary to protect the applicant from a risk of breach of an interdict. Previously, for matrimonial interdicts, the onus was on the defender to show that the power was unnecessary. Perhaps a clearer example of the "law of unintended

consequences" is with regard to the interaction of bail conditions and powers of arrest in domestic abuse cases. It is now standard practice for the Crown to seek special bail conditions preventing an approach to the victim of domestic abuse, where a criminal case is pending. This has led to reluctance on the part of Sheriffs to attach a power of arrest to a protective interdict where bail conditions have been imposed. A power of arrest is granted for a specific period of time, usually at least a year. Bail conditions will cease when the criminal case is concluded and often the victim is not aware that this has happened. She is therefore left with no formal protection other than an interdict.

We consider that the creation of a criminal offence of stalking would be of assistance in many cases involving harassment. The effect of creating such an offence should be to reduce the requirement for victims to seek any civil order for their protection whether it be an interdict or an NHO.

2. What do you see as the main benefits of making it easier to obtain a Non Harassment Order.

The main benefit is that an NHO is an order which has a criminal sanction for its breach. Therefore the complainer reports the breach and the matter is then in the hands of the police and then the PF. There is no need for the complainer herself to take proceedings, with the attendant costs and implications of an action being raised in her name. This gives the perpetrator a clear message that the conduct complained of is not acceptable in this society. It also creates distance between the perpetrator and the victim. This contrasts with the procedure for breach of an interdict which requires the pursuer to make a further application to court in her name for a finding of breach of interdict. That in itself continues the connection between perpetrator and victim which may cause her some satisfaction. The costs implications are also significant and create a barrier to such actions which are quite rare.

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

The issue removal of means testing creates is about equality of arms before the court and in particular the right to a fair hearing under ECHR. In the event the Pursuer in an action seeking protective measures is not to be means tested a Defender must be given Legal Aid under the same conditions. There should be equal access to justice for both parties to the action. In the event the Pursuer were to be granted Legal Aid under different conditions than the Defender, the Defender could argue that his right to a fair hearing had been breached. It is not unknown, though not common, for false allegations of abuse being made in order to have a partner ejected from the house or to prevent him or her having contact with children. This issue would be highlighted if free legal aid was automatically granted only to the pursuer.

An accused is granted Legal Aid to defend criminal proceedings as their liberty may be at stake or a criminal conviction could have serious consequences to their future employability or access to foreign countries. The complainer does not require legal aid as her role in the proceedings is simply that of witness. Her interests are looked after by the Crown who effectively act on her behalf

One other problem which may arise is that pursuers may raise actions in respect of a course of reasonably minor arguments with their former partners if Legal Aid is not means tested. However an application for legal aid will still be subject to scrutiny on the merits of the case and the courts will still apply the same tests to such actions. We consider that the number of trivial cases would not be significant as competent solicitors will only take actions to court if the evidence they can present is sufficient to support the application for legal aid and to the court.

Interdict and Non Harassment actions are raised under emergency Legal Aid. The Legal Aid Board have been known to refuse Legal Aid on the merits of the action if the Pursuer has not reported the behaviour complained of to the Police. If the Applicant is not to be means tested it may be that the Legal Aid Board will take a stricter view on the evidence required to justify granting Legal Aid on the merits and refuse applications on the merits.

If legal aid is made available to both parties without means testing, this is likely to lead to more actions being defended. As has been stated in the consultation document often victims of abuse do not tell anyone about the abuse and there is very little supporting evidence. If one effect of this change was an increase in the number of defended actions more cases will proceed to Proof. Given the difficulty a victim of domestic abuse is likely to experience in giving evidence in the presence of her abuser, there is a likelihood of cases being lost as a result.

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

There is considerable justification for free legal aid for such cases. Firstly there is the principle that victims should not have to pay for their own protection. Court actions are costly. An undefended interdict action will cost a minimum of £400 plus court fees and sheriff officers' costs. These costs can exceed the solicitor's fees. Even if the pursuer is eligible for legal aid, she may still have to pay a contribution unless she is in receipt of Income Support. Such contributions can run to four figures. There would be greater access to justice for low earners who may be entitled to Legal Aid but are unable to pay their assessed contributions.

Many people find it difficult to find a solicitor willing to undertake an action for interdict under Legal Aid due to the extensive work involved on the part of the solicitor and the low remuneration paid to solicitors by the Legal Aid Board. We doubt however that the removal of means testing would have any impact on this.

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.

If it were a criminal offence to breach an interdict with power of arrest it would be subject to the criminal burden of proof, that is proof beyond reasonable doubt. It would therefore require a higher standard of proof than breach of interdict is presently subjected

to i.e. the balance of probabilities. The Pursuer would have no control over breach of interdict proceedings being raised as it would be a decision for the Procurator Fiscal as to whether a prosecution should be pursued. The decision of the Procurator Fiscal is final and the complainer would have no recourse if the Procurator Fiscal refused to pursue criminal charges for an alleged breach of interdict. The Court may be less inclined to grant a power of arrest if criminal liability is to be attached to a breach of the interdict for behaviour which may not usually amount to criminal behaviour, such as approaching the Pursuer in the street. If a breach of interdict would justify criminal charges it is likely the Defender could have been charged with a criminal offence in any event such as breach of the peace.

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

The main advantage to making breach of interdict a criminal offence would be that the Pursuer would not be required to raise further proceedings which would probably result in a fresh application to the Legal Aid Board and a further drain on Legal Aid resources. Such proceedings would run in the name of the Crown thus lending distance between the abuser and his victim. This also reinforces the message that the conduct complained of is not acceptable to society in general. Once a breach has been reported to the Police the Police will carry out all the necessary investigations to bring the matter back before the Court. If convicted the Defender would have a criminal record. The knowledge that he could end up with a criminal record if he breaches the interdict may be a greater deterrent to him breaching the order in the first place.

7. What costs would be associated with all the proposals contained in the Bill.

There would be an increase in costs to the Legal Aid Board as Legal Aid would have to be made available to both parties on the same conditions to ensure that there was a level playing field and both parties had access to justice.

At present many actions seeking protective measures do not proceed beyond initial hearings on interim orders as the actions are undefended. It is likely that a higher percentage of cases would be defended if Legal Aid is not to be means tested as there would be no cost to the Defender to defend the action. The Defender would be more likely to defend the action if criminal liability would be attached to any breach of the protective measures granted. There would therefore be a substantial increase to Civil Legal Aid costs.

There would also be an increase to the costs of Criminal Legal Aid if breach of interdict were to become a criminal offence.

There would be an increase in costs to the Police and Procurator Fiscal in investigating alleged breaches of interdict. There would also be increased Court costs with more

defended actions proceeding to Proof to obtain the initial orders in addition to Trials for breach of interdict proceedings.

