Justice Committee

Domestic Abuse (Scotland) Bill

Written submission from Scottish Women’s Aid

Foreword

Scottish Women’s Aid (“SWA”) is a national organisation working for change on issues of domestic abuse and an umbrella body to a membership of 40 autonomous Women’s Aid groups throughout Scotland, which provide temporary accommodation (refuge), information and support to women, children and young people who experience domestic abuse in Scotland.

Introduction

SWA welcomes this Bill and the crucially important reforms it introduces.

We support the removal of the course of conduct requirement for Non Harassment Orders, cost–free access to civil legal protection orders for all those experiencing domestic abuse and the creation of a more robust respond to perpetrators who breach civil protection orders via criminalisation of breach of interdict, reforms which will greatly benefit women, children and young people experiencing domestic abuse.

However, there are specific matters which must be addressed and/or amended in order to ensure that the proposals work in practice and we have commented on these, specifically the need to remove any definition of “domestic abuse” from the Bill.

Section 1- Amendment of the Protection from Harassment Act 1997

The Bill will introduce a new section into the Protection from Harassment Act 1997 (“the 1997 Act”) which removes the requirement to show a course of conduct before a Non-Harassment Order (“NHO”) can be granted in civil proceedings involving domestic abuse; only one incident of harassing behaviour would be required in these circumstances.

SWA supports this section, subject to the removal of subsection 1(4) referring to the definition of domestic abuse.

Currently, Section 8 of the 1997 Act refers to a “course of conduct” which is defined as “conduct on at least two occasions”. The proposed section 8A does not contain references to “courses of conduct” and, instead, provides that a person must not engage in conduct which will amount to harassment.
NHOs are an important part of the suite of protective orders available to women, children and young people experiencing domestic abuse, because they can be applied to behaviour that may not be covered by an interdict.

Removing the course of conduct requirement would benefit women, children and young people experiencing domestic abuse by increasing the protection available to them. They would no longer have to endure repeated abuse and multiple incidents before they could obtain an order, unlike the current situation in relation to evidential requirements for NHOs.

This will give women, children and young people experiencing domestic abuse greater confidence in reporting abuse, and make it easier for them to seek protection from the police and the courts, thus supporting the work in relation to domestic abuse and violence against women being undertaken by the Scottish Government.

**Section 2 - Amendment of the Legal Aid (Scotland) Act 1986**

SWA supports the proposal to remove means testing where a person is pursuing certain civil protection orders due to domestic abuse.

As stated in our response to the earlier consultation paper, we strongly believe that people seeking protective orders as a consequence of domestic abuse should not be required to pay for them.

Domestic abuse is a prevalent social evil destroying the lives of many women, children and young people across all communities in Scotland. It is a pattern of behaviour, the aim of which is to exert control over a partner or ex partner's life choices and which undermines their personal autonomy. The perpetration of domestic abuse is repetitive and life-threatening, and the impact has serious and long-lasting consequences for the health and well-being of women, children and young people. It is an assault on women and children's human rights and one which has fear as a common denominator and we must support them when they seek the protection of Scottish civil law against this.

Those seeking such orders, particularly women, children and young people experiencing domestic abuse, are potentially or actually at risk of serious harm through the unwanted, and persistent, abusive and criminal behaviour of someone else.

It is inequitable that an abuser will get criminal legal aid and will have to pay nothing towards his defence for his, more often than not, repeated court appearances in relation to his abusive behaviour, while the woman has to pay to get legal protection, protection against him committing another criminal act and access to that protection may be denied her unless she can pay.

“Protection orders are among the most effective legal remedies available to complainants/survivors of violence against women… Protection from domestic violence
and the right to a life free from violence should be a principle not only in legislation on violence against women but also in all relevant areas of family and divorce law. …Legal aid, including independent legal advice, are critical components of complainants/survivors’ access to, and understanding of, the legal system and the remedies to which they are entitled. Legal representation has proven to increase the likelihood of a positive outcome for the complainant/survivor in the legal process.” (Handbook for legislation on violence against women; United Nations; Department of Economic and Social Affairs; Division for the Advancement of Women; New York; 2009)

Therefore, we must allow women experiencing domestic abuse, who were previously unable to do so, the ability to access civil protective orders and decrease the options for the abuser to perpetrate further abuse of a criminal nature.

These protective orders would be:-

- Domestic interdicts under section 18 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (as amended) with an interdict attached under the Protection from Abuse (Scotland) Act 2001
- Matrimonial interdicts under section 10 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (as amended), with an power of arrest attached under the Protection from Abuse (Scotland) Act 2001
- Common-law interdicts with a power of arrest attached under the Protection from Abuse (Scotland) Act 2001
- Exclusion Orders under the Matrimonial Homes (Family Protection) (Scotland) Act 1981; and
- Non-Harassment Orders under the Protection from Harassment Act 1997

It has been acknowledged that women’s earnings are, unjustifiably, less than men and that they are also more likely to be in lower paid or part-time employment. Solicitors tell us that the main reason for women not taking up offers of legal aid, and the most problematic issue for them, is contribution levels. We have been advised that women on low to medium earnings, which are routinely supplemented by tax credits and benefits, often find that that they have to pay a large contribution, which, in some cases, leads either to financial difficulties or their turning down the offer of a civil legal aid grant.

Leaving an abusive partner often leaves women in financial hardship. They are particularly disadvantaged because, in addition to daily living expenses and the costs of establishing a new home, all of which they will now be personally and solely responsible for, they are likely to have the added burden of servicing joint debts, along with mortgage or rent costs, arising from their previous relationship.

Women fleeing domestic abuse are in a difficult transitional period, being in a situation where they are attempting to leave behind arduous and dangerous circumstances and rebuild their lives. Therefore, it is against all the tenets of justice that this situation should be further exacerbated by the need to pay to get protection, and women having to make the unpalatable choice between either seeking protection through the courts
and, consequently, struggling financially or going into debt, or not seeking civil protection, with all the implications for their own and their children’s safety that this decision may entail.

This has been a long-standing issue for women. In 1998, we wrote in response to the consultation paper Access to Justice: Beyond the year 2000...

“Research which resulted in the national strategy initiatives found, amongst other findings, that access to civil legal aid was the biggest issue preventing abused women from gaining access to solicitors’ services and the legal process”.

Women, children and young people experiencing domestic abuse should be confident of getting access to justice and protection against the abuser and these reforms will go a long way towards securing this confidence.

Financial Costs

In terms of cost, additional grants of civil legal aid by the Scottish Legal Aid Board (“SLAB”) would need to be offset against a reduction of costs achieved by removing any breaches of interdicts from civil legal aid proceedings. It should be recognised that, in the long-term, these reform will, hopefully, lead to a reduction in repeat offending by abusers and other costs such as re-housing, child protection and health costs.

Indeed, the cost to society of domestic abuse is acknowledged by the Scottish Government’ in their 2009 policy document “Safer Lives: Changed Lives: A Shared Approach to Tackling Violence Against Women in Scotland”, which states, at page 12 ...

“Difficult though it is to quantify, The Cost of Domestic Violence (a study in 2004 conducted for the UK Government’s Women and Equality Unit by Sylvia Walby), estimated that the cost of domestic abuse in England and Wales was £23 billion. The cost to the public purse of violence against women is estimated to be almost double this figure at £40 billion (Source: A study by Jarvinen et al in 2008; New Philanthropy Capital Report – Violence against women: Hard knock life). Given the Scottish population is roughly 10% that of England, this indicates that some £2.3 billion could be the cost to the Scottish public purse of domestic abuse and £4 billion the cost of violence against women.”

Further issues for discussion in relation to section 2

Applicant’s capital

The proposed changes proposed only relate to disregarding a person’s disposable income. When applying for civil legal aid, a person’s disposable income and capital (such as savings, etc) are also assessed. Therefore, to make the proposals truly cost-free, any applicant for one of the specific protective orders relating to protection from domestic abuse must also have their capital disregarded. Section 2 does not appear to disregard capital and must therefore be amended to reflect this.
Definition of “domestic abuse” in section 2(d)

To make these proposals workable, the wording stating that “domestic abuse” is to be construed in accordance with the definition in section 4 must be removed from the Bill, for the reasons we will set out below in our comments below on section 4.

Applications for protective orders

An ordinary action is raised in the sheriff court using a formal document known as an “Initial Writ” which contains the “craves” or applications for the orders that are sought from the court. Most family law cases involve several craves. We note that there may be an issue in relation to applications for protective orders being raised as one of a number of applications to the court contained in the one Initial Writ. It should be possible for protective orders to be raised as “stand alone” issues, particularly to ensure that legal aid “clawback” provisions do not mean that applicants would, in the end, have actually to pay for their protective order if they recover funds or assets from the other party under, for instance, a divorce settlement.

We are aware that there is concern that the intention of the proposed legislation is that all craves raised in conjunction with an application for a protective order would attract this waiving of the income and capital test. This is not our interpretation of the legislation and as far as we are aware, the waiver would only apply to application and work related to the specific protective orders referred to and not to other related issues such as contact, divorce and so on.

Retention of merits test

A further matter relating to the granting of civil legal aid should be clarified.

When SLAB decides whether someone should be granted civil legal aid, it applies a number of tests, namely:-

- “the means test”- an individual must qualify financially both in terms of their disposable income and disposable capital;
- “the merits test”- the applicant must have probable cause or, simply put, a legal basis for their case; and
- it must be reasonable in all the circumstances of the case that they should receive civil legal aid.

If the financial eligibility test was removed, the “legal merits” test of probable cause and reasonableness would still require to be applied before an application for civil legal aid could be granted.

Scottish enabling legislation

1) Precedent set under Civil Legal Aid (Scotland) Regulations 2002 and Civil Legal Aid (Scotland) Amendment (No.2) Regulations 2007
SLAB’s mailshot of October 2007 to the legal profession on changes to legal aid states, *inter alia* ...” The Civil Legal Aid (Scotland) Regulations 2002 were amended, as at 1 August 2006, to provide that civil legal aid should be available to a person concerned as claiming, or having an interest in the property, financial affairs or personal welfare of an adult under the Adults with Incapacity (Scotland) Act 2000, other than the adult to whom the application relates, for intervention of guardianship orders.

These regulations amended sections 15 and 17 of the Act and also regulation 5 of the principal civil regulations to provide that a person making such an application would be eligible for legal aid without regard to that person’s income or capital; would not require to pay any contribution to the Fund; and that such application need not be accompanied by a statement in writing itemising the applicant’s disposable income and disposable capital.

The Civil Legal Aid (Scotland) Amendment (No.2) Regulations 2007 came into force on 5 October 2007 and further amended the civil regulations to provide for other guardianship order applications made under the 2000 Act and more importantly, extended the modified means test, in connection with all such orders, to the incapable adult.”

This clearly shows that a precedent has already been set in relation to granting civil legal aid without an assessment of capital and income and payment of a contribution by the applicant.

2) Legal Profession and Legal Aid (Scotland) Act 2007

The Legal Profession and Legal Aid (Scotland) Act 2007, firstly, empowers SLAB to publish a plan, which requires ultimate approval by Scottish Ministers, as to who is entitled to receive civil legal aid.

The Act has set a precedent in extending eligible proceedings, as section 71 has amended section 14 of the Legal Aid (Scotland) Act 1986, so that civil legal aid is now available for proceedings for defamation or verbal injury. These proceedings were previously specifically exempted from categories of proceedings for which civil legal aid was available.

Section 72 of the 2007 Act appears also to gives SLAB discretionary powers in relation to the granting of civil legal aid.

Therefore, it would appear that SLAB and Scottish Ministers potentially already have the capacity to make those seeking protective orders a special case under this legislation.

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Human Rights arguments for no means testing

Access to justice is a human right and accords with the notion that the state has a ‘positive obligation’ to protect its citizens from threat to their safety. If the protection which the state has an obligation to offer is compromised, by the denial of legal aid, then this contravenes human rights legislation.

We set out, at Appendix I, the various Articles of the European Convention of Human Rights and relevant case-law derived there from, demonstrating the legal basis supporting the waiving of means tests altogether in cases where an applicant is seeking one of the listed protective orders as a consequence of domestic abuse.

Section 3 - Breach of interdict with power of arrest

SWA support the creation of a criminal offence for breach of an interdict with a power of arrest granted due to domestic abuse.

Currently, if the interdicted abuser breaches an interdict with a power of arrest attached, unless the abuser has perpetrated a separate criminal offence during the breach, the police may only arrest the abuser and hold him overnight, to appear before the Sheriff the next day in terms of the breach.

The Sheriff is empowered only to order the abuser to be held for up to a further 48 hours. If the woman, child or young person holding the interdict wishes to take further action against the abuser for breach, they must raise an action for breach in the civil courts. In doing so, they are likely to incur further costs and fees in pursuing the action, 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. Certainly, we are not aware of any women ever having pursued an action of breach.

Abusers are aware of this situation and are prepared to treat interdicts with a power of arrest contemptuously, knowing that the penalties are minimal. They are also aware that if they regularly breach the interdict and do not commit a criminal offence in doing so, that they can continue to terrorise and abuse women, children and young people, leaving them in dangerous and vulnerable situations. Interdicts only work if the perpetrator believes in their deterrent potential as regard the consequences breaching an order will have on them personally and currently, as we have indicated, these are limited.

Therefore, there are clear advantages to criminalising breach of an interdict with a power of arrest. It would:

- enforce the power of the order;
- act as a more effective deterrent by making it very clear to the abuser that breach was not a trivial matter and could result in their having a criminal record;
- give women, children and young people experiencing domestic abuse more confidence in the effectiveness of these measures;
• lessen the onus and pressure on the person with the interdict to pursue the case as the responsibility for investigating, commencing and running the case would be placed on the police and procurator fiscal, respectively;
• clarify the penalties for breach;
• encourage reporting of domestic abuse to the police;
• be a quicker and simpler remedy with which to deal with a breach. The current civil proceedings deal with breach as a contempt of court, which is a “cumbersome” procedure and may take many months if not longer to determine.

We understand that concern has been voiced that criminalisation would, in fact, discourage reporting due to concerns from women about giving evidence in court and the fact that the woman holding the interdict would have no control over the decision to prosecute. While women, may, indeed, have concerns, the police, Fiscal and courts are already well-aware of the issues for women and witnesses in domestic abuse —related criminal proceedings.

Continued and improved support and safety planning, increased and better use of the special measures available under the Vulnerable Witnesses legislation for witnesses in such cases coupled with improved liaison with specialist support organisations such as local Women’s Aid groups, will all go a considerable way to assisting women, children and young people give their best evidence.

There are additional matters in relation to the Bill which must be addressed in order to ensure that this proposal works in practice:

• The standard of proof for breach of an interdict with a power of arrest attached is currently the civil standard which is the matter must be proven on the balance of probabilities. If it were a criminal offence to breach an interdict with a power of arrest attached, it would then be subject to the criminal burden of proof, that is, proof beyond reasonable doubt, which is a higher standard of evidence.

• Under civil law, there is no requirement to have corroborated evidence for the police to arrest for breach under the power of arrest attached to the interdict. However, the criminal law requires corroboration, which is evidence from at least two different sources, not necessarily two different witnesses, that the offence has occurred.

Section 3 does not address this matter but there is no reason that breach of interdict with a power of arrest, as an order of the court, cannot be treated in the same way as a breach of a drug treatment and testing order, community service order, supervised attendance order, restriction of liberty order or a probation order, all criminal offences but which can, nonetheless, be spoken to by one witness alone.

“The general requirement of Scots Law that essential facts be corroborated by evidence from two independent sources has been relaxed in
relation to proof that an offender has failed to comply with a probation order for the purposes of section 230(1) of the Criminal Procedure (Scotland) Act 1995. In such proceedings the evidence of a single witness that a probationer has failed to comply with a requirement of a probation order will be sufficient."

“Criminal Proceedings etc. (Reform) (Scotland) Act 2007: Section 58- Restriction of liberty orders: Explanatory Notes Para 348. The purpose of this section is to permit breach of a restriction of liberty order to be proved by the evidence of one witness. This provision brings proof of breach of such orders into line with proof of the breach of probation, community service, drug treatment and testing, and supervised attendance orders. Section 245F of the 1995 Act is amended accordingly.”

- If either the police do not report the incident to the Fiscal, or the Fiscal does not proceed with a criminal prosecution, is the holder of the interdict with the power of arrest still entitled to proceed by way of minute for breach of interdict in the civil court, as section 3 is silent on this matter?

If so, since one of the current difficulties with pursuing a breach through the civil courts is that the procedure may take many months if not longer to determine, then some form of “fast-tracking” approach in dealing with the case must be developed, otherwise the woman holding the interdict will be in the same, if not worse, position than at present.

Similar to the provisions enacted at section 49(2) of the 2003 Act in the Criminal Justice (Scotland) Act 2003, albeit this relates to NHOs, there should be a comparable provision for the police to have a statutory power of arrest without warrant, for breach of an interdict with a power of arrest created by subsection (3) is without prejudice to any other power of arrest.

**Section 4 - Meaning of “domestic abuse”**

SWA do not agree with the definition of “domestic abuse” in the Bill. It seeks to include other forms of abuse and violence between near and extended family members, which is not in line with the recognised and understood definition referring to spouses, partners and ex-partners. While domestic abuse does, indeed, impact on children and others, this is a different matter from family violence and parental abuse. We support the removal of any definition of “domestic abuse” where it occurs within the Bill.

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It has been suggested that amending the wording of the definition in the Bill would be sufficient but this will not resolve the issue. There has always been a problem in producing a legal definition; firstly, because of the possible impact on criminal law and also because it could have unforeseen implications for, and clash with, other pieces of legislation where there is no definition - housing law and the Children (Scotland) Act 1995, for instance. In the latter, “domestic abuse” was introduced into section 11(7) as a specific matter the court had to consider before making any order relating to the child without the necessity of a definition being included to explain the term.

The issue of a definition of “domestic abuse” has also arisen in relation to the current Children’s Hearings Bill, where the Bill seeks to have domestic abuse as a new referral ground. We therefore run the risk of having two separate, potentially different and, therefore, unworkable, legal definitions, which will negatively impact on the criminal and civil aspects of the proposals.

The general factors militating against a definition are:-

- in terms of civil law and access to protective orders without means testing, the category of persons encompassed by the definition as being eligible to apply for a protective order would be far in excess of the intended beneficiaries. Thus the projected costs on which the Bill is premised would increase, making the proposal unworkable and therefore denying protection to the women, children and young people the proposals are intended to benefit.
- In relation to criminalisation of breach of interdict with a power of arrest attached granted due to domestic abuse, if the definition is too narrow, then abusers could rely on it to avoid prosecution. On the other hand, if the definition is too wide, it will be unhelpful to the police and the Fiscal, by unnecessarily complicating matters in relation to the investigation and prosecution of domestic-abuse related offences.
- The courts are likely to be unwilling to grant interdicts with a power of arrest in cases involving domestic abuse if the definition of “domestic abuse” is too wide and goes outside accepted terminology. This will defeat the intention of the Bill to ensure that women, children and young people experiencing domestic abuse can access these orders.
- Since the Bill proposes that the consequences of breaching such an order will result in criminal proceedings, the courts require clarity and will be unhappy pronouncing on such a catch-all offence.

In summary, as we have stated above, the preferable option is to remove completely any definition or reference to a definition of “domestic abuse” from the Bill and allow the two words to stand on their own merits, with “abuse” being supported by the already accepted and widely used wording present in the Family Law (Scotland) Act 2006, the Protection from Abuse (Scotland) Act 2001 and the Children (Scotland) Act 1995, as amended.
Conclusion

There are potential financial costs associated with these proposals, in terms of a rise in civil legal aid costs, resulting from increased applications and cost-free access to such orders, along with increased police involvement and additional criminal court hearings for breach.

This can be balanced by the fact that applications for civil protective orders are falling, according to the Scottish Legal Aid Board’s Annual Report for 2008-2009; there is the potential for savings arising from reductions in civil court time if these courts were not dealing with breaches, and a potential reduction in police having to attend repeat call-outs for breach of interdict, if the abuser is under the control of the criminal justice system, both of which could be offset against any increase.

However, there are other overwhelming legal, financial, and ethical, human rights arguments for implementation of these proposals, primarily the benefits derived in allowing women, children and young people greater and easier access to protective orders, coupled with the creation of more effective and robust protective orders, which greatly outweigh any potential cost issues.

SWA acknowledges the commitment Rhoda Grant MSP shows towards addressing the barriers women, children and young people experiencing domestic abuse find in accessing protection from abuse, by her introducing this Bill and also the substantial work undertaken by her, her researchers and academics involved in drafting the Bill, in getting the Bill before the Scottish Parliament.

We also acknowledge the time and other constraints present in drafting Bills, in that it is not possible to cover every eventuality, thus the various Parliamentary Stages of the Bill discussing and amending the text, and so we hope that our comments will strengthen the principles of the Bill in achieving its impact. The Scottish Parliament and Scottish Government is committed to working to end violence against women and has prioritised ending domestic abuse on this agenda and we call on them to support these proposals as part of their work in making a safer Scotland for women, children and young people.
Appendix I- EHRC Legal basis to support the waiving of means tests altogether

We would content that the Scottish Government has obligations under Articles 2, 3, 6 and 8 of the European Convention on Human Rights, as integrated into Scots Law by the Scotland Act 1998, and enshrined in the UK Human Rights Act.

Article 2 - Right to life- “Everyone’s right to life shall be protected by law”

This Article stipulates that the State has a duty to act where there is risk to a person’s life. It places an obligation on the State, not only in preventing the State’s intentional and unlawful taking of life, but also in terms of taking appropriate steps to safeguard the lives of those within its jurisdiction; in other word, it demonstrates the positive obligation incumbent on the state.

The interpretation of this obligation can extend to the complete waiving of means testing for civil legal aid in relation to a person securing legal representation for a Protective order.

A landmark ruling in relation to Article 2 was made in the case of Opuz v Turkey (2009) ECHR 33401/02 (9 June 2009), which sets a precedent, throughout Europe, for governments to protect in cases involving domestic abuse. The European Court of Human Rights ruled against the city of Ankara for not protecting a woman against domestic abuse and stated that Turkey officially violated the ECHR by failing to prevent the murder of a woman. This is the first time that the European Court of Human rights has ruled over a state for failing to protect a woman from domestic abuse.

Altogether, the judges ruled that Turkey violated three Articles of the ECHR prohibiting torture and discrimination.

- The court found there had been a violation of Article 2 because the Turkish authorities failed to take action after being repeatedly alerted about the violent behaviour of the dead woman's son-in-law.
- Article 3 - the prohibition of torture and of inhuman and degrading treatment - had been violated when the state failed to protect Ms Opuz from the abuser's violent and abusive behaviour.
- It also said Article 14 - the prohibition of discrimination - had been violated because the violence suffered by the applicant and her mother was "gender-based", which amounted to a form of discrimination against women.

A further important case relating to the operation of this Article is Osman v United Kingdom (2000) 29 E.H.R.R. 245. In this case, the court held that a state’s duty to protect the right to life included a duty to act where there was a real and immediate risk to a person through the criminal conduct of another person who is known to the authorities, and their powers can reasonably be used to avoid that risk. However, the court also made it clear that this duty "must be interpreted in such a way which does not impose an impossible or disproportionate burden on the authorities".
See also

**Paul and Audrey Edwards v United Kingdom (Application No 4647/99) March 14 2002**

**Dana Kontrova v. Slovak Republic 31 May 2007.**
Ms. Kontrova filed a complaint against Slovak Republic for the violation of her children’s right to life, violation of her right to respect of her private and family life, violation of her right to a court trial and non-existence of an effective state remedy. European Human Rights Court (EHRC) in Strasbourg awarded her 25,000 euro as a non-pecuniary damage compensation and additional 4,300 euro for expenses incurred before both the Constitutional Court of Slovakia and EHRC.

**Article 3 - No one shall be subjected to torture or to inhuman or degrading treatment or punishment.**

Articles 3 and 8 appear to be those which are mainly concerned with protecting women from abuse. Choudry and Herring state, at page 17, “Positive obligations are now imposed on local authorities, police, the Crown Prosecution Service and courts to ensure that victims of domestic violence (including children witnessing it) are protected in an effective and reasonable way. They have rights to this protection under Articles 3 and 8.”

They then go on to expand upon the definition of torture, inhuman or degrading treatment or punishment, as it applies to domestic abuse. “Actual bodily injury or intense physical or mental suffering will generally qualify as ‘ill treatment. Treatment which humiliates or debases an individual; shows a lack of respect for, or diminishing human dignity; or arouses feelings of fear, anguish or inferiority capable of breaking an individual’s moral or physical resistance.’ ... ‘Even domestic abuse which is non-physical can come within this prohibition when it is recalled that creating feelings of inferiority or lack of respect of dignity can be included.”

Further, they also comment that domestic abuse raises three additional key points:
- “Domestic violence can be seen to be rooted in exercise of control;
- Can be seen to be particularly degrading in the context of an oppression against women analysis (i.e. previous lack of legal protection can be seen to have acted as a warrant for the abuse);
- Serious emotional abuse ‘which leads to an overbearing of an individual’s personality’, can also be seen as degradation.”


With regard to the State’s responsibility under this Article, it would appear that the definitions of ‘inhuman’ and ‘degrading’ include abusive episodes and situations that women seeking protective orders have experienced. The case law in this area has
shown that it can cover acts perpetrated by the State itself or situations involving persons in private, and can apply either sanctions against perpetrating behaviour in breach of the Article or impose positive responsibilities in terms of the State’s responsibility to protect.

In terms of the judgement in Ireland v United Kingdom (1979-80) 2 E.H.R.R. 25, a wide spectrum of treatment can be defined as “degrading” in terms of Article 3. It can therefore be argued that the threatening, stalking, humiliating and degrading physical and emotional maltreatment of, and behaviour perpetrated against, women experiencing domestic abuse, and the fear, humiliation, breaking down of a woman’s self-respect, dignity and loss of sense of self experienced by women, amounts to the type of behaviour and treatment which Article 3 protects against.

In E v United Kingdom 2003 36 E.H.R.R. 31, a local social work department’s failure to intervene was held to be a breach of Article 3. The court held that countries are required to take steps to ensure that individuals are not subject to torture or inhumane or degrading treatment, including such treatment by another private individual.

Therefore, in terms of the relevance of Article 3 in the argument for the provision of cost-free protective orders for those experiencing domestic abuse, if a woman, child or young person is experiencing domestic abuse, they are, therefore, being “subjected to torture or to inhuman or degrading treatment or punishment”, despite the fact that this behaviour is being perpetrated by a private individual. Consequently, the State does, indeed, have a positive duty to take steps to protect the woman, children and young people and prevent that treatment.

Article 6- (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

This would cover access to a civil court to obtain a protective order. A precedent was set by the decision in Airey v Ireland (1979-80) 2 E.H.R.R. 305 in relation to State’s duties to facilitate access to justice under Article 6 of the European Convention on Human Rights. It involved a woman who was unable to get a judicial separation from her husband in Ireland because she could not afford to pay a solicitor to act for her. The courts stated that there was a positive duty on a country to facilitate access to justice, including the provision of legal aid, where the legal complexities would mean that a litigant would not be able to present their own case effectively, or where the country’s laws require that a person is represented by a lawyer, viz at paragraph 22 of the judgement, "Having regard to all the circumstances of the case, the Court finds that Mrs. Airey did not enjoy an effective right of access to the High Court for the purpose of petitioning for a decree of judicial separation. There has accordingly been a breach of Article 6 para 1 (art. 6-1)."
In *Ashingdane v United Kingdom* (1985) 7 E.H.R.R. 528, the court held that countries can limit access to the legal system in certain circumstances without breaching Article 6, but only insofar as the limit does not impact on the essence of the right to access, it serves a legitimate aim and its objective is proportionate.

*Steel and Morris v United Kingdom* (2005) 41 E.H.R.R. 22, referred to as the ‘McLibel’ case because two protesters were sued for defamation by McDonalds Restaurant for distributing leaflets. They were unable to access legal aid for a defamation case and therefore had to carry out their own defence. The court held that the blanket denial of legal aid in this specific case had been a breach of Article 6.

**Article 8 - Everyone has the right to respect for his private and family life, his home and his correspondence**

It has been considered that Article 8 and Article 3 work together and in such a way as to offer protection and impose a positive duty to act where this obligation under Article 3 alone might not apply.

In the case of *X and Y v The Netherlands* (1986) 8 E.H.R.R. 235, it was held that the concept of private life covered the physical and moral integrity of the person.

Further, the rights enshrined in Article 8 also cover the right to respect for a home, as seen in *Connors v United Kingdom* (2005) 40 E.H.R.R. 9, where it was held that a breach of Article 8 had occurred because legal procedures in existence were not sufficient to protect the appellants’ right to respect for a home.

The European Court of Human Rights delivered a Grand Chamber judgment in the case of *T.P. and K.M. v. the United Kingdom* (application no. 28945/95).

It noted that “the local authority’s failure to submit the issue to the court for determination meant that T.P. was not adequately involved in the decision-making process concerning the care of her daughter, K.M.... Therefore, there had been a failure to respect the applicants’ family life, thus a violation of Article 8 in that the first applicant was not provided with a proper, fair or adequate opportunity to participate in the decision-making procedures following the removal of the second applicant as an emergency measure,”

The wording in Article 8 explaining that the right must be exercised “in accordance with the/prescribed by, law” has also been held to mean that the citizen must have adequate access to the law in question- *The Sunday Times v United Kingdom* (1979) 2 EHRR 245;

Choudhry and Herring state at page 9, in relation to situations involving children that “...it can be seen that, within the context of domestic abuse, the state may be required to intervene in order to protect the family lives of the abused parent and any children under both its Article 3 and Article 8 obligations. If the relationship between the child
and parents is being severely disrupted by any violence (even if it is not being directed at the child), there is a strong case for claiming that both the child’s and the abused parent’s right to family life are being interfered with. This may then, in turn, create a positive obligation upon the state to intervene to protect their rights of family life.’

In summary, States have a positive obligation to act to protect citizens from violent and abusive behaviour under Articles 3 and 8. Therefore, it can clearly be argued that if the State fails to allow a woman access to a protective order, which she needs to prevent her being “subjected to torture or to inhuman or degrading treatment or punishment” and to ensure that she has “the right to respect for her private and family life, her home and her correspondence”, then the State is in breach of Articles 3 and 8.

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