



Scottish Women's Aid

Response to Scottish Government Consultation on Family Law -

About

Scottish Women's Aid (SWA) is the lead organisation in Scotland working to end domestic abuse and plays a vital role in campaigning for effective responses to domestic abuse. SWA is the umbrella organisation for local Women's Aid organisations across Scotland, each providing practical and emotional support to women, children and young people who experience domestic abuse. The services offered by our members include crisis intervention, advocacy, counselling, outreach, follow-on support and temporary refuge accommodation.

We also run the Scotland's Domestic Abuse and Forced Marriage Helpline taking over 1000 calls, WhatsApp messages, and texts (24h/365) every month.

Introduction

Domestic abuse, along with other forms of gender-based violence, is a form of gender discrimination and *"one of the fundamental social, political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated."*¹ These actions, are a form of economic abuse², which in the context of domestic abuse *"...is designed to reinforce or create economic instability. In this way it limits women's choices and ability to access safety. Lack of access to economic resources can result in women staying with abusive men for longer and experiencing more harm as a result."* Up to 90% of domestic abuse survivors cite having experienced economic or financial abuse by their intimate partner.³ Economic abuse is recognised in the new Domestic Abuse (Scotland) Act 2018, and, therefore, this behaviour can attract criminal penalties. However, it remains a lesser-known form of domestic abuse and often goes unidentified despite its serious and long-lasting consequences for the survivor.

Summary of our response

Our response focusses on the very specific issues for women, children and young people experiencing domestic abuse that already exist in enforcing their rights under these sections, the deficiencies in these provisions as they apply to them and, given the possible unforeseen consequences that may arise when changing definitions, the matters that must be taken into account and incorporated.

¹ 1 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation 35 on Violence Against Women, para 10, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=CEDAW/C/GC/35&Lang=en

² The Domestic Abuse Report 2019: The Economics of Abuse <https://www.womensaid.org.uk/research-and-publications/the-domestic-abuse-report/>

³ What's yours is mine: The different forms of economic abuse and its impact on women and children experiencing domestic abuse <http://www.refuge.org.uk/files/Whats-yours-is-mine-Full-Report.pdf>

Importance of domestic abuse competent responses

The positive implementation of any of these reforms to ensure women, children and young people are adequately protected, particularly when engaging in the proceedings around financial provision for cohabitants and simplified divorce, relies very heavily on both women's legal representatives and the court's understanding of cause, dynamics, effects of domestic abuse, especially coercive control and economic abuse, and being able to identify, present and inquire about, domestic abuse. We are not confident that the current blanket approach of either civil practitioners or the civil courts is appropriately domestic abuse competent to ensure this happens

Cohabitants' Rights in the Family Law (Scotland) Act 2006

- **Section 25** - We are not completely confident that the process will identify and protect "economically vulnerable cohabitants" and therefore identify women experiencing domestic abuse both when they are making claims against perpetrators or, crucially, when perpetrators are making vexatious and malicious claims against women as a further continuation of the abuse. We remain concerned with the wording of the definition of cohabitant, particularly that it is inconsistent and not in line with that across numerous other pieces of legislation protecting women children and young people experiencing domestic abuse.
- **Sections 26 and 27** - We reiterate our previous comments that the presumption of "equal shares" in household goods, money and property in these sections does not result in equality in practice for women experiencing domestic abuse; additionally, there are concerns as to how women's prior and personal resources may be incorporated, how "savings and investments" would be identified and treated and how the process could be manipulated by perpetrators
- **Section 28** - We note that, positively, the proposed replacement section 28 contains, as we recommended, tests the court must consider, supported by guiding principles and goes further by adding specific accompanying "relevant factors", "additional general factors" that must be applied and taken into account and court powers to set aside agreements made by the parties. However, we are not confident that these will adequately allow the court to identify and take account of domestic abuse. As it stands, section 28 does not recognise economic abuse and facilitates perpetrators of domestic abuse in maliciously raising actions, either to coerce the woman into returning to the abuser, or in the knowledge that in defending the action, the woman will be obliged to incur substantial legal costs, and further, often serious economic disadvantage to her and her children, a clear continuation of the abuse.
 - **Section 28D** - We support the proposed new powers allowing the court to challenge the fairness and reasonableness of any agreement.
 - **Section 28E** -SWA, on balance, does not support proposals to extend the time limit for parties to make an agreement as there are negative implications and risks for women experiencing domestic abuse.
 - **Section 28F**- We have concerns about the proposals allowing the parties to agree an extension of time to make an agreement, and again, on balance do not support, as there are negative implications and risks for women experiencing domestic abuse.

Financial provision from a deceased partner's intestate estate

Where a death is domestic homicide related, we are of the view that perpetrators of domestic abuse must not be able to make a claim on the estate of a woman whom they have abused.

Extending the age of marriage and revision to criminal offence

The wording in the criminal offence should be amended to close the loophole around coercion to protect **those of all ages** at risk of forced marriage in Scotland.

Extending Simplified Divorce Proceedings

SWA does not support this proposal as we have considerable concerns around the potential for perpetrators of domestic to use it to continue the abuse of children and their mothers, particularly to secure contact with children that is unsafe and contrary to the child's best interests and welfare, and the lack of children's participation.

Withholding an address

We support reform on this particular issue, but it must be wider and go far beyond use only in the proposed simplified divorce procedure.

CRWIAs and EQIAs

Neither of the two sets of draft Child Rights and Wellbeing Impact Assessments nor the draft Equality Impact Assessments adequately refer to violence against women, specifically to domestic abuse and the need for the legislation to be crafted in such a way that requires and enables civil practitioners and the courts to be domestic abuse- competent, actively inquire about and identify domestic abuse against women and children, in line with trauma-based practice and the intention of Equally Safe.

Question 1-Do you disagree with any aspect of the SLC draft Bill to improve rights of cohabitants when their relationship ends otherwise than on death, or consider that any appropriate provision is missing? ☒ **Yes (disagree)**

Question 2-Should the scheme for the reform of cohabitants' rights on separation apply to couples who separate after the date of commencement of the legislation implementing the proposed reforms? ☒ **Don't know**

Question 3-Do you have any comments on our draft impact assessments on the proposals for improving cohabitants' rights when their relationship ends otherwise than on death? ☒ **Yes**

Question 4-Do you have any other comments on the proposals for improving cohabitants' rights when their relationship ends otherwise than on death? ☒ **Yes**

Economic abuse is recognised in the Domestic Abuse (Scotland) Act 2018, and, therefore, this behaviour can attract criminal penalties. However, it remains a lesser-known form of domestic abuse and often goes unidentified despite its serious and long-lasting consequences for the survivor. As it stands, section 28 does not recognise economic abuse and facilitates perpetrators of domestic abuse in maliciously raising actions, either to coerce the woman into returning to the abuser, or in the knowledge that in defending the action, the woman will be obliged to incur

substantial legal costs, and further, often serious economic disadvantage to her and her children, a clear continuation of the abuse.

SWA responded to the Scottish Law Commission's (SLC) 2020 consultation, raising concerns about the 2006 Act and consequences for women experiencing domestic abuse, which are relevant for reiteration here in relation to the proposed reforms.

In their subsequent 2022 Report, at paragraphs 1.19 and 1.20, the SLC set out the list of concerns raised not only by SWA but also Engender, stating that they had been “... *mindful of these concerns in our approach to development of policy and reform of the law in this area.*”

However, the SLC then went on to say that “*While we acknowledge concerns relating to the risk of spurious claims and dishonest assertions of expenditure, loss or economic disadvantage, we take the view that these are not issues that can or should be addressed by means of statutory provision. **Rather, these are matters that can only be addressed by encouraging those involved as advisors and in the court process to stay alert to these risks and employ robust processes for the testing of evidence, adherence to procedure and swift resolution of claims. What we do recommend is that the legislation requires the court to take account of any behaviour by either cohabitant that has an effect on the economic position of or the present and foreseeable resources of the parties, or either of them, when determining a claim for financial provision. Our proposed reforms relating to the time limit for claims should also go some way towards meeting SWA’s concerns.***” (our emphasis in bold)

This means that the proposed changes to the sections on cohabitants’ rights in sections 25 to 28 rely very heavily on the court’s understanding of cause, dynamics, effects of domestic abuse, especially coercive control and being able to identify, and ask about, domestic abuse, particularly in “*having regard to all the circumstances of the case.*” It would be inequitable if this resulted in women being penalised through the courts making awards in favour of perpetrators due to a lack of understanding of the reality of the claim; therefore, explicit discussions around domestic abuse will be needed.

Our member services commented that understanding of domestic abuse and women’s “economic vulnerability”, in the context of different socio-economic backgrounds of judiciary and legal professionals may be challenging. They went on to say that due to gender inequality, in a heterosexual relationship, women are likely to be “economically vulnerable” and therefore, the mindset in considering this and how it is represented through the gender pay gap, lower NI pension contributions, and provision of unpaid care arguably makes the case for an increased “weighting” in financial awards made to women in these circumstances.

The SLC’s position above and response to our concerns is important to consider, given the fact that in this present consultation, the Scottish Government supports and takes forward their recommendations and the legal changes in the SLC draft Bill, which form the basis of Questions 1 to 4. While some of these recommendations and changes are supportive, others raise additional concerns and problems in practical implementation.

In relation to domestic abuse, there are a number of reasons why women may not be using these provisions, including the fact that they are unaware of their rights under

sections 26, 27 and 28, in particular. However, it will be possible that a perpetrator could use these provisions to perpetuate abuse by bringing an action against the woman. It is vitally important that any changes support women and minimise the opportunity for the process to be used and manipulated to further the abuse post-separation.

Section 25- The definition of “cohabitant”

SWA comments and concerns

SWA supported a change in the definition of cohabitant proposed in the SLC 2022 draft Bill but were concerned about how an “*enduring relationship*” would be proved as this is terminology drawn from the Adoption and Children (Scotland) Act 2007 and is used for the quite different purpose of child adoption as opposed to financial provision. Our member services queried “*enduring family relationship*”, why “*enduring*” and/or “*family*” is needed, what these terms mean in this context and how it would be measured/identified, as it is inconsistent with the definitions relating to domestic abuse, particularly in relation to “family.”

The revised definition may compromise the definition of cohabitants in several other pieces of legislation relevant to domestic abuse. SWA previously raised concerns about the section 25 definition, that it is not in line with that across numerous other pieces of legislation which are important because of the protection they give women, children and young people experiencing domestic abuse, namely the Domestic Abuse (Scotland) Act 2018; Domestic Abuse (Scotland) Act 2011; Domestic Abuse (Scotland) (Protection) Act 2021 ; Matrimonial Homes (Family Protection) (Scotland) Act 1981; Abusive Behaviour and Sexual Harm (Scotland) Act 2016; Housing (Scotland) Acts 2001, 2006 and 2010, respectively and the Housing (Scotland) Act 2025 which refers back to the 2021 Act definition. Requiring that couples must “*live together*”, and presumably “*live together*” all of the time, is also not consistent with the definitions of domestic abuse in the above, and will not protect a couple who did not live together all of the time but where one was still being financially and economically abused by the other; the terms of section 1(b)(ii) of the 2021 Act referring to persons who live together some or all of the time should be noted in this regard.

We previously advised we would not support the removal of the term “spouse” from any definition unless it was clear that there would be no unforeseen consequences to the operation of the Domestic Abuse (Scotland) Act 2018 and the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. Both define partners and ex-partners as (a) *spouses* or civil partners of each other, (b) living together as if *spouses* of each other, or (c) in an intimate personal relationship with each other. We would therefore ask the Scottish Government to investigate the matter further to ensure that there would be no disruption to the operation of the legislation above.

A member of the SWA Survivor Reference Group (SRG) commented that “...*Section 25 is not well designed to reliably protect economically vulnerable cohabitants, nor to reliably screen for domestic or litigation abuse. The statutory tests are framed around relationship facts, contributions, advantage/disadvantage and fairness, not around safeguarding, coercive control, or economic abuse. That means a survivor’s situation is treated as just one set of “circumstances”, rather than something the process is structured to identify and respond to...*”

Finally, SWA supports the position that no qualifying period of cohabitation be introduced in order to access remedies under the 2006 Act, reflecting our previous view that any period would be entirely arbitrary, judging from other jurisdictions' procedure.

Section 26 – Rights in certain household goods

SWA comments and concerns

Presumption of “equal shares”

A presumption of “*equal shares*” does not, in practice, result in equality for women experiencing domestic abuse since, by the nature of economic abuse, their resources will have been disproportionately used by the perpetrator for his own purposes; the woman is made financially responsible for all costs, but all goods are in the perpetrator's name; she has been forced to buy him goods and services for his personal use from her income or credit and is forced, not only to meet the household expenses but also to buy the household goods (e.g. furniture, white goods), while the perpetrator has not used his own resources, income, savings, etc to do so.

Alternatively, the perpetrator may pay for substantial costs, such as rent or mortgage, whilst holding the survivor financially responsible for everything else. This results in the appearance of him ‘investing’ in and covering substantial ‘goods’ while the survivor has been ‘spending’, which, in reality, means buying food, clothes, medication, toiletries for herself and any children.

While the presumption of “*equal shares*” may be useful where the perpetrator is claiming all the assets are his, it must be capable of rebuttal by either party on application to the courts, and subject to similar tests to those proposed in the revised section 28 below.

Women's prior resources and personal assets

There is a danger that women's “prior resources”, such as savings already held by her prior to the relationship, as opposed to being amassed during this period, could be included. Women will be disadvantaged if such resources were pooled and taken into consideration in the “*equal shares*” assessment, when the reality is that these were not joint resources. A member of the SRG noted “*Savings and investments*” are especially vulnerable to non-disclosure and manipulation, meaning the asset pool may be incomplete or distorted. Without robust disclosure, enforcement and safeguards against coercive use of the process, an “*equal shares*” presumption could be readily manipulated and may entrench, rather than remedy, inequality in practice.”

Similarly, a women's personal assets, particularly items previously personally owned by her prior to the relationship and brought into the house by her, may be at risk. Further discussion is needed as to how these will be identified, protected and excluded from any assessment of “*equally shared property*” and this protection must extend to assets that the perpetrator forced the woman to buy with her money as part of the abuse. This is important since the perpetrator could claim these as “household” property, or that they were purchased as “household goods”, particularly valuable assets such as antique.

In an effort to mitigate their culpability, an abuser could falsely claim a woman ‘benefitted’ from a debt incurred via a loan, credit card, overdraft etc, reflecting

arguments put forward by lenders to reduce their exposure to writing off coerced debt. For example, a woman is forced to take out a loan to improve the family house. While this was done under threats from the abuser and the woman is now fully responsible for the repayment of the loan, the abuser could, potentially, and inappropriately, argue that the woman ‘benefitted’ from having a better living environment and increased property value, so suffered no economic disadvantage.

Our member services also noted examples of women, post separation, discovering that the perpetrator had run up debts in their name, of which the women were unaware but would be expected to service going forward and they raised the point of how women in this position would be recompensed for that current and future disadvantage.

Section 27- Rights in certain money and property

SWA comments and concerns

We would reiterate the concerns raised above in relation to “*equal shares*” and again, this presumption must be capable of being rebutted by either party on application to the courts, subject to similar tests to those proposed in the revised section 28 below.

A number of factors must be explicitly considered and referred to, such as economic sabotage, economic exploitation, with a SRG member adding matters such as the perpetrator’s use of economic abuse, coerced debt, financial control and concealing and/or dissipating assets. The following are also concerns: -

- Abusers can manipulate banking to make it appear they alone were doing all of the investing; women are often unaware of the existence of any investments/savings, whether “jointly” held or otherwise; perpetrators use third parties and relatives to divest money and keep their “pot” safe.
- Any personal savings or investments that women brought into the relationship, or that they managed to save during the relationship from their own income, especially despite the abuser trying to control their finances, would be part of the “pot”. Our comments on section 26, above, sets out how this would disadvantage women.
- Social connotations and meaning/interpretation of “investment” in terms of the gendered division of labour and investment in our society disadvantages women; where women “invest” in the wellbeing and survival of the family, which is not seen as investment at all, men make “tangible” investments in property and other assets.

Section 28 – Financial provision where cohabitation ends otherwise than by death

In our response to the 2020 SLC consultation, we agreed that the current law is unclear, and does not explicitly address fairness and reasonableness, including the conduct of the parties toward one another, and any child, during the cohabitation. Importantly, it has no meaningful test to identify and protect vulnerable parties which would allow domestic abuse and coercive control to be considered by the court, thus both supporting claims by women experiencing economic abuse and preventing malicious claims by perpetrators.

SWA was clear that any reform of the section could not simply leave the matter to judicial discretion. We suggested a statutory test to assess whether an award is just and equitable, referencing parties' vulnerability and conduct, including domestic and economic abuse, supported by Guidance or a statement of guiding principles around factors that must be taken into account. We also recommended that any proposed changes should be subject to an EHRIA and CWRIA.

However, we also voiced concerns that an order to transfer property may disadvantage women and encourage perpetrators to make spurious claims. It is possible that the property is in the woman's sole name and she has been responsible for meeting all the relevant costs relating to the property, and other "household costs" but the perpetrator represents that it has been himself responsible for these expenses and seeks a transfer of the property. Similarly, the property could be registered in the sole name of the perpetrator and while he claims that he had paid all the household costs and expenses, these have, in reality, been paid from the woman's income or financial assets.

There were concerns around the definition of "resources" and issues where women bought their own existing savings, etc into relationship as any change could operate to the disadvantage of women experiencing domestic abuse whose resources were greater than that of the perpetrator. We did support the exclusion of pension schemes as resources and note that this exclusion is continued in these proposals.

SWA comments and concerns

Domestic abuse competence

In relation to the proposal for a completely new section 28, the 2022 SLC recommendations, and those in the current consultation, take note of our concerns above, which were instrumental in influencing how these Guiding Principles and relevant factors would work in relation to domestic abuse, as the SLC stated in their 2022 Report, at paragraph 5.56 *"We were reminded, in their responses to the Discussion Paper, by SWA and Engender of the need to take account of the effect of domestic abuse on victims (usually women), including the vulnerability of victims of domestic abuse to sustained abuse following separation. We recognise that other forms of behaviour (such as gambling or dissipating assets), which could adversely affect the resources of parties, should also be taken into account."*

The current proposals, firstly, and most importantly, rely very heavily on the court's understanding of cause, dynamics, effects of domestic abuse, especially coercive control and being able to identify, and ask about, domestic abuse, particularly in *"having regard to all the circumstances of the case."* It would be inequitable if women were to be penalised through the courts making awards in favour of perpetrators due to a lack of understanding of the reality of the claim and domestic abuse not being identified; therefore, explicit discussions around domestic abuse will be needed.

A thorough understanding of the role that economic abuse plays and the nature and dynamic of this facet of domestic abuse is vital, in that the issue is not solely about **restricting** women's access to money as they can also be made financially responsible for *everything*. An abuser can put all bills and liabilities, etc, into a woman's name and force her to make the payments, but then, particularly in the context of financial settlements, make the claim that she was financially abusing *him*,

that he had no access to resources and unfortunately, the paperwork will reflect that. Women must be able to raise the issue of domestic abuse where a perpetrator is making a spurious and vexatious financial provision claim against his former partner for the sole purpose of continuing the abuse, especially economic abuse and causing financial hardship.

Without this understanding, these principles and factors on their own will not allow the court to effectively scrutinise the assets of perpetrators and the nature of abuse; the behaviour of the perpetrator may allow them to conceal assets, misrepresent their own and the woman's financial position, with specific reference to the following:

Identifying women experiencing domestic abuse as “economically vulnerable cohabitants”

We are not completely confident that the process will identify and protect “economically vulnerable cohabitants” or appropriately consider women's economic disadvantage, and domestic abuse and therefore identify women experiencing domestic abuse, both when they are making claims against perpetrators or, crucially, when defending perpetrators' vexatious and malicious claims, made against women as a further continuation of the abuse.

A member of the SRG observed that a revised section may still fall short in practice ...*“unless domestic abuse (including coercive control and economic abuse) is expressly named as a relevant factor and clearly linked to how the court assesses fairness, disclosure, capacity to negotiate, and the validity of “agreements,” so that abuse is not treated as mere background context or overlooked absent findings...”*

In addition to identification of domestic abuse, the following requires further exploration and discussion:

- How “fairness” will be framed and interpreted, given that the courts' identification and understanding of domestic abuse is not fully developed and women's legal representatives will require to be fully conversant with such matters in order to ensure that a woman's claim is made and properly framed.
- Courts will have to be alert to the fact that the perpetrator, in mitigation of any future financial award against him, particularly in relation to support for a child, “offers” or “undertakes” to provide support for the child while ,in reality has done nothing whatsoever to provide for the child's upkeep and welfare during the relationship, and actually acted to the contrary, with disadvantage of the child, their welfare and best interests.
- Under section 28(C)(5) & (6) the terms of any agreement between the parties, whether entered into before, during or after the end of the cohabitation, is relevant to any claim. The court cannot make an order inconsistent with this so the important proposal to give the court powers, under draft section 28D(2), to vary this agreement, or, crucially, set it aside where it was not “ *fair and reasonable at the time it was made*” is a vital protection for women experiencing domestic abuse where the abuser has made them sign such an agreement
- We also consider that a claim of unjust enrichment should be available to counter a claim made under section 28.

Presumption of “equality

- A presumption of “equality” between the parties as a starting point might disadvantage women, particularly where resources have not been pooled and

perpetrators have kept their own separate and/or used women's; or where the parties have not, in fact, agreed that they would financially support one another during the relationship. Perpetrators may have paid expenses, costs, bought assets in their name but using the women's money and income, so while the position appears that the perpetrator has unequally been responsible for household expenses and therefore, on the face of it, should be recompensed equally, the reality is that he has not.

SWA comments on sections 28D, 28E, 28F and 28G

New Section 28D

SWA previously stated that women experiencing domestic abuse would require specific protection to ensure that the court could challenge the fairness and reasonableness of any agreement on finances between the parties, the circumstances under which it was entered into, the content of the agreement and then be able to set aside the contract.

This positive proposal gives the court power, when determining an application for financial provision under section 28(2), to vary or set aside any agreement, or any term of an agreement between former cohabitants, if the agreement, or term of the agreement was not fair and reasonable at the time it was entered into.

The court must be able to consider that the agreement was entered into not only as a consequence of domestic abuse, and coercion and intimidation but also fraud, deception and capacity issues, such as taking advantage of a woman's vulnerability through immigration insecurity, learning disability, language barrier or unfamiliarity with Scots law or the nature of the agreement. We would agree with paragraph 7.25 of the consultation that even if the woman had obtained independent legal advice and the agreement was duly witnessed, the court must be able to still set it aside on the grounds of serious injustice.

New Section 28E

SWA, on balance, does not support any proposals to extend the time limit, as there are both benefits and risks for women experiencing domestic abuse.

On the one hand, extending the limit would offer women experiencing domestic abuse the opportunity to consider a claim against the abuser once she has dealt with the more immediate and urgent matters of accommodation, obtaining protective orders, issues around children, etc, and could give her the opportunity for redress against the perpetrator for economic abuse she suffered.

However, the negative side is that an extension would also facilitate the perpetrator being able to essentially continue the abuse for several years; the perpetrator could hold the threat of a making a claim against her over the woman to prevent her leaving, reporting to the police, or as a lever to demand child contact or residence and could also exert these threats after the cohabitation has ended to continue the control and abuse. A woman would have several years of worry not knowing whether or not she would be forced to defend a claim for a substantial sum of money and the potential diminution of her assets in defending an action or having an award made against her, and the implications of both of these. This would delay women and children's recovery from the abuse and only serve to prolong the trauma experienced by them.

Also, given that the court would have discretion whether to allow a late claim, a solid test that explicitly requires the court to look behind the circumstances of a late claim, and an understanding of domestic abuse to support this, would be needed.

New Section 28F

The proposal is that the parties themselves can agree on an extension, but this process is again open to misuse due to domestic abuse and again, on balance, do not support this. We have concerns that the perpetrator could manipulate the process, using threats and coercion to force the woman into agreeing the extension of the time limit. The court would have to carefully consider the reasoning behind the claim and whether it was vexatious and malicious meaning there would have to be a specific and explicit test to identify late claims that are spurious, unjust, unfair, unreasonable, were entered into as a consequences of coercive control and represented continuation of economic abuse against the woman.

We previously commented that if any provision allowing a late claim is introduced, there must be an accompanying provision to the effect that the court must overturn any such agreement in circumstances where a vulnerable party has been exploited, the agreement is not fair or equitable, would disadvantage one of the parties or where domestic abuse is an issue. Section 28D above, proposing to overturn unfair financial agreements may cover this but we are not confident that this is adequate.

New Section 28G - Interpretation of sections 26 to 28F

It is positive that subsection 2 states *“In section 28C(4)(b), sections 2(2) to (6) and 3 of the Domestic Abuse (Protection) (Scotland) Act 2021 apply for the purposes of determining whether behaviour by one cohabitant is abusive of the other cohabitant as they apply for the purposes of determining, under Part 1 of that Act, whether behaviour by person A is abusive of person B.”*

SWA had voiced concern about a lack of clarity as to whether a section 28 claim considered past, present and/or future disadvantage to one party or the need for contributions from the other so these proposals may address that. However, “resources” is defined in new section 28G as including present and “reasonably foreseeable” resources. Our member services raised the issue of how “foreseeable resources” would be calculated and identified. For instance, if a woman had a child, she would likely take time off work, perhaps for a lengthy period, while the perpetrator continues to work, earn income, make investments and gather pensions and the question was how the court would take these income streams into consideration.

CRWIA and EIA on potential reform of cohabitants’ rights to financial provision on separation

Finally, we would comment that neither the draft Child Rights and Wellbeing Impact Assessment nor the draft Equality Impact Assessment adequately refer to violence against women, particularly domestic abuse, and the need for the legislation to be crafted in such a way that requires and enables civil practitioners and the courts to be domestic abuse competent, inquire and identify domestic abuse against women and children, in line with trauma-based practice and the intention of Equally Safe.

Financial provision on intestacy- section 29- Questions 5 and 6

Question 5-Should the recommended definition of “cohabitant” under the SLC’s proposals for reform of cohabitants’ rights on separation, also apply to circumstances where a cohabitant is applying for financial provision from their deceased partner’s intestate estate? ☒ Don’t know

Question 6-Other than the time limit, what other practical difficulties are encountered by persons making an application for financial provision on intestacy?

It is important to be aware that a death may be domestic homicide related. Our position is that perpetrators of domestic abuse must not be able to make a claim on the estate of a woman whom they have abused. The court must apply tests similar to those above around the conduct of the parties and abuse by one toward another, and the applicant’s financial advantage over or disadvantage by the other, in order to support a determination that such a claim is unreasonable, unjust and inappropriate.

Abusers’ ability to interfere in this way seriously impacts children of survivors as well, i.e. where the child is from a previous relationship, there is no will and the perpetrator is ‘next of kin’ as he can choose not to support the child with the money left by their mother because it is not his child.

Part 2: The minimum age of marriage and civil partnership- Questions 7- 10

Question 7=Should the Scottish Government legislate to raise the minimum age of marriage and civil partnership to 18? ☐ Yes ☐ No ☒ Don’t know. If you wish, you can choose a reason (or reasons) for your answer from the list below and/or add your own reasons:

- ☐ raising the minimum age would protect some children and young people from harm they would not otherwise suffer
- ☐ other measures can be taken to protect children from harmful conduct, without increasing the minimum age for marriage or civil partnership (please provide information about these other measures below)
- ☐ in general, people aged 16 or 17 do not have the capacity to understand what it means to marry or enter a civil partnership
- ☐ raising the minimum age in Scotland would meet our international obligations
- ☐ we should keep the minimum age at 16 as it’s consistent with some other rights that 16-year-olds can also exercise like leaving home
- ☐ there’s not enough evidence to justify reform
- ☐ other (please add your reasons below)

We note the terms of the UNCRC recommending that the UK prohibit all marriages of children under 18 years of age; that the United Nations describes “child marriage” as any marriage where at least one of the parties is under 18 years of age and that ; Goal 5 of the UN Sustainable Development Goals aims to eliminate what it defines as harmful practices, including child, early and forced marriages and that CEDAW considers child marriage to be a form of forced marriage and that the overwhelming majority of child marriages involve girls under 18.

Question 8-Do you agree or disagree that the Scottish Government should legislate to extend the forced marriage offence? This would be so that any conduct with the

intention of causing a person under 18 to marry or enter a civil partnership would be a criminal offence, including where there is no evidence of coercion.
AGREE BUT CAVEATED IN TERMS OF AGE

We note that England and Wales raised the minimum age of marriage and civil partnership to 18 to close a very specific issue in their law that is not reflected in Scots law and at the same time, extended the criminal offence of forced marriage in England and Wales only, so that the offence there can be carried out whether or not conduct against them amounts to violence, threats, any other form of coercion or deception.

We did oppose the introduction of the criminal offence of forced marriage on the grounds it would not be used as children would not wish to criminalise their parents; indeed, there have been no prosecutions in Scotland.

However, if current wording restricts the use of the criminal offence in Scotland, where parties have capacity, to circumstances only where there is evidence of violence, threats, and any other form of coercion or deception, then steps should be taken to address this, to ensure that **any** conduct with the intention of causing **a person** to marry or enter a civil partnership would be a criminal offence, so that **those of all ages** at risk of forced marriage in Scotland, not just young people, would be protected.

Question 9-Do you have any comments on our draft impact assessments about the minimum age of marriage and civil partnership? We are particularly interested in any evidence about the experience of harm (or other impacts) for parties aged 16 or 17 who are permitted to marry or enter a civil partnership in Scotland, to their children or to others. You should not include personal data in your response
. ☒ No

Recognition of relationships registered outwith Scotland- Questions 9 and 10
No comment

Part 3: Qualifying requirements for religious and belief bodies to meet when they solemnise marriage or register civil partnership Questions 11- 16
No comment

Part 4- Extending Simplified Divorce and Dissolution to cases where there are children under 16 and no dispute about their welfare

Question 17-The Scottish Government is considering making simplified divorce and dissolution procedures available in cases where: there are children (one or more) of the family under 16; and the spouses or civil partners have agreed about the upbringing of the children and so neither applies for an order under section 11 of the 1995 Act in relation to the children. Do you agree or disagree with making the simplified procedures available in these cases? ☒ Disagree

Question 21-Do you have any other comments on extending the simplified divorce and dissolution procedures? ☒ Yes

SWA does not support, and has considerable concerns around, this proposal and the potential for perpetrators of domestic to use it to continue the abuse of children and their mothers, and to secure contact with children that is unsafe and contrary to the child's best interests and welfare.

The main benefit seems to be aimed at financial savings to the "public purse" and for couples seeking divorce or dissolution who have agreed all matters, including the arrangements for the upbringing of their children and who do not qualify for legal aid, or who are eligible but would have to pay a contribution.

In this process, the proposed SCJC draft new rules and the Scottish Government proposals require the applicant spouse/civil partner to complete a form giving certain information relating to the child which they then send to the non-applicant spouse/civil partner, who signs that they agree with the information and consent to the arrangements for the child's welfare, as set out by the other spouse, and the court will consider this form.

There are numerous problems with this: -

- The presence of domestic abuse is not always obvious to the court and perpetrators go to great lengths to conceal this during legal and other proceedings to achieve the outcome they wish.
- While the courts will consider the application, there is no routine hearing or routine questioning of the parties apart from the court's consideration of the information submitted on the relevant forms. This is an issue as the simplified process may unwittingly both mask/fail to identify the presence of domestic abuse perpetrated by one spouse or civil partner against the other spouse and her children, thus allowing the abuse against the other parent and child to continue during the divorce/dissolution proceedings and after the separation, to their detriment.
- We are concerned that the SCJC EIA stated "*Positive Impacts – translation: In cases where the parties do have children then having the case dealt with on the papers under a simplified procedure will help to avoid the need for translation during the hearings that might otherwise arise.*" Access to a translator is important in this process and the documents will still require translation or the non-applicant party will have no idea what they are agreeing to. This will be an issue for women experiencing domestic abuse who are unfamiliar with Scots law, especially those for whom English is a second language, in that they may be coerced into signing the agreement, or simply told that this is a legal requirement under Scots law that they must sign, in both cases without fully understanding the implications of what they have agreed to around the residence and care of their children.

In the simplified process the applicant requires the non-applicant spouse/civil partner to sign the form; doing so signifies the latter's "consent" to the simplified proceedings, the veracity of the information in the form and all the arrangements for the children including living arrangements and contact. This

form has to be returned to the applicant spouse/civil partner who then submits it to the court.

SWA considers that this process and the forms are not appropriate and fraught with problems. Allowing the applicant, potentially an abusive spouse or civil partner, to represent the child's views in the paper is not appropriate and this is an issue of real concern where domestic abuse is an issue, as follows: -

- The voice of the child, their participation in the process and their ability to give their views on the arrangements to the court is entirely absent, which is not in line with other procedures involving children and their right to participate in proceedings involving their future care and welfare. A member of the SRG stated *"Children's experiences may be invisible without a mechanism to hear children directly or via a professional..."*
- The proposed process will allow abusers the opportunity to, not only submit untrue information on the state of the relationship, but due to coercive control, also force the non-abusing partner to agree and submit to potentially dangerous and unsafe living arrangements, childcare and contact and residence arrangements. A member of the SRG commented *"... Fear driven compliance may appear like cooperation... Economic abuse and dependency distort bargaining power, making the victim's 'agreement' not voluntary."*
- It is not clear how the court will establish the accuracy and veracity of any or all of this information provided by the applicant, particularly that around child protection and referral to Hearings. It is entirely possible for the abusive partner to minimise and hide the abuse that has been ongoing prior to and during the divorce/separation process. The presence of coercive control as a tactic of domestic abuse means that abusers may pressurise women and children into not mentioning abuse during the proceedings and to coerce the non-applicant spouse/civil partner to agree, in the various submissions and paperwork for the court, that *"suitable arrangements have been agreed"* and that they are content with these "arrangements" when the opposite is, in fact, very much the case.
- This will be a particular issue where domestic abuse has been a feature of any child contact and/or residence proceedings after the couple have separated but the marriage or civil partnership has not been formally terminated as the abuser may persuade the court that the "issues" around child contact/residence have been "amicably" resolved, when, again, the opposite is the case.
- If these *"arrangements"* are effectively endorsed by the court through the expedited proceedings and not challenged by the court, this will allow abusers to otherwise circumvent section 11 proceedings and continue the abuse. Threats may be used to secure compliance and silence, including those directed against children, and this could extend to financial abuse. Similarly, it may mean that unsafe contact arrangements already in place under section 11 are allowed to continue.

Given that this is intended to be a quicker process, it is not clear what investigation and background checks will the court actually undertake and how they will do this. Will they seek, or be required to obtain, background information from third parties to verify information given on child protection and children's hearings referrals, vital to the proceeding, as these matters can be concealed and misrepresented by abusers? A member of the SWA SRG pointed out *"...Children's experiences may be invisible without a mechanism to hear children directly or via a professional. If there's no*

opportunity for third-party evidence (school, health visitor/GP, social work, police history, refuge/advocate, etc.), decision-makers may never learn about risks. Child arrangements can enable continued harassment, surveillance, manipulation through the child, and repeated unsafe interactions. If the system relies on parties flagging abuse or disputing arrangements to trigger safeguards, many survivors will not feel safe to do so..."

- It is vitally important that the forms and process capture all relevant information relating to the welfare of the children so that the court can assess the situation, identify domestic abuse at an early stage, and any issues around one of the parties being coerced into participating in the simplified procedure, particularly to circumvent proper investigation of domestic abuse and child contact/residence, so that a hearing can be fixed or case remitted to family action proceedings.
- The court must seek information on any current or previous actions under section 11 to actively ascertain whether domestic abuse is, or was, an issue and scrutinise the abuser's actions in the period prior to the "simplified" proceedings being raised. This whole issue underlines the importance of the judiciary having a clear understanding of the dynamics, tactics and impact of domestic abuse on women and children, and on the civil courts being able to access information around criminal proceedings relating to domestic abuse.

Question 18-Should Ministers amend the Orders which helped establish the simplified divorce and dissolution procedures to remove the references to "mental disorder" and instead exclude only cases where one of the parties actually "lacks capacity"? ☒ No comment

Question 19-Considering these points, do consultees think any changes are required to the procedures for withholding addresses in simplified divorce and dissolution cases? ☒ Yes

SWA comment and need for reform

Our understanding is that the client's solicitor would designate their client in the Initial Writ as residing care of their business address, or, perhaps, care of a specialist service's operational office, and in the Writ's pleadings to the court explain the need for restriction of the address, with reference to the abuse and danger of ongoing abuse but, for the women and children experiencing domestic abuse, having to repeat this is unacceptable.

We agree that wider reform is needed on this particular matter but also emphasise that the problem goes far beyond the current question relating to the simplified divorce procedure. It is a recurring issue in relation to actions for contact and residence where domestic abuse is an issue and women are seeking to withhold their current address from the abuser and not have it disclosed in court papers; this is a particular safety issue where she is residing with her children in refuge, which is intended to be a safe, secure place and accommodation. Disclosing the address means compromising the safety and anonymity from abusers of, not only the woman and children directly involved, but also the other women and children residing there.

A simpler a process is necessary so that women's addresses, particularly when living in a refuge, are not disclosed in court papers or to the abuser; again, this relies on

the court's understanding of domestic abuse and the safety issues facing women and children. The consultation paper refers to the NES publication on trauma-informed skills and we would also remind the Scottish Government of the provisions of the trauma-based practice principles in sections 26 and 28, relating to civil proceedings, in the Victims, Witnesses and Justice Reform (Scotland) Act 2025 and the obligation that, once commenced, will be placed on civil courts
<https://www.legislation.gov.uk/asp/2025/12/contents>

Question 20-Do you have any comments on our draft impact assessments about extending the simplified divorce and dissolution procedures? ☒ Yes.

CRWIA and EIA on Potential extension of simplified divorce and dissolution procedures

Equality Impact Assessment

- The draft Equality Impact Assessment does not mention violence against women which is a concerning omission given the potential for this particular reform to have manifestly negative consequences for the safety and welfare of women experiencing domestic abuse.
- It is also concerning that no engagement was undertaken with third sector organisations, particularly those engaged in the violence against women sector.

Child Rights and Wellbeing Impact Assessment

- The draft Child Rights and Wellbeing Impact Assessment also does not make any reference to domestic abuse. We also note that no engagement with children and young people was undertaken, particularly those experiencing domestic abuse, who are more likely to face negative consequences from these proposals and look forward to hearing how and when this will be undertaken.
- While reference was made to UNCRC Article 19 (Protection from violence, abuse and neglect), this was simply to say that potential extension of the simplified procedure does not affect the requirements on a court dealing with a divorce or dissolution to consider an order under section 11 of the 1995 Act on parental responsibilities and rights. However, the revised process would allow an abusive applicant to use the process to mask any domestic abuse and prevent the court both considering the need for a section 11 order and seeking further evidence on the application.

On the matter of Impact Assessments, we would also reiterate our comments above in relation to the **CRWIA and EIA on potential reform of cohabitants' rights to financial provision on separation** in that, again, neither adequately refer to violence against women, particularly domestic abuse, best and trauma-based practice or Equally Safe.

Further work is needed before both sets of Assessments reflect the impact proposed changes will have on women and children experiencing domestic abuse.

In conclusion, SWA looks forward to discussing this and the other matters raised in the consultation paper further with the Scottish Government.