

"THERE IS A LACK OF AWARENESS OF EXCLUSION ORDERS AND BECAUSE IT IS NOT BEING USED THERE IS NOT THE BUILD UP OF EXPERIENCE - LIKE A MUSCLE NOT BEING USED, OVER THE YEARS."

RESEARCH REPORT

The use and effectiveness of exclusion orders under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 in preventing homelessness

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The views expressed in this report are those of the researchers and do not necessarily represent those of Scottish Women's Aid or members of the research advisory group.

1

INTRODUCTION

An exclusion order is a civil legal remedy that removes an abuser from a family home and, together with other legal remedies, should enable women to remain in their own home, living safely apart from an abuser. Very little is known about how often women use these orders and whether they are effective when used.

Exclusion orders were introduced into Scots Law by the Matrimonial Homes (Family Protection) (Scotland) Act 1981, as part of a range of civil legal remedies intended to protect women from abusive partners. Exclusion orders offer women the option of removing the abuser from the home as an alternative to leaving and seeking rehousing. Since their introduction, there have been many changes in the response to domestic abuse and rehousing as a homeless person. One policy shift in recent years has been a focus on prevention of homelessness and in this context, exclusion orders may have a role to play as an alternative to rehousing through homelessness services. Exclusion orders could prevent homelessness for women and their children, if women choose to stay in the home and remove the abuser. However, there is no clear evidence from central or local data that establishes whether exclusion orders, nearly 30 years after their introduction, present an effective, sustainable alternative for women who do not want to leave their home.

This is a report of the findings of research commissioned by Scottish Women's Aid to consider how effective exclusion orders are in preventing homelessness of women, children and young people in the context of domestic abuse. In this study, effectiveness is defined to include consideration of whether exclusion orders are used and, when used, whether they operate to keep women in their home, safe and protected from further abuse, without any future period of homelessness. This research is concerned with one legal remedy which may have a role to play in the prevention of homelessness: an assessment of its current contribution to the prevention of homelessness and the reasons why women use it; barriers to using it; and what changes, if any, may be required to expand its contribution to the prevention of homelessness.

Initial scoping of the research with women's aid groups and in local courts identified that there is little use of exclusion orders. The research then focused primarily on identifying why women are not using exclusion orders as a remedy. This involved identifying those factors that influence women as they decide whether to leave the home and seek rehousing elsewhere, or stay in the home with or without exclusion orders. Our focus in identifying these factors was to consider what changes, if any, would be required to make exclusion orders a more viable alternative and accessible to women.

This study therefore has five main concerns:

How effective are exclusion orders in preventing the homelessness of women, children and young people in the context of domestic abuse? This involves a consideration of how many women are using the remedy and their impact when used.

Why are women not using exclusion orders?

What factors influence women's decision to pursue an exclusion order?

What factors influence women's decision to leave the home and settle elsewhere?

What changes are required to make exclusion orders a more viable, sustainable option?

This report is based on research involving local women's aid groups across Scotland and in four local authority areas in Scotland. At an early stage it was agreed that the four local authority areas chosen for this study would not be identified in the report; and all data from local courts, local services and most importantly, local women who have used these services is reported anonymously to maintain confidentiality.

Exclusion orders are one option available to women and will not be the right option for every woman. The study has sought to identify ways to improve the opportunities for women to use exclusion orders if they want to remain in the home and an exclusion order is required to suspend the abuser's right to live in the home. Women will continue to make their own assessment about whether their interests are better served by leaving and starting afresh elsewhere or by excluding the abuser and staying in the home.

Following a description of the methodology in the next chapter, the policy context and current knowledge about exclusion orders and the homelessness alternative is discussed in Chapter 3. Chapter 4 then presents the main findings from the court data; Chapter 5 presents the findings from the survey of local women's aid groups; Chapters 6 and 7 report on the factors which influence women's decisions to leave the home or stay in the home, from the viewpoint of women (Chapter 6) and on the services that work with women (Chapter 7). The final chapter draws together the conclusions from each of these and makes some recommendations.

The Matrimonial Homes (Family Protection) (Scotland) Act 1981 is written in gender-neutral terms. However, the vast majority of domestic abuse is perpetrated by men against women and that fact is reflected in the use of gendered pronouns in this report.

In reporting on the use of a legal remedy, this report necessarily uses some technical legal language and a glossary of legal terms is included at Appendix A.

2

METHODOLOGY

The research aim was to “explore how effective exclusion orders are in preventing homelessness of women, children and young people in the context of domestic abuse”. The research brief identified that the research should pay particular attention to the following issues:

- access to the justice system
- access to information and advice on exclusion orders
- the effectiveness of exclusion orders.

In identifying these issues there was an unstated assumption in the research brief that access to the justice system and access to advice and information might be acting as a barrier to the use of exclusion orders. The research set out to investigate whether women were using exclusion orders and any barriers that might operate to prevent women from using exclusion orders and whether, when used, orders were successful in maintaining women in their home, safe and protected from further abuse, without any future period of homelessness.

The early stages of the research identified that exclusion orders were not a frequently used remedy; it appeared that exclusion orders were being used less frequently now than they had been in the past. Their infrequent use meant that it would prove difficult to assess their effectiveness as a means to keep women in their home, safe and protected from further abuse, without any future period of homelessness. The research therefore shifted focus to identify the reasons why women were not using exclusion orders and what changes would be required to present exclusion orders as a viable, sustainable method of preventing homelessness.

As identified in the previous chapter this study has five main research questions:

How effective are exclusion orders in preventing the homelessness of women, children and young people in the context of domestic abuse?

Why are women not using exclusion orders?

What factors influence women’s decision to pursue an exclusion order?

What factors influence women’s decision to leave the home and settle elsewhere?

What changes are required to make exclusion orders a more viable, sustainable option?

The research took place between November 2009 and May 2010; it consisted of the following key components.

2.1 Desk research

The desk research consisted of a contextual literature/policy review that focussed on understanding policy changes that might influence women's choice of remedy, and data analysis of existing national data sets provided by the Scottish Legal Aid Board (SLAB), the Scottish Government and the Scottish Court Service. It was important to understand what policy shifts, if any, might have had an impact on the use or effectiveness of exclusion orders.

2.2 A survey of local women's aid groups

We conducted a structured telephone survey of local women's aid groups to identify whether exclusion orders were used by groups' service users, the factors which groups thought influenced their service users and any changes which might be required to increase use of exclusion orders.

There are 45 local groups, four of which are not affiliated to SWA. All groups were asked to participate in the survey and 36 did participate. The survey findings were quantitative and qualitative. One finding from the survey was that exclusion orders appeared to be rarely used by women leaving abusive partners. This shaped the subsequent phases of work and helped to refine/identify the key issues for investigation. In particular, the survey highlighted a perception within women's aid services that neither criminal nor civil legal responses could be relied upon to prevent continuing abusive behaviour and protect women from it. These were important findings, which had implications for both the identification of women to speak with and the topics to discuss with them (see below).

2.3 Data collection from sheriff courts

There are 49 Sheriff Courts in Scotland. The research team was allowed access to six courts. These courts served the local authority areas where we carried out our qualitative interview programme, although the boundaries of the courts do not exactly match the local authority boundaries. It was important that the court data should not be linked with specific courts or cases and it was on that understanding that we were allowed access to the data. The courts, and thus the local authorities, are not named in order to protect confidentiality.

We took care to include a range of courts serving different types of population. These courts were:

Court A – medium-sized Sheriff Court in central belt town, serving a mixed urban and rural population

Court B – large Sheriff Court in a busy city, serving an urban population

Court C – large Sheriff Court in central belt town, serving an urban population

Court D – medium-sized Sheriff Court serving an urban and rural population

Court E – small rural Sheriff Court

Court F – small rural Sheriff Court.

In each court the research team reviewed the case papers of a sample of family law cases registered in the court during 2009 to identify the cases that included a crave for an exclusion order. There were 3,227 family law cases registered as F¹ cases in the six study courts in 2009. We reviewed 2,831 of the writs (88% of all registered cases) which were available in the sheriff clerk's office. The remaining 12% of registered cases were not available for review for operational reasons. Data from the writs was collected according to a template. The data included:

- gender of pursuer and defender
- date of lodging
- legal aid status of pursuer, where apparent
- additional craves
- legal relationship between pursuer and defender
- tenure of occupation of the home and the entitlement
- the presence of children in the household
- classification of the abuse – for example, physical violence, emotional abuse and/or abuse of children
- interim outcomes and final outcomes.

This stage of the research identified the number of exclusion order actions, who was using them and in what circumstances and the range of outcomes. From this, we can identify the circumstances in which women have chosen to use exclusion orders and suggest some factors which may influence women's use of the remedy.

¹ Family law cases between individuals are generally registered by the courts as F cases.

2.4 Interview programme

2.4.1 Professional/service interviews

This stage involved more in-depth work in four local authority areas to explore the reasons why women were not using exclusion orders and the factors that influenced women's choices. Working with the Research Advisory Group, four areas were identified for further study. As we wanted to speak with women in these areas who had experience of using exclusion orders or who had actively considered the option but not pursued it, each area had at least one local group that had reported that they had recent experience with service users who wanted to use exclusion orders. The areas included a mix of rural and urban areas. In these areas, we collected data from the Sheriff Courts (see above) and consulted a wide range of stakeholders from services in contact with women leaving abusive partners.

The first point of contact in each area was the local violence against women partnership (VAWP) or domestic abuse partnership and the local women's aid groups. The partnerships and local groups provided us with an overview of local services involved in the delivery of services to women. There were some area-specific projects involved, but in the main the stakeholders were from similar services across the four areas.

In each area the researchers met with staff from local women's aid groups, homelessness services, social work children and families, social work criminal justice (some mainstream and others from specific projects aimed at women with partners in the criminal justice system linked to domestic abuse), police, and local solicitors. In some areas we met with area-specific projects for women, housing support or advice services and other advice or support services. All consultees were identified for interview by either local VAWP or local services working with women. All consultees were involved in delivering services or in directing the strategy of services that are used by women leaving abusive partners.

Thirty-seven consultees were interviewed individually and face-to-face, with a few telephone interviews. There were also seven small group discussions with staff in some services. In total, 60 people participated in this part of the interview programme. The consultees were asked about:

- the extent of the use of exclusion orders
- the information and advice provided by their service
- the factors that influence women's decision-making
- any changes or improvements to the system that would improve the protection for women in their home.

2.4.2 Service user interviews – the key stakeholders

The methodology was designed around speaking to women who had experience of using exclusion orders or women who had made a decision not to use the remedy. Interviews with women would provide some insight into whether exclusion orders

had been effective in preventing any period of homelessness, and any barriers to using the remedy.

Services were asked to put us in touch with women who had experience of using exclusion orders within the last three years or who had actively considered using an order but decided against it. Although we had chosen areas where the survey had identified some awareness and use, it became clear that it was difficult to identify and contact service users who met the original criteria; services had very little experience of exclusion orders and little contact with women who had used exclusion orders. In response to this and the changing focus of the research, we broadened our criteria to include women who had separated from an abusive partner so that we could explore with them the factors which influenced the decisions they made about housing after separation. Given early identification in the survey of a perception among respondents that neither criminal nor civil legal responses could keep women safe in the home, we also discussed with women their experience of the legal system and their attitude to civil legal remedies, including exclusion orders.

We spoke with 34 women, 16 individually and 18 in groups. The groups were pre-existing service user groups. Although a range of services, including lawyers and homelessness services, were asked to identify women for interview, most women who participated were invited by local women's aid groups, but eight were invited via other specialist services.

2.4.3 Other stakeholders - consulting agencies working with women

Throughout the research, the research team had meetings with representatives from national and specialist stakeholder bodies about the issues arising from our work. This included the following: Scottish Women's Aid, Scottish Legal Aid Board, National Domestic Abuse Helpline, Family Law Association, Scottish Government Homelessness Team, Scottish Housing Regulator and ASSIST. These discussions were a useful opportunity to discuss some of the emerging themes, and helped to refine and test a range of possible recommendations. The contribution of the stakeholder bodies has been most helpful in assisting the formulation of recommendations but this does not mean the recommendations are endorsed by the bodies; the research team remain solely responsible for the policy focus of the recommendations.

This report draws together the desk research and the findings from all parts of the study, including, most importantly, the views and experiences of 34 women who had first-hand experience of choosing whether to use the law, in one form or another, to support and protect them in their decision to leave abusive men.

A written note was taken of all interviews. Extracts from the interview notes appear as quotes in the report.

The report draws on wide ranging and multiple views on and experiences of the usefulness of exclusion orders and barriers to using them. Informed by these views and experiences, the research team has made recommendations on policies, practice and legal reform that may increase the opportunities for women to stay in their homes safely and prevent homelessness for women and their children.



3

EXCLUSION ORDERS IN CONTEXT

3.1 What are exclusion orders?

An exclusion order is a civil legal order, which can be used by women to:

- remove an abuser from the home she currently shares with him
- prevent the return of an abuser who has left the home but still has rights to return, or to
- remove an abuser from a home that she has left so that she can return safely to the home.

An exclusion order regulates the occupancy of the home until divorce or the ownership or tenancy of the home is resolved. It is a temporary order and does not affect ownership or tenancy rights, which will still need to be resolved between a woman and the abuser.

Exclusion orders act to suspend an abuser's right to live in the home and will generally be supported by interdicts and powers of arrest that prevent the abuser's return to the home, once he has been ejected. Although this research is concerned with exclusion orders as the civil remedy that can exclude an abuser with a right to be in the family home, regardless of his property rights, the operation of interdicts and powers of arrest also affects the operation of exclusion orders.

3.1.1 Brief introduction to Matrimonial Homes (Family Protection) (Scotland) Act 1981

Exclusion orders were introduced in the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (MHA). The Act provided married women and some cohabittees with the right to:

- remain in occupation of a family home whether or not they had a tenancy or ownership right to stay there, and
- exclude an abuser from the home.

The Act also introduced various supporting orders about the use of household furniture, orders to distribute responsibility for payment of household outgoings, and an order which could transfer a tenancy between spouses or joint tenants.

Powers of arrest were introduced in the Act, and they can be attached to certain interdicts. Interdicts and powers of arrest are generally sought alongside exclusion orders and are used to deal with any attempts to return to the home. Breach of an interdict with a power of arrest is not a criminal act, but it does give the police powers to intervene. Breach of an interdict is also a contempt of court that can be punished by a civil court. This may involve yet another court action and requires the pursuer to directly ask the court to fine or imprison an abusive partner.

As enacted, both exclusion orders and powers of arrest were available to those with certain property rights and/or marital status but not to all those in need of protection from domestic abuse. Automatic occupancy rights and therefore the right to apply for either an exclusion order and/or powers of arrest were originally limited to married persons or cohabittees who were joint owners or tenants. Other cohabittees had to apply to the court for full protection. Although this has changed and powers of arrest are available to everybody who needs protection from domestic abuse, exclusion orders are still available only to people with occupancy rights granted by the MHA or property law. Those entitled to pursue actions for exclusion orders now include married women, civil partners, cohabittees who have joint title (joint owners or tenants) and those cohabittees who have gone to court and have been granted occupancy rights by the court (initially for a period not exceeding 6 months).

A court can grant an exclusion order to suspend an abuser's right to occupy the home, where the court is satisfied that the order is "necessary for the protection of the applicant or any child of the family from any conduct or threatened conduct or reasonably apprehended conduct of the non-applicant spouse, which is or would be injurious to the physical or mental health of the applicant or child", Section 4(2) of MHA.

Although the orders are intended to provide protection in the home, the Act also directed courts to consider generally whether exclusion of an abuser would be unjustified or unreasonable taking into account a range of factors including the needs and resources of both parties. Therefore, the legal test for an exclusion order is based on necessity for protection, but that necessity can be superseded by a range of other factors. Nonetheless, the MHA was groundbreaking in a number of ways:

- it extended the right to occupy a property, the matrimonial home, to the spouse of the owner or tenant. This meant that a spouse could not be put out of her home without a court order
- it acknowledged the range of domestic abuse, and provided protection from both physical and mental injury, either to a woman or her children or both
- it provided women with the means to enforce their rights at a time when the police response was generally not satisfactory
- it introduced the concept of a police response (powers of arrest) flowing from a breach of a civil order, and

- it allowed for a system of protection which suspended established property rights and together with interdicts and powers of arrest provided a means to keep women safe in their own home.

3.2 National data on the use of exclusion orders

The Scottish Court Service (SCS) collects data on civil cases in all civil courts in its case management system (CMS) by recording the primary crave in each action and the Scottish Legal Aid Board (SLAB) collects and publishes data on civil legal aid applications.

The SCS has helpfully provided data drawn from their CMS on the number of cases with an exclusion order as a primary crave, but we have not used this data to identify the total number of cases in Scottish courts. In some exclusion order cases there can be more than fifteen different craves. Where there are so many craves in an action the exclusion order crave is not always recorded as a primary crave. Therefore, we have made no further reference to this data to identify national use of exclusion orders.

Data from SLAB identifies the number of civil legal aid applications. It includes applications from both pursuers and defenders. It does not capture all civil cases (only those with a legally aided component) and may include applications that do not result in a court action. Despite these caveats, it does provide a proxy for identification of a trend in the use of exclusion orders. Both the number of applications relating to protective orders generally and the number of applications relating to exclusion orders have fallen since 2005². There has been a downward trend in applications relating to all protective orders including exclusion orders and a significant drop in the number of applications for exclusion orders and other protective orders in 2006/07. See table 3.1 on page 16.

3.3 Policy, service provision and demographic changes

Since the MHA was introduced, there have been changes that may have influenced the use of exclusion orders by women leaving abusive partners. Changes include:

- demographic changes, including changes to patterns of cohabitation and tenure
- improved criminal justice response to domestic abuse
- additions and changes to the range of civil protection orders and family law
- changes to legal aid provision
- improved homelessness response and improvements to the quality and range of temporary accommodation.

² *The first year for which there is data.*

Table 3.1: Civil Legal Aid Applications

	2005/06	2006/07	2007/08	2008/09
Total legal aid applications in family/matrimonial cases ³	n/a	10,523	9,773	10,740
Civil legal aid relating to all protective orders (excluding Exclusion Orders) ⁴	2,020	1,663	1,447	1,480
Civil legal aid relating to Exclusion Orders (EOs) ⁵	371	264	268	235
% of Family related LA applications relating to EOs	n/a	2.5%	2.7%	2.2%

3.3.1 Demographic changes

There have been substantial demographic changes since the MHA came into force in 1982, for example:

- housing tenure: in 1981, more than 60% of all housing stock was rented; now 62% of housing stock is owner-occupied⁶
- cohabitation: this has increased. In Scotland in 1991 3.8% of households included cohabiting couples, which by 2001 had increased to 6.9%⁷
- women working: the proportion of women working now is greater than previously. At the start of 1971, the employment rate for women was 56% compared with 70% in the three months to December 2008⁸.

An increase in owner-occupation and reduction in social housing stock may have had an impact on the options available to women. Owner-occupation could either act as an incentive for women to use exclusion orders to stay in the home or, in a previously buoyant housing market, provide an opportunity to use equity in the home to move and start afresh. Higher rates of economic activity might also be expected to increase the range of choices available for women.

3.3.2 Changes in criminal justice response

Since the introduction of the MHA, the criminal justice response to domestic abuse has improved and this improvement might provide some women with an alternative

³ Scottish Legal Aid Board, *Annual Report 2008-2009 and Annual Report 2007/08*

⁴ Data provided by the Scottish Legal Aid Board. This data includes applications that have protective orders as either a primary or ancillary crave. Data published by SLAB in the *Patterns of Civil Supply Research Briefings* includes only those applications with a protective order as a primary crave

⁵ *Ibid.*

⁶ *Housing statistics for Scotland 2009: Key Trends Summary*, a National Statistics Publication for Scotland, Scottish Government

⁷ *Scotland's Population 2002: The Registrar General's Annual Review of Demographic Trends General Register Office for Scotland*

⁸ *Office of National Statistics March 2009*

⁹ *In partnership, challenging Domestic Abuse, Joint Protocol between ACPOS and COPFS, ACPOS, reviewed edition 2008*

¹⁰ *The Crown Office and Procurator Fiscal Service (COPFS) disposed of 77.5% of all cases (not only domestic abuse) in the summary criminal courts within 26 weeks in the period April-Dec 2009* <http://www.copfs.gov.uk/About/corporate-info/Targets>, accessed 1st June 2010

to exclusion orders. The protocol between the Association of Chief Police Officers in Scotland (ACPOS) and the Crown Office and Procurator Fiscal Service (COPFS)⁹ has been instrumental in introducing:

- a mandatory arrest system in domestic abuse incidents where there is a sufficiency of evidence that an offence has been committed
- a presumption against no-drop prosecution, and
- a presumption that, where bail is not opposed, special bail conditions will be requested in all domestic abuse cases.

Since criminal acts need to be established by corroborated evidence (two or more sources of evidence) and be proven beyond reasonable doubt, there are circumstances where a report of a domestic abuse incident will not result in a criminal prosecution. An accused may be detained in the short term and then released without charge or prosecution and return to the home without any restriction. It is only if an accused is charged with a crime or offence that a case is forwarded to the fiscal service to assess whether the evidence supports a prosecution. If a prosecution proceeds, then special bail conditions may be imposed. These would likely order the accused to stay away from the home. The special bail conditions would remain in place until the criminal case concludes.

Special bail conditions can reproduce the effect of exclusion orders, but will only be in place until the criminal process is completed, either by a plea of guilty, a trial or a decision not to proceed with a prosecution. The length of time between first appearance and a plea or trial in most summary criminal case is 26 weeks or less¹⁰. Therefore, bail conditions are unlikely to last longer than six months and may last considerably less than that as prosecutions related to domestic abuse are prioritised by COPFS.

There has been a steady increase in the number of domestic abuse incidents attended by police and the number and proportion of those incidents that result in a report to COPFS since Scottish police forces started monitoring their attendance at domestic abuse incidents. See table 3.2 on page 18 for the last four years.

Despite improvements in the police response, many abusers in reported incidents are free to remain or return to the family home without any protection for women and children in the home from the criminal justice system. Despite improvements in the criminal justice system, exclusion orders might still be expected to play a role in protecting women who:

- do not want to involve the police
- report to the police but there is no clear and corroborated evidence of a crime
- require an exclusion order to prevent the return of an abuser when special bail conditions come to an end.

Table 3.2: Reported Domestic Abuse Incidents

	Total incidents ¹¹	Total crimes and offences	% of incidents recorded as a crime or offence	Total reported to COPFS	% of incidents reported to COPFS
2005-06	45,812	23,991	52.4%	14,180	31.0%
2006-07	48,801	23,803	48.8%	15,582	31.9%
2007-08	49,655	24,834	50.0%	15,647	31.5%
2008-09	53,681	29,283	54.6%	18,691	34.8%

3.3.3 Changes to civil protection orders and family law

Aspects of the MHA and civil protection have been modified since first introduced and these may have implications for the choice of remedy that women make. The changes include:

- the range of people with a right to apply for an exclusion orders has been extended to civil partners
- the range of people with the right to apply for a power of arrest has been extended; the automatic right to apply is no longer linked to marriage and/or title to property
- the onus of proof in most applications for powers of arrest has shifted since the introduction of the Family Law (Scotland) Act 2006¹². The onus is now on the applicant to prove that the power of arrest is necessary to protect the applicant from a risk of abuse arising from a breach of the interdict. This change has increased the burden of proof on the applicant
- post-arrest procedures using powers of arrest have changed. Where there is insufficient evidence to support a criminal prosecution, the person in breach of the interdict can be detained until appearance in court on the next lawful court day. The court has limited powers to detain for a further period not exceeding two days if the fiscal presents a petition to request detention. Otherwise, he is released (Section 5, Protection from Abuse Act, 2001 and 2006 Act)
- all powers of arrest granted after 2006 are now valid only for a maximum of three years, after which time they require renewal by application to the court (2001 Act and 2006 Act)
- the 2006 Act also reduced the separation periods required to establish irretrievable breakdown of marriage to one year for separation with consent and two years for separation without consent. This means that a separated spouse can be divorced within two years of separation, without her consent, and this will have an impact on the longevity of some exclusion orders
- an additional remedy of non-harassment orders, breach of which is a criminal offence, has been introduced (Section 8-11, Protection from Harassment Act 1997).

3.3.4 Changes in legal aid

Legal aid can reduce the cost of an action so that a woman may pay nothing at all or a set level of contribution based on an assessment of her income and capital. Legal aid is a publicly funded benefit available to those who are assessed to have a probable cause of action (having sufficient evidence to take a case to court) and are financially eligible. Access to legal aid is dependent on access to a lawyer prepared to do the work on legal aid. The supply of legal aid is mainly related to the commercial decisions taken by private sector firms. Commercial responses to changes in the fee structure and legal aid process impact on the accessibility of legal aid to fund actions for civil remedies, including exclusion orders. The supply of legal aid has an impact on how practical it is for women to apply for exclusion orders.

The number of firms providing civil legal aid has fallen by 12% in the period 2003/04 to 2008/09¹³. There has been a reduction in the number of solicitors' offices submitting legal aid applications relating to civil protective orders and there are fewer applications (see table 3.3).

This includes outlets making applications for exclusion orders, interdicts and non-harassment orders.

The availability of legal aid has an impact on how practical it is for women to apply for exclusion orders.

3.3.5 Changes to homelessness services

An alternative option for women and their children is to leave the family home and live separately, and perhaps anonymously, elsewhere. In those circumstances women may present to a local authority as homeless and be entitled to housing.

The proportion of applicants presenting as homeless due to violent dispute within the household has remained relatively constant over the years. The most recent data indicates that there has been a downturn in the number of homeless presentations. (See table 3.4)

Table 3.3: Number of outlets making protective order related legal aid applications

	Apr-Sep 2005	Apr-Sep 2006	Apr-Sep 2007	Apr-Sep 2008	Apr-Sep 2009
Scotland	383	323	282	302	278

Table 3.4: Number and proportion of homeless applicants, violent dispute¹⁴

	2007/08	2008/09	2009/10
Number of homeless applications – violent dispute	5,908	6,156	5626
% of all homeless applications – violent dispute	10.4%	11%	10%

¹¹ *Statistical Bulletin Crime and Justice Series: Domestic Abuse Recorded by the Police in Scotland 2008-09*

¹² *Family Law (Scotland) Act 2006, schedule 3*

¹³ *SLAB Research Briefing, July 2009, Patterns of Civil Supply: National findings*

¹⁴ *Data is taken from the Scottish Government (2007/08 to 2009/10) publications of annual homelessness statistics, the Scottish Government website*

When the MHA was first introduced, it was employed by a number of local authorities to restrict options for women. Women who tried to make a homeless application because of domestic abuse were required by some local authorities to try to exercise their rights under the MHA before the local authorities would consider their applications under the homelessness legislation. This practice existed despite clear government guidance discouraging this approach.

The latest version of the Code of Guidance (2009) states that advice on rights under the MHA may be required by applicants but “exercising these rights should not be made a condition of access to services”. The Code advises, “local authorities must not put pressure on people to remain in or return to their previous houses if that would cause distress. In particular, when a person is seeking refuge because of a fear of abuse there will be an immediate need for rehousing.” The emphasis is on ensuring that applicants are not pressured to return home.

Since the establishment of the Scottish Parliament there have been considerable developments in the area of homelessness policy and practice in Scotland through implementation of the Housing (Scotland) Act 2001, and the Homelessness etc (Scotland) Act, 2003. Key changes included the extension of priority-need status to single applicants who have experienced domestic abuse. Aspects of the legislation have still to be enacted, including the abolition of an assessment of priority need, which is expected to take place by 2012. This will mean that the vast majority of applicants assessed as homeless will be offered permanent/settled accommodation. This will increase the housing options for abusive men who have been excluded from the home by exclusion orders or by other means. Some authorities have already taken steps towards housing men who have been excluded but do not have priority-need status. Increasing the housing options available to them may have a role to play in increasing the safety of women who wish to remain in the family home.

In recent years, there have been improvements in the standards of temporary accommodation for homeless households. This was given added impetus when the Scottish Executive (as was) introduced the Homeless Persons (Unsuitable Accommodation) (Scotland) Order in 2004. These regulations set out the standards of accommodation which local authorities have to use for households with children and pregnant women. They include physical standards, proximity standards (e.g. proximity to health and education services) and safety standards, particularly in their suitability for children (the order exempted certain forms of temporary accommodation, including women’s aid refuges). The quality of accommodation offered to homeless households by local authorities is subject to inspection by the Scottish Housing Regulator.

There has also been increased and improved refuge provision funded by the Refuge Development Programme¹⁵, which was managed by Communities Scotland.

¹⁵ *The Refuge Development Programme: funding by the Scottish Executive between 2001-2004 made available to improve refuge provision.*

¹⁶ *‘Meeting the Best Interests of Children Facing Homelessness’, Scottish Government June 2010*

Alongside the developments in legislation, there has been a greater emphasis on the prevention of homelessness. The Scottish Government has produced guidance on homelessness prevention, which identifies domestic abuse and sexual abuse of a child in the household as an indicator of risk of homelessness, and an area for homeless prevention activity by local authorities.

The interrelationship between domestic abuse and homelessness, and in particular its impact on children, has been recognised in other policy areas. The Scottish Government's National Domestic Abuse Delivery Plan for Children and Young People ("the Delivery Plan") has 13 priority areas one of which specifically addresses homelessness:

- reduce the risk to women and children of becoming homeless as a consequence of domestic abuse and ensure, whenever necessary, they are supported to make the move to safe and suitable accommodation without facing additional emotional, economic or social disadvantages (Priority Area 8).

The Delivery Plan recognises that exclusion orders under both the MHA and the Children (Scotland) Act 1995 offer an alternative to homelessness so that women and children could stay in their home safely. The plan emphasised that the effectiveness of exclusion orders is linked to a coordinated approach to support women and children in their home, higher levels of home security, and monitoring of the abuser to ensure compliance of orders.

The Scottish Government recently published guidance regarding the needs of children in homeless households. This guidance¹⁶ emphasises the need for a multi-agency approach to support applicants to stay in their home safely alongside the option of rehousing in alternative accommodation.

This study provided an opportunity to explore whether a policy focus on prevention of homelessness and the Delivery Plan has been translated into support for women to use exclusion orders to enable them to remain in the home.

3.4 Key points

The MHA introduced remedies for abused women that were innovative at the time. Data from SLAB suggests that applications for legal aid for exclusion orders and other protective orders are decreasing but we are unable to identify from existing data how extensively exclusion orders are used.

In the years since the introduction of the MHA, there have been policy changes which have raised the profile of domestic abuse and improved the response to it, particularly in homelessness services and in the criminal justice system. There have also been changes to the range and scope of the legal remedies available and the supply of legal aid firms. This study provided an opportunity to explore whether these changes have influenced women's use of exclusion orders and to explore their effectiveness as a remedy to keep women safe in their home as an alternative to homelessness.



4

HOW EFFECTIVE ARE EXCLUSION ORDERS IN PREVENTING HOMELESSNESS: FINDINGS FROM THE COURT DATA

In order to identify the extent of use of exclusion orders, a manual search of a sample of family cases was carried out in six sheriff courts. These courts served the local authority areas where we carried out the main part of our qualitative interview programme, although the boundaries of the courts do not exactly match the local authority boundaries.

The courts served different types of population. The courts were:

Court A – medium-sized Sheriff Court in central belt town, serving a mixed urban and rural population

Court B – large Sheriff Court in a busy city, serving an urban population

Court C – large Sheriff Court in central belt town, serving an urban population

Court D – medium-sized Sheriff Court serving an urban and rural population

Court E – small rural Sheriff Court

Court F – small rural Sheriff Court.

Courts D and F were located in the same local authority area, courts C and E in another local authority area and courts A and B were the only courts in their local authority area. In each court the research team reviewed the case papers of a sample of family law cases registered in the court during 2009 to identify the cases that included a crave for an exclusion order.

4.1 How many exclusion order actions were there?

Court data from a search of initial writs in six sheriff courts (in four local authority areas) revealed 34 family law cases in which an MHA exclusion order (EO) was requested. There were 3,227 family law cases registered in these courts in 2009 and we were able to review 2,831 of the writs (88% of all registered cases). Exclusion order work represents just over 1% of the proportion of the reviewed caseload across these courts (see Tables 4.1 and 4.2 on page 24).

Thirty-one of the EO cases included craves for EOs from women (30 of the cases were raised by women and 4 by men, but one of those included a counterclaim by a woman). The data is presented in detail in Appendix B.

The interview programme disclosed some local differences in the response to domestic abuse: services in one area, with courts C and E within its boundaries, had concerns about special bail conditions (see Chapter 6); another area with court A within its boundaries had a policy to house men excluded from the home and each area had different home security arrangements. Some areas had women’s aid groups with close links to lawyers who specialised in protective orders, while others did not cultivate any relationship with particular firms. Two areas had specialist projects working with women whose partners were in the criminal justice system. Despite these variations and the inclusion of rural and urban courts, the percentage and number of applications for exclusion orders/family cases in these local courts varied within a very small range (see table 4.2).

Table 4.1: Exclusion Order Cases, by court, gender and % of caseload

	EO crave 2009	% of reviewed family cases	Female Pursuer	Male Pursuer
Court A	6	1.8%	5	1
Court B	13	1.1%	12	1
Court C	9	1%	9	0
Court D	5	1.8%	3	2
Court E	1	0.7%	1	0
Court F	0	0	0	0

Table 4.2: Exclusion Order Cases, by local authority area

By local authority area	EO crave 2009	% of reviewed family cases
Court A	6	1.8%
Court B	13	1.1%
Court C +E	10	1%
Court D +F	5	1.5%

Set in a context of an increasing rate of reported domestic abuse, exclusion orders are used by a very small proportion of those experiencing domestic abuse.

4.2 How are exclusion orders used?

In our sample, exclusion orders were not primarily sought as a method of removing an abuser from a shared home but sought as a means of keeping the abuser away after he had already left the home. In 23 (of 34) cases it was clear that the defender had already left the home; some had left because special bail conditions prevented return (4), some had separated in the recent past and a very few had lengthy separations. Exclusion orders may be used after a lengthy separation, where both parties still have rights to enter the house and the occupier may need an exclusion order to stop an abusive former partner returning without her consent.

The courts have powers to deal with the financial consequences of an exclusion order either by ordering payment of aliment or by an apportionment of household expenses to help pay for the costs of remaining in the home. Relatively little use was made of remedies to re-apportion the financial burden (10 cases).

The following is a summary of the key characteristics in the exclusion order cases:

- the majority of pursuers were in owner occupation (21 of 34) but this mirrors the percentage of housing stock (62%) in owner occupation¹⁷, so exclusion orders were not sought disproportionately by either owner-occupiers or tenants in social housing in our sample
- most cases had children under the age of 16 (20) living in the household; concerns about the impact of abuse on children were clearly mentioned in 15 cases;
- the nature of abuse was both physical violence and emotional abuse to the pursuer and risk to the children (9). A sizeable minority of cases (11 of 34) were based on emotional abuse only – six affecting the mental health of the applicant only and a further five affecting the mental health of the applicant and a child
- the police had already been involved in 24 cases, but some who had not reported to the police were successful in obtaining an order
- the pursuer was in receipt of legal aid in 14 cases (8 in owner occupation and 6 in social housing)
- in 10 cases there was no evidence lodged; an exclusion order, interdict and powers of arrest was granted in one, an exclusion order and interdict (no power of arrest) was granted in another; seven obtained interdicts with no powers of arrest and in one case no orders were granted
- two cases proceeded on the basis of the pursuer's affidavit alone, undertakings were granted in both cases. In one other case, the only affidavit lodged was by the pursuer but that was corroborated by a copy of a criminal complaint against the defender and the exclusion order was granted.

4.3 Outcomes

An exclusion order was granted in 13 cases and an undertaking was given by the defender in a further six cases. An undertaking given in court by the defender that he will not return to the home might be considered a similar outcome to an exclusion order. If the undertaking is breached the defender can be ordered to appear in the civil court and answer for his breach, but unless the undertaking is supported by interdicts, which have a power of arrest, there is no immediate remedy at the time of breach. None of the undertakings was supported by this type of interdict and although they all had interdicts against further abusive acts, none of those interdicts had powers of arrest.

There was a refusal to grant an exclusion order in one case. Anonymity could be compromised by an in-depth consideration of the circumstance and characteristics of that case.

¹⁷ *Housing statistics for Scotland 2009: Key Trends Summary, a National Statistics Publication for Scotland, Scottish Government*

In the remaining cases, it was not clear from the court records whether the pursuer decided not to proceed or came to an agreed settlement before or during the hearing. The full range of outcomes at interim hearings is noted in the table B7 in the appendix. The following key points can be made drawing on this small sample:

- exclusion order applications were used infrequently; (34 cases, 1% of the family law caseload in our sample courts)
- exclusion orders were granted in 13 cases and undertakings to remove and/or stay away from the home in a further 6 cases
- exclusion orders rarely changed the occupation of a family home (only 2 cases in our sample); more often than not the court regulates an existing situation
- powers of arrest were rarely granted and few were granted in defended actions
- most successful cases relied on evidence from more than one source but some were successful without any evidence or uncorroborated evidence.

4.4 Key Points

The research was intended to investigate the effectiveness of exclusion orders as a means of preventing homelessness of women, children and young people in the context of domestic abuse. From this sample, it would appear that exclusion orders are used by a small proportion of those experiencing domestic abuse and that when used in the sample they rarely changed the status quo and removed the abuser from the home.

5

HOW EFFECTIVE ARE EXCLUSION ORDERS IN PREVENTING HOMELESSNESS: FINDINGS FROM THE SURVEY OF LOCAL WOMEN'S AID GROUPS

There are 45 local women's aid groups in Scotland; five of them are not affiliated to Scottish Women's Aid. Telephone surveys were completed by a member from 36 women's aid groups operating in 27 of Scotland's 32 local authorities. The chapter is organised around the main themes from the survey. The views expressed in the survey are those of the individuals interviewed and cannot be generalised to represent the groups as a whole.

The survey asked respondents from women's aid groups to consider what they knew about the use of exclusion orders locally, including access to legal services, whether women used them and whether they were successful at keeping women safe in the home. We also asked them their views on the factors that influenced women to use or not use exclusion orders and what improvements could be made to encourage greater use.

5.1 How many women sought exclusion orders?

Respondents were asked how many women using their services had considered using exclusion orders to return/remain in their home in the last financial year (2008/09). Ten groups reported that no one had – nine of these groups reported that there had been no applications by women in contact with their group in the past three years. Some of these groups with no exclusion order activity in recent years had difficulty in recalling the last time when, if at all, a woman using their services had sought an exclusion order. One respondent commenting on exclusion orders, said:

"No staff can remember one - it seems a disappointing route to embark on because of the costs and the burden of proof."

The remaining 26 groups identified approximately 89 women who had considered an exclusion order as an option. This is an approximation as some responses were a percentage of service users and although we asked for information about a specific financial year (2008/09), it became clear that some answers also included some cases that were in the calendar year 2009 rather than the 2008/09. From the responses, we have built up the a picture of approximated use (see table 5.1 on page 28).

Many women who considered the option did not pursue the option as far as taking legal advice about the practicality of the remedy and of those who did, four were advised that they did not have sufficient evidence and a further two could not afford the legal cost involved. Nineteen women from across 27 local authority areas in

Scotland raised an exclusion order action and, of those, 17 women were successful.

5.2 How effective when used

Of the 17 orders granted, 12 were thought to have been effective and women were thought to be still living safely in their home; four were not a long-term success and one woman reconciled with her partner. Of those that were not a long-term success, women involved had to seek rehousing, some through homelessness services. Two women moved into refuge after an exclusion order had been granted, because the abuser continued to harass them at their homes. The police response to breaches of the interdicts that accompanied the exclusion order had been ineffective in preventing further harassment because there had been insufficient evidence that the breaches involved a criminal act.

Another two exclusion orders had been successful as a protective order in keeping the women safe but because they did not resolve long-term housing, women had to move after the order was granted. Both women were joint owners of the home. One woman obtained an exclusion order after a lengthy stay in refuge and returned to the home with her children, only then to face becoming homeless because her husband wanted the house sold as part of the divorce action. In another case, after the order was granted the woman struggled to meet all the financial obligations of the house on her own and decided to sell the house.

5.3 What factors influence women’s decision to leave the home?

Women’s aid respondents were asked to identify what they thought influenced women’s decision to leave the home and seek rehousing rather than stay in the home and seek exclusion. The key influencers were thought to be concerns about safety (26 responses) and the cost involved (9 responses). Respondents thought that the cost of staying in the home was more influential (7 responses) than the cost of legal action (2 responses).

Women’s aid respondents identified two particular factors that influenced women’s assessment of safety:

- a judgement by a woman that the abuser would not leave her alone in a house where a) he knew where she was and b) he had a sense of entitlement to the home, and linked to that
- a perception or experience by women that their abuser would continue to harass and abuse her regardless of the response from criminal or civil legal responses.

Table 5.1 Women who considered using exclusion orders and outcomes

Number of women who considered the option of using EOs	89
Number of women who actively explored by seeking legal advice	25
Number of women who did not proceed beyond seeking legal advice because of cost	2
Number of women who did not proceed further because of lack of evidence	4
Number of actions raised	19
Number refused	2
Number granted	17

The cost of staying in the home was identified as a key factor by seven respondents. This was especially for women in owner-occupied property who had to consider the long-term prospect of buying out the other owner’s share in the home.

When women had to pay a contribution for legal aid, two respondents identified that this influenced women’s decision to leave the home rather than pursue legal action. These respondents recounted experiences of women in low-paid and part-time jobs who, when faced with the prospect of making legal aid contributions, preferred to leave the home and not to proceed with legal action.

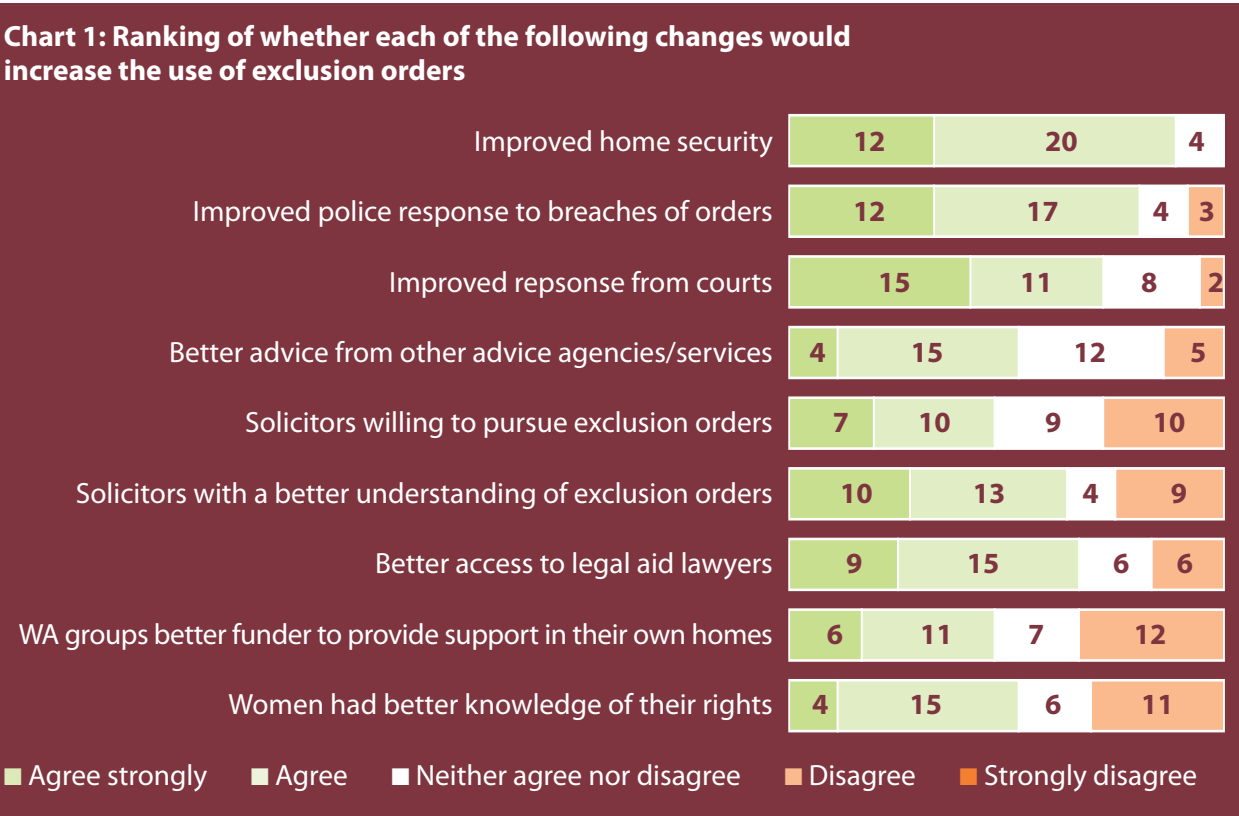
One respondent identified the approach of some specialist services, including her own service, as an influencing factor:

“(Leaving) is presented as the easiest option because we cannot say that she could get him out of the house.”

5.4 What changes are required to encourage women to use exclusion orders?

Respondents were asked to rank whether various changes would encourage women to use exclusion orders. Chart 1 displays the responses.

Increased home security for women was ranked as the most effective change which would encourage women to apply for exclusion orders (adding together agree and agree strongly responses, 32, n=36). Twenty-nine respondents agreed that women would be more likely to opt for an exclusion order if the police improved the response



to breaches of orders. Whilst there is a recognition that the police response to domestic abuse has improved, concerns were expressed by respondents that the response to breaches of civil orders is patchy and ineffective.

A majority (26) also had concerns about the courts' response and agreed that women would be more likely to opt for an exclusion order if there was an improved response from the courts. This view was held fairly equally across groups whether or not they had any recent experience of the court's response to exclusion orders.

Improved access to lawyers and legal aid was also identified as a change that would increase use of exclusion orders. Although better access to legal aid lawyers might improve use, access to solicitors with a better understanding of exclusion orders would also improve use. Although a slight majority (19) considered that exclusion orders would be used more often if women had better knowledge of their rights, a sizeable number (11) thought that better knowledge of rights would not make any difference. Access to lawyers and legal aid to support women to exercise their rights was thought likely to have a greater impact than increased awareness of rights.

When asked to identify up to three improvements which would improve the situation for women who want to remain in their own home and live apart, safely from their abuser, the most frequently identified improvements were: an improved response from courts and the police (26), improved home security (17) and increased access to legal services (11).

5.5 Key Points

The survey identified a low and patchy use of exclusion orders by women in contact with women's aid groups; respondents identified approximately 19 court actions in 2008/09 raised by groups' service users. Seventeen orders were granted and four of those had not been effective; women had to seek rehousing either because of continued harassment or the longer-term sustainability of staying in the home.

Nine groups had no service users in the recent past using or considering exclusion orders, some commenting that they could not recall an exclusion order in over 20 years.

This low level of use co-existed with respondents' views that women were pessimistic about the effectiveness of legal remedies to keep women safe in their homes. In responding to the survey respondents linked the courts' response to domestic abuse in criminal cases, and other civil cases such as interdicts, to their perception about how courts would respond to exclusion orders. Groups with very little or no experience of exclusion orders drew on their knowledge of the courts' response to domestic abuse in other cases to explain their view of women's lack of confidence in exclusion orders.

Following the survey and the data collection from the courts it was clear that there was very little use of exclusion orders; this refocused the research on the factors which influence women's decision making about whether to leave home and seek rehousing elsewhere, or stay in the home and use exclusion orders. The survey had started this process of identifying these factors in broad terms and the remainder of this report focuses on identifying lessons on how exclusion orders can be made more accessible to women.

6

WOMEN'S VIEWS AND CHOICES: FINDINGS FROM INTERVIEWS WITH WOMEN

In this chapter we consider what women told us about the circumstances in which they stayed on in the home without using an exclusion order, what factors influenced those women who did use an exclusion order, and the circumstances of those women who decided to leave the home, regardless of the legal option to stay. Women, reflecting on their own experiences, also offered their views on the changes required to enable women to use exclusion orders as an alternative to leaving the home.

We interviewed 34 women in four different local authority areas of Scotland. Women were identified for interview by local services, mostly local women's aid groups, although eight were identified by another specialist service for women.

This provides insight into why women chose the routes that they did and their perceptions about their options. The women were all in contact with women's aid services or other specialist services so therefore they do not include women who managed their separation without using these services. As qualitative research is illustrative rather than statistically representative, women's views, experiences and perceptions provide useful insight but these are not conclusions from a robust, statistically valid sample.

We spoke with women who were still living in the home that they had shared with an abuser, or had returned to it, as well as women who had left the home and were in temporary housing or alternative permanent housing. They discussed the reasons for making the choices they had and their experience of using the legal system to help them deal with an abusive partner.

In order to provide some context to the qualitative data reported, data concerning the legal status, housing status and outcomes of the women interviewed is contained in Appendix C and is referred to for context throughout this chapter.

6.1 Did women use exclusion orders?

Over half of the women consulted had left their home and were living in refuge or in alternative permanent housing. Of the women interviewed just under half (15) were still living in the home that they had previously shared with the abuser and the majority were doing so without the use of an exclusion order. Only three women had used an exclusion order to put their abuser out of the home.

6.2 What factors influence women's decision to pursue an exclusion order?

Three women who successfully pursued an exclusion order had some common factors in their experiences. These factors might point to the circumstances that influence or support women to apply for exclusion orders.

All were tenants or joint tenants in social housing. All three women were staying away from the home and in safe refuge accommodation when they decided to take action for exclusion orders. As well as providing a safe environment, their stay in refuge afforded them time to consider their options. Two remained in the refuge until the exclusion order had been granted and the abuser removed. All three had been provided with information on exclusion orders by women's aid workers who also assisted them in contacting lawyers. All three women were eligible for legal aid and cost was not a hindrance to taking action. One woman did pay a large contribution, which she was prepared to do to obtain the right to return to her home.

They were not happy with their alternative housing options via the homelessness route. One woman in particular was clear that the prospect of poorer housing circumstances was the main factor in deciding to proceed with an exclusion order. This woman commented:

"It was the rubbish offer from the housing that made me decide. I wanted to move back into my house rather than the house they offered."

One woman spoke of her sense of entitlement to the home, which influenced her decision; this gave her the impetus to overcome barriers and engage with the legal system:

"I thought from day one, why should we be leaving? It should have been him."

All three women had children and this influenced the decision to pursue an exclusion order. One woman commented:

"My house means everything to me and I wanted to keep my children's house. We would never have got as good a house as this again."

6.3 How effective were the exclusion orders granted?

The three women who gained exclusion orders against their abuser did in fact experience temporary periods of homelessness; however, they had returned to and remained in the family home at time of interview, and did not require alternative permanent housing. One of the women had yet to resolve the longer-term occupation of the home and another woman two years after the initial order, still required and used the interdicts and powers of arrest.

6.4 Women who did not use exclusion orders

Women who did not use exclusion orders included women who did not need the

order, women who did not know it was an option and women who knew it was an option but decided to leave.

As noted above, the majority (15) of the women who continued to live in the home did so without the abuser and without using an exclusion order. Eight women did not require an exclusion order because they had been the sole tenant or owner and had not been married to the abuser. A small number of women (4) who would have required an exclusion order to remove the abuser had not known about the possibility of taking such action but had managed to stay in the home without an order.

Intervention by the criminal justice system by imposing special bail conditions, probation orders or prison had acted to remove the abuser in six cases and the abusers had not returned since. In others, the abusers had left the home voluntarily and moved away.

More than half of the women whose circumstances meant an exclusion order was a competent remedy¹⁸ did not think about using an exclusion order because they did not know it was an option. All had been in contact with at least one agency and most had contact with several agencies/services as they sought assistance including from the police, women's aid, homelessness services, social work and solicitors. This included four women who had received legal advice and pursued other legal options without realising that an exclusion order may have been an option for them.

Women's experience of advice and information giving from services about the legal options available to them varied. Almost all of the women interviewed had received information about interdicts and powers of arrest, but only five had been advised about exclusion orders. Two women who had sought out information about rights to the home were given incomplete or misleading information. This is illustrated by one woman, a joint owner-occupier of a home, who approached a CAB when she was thinking about leaving to get advice about her legal rights:

"... they did not give me any information about my legal rights, they told me that there was nothing they could suggest I could do."

Another woman was told by a social worker there was some order that she could use:

"but that I would only get him out for a week and what was the point of that."

Although lack of information meant that the majority of women left the home without considering the option of staying with an exclusion order, only two women said that they would have tried to obtain an exclusion order if they had known it was an option. Both women moved out and had interdicts and powers of arrest in place to prevent further abuse. One woman who had been in contact with women's aid and three lawyers did not know that an exclusion order might have been available to her.

18 *A competent remedy is the phrase used when we have identified from details provided by women that they and their abuser had occupancy rights. In doing so, we are not making any assessment that these women would have been successful in any application, simply that it was one legal option that could be explored in the context of leaving an abusive partner.*

Another, who had also sought legal advice and had taken legal action to get an interdict and power of arrest, said:

“Hearing about exclusion orders just makes me even madder... if I had known about them I might have tried to pursue it as it would have given me more time to think about what to do rather than feel so rushed into moving out.”

Two women who had received advice about exclusion orders chose not to use them. Their decisions not to use exclusion orders were influenced by their assessment of how safe and secure they would feel in the home. One woman was influenced by a perception that the process was difficult and that she would need to provide proof. She explained her decision:

“Women’s aid told me that I could get an order but I was put off by them telling me that it was a difficult process and I would have to provide proof. What could you prove – it happens when you are alone. My husband would have stuck to a court order because he would not want to be seen to get in to trouble, but I still think it is too difficult and anyway even if everybody told you that you could stay on I don’t think that most would stay. The only thing that could make you feel safe would be a ring of police around the place.”

Another woman who had been advised by a lawyer that she could apply for an exclusion order explained that it was easier to leave:

“He would have come and gone as he pleased... I worked out that I could never have afforded to buy him out or afford to run a large house. I also didn’t want to be there with the memories of what I had put up with and experienced. All I wanted was to get out of that situation – I couldn’t cope with it any more.”

6.5 Factors that influence women’s decisions

We asked women about the background to their decisions to stay in the home or leave. Women talked about a number of factors that had an impact on their decisions. These included: safety, the abuser’s contact with their children and affordability. Perceptions of the legal system, access to lawyers and legal aid also had an impact on women’s decisions about the home and/or using protective orders generally. These factors are considered below in more detail.

6.5.1 Safety and peace of mind

Women who left the home primarily described their decisions as a response to two connected issues: a concern about safety and a desire for peace of mind.

Women’s assessment of safety involved an assessment of both their abusers’ persistence and unpredictability and the ability of the police or the courts to protect them. Fear that, even with orders in place, the abuser would continue or increase

abuse was a primary reason for women leaving the home. One woman explained why she chose to leave rather than take any action against her abuser:

“...because taking a stand is really dangerous, it would unleash the stuff you’d never seen.”

When women talked about whether exclusion orders and/or interdicts could keep them safe in their home, they did not make any distinction between the criminal and civil justice system. This reflects the reality that immediate enforcement of powers of arrest on breach of interdicts does depend on a police response. Women with a disappointing experience of courts and/or the police in the criminal justice system were more likely to leave the home. Seven women interviewed reported that they had experience of disappointing responses and most of those (5) had left the home. Disappointing responses from the police and/or courts ranged from concern that the police did not take reports seriously to concern that when cases got as far as criminal court, the abuser was dealt with lightly. One woman who had been disappointed by the police attitude to her report of domestic abuse, explained her lack of confidence in the law to keep her safe:

“...an exclusion order was just not an option in my case, it is just a bit of paper, it doesn’t mean anything to someone who is ruthless.”

Conversely, a few women chose to leave despite thinking that they could be safe in the home; they did not want to remain in the home because of their experience of abuse in the house. One woman explained:

“He’s ruined it for me... it’s not home any more.”

Regardless of whether they could be made safe in the home some women needed a fresh start:

“You just want somewhere you can just be.”

6.5.2 Children, safety and contact

A few women were influenced in their decision not to enforce their rights (either to the home or other protective orders) because they expected that they would have to maintain contact with an abuser because of his contact with children. One woman explained her reasoning. She had been in refuge for a year with her children before being rehoused, but she had not wanted to stay on in the family home or get any court orders because:

“...what was the point of an interdict, it’s only a bit paper and a knife can go through it, it just annoys him. I am scared to aggravate him because of contact with children.”

One woman had been rehoused, not knowing that she could have tried to stay on in the original family home. She and her family had set up another home in the same town and some years later she was moving again because of continuing harassment:

“Because he has contact with the kids he continues to call at the house and has kicked in the door just to let me know he could... that is why we are moving again. The police have been involved and I did get home security – the address was tagged for them to respond. But sometimes the police took an hour to arrive.”

Another woman explained her concerns about continuing contact. Contact was ordered by the court despite a history of abuse, which included a number of criminal prosecutions against him because of his behaviour towards her and the child. This woman had a high level of home security after a risk assessment by police and women’s aid. Her former partner had a conviction in relation to neglect of the child. The court attempted to reinstate contact after the conviction and ordered supervised contact at a contact centre. She said the contact involved bullying and threats to her, and contact was eventually stopped only to be reinstated again. Eventually, after a year or so of attempts by the court to establish contact, a sheriff ruled there should be no more contact or dealings. She feels safe now because he is subject to a curfew and she has home security, but felt that although she was supported by the police, the court did not take her concerns about abuse seriously when dealing with his contact application.

6.5.3 Affordability

The ability to meet the costs of staying in the family home is a determining factor for some women and especially those who had been living in the owner-occupied sector. Amongst women who had been owner-occupiers, the affordability of staying in the home had been a factor in the decision-making process for the most, and only one owner-occupier remained in the home. One woman who did not know that she could have sought an exclusion order reflected that she would not have used the remedy in her circumstances:

“I didn’t know that I could get him out but looking back I wouldn’t have done it anyway. I couldn’t afford the house on my own and I felt that he had driven me out of my house and I wanted to be a million miles away from him.”

6.5.4 Women’s views and experiences of using the law

Since only two women had known about and decided against using exclusion orders to remain in the home, we asked women about their experience of using the law in response to domestic abuse and how this influenced them. This allowed us to explore a theme identified in the survey that the legal response to domestic abuse influences women’s decisions when they separate from an abusive partner.

Some women had already linked their safety to a perception about the effectiveness of civil orders to keep them safe. A few women reported receiving advice from

services that actively discouraged the use of civil orders whether they intended to stay in the home or not. One woman told us:

“Housing said I could get an interdict but it was only a piece of paper even with power of arrest.”

Another woman was told by her lawyer not to bother with an interdict and power of arrest and that it was better to phone the police.

Four women reported that they did not apply for any civil orders after receiving advice that they needed a number of different sources of evidence before they could apply for either a power of arrest or an exclusion order. Since most of the abuse happened in private, this advice discouraged them from applying for any orders. Women who did pursue legal remedies also reported that evidence collection was difficult and protracted. This is illustrated by one woman’s experience:

“I don’t know what happened when he appeared at court... I changed the locks [when he was in custody]. I went to see a lawyer [after this]... she advised me that as he was joint owner he had a right to occupy. She said it was not possible to get an interdict straight away as there was not enough evidence, although I still had... injuries in the last attack. But I got more evidence over the next few months... Eventually he was lifted for following me and the solicitor was told about this. I then got an interdict with power of arrest... by this time I had left the home and been rehoused... It’s difficult to get your head around the amount of information that’s needed to prove you are being abused.”

Other women were advised that they needed incidents that were more recent or had to wait until bail conditions had been lifted before applying for interdicts:

“I was told I would not get legal aid at the moment as my husband is on bail with conditions and that this is a stronger remedy than interdicts as he would be arrested if he broke bail conditions but I hope to get an interdict with power of arrest if bail conditions are lifted.”

Two women had difficulty finding lawyers prepared to do protective order work on legal aid. One woman, who wanted an interdict and power of arrest, was advised by the first lawyer she saw that she should seek divorce, sell the house and move on and that the lawyer did not do any other type of work. She then went to another lawyer who advised her that she would not get legal aid because she was an owner-occupier. She was one of two women in owner-occupation who reported that their lawyers advised them that they were not entitled to legal aid because they jointly owned the family home. This is unlikely to have had an impact on the entitlement to legal aid, but may have had an impact on the solicitor’s willingness to do the work on legal aid rates as opposed to private fee rates ultimately charged against the proceeds of a sale of the family home. They both did eventually find lawyers willing to do the work on legal aid.

The cost of legal action was identified as a problem by two women who spoke about delaying any legal action until they had stopped working so that they could qualify for legal aid without having to pay a contribution. One consultee said:

"I am waiting until I am entitled to legal aid... once my income reduces I will get legal aid and then maybe get interdicts and stuff but I don't want to go back. I want to start somewhere else."

6.6 Reflecting on decisions

A couple of women regretted the decisions that they had made at a time of crisis. One woman described how she felt about making a quick decision and not having time to consider the range of housing options:

"After you have fled because of fear, you're faced with the need to make a quick decision and I accepted the house... Your emotions don't really count in all this. Once her house is whipped off a woman, you can't go back."

One woman regretted taking court action, not an exclusion order, without fully thinking through all the consequences. She had left a violent and threatening husband and moved to another area and, acting on advice, had changed her name. While taking court action against him was successful in making sure that she had protective orders and a residence order for her child, it alerted him to her whereabouts and allowed him to seek contact with the child. She stressed how low and unwell she had felt when deciding what choices to make, and had decided on a course of action which she felt compromised her safety:

"When you go to the lawyer you are at your lowest point and at your wits end, feeling unprotected... you are persuaded by the protection on offer through the interdicts. But had it been properly explained that he might successfully seek access and discover my whereabouts, I might not have gone ahead. There wasn't the time to ask sensible questions and make the best choices."

She described the experience of seeing a lawyer as:

"...they just you sit down there, we will take control of this... they want to do what they think they can do without any full explanation."

Another woman did not regret the action she had taken, but did reflect that she needed support before making a decision. This woman, although she had been in refuge for over year, did not regret leaving the family home:

"I never felt the house was my home... I needed to heal emotionally and mentally, before dealing with the house. I think I should have been guided at first contact to seek professional support to build up my strength before making a decision."

The three women who had successfully obtained exclusion orders had all made their

decision after some time spent in refuge. They had an opportunity to reflect on options and make a decision, rather than react quickly.

6.7 What changes are required to make an exclusion order a viable, sustainable option?

The women we consulted made some suggestions for improvements that would have helped them and would assist women in the future. These improvements included changes to:

- advice and information resources
- time to consider options
- simplified legal process
- remove barriers of cost of legal remedies
- wider changes in the legal system to counteract feeling that it favours the rights of the perpetrator
- improved home security.

6.8 Key Points

Some women manage to stay in the home without using an exclusion order. Women who are sole tenants or owners and cohabited with an abuser are able to remove him without an exclusion order.

Of the 20 women whose circumstances meant an exclusion order was an option to consider, more than half (13) did not know about them although they were in contact with services. Four women had received legal advice and pursued other legal options without realising that an exclusion order may have been an option. A further two women would have chosen to stay in the home if they had known that was an option.

Exclusion orders are not a well-publicised remedy and women are reliant on agencies/services to provide them with accurate information on what they are, how they operate and what might happen if they decided to try to get an exclusion order. The written information provided to women experiencing domestic abuse rarely referred to excluding the abusive partner as a possible option either in the short or longer term.

Some women encountered barriers to using the law. Four were discouraged, after they received advice about the level of evidence that they would need to supply to obtain any court orders, or the delays involved. It seemed self-evident to them that if their partners had been arrested and charged that they should be able to obtain civil orders at the same time, but instead some women were told that they needed to wait until special bail conditions had come to an end, or that they needed more evidence.

To a few other women who had never reported to the police or other services before leaving, it seemed an impossible task to collect sufficient evidence to prove abuse.

Access to lawyers and cost of legal services was a problem for a small number of women. Two women had difficulty finding a lawyer to do protective order work on legal aid and another two women were postponing any action until they could obtain legal aid.

The majority of the women we spoke with had left the home. The main factors that influenced the decision to leave were:

- lack of safety in the home, especially as the abuser would know where they were and feel entitled to harass them there; this could be exacerbated by concerns about contact with children
- concerns that legal responses would not keep them safe
- not being able to afford to stay on in the home in the short term, or in the long term, especially for owner-occupiers who worried that they would not be able to take on full responsibility for the home.

Only three women sought exclusion orders. All of them sought orders after a period in refuge. All of these cases were successful and these women were continuing to live in the home. The exclusion orders were not sought at point of crisis but after each woman had time to consider her options and longer-term consequences and sustainability.

Some women will always choose to leave to protect her safety and establish a new home but women suggested improvements which would have helped them: improvements to advice and information; time to consider options and return to the home after a period of respite; changes to the legal process; cost of legal action and improved home security.

7

WOMEN'S OPTIONS AND CHOICES: FINDINGS FROM INTERVIEWS WITH SERVICES WORKING WITH WOMEN

This chapter reports on the findings of a consultation programme with a range of practitioners working with women in the four local authority areas included in this study. Consultees were from organisations and services working with or on behalf of women leaving abusive partners; these included the police (4), solicitors (7), housing/homelessness staff (in both the voluntary and statutory sectors) (11), social work (children and families and criminal justice) (14), Violence against Women Partnerships (VAWPs) (3), women's aid groups (16) and some other specialist services (5). They were all involved in delivering or directing the strategy of services used by women leaving abusive partners and most were from services represented in local VAWPs.

VAWPs are multi-agency partnerships which coordinate service responses to violence against women, including domestic abuse. Most partnerships consist of representatives from statutory and voluntary sector services and none of the partnerships in this study included civil legal services for women.

Thirty-seven consultees were interviewed individually and face-to-face, with a few telephone interviews. Additionally, seven small group discussions were held involving staff in some services. In total, 60 people took part in this strand of the interview programme. Five consultees had a solely strategic or policy role in services or partnerships, the rest were working in services that abused women use. The research was not concerned with an audit or evaluation of services but in identifying experience and views about the use of exclusion orders, the information and advice provided by their service, the factors that they thought influenced women's decision-making and any changes or improvements which would improve the protection for women in their home.

As the court data and survey of women's aid groups had identified low levels of use of exclusion orders, most of the consultees had little experience of working with women who had used exclusion orders. Lawyers and women's aid had more experience of exclusion orders, but as in the survey, not all of the women's aid groups had service users who had used exclusion orders.

7.1 Why are women not using exclusion orders?

In part, changes in demographics have had an impact on the appropriateness of exclusion orders as a legal response. Women who have sole title to a family home and cohabit can use simple actions of ejection to remove an abuser from the home. Both solicitors and

women's aid workers had experience of women who stayed or returned to the home without using exclusion orders. The legal remedies used included ejection, interdict and powers of arrest to prevent return following removal by special bail conditions.

We spoke with seven lawyers all doing legal aid family law work and all with close working relationships with local women's aid groups. All of those who had a long track record in protective order work agreed that there had been a reduction in the number of women seeking exclusion orders, although there was little consensus about the precise timing or cause of that reduction. It was reported that firms of solicitors had withdrawn from doing legal aid work in general, or protective work in particular, and that fewer women who are entitled to seek exclusion orders are interested in the option.

7.1.1 Low awareness and information provision amongst services

Consultees from generalist services (housing, police and social work) reported that their services rarely advise women about exclusion orders. They very often do not have sufficient information or knowledge to offer information or advice to women about exclusion orders. Although there were exceptions, there was a dearth of good quality, easily accessible information for women on exclusion orders. Written information provided to women experiencing domestic abuse rarely referred to excluding the abusive partner as a possible option either in the short or longer term.

Housing, social work and police consultees confirmed that their general practice was to refer or signpost women to other agencies, mainly woman's aid or a solicitor for advice on all her options. We consider the experience of each type of service in turn.

Social work

Social work staff working with women rarely discussed using the law to stay in the home without the abuser. Specialist social work staff, working with women whose partners were in the criminal justice system, focused on safety planning with women. This did not include using any civil legal remedies to exclude or prevent an abuser's return to the home.

Social work staff working with children and families emphasised that the focus of their work was the protection of children. Although protection might be achieved by women seeking exclusion with MHA exclusion orders, none of the social work staff we discussed this with had suggested this course of action to women. Some were not sufficiently confident that they would correctly identify which women might be able to get an order.

Homelessness services

It was generally agreed by those working in homelessness services that homelessness staff felt inhibited from fully exploring all housing options available to women leaving an abusive partner, including the option to return to the home and have the abuser removed. Homelessness staff focus on providing accommodation and meeting immediate needs and in that context discussing protective orders could be problematic, although all staff indicated that they would signpost to women's aid groups or lawyers for further advice.

The prevailing view was that once women had left the home and approached homelessness services they had made the decision to be rehoused permanently. In those circumstances, there was concern that it would be inappropriate to discuss an exclusion order option as that might be interpreted as an unwillingness to process a homeless application. Staff did not want to be viewed as gatekeeping access to their service. One comment illustrates this concern:

"I will be honest I don't tend to discuss exclusion orders for women to go back to their tenancies. I have in the past but the reactions seemed to be that I was telling them to go back to a violent situation, which obviously I am not."

Another consultee sounded a note of caution that women should not feel pressurised into seeking exclusion orders if staff did provide information on exclusion orders, as the following comment illustrates:

"We need to be careful that women aren't held to account if they don't use it [MHA]."

Staff also commented on the relative complexity of exclusion orders, entitlement and evidence requirements, which meant that they were more comfortable with signposting to women's aid and/or a lawyer for information.

Police

The police are in contact with an increasing number of women who report domestic abuse incidents. Police provide women with contact numbers of groups and other local specialist services leaflets. Leaflets on domestic abuse generally include information on interdicts and powers of arrest but not on exclusion orders. Specialist domestic abuse officers will make contact after an incident and offer safety planning and advise women to contact other services for further advice and information, for example women's aid and/or lawyers.

Specialist services

Women's aid workers were often more able to offer information about exclusion orders than other services and some, but not all, understood the consequences of a woman's married status or entitlement to the home. All women's aid groups reported exploring all housing options with women, including exclusion orders. However since the remedy is used irregularly, even some specialist services had limited practical experience of exclusion orders. As one specialist consultee said:

"There is a lack of awareness [of exclusion orders] and because it is not being used there is not the build up of experience – like a muscle not being used over the years."

Access to and experience of legal services

Consultees from a range of services identified that women encountered specific barriers to using any civil legal remedy. These were a) finding a lawyer b) the cost of taking legal action c) the legal approach, and d) the response of the courts. Where there were geographic differences they are referred to in the text.

Finding a lawyer

Statutory services felt unable to refer to particular lawyers, which meant that some women might contact a number of lawyers before finding one who would do protective order work.

Police in one area identified that women had difficulty identifying lawyers who would do any protective order work. One police officer commented that there was a lack of solicitors in his area willing to do this type of work and the police felt unable to identify and refer women to particular specialist solicitors. Another specialist service in the same area, working with women who were considering leaving an abusive partner, did not refer to specialist solicitors and did not know who was offering that type of service locally.

Women's aid groups advised women to seek advice from lawyers, and some facilitated this by making active referrals and appointments, so giving women the opportunity to get advice easily. Others did not refer women and used general directories of legal aid firms to give women information about all legal aid firms in the area. Some groups had sketchy knowledge of what was available locally, and which solicitors were experienced and acting for women in their area. Once referred or advised to see a lawyer, the confidential nature of the relationship between solicitor and client meant that women's aid groups and other services did not intervene or direct women in seeking particular remedies or pressing for particular advice.

It was agreed that the number of lawyers prepared to do protective order work had reduced. This was seen as linked to changes in legal aid (see below) but one lawyer offered an explanation that some lawyers may not do protective order work because of their perceptions of the client group:

"Other lawyers view such clients as being unpredictable and the possibility of the client cancelling the action is seen as quite high."

Supply of legal aid solicitors/cost of legal advice/action

The cost of legal action was identified as a barrier by a number of consultees from a range of services (lawyers, women's aid workers and police); cost was generally a reference to the level of legal aid contributions or to the level of private fees when legal aid was not available.

Legal aid changes had meant that firms have withdrawn from doing protective order work on legal aid, reducing the supply of legal aid lawyers in most areas. A switch from hourly rates to block fees for civil legal aid meant that most lawyers interviewed thought the intensive work required for an exclusion order case was poorly paid. Lawyers were also expected to absorb the outlays needed to prepare a case, until the case was completed. One lawyer thought this influenced the supply of lawyers willing to do exclusion order work:

"To get a medical report I need to make a payment up front and most clients can't pay and the legal aid board will not pay until the end of a case, unless it is

over £150, so solicitors absorb the outlay and many are not prepared to do that.”

In one urban area, we were told that five prominent family solicitors had withdrawn from doing any interdict work on legal aid. A lawyer explained what had happened:

“Other firms in the... area do divorce and childcare stuff but send those same clients to me to do an interdict if that is needed. I have heard some of them say that sheriff officers make more money out of interdicts than we do... There is a perception that it’s a lot of work for no money.”

Those continuing to do legal aid work were generally working in communities where there were high rates of financial eligibility of legal aid and/or had a high level of commitment to legal aid as a service. For some, there was continuing commercial pressure to do less legal aid.

The proportion of women working now is greater than previously, and a number of consultees highlighted that even where women do not have to pay their legal costs in full they can find that the cost of legal aid contributions is prohibitive. For example, one service provider recounted how one woman who worked part-time in a low paid job had decided not to go ahead with an action when told that her legal aid contribution would be £1,200.

The legal approach and response

Consultees in women’s aid and other specialist services, drawing on feedback from their service users, described the experience of seeing a solicitor for women as “daunting”, conducted in a “different language” and “quite threaten[ing] when they find lawyers aren’t interested in their story”.

In contrast to some other services that women might approach, a lawyer’s attention to the details and time line of abuse, and identifying other sources of evidence to substantiate particular incidents, was categorised as “off-putting” for women. Women’s aid workers reported that when women were asked to provide corroboration for powers of arrest and exclusion orders, this excluded some women from the court system. A women’s aid worker, talking about a woman’s experience said:

“I went with her to the lawyer... he discouraged her because there wasn’t enough evidence. She hadn’t been to her doctor or any services before coming to women’s aid.”

Where women do have witnesses, they may not want to involve them. One women’s aid worker explained that the women she worked with were balancing concerns about other people’s safety; they were reluctant to involve other family members, such as mothers and sisters to provide supporting statements, because they could then be exposed to threats and violence:

“There are quite a lot of criteria to meet and the need for witness statements is a problem because children might be the only witnesses. Even if a family member

is prepared to give a statement – they might become a target for him. So if your mum goes witness he knows where she is and chances are she is older and vulnerable.”

Lawyers did acknowledge that the legal process can be difficult for women. One lawyer described her approach:

“I always advise clients that it is an exhausting process – the best advice is to leave, leave and forget the house or leave and raise actions once you are out. I really would not want to raise an action when they were still in the house together. I always tell them that there are no guarantees and it is an uncertain situation. It is almost unbearable to expect a woman to raise an action when they are in the house... I always describe the process to clients and ask them to think about the impact on the man. Will it make it worse? If she leaves and then applies, it can be used as a get out by the court – she has alternative accommodation.”

Courts’ response to applications for protective orders

Lawyers in three areas were frustrated by their local court’s approach to applications and this informed the advice they give to clients, especially around the quantity and quality of evidence required.

The disposal of applications for protective orders at the interim stage, within a week or two of the application, is the crucial stage for women. The test at the interim stage is whether the sheriff is satisfied that the need for protection has been established. Three lawyers, working in different courts, spoke of their frustration with a court system which sometimes had difficulty in making decisions at this crucial interim stage, as one reported:

“When the Defender lodges affidavits then most sheriffs say that they can’t decide who is telling the truth and then they put the decision off until proof... it is really frustrating. I had one case where the woman and children were absolutely terrorised by this man who was an alcoholic – I had affidavits and a medical report, but still didn’t get it. Sheriff A just took an age and then decided that he couldn’t decide.”

Because the court is asked to look at needs and resources of the parties as well as protection, one lawyer said that some cases can focus on answering the question “who should live in the house” rather than “if she exercise her right to be in the home, would she be safe”.

Other lawyers offered similar examples in different courts where sheriffs postponed decisions on exclusion orders when the defender offered any evidence to contradict the woman’s evidence. One lawyer described a recent case where there had been history of violence, but the woman moved out of the home after the interim motion was refused. This lawyer explained that some sheriffs just did not like making a decision when the case was defended:

“Sometime you just get lucky with a Sheriff – some other Sheriffs with conflicting affidavits at an interim hearing will refuse to grant and send it for proof.”

Experience of this type of response from the courts inevitably informs the advice that lawyers give women:

“Often there are no grounds or insufficient evidence about the level of violence to go for an exclusion order. You can get very cautious – sheriffs hate putting the abuser out of the house.”

Lawyers also highlighted that powers of arrest had become more difficult to get without affidavits. Even with affidavits from the woman and a witness or other supporting evidence, one lawyer described the approach in her local court:

“The sheriffs at X have taken to obsessing about the meaning of “necessary” and they will not attach a power of arrest if there are no incidents in between grant of interim interdict and hearing.”

Although special bail conditions were generally considered effective at removing immediate risk, the existence of special bail conditions could complicate the civil legal options available. It was accepted by most lawyers that exclusion orders, if needed, should be applied for close to trial when bail conditions are likely to end. In most areas, lawyers advised women that powers of arrest would not be granted if bail conditions were in place. A specialist consultee commented on this practice:

“Anecdotally interdicts with powers of arrest are not difficult to get, the problem is getting them where special bail conditions are still in force. Solicitors advise that they are difficult to get and Sheriffs are reluctant to grant them. They are not seeing it as a window of opportunity to seek civil remedies.”

Two lawyers working in one largely rural local authority were satisfied by the approach taken in their local courts in assessing evidence at interim hearings and dealing with bail conditions. One of them commented that a Sheriff working in a small sheriff court might know the defender through the criminal court, and that may be a factor when granting orders.

7.2 What factors influence women’s decision to pursue an exclusion order?

In the main only lawyers and women’s aid workers identified factors which influenced women’s decision to pursue exclusion orders. The reasons they gave were grounded in women’s personal motivations and not in the way that they or other services responded to women’s needs:

- women felt they had a prior claim to the home – for instance if it was her home before the abuser moved in
- women felt they had nowhere else to go

- women stay in the home because they and/or their children have built up an attachment to their home, investing resources and energy and do not want to leave the home and friends behind.

7.3 What factors influence women's decision to leave the home and settle elsewhere?

Safety

When women did decide to leave the home, practitioners thought that were doing so because they were afraid of further abuse to them and others if they stayed in the home. Interviewees from a wide range of services (police, social work, housing and women's aid) all commented that women who left the home did so because they felt at risk in the home. Practitioners thought that women would feel at risk even if they had civil orders. Some went further and commented that criminal responses, protective orders and/or home security would not keep women safe if the abuser was determined. This is explored below. Particular concerns were raised about the criminal justice response and the enforcement of civil orders.

Criminal Justice response

The majority of consultees from criminal justice services (police, social work and specialist criminal justice projects) agreed there had been an improved police response to domestic abuse, but the court's final sentencing sometimes reduced women's confidence in the system to protect her. Concerns were raised by consultees from police, women's aid and lawyers about special bail conditions and sentencing practices. They thought that both influenced women's concerns about safety and services' confidence in the criminal justice system to tackle domestic abuse.

Special bail conditions were being used consistently in most areas, but both police and women's aid in one local authority area had experiences where special bail conditions had not been imposed by the court, and they thought women were left unprotected as a result. The women's aid group recounted a particularly violent case and the impact of a refusal to impose special bail conditions:

"He threatened to shoot her and yet he was released from remand with no special bail conditions and was back in the house the same afternoon. The police told her to get out the house quick because they knew he would come back after the court finished."

Even when used, this women's aid group thought that women only had confidence in bail conditions if breach resulted in some visible impact. The same group described one service user's experience:

"Women do not have any real confidence in bail conditions. One woman's partner had breached bail conditions nine times, he was not supposed to come within 200 yards of the house and he breached this but always left by the time the police arrived."

One police view was that men were pleading guilty early on in the trial process and

receiving fines. This meant that there were no further opportunities for offender management. Greater use of deferred sentencing would provide an opportunity for some control and management of the offending behaviour and protection of women:

"It's not rocket science."

In another area, a lawyer thought that fines were the most frequent sentencing choice for a first offence. After that, community service is a more likely disposal. His impression was that his local court does not use deferred sentences or probation to increase control and management opportunities with offenders.

Confidence in protective orders

Consultees across a range of services thought that women had little confidence in protective orders because of problems in enforcing interdicts and responding to breaches of orders. Consultees from the police, women's aid, other specialist support services and lawyers were critical of the enforcement of interdicts and powers of arrest. One interviewee from a specialist support service remarked:

"It will work with men if he is afraid of court action – if he lives a 'straight' life. Some have breached interdicts on a number of occasions, are arrested and nothing really happens. They realise that the justice system doesn't work against them – it is quite ineffective. It doesn't hold the perpetrator accountable so there is no fear... when men breach they are remanded then back out, then breach again and then back in court with a different fiscal and sheriff."

One senior police officer commented:

"Where there are breaches of interdict with powers of arrest the courts have very limited sentencing powers – there is no option of incarceration. So while the police do arrest where there are breaches of interdicts it is not that tough a deterrent or at least it is not perceived to be."

Lawyers were similarly critical of the enforcement of breaches of powers of arrest.

Courts response to child contact

There was a point of view among a small number of consultees that continuing contact with an abuser because of contact with children added a layer of complexity when dealing with the court and/or could compromise safety. It was reported that continuing contact with the abuser despite rehousing and/or protective orders could be used by a former partner to harass a woman. One women's aid worker commented:

"Even with an interdict, a man can continue making contact. Women often receive threatening texts or messages through their children."

A solicitor highlighted the problems that can arise when the abuser has contact with the children and there is risk of contradictory orders in civil and criminal proceedings:

“He was on special bail conditions not to come to the house and yet in the court case dealing with contact, the solicitor who did the bar report on access reported to the court that it was okay for him to come to the house to pick up the kids.”

7.3.1 Homelessness can be a straightforward option

Homelessness is and has been an important route into alternative housing for women leaving abusive men. Changes in the operation of homelessness services may enable women to leave the home, present as homeless and seek rehousing rather than remain at home and take legal action to exclude their partner. Over time there have been improvements in homelessness services and the response to women leaving an abusive partner. The improvements identified by consultees include,

- changes in staff attitudes and practices so that women presenting as homeless when they leave an abusive partner are believed and are not required to evidence the abuse
- better appreciation of the circumstances of abuse and more positive staff attitudes towards women who have experienced domestic abuse
- increased quality of temporary accommodation provided by the local authority
- improved and increased refuge space.

Both homelessness services and some women’s aid groups identified that the homelessness route was a more straightforward option for women than it had been historically. One comment from a women’s aid worker illustrates this:

“Overall the homelessness service has improved its response to women... and... we have built up a really good working relationship. Women are more confident of using the homelessness route with women’s aid support. Staying at home and excluding him can seem more threatening.”

Although consultees did not report that women consciously chose homelessness rather than staying in the home, there was recognition from homelessness staff, women’s aid workers and others that applying for housing as a homeless person is a more straightforward process than staying in the home and seeking court orders.

7.3.2 Affordability

Women’s aid workers and lawyers identified that some women could not afford to remain in the family home. This was usually identified as a discouraging factor for women who were joint owner-occupiers. An assessment of the financial implications of staying in the home influenced women’s decision-making and could also undermine women’s housing once an exclusion order was granted. One women’s aid group had experience of a woman who did obtain an exclusion order; she could not afford the mortgage payments on her own after the excluded joint owner simply stopped making his share of the payments, and the house was eventually re-possessed.

There was a view that joint ownership was an additional burden for women. The

financial liabilities of ownership added a layer of complexity to her decision making and potentially made it more difficult to disengage from an abuser. For example, if a woman left the home she was still liable for the mortgage, and if he allowed arrears to accumulate, she could have difficulties with her credit rating just at a time when she needed greater access to credit to establish a separate home. Women in this situation often felt tied to the house, the financial obligations and the abuser.

A women's aid worker explained some of the difficulties:

"Women who did not come into refuge tended to be owner-occupiers who really struggled with balancing the financial burden of staying in the house and the possible burden of leaving the house and husband running up arrears, all at the same time as dealing with abuse."

One lawyer clearly linked her experience of fewer women seeking exclusion orders than in the past to a growth in owner-occupation:

"I think there are more people with mortgages and so it's just not as straightforward as getting an exclusion order in a council tenancy – so it's not just about getting an exclusion order but about paying the mortgage after they are in the house."

Another thought that increased economic independence gave women scope to make more choices and that some women with access to their own income can afford to take on full responsibility for the home.

Issues concerning affordability are not restricted to owner-occupiers; they can also be a factor for women in rented accommodation. A women's aid worker, referring to one woman's recent experience, pointed out that men left in the home whilst the women moved into refuge might stop paying rent, run up arrears and vandalise the house. A woman returning to the home in those circumstances would likely have responsibility for arrears and repairs.

7.3.4 Focus on moving

In written material distributed to women by services, and in interviews with practitioners in specialist services, social work, and homelessness services, there was a focus on women moving away from the abuser as the safest and most straightforward option for women. This mirrors the focus of many domestic abuse or violence against women strategies; a review of materials disclosed that very few strategies mention using the civil law as an option for women who want to stay in the home. In the four local areas in this research, only one strategy had a focus on encouraging the use of civil orders to stay in the home.

Practitioners in most statutory services had received training on the impact of domestic abuse on women and children and on understanding domestic abuse. Social workers recognised that as part of their focus on child protection in domestic abuse cases their intervention might lead to a separation with women and children leaving the home. Many were very aware that children are at risk in the home and that

women may be at increased risk at the point of leaving an abusive partner. These two factors were referred to by practitioners in social work and specialist services as they explained their focus on safety planning whilst still in the home, and then leaving the home when a decision is made to separate. Leaving the abuser and leaving the home were conflated, and very few practitioners factored in separating from the abuser and getting him removed from the home.

This type of social work intervention was mentioned by other consultees as a factor which influenced some women to leave the family home. One remarked on the approach she observed in other services:

“Women are encouraged to move, leaving is seen as a panacea to the problem, social work particularly encourage women to leave if not they will take the children into care and this is done without any safety planning.”

7.3.5 Concern about housing options for men

Another influencing factor identified was a view that women are reluctant to take action to put the abuser out if he has nowhere else to go. Women may judge that he will keep coming back to the home if he is homeless, or be hugely disadvantaged in his subsequent housing options. One women’s aid worker said:

“Women often took too much responsibility for others; this meant that they worried about where adult children might live if they forced the issue about the family home and often worried about the housing options open to abusers either to head off a retaliatory response or because of genuine concern about them.”

One local authority had a policy of rehousing men who became homeless because of relationship breakdown, including abusive men. This policy was influenced by a desire to minimise disruption to women and children by offering alternatives to men. This local authority had received positive feedback on this scheme from the police as they thought it encouraged women to take action when they know that he has somewhere else to go.

7.4 What changes are required to make an exclusion order a viable, sustainable option?

This next section considers changes that may be required to present exclusion orders as a more viable, sustainable option.

7.4.1 Increase awareness of remedy and improve advice and information

Practitioners across a range of services (women’s aid, housing and law) recognised that exclusion orders were not well understood by either practitioners or women. Few practitioners other than some of the women’s aid groups and lawyers had recent experience of women using exclusion orders, and this fed a lack of general awareness about the remedy in practice. Even among practitioners that did have some knowledge, some were hazy about the details, for example, who could apply, what if any time limits there were, and whether the remedy extended to women who were emotionally abused. This lack of awareness is reflected in the information and/or

advice given to women regarding their options relevant to leaving and safety planning.

There is a dearth of good, clear information and advice on civil remedies, particularly exclusion orders. Police, housing and social work services depended on specialist services such as women's aid to raise the option of an exclusion order. Women who chose not to contact women's aid or a lawyer would not receive any advice and/or information on exclusion orders from the generalist services. Written information distributed by services rarely referred to exclusion orders or the option of remaining in the home.

One consultee identified an issue that information and advice about exclusion orders should be available from a wide range of services. She commented that some women do not want to contact specialist agencies because of perceptions about the service and their own abuse. Women needed information whilst they were still in the home and before they reached crisis. Another practitioner commented that women needed information about the process, such as how quickly a decision could be made.

One lawyer identified that other lawyers and sheriffs would benefit from training as the remedy was not used often enough for many to build up specialist knowledge.

Women require access to good-quality and up-to-date information and advice about their options including information and advice on exclusion orders.

7.4.2 Remove barriers to using civil legal remedies

Access to lawyers and legal aid

Increased access to legal services and help with cost was identified as an improvement which might encourage greater use of exclusion orders, by a few consultees from women's aid, other specialists, homelessness services and lawyers. In interview, most consultees reported that their services did not refer women to specialist solicitors in their area. Statutory services such as police and social work felt constrained to the extent that they could not make recommendations. Other services did not know some of the solicitors doing work in their area with a background in working for women's aid service users. Better knowledge is required about local legal services. While this will not increase the supply of legal aid firms doing protective order work, it will increase the chances that women are put in contact with those solicitors willing to do the work, and thus increase one aspect of access to legal services.

Housing services, women's aid services, police and other specialist support services all had experience of women who could not afford legal action, whether for interdicts and powers of arrest or exclusion order, because of the requirement to pay a contribution to legal aid. By contrast, moving home seemed cheaper and easier. A small number of consultees identified that costs for legal remedies for domestic abuse should be reduced or available free to women, regardless of income, or funded by other means. As an example one consultee suggested that perhaps there was an opportunity to consider using Children Act exclusion orders where appropriate or funding women in their applications.

Legal issues

Suggestions for changes to exclusion orders, interdicts and powers of arrest, the legal process and criminal response were identified by a wide range of consultees from all sectors. The changes included:

- reframing the legislation to remove the ability of other considerations to override protection, ie. repeal s4(3) the MHA
- changing the onus of proof so that a defender faced with evidence of abuse would have to prove the woman is safe
- criminalising breach of interdict; although the criminal standard of proof could be an issue, criminalisation might be a disincentive for the abuser
- improved interaction between criminal and civil processes
- the introduction of a police power to exclude the perpetrator
- greater joint working between police, support and legal services so that a civil legal response could be mustered before a perpetrator was released from custody
- combined courts to deal with criminal and civil remedies from the same incidents
- greater clarity about obtaining orders that complemented special bail conditions
- increasing the scope and life of interdicts; since exclusion orders had been introduced, Anti Social Behaviour Orders (ASBOs) had been introduced which could be used to exclude someone from an area; interdicts which had similar geographic scope might help women to manage the fear of abuse or of having any contact with the abuser
- introducing a simplified and quicker process for an application; corroboration was identified as one barrier to a simple quick remedy
- using more effective sanctions in the criminal courts for domestic abuse so that women felt secure; this could include greater use of probation or deferred sentencing to manage offending behaviour, and this would increase the likelihood that women could remain safe in their home.

7.4.3 Improvements in services

A few practitioners in local authority services suggested that increased joint working between services to link women into support to help apply for exclusion orders, and home security packages to support those orders, might improve women's options. The provision of home security measures is limited in some areas and is often installed for short periods: making them a permanent option was identified as an improvement. Some consultees recognised that joint work was often focused on the aftermath of police intervention and that services might have to think more creatively, strategically, and collaboratively to support women who want to stay in the home. This might

include local authorities thinking about funding legal action where it is required. As one consultee pointed out, authorities fund ASBOs to tackle behaviour in the public sphere, so why not fund exclusion orders, interdicts and powers of arrest.

7.5 Key Points

Most consultees in generalist services had insufficient information about exclusion orders, what they were, who could apply for them and in what circumstances. Written information distributed by generalist services rarely referred to exclusion orders or the option of remaining in the home. Women were signposted to women's aid and lawyers for advice and information about their options.

There are barriers to using civil legal remedies. These include: a reduction in legal aid lawyers willing to do protective order work, the cost of taking legal action and the demands of the legal process. The perceived need for corroborative sources of evidence, alongside a reluctance in some cases to make interim decisions, contributed to a view that civil remedies were difficult to obtain.

Perceptions about the final disposal of prosecutions, and the enforcement of powers of arrest, reinforced a view within some services that civil remedies were not effective responses to domestic abuse.

Special bail conditions are generally viewed positively, although they were not granted in all cases; when they were granted it was sometimes difficult to make the best use of the breathing space available to get civil orders in place for continuing protection, as some courts would not grant applications whilst bail conditions were still in effect.

Practitioners explained that women were motivated to leave the home because of safety concerns. These safety concerns were reinforced by practitioners' awareness of the risk to women at the time of leaving, and lack of confidence in available legal responses to counteract the abusive behaviour. In contrast to the legal response, homelessness services offered a straightforward option for women. Practitioners understood how the homeless system operated and could advise women about their rights and options. Improvements in crisis/temporary accommodation provided by local authority homelessness services and women's aid groups, together with a more positive approach by homelessness services, has made the homeless route a more attractive option for women, at least as a short-term crisis response.

Practitioners identified that some women could not afford to stay on in the home, and decided to leave because they could not pay the full housing costs on their own. This was a particular but not exclusive concern for women in owner-occupation.

A focus on child protection appears to have resulted in some services advising women to leave and some women feeling under pressure to leave, without other options being properly explored. By contrast, continuing contact between the abuser and children can continue to put women at risk.

Some consultees assumed that when a woman leaves the home because of domestic abuse she does not want to return there. This is a particular issue for homelessness services where staff may be concerned that they do not discourage women from accessing their services. Such concerns can inhibit information giving and advice on the option of returning home safely.

The possible lack of housing options for abusers, if they were put out of the home, was identified as a consideration for some women, particularly if they were concerned that he was likely to return to the home because he was homeless, or had concerns that he would have few housing options.

Changes required focus on: improving advice and information, reducing the barriers to accessing legal services, changes to the law, improving the response from the courts, improving support available to women who want to stay in their home, and improving joint working around civil orders.

8

EXCLUSION ORDERS: USE AND EFFECTIVENESS

This final chapter reflects on the key themes that have emerged in this research. The evidence has been gathered from a range of sources: women, local courts and a wide range of services delivering services to women leaving abusive partners. This research is not an evaluation or audit of services or the legislation. It is concerned with one legal remedy that may have a role to play in the prevention of homelessness, an assessment of its current contribution to the prevention of homelessness and the reasons why women use it, barriers to using it and what if any changes may be required to expand its contribution to the prevention of homelessness. The research illuminates a number of issues relevant to service development for services working with women and issues about the operation of the legislation.

The discussion is presented under a number of headings which refer back to the research questions:

How effective are exclusion orders in preventing the homelessness of women, children and young people in the context of domestic abuse?

Why are women not using exclusion orders?

What factors influence women's decision to pursue an exclusion order?

What factors influence women's decision to leave the home and settle elsewhere?

What changes are required to make exclusion orders a viable, sustainable option?

8.1 How effective are exclusion orders in preventing the homelessness of women, children and young people in the context of domestic abuse?

Exclusion orders are not contributing to the prevention of homelessness. The remedy is used by very few women leaving an abusive partner. This is evidenced by the findings of the survey, the court data and the interview programme in four local authority areas:

- nine local women's aid groups reported that they had no recent experience (within the past three years) of women seeking exclusion orders

- 19 women in contact with local women's aid groups in 2008/09 applied for an exclusion order (17 were granted)
- 34 cases (1%) of the sample of family law cases reviewed included a crave for an exclusion order; 13 of these cases resulted in the grant of an interim exclusion order and only two of those changed the status quo
- three women in our interview group of 34 women had applied for and been granted an exclusion order.

The court sample identified that there was very little variation of use of exclusion orders in the courts in each of the four local authorities, despite some local differences in the response to domestic abuse and the inclusion of rural and urban courts in the sample.

When used, exclusion orders can be effective in providing a long-term, safe housing option, although women may still require temporary accommodation to allow them time to consider their options and then pursue legal action. The three women in the interview group who had used exclusion orders all benefited from moving into refuge for a short period of time to consider their options, before starting a court action.

Whether exclusion orders will be effective in the longer term will depend on women's continuing safety in the home and their financial situation. The evidence from some practitioners and the survey was that even when successfully used by women, exclusion orders were not always sustainable and women may still have to leave the home and seek rehousing. Women's aid groups responding to the survey identified two women who left their home and entered the homelessness system after they had obtained an exclusion order because men continued to return to the home and the powers of arrest and police intervention did not deter violent and abusive behaviour.

Affordability may be an issue for women, even after an exclusion order has been granted and is effective in providing interim, safe and secure accommodation, and women in owner-occupation may be forced to sell the home later.

8.2 Why are women not using exclusion orders?

8.2.1 Demographic changes: tenancy and occupancy rights

Some women do not need exclusion orders to stay in the home living separately from an abuser. Women with sole title to the home do not need an exclusion order to remove an abusive non-entitled cohabitee. A combination of a criminal justice response, especially special bail conditions and interdicts, and powers of arrest if necessary, has the same practical effect for women in this situation. Alternatively, women could use simple actions for ejection to remove non-entitled cohabitees.

Nearly half of the women interviewed had separated from abusive partners and were still living in the home; only three had used exclusion orders to manage that. Although exclusion orders are not used by many women, women may still be opting to

remain in the home separate from the abuser by using other legal remedies, intervention from the criminal justice system or without any intervention.

8.2.2 Barriers to use: awareness, advice and information

The research has highlighted deficits in the information and advice provided to women. Women did not always get appropriate information and advice about all their options. This is true whether they are in contact with the police, social work, housing services, specialist services and/or lawyers.

Only one of the local VAW partnerships in this study had produced an information book on domestic abuse for practitioners in all services aimed at increasing knowledge on the range of remedies/options available to women, including information on exclusion orders. Scottish Women's Aid has also produced a legal guide, which includes information about exclusion orders. This was distributed to groups in December 2009, during the research.

There has been an increase in domestic abuse training across a range of services; much of it has focussed on awareness raising and understanding the impact of abuse on women and children with less focus on the availability of civil remedies. Many practitioners delivering services to women reported that they would not feel confident advising women whether they should even think about using exclusion orders. It is a complicated remedy and more difficult to give advice about than, for example, interdicts. Interdicts are based on a straightforward assessment of need, whereas the right to apply for an exclusion order is dependent on the legal relationship to the abuser and/or the legal title to the home.

Decisions about exclusion orders involve a complex mix of factors that women and those advising them need to balance, often at times of great stress and anxiety. This includes balancing the cost and effort required to pursue legal action against the support available to keep her safe from the reaction from the abuser, and the continuing cost of staying in the home. These factors are highly variable according to women's specific legal situation and women's assessment of the risk posed by the abuser. All of this adds to the complexity of giving information and advice to women about the remedy and their options.

8.2.3 Barriers to use: access to legal remedies

There has been a decline generally in the number of lawyers offering civil legal aid and those prepared to do protective order work. Practitioners, including lawyers, spoke of a decline in the number of lawyers continuing to do this work, but those lawyers that continued to both provide legal aid and raise exclusion order actions reported a reduction in demand for exclusion orders from women leaving abusive partners.

Data from SLAB confirmed that there has been a reduction in the number of outlets supplying legal aid for protective orders, and some women did struggle to find lawyers prepared to do any protective order work on legal aid, especially where the services they did contact did not signpost them to specialist lawyers known to provide legal aid. Women might contact a number of lawyers before finding one who

would do protective order work. This is an issue for all protective order work and not just exclusion orders.

Women who owned the family home encountered a particular difficulty in accessing legal aid, and when they did, money from the sale or transfer was reclaimed to set off legal fees. Other women decided against any legal action for any protective orders because of the level of legal aid contribution they would have been required to pay.

Lawyers recognised that working with clients in crisis requires time and effort that most felt was not financially compensated by the legal aid system, and that some women are asked to make a greater contributions towards legal costs than they can afford.

Even with better advice and information, and support to consider her options, women will not be able to pursue exclusion orders if they cannot find a lawyer prepared to carry out the work, or they cannot afford to pursue legal action.

8.2.4 Legal approach and response to domestic abuse

Pessimism about the courts' response to domestic abuse and the value of any protective orders from the courts was identified in interviews and the survey. In discussion, women and practitioners made no distinction between their perception of the courts' response to protective orders, enforcement of powers of arrest, contact applications and criminal prosecutions.

Although corroboration is not required in the civil courts, lawyers make a strategic assessment of the risk of a refusal of an order, which may only act to embolden the abuser, and often advise that women need more than one source of evidence to get either a power of arrest or an exclusion order. There were women who felt excluded from the court system because they did not have any corroboration. Not all women who did have witnesses wanted to involve them because they might then be exposed to threats and violence, and this too felt like a restriction of their options.

It is clear from the court data that cases did proceed without corroborative affidavits or other evidence and still resulted in the grant of protective orders, including exclusion orders. However this was not reflected in the advice women received, or in the perception of practitioners.

Other technical aspects of the process of applying for an exclusion order have had an impact. These are the court's approach at the interim stage and a perceived conflict between special bail conditions and civil orders:

- some exclusion order applications stalled at the interim stage because decisions were deferred so that the court could assess the evidence and witnesses at a full hearing. Because the court is asked to look at needs and resources of the parties, as well as protection, in exclusion order cases, there can be a wide range of disputed issues to be resolved at the interim hearing. Delays can act to discourage use of the remedy and add to lawyers' perception of the quantity and quality of evidence required to surmount this difficulty

- special bail conditions and their interaction with other remedies was a matter of concern to lawyers and women's aid consultees. Women were advised that they could not apply for civil orders whilst special bail conditions were in place and lawyers in three areas confirmed that would be standard advice in their area. There was a concern that women could not apply for civil orders during the time that special bail conditions provided them with the time and space to consider their options.

Special bail conditions can have the same impact as an exclusion order but they are likely to be short lived and will fly off as soon as a criminal prosecution concludes. A man may be excluded from the home whilst awaiting trial and this can provide women with an opportunity to consider her options. Although special bail conditions were viewed favourably, it was highlighted that the breathing space that they can provide was not easily used to pursue civil protective orders.

Once excluded from a home by an exclusion order, an abuser is likely to be subject to an interdict from returning and/or continuing his abusive behaviour. Powers of arrest can be attached to such an interdict. Lawyers and others identified that the existing law on powers of arrest and their enforcement was problematic, and there were examples of repeated breach of interdicts and powers of arrest without any effective deterrent. Problems identified included repeated breaches where no action was taken by the police because there was no evidence of a crime, and breaches followed by detention but with no further sanction because there was no evidence that the breach amounted to a criminal offence.

A consequence of changes to powers of arrest introduced in the Family Law (Scotland) 2006 was that the onus of proof from the Protection of Abuse (Scotland) Act 2001 applied to most powers of arrest. This change was identified as a barrier for women; post 2006 women have to establish that powers of arrest are necessary. Prior to 2006 the onus was on the defender in domestic abuse cases to prove that a power of arrest was unnecessary. Certainly, the court data indicated that powers of arrest were rarely granted and few were granted in defended actions.

Child contact applications also deal with issues arising from domestic abuse, and some women experience contact as another opportunity for the abuser to continue the abuse. Some women in this situation worried that their concerns about domestic abuse were not taken seriously when courts tried to establish or maintain the abuser's contact with children.

Women, women's aid groups and some other services, including police and lawyers, all expressed concern about disposal in the criminal justice response. Those that had direct experience thought that the courts could use probation or deferred sentencing to manage offending behaviour, and that this would increase the likelihood that women could remain safe in their home. Women in our interview groups who did have a positive experience of the criminal justice system tended to remain in the home.

8.3 What factors influence women's decision to pursue an exclusion order?

The few women we interviewed who decided to pursue exclusion benefited from:

- access to a place of safety to allow time and space to consider options
- good information and advice
- access to lawyers and legal aid
- the prospect of long-term sustainability because they were tenants in the social housing sector.

8.4 What factors influence women's decision to leave the home and settle elsewhere?

Women and services identified a complex mix of factors which influence women as they make decisions about how best to leave an abusive partner and secure their and their children's safety. There is inevitably some cross-over between some of the factors already identified as reasons why women do not use the specific legal remedy of exclusion order and the factors that influence the decision to leave.

8.4.1 Safety

All services and women identified that a primary factor when women choose to leave the home is safety: she would not feel or be safe in the home, even if she was able to exclude or otherwise manage his removal. Women's assessment of safety is the balancing of several of the following factors: her perceptions about the abuser's behaviour, his likely reaction and the law's ability to protect her from that reaction. Her assessment of the law will be based on her previous experience and the perceptions gleaned from other services.

Our sense is that services' growing awareness of domestic abuse and awareness of higher risk at the point of separation from an abuser informs the approach that they take with women seeking advice from them. Practitioners in services are aware of repeated and/or extreme incidents of violence perpetrated against women. Faced with a woman telling them that her partner is violent and abusive, few practitioners would confidently advise that staying at home with legal and other protections would be a safe option for the woman and her children. In this context, some level of risk assessment about future safety (formal or informal) plays a role in advice giving and related decision making.

Practitioners' lack of confidence in the option of staying at home with legal and other protections is based on their experience and perception of the justice response, and has implications for their assessment of future risks. If they have little faith that a power of arrest will be both adequately policed and enforced by the courts, then they are unlikely to advocate to women that they engage in a system that provides, in their view, an imperfect and variable response.

When women move away from a family home, they are not necessarily safe from the abuser. Some women have to move again, either when her abuser discovers where she is living and/or he makes living in the new home intolerable. In some cases, continuing contact with the abuser happens because of contact with children. This may result in further moves.

The possible lack of housing options where an abuser is put out of the home was identified by some housing practitioners as a concern for some women, especially if they thought he was more likely to return because he was homeless.

The opportunity for exclusion orders to make a greater contribution to the prevention of homelessness would be improved if women's concerns about safety were addressed and practitioners had increased confidence in women's safety. However, concerns about safety mean that some women will always choose to move away from the home.

8.4.2 Homelessness services

At the point of crisis, accessing homelessness services is likely to be more straightforward and quicker than the process of approaching the courts. There have been improvements in crisis/temporary accommodation provided by both local authority homelessness services and women's aid groups. Women valued the feeling of safety that leaving the home could bring.

Accessing homelessness services involves minimal re-telling of the details and history of abuse, there is no need to involve anyone else as a witness, there is less concern about cost and if a woman wants to proceed it will result in a change of circumstances. By contrast, remaining in the home and using legal remedies involves giving statements to a lawyer, asking witnesses to become involved, may involve cost and, after all that effort, the outcome is uncertain.

The women consulted who did get an exclusion order did so after a period in refuge. This indicates that women can and will revisit the decision about whether to stay in the home, even after choosing homelessness as an immediate response. Access to refuge or other temporary accommodation can be a step to consider options and does not rule out returning to the home to live safely without the abuser. Increasing the use of exclusion orders may not reduce the demand from women for temporary housing as a homeless person. Greater awareness of the remedy may increase the number of women who leave home for short periods so that they can raise court actions from a safe place.

8.4.3 Affordability

In our interview group, most owner-occupiers had chosen to leave and seek rehousing. Women and services identified that the cost of remaining in the home after a partner had been excluded was an issue, and particularly so for women who jointly owned their home. Women in that situation focussed on the long-term sustainability of the choices they made, and the effort and cost of obtaining an order that is not sustainable in the long term makes exclusion orders less useful to them.

However, exclusion orders were not sought disproportionately by either owner-occupiers or tenants in social housing in our sample of cases from the court data, indicating that affordability may be an issue more apparent for women in contact with women's aid and other specialist services.

Although there are remedies available in the MHA to order payment of household outgoings in the short-term, these were not used in most cases in our court sample, or by any of the women in our interview group who had exclusion orders. This research did not investigate the reasons why affordability concerns were not tackled by using court orders.

8.4.4 Focus on moving

There are widespread assumptions across a number of services that, when a woman leaves or wants to leave an abusive partner, moving away is the safest and easiest option for women. A focus on child protection in domestic abuse cases had influenced this view in some services.

This focus on moving was apparent in written material distributed to women, and in discussions with practitioners. In the four local areas in this research, only one strategy had a focus on using civil orders to stay in the home.

Leaving the abuser and leaving the home were conflated, and very few practitioners we spoke to factored in the option of separating from the abuser and getting him removed from the home.

8.5 What changes are required to make exclusion orders a viable, sustainable option?

At present, few women use exclusion orders, and the barriers to use include access to information and advice about exclusion orders, and access to legal services. Where these barriers are overcome, women encounter difficulties with the legal requirements, court process and court response.

Pessimism about the law's response to domestic abuse was apparent in the survey responses and interviews, and this can inform women's willingness to pursue civil remedies. This pessimism is largely informed by experience or a perception about the way that the courts respond to domestic abuse in the criminal courts, and in response to breaches of powers of arrest.

The recommendations here are designed to tackle these barriers, difficulties, and perceptions. Implementation of the following recommendations may act to make exclusion orders more accessible, better understood and an effective means of protecting women in their home, but some women will always choose to leave to protect their safety and that of their children and because of their desire to make a fresh start. Our aim in making these recommendations is to increase the range of options available to women.

In making recommendations we have taken account of the Scottish Government and

COSLA framework for service developments and improvements to local responses to violence against women, Safer Lives: Changed Lives¹⁹. That framework encourages partnership working at a local level and support for the development of local responses to tackling violence against women. We have envisaged a crucial role for local VAW partnerships and their members in these recommendations in developing and planning services and as a source of local intelligence about the legal response to domestic abuse. Some partnerships may already be doing all or some of this.

RECOMMENDATION: Improve advice and information

The provision of good quality information on protective orders is crucial if women are to make informed decisions about whether to leave or remain in their home by excluding the abuser. Staff working in services used by women who experience domestic abuse also need to access to good quality information and training in this area. We recommend:

Clear and comprehensive information on the range of remedies including exclusion orders should be produced, be publicly available and provided to women and staff. It should incorporate information about the legal remedies available that allows the court to order payment of household outgoings and other remedies to shift or share the financial burden of remaining in the home.

Training needs in services may include up-to-date information on civil legal remedies, the availability of local legal aid solicitors, the operation of protective orders including powers of arrest, and the response of local courts in their local area. Training on these issues would enable staff to explain returning or staying in the home with protective orders, so that women can judge whether it is a safe and sustainable option.

RECOMMENDATION: Extend the scope of local partnerships

Knowledge of the use of and effectiveness of civil remedies, and the availability and experience of family lawyers, is limited within services at a local level. There is generally a lack of good local intelligence on the use of protective orders; to increase knowledge in this area we recommend that:

VAW partnerships review their membership to broaden their scope to include representation or regular feedback in this area of civil law. Their scope could include:

- any difficulties in obtaining legal aid and access to legal services
- the response of the courts
- any problems with enforcement of breaches

VAW partnerships could consider mechanisms to disseminate that information across all services working with women.

VAW partnership could consider extending offers of training on domestic abuse to lawyers and/or invite lawyers to present training on legal remedies.

¹⁹ Safer Lives: Changed Live, A Shared Approach to Tackling Violence Against Women in Scotland, The Scottish Government, Edinburgh 2009

RECOMMENDATION: Increase transparency in the justice system

Local VAW partnerships would be a useful forum to collect and disseminate data on the local legal response and make transparent the outcomes related to domestic abuse in the justice system. This would either identify any local issues requiring a service response or build confidence in the system amongst services and women. In turn, this would inform local advice giving about exclusion orders and the effectiveness of the response.

COPFS does maintain a Case Management Database. The database is a live, operational database used to manage the processing of reports and has not been devised as a database for monitoring outcomes, but some data on outcomes can be extracted on charges arising from a domestic abuse incident.

We recommend that each VAW partnership:

Seek access to detailed information, which could be useful for local planning fora about the criminal justice response in their area, including:

- **number of reports of crimes associated with domestic abuse incidents**
- **number of associated prosecutions**
- **outcomes of any prosecutions for domestic abuse aggravated prosecutions**

Additional data, which we understand is not extractable from COPFS data, includes the use of special bail conditions, and reports on the number and outcome of breaches of powers of arrest. Some local intelligence on these could be gathered qualitatively from partners in the criminal justice system.

Devise a framework for recording and monitoring information on protective orders, their use and effectiveness in their area, to monitor data, identify trends and design local service responses.

RECOMMENDATION: Focus on an advocacy role

To ensure that women have a better understanding of the criminal and civil justice process, to increase their confidence in engaging with the system and to provide support, advice and advocacy we recommend that:

VAW partnerships consider how support can be provided with legal matters and with advocacy and liaison with agencies and services, including lawyers, in their area.

RECOMMENDATION: Make use of funding from other sources to fund legal actions

At least one authority (not in this study) has funded legal support to women to pursue protective remedies, where they were required, as part of its response to VAW. Local authorities have obligations for child protection and prevention of homelessness and some local authorities fund legal/advice services as part of that prevention of homelessness role. Since women's access to funding of legal actions can act as a disincentive we recommend that:

Local authorities should consider the possibility of expanding the remit of any legal services they fund to include protective orders work.

Local authorities should consider alternative forms of funding and supporting women to take action to exclude the abuser under the MHA if women want to take action but are prevented from doing so because of cost.

RECOMMENDATION: Home Security measures

The availability and scope of home security services varies according to local authority area. Those women in our study who had access to home security service were appreciative of the additional feeling of safety, especially where they had access to mobile alarms. They accessed home security via police, local authority or Women's Aid. Concerns about safety were a primary factor when women moved away from the home, and as a response to that, we recommend:

There should be clear routes for women to access home security services regardless of their involvement in other services. Consideration should be given to a standard service available to all women in civil court proceedings.

RECOMMENDATION: A review of existing legislation

Even with a better understanding and awareness of exclusion orders and changes in advice and support for women, the law and procedures relating to exclusion orders present further barriers for women. One issue was identified, soon after the legislation was introduced, in research conducted by Strathclyde University Law School for the Scottish Home and Health Department²⁰. In that research as in this, the legal test that allows for consideration of factors other than the protection of the applicant when considering an exclusion order (section 4(3) of the MHA Act), and the response to breach of interdict, have been identified as barriers to use and enforcement. The 1988 research called for the repeal of s4(3) and the criminalisation of breach of interdict. These same issues were raised in this research.

Other developments, legal and otherwise, since the legislation was introduced have affected access to, and the applicability and effectiveness of, both exclusion orders and the interdicts and powers of arrest that are required to keep excluded men away from the home. Those developments are:

- changes in patterns of cohabitation, which have reduced the relevance of exclusion orders for some women
- divorce can now be granted after two years separation without the other spouse's consent, after which an exclusion order falls
- the onus of proof in most applications for powers of arrest has shifted since the introduction of the Family Law (Scotland) Act 2006 and has increased the burden of proof on the applicant

²⁰ *The Operation of The Matrimonial Homes (Family Protection) Act 1981*, AA Jackson, M Robertson and P Robson, Scottish Home and Health Department 1988

- an improved criminal justice response, particularly the use of special bail conditions to remove the abuser at least temporarily from the home
- changes in the supply of legal aid for protective order work.

Taking account of both concerns about the MHA and the impact of changes since it was first introduced, we recommend:

A review of existing legislation with the intention of redrafting the range of orders available, clarifying the tests at the interim stage, the evidential requirements, the process, the interrelation between criminal and civil processes and the costs involved.

That any review should take account of the UN Handbook for Legislation on Violence against Women which provides a model framework for legislation on violence against women and is a useful template against which to consider the law and practice of exclusion orders [see below].

That any review should consider the option of combining civil and criminal responses to domestic abuse in one court, so there is a consistent response in criminal and civil cases, including child contact cases.

Consideration is given to a simplified process that allows advisers other than lawyers to make applications for women. A simplified process could be available for those orders which are required for immediate protection and the sustainability of the order.

Any review should consider measures to encourage solicitors to provide legal aid services and prevent further withdrawal from the delivery of these important services. This should also consider access to legal aid; there are problems in both access and eligibility.

That the change in the onus of proof and the procedures following breach for powers of arrest be repealed, and that powers of arrest attached to all domestic interdicts revert to the previous position, and that an effective enforcement procedure for powers of arrest be introduced.

The UN recommends the use of orders to remove a perpetrator, ex parte where there is risk of violence²¹. The current Scottish system can operate to allow that, but only where there is sufficient evidence to support a criminal prosecution and special bail conditions are imposed. Further measures not currently in place in Scotland but recommended by the UN for inclusion in civil protection orders include:

- restraining the perpetrator from causing further violence to the woman's dependents, other relatives and relevant persons in one action

²¹ *The UN Handbook for Legislation on Violence against Women*, United Nations, New York, 2009

- requiring that the movements of the defendant/offender be electronically monitored
- allowing protection orders to be issued in both criminal and civil proceedings
- ensuring that evidence (oral or in the form of an affidavit) of the woman seeking protection is sufficient evidence
- ensuring there should be no requirement that independent evidence, medical, police or otherwise, is necessary to support an order
- criminalising breach of interdict.

8.6 The future for exclusion orders

Exclusion orders are not used by many women separating from abusive partners. Some women do not need them to remove a partner from the home and others do not want to stay in the home. But, for those who would choose to stay at home if they could, this research has identified barriers to using exclusion orders. These barriers included women's and professionals' perceptions about the effectiveness of civil orders as a protective measure, lack of access to comprehensive information and advice, legal and administrative hurdles facing those seeking protection at home, and affordability issues.

Tackling these barriers will present exclusion orders as an option for women who have experienced domestic abuse, but women will still face a complex and personal range of factors as they make decisions to leave abusers. The multi-agency approach envisaged by both the National Domestic Abuse Delivery Plan and the VAW framework can help support women to use exclusion orders and enable them to remain in the home, make it easier for women to make informed decisions in a place of safety and then help them access and negotiate legal services. Legal reform, however, could produce a simpler, quicker and cheaper remedy to enable women to stay safely in their home.

APPENDIX A: GLOSSARY OF TERMS

Affidavit: a signed statement made on oath which is submitted to court as evidence

Ailment: financial support or maintenance which can be enforced by law

Crave: the court orders requested are contained in a crave or craves, in an initial writ

Cause of action: a set of facts which are sufficient to justify a court action to obtain money, property, or the enforcement of a right against another party

Counterclaim: a claim by a defender in a case against the pursuer even though he could have sued for it separately if he wished

Entitled: where only one person in a couple has their name on the ownership documents of the property i.e. the sole tenant or sole owner, they are the entitled partner

Ex parte: in the absence of and without representation of or notification to other parties

Initial writ: the court document that the person first raising a court action will draw up and which tells the court why they want the court to make an order. The three elements of a writ are the craves (what you want the court to do), the articles of condescendence (a narrative of the circumstances of the case) and the pleas in law (the legal basis for the craves)

Interdict: a court order that prohibits/forbids a named individual from certain acts detailed in the order

Interim hearing: a court hearing to decide urgent issues at an early stage of case

Interim orders: orders made by the Court, until further orders are made and the case concluded

Jointly entitled: where 'title' to the property is held in both names i.e. joint tenants or joint owners

Motion: an application made to the court to obtain a ruling or order directing that some act be done in favour of the party making the motion

Non-entitled: the spouse or partner of the tenant or owner who has rights in the home, because of marriage, civil partnership or because rights have been granted to them as a cohabitee

Occupancy rights: the right to occupy the matrimonial/ home, the right to return to that home and the right to apply for a court order to exclude. They arise automatically

on marriage or civil partnership, but a non-entitled partner who cohabits has to go to court to have their occupancy rights granted

Proof: the determination of a case by a sheriff/judge after hearing the parties and their witnesses give evidence on oath

Pursuer: the person who starts a civil court action

Drawn in part from the Scottish Courts Service, A glossary of more common Scottish legal terms.



APPENDIX B: COURT DATA

Table B1: Legal relationship and tenure

	EO crave 2009	Legal Relationship		Tenure		
		Married	Cohabitees	Owner occupied	Social Housing	Not averred
Total	34	28	6	21	11	2

Table B2: Entitlement of Pursuer

Cohabitee with no title	1
Entitled	2
Jointly entitled	26
Non-entitled	2
Not known	3
Total	34

Table B3: Type of abuse

Injurious to the physical and mental health of the applicant and a child in the household	9
Injurious to the mental health of the applicant	6
Injurious to the physical and mental health of the applicant	6
Injurious to the physical health of the applicant	6
Injurious to the mental health of the applicant and a child in the household	5
Injurious to the physical health of the applicant and a child in the household	2
Total	34

Table B4: Male pursuers

Outcomes at Interim Hearing	All cases
Exclusion Order granted together with one or more interdict and POA	2
Interim interdict granted, no POA (not noted whether POA insisted on or withdrawn at hearing)	1
Interim interdicts/orders re children only	1
Total	4

Table B5: Outcomes at interim hearings, defended and undefended

	All cases	Undefended	Defended
Exclusion Order granted together with one or more interdict and POA	10	6	4
Interim interdict granted, no POA (not noted whether POA insisted on or withdrawn at hearing)	6	0	6
Undertaking given not to re-enter home, interdict no POA	6	0	6
Exclusion Order granted together with one or more interdicts, but no POA	3	2	1
No interim hearing	2	1	1
Interim interdict granted with POA	1	1	0
Interim interdicts/orders re children only	2	0	2
Occupancy rights granted	1	1	0
Exclusion Order refused, interim interdict granted, no POA	1	0	1
Interim interdict granted , POA refused	1	0	1
Exclusion Order motion withdrawn, Interim interdict granted, POA refused	1	0	1
Total	34	11	23

Table B6: Outcomes, previous police involvement and bail

Outcomes at Interim Hearing	All cases	Extant Bail Conditions	Previous police involvement
Exclusion Order granted together with one or more interdict and POA	10	2	8
Undertaking given not to re-enter home, no POA	6	0	4
Exclusion Order granted together with one or more interdicts, but no POA	3	1	2
Total	19	3	14

Table B7: Outcomes by type of abuse

		All	Mental health	Physical and mental health	Physical health	Mental health and harm to child	Physical health and harm to child
Exclusion Order granted together with one or more interdicts and POA	10	4	1	2	1	2	0
Undertaking given not to re-enter home, no POA	6	1	1	0	2	1	1
Exclusion Order granted together with one or more interdicts, but no POA	3	0	1	0	1	1	0
Total	19	5	3	2	4	4	1

Table B8: Outcomes by evidence lodged

		P affidavit	P+ additional Affidavit	P+ Medical evidence	None
Exclusion Order granted together with one or more interdict and POA	10	1 (+ copy complaint)	2	6	1
Undertaking given not to re-enter home, no POA	6	2	0	3	1
Exclusion Order granted together with one or more interdicts, but no POA	3	0	1	1	1
Total	19	3	3	10	3

Table B9: Outcomes – defender had already left the home

Outcomes at Interim Hearing	All cases	Defender already given up occupation
Exclusion Order granted together with one or more interdict and POA	10	8
Undertaking given not to re-enter home, no POA	6	5
Exclusion Order granted together with one or more interdicts, but no POA	3	3
Total	19	16



Table B10: Outcomes, defender represented

Outcomes at Interim Hearing	All cases	Defended
Exclusion Order granted together with one or more interdict and POA	10	4
Undertaking given not to re-enter home, no POA	6	6
Exclusion Order granted together with one or more interdicts, but no POA	3	1
Total	19	11

Table B11: Outcomes with children in household

	All cases	Cases with children in household
Exclusion Order granted together with one or more interdict and POA	10	6
Undertaking given not to re-enter home, no POA	6	4
Exclusion Order granted together with one or more interdicts, but no POA	3	2
Total	19	12

APPENDIX C: WOMEN CONSULTED

Table C1: Status of women consulted

	Owner occupation	Renting Social	Renting Private	Total	Exclusion order is a competent remedy
Married women					
Sole tenant or owner	1	3	0	4	3*
Joint tenant or owner	6	3	0	9	9
Partner is sole tenant or owner	0	1	0	1	1
Cohabiting women					
Sole tenant or owner	1	11	1	13	0
Joint tenant or owner	3	4	0	7	7
Partner is sole tenant or owner	0	0	0	0	0
Total	11	22	1	34	21

* One of the four women who were entitled was in another jurisdiction at the point of separation and thus outwith the scope of the MHA

Table C2: Advice for women where an exclusion order was a competent remedy

Women given information/advice about staying in home and removing the abuser	5
Women that were not given information/advice about exclusion orders	13
Unknown	2
Total	20

Table C3: Outcomes for women, with EO as competent remedy who were given advice

Exclusion orders granted and returned home	3
Did not seek to return and rehoused	2
Total	5

Table C4: Outcomes for women, with EO as competent advice, no information or advice about EO

Stayed on in home or returned without an exclusion order	4
In refuge	5
Rehoused	4
Total	13

Table C7: Outcome, women who had advice from a lawyer and had a competent remedy for EO

Lawyer advised about an exclusion order	4
No advice from lawyer about exclusion order	4
Not known	1
Total	9

Table C5: Outcomes for all women at time of interview

In original home	15
In refuge	10
Rehoused	7
Lodging with a relative	1
Living in the shared home with him	1
Total	34

Table C8: Women who have had some police involvement and still in the home

The abuser has or had special bail conditions	4
The abuser had special bail conditions then probation	1
The abuser on probation	1
The abuser in prison	1
No special bail conditions etc	5
Total	12
Total number of women where there was police involvement	24

Table C6: Circumstances of women who are still in their home

Exclusion orders granted and in the home	3
Did not require an exclusion order to put the abuser out – they were cohabiting and had sole title	8
Partner left home and currently not in the area	1
Partner abandoned tenancy and woman moved back	1
Partner left and gave up interest in the tenancy	1
Partner moved out and living locally	1
Total	15

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