

## PART 6

# Domestic abuse

*Solicitors should keep under review at all times the availability of public funding and its extended availability in cases of domestic violence and the need to provide clients with costs information at the outset and on a regular basis.*

*At the time of drafting this Protocol, sections of the Domestic Violence, Crime and Victims Act 2004 which deal with family law are not yet in force. Therefore this part of the Protocol deals with the law as it stands but refers to the new Act to alert solicitors to the areas where it will affect practice when it comes into effect.*

## BEFORE THE ISSUE OF AN APPLICATION

### 6.1 WHAT IS DOMESTIC ABUSE?

**6.1.1** Domestic abuse has not been defined in law in England and Wales and is decided in any given case on the evidence presented to the court. The Inter-Ministerial Group on Domestic Violence signed up to the following definition of domestic abuse in 2004:

‘Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.’

- An adult is defined as any person aged 18 and over.
- Family members are defined as mother, father, son, daughter, brother, sister and grandparents, whether directly related, in-laws or step-family.

- 6.1.2** The following definition, which relies heavily on the definition in the New Zealand Domestic Violence Act 1995, is gender neutral. The Advisory Board on Family Law in their report to the Lord Chancellor on *Parental Contact in Cases where there is Domestic Violence* recommended this as the broad definition which should be adopted by the courts. Domestic abuse is violence against a person by any other person with whom that person is, or has been, in a domestic relationship.
- 6.1.3** Practitioners are referred to the Family Law Act 1996 as extended by the Domestic Violence, Crime and Victims Act 2004. Under those Acts a ‘domestic relationship’ includes partners, family members and ‘associated persons’ as defined in Family Law Act 1996. This was extended by the Domestic Violence, Crime and Victims Act 2004 to include cousins and same-sex cohabitants.
- 6.1.4** Domestic abuse can include:
- (a) physical abuse, including slapping, pushing and physical intimidation generally;
  - (b) sexual abuse, including female genital mutilation;
  - (c) psychological abuse, including but not limited to:
    - (i) intimidation;
    - (ii) harassment;
    - (iii) damage to property;
    - (iv) threats of physical, sexual or psychological abuse;
    - (v) controlling behaviour, including financial abuse and isolation of a victim;
  - (d) forced marriage, which may include elements of (a) and (c);
  - (e) in relation to a child, causing them to witness or putting them at risk of witnessing the abuse of a person with whom they have a domestic relationship (this does not apply to the person who suffers the abuse).
- 6.1.5** Domestic abuse may be a single act or a number of acts forming a pattern of behaviour, even though some or all of these acts when viewed in isolation may appear to be minor or trivial.

**6.1.6** The Inter-Ministerial Group’s definition of domestic violence (see **para. 6.1.1** above) has been adopted by government departments and other statutory agencies in England and Wales. The common definition was considered necessary to improve joint working and monitoring. Solicitors should be aware that this definition will be used by the police, the Crown Prosecution Service (CPS), local authorities and some other agencies.

**6.1.7** The Government definition is supported by an explanatory text:

‘The definition acknowledges that domestic violence can go beyond actual physical violence. It can also involve emotional abuse, the destruction of a spouse’s or partner’s property, their isolation from friends, family or other potential sources of support, control over access to money, personal items, food, transportation and the telephone, and stalking. Violence will often be witnessed by children and there is an overlap between the abuse of women and abuse (physical and sexual) of children. The wide adverse effects of living with domestic violence for children must be recognised as a child protection issue. They link with poor educational achievement, social exclusion and to juvenile crime, substance misuse, mental health problems and homelessness from running away. It is acknowledged that domestic violence and abuse can also manifest itself through the actions of immediate and extended family members through the perpetration of illegal activities, such as forced marriage, so called “honour crimes” and female genital mutilation. Extended family members may condone or even share in the pattern of abuse.’

**6.1.8** Domestic abuse is a controlling, coercive pattern of behaviour, that often goes on for an extended period of time. Although individual acts may appear minor or trivial, when viewed in isolation, it is the overall effect on the victim and any children that needs to be considered.

**6.1.9** Forced marriage is a specific form of domestic abuse and solicitors should be aware of it and screen for it. Solicitors are referred to **para. 2.2.1(4)** on this issue and to the Law Society’s leaflet appended at **Appendix 5**.

**6.1.10** When dealing with clients who have been the victims of forced marriage, solicitors must be careful to refer as far as possible to organisations which have a track record in advising and assisting clients who are experiencing marital difficulties, violence or

other forms of abuse. It is not sufficient merely to refer clients to organisations of their own ethnic background, as this does not guarantee that they will receive appropriate advice and assistance. They may simply be advised to attend mediation or reconciliation meetings involving family and/or community elders. Clients need to receive information and advice in non-judgmental and safe environments where they are not made to feel ashamed of contemplating taking steps to end their marriage or to protect themselves or their children.

## **6.2 SCREENING FOR DOMESTIC ABUSE**

**6.2.1** The role of solicitors in identifying domestic abuse can be invaluable. In order to respond more effectively to domestic abuse, solicitors should:

- (a) recognise that domestic abuse is a serious problem, and always prioritise the safety of victims. It is important not to collude with perpetrators;
- (b) recognise that domestic abuse occurs irrespective of class, race or ethnicity, sex or sexuality, age, mental or physical ability, and be sensitive to different needs and experiences of clients from different backgrounds and cultures;
- (c) ask questions about domestic abuse directly and routinely as part of normal interview procedures. Solicitors should be aware that disclosure may be piecemeal and so questions should be asked sensitively and appropriately at each interview;
- (d) not be judgmental;
- (e) have information about other sources of help and support available within the local area and keep such information up to date. Resources include:
  - (i) domestic violence units at local police stations;
  - (ii) domestic violence liaison officers at police stations, if appropriate;
  - (iii) WAFE and Refuge national domestic violence helpline;
  - (iv) local refuges, Refuge and other groups dedicated to the assistance of victims of domestic abuse;
  - (v) specialist organisations dealing with domestic abuse of victims from minority backgrounds;

- (vi) independent lay advocate victim service providers;
- (vii) perpetrator programmes;
- (viii) Citizens' Advice Bureaux;
- (ix) Rights of Women;
- (x) Families Need Fathers, Fathers Direct and other non-resident parent support groups;
- (xi) domestic abuse victim support groups;
- (xii) Department for Work and Pensions offices;
- (xiii) local authority housing departments;
- (xiv) local housing trusts;
- (xv) social services department.

### **6.3 SCREENING QUESTIONS**

**6.3.1** Impartial screening techniques should be used as part of normal interview techniques to establish if there is an issue of domestic abuse for that individual client. Solicitors must recognise that victims may not disclose domestic abuse at first or early meetings. Screening questions might include:

- (1) Have you been arguing a lot recently?
- (2) Do you generally have a lot of arguments?
- (3) When you argue, what usually happens?
- (4) Have you or your partner ever been convicted of any criminal offence, in particular those including violence and/or drugs or alcohol?
- (5) What happens when your partner loses their temper and/or you lose your temper?
- (6) When you and/or your partner drink alcohol does this ever result in arguments?
- (7) Do you and/or your partner ever become violent after consuming alcohol or any other substance?
- (8) How safe or afraid do you and/or your partner feel in your current relationship?
- (9) Has your partner ever threatened you with a weapon and have you ever threatened him or her with a weapon?
- (10) Has your partner threatened to harm himself or herself and/or the children and have you ever threatened to harm yourself and/or the children?
- (11) Has your partner ever stalked you and have you ever stalked your partner?

**6.3.2** Whether to raise the issue of possible domestic abuse with a client who may be a perpetrator is obviously a very sensitive matter. Where there are children of the family, any screening which is carried out must seek to establish whether there is an issue of abuse for the client only or for the client and any children of the family. Where there are children of the family, screening needs to include questions about the client's own propensity. This is the reason why the questions above are drafted to include the conduct of both parties.

**6.3.3** If solicitors suspect that their client is the victim of domestic abuse, more direct questions should be considered, for example:

- (1) Are you afraid of your partner?
- (2) Why are you afraid of him or her?
- (3) Has there ever been any violence between you?
- (4) Have either of you been hurt by the other? If so, is the violence escalating in frequency and/or severity?
- (5) Were these injuries caused by someone you know?
- (6) Have your children ever witnessed any violence between you?
- (7) Are you/Is your partner currently pregnant?
- (8) Do you have any disabilities (mental or physical)?
- (9) What support networks do you have in terms of friends, family or others?

These questions are based on National Family Mediation guidelines for screening for domestic abuse in mediation, but have been revised and extended after consultation.

**6.3.4** Even where domestic abuse does not emerge as an issue at the initial interview, the possibility of abuse should be kept under review at all times. Many forms of domestic abuse are hidden and not recognised as such by clients. They may also be fearful of the consequences if they disclose violence (e.g. because of threats that they will be harmed if they disclose the abuse). Note that these questions are not exhaustive and they do not represent a comprehensive list.

**6.3.5** Solicitors should consider making materials on domestic abuse available for clients to take away from their offices.

## 6.4 NEEDS ASSESSMENT

6.4.1 If domestic abuse does emerge as an issue, solicitors will need, as appropriate, to do the following:

- (1) Explain the options available if clients want to take any action, ensuring the victim's safety is paramount throughout while accepting that clients must be allowed to make their own decisions. Clients' options include:
  - (a) noting the incident but taking no other action at that time;
  - (b) visiting their GP;
  - (c) contacting a local domestic abuse service for support, practical help, advice and advocacy, including a refuge where necessary;
  - (d) contacting the local authority housing department and local housing associations for advice and assistance and access to emergency accommodation under homelessness legislation;
  - (e) contacting the police generally to enquire whether they will investigate any criminal offences and whether the CPS is prepared to bring a prosecution under the Protection from Harassment Act 1997 or other criminal legislation (see *The Role of the Crown Prosecution Service*, a guide produced by the CPS at **Appendix 16**);
  - (f) sending a letter to the alleged abuser recording the incident(s) and demanding the cessation of the abuse with an indication of the further action that might or will be taken if it does not cease. If the client is legally aided, solicitors must send such a letter unless there are good reasons not to do so. However, solicitors must consider whether the sending of such a letter will put the client at risk;
  - (g) applying for legal protection from their partner by way of an injunction.
- (2) Advise on the strengths and limitations of each remedy in curbing the abuse and the potential impact on the abuser of any possible course of action.
- (3) Advise on the prospects of obtaining an order and the merits, implications and costs of the remedies.

- (4) Discuss the potential impact of the domestic abuse on any children, including potential risks involved when considering contact arrangements and the likely effect upon them of any action clients wish to take.
- (5) Discuss whether any application needs to be made to protect the children of the family or any one of them.
- (6) Discuss how a partner's abuse will impact on other legal remedies or proceedings such as divorce, residence, contact and ancillary relief and immigration.
- (7) Provide information about other agencies and support groups as appropriate.
- (8) Give assistance, where appropriate and where possible, with the practical problems posed by domestic abuse. For example:
  - (a) discuss appropriate safe contact telephone numbers and addresses;
  - (b) discuss keeping a log of any incidents which arise if it is safe to do so;
  - (c) discuss keeping certain documents in solicitors' offices, for example passports, health cards, bank documents and children's photographs.
- (9) Consider with clients whether it is appropriate to change the numbers of their mobile and home telephones.
- (10) Discuss safety planning and if appropriate prepare an action plan for clients, for example detailing how they would get help or leave in an emergency, or how they can maximise their own and their children's safety after separating from their violent partner. (Ideally this should be client-led and confirmed to the client in writing, provided it is safe for the client to receive written communications. An action plan can be found in the LSC's leaflet on domestic violence and harassment – see [www.clsdirect.org.uk](http://www.clsdirect.org.uk).)
- (11) Suggest to clients that they telephone the police when incidents occur and ask the police to log these incidents and give clients the relevant log number.
- (12) Advise as to the recording of evidence including photographs of injuries, dated where possible.

## **6.5 COMPILING A RECORD OF EVIDENCE**

### **Gathering evidence**

**6.5.1** Solicitors should discuss with clients the need to protect existing evidence of violence or harassment and the need to think about gathering evidence in the future. This may be particularly important where a client has insecure immigration status and wishes to apply for indefinite leave to remain in the UK under the ‘domestic violence rule’ within immigration law. The need to provide proof of domestic violence is crucial in any such application and clients must be strongly advised to report incidents of domestic abuse to the police, GPs, hospitals or support groups. It is also important in the context of immigration cases that solicitors keep accurate records of all incidents of domestic abuse.

**6.5.2** Actions to produce a record of the abuse may include:

- (a) urging clients to visit their GPs to have a record made of any injuries;
- (b) advising clients to obtain photographs of any injuries immediately after any violent episode or when any bruising develops (preferably with some evidence of the date on which the photographs were taken);
- (c) asking clients for the names and addresses of any witnesses to the violence or harassment and taking statements from them, or asking the client to obtain written statements from them;
- (d) encouraging clients to keep a diary or record of events which has been contemporaneously signed and dated;
- (e) asking clients to retain abusive or threatening notes, emails or other written communications;
- (f) asking clients to keep photocopies of abusive or threatening text messages and to record abusive or threatening telephone messages.

### **Personal statements**

**6.5.3** Solicitors should consider and discuss with clients the benefits of making personal statements, and where appropriate assist clients to do so. Local domestic abuse support services may also be able to assist with this, and provide follow-up support

once the personal statement has been made. A personal statement is a short document, possibly in letter form, setting out a client's statement of the domestic abuse which they state they have suffered. Solicitors should recognise that some victims will need follow-up support after outlining the history of the abuse they have suffered. This can be used to provide information to other agencies from which services or support may be needed, for example the Department for Work and Pensions. Clients should be advised that statements may be given to those agencies and that it may be necessary for them to confirm their position verbally to other agencies.

- 6.5.4** Preparation of such a statement should avoid the need for the client to tell the same story in full to a number of different agencies, although further details may be required by those agencies. For the statements to be of use they will need to be regularly updated. Clients should be advised that the confidentiality of such statements cannot be guaranteed once they have been given to other agencies.

## **6.6 SAFETY PLANNING**

- 6.6.1** As soon as domestic abuse is revealed as an issue, solicitors should prioritise the safety of clients and any children and advise clients as to how to protect themselves and their children. The following matters should be considered.

### **Confidentiality**

- 6.6.2** Solicitors should discuss with clients their duty of confidentiality and the opportunity to speak openly without fear of disclosure. However, it is very important to explain clearly the limits of that confidentiality, particularly in relation to the court's powers to order disclosure of information about the whereabouts of a child. It should also be made clear that the duty of confidentiality does not extend to information about the commission of a crime, including child abduction, or about harm or the threat of harm to a child (for guidance on this see **Appendix 17** for contact details of the Professional Ethics department at the Law Society). Solicitors should also consider the guidance given in *The Guide to the Professional Conduct of Solicitors 1999*, Principle 16.02.

### **Keeping clients' whereabouts confidential**

- 6.6.3** When clients are in hiding or face particular risk from their partners or families, solicitors should discuss with them the possible dangers of disclosure of their whereabouts once proceedings are issued. Solicitors need to consider carefully whether injunctive relief is appropriate in such circumstances.
- 6.6.4** Solicitors should consider ways in which clients' whereabouts can be kept confidential, such as:
- (a) issuing proceedings in a different location (although it will be necessary to explain to clients that there will be an increase in costs as a result of using agents);
  - (b) asking the court for leave to withhold clients' addresses from documentation;
  - (c) the use of agent solicitors in a different area of the country;
  - (d) constant vigilance about the contents of documents;
  - (e) rules about the posting of letters and documents.
- 6.6.5** However, solicitors should advise clients of the court's powers under Family Law Act 1986, s.33 in relation to disclosure of the whereabouts of a child to the court.

## **6.7 SOURCES OF FUNDING**

- 6.7.1** Where clients are not eligible for public funding (despite the possible waiver of the upper income limit available to domestic violence victims) and are not able to pay privately for the cost of legal advice and obtaining protection, solicitors should provide information about other sources of help to obtain protection through the courts, for example:
- (a) Women's Aid (WAFE);
  - (b) Welsh Women's Aid;
  - (c) Citizens' Advice Bureaux;
  - (d) Rights of Women;
  - (e) Families Need Fathers;
  - (f) the police, who may bring criminal proceedings under the Protection from Harassment Act 1997;
  - (g) the Bar Pro Bono Unit.

For contact details of these organisations see **Appendix 17**.

## **6.8 PROTECTION FROM HARASSMENT ACT 1997**

- 6.8.1** Solicitors should consider whether applications under the Protection from Harassment Act 1997 are more appropriate for clients than applications under the Family Law Act 1996, Part IV. If so, it is important to liaise with the police. The police will investigate any offence reported and then, in all but the most minor and straightforward cases, refer the case to the CPS which will determine whether a person is to be charged. If an offence investigated by the police is classified as ‘domestic violence’ the charging decision must always be made by the CPS. Domestic abuse cases may involve many different criminal offences, most commonly assault, but it is important to be aware that if a perpetrator is prosecuted under the Protection from Harassment Act 1997, on conviction the court can impose a restraining order for an unlimited period of time. However, solicitors should consider the different burden of proof in criminal proceedings under the Protection from Harassment Act 1997 as opposed to civil proceedings either under that Act or under the Family Law Act 1996, Part IV. Solicitors should be aware that proceedings under the Protection from Harassment Act 1997, s.3 may be founded on the basis of one act of harassment and anticipated further breaches of s.1. In contrast a prosecution under s.2 or s.4 of the Act requires at least two actual incidents in order to constitute ‘a course of conduct’.
- 6.8.2** Solicitors should be aware of the differences between criminal and civil proceedings under the Protection from Harassment Act 1997 and potential disadvantages to the client in relying on criminal sanctions. (Bail may be varied when the client is unaware of the charge, the client has a lack of control over the proceedings and the burden of proof in criminal cases is higher.)
- 6.8.3** Solicitors must note that the Domestic Violence, Crime and Victims Act 2004 will shortly be implemented. This makes breach of a non-molestation order a criminal offence and operates in a similar way to the Protection from Harassment Act 1997, by providing a criminal sanction for breaching a civil order.

- 6.8.4** This new Act will also make restraining orders available to the criminal courts for any offence, on conviction or acquittal. Orders on acquittal are to be made where it is clear from the evidence that a victim needs some form of protection.

**6.9 FAMILY LAW ACT 1996, PART IV: CLIENTS WHO ARE UNDER AN INCAPACITY**

- 6.9.1** Solicitors are reminded that any child applicant for an injunction under the Family Law Act 1996 must proceed by a next friend and must commence proceedings in the High Court. In addition any child under 16 needs leave of the court to issue an application (Family Law Act 1996, s.43). Rule 9.2A does not apply (FPR 1991, rule 9.2, and see rule 9.1(3)). Any child respondent for a Family Law Act injunction must proceed by guardian ad litem (FPR 1991, rule 9.2 and rule 9.1(3)). The Official Solicitor will act as next friend or guardian ad litem of the minor if there is no other suitable person to do so. Solicitors should be aware that remedies against minors are limited (Family Law Act 1996, s.47(2); *H v. H (A Child) (Occupation Order: Power of Arrest)* [2000] 2 All ER (D) 2067; Powers of Criminal Courts (Sentencing) Act 2000, s.89(1)).
- 6.9.2** Clients who are patients must begin proceedings by a next friend and defend proceedings by a guardian ad litem (FPR 1991, rule 9.1(1) and rule 9.2). Solicitors are reminded that a potential contemnor must be able to understand that an order has been made forbidding him or her to do certain things and that if he or she does them they will be punished (*P v. P (Contempt of Court: Mental Capacity)* [1999] 2 FLR 897, together with the earlier case of *Wookey v. Wookey* [1991] 2 FLR 319).

**AFTER THE ISSUE OF AN APPLICATION**

**6.10 SERVICE OF PAPERS**

- 6.10.1** Solicitors should ask the court to return issued papers to them immediately so that they can arrange service on respondents. Solicitors can then arrange for personal service of these docu-

ments or, if permitted, by some other means. If the client is taking divorce proceedings, solicitors should consider serving the divorce documents with the injunction application in order to minimise cost and delay. Solicitors should forewarn clients when papers are due to be served as they may need to leave the home or take other steps to protect themselves.

**6.10.2** Solicitors are referred to Resolution's *Guide to Good Practice on Service* (see **Appendix 17** for contact details).

## **6.11 LEAVING THE HOME**

**6.11.1** If clients are still living with violent partners, solicitors should discuss with clients whether they need to leave their home before service of proceedings.

**6.11.2** If so, or if clients are considering leaving the family home in any event, temporarily or permanently, it is important to discuss the implications of this action and the effect it may have on the children, including financial aspects. Solicitors should advise clients of the support available from women's refuges, including specialist refuges for black and minority women, and also advise of their rights under homelessness law to access temporary accommodation via the local authority.

**6.11.3** Consideration should be given to the respective merits of moving out immediately or remaining in the property, bearing in mind any potential ancillary relief claim at a later stage. However, client safety is a priority. Some local authorities may be able to help with increased safety measures in the home, if clients do not want to leave.

**6.11.4** Solicitors should also discuss with clients the need to take with them irreplaceable and important items such as photographs, legal documents, personal items of monetary or sentimental value, passports and benefits entitlement documents. (Whilst not irreplaceable, the last two sets of papers are nevertheless important and may help to prevent unnecessary delays in obtaining benefits or in dealings with the Home Office in cases also involving immigration problems.) Clients may need to remove some of these items themselves prior to leaving the home.

- 6.11.5 Solicitors should discuss the possibility of clients returning home with police assistance to collect their belongings if the police are willing and able to assist.
- 6.11.6 Solicitors should, however, warn clients that they should not take joint or similarly classed items or strip the house of contents or behave in any other highly inflammatory manner.
- 6.11.7 Solicitors must advise clients that if they leave their children with their partners they must not assume that the children will be returned to them automatically by the court. The police are unlikely to assist in retrieving children unless they are perceived to be ‘at risk’ and former partners may be unwilling to relinquish them.

## **6.12 OTHER PROCEEDINGS AND NEGOTIATIONS**

- 6.12.1 Where domestic abuse is an issue, great care should be taken to ensure that clients’ safety is not compromised by meetings arranged by third parties (for example, the CAFCASS officer) and that clients are not pressured into face-to-face meetings with their ex-partners for the purposes of ‘door of the court’ negotiations on, for example, children or financial matters. Safety issues should be raised with CAFCASS officers if they are or become involved. Any safety issues within the confines of the court building should be discussed with court staff in advance. The ushers should also be informed of any possible difficulties upon arrival at court and asked that arrangements are made for the victim and perpetrator to arrive and leave the court building separately where necessary, and that separate rooms be made available for a conference, so that the client does not need to have face-to-face contact with the other party prior to entering the court.

## **6.13 CHILDREN APPLICATIONS AND LEAVE TO APPLY**

- 6.13.1 Proceedings can be used as tools for abusers to continue their abuse or harassment. Where applications under the Children Act 1989 are used in this way, an application under s.91(14) of the Act, which forbids further applications without leave of the

court, should be considered. Courts grant these orders sparingly and solicitors must be aware that courts can be critical of an early application.

## **6.14 INJUNCTIONS**

- 6.14.1** Solicitors should ensure that the process of obtaining legal protection for parties who are or have been the victims of domestic abuse is as supportive, effective and fast as possible.
- 6.14.2** Solicitors should not accept instructions in a domestic abuse case unless they have time, expertise and capacity to deal with it speedily and to give the client the time they may require.
- 6.14.3** The implications of the Domestic Violence, Crime and Victims Act 2004 (when implemented) need to be discussed with the client. The breach of an order, but not of an undertaking, will be a criminal offence and proceedings for breach will take place in the criminal courts. Whilst the Act intends this provision as a protective measure and not as a deterrent to obtaining an order, the client must be aware of the likely consequences for the perpetrator and any children of obtaining an order which is breached. If there is a breach, will the client want to be represented in any proceedings? If so, is the client prepared to forgo an order and accept undertakings? There may also be funding implications for a client who wishes to pursue a civil remedy.
- 6.14.4** Solicitors should make clients aware of the possibility of costs orders within family proceedings and, above all, ensure that clients are aware that if they are publicly funded, the statutory charge could apply to any costs incurred within any proceedings covered by the certificate, including proceedings for injunctive relief and children. Solicitors should explain that emergency public funding can be granted using devolved powers, but that the client must co-operate in the LSC's means assessment. If an emergency certificate is granted, it is important that the client understands that a contribution may be payable and he or she will be liable for all the costs incurred (including the difference between funded and private client rates) if the certificate is revoked (for example, for

non-cooperation in the means assessment, because an offer is not accepted, or because it transpires that the client is not financially eligible).

## **6.15 WITH OR WITHOUT NOTICE?**

**6.15.1** If injunctive relief is appropriate, solicitors should discuss with clients whether it is appropriate to make a without notice application. The issues to consider are:

- (a) whether the client may be in danger if proceedings are issued on notice;
- (b) the seriousness of any threat to the client, including whether it is urgent and imminent;
- (c) the likelihood of the court granting a without notice order;
- (d) the concerns of court with regard to the draconian nature of orders made without notice; and
- (e) whether the client is likely to be deterred from pursuing a remedy if unable to obtain the protection of the court before the application is served upon his or her opponent.

**6.15.2** If clients have taken some time to seek help about a violent incident, particularly careful consideration will need to be given as to whether it is appropriate to apply for a without notice order. The seriousness of a threat should not be dismissed simply because of delay, as any delay may not indicate the level of fear which clients may feel. Many victims of domestic abuse take some time to report the abuse. However, where possible solicitors should make a clear legal judgment about whether courts are likely to grant a without notice order and advise in the particular circumstances. Solicitors advising or acting for publicly funded clients must have regard to the LSC's Funding Code and its decision-making guidance.

**6.15.3** Solicitors should bear in mind that occupation orders are rarely granted without notice, unless the respondent is out of occupation already. Solicitors should be mindful of the court's powers to abridge service of any application from the usual two clear days to a matter of hours.

**6.15.4** Applicants and respondents should both be advised to remain calm during any court proceedings. In cases where clients fear

for their safety and are particularly anxious that their addresses be kept confidential, consideration should be given to the arrangements whereby clients arrive at and leave court and where they are situated while waiting at court (see **para. 6.12.1** above). Solicitors should familiarise themselves with any special facilities available in the courts where they work frequently.

- 6.15.5** Solicitors should be aware of the need to have a complete note of hearing details available on request for any party who has not been present at the hearing (*Re W (Ex Parte Orders)* [2000] 2 FLR 927). Applicants' legal representatives should also ensure that the order as drawn contains a list of all affidavits, witness statements and other evidential material read by the judge.
- 6.15.6** Practitioners should remember that there are differences in the powers of enforcement of the family proceedings court and the county court and should consider where it would most benefit their clients to issue their application. They should advise their clients accordingly.

## **6.16 LENGTH OF ORDER**

- 6.16.1** Solicitors must give careful consideration to the proper duration of any order or power of arrest to ensure that clients have protection over a reasonable period of time. For example, courts should not limit the duration of a non-molestation order only because a power of arrest is linked to that order (see *Re B-J (A Child) (Non-Molestation Order: Power of Arrest)* [2000] 2 FCR 599).
- 6.16.2** Solicitors should be mindful of the court's powers to extend an injunction both in duration and in scope. They should also be aware of the differences in duration of occupation orders for different types of occupiers.

## **6.17 POWERS OF ARREST**

- 6.17.1** The need for a power of arrest to be attached to an order must be carefully considered. The practical effect of attaching a

power of arrest to an order and how such orders can be enforced must be explained to clients. Solicitors should remember that on a with notice application courts *must* attach a power of arrest to an order where respondents have used or threatened violence against applicants or a relevant child unless satisfied that they will be adequately protected without one. On a without notice application courts have the discretion to attach a power of arrest in the above circumstances, based on whether there is a risk of significant harm.

- 6.17.2** Where a power of arrest is attached to an order and in all cases of non-molestation orders, after the order has been served on the respondent, the local police must be notified and a copy of the order delivered to them. Ideally, process servers should lodge the copy injunction order with the police immediately following service on the respondent. A receipt from the police station should be obtained whenever possible and kept on file.
- 6.17.3** Even where a power of arrest is not attached to an order, if there are concerns about the safety of clients, the local police's domestic violence unit should be notified in case a serious incident should arise. Solicitors must warn clients not to encourage breach of an order where a power of arrest is in force and of the result of doing so.
- 6.17.4** Practitioners are referred to the sections below dealing with breaches of orders and the consequences of such breaches but should note in particular that the Domestic Violence, Crime and Victims Act 2004 makes breach of a non-molestation order a criminal offence. Section 1 of that Act amends the Family Law Act 1996 by inserting a new s.42A. The offence may be punished either as a criminal offence with a maximum penalty of five years' imprisonment, or as a civil contempt of court.

## **6.18 ANCILLARY MATTERS**

- 6.18.1** Where an occupation order is made under the Family Law Act 1996, consideration should be given to requesting that the court exercise its powers under Family Law Act 1996, s.53 and Sched. 7 to transfer tenancies between parties, and under s.40

to make orders concerning payment of outgoings relating to the home. Solicitors must note, however, that s.40 orders are currently unenforceable. Any application seeking an occupation order or an order transferring a tenancy must be served on the mortgagee or landlord (FPR 1991, rule 3.7(10)–(11)).

## **6.19 SERVICE OF ORDERS**

- 6.19.1** Clients must be made aware that they have a responsibility to cooperate with solicitors, enquiry agents and the police so that service of orders can be effected on respondents. If clients do not cooperate, solicitors should advise them that public funding may be withdrawn as a result.
- 6.19.2** Solicitors are reminded that orders must be served on respondents even if they are aware of the terms of the order. Service of orders on respondents must be in person unless the court directs otherwise. Solicitors should be aware that there are safety implications for clients both before and immediately after service.
- 6.19.3** Solicitors should ensure that their client is notified when service is due to be effected and when it has been effected and discuss safety options/safety planning with them.

## **6.20 CRIMINAL EVIDENCE**

- 6.20.1** Where alleged perpetrators of domestic abuse have criminal records or there are concurrent criminal proceedings, solicitors should, where possible, introduce findings from these proceedings into the family proceedings in appropriate cases.
- 6.20.2** Where there are concurrent criminal proceedings relating to the same incidents, solicitors should consider whether it is appropriate to seek an adjournment of any family proceedings until after the criminal proceedings have been concluded, bearing in mind issues of safety and costs. Solicitors are reminded of the need to familiarise themselves with ongoing legislation and proposed legal reform in this area. In any event, where there are concurrent proceedings, solicitors should liaise with

the CPS to ensure that any civil, family or criminal court orders that are made are not inconsistent with each other.

**6.20.3** In certain circumstances, women do change their minds about continuing with proceedings concerning domestic abuse issues. However, due to the police and CPS's positive prosecution policy, regardless of a woman formally withdrawing her statement, the CPS may continue with proceedings to show that they *are* taking domestic abuse seriously and to send a clear message to perpetrators. This means that women could be witness summonsed and forced to attend court despite their wishes to the contrary. Solicitors must ensure that they inform their clients that this is a possibility when advising a client about pursuing criminal proceedings (see *The Role of the Crown Prosecution Service*, a guide produced by the CPS at **Appendix 16**).

## **6.21 ACTING FOR THE RESPONDENT**

### **Public funding**

**6.21.1** Solicitors should provide the following information to any clients who are respondents in proceedings for injunctions.

- (1) Respondents are unlikely to justify a grant of legal representation unless:
  - (a) an application has been made for an occupation order (unless the respondent is already out of occupation of the property, has no good reason to return and any other issues in the proceedings are insufficient to justify public funding being used); and/or
  - (b) there are very serious allegations which are denied wholly or substantially; and/or
  - (c) there is any question of inability to defend (for example because of mental incapacity or minority).
- (2) Respondents in appropriate cases will be assisted by the availability of 'Help at Court' to advise about the giving of undertakings.

### Preparing for court

- 6.21.2** When a case is going to a court hearing, a solicitor, or a respondent if acting in person, should:
- (a) wherever possible, prepare a statement in reply to the applicant's sworn statement in readiness for the hearing;
  - (b) consider what evidence could be obtained to support the respondent's case, including evidence from the housing department about the likelihood of either party being rehoused if an occupation order is made;
  - (c) consider the need for cross-applications for non-molestation and occupation orders, if there are allegations of assault on both sides.
- 6.21.3** If a return date is fixed, the respondent's sworn statement in reply should be filed and served as soon as possible prior to the return date. If possible, any additional evidence should be adduced before the return date. If this is not possible, the applicant's solicitors should be advised in writing of the intention to adduce further evidence, and if necessary leave should be sought at the return date hearing.

## 6.22 AT COURT

- 6.22.1** In accordance with **para. 6.15.4** above, applicants and respondents should both be advised of the wisdom of remaining calm during any court proceedings.
- 6.22.2** Where possible, solicitors acting for respondents in an application for a non-molestation order should try to resolve the case by suggesting their clients give undertakings (or perhaps by the parties giving cross-undertakings). However, as a power of arrest will not attach to an undertaking, solicitors should advise respondents that there is a real possibility that an undertaking will not be accepted for that or another reason, so that clients are not given false hopes or false expectations.

## **6.23 OTHER PROCEEDINGS**

**6.23.1** Solicitors should consider and advise on the following:

- (a) whether proceedings need to be launched under the Children Act 1989 if there are concerns about where any child should live or in relation to contact arrangements between the child and their non-resident parent;
- (b) whether an application for the transfer of a tenancy under the Family Law Act 1996, Sched. 7 would be appropriate. Where necessary, an order should be sought preventing either party filing a notice to quit which would render both parties homeless. If a tenancy is in joint names and one party surrenders that tenancy for any reason, including vindictiveness, the consequences are that the other party is left homeless and is deemed to have made themselves voluntarily homeless.

## **6.24 CONTACT**

**6.24.1** If either party has concerns about contact with any children, this should be raised at the first hearing. If contact is refused, directions can be made and an undertaking given to issue an application at that first hearing (see **Appendix 6**).

**6.24.2** Solicitors must advise respondents of the importance of regaining the trust of parents with residence where contact is concerned. Solicitors should advise clients who are perpetrators of domestic abuse to contact the Respect national helpline for information and help, and also encourage their attendance at local perpetrator re-education programmes.

## **6.25 AFTER THE HEARING**

**6.25.1** Solicitors should carefully check the content and wording of orders to ensure that they reflect exactly the terms of any orders specified by the judge.

**6.25.2** Solicitors must ensure that orders are correctly served.

- 6.25.3** Solicitors must advise clients in writing of the order that has been made and the consequences of breaching it. A copy of the order should be sent to the client as soon as it is received from the court. Clients should be advised that after the Domestic Violence, Crime and Victims Act 2004 is implemented, a breach of a non-molestation order will be a criminal offence. This means that the police will take action under criminal law in respect of the breach, without needing consent of the applicant to do so. In appropriate cases, solicitors should advise clients that any communications with applicants should be dealt with through solicitors because of the risk that any attempt to contact applicants by other means would probably be seen as harassment.
- 6.25.4** Solicitors should ensure that clients understand the meanings of orders and should advise parties not to act in such a way that would put the other party at risk of committal proceedings or breach of bail in criminal proceedings, for example by telephoning a party who is forbidden to contact them.
- 6.25.5** Once proceedings have been concluded, it may be possible for mediation to be considered, notwithstanding that there has been violence within the relationship. However, solicitors must always give priority to the safety of the parties and the children, and must be aware that mediators will be unable to deal with a case where there is an unmanageable power imbalance between the parties.

## **APPLICATIONS FOR ENFORCEMENT**

### **6.26 ENSURING THAT ORDERS ARE ENFORCEABLE**

- 6.26.1** Many injunctions obtained under the Family Law Act 1996 are accompanied by powers of arrest. This means that in the event that respondents are in breach of a properly served order the police may arrest them if they violate that order and bring them before a judge within the appropriate time limits.
- 6.26.2** Section 1 of the new Domestic Violence, Crime and Victims Act 2004 makes breach of a non-molestation order a criminal,

arrestable offence meaning that offenders can be dealt with for any breach in either the civil court or the criminal court.

**6.26.3** When this section of the Act comes into force, many actions for breach of a non-molestation order may become the responsibility of the police. Solicitors should note the position and the need to remind clients of the new method of enforcement, which may not involve solicitors or the clients.

**6.26.4** There are, however, occasions when persons who are given protection by an injunction must start the committal process, either by issuing a notice to show cause or by applying for a warrant of arrest.

**6.26.5** All methods of enforcement depend on the orders which clients are seeking to enforce being properly served and solicitors are referred to **para. 6.19** above. The court's powers of enforcement should have been fully explained to applicant clients before an order was sought, but if clients were very distressed when the proceedings commenced, it may be necessary to discuss again the powers available to the courts to ensure that clients give full and informed instructions. Clients should, in all cases, be made aware of the range of powers open to the court and of the fact that respondents are unlikely to be given an immediate custodial sentence for a first breach unless it is of a particularly serious nature. If the breach is dealt with in the criminal courts, bail could be refused and the defendant remanded in custody.

**6.26.6** This section of the Protocol sets out guidance as to best practice on enforcement proceedings, however generated.

## **6.27 FUNDING AND COSTS**

### **In all cases**

**6.27.1** Solicitors should consider possible actions with clients and advise on whether applications for committal are likely to be successful, the likely benefit to clients of making applications, the potential response of respondents to such applications and the likelihood of any costs orders being made.

**Private funding**

- 6.27.2** Solicitors should offer an estimate of costs to applicants before action is undertaken.

**Public funding**

- 6.27.3** Solicitors are reminded that in all cases they must consider whether clients are or remain eligible for public funding, check the scope, costs limit and availability of their clients' public funding certificates and ensure that they are covered for the work. Solicitors should also advise clients in relation to any resultant costs increase.

**6.28 BURDEN OF PROOF**

- 6.28.1** The usual standard of proof for family law cases involves courts being satisfied on the balance of probability that clients are telling the truth. However, in committal applications the burden of proof is weightier and courts must be satisfied beyond reasonable doubt that a respondent has breached the order as alleged. This is because the respondent's liberty is at stake.
- 6.28.2** When the 2004 Act comes into force, applications for non-molestation orders will probably continue to be heard on the basis of balance of probability evidence, although a breach of a non-molestation order will be criminal and therefore subject to the 'beyond reasonable doubt' standard of proof.

**PROCEDURE AFTER BREACH IF SOLICITORS ARE ACTING FOR APPLICANTS****6.29 WHERE POWERS OF ARREST HAVE BEEN ACTIVATED**

- 6.29.1** Solicitors should check that powers of arrest have been properly invoked and that respondents have been arrested for breach of a term to which a power of arrest applies. In particular, it should be noted that arrest for breach of the peace

(unless involving breach of one of the relevant terms of the order) will be insufficient to invoke properly a power of arrest.

- 6.29.2 If acting for an applicant, solicitors should ensure that their client has been notified and will attend at court. It may be helpful to remind arresting officers that they should attend with any available statements.
- 6.29.3 If time permits, it is helpful to provide a short statement of a client's case for the court.
- 6.29.4 Solicitors should consider whether it is appropriate to draft a notice to show cause to bring to the court's attention any breaches not covered by the power of arrest.

### **6.30 WHERE POWERS OF ARREST HAVE NOT BEEN ACTIVATED**

- 6.30.1 Prior to issuing an application for committal, solicitors should check that the order breached carries a penal notice which has not expired. They should discuss with clients the acts which have given rise to the allegations of breaches of orders.
- 6.30.2 Solicitors are reminded of the need to keep under review safety considerations for clients and any children of the family, and to discuss and consider safety options and planning with clients. As soon as breaches are reported, solicitors should advise clients of potential sources of assistance and refer them to any providers of emergency housing, refuge accommodation and any other available resource so that they can, when necessary, protect themselves and their children.
- 6.30.3 Solicitors must explain to clients the powers of an injunction and also the limitations of court orders. Clients must be aware that some individuals will breach court orders and that they must at all times put their own and their children's safety first.
- 6.30.4 If breaches of court orders are reported to solicitors by applicants in injunction proceedings, the solicitor should discuss with their clients what action the clients wish to take. They

should encourage clients at all times to keep records of any alleged breaches in the same way they did before the order was granted.

**6.30.5** Solicitors should discuss with clients the various courses of action which they can take:

- (1) They can write to solicitors acting for respondents or to respondents themselves, advising that there is an allegation of breach and that if any further breaches occur, their clients will take steps to apply for committal.
- (2) They can apply to enforce orders.
- (3) As soon as the Domestic Violence, Crime and Victims Act 2004, s.1 is implemented, they can report (or advise their clients to report) the breach of a non-molestation order to the police, as it will be a criminal offence.
- (4) They can report matters (or advise their clients to report matters) to the police if they think other criminal offences have been committed.
- (5) They can advise clients who wish to leave their homes and find alternative accommodation. Solicitors are reminded of the duties of public landlords to make a finding of involuntary homelessness in the event that an applicant for housing presents alleging fear of violence from a partner.
- (6) They can apply to extend the nature or scope of current orders.
- (7) If no power of arrest has been attached to a current order they can apply for a warrant of arrest.

**6.30.6** In cases where there are minor children, clients should consider the implications of the breach on any arrangements for the children including contact. Where appropriate, consideration should be given to the use of orders under the Children Act 1989 to regulate/prevent contact between children and an allegedly violent parent. Clients should be reminded of the need to co-operate with other agencies such as the police Child Protection Team or social services, who may become involved in relation to children once injunction proceedings have been issued.

### **6.31 WARRANTS OF ARREST**

- 6.31.1** Solicitors are reminded that if a power of arrest has not been attached to all or part of an order they can apply in appropriate circumstances for a warrant of arrest under Family Law Act 1996, s.47(8). Application should be supported by evidence setting out details of the alleged breaches. Consideration should be given to how warrants will be served: practice appears to vary from area to area, but on request by the court the police may assist.
- 6.31.2** The use of warrants does not appear to be widespread. Practitioners should note that warrants of arrest cannot be obtained to enforce sections of an order in respect of which the police have declined to exercise a power of arrest.

### **6.32 DRAFTING APPLICATIONS TO ENFORCE**

- 6.32.1** Before drafting notices to show cause, solicitors must check that orders are endorsed with a penal notice and that the notices have not expired.
- 6.32.2** Solicitors are reminded that because the burden of proof upon applicants in committal applications is high, applications must state clearly, on their face, the exact terms of order, the nature of breaches and how those breaches were effected. Details of times and places are required. Notices to show cause must specify each breach of an order as alleged separately and numerically.

### **6.33 EVIDENCE IN SUPPORT**

- 6.33.1** Solicitors are reminded that evidence in support should be as full as possible, and if possible provided by other witnesses as well as by applicants.

**6.34 SERVICE OF NOTICE TO SHOW CAUSE**

- 6.34.1** Solicitors are reminded that personal service of notices to show cause is necessary and must be effected at least two days prior to the hearing unless leave to abridge time is given. If a respondent can be shown to be avoiding service deliberately, solicitors are reminded that they will need to make an application to the court to apply for leave to serve in an alternative manner.

**6.35 OPEN COURT**

- 6.35.1** Family hearings usually take place in chambers, either in the room of the district judge or in the main court. Family clients are therefore unused to the appearance of judges and advocates in ‘open court’. Clients should be advised of the difference between the chambers hearings which they will have experienced previously when obtaining orders and a committal hearing in open court, with its more formal rules of conduct.
- 6.35.2** Solicitors are reminded that as committal hearings take place in open court, they may need to be gowned.
- 6.35.3** Although solicitors are well used to the rules of behaviour which provide how parties should behave, clients will often be unaware of these and should be advised of court etiquette. For example, it is helpful to explain when clients should stand or sit and how they should address judges. It may be helpful if time permits to show clients the courtroom prior to the hearing to enable them to become familiar with the layout.
- 6.35.4** Clients should be reminded that it is not appropriate to talk whilst their former partner is giving evidence, to laugh or make obvious facial or other gestures during the course of that evidence. Although they may be shocked or angry at what the other party is saying, their position will not be assisted by such behaviour. Clients should be made aware that judges often watch one party when the other is giving evidence and will be unimpressed by an apparent lack of respect.
- 6.35.5** If clients wish to discuss particulars of evidence being given they should be asked to pass a note to their solicitors, or solicitors

may wish to ask clients, before commencing cross examination, if any matters have arisen on which they wish their advocate to consider asking questions. Clients should be provided with paper so that they can write down these concerns.

## **6.36 COURT PROCEEDINGS**

**6.36.1** Solicitors should be aware of the safety implications for their clients (and potentially themselves) before, during and after hearings. Points to consider include:

- (a) notifying the court in advance and alerting their ushers and/or security guards;
- (b) ensuring that applicants and respondents are seated separately;
- (c) ensuring that the parties leave separately, perhaps by separate entrances and at different times;
- (d) considering whether it is appropriate to ask a third party, for example the police, to escort clients to and from a hearing or to accompany them to and from court;
- (e) considering the availability and use of screens or video links.

**6.36.2** Solicitors acting for applicants may have to deal with respondents acting in person. Solicitors should be cautious, keep full attendance notes, and if possible ensure the presence of another person at all such exchanges. Solicitors should be aware of the possibility of incidents and potential breaches occurring during such exchanges about which the solicitor may have to give evidence. In any such case solicitors should, whenever practical, call the Law Society's Professional Ethics helpline immediately to obtain guidance as to whether they may continue to act for clients. Solicitors should consider whether it is appropriate to contact the police if such an incident occurs.

## **6.37 APPLYING FOR AN ADJOURNMENT**

**6.37.1** It may be necessary for either applicants or respondents to apply for an adjournment in order to obtain further evidence or if extra court time is required.

- 6.37.2 Solicitors should consider how best to protect the safety of applicants in the event of an adjournment, by strengthening original injunctions or by imposing bail conditions or otherwise.
- 6.37.3 If acting for respondents, solicitors are reminded that they may need to apply for bail.
- 6.37.4 Solicitors are reminded that bail conditions can be made, but not enforced, by the county court.

### **6.38 AFTER THE HEARING**

- 6.38.1 Whether acting for the applicant or the respondent, solicitors should explain carefully to their clients the terms of any order made and their effect. Solicitors should keep full attendance notes confirming this.
- 6.38.2 Solicitors should advise applicants that any further breaches should be noted and reported to the police and to them. Solicitors are reminded of the need to explain the implications of any reconciliation to clients and the need to return to court to discharge orders.
- 6.38.3 Solicitors must advise clients of the process of and the timescale for purging contempt of court. Solicitors should also ensure that any orders made by the court are personally served upon respondents or that the court makes an order that service be dispensed with if the respondent is in court personally.
- 6.38.4 Clients must be reminded of practical safety measures.

### **6.39 OTHER ISSUES FOR THE RESPONDENT**

- 6.39.1 After any injunction orders have been served, respondents should be advised of the possibility of criminal proceedings or applications for committal in the event that orders are breached. Solicitors should explain to clients the meaning of orders and how breaches might occur. They must be warned of the consequences of a breach. They should be advised that

even if the applicant invites them to return to their home or contacts them in any way, respondents must refuse to communicate with applicants unless any orders have been discharged prohibiting such communication.

- 6.39.2** In the event that an application for committal is made, or that solicitors acting for respondents receive a letter relating to an alleged breach, clients should be advised immediately. Respondent clients should be asked to give their version of events. In the event that a breach has occurred, respondents should be advised that it is vital that they apologise when necessary. If respondents deny any or all of the breaches, this denial should be put in writing.
- 6.39.3** In the event that an apology is given but this does not avert a potential committal, respondent clients should be advised that they should make a statement to the court regarding their conduct. That statement should explain any reasons for an alleged breach, any mitigation, extenuating circumstances or reasons for the breach (e.g. answering a telephone call made by the applicant when the respondent has been ordered not to contact him or her).
- 6.39.4** In the event that the respondent has been arrested whether under a power of arrest or otherwise, they should be seen as soon as possible, either in the police station or at court and asked to provide full details of the incident which led to the arrest. If an affidavit can be prepared at this stage it would be of assistance to the court.
- 6.39.5** If preparation of an affidavit is not possible solicitors should ensure that they have taken sufficient note of the evidence to be able to give a chronological history of events and provide details of the allegations made and any response to them.
- 6.39.6** It may be necessary to apply for an adjournment to ensure that evidence is properly considered and the respondent's case fully put.
- 6.39.7** It is necessary to consider the papers served, both notices of application to show cause and statements on oath, to ensure

that these comply in every respect with the statutory requirements and are not defective. (For example, orders and breaches must be particularised in notices.)

- 6.39.8** Respondents should be warned after any committal hearings of the possibility of further applications. In the event that a suspended committal sentence has been imposed, solicitors should ensure that respondents know what this means and the likely effect of breach.