

# Domestic Violence and Harassment

## Overview

This factsheet provides information about the range of protection available to victims of domestic violence or harassment.

## The Legal Framework

The bulk of the current law to protect against domestic violence and harassment is found in Part IV of the Family Law Act 1996 (FLA). The FLA will be suitable to help in the majority of domestic violence or harassment situations that arise within families.

In some cases, it may also be necessary to look to the Protection from Harassment Act 1997 (PHA). The PHA provides different responses to harassment situations, including the power to compensate harassment by awarding damages.



## The Terminology

**Domestic violence** is a term used in cases brought under the FLA. It is not strictly defined. Domestic violence may include any incident of threatening behaviour, violence or abuse. Abuse may be psychological, physical, sexual, financial or emotional. Abuse may be directed against another adult or a child. A child will suffer from abuse indirectly if he or she witnesses it or hears it or experiences the aftermath of it. There is no typical victim of, or perpetrator of, domestic violence: domestic violence affects people regardless of gender, background or sexuality.

**Molestation** is an expression used in the FLA. Molestation is not strictly defined. Court decisions about domestic violence say that molest may be considered synonymous with pester. It may mean, to cause trouble; to vex; to annoy; to put to inconvenience. It includes behaviour which does not amount to violent conduct. It applies to any conduct which can properly be regarded as constituting a degree of harassment so as to require an intervention. Repeated telephoning may amount to molestation.

**Harassment** is an expression used in the PHA. It is defined as behaviour that alarms a person or causes them distress. It includes speech. Under the PHA, harassment must be a course of conduct, meaning it must involve conduct on at least two occasions.

**Applicant** is a term used frequently in court proceedings for the person who has made an application to the court asking for an order.

**Respondent** is a term used frequently in court proceedings for the person against whom an application for an order has been made.

An **occupation order** is a type of order a court can make under the FLA. An occupation order regulates who is entitled to live in a property.

A **non-molestation order** is a type of order a court can make under the FLA. A non-molestation order forbids a person from behaving in a particular way towards another.

**Associated persons** is an expression defined under the FLA. An occupation order and a non-molestation order may only be made under the FLA in cases between associated persons. People are considered associated if:

- They are or were married or in a civil partnership or cohabitants;
- They have agreed to marry or enter into a civil partnership;
- They are living, or have lived, in the same home (but the relationship must go beyond one of them being the other's employee, tenant, lodger or boarder);
- They are relatives;
- They have had an intimate relationship of significant duration;
- They have a child together, or
- They are both involved in other family proceedings.

**Dwelling-house** is an expression defined under the FLA. The court may make an occupation order in relation to a dwelling house, which includes any building or part of it, any caravan house-boat or other structure occupied as a home.

**Relevant child** is an expression defined under the FLA. The court is required, when deciding whether to make either an occupation order or a non-molestation order, to consider the needs of any relevant child. A relevant child is one:

- Who lives (or who might reasonably be expected to live) with either party;
- Whose interests the court is considering in related proceedings, or
- Any other child whose interests the court thinks are appropriate to take into account.

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## Occupation Orders

The court may only make an occupation order in a case between associated persons. So, a tenant could not seek an occupation order against his landlord under the FLA.

Further, the court may only make an occupation order in relation to a home that the associated persons lived in, or intended to live in. A property bought by a couple for investment purposes, in which they never lived nor intended to live, could not be the subject of an occupation order.

An occupation order may:

- Exclude a party from the home (and the vicinity of the home) altogether;
- Terminate or restrict the right of one party to live in the home;
- Regulate how the home is used, setting out who is entitled to use which parts of it and when.

The precise type of occupation order made will depend on the circumstances of the case. For example, it is more appropriate to regulate how two people are to continue to use a home if the property is spacious and has multiple bedrooms, bathrooms and living areas.

A court can, when making an occupation order, also make orders to resolve related matters. These orders might include:

- Who is responsible to repair and maintain the home;
- Who should pay rent, mortgage instalments and other outgoings on the home;
- Who is entitled to use the furniture or other contents of the home;
- Who is responsible for keeping the home, and any furniture or contents in it, secure.

The duration of an occupation order depends on the parties' relationship and their respective legal rights in relation to the home. For example, in a case between former cohabitants, the court's order may only run for six months. Extensions in duration are possible in some situations.

In practice, most occupation orders, even if the court is able to make them to last indefinitely, are reviewed at regular intervals: usually every six or twelve months.

When deciding whether to make an occupation order, a court is also required also to consider whether to make a non-molestation order.

## Non-Molestation Orders

The court may only make a non-molestation order in a case between associated persons, or if the order is needed to benefit any relevant child.

A non-molestation order may be expressed to refer to molestation generally, as well as to particular defined acts. In practice, most non-molestation orders include both. The terms of the order must be precise and capable of being understood.

A non-molestation order may be made to last for a specified period, or to run generally until another order is made. As with occupation orders, in practice most Judges like to review non-molestation orders regularly, usually every six to twelve months.

A non-molestation order will be tailored to the circumstances of the particular case and the behaviour that must be regulated. Some provisions we see frequently include orders forbidding a respondent from:

- Using or threatening violence against the applicant;
- Using or threatening violence against a related child;
- Coming within a specified distance of the applicant;
- Coming within a specified distance of the applicant's home and / or place of work;
- Coming within a specified distance of a related child's school;
- Communicating with the applicant by any means (letter, SMS, telephone, e-mail), except through solicitors, and
- Threatening the applicant.

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## The Procedure

The procedure for obtaining either a non-molestation order or an occupation order is identical. The same form is used. The application must be supported by a witness statement. The witness statement has to include a **statement of truth**. This is a solemn declaration by the person making it that they believe the contents of the statement are true. A false statement may expose the maker to punishment for contempt of court or perjury.

The application is filed with the County Court (so long as it has a family hearing centre) or Family Proceedings Court closest to where the applicant lives or works. There is a filing fee on the application.

The general rule in court proceedings is that fairness requires both parties to have an opportunity to present their case to a Judge before an order is made. However, courts recognise that domestic violence cases may need to be handled differently to protect the individuals and children involved. In appropriate cases, it will consider an application **without notice** to the respondent. It will do so where it considers it just and convenient to do so. In deciding whether to hear an application without notice, the court must consider the circumstances of the application but in particular:

- Whether the respondent presents any risk of significant harm to the applicant or a relevant child if the order is not made immediately;
- Whether the applicant might be dissuaded or prevented from carrying on with the application if the order is not made immediately, and
- Whether it is reasonable to believe the respondent is aware of the proceedings and is evading service.

In practice, courts tend not to make occupation orders without notice except in extreme cases.

If an order is made without notice, the court must give the respondent an opportunity to argue his or her case as soon as just and convenient.

If the application is not sufficiently urgent to be heard without notice, it must be served on the respondent before it is considered by the court. The respondent is entitled to at least two days' notice before the application comes before a Judge.

When deciding whether to make an occupation order, a court is required to take the circumstances of the parties and any relevant child into account, and in particular the following:

- Their housing needs and resources;
- Their financial resources;
- The likely effect of any decision not to make an occupation order on each of their health, safety and wellbeing;
- The parties' conduct;

If the court believes a relevant child would suffer significant harm because of the respondent's behaviour if an occupation order were not made, it should usually make the order.

When deciding whether to make a non-molestation order, a court is required to be satisfied that:

- There is evidence of molestation;
- The applicant (or relevant child) needs protection, and
- On balance, judicial intervention is needed to control the respondent's behaviour.

The court will usually hear evidence from both parties and any witnesses, before concluding what has occurred and the steps necessary to protect against domestic violence. To conclude that something has occurred, the court has to be satisfied that it is more likely than not: this is referred to as the **standard of proof**. This standard of proof is sometimes expressed as **the balance of probabilities**.

In some cases, it may be possible to resolve matters without the need for a full hearing through the use of **undertakings**. An undertaking is a solemn promise by a person to the court to do (or not to do) something. If that promise is not kept, it is treated as a breach of a court order. A person who breaks their undertaking may be dealt with for contempt of court. Contempt of court may be punishable by a fine, a period of imprisonment or the seizing of assets (or any combination of these). It is for the court to decide whether the circumstances of a case are appropriate for it to accept an undertaking rather than conduct a full hearing. The court must be satisfied that the undertaking is sufficient protection for the applicant or any relevant child.

## Enforcement

An occupation order is enforced as any court order. A respondent who fails to comply with the order may be dealt with for contempt of court.

The FLA entitles the court to attach a power of arrest to an occupation order. This is an enhanced way of enforcing an occupation order. A power of arrest directs the police to arrest immediately any person who it appears has breached an occupation order and produce him before a Judge. The court will usually attach a power of arrest to an occupation order if satisfied that the respondent has used or threatened violence against the applicant or a relevant child.

The court may not attach a power of arrest to a non-molestation order. However, it is a separate criminal offence for a respondent to breach the terms of a non-molestation order. The police are entitled to arrest a respondent who it appears has breached a non-molestation order. He or she is then dealt with through the criminal justice system as with any other crime. If found guilty, the respondent may be fined or sent to prison (or both).

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## Protection from Harassment

Most family situations will be capable of being managed using occupation and/or non-molestation orders made under the FLA. The PHA may be suitable, however, if a person does not come within the definition of an associated person under the FLA.

The PHA creates the tort of harassment. A tort is the infringement of a person's rights by another.

The PHA entitles a court to make orders preventing a respondent from harassing an applicant. Failure to comply with those orders is dealt with as a contempt of court. A power of arrest may not be attached to an order made under the PHA. It is a criminal offence to breach an order made under the PHA, and this offence is dealt with in the same way as the breach of a non-molestation order.

The PHA also entitles a court to award damages for the harassment. The damages may compensate the applicant for, amongst other things, anxiety caused by the harassment and any financial loss resulting from it. In one reported decision, a court awarded an application £35,000 damages against her former mother-in-law.

An application under the PHA is made in the County Court. There is a filing fee on the application.

In unusual cases, it may be appropriate to proceed against a respondent under both the FLA and the PHA. If this proves necessary, both applications ought to be considered together.



Please feel free to discuss your own position and concerns. Contact your nearest office on:

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## Domestic Violence and Children

Children are particularly at risk in family environments where domestic violence or abuse is a feature. There is a consensus amongst the global medical, psychological, and social welfare communities that the emotional development of children exposed to domestic violence may be seriously impaired. The harm arises whether the children are exposed directly to the violence, or whether they experience it indirectly – seeing it, hearing it, or seeing a parent in the aftermath of abuse. The research supporting this view is accepted beyond serious debate.

Courts therefore take the potential for harm to children through domestic violence extremely seriously. Judges are required to consider at every stage when dealing with children cases whether domestic violence is an issue, and the factual and welfare issues that arise if it is.

When there has been a history of domestic violence or domestic abuse in a family, it is vital that the children are protected from further harm during contact with the violent parent. Appropriate safeguards to manage contact safely must be put in place.

A pattern of domestic violence is not an automatic bar to children having contact with a parent in the future. However, that pattern will inform the court about how contact is best managed. For example, is there a need for behavioural or other therapy by the violent parent before contact can take place safely? Are other forms of contact – indirect – better to enable the link to remain whilst ensuring children are protected? The domestic violence history will be looked at to decide whether contact should occur, and if so on what terms.

In the event contact with a violent parent is thought appropriate, there are many practical safeguards which can be deployed. These include:

- Monitored indirect contact only;
- Supervised contact (one-on-one close supervision) or supported contact (less intensive supervision, with trained professionals on hand but at a discreet distance to manage situations if they arise);
- Special arrangements for handover, for example, to ensure that children do not see abusive behaviour between the adults;
- A course of therapy for the individual or the family as a whole.

These measures can also be used in conjunction with the orders under the FLA and/or the PHA.

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