



# Domestic violence

## Overview

Under The Family Law Act 1996 a person suffering from domestic violence can seek protection by way of a non-molestation and or an occupation order. A non-molestation order is used to restrain someone from using or threatening violence to the applicant or a relevant child, or from molesting them. An occupation order regulates the occupation of the family home.

## Categories of persons who can apply

Non-molestation and occupation orders are only available to certain categories of people. These categories are as follows:

- › Married persons
- › Cohabitants
- › Civil partners
- › Two people who live or have lived in the same household (but not if one is the employee, tenant, lodger or boarder of the other)
- › Certain relatives e.g. parent, brother, sister or aunt
- › Two people who have agreed to marry each other (you must apply within 3 years of the agreement to marry ending)
- › The applicant and the other person are parents of a child or have parental responsibility for a child
- › The natural parent or grandparent of a child who has been adopted or is freed for adoption
- › The applicant and the other person are parties to the same court proceedings
- › The applicant and the other person have or have had an intimate personal relationship of significant duration.

A relevant child is defined as:

- › Any child who might be expected to live with either of the parties involved
- › Any child who is the subject of adoption or Children Act proceedings
- › Any child whose interest the court considers relevant.

## Occupation orders

These orders can exclude an abuser from the property and or a certain distance of the property, or can be used to divide the property to exclude the abuser from part of it. As well as being associated persons the property must be a dwelling house and must be or have been intended to be the home of the applicant and respondent. The order will also state the length of time the order will remain in force. Generally the orders will last between 6 months and a year but they can last until a further order is made.

As well as making an occupation order the court also has the power to make ancillary orders regulating the use of the property. For example the court can make an order requiring one or both parties to pay the mortgage or rent on the family home or following a final order the court can make an order for the transfer of the tenancy.

In deciding whether or not to make an occupation order the court will have regard to all the circumstances of the case, including:

- › The housing needs and housing resources of each of the parties and of any relevant child
- › The financial resources of each of the parties
- › The likely effect of any order, or of any decision by the court not to exercise its powers on the health, safety or well being of the parties and of any relevant child
- › The conduct of the parties to each other

The court must make an order if it appears that the applicant or any relevant child is likely to suffer significant harm attributable to the conduct of the respondent if an order is not made, unless it appears that the respondent or any relevant child is likely to suffer significant harm if the order is made and the harm likely to be suffered by the respondent or the child in that event is as great as, or greater than the harm attributable to the conduct of the respondent which is likely to be suffered by the applicant or child if the order is not made. This is known as 'the balance of harm test'.

## Non-molestation orders

The Act does not define molestation but it can include intimidation, pestering, threats and harassment. The actual wording of a non-molestation order forbids the "respondent from using or threatening violence against the applicant and instructing, encouraging or in any way suggesting that any other person should do so". It can also forbid the respondent from intimidating, harassing or pestering the applicant and instructing, encouraging or in any way suggesting that any other person should do so. In deciding whether to make an order then court has to have regard to all the circumstances, including the health, wellbeing and safety of the applicant or relevant child.

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## Ex-parte applications

In appropriate cases the court can make a non-molestation or occupation order without the respondent having notice of the application. If an order is made ex-parte then the court must list the case for a further hearing as soon as possible.

When deciding whether to grant an ex-parte order the court will need to be convinced that there is a good reason for not giving the respondent notice. The court will need to consider whether there is risk of significant harm to the Applicant or child if the order is not made, whether the Applicant will be prevented from pursuing the application if the respondent has notice or whether the Respondent is deliberately evading service and a delay will prejudice the Applicant or child.

## Breach of orders and powers of arrest

The breach of a non-molestation order made after 1st July 2007 is a criminal offence. If the order is breached the offender will be arrested by the police and action is then taken by the Crown Prosecution Service through the criminal court. For orders made prior to this date the applicant had to apply for a power of arrest to be attached and the breach would be dealt with by the civil court.

Unlike non-molestation orders the breach of an occupation order will not be a criminal offence. If a power of arrest is considered necessary the applicant will have to apply to have this attached to the order. A power of arrest will then permit the police to arrest a respondent if they are in breach of the order. The case will then be referred back to the court and if the judge or magistrate finds that the order has been breached, they can impose various sanctions. In the county court the judge can impose a suspended sentence, commit the respondent to prison for up to 2 years and/or impose an unlimited fine. In the family proceedings court the sanctions are a fine of up to £5,000 or imprisonment for up to 2 months.



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## Undertakings

Where appropriate, a case can be concluded by way of undertakings. These are promises by the respondent which can be enforced if breached. A power of arrest cannot be attached to an undertaking. Furthermore, the court cannot accept an undertaking where it would otherwise have attached a power of arrest to the order.

If the respondent breaches an undertaking this is contempt of court, which can be dealt with by way of a fine, imprisonment or both.

## Protection for persons not eligible under the Family Law Act

If a victim does not come within one of the above categories of associated persons they can apply for an order under the Protection from Harassment Act 1997 (PHA). This Act created a statutory tort “where a person pursues a course of action which amounts to harassment of another and which they know or ought to have known amounts to harassment of the other”. Like the Family Law Act there is no definition of harassment, save that the PHA states it includes ‘alarming the person or causing them distress.’ A course of conduct must include at least two occasions. Where a statutory tort has been committed, or is apprehended, the applicant may claim damages and/or an injunction.



## Contact us

Please feel free to discuss your own position and concerns. Contact your nearest Russell Jones & Walker office or call:

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### Our offices:

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