

# PROTOCOL FOR THE ESTABLISHMENT OF THE ORDER OF PROTECTION FOR THE VICTIMS OF DOMESTIC VIOLENCE



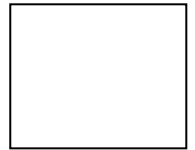
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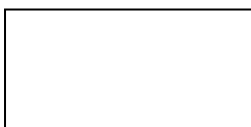
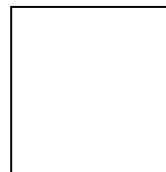
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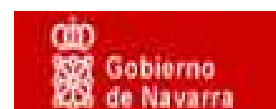
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## **PREAMBLE**

- I -

The new regulation on Order of Protections in our new Criminal Prosecution Law, an initiative undertaken by a multi-party effort and approved by both Chambers, constitutes a step forward in the fight against domestic violence because by a single application or request, all victim protection services enacted by the current legal framework (criminal, civil and social protection and assistance) merges in a unified service.

This transcendental reform began taking shape in the Parliamentary Sub-commission formed by the Congress in its October 22, 2002 session with the aim of “formulating legislative measures to find an integral response to gender-based violence”. While working, the Sub-committee held a joint meeting on February 4<sup>th</sup> with the Secretary of Justice, the Secretary of Labor and the Secretary of Social Services, in which the Secretary of Justice exposed the design of the new judicial tool to all parliamentary groups: the Order of Protection for the Victims of Domestic Violence. This Order serves as a unifying channel of tutelage and protection for the victims of these crimes.

From the inception of this idea, backed by the absolute consensus of all Parliamentary Groups, the Sub-committee developed this proposal in a technical commission formed by experts from the General Council of the Judiciary, the States’ Attorney General, and the Judiciary. As such, the Order of Protection was included in the selection of legislative measures as part of the conclusions of the Sub-Commission. The aforementioned Order took shape on the basis of six basic principles that serves as a framework for this regulation:

- a) The principle of protection to the victim and her family. The milestone of the Order of Protection is the fundamental objective in protecting the integrity of the victim and her family against the aggressor. In other words, the main objective of the Order of Protection is that the victim and the family recuperate the sense of security in the face of possible future threats or reprisals by the

aggressor. For this reason, in the case of domestic violence, the access to an Order of Protection constitutes a right for the victim.

- b) Principle of general application. The Judge should be allowed to use the Order of Protection as long as is necessary for the protection of the victim, disregarding if the alleged domestic violence constitutes a crime or misdemeanor.
- c) Principle of emergency. The Order of Protection should without undermining the due process or the principle fairness, be received and executed as soon as possible. An expedited process should be devised in order to have the judicial verification of the circumstances and the subsequent protection measures for the victim.
- d) Principle of accessibility. The effective regulation of the Order of Protection requires the formulation of a simple procedure in order to make it accessible to all victims of domestic violence. Therefore, the Order request should follow norms of simplicity in order to allow the victim, representatives, etc. to easily access the Court and request the Order, free of charge.
- e) Principle of integrity. The concession of an Order of Protection by the Court should follow, in one simple step, the granting of an integral statute for the protection of the victim that would enact surveillance and tutelage made of criminal, civil and social protection measures.
- f) Principle of procedural usefulness. The Order of Protection will facilitate, among other things, the action of the Judicial Police and the subsequent process of criminal examination, specifically during the gathering, handling and conservation of evidence.

- II -

The Recommendations made by the Committee of Ministers of the Council of Europe (2005)<sup>5</sup> on the protection of women against violence (adopted on the 30<sup>th</sup> of April 2002) recommends the State Members to introduce, develop and/or improve the national policies over the following basis: the maximum security and the protection of victims; to strengthen the capacities that assist the female victims of

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domestic violence by enacting an optimum assistance and sustainment structure that helps to avoid further victimization; the adequacy of the Criminal and Civil Code, included its procedures; and the specialized training of professionals. As we can see, the principles encompassed in the Order of Protection' regulatory law, not only follow the recommendations of the Council of Europe but go even further in offering the victim an integral framework for protection.

The speed, integrity and simplicity of the regulatory framework for the Order of Protection requires coordination of legal representatives and public officials in order to protect the victims of domestic violence, unfolding the broad spectrum of mechanisms envisioned in the current Legal Framework.

This inter-institutional coordination constitutes the foundation for the creation of the Monitoring Commission for the Establishment of the Order of Protection, envisaged in the 2<sup>nd</sup> Additional Disposition of the regulatory law of this Order.

Constituted on July 22 2003, the Monitoring Commission for the Establishment of the Order of Protection is formed by representatives of the General Council of the Judiciary, the States' General Attorney and the Judiciary, the Secretary of the Interior, the Secretary of Labor and Social Affairs, the Autonomous Communities, the Spanish Federation of Municipalities and Provinces, the Spanish General Council for the Practice of Law and the Tribunal Clerks' General Council of Spain.

The common objective of those of us participating in the Monitoring Commission on the elaboration of the present Protocol consists essentially in putting into practice those aspects of the code that in an interrelated manner, will make possible the proper working of the integral protection mechanisms designed for the new regulation, without disregarding the developments on each institution or administration in their area of competence.

This aim assumes a commitment that was born within the Observatory of Domestic Violence with a call for permanence and with the objective of combating comprehensively the domestic and gender-based violence.

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As contemplated in the Second Addition on Dispositions of the regulatory Law of the Order of Protection for the victims of domestic violence, the Commission will draft a report on the elaboration of comprehensive Protocols for the establishment of the Order of Protection. The Commission will also adopt the adequate coordination mechanisms that will safeguard the effectiveness of protection measures adopted by the Judges, the Tribunals and the relevant public agencies.

### - III -

In its first meeting, the Commission for the Establishment of the Order of Protection agreed to draft a Protocol that will serve as a general framework for the future actions of different institutions and public agencies. Other developmental instruments will further solidify this Protocol.

Aiming at systematizing in the present Protocol the benchmarks requiring joint commitments by members of the Monitoring Commission, seems useful to differentiate three instances in the processing of an Order of Protection:

- a) The application process for the Order of Protection it is indispensable to facilitate access to information for the victim, to the forms for the Order of Protection and to facilitate agile communication channels.
- b) In order to execute the Order, the coordination between all intervening counterparts in the process should be guaranteed.
- c) Relevant social protection and assistance agencies play a central role at the local and at an autonomic level in the phase of notification and execution.

### - IV -

In accordance with the aforementioned, the Monitoring Commission on the Establishment of the Order of Protection establishes the following general principles defining the responsibilities and interaction framework for all members aiming at the implementation of the order of protection for the victims of domestic violence.

## **1.- INITIAL PHASE: REQUEST OF THE ORDER OF PROTECTION**

### **1.1.- ORDER OF PROTECTION REQUEST**

The protection order could be requested by the victim or by those persons having a familial relation as explained in the current article 153 of the Criminal Code. On the other hand, as disposed in paragraph 2º of the 2<sup>nd</sup> item of the article 544 ter LECR, without detriment of the general responsibility to denounce, as stipulated in articles 262 of the same Law, the entities or assistance organisms whether private or public, that had knowledge of any of the aforementioned incidents that are the basis for the Order of Protection, will have to notify the Court on duty or the General Attorney in order to open or call the attention to the procedure for the adoption of the order of protection.

The Order of Protection request could be submitted in any police precinct, Civil Police local posts, or any branches of the Local or Autonomous Police; in the Court or in the District Attorney's Office; in the Office for the Attention of Victims; in the social services or assistance agencies dependants on Public Agencies, or in the Bar Associations' Services for Legal Orientation. It can also be submitted or delivered by the Court on duty or demanded by the District's Attorney.

The Order of Protection will be requested through a standardized procedure with the following characteristics:

- ?? Simplicity, which is a form easy to fill by any person
- ?? Easiness to access, which is a form that could be obtained in a wide variety of institutions and bodies.
- ?? Integrity, because a single petition will open the means for the possible adoption of criminal, civil and social protection measures.

In terms of the content, it should always include a description of the incidents based on the penal infraction (criminal or misdemeanor) where the basis for the

petition will be justified as stipulated in item 1 of the article 544 ter of the Criminal Prosecution Law.

To this effect, the Monitoring Commission on the Implementation of the Order of Protection approved a sole and standardized form that captures the aforementioned characteristics. The form will be posted immediately on the General Council of the Judiciary web site, and in other institutional and official WebPages from institutions, agencies and Commission members. This form will be launched without detriment to other complementary distribution means that each organization or institution might deem appropriate.

### **1.2.- EASELY ACCESSIBLE INFORMATION FOR THE VICTIM**

The general principle that should motivate the action of the public authorities is the victims' easy access to the forms for the Orders of Protection and the information on the Order. In this way, the Order of Protection and other relevant information will be available to the victim. To this effect, it will be very convenient to have the following conditions:

- ?? Forms of Order of Protection should be available in the judicial, penal and civil bodies, in the District Attorneys' Office, in the Office for the Attention of Victims, in the Office of Attention to the Citizenship, in the Bars' Association Legal Orientation Services and in the police precincts and in social services and assistance institutions dependant on Public Agencies.
- ?? In all cases, this form could be obtained through the Internet, in the Judicial Police General Council's website and in other related institutions and organizations.
- ?? Whenever necessary, the form will be translated in the Autonomous Community co-official language.

### **1.3.- WHERE TO DELIVER THE FORM OR REQUEST**

According to the Law, the Order of Protection will be requested directly in the District's Attorney or the Judiciary, or in the Security Forces and Bodies, in the Attention Offices for Victims the Social Services or in social service branches of



other public agencies, or in the Bar Association's Legal Assistance Services. Once the form is received, it will be sent without delay to the Court on duty, which could require the Judicial Police to execute those necessary proceedings for the adoption of the Order of Protection.

Among the possibilities allowed by the Law, experience shows that in most cases the victim submits the complaint denouncing the incident in the police precinct or in the Court on duty and when the victim delivers the order of protection request form, a professional could assist her, or a professional or public employee could even accompany her to the police.

#### **1.4.- COURT ON DUTY INTERVENTION**

When the Court on duty receives an Order of Protection request, the following situation could emerge:

1. When the incident constitutes a misdemeanor, the article 964.2 LECR allows holding a misdemeanor or minor offense trial immediately. In the plenary, the Order of Protection hearing could be held.
2. When the incident constitutes a crime, the court will call for a hearing to decide on the Order of Protection request, ordering the necessary summons to guarantee the presence of the victim, the accused and other persons needed. This hearing could simultaneously be held as envisaged in the article 504 bis 2 LECR when its summons would be legitimate or with the audience regulated in article 798 LECR in those causes processed as "expedited trials" ("juicios rápidos").

#### **1.5.- JUDICIAL POLICE INTERVENTION**

In this sense, and taking into account that a considerable amount of cases for the Order of Protection will be requested to the Judicial Police, the police will draft the corresponding testimony for the filing of the incidents and the appropriate report in order to anticipate the future necessary investigations upon which the Court will rule. In this way, the agility of the process will be guaranteed and at the same time,

the Court on duty will act with more elements to base the need for an Order of Protection.

On the other hand, this instrument is granted with processing of “expedited trials” considered in the Law 38/2002, which must begin with a testimony (argument explained in article 795 Criminal Prosecution Code).

In conclusion, it is advisable that the Order of Protection is delivered to the Court accompanied by the corresponding testimony drafted by the Judicial Police.

#### **1.6.- REMITTAL OF THE TESTIMONY TO THE COURT ON DUTY**

In those cases when the request is presented to the Judicial Police or is reported to the Districts’ Attorney, it could be convenient to establish a mechanism that allows for the agile and fast notification of the Order of Protection (attached to the testimony) from the Judicial Police to the Court on duty. Whenever it is not possible due to concurrent circumstances, the mechanism could be designed as a telematic system.

## **2.- STEP FOR THE ADOPTION OF THE ORDER OF PROTECTION**

### **2.1.- TO OPEN A CRIMINAL CASE**

All requests for an Order of Protection should be binding to a concrete criminal process.

Observing the procedural aspect, some of the following situations could emerge:

?? If there is not a criminal process opened in relation to the incidents based on the Order of Protection, the Court will agree to open a case as part of the corresponding criminal case based on a misdemeanor or a crime.

?? When a criminal case is opened on incidents based on an Order of Protection, the Court or the Tribunal with information on the case will rule over the order of protection of the victim, as stipulated in item 11 of article 544 ter LECR, with emphasis on cases where the risk of greater threat increases.

?? When expedited action is required to tackle the case the further remittal of the actions to the relevant Court, enacted by the norm of shared responsibilities, should not be disregarded (article 40 Regulation Judicial Police's General Council 5/1995)

### **2.2.- NON-CONCURRENCE OF MULTIPLE ORDERS OF PROTECTION**

Due to evident organizational and coordination consideration, victims of domestic violence will only need to submit a single Order of Protection. In this way, multiple orders of protection may not be submitted by the same victim.

The content of the Order of Protection can be modified when the circumstances changes (*rebus sic stantibus*) in the judicial body with jurisdiction over the case (as in those cases where the threat increases for the victim), but further orders of protection contradicting a previous one could not be passed.

In those urgent cases, the Order of Protection can also be modified by the Court on duty, and if considered appropriate and without disregarding the further remittal of the action executed by the relevant judicial organ.

### **3.- COMMUNICATION AND EXECUTION OF THE ORDER OF PROTECTION**

#### **3.1.- CRIMINAL AND SECURITY MEASURES**

In any case it deems appropriate, and considering the gravity of the incident and the need for the integral protection of the victim, the Court on duty could opt for precautionary measures legally available (provisional imprisonment, restraining order, prohibition of residence, prohibition of communication, and repossession of weapons, etc.). In this context, it becomes relevant that the Court's order dispositions offer an in depth description of the reach and content of each of the adopted measures.

It is necessary to establish an agile and fast communication mechanism for the Order of Protection between the Districts' Attorney and the Judicial Police. The mechanism will be designed as a telematic system that will not be required public institutions or agencies that might not have these resources. However, the coordination of different Security Forces and Bodies is especially important (National Police, Civil Police, Autonomous Community Police and Local Police). To this effect, and among other instruments, the Judicial Police' National Commission, and the Collaboration Protocols might also be useful.

in the sphere of the Autonomous Community, provincial and/or judicial party (article 47.4 Regulation Judicial Police General Commission 5/95 and article 8 of the Instruction Judicial Police General Commission 2/2003). Adequate mechanisms will be established for the control and monitoring of the application of the Order of Protection, specifically in areas of victims' safety where the intervention of the

Security Forces and Bodies is relevant. The breach of measures by the accused person could lead to their detention and is understood as tantamount to committing the alleged crime of infringement of a precautionary measure of the article 468 of the Criminal Code.

### **3.2.- CIVIL MEASURES**

The indubitable innovation in the protection of victims introduced by the new regulation of the Order of Protection consists in the possibility of the Court on duty to adopt provisional measures of civil character.

In conformity with the driving principles of this jurisdiction, these measures should be solicited by the legal representative of the victim, or by the Attorney Generals' Office if the victim has children or handicapped minors. Once the order is requested, it will be debated in the scheduled hearing as envisaged in the article 544 ter LECR, in which the Court on duty will pass the corresponding sentence.

These measures are based on the principle of use and enjoyment of the family, and the pass of the custody, visits, communication and visits rights, the food provision regime and any disposition deemed as appropriate in order to distance the minor from the danger or threat.

On the other hand, these measures are provisional, this is, they have a limited validity within time, having to be subsequently ratified, modified or left without effect by the Civil Judge. We have to remember that the second paragraph of section 7 of article 544 LECR provides that these type of measures contained in the Order of Protection will have a temporary validity of thirty days. If within this period, the victim or legal representative decides to open a family case within the civil jurisdiction, the adopted measures will continue in force during the thirty days following the submittal of the case. Within this period the measures should be ratified, modified or left without effect by the relevant Magistrates' Court.

### **3.3.- COORDINATION BETWEEN THE CIVIL AND CRIMINAL JURISDICTIONS**

However the new Law allows the Magistrates' Court on duty to adopt precautionary measures of a civil scope, and the coordination between the civil and criminal jurisdictions becomes relevant.

A first coordination guideline is stipulated in the new item 7 of the article 544 ter LECR that points out the necessity for the Court on duty to adopt such measures that have not been passed by another body within the same civil jurisdiction, without disregarding the measures required in article 158 of the Civil Code.

Secondly, it is necessary to address the aim of coordination included in the limited duration of the civil measures adopted by the Court on duty. To this effect, the second paragraph of the 7<sup>th</sup> item of the article 544 ter LECR provides that these types of measures included in the Order of Protection will be valid for thirty days.

Due to the aforementioned coordination provisions between jurisdictions, normative instruments approved by the General Council of the Judiciary and other Courts and Tribunals' administrative bodies could prove to be useful, and the important function of the Attorney General in facilitating this coordination should be taken into consideration.

In compliance with the dispositions in paragraph 2 of the 7<sup>th</sup> item in article 544 ter LECR, the Magistrates' Court must rule within 30 days concerning the ratification, modification or enactment of civil measures of the Order of Protection. The Magistrates' Court failure to comply with the aforementioned deadlines will have the consequence of voiding the measures agreed by the Examining Magistrate.

### **3.4.- SOCIAL ASSISTANCE AND PROTECTION MEASURES**

According to the Law, the Order of Protection agreed by the Court on duty enables the social protection and assistance tools planned by Public Administrations (State, Autonomous and Local).

The regulatory Law of the Order of Protection establishes a single channel through which the victim can solicit all protection measures and social assistance as

needed. It is necessary that all the involved administrations coordinate to provide an adequate assistance to the victim from the beginning.

In conformity with the stipulations in item 8 of the article 544 ter LECR, an integrated system for the administrative coordination will be established by conduct of a general guideline that could be developed by the Autonomous Community. In order to enable an agile and effective communication, the integrated system for administrative coordination will be based in the following pillars:

1. A Coordination Point will be established where the Court will remit Orders of Protection and from where the necessary and requested assistance by the victim will be coordinated and facilitated according to the legal framework.
2. A communication system will be established, preferably a telematic one that would allow the quick remission of the Order of Protection from Court on duty to the corresponding Coordination Center.
3. The coordination point will assign the required assistance and protection to the needs of the victim facilitating the immediate access to the requested support and assistance.

In a transitory way, from the definitive establishment of the administrative coordination integrated system, the Examining Magistrates will inform the relevant social assistance agency or body of the Autonomous Community of the order of protection.

The Order of Protection issued by the Court grants the victim an integral statute of protection that implies a legal ability to access social assistance measures established by the legal framework, and in particular, the active rent ("Renta activa") for the social insertion as regulated in the article 2.2 c) of the RD 945/2003 of July 18<sup>th</sup>; the free of charge legal and specialized assistance; and any other assistance or protection measure envisaged in the law.

The length, content, reach and relevance of the provided assistance and support will be established according to the criterion established by each Administration

depending on the needs of the victim and the circumstances of her family environment.

### **3.4- OFFICES FOR THE ATTENTION OF THE VICTIM**

The Offices for the Attention of Victims are called to perform a main role in their work of permanently informing the victim about the accused procedural stage, and about the reach and relevance of the precautionary measures undertaken. To this effect, the Court passing the Order of Protection will inform the Office for the Attention of the Victim about the existence of the next following procedural steps affecting the accused, as well as when the case is on phase of execution.

The workings of the Offices for the Attention of Victims will be developed in a proactive manner by taking the initiative of contacting the victim and anticipating her possible needs. Please note that the Recommendations of the Ministerial Committee of the Council of Europe's (2002) 5 to the Member States on the protection of women against violence, proposes that the protective measures should be designed "to promote the launch of proactive procedures for the protection of victims that would take on the initiative of contacting the victims when the matter is brought to the police."

Likewise, the functions of the Offices of Attention to Victims will adapt to the regulation and implementation of the Order of Protection, with the aim of improving the assistance to victims. Therefore, educational and training guides will be provided to the personnel providing services in these Offices.

### **3.5- CENTRAL REGISTRY FOR THE PROTECTION OF VICTIMS OF DOMESTIC VIOLENCE**

In conformity with the provisions of the new version of article 544 ter of the Criminal Prosecution Law, a Central Registry for the Protection of Victims of Domestic Violence should be established to enhance the effectiveness of the Order of Protection.



The Central Registry should be appropriately coordinated with other existent registries, from the Prosecutors' Domestic Violence Services to the Domestic Violence Registry created by the Instruction CGPJ 3/2003, launching effective information and data sharing.

### **3.6.- THE PENITENTIARY ADMINISTRATION**

By the implementation of item 9 of the article 544 ter of the Criminal Prosecution Law, the judicial body issuing an Order of Protection will report of such Order to the Penitentiary Administration.

## **4.-LEGAL ASSISTANCE AND REPRESENTATION**

The attorney's assistance is relevant for the effective legal and judicial tutelage and for the adequate exercise of the right for legal representation, especially when the Examining Magistrate on duty can also enact measures of civil nature affecting the enjoyment and use of the domicile, the visiting rights and the duty to provide alimony.

To facilitate the exercise of the aforementioned rights in conformity with applicable norms and agreements is appropriate. Likewise, it is worth mentioning the need for more specialized training of those professionals providing legal assistance and judicial representation to the victims.

## **5.- PUBLISHING AND DISSEMINATION OF THE ORDER OF PROTECTION**

The awareness by the victims of the mere existence of an Order of Protection, and its features and proceedings, represents one of the key elements for the success of the institution. Therefore, the following steps should be followed:

?? The Monitoring Commission for the Implementation of the Order of Protection for Victims of Domestic and Gender-Based Violence will devise brochures, posters and other information materials about the Order of

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Protection. Its dissemination will be through the civil and criminal judicial bodies, Public's Prosecutor Offices, Offices for the Attention to Victims, Offices for the Attention of Citizens, the Bar Associations' Legal Orientation Services, police precincts and social services or Public Agencies branches of assistance.

?? In a complementary manner, each institution or Administration will make dissemination activities deemed appropriate.

### **6.- TRAINING**

As indicated in the European Councils' Recommendation (2002) 5 of the Ministerial Committee on the protection of women against violence (adopted on April 30<sup>th</sup> 2002), it is necessary to encourage the "specialized training of professionals battling the violence against women", where the different Professional Development Plans developed by the different institutions and public administration becomes extremely important.

A multidisciplinary approach, stemming from the participation of different affected professionals, contributes to the improvement of quality of training because all participants will come in contact with diverse perspectives of the problem.