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Domestic Abuse (Scotland) Bill: Consideration prior to Stage 3

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The Domestic Abuse (Scotland) Bill will be debated at stage 3 on 1 February 2018. This briefing summarises the main issues considered at stages 1 and 2.

ABUSE

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Executive Summary

The Scottish Government introduced the Domestic Abuse (Scotland) Bill with provisions to:

- create a statutory offence of domestic abuse against a partner or ex-partner
- make changes to criminal procedure, evidence and sentencing in domestic abuse cases

The proposed new offence is intended to cover behaviour which is already criminal, as well as abuse which might not be captured by current offences. In relation to the latter, it is intended that the offence set out in the Bill will help enable the effective prosecution of behaviour that is controlling, coercive and emotionally or psychologically abusive.

Stage 1 scrutiny by the Justice Committee disclosed broad support for the way in which the proposed offence was defined in the Bill as introduced. This was despite concerns expressed by some witnesses that it set the threshold for criminality too low.

The main elements of how the proposed offence is defined were not amended at stage 2. However, the Bill was amended to:

- extend the territorial reach of the offence by providing that the Scottish courts could, in certain circumstances, convict a person on the basis of behaviour occurring wholly or partly outside the UK
- expand the scope of an aggravation (set out in the Bill as introduced) which may apply where the offence involves a child

The proposed changes to criminal procedure, evidence and sentencing were generally welcomed. Much of the stage 1 evidence in this area related to non-harassment orders. The Bill as introduced included provisions requiring the courts to consider making a non-harassment order when sentencing an offender. Whilst there was broad support for this change, some argued that further reform is needed. The Bill was amended at stage 2 so that a non-harassment order in a domestic abuse case, in addition to protecting the victim, could also cover children involved in the case.

The other provisions of the Bill relating to criminal procedure, evidence and sentencing were not the subject of any stage 2 amendments. However, stage 2 amendments did add a new provision seeking to extend an existing restriction on the use of bail, in cases where a person is prosecuted for a violent or sexual offence under solemn procedure, to include domestic abuse.

Other issues considered by the Justice Committee during scrutiny of the Bill included emergency barring orders and specialist domestic abuse courts.

Emergency barring orders (EBOs) are short-term orders designed to protect victims who may otherwise feel compelled to flee their homes. During stage 1, the Justice Committee received evidence arguing that the Bill should be amended to include provision for EBOs in Scotland. This led to the Committee taking further evidence at stage 2. Following this, the Scottish Government wrote to the Justice Committee outlining plans to consult on the

possibility of introducing some form of EBO in Scotland. Proposed stage 2 amendments did not include any seeking to include provision for EBOs in the current Bill.

Specialist domestic abuse courts may include a number of elements designed to support the effective prosecution of domestic abuse cases (eg specific training for key personnel and arrangements for the prioritisation of domestic abuse cases over other cases). A stage 2 amendment sought to encourage the spread of such courts by giving the Scottish Ministers an order-making power to require their establishment. The amendment did not receive Scottish Government support and was not agreed to by the Committee. However the Cabinet Secretary for Justice did offer to discuss the matter further in advance of stage 3.

Introduction

The [Domestic Abuse \(Scotland\) Bill](#) was introduced in March 2017. ¹ It seeks to create a statutory offence of domestic abuse against a partner or ex-partner; and make changes to criminal procedure, evidence and sentencing in domestic abuse cases

The Parliament's Justice Committee was designated at lead committee for parliamentary consideration of the Bill. Its [stage 1 report](#), recommending that the general principles of the Bill be approved, was published on 21 September. ² The Scottish Government provided a [written response](#) to the stage 1 report on 27 September. ³ The Bill completed stage 1 with the [stage 1 debate](#) on 28 September, following which the general principles of the Bill were agreed without a vote. ⁴

During stage 2, in addition to dealing with proposed amendments, the Justice Committee took evidence on emergency barring orders. Completion of stage 2 was followed by publication of the [Bill as amended at stage 2](#). ⁵

Stage 3 proceedings (final consideration) are scheduled to take place on 1 February 2018.

Key dates in the Parliament's consideration of the Bill are set out below:

- Bill introduced - 17 March 2017
- Stage 1: Justice Committee evidence sessions - 9 and 30 May; 6, 13, 20 and 27 June 2017
- Stage 1: Justice Committee report published - 21 September 2017
- Stage 1: plenary debate - 28 September 2017
- Stage 2: Justice Committee - 31 October; 21 November; and 12 December 2017

The rest of this briefing looks at key issues raised during stage 1 and stage 2 consideration of the Bill. An [earlier SPICe briefing](#) provides additional information on the Bill as introduced. ⁶

Offence of Domestic Abuse

Overview

The Bill (sections 1 to 10) provides for a statutory offence of domestic abuse against a partner or ex-partner. It sets out three conditions, all of which have to be proven for a conviction:

- the accused engaged in a course of behaviour which was abusive of the accused's partner or ex-partner
- a reasonable person would consider the course of behaviour to be likely to cause the partner/ex-partner to suffer physical or psychological harm
- the accused either intended the course of behaviour to cause such harm or was reckless as to whether it would

This proposed offence is intended to cover behaviour which is already criminal as well as abuse which might not be captured by the current law. In relation to the need for a new offence, a written submission from the Crown Office & Procurator Fiscal Service (COPFS) to the Justice Committee's stage 1 call for evidence stated: ⁷

“ The current framework of common law and statutory offences enables prosecutors to hold perpetrators to account for a wide spectrum of abuse. However, gaps exist in relation to the effective prosecution of psychological abuse and controlling and coercive behaviour that cannot overtly or easily be characterised as violent or threatening. ”

“ The proposed offence addresses a gap in existing law by recognising that domestic abuse may not only damage or violate a victim's physical integrity; but may also undermine a victim's character, restricting a victim's autonomy and freedom and their ability to live their life in the manner they choose. ”

Existing offences (eg assault) could still be used where a case of abuse is not covered by the proposed offence (eg where a single incident rather than a course of behaviour is being prosecuted).

In the executive summary to its stage 1 report, the Justice Committee stated that:

“ The domestic abuse offence is intended to address a gap in the criminal law, as it is not currently possible to convict an individual on the basis of a course of conduct that includes psychological abuse. (The current law focusses on discrete incidents of physical violence or on threatening behaviour that causes fear or alarm.)”

“ The Committee received compelling and persuasive evidence that psychological abuse within a relationship or by an ex-partner can cause immense and enduring trauma and harm. This evidence was underlined in the powerful and moving private testimony received from abuse survivors. It was sobering to reflect that some of the conduct described to the Committee cannot currently be prosecuted because it is not criminal. The Committee is persuaded that there is a gap in the law that needs to be closed. (paras 3-4) ”

The main elements of how the proposed offence is defined were not amended at stage 2. However, amendments agreed at stage 2 did:

- extend the territorial reach of the offence by providing that the Scottish courts could, in certain circumstances, convict a person on the basis of behaviour occurring wholly or partly outside the UK
- expand the scope of an aggravation (set out in the Bill as introduced) which may apply where the offence involves a child

The changes are considered further below.

Definition of the offence

Stage 1 scrutiny disclosed broad support for the way in which the proposed new offence was defined in the Bill as introduced. The Justice Committee's stage 1 report noted that:

“ Most evidence that the Committee received expresses contentment with, and welcomes, the drafting of the new offence of domestic abuse, as set out in the Bill, considering that it reflects the lived experience of many victims of domestic abuse much more effectively than the current law. (para 66) ”

However, some witnesses expressed concern that the definition may set the threshold of criminality too low. A number of aspects of the definition were highlighted in this respect, including the inclusion of "distress" in the definition of psychological harm. A submission from Andrew Tickell to the Justice Committee's stage 1 call for evidence argued that: ⁷

“ to prosecute an individual for 'abusive behaviour' under the proposed legislation, the prosecutor need only show that the accused has engaged in monitoring or controlling behaviour on more than one occasion which was likely to cause distress, whether or not any distress actually arose. While monitoring behaviour may give rise to substantial harm – even relatively minor episodes in a relationship clearly have the potential to give rise to 'distress'. To categorise this behaviour as criminally 'abusive' risks being dramatically excessive.”

It was suggested that the definition could be improved by requiring that a course of behaviour is likely to cause serious or substantial psychological harm. Considering the response to such concerns, the stage 1 report stated that:

“ Overall, the Cabinet Secretary said that he did not accept that the Bill set the threshold for criminalisation too low, referring to the 'threefold test' set out in the Bill (...). For the COPFS, Anne Marie Hicks said that she was content with the definition as set out in the Bill, saying that in her view there was no risk of the Bill criminalising 'normal friction' within a relationship. She considered that the Bill delivered the necessary legal certainty for prosecutors to work with it. (para 64) ”

The Justice Committee went on to report:

“ concerns with some aspects of the definition from a minority of stakeholders, including legal experts and the Scottish Police Federation. The Committee asks the Scottish Government to further reflect on, and respond to, observations that the current definition may have inadvertently set the bar of criminalisation too low, in that it may capture behaviour that does not amount to a course of psychological abuse. (para 67)”

In its written response to the stage 1 report, the Scottish Government responded that:

“ We note that the Committee heard evidence that the inclusion of 'distress' within the definition of 'psychological harm' contained within the offence risks setting the threshold for criminalisation to low”

“ However, we have included 'distress' as part of the definition of psychological harm because we consider that merely referring to fear or alarm would mean courses of conduct that should be criminal as a matter of policy would not be included within the scope of the offence. (...)”

“ The Committee also heard evidence to the effect that the offence should be restricted to behaviour that causes 'serious harm'. However, restricting the offence to 'serious harm' - especially serious psychological harm - would be another higher threshold that has to be met, and risks creating uncertainty about what behaviour amounts to abuse (and particularly when the threshold of 'serious' harm is met as compared to 'harm'). (p 3-4)”

Addressing the issue of whether the Bill set the criminal threshold too low, Liam McArthur MSP stated during the stage 1 debate:

“ Initially, I admit that I was persuaded by some of those concerns, but over the course of the evidence that we heard I became increasingly satisfied that the tests were sufficiently robust. The Government response to the Committee's report provided further help in clarifying that position. (cols 86-87)”

However, some of those speaking in the debate expressed continuing concerns over the issue.

As noted earlier, the main elements of how the proposed offence is defined were not amended at stage 2.

Scope of the offence

The proposed offence deals with the abuse of a partner or ex-partner. Section 10 defines partners as any of the following:

- spouses or civil partners of each other
- people living together as if spouses of each other
- people in an intimate personal relationship with each other

The [explanatory notes](#), published with the Bill as introduced, stated that: ⁸

“ The phrase 'intimate personal relationship' is intended to cover relationships between boyfriends and girlfriends (including same-sex relationships), although the relationship need not be sexual. Other family relationships and other types of relationship (eg between friends or business partners or work colleagues) are not covered by the offence. (para 53)”

The definition is gender neutral. Ex-partners are defined by reference to the above.

The Justice Committee's stage 1 report noted that:

“ Evidence to the Committee was divided as to whether the Bill was right in defining the new offence in this way, rather than (as in England and Wales) legislating for an offence that would apply to relationships within households generally. A large number of stakeholders considered that the Bill took the right approach. They accepted the Scottish Government's argument that it flowed from its 'gendered analysis' and the definition of 'domestic abuse' consistently used by the Government itself and by law enforcement agencies such as the police and the COPFS. (para 75) ”

During stage 1 scrutiny, the Justice Committee considered evidence on whether the scope of the offence might be widened. Suggestions for doing so were mainly in the context of elder abuse and the impact of domestic abuse on children.

The protection of children is considered below. In relation to elder abuse, the website of [Action on Elder Abuse](#) includes the following definition:⁹

“ A single or repeated act or lack of appropriate action, occurring within any relationship where there is an expectation of trust, which causes harm or distress to an older person.”

It goes on to highlight five types of abuse: physical, psychological, financial, sexual and neglect. It notes that:

“ The abuser is often well known to the person being abused. They may be: a partner, child or relative, a friend or neighbour, a paid or volunteer care worker, a health or social worker, or other professional. Older people may also be abused by a person they care for.”

The offence in the Bill does cover older people who are abused by a partner or ex-partner. However, as described above, elder abuse extends to the abuse of an older person by a wider range of people within a relationship where there is an expectation of trust. Stage 1 witnesses, seeking the widening of the offence set out in the Bill, included one from Action on Elder Abuse Scotland. He argued, at the Justice Committee's meeting on 13 June 2017, that:¹⁰

“ We feel that, because there are particular issues to do with people as they get older, it might be too restrictive to confine the provisions to partners and ex-partners. People find themselves living with sons, daughters and other extended family members who then become care givers. In such circumstances, in our experience, abuse, exploitation and all manner of such behaviours occur. In order for the Bill to properly protect older people, its scope with regard to likely perpetrators and likely victims needs to be enlarged. (col 29)”

When asked to respond to the view that expanding the scope of the offence in this way would dilute its focus on domestic abuse as understood within the broader context of gender inequality and gender-based abuse, he responded: ¹⁰

“ I suppose that our question to you as politicians is this: if this is not the right bill, what is? I still think that we have to address the fact that the abuse of older people is a significant, serious and growing problem. It cannot be shied away from. (col 30)”

With regard to the above debate, the stage 1 report noted that:

“ The Committee accepts the Scottish Government's decision to restrict the offence to abuse within a relationship or by an individual against their former partner, rather than defining it more widely (for instance to include the parent-child relationship, or abuse of other family members). (para 83)”

This aspect of the Bill was not amended at stage 2.

Extra-territorial jurisdiction

A Scottish Government amendment agreed at stage 2 added a new section 2A extending the geographical reach of the proposed domestic abuse offence. It will allow the Scottish courts to convict a person of the new offence on the basis of abusive behaviour occurring wholly or partly outside the UK. This will only be possible where the accused is habitually resident in Scotland or is a UK national.

During consideration of the amendment, at the Justice Committee's meeting on 21 November 2017, the Cabinet Secretary for Justice stated that: ¹¹

“ Members will recall that the issue was raised by Scottish Women's Aid in evidence at stage 1. Scottish Women's Aid emphasised that it was necessary to provide Scottish courts with extraterritorial jurisdiction over the domestic abuse offence to comply with the Istanbul convention on violence against women. (col 9)”

He went on to explain that the amendment:

“ does not make such provision when the offence is committed in another UK jurisdiction. That is because, when an offence occurs partly in another UK jurisdiction, common-law rules concerning offences that are committed across the different jurisdictions of the UK will enable the elements of a course of conduct that happen in another part of the UK to be included in the charge. For the avoidance of doubt, when the behaviour occurs wholly in another UK jurisdiction, we think it appropriate that it should be prosecuted in a court in that jurisdiction. (col 9)”

Impact of domestic abuse on children

The offence set out in the Bill does not deal directly with child abuse. However, the Bill does include provisions which seek to reflect the impact domestic abuse can have on children (eg where a child is cared for by a victim of domestic abuse). It does this by

setting out a statutory aggravation (in section 4) for cases where the offence involves a child.ⁱ

The [policy memorandum](#), published with the Bill as introduced, explained that:¹²

“ The aggravation is intended to ensure the new offence effectively captures the seriousness of perpetrators involving children in domestic abuse by providing that the offence is aggravated if, in committing the offence of abuse of a partner or ex-partner, the perpetrator used a child in the commission of the offence. The aggravation also reflects the harm that can be caused to a child who grows up in an environment where domestic abuse is taking place by providing that the offence is aggravated where a child sees, hears or is present during an incident that happens as part of the abuse. (para 85)”

The Justice Committee's stage 1 report noted that:

“ the inclusion of the aggravator in relation to a child alongside the offence was in general warmly welcomed. Witnesses from organisations working with children and young people told the Committee that the inclusion of the aggravator showed that the Scottish Government had at least listened and responded to concerns raised during the pre-legislative consultation. (para 78)”

The Committee did, however, receive evidence arguing for further legislative protection for children (beyond that provided for in the Bill as introduced). This included calls for the:

- expansion of the proposed aggravator to include a wider range of situations where a child is cared for by a victim of domestic abuse (eg to include cases where the child does not witness any of the abusive incidents)
- creation of a separate offence committed against a child where that child is being cared for by a victim of domestic abuse

It was argued that widening the scope of the aggravator would better reflect the impact domestic abuse has on children (even where the direct victim of abuse sought to protect a child of the relationship from knowing about the abuse). In its stage 1 report, the Justice Committee welcomed the inclusion of the statutory aggravator, adding that:

“ The Committee invites the Scottish Government to respond to evidence that the reference in the current drafting to the aggravation being established where a child 'sees or hears, or is present, during' an incident of abusive behaviour is too narrow. It was argued in this evidence that children in the care of a victim of abuse are likely to suffer trauma as a result of that abuse, whether or not they directly witnessed particular abusive incidents, and that there is therefore 'aggravation'. (para 85)”

With regard to having a separate offence, some witnesses argued that this would allow the justice system to more clearly highlight the impact on children raised in a household where domestic abuse is occurring. On this issue, the stage 1 report accepted the Scottish Government's position that more major reforms to the criminal law aimed at protecting children from abuse (going beyond the creation of a statutory aggravation) should be considered separately from the current Bill. The Justice Committee (stage 1 report, para

ⁱ An aggravating factor makes an offence more serious and is likely to increase the sentence imposed by the court. Some, but not all, are set out in legislation. (A mitigating factor makes an offence less serious.)

84) welcomed the Scottish Government's plans to consult on relevant provisions of the Children and Young Persons (Scotland) Act 1937.

Responding to arguments that the scope of the statutory aggravation should be wider, the Scottish Government stated in its response to the stage 1 report:

“ We note the views offered that the statutory child aggravation may be seen as 'too narrow'. We have approached the development of the aggravation with criminal principles firmly in mind. It is important to remember that this is a sentencing aggravation, and as such, we think it is important to anchor it to the specific actions of the perpetrator in committing the offence.”

“ We consider it may be difficult for a court to determine, in an individual case, to what extent an offence is aggravated, and therefore what account to take of this when sentencing the offender, if the aggravation relates not to what the perpetrator did or what the child witnessed first-hand, but to the family circumstances of the victim, or the effect that the behaviour had on the victim's (or the perpetrator's) children. (p 5)”

However, the Scottish Government did lodge stage 2 amendments seeking to expand the scope of the aggravation. The amendments were agreed, with the result that the proposed aggravation now includes situations where a reasonable person would consider the domestic abuse likely to adversely affect a child. Proof would not require evidence that the child was aware of the abuse. This aspect of the aggravation is limited to children usually residing with the victim or perpetrator of the abuse.

Policing and prosecution

As part of stage 1 scrutiny, the Justice Committee considered a range of factors which might impact on the effective policing and prosecution of the proposed offence. For example:

- the possible reluctance of victims to report domestic abuse
- the need to ensure public awareness and understanding of the law
- the need to ensure that relevant criminal justice professionals are adequately trained and resourced
- potential difficulties in obtaining corroborated evidence in relation to offences generally committed in private

In its stage 1 report the Justice Committee stated that:

“ The Committee agrees with evidence that, if the Bill is agreed to, it will be crucial for the Scottish Government to have in place a plan for its implementation, especially in relation to the new offence of domestic abuse. The Committee welcomes indications from the Scottish Government that it intends to mount a publicity campaign around the new offence, and that third sector organisations are likely to be involved in it.”

“ The Committee acknowledges that the Scottish Government's 'gendered analysis' is based on evidence showing that domestic abuse victims are overwhelmingly female and that perpetrators are overwhelmingly male. The Committee asks the Scottish Government to note views expressed during stage 1 scrutiny that it is vital that the public narrative on the unacceptability of domestic abuse takes account of male victims of abuse and abuse within same-sex relationships, and that the public message about the Bill is an inclusive one.”

“ The Committee recognises the importance of all those involved in the process of implementing the new offence, if and when it becomes law, receiving appropriate training, including the judiciary.”

“ The Committee notes that implementation of the new offence will have cost implications for the police, the prosecution service, the third sector, and criminal justice social work, and considers it crucial that the Scottish Government keep these implications under review. (paras 114 to 117)”

The Scottish Government's response to the stage 1 report noted that:

“ As the Cabinet Secretary for Justice indicated to the Committee, if the Bill is passed, there will be a publicity and awareness campaign to coincide with the new offence coming into effect. That campaign will be to ensure that people are aware of the new provisions in the legislation and the implications that it could have for individuals. In developing publicity and awareness-raising material, the Scottish Government will take account of the fact that, while the majority of domestic abuse involves a male perpetrator and a female victim, men can also be victims of domestic abuse, and abuse can occur in same-sex relationships.”

“ If Parliament pass the Bill, the Scottish Government will work closely with police, prosecutors, third-sector groups and other stakeholders to plan the implementation of the new legislation. As is the case with any new piece of legislation, training and appropriate guidance will be required for procurators fiscal, the police and others involved in its implementation. That will be taken into account as the Scottish Government coordinate implementation of the legislation. This will include on-going consideration of the resources required to enable the legislation to be implemented. (p 7)”

A stage 2 amendment lodged by Claire Baker MSP sought to require the Scottish Government to review the operation of the legislation and report on various issues (the report having to be published at the end of a two-year period from the Bill receiving Royal Assent). The amendment was considered at the Justice Committee's meeting on 21 November 2017.¹¹ During the meeting, the Cabinet Secretary for Justice stated that the proposed statutory requirement is not necessary. He agreed that it will be important to monitor and evaluate the impact of the legislation, but argued that it is also important:

“ not to rush to lay in statute the specific details of what data must be recorded and published; it is better to consider that in the round in consultation with key interests (col 32). ”

Despite his comments, the Committee voted in favour of the amendment (for 6, against 5) at its meeting on 12 December 2017 (adding a new section 12A to the Bill).¹³

Criminal Procedure, Evidence and Sentencing

Overview

The Bill as introduced (section 11 and part 1 of the schedule) also set out changes to criminal procedure, evidence and sentencing in domestic abuse cases. The proposed reforms sought to:

- create a standard condition of bail prohibiting an accused from obtaining a statement (or precognition) from an alleged victim other than through a solicitor
- prohibit an accused from personally conducting the defence in court
- apply special measures aimed at protecting child witnesses during trial
- permit certain expert evidence relating to the behaviour of an alleged victim
- require the court to consider the future protection of the victim when sentencing an offender
- require the court to consider making a non-harassment order when sentencing an offender

The reforms apply to cases involving the domestic abuse aggravator provided for in section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, as well as to prosecutions for the new offence set out in the Bill.

Much of the stage 1 evidence considered by the Justice Committee related to non-harassment orders. In relation to the reforms set out in the schedule more generally, the stage 1 report said:

“ The Committee welcomes reforms set out in the schedule to the Bill, relating to criminal procedure, evidence and sentencing in domestic abuse cases. Most evidence to the Committee indicated that these reforms would benefit complainers and victims in domestic abuse cases, without concerns being raised about the accused suffering detriment in relation to their right to a fair trial and a presumption of innocence. (para 145)”

The provisions on non-harassment orders were amended at stage 2 to allow an order, imposed by a criminal court in a domestic abuse case, to also cover children involved in the case. Relevant amendments, along with the main issues raised in relation to non-harassment orders, are outlined below.

The other provisions of the Bill as introduced relating to criminal procedure, evidence and sentencing were not the subject of any stage 2 amendments. However, stage 2 amendments did add a new provision seeking to extend an existing restriction on the use of bail, in cases where a person is prosecuted for a violent or sexual offence under solemn procedure, to include domestic abuse. This is also considered further below.

Non-harassment orders

In relation to non-harassment orders (NHOs), the policy memorandum published with the Bill noted that:

“ Non-harassment orders (NHOs) are intended to provide a means of ensuring that ongoing harassment by one individual of another can be prevented. NHOs can be granted by a civil court on application by the person suffering harassment, or by a criminal court (on application by the prosecutor) following conviction for a criminal offence involving misconduct towards another person.”

“ In either case, an NHO can require a person to refrain from such conduct in relation to the victim, for example to desist all contact with the victim, for a period of time as laid down by the court within the terms of the order. Breach of the terms of an NHO is a criminal offence. (paras 157-158)”

As noted above, existing provisions allow a prosecutor to apply to the court to make an NHO against a person convicted of an offence. The Bill requires the court to consider making an NHO, in domestic abuse cases, without the need for an application by the prosecution. The court could still decide that an NHO is not appropriate in the particular circumstances of a case. The Justice Committee's stage 1 report stated that this reform was "welcomed in practically all evidence to express a view" (para 122). It went on to note that the Committee supported the reform.

During stage 1 scrutiny, the Justice Committee also considered evidence on the effectiveness of NHOs. Its stage 1 report said that it was:

“ concerned by evidence that, even when it has been granted, an NHO is not always an effective remedy for victims of abuse or harassment, and asks the Scottish Government whether it accepts this evidence and, if so, what plans it has to address this issue. (para 135)”

The Scottish Government's written response stated:

“ NHOs are an important tool in seeking to prevent the further abuse of a victim by a perpetrator. Breach of the terms of an NHO, where proven, is a criminal offence and the maximum penalty on conviction on indictment is five years imprisonment. However, we acknowledge that they may not always prevent further offending by a perpetrator of domestic abuse. It is important that courts consider the conditions of an NHO are appropriate in each case to provide protection to the victim. (p 7)”

Areas where stage 1 evidence suggested further change to NHOs included the use of them to protect children affected by domestic abuse. A written submission from NSPCC Scotland stated:⁷

“ NSPCC considers it imperative that this protective provision is extended to children with a parallel requirement on the court to consider making a non-harassment order covering children in domestic abuse cases. The inclusion of the aggravator formally recognises the harm caused to children by domestic abuse, as specified in the policy memorandum. It is of fundamental importance that the new legislation addresses children's right to protection in domestic abuse cases, and provides courts with the necessary authority to make protective orders relating to children.”

In evidence to the Justice Committee on 9 May, a member of the Scottish Government's bill team noted that: ¹⁴

“ The provision that relates to non-harassment orders links back to the existing provision in the Criminal Procedure (Scotland) Act 1995, which refers to a non-harassment order being available where a victim is subject to misconduct. In a case a couple of years ago, a court ordered a non-harassment order for a partner who had been abused and also their children, but that was overturned on appeal because it was found that the court had gone too far in interpreting existing law.”

“ The Domestic Abuse (Scotland) Bill still limits the order to the partner or ex-partner as the direct victim of the abuse. Children 1st and one or two other stakeholders have suggested that, because we have child aggravation in the bill, the policy could go further so that where a domestic abuse offence is proven and a child was involved in that abuse, a non-harassment order should be available for those children. We are happy to consider the views of members and stakeholders during stage 1 scrutiny on whether the provision in that area can go a bit further. (cols 33-34)”

In its stage 1 report, the Justice Committee indicated that it was sympathetic to calls for a change to the law on NHOs to allow criminal courts to impose them for the protection of children involved in cases of domestic abuse. During stage 2 consideration the Justice Committee went on to agree a number of amendments, lodged by Mairi Gougeon MSP, making relevant changes to the Bill. In outlining her amendments, at the Justice Committee's meeting on 21 November, Mairi Gougeon explained that: ¹¹

“ The benefit of those amendments will be that children who reside with the perpetrator of the domestic abuse and children who reside with the partner or ex-partner who has been abused will be able to receive the protection of an NHO. Any child who is the subject of the child aggravation in section 4 of the bill will also be eligible for the protection of an NHO—that does not depend on where the child lives—in addition to the court having to consider whether to make an NHO in respect of the partner or ex-partner. (col 18)”

Other proposed amendments considered at stage 2 included ones lodged by Linda Fabiani MSP on the use of NHOs in domestic abuse cases. They sought to make it mandatory for a court, where a person is convicted of domestic abuse, to impose an NHO in favour of the victim. In explaining the background to the proposals, at the meeting of the Justice Committee on 21 November, she explained that she approached the issue: ¹¹

“ with a background of many years dealing with victims of domestic abuse who felt that they had been let down by courts that did not grant non-harassment orders. I understand that position, which has been backed up by answers to my written parliamentary questions over the years: it certainly seems that the courts have issued fewer non-harassment orders than they should have. (col 21)”

Members of the Justice Committee noted concerns about a perceived failure to impose NHOs in the past, whilst also voicing concerns about the mandatory nature of the proposed reform. At the same meeting, the Cabinet Secretary for Justice argued that:

“ Although the amendments are well-intentioned, they would go too far by removing the ability of judges to assess each case that they deal with and to make decisions that are based on the facts and circumstances of the case. (col 24)”

However, he went on to add:

“ However, I sympathise with Linda Fabiani and others who seek to take further steps to strengthen the system of non-harassment orders. I am happy to work with Linda Fabiani and others ahead of stage 3 to see whether there are ways in which the provisions in the Bill can be improved, while leaving appropriate discretion with the court. (col 25)”

On that basis, Linda Fabiani agreed to withdraw/not move her amendments.

Restriction on bail

Existing legal provisions provide that, where both of the following apply, a person should only be released on bail if there are exceptional circumstances justifying it:

- the person is accused in solemn proceedings of a violent or sexual offenceⁱⁱ
- the person has a previous conviction under solemn proceedings for a violent or sexual offence

Thus, the accused in such a case is more likely to be remanded in custody whilst court proceedings are ongoing.ⁱⁱⁱ

Scottish Government amendments, agreed at stage 2, added a new provision to the Bill (part 1 of the schedule) seeking to extend the existing restriction on the use of bail, in cases involving a violent or sexual offence, to include ones involving a domestic abuse offence.

A domestic abuse offence is defined to cover any offence with the domestic abuse aggravator provided for in section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, as well as the new offence set out in the Bill.

ii Criminal procedure (ie the procedure for the investigation and prosecution of crime) is divided into solemn and summary procedures. Solemn procedure involves the most serious criminal cases, whilst summary procedure is used for less serious offences.

iii A similar restriction on bail applies in drug trafficking cases.

Emergency Barring Orders

During stage 1 consideration of the Bill, the Justice Committee received evidence arguing that it should be amended to include provision for emergency barring orders (EBOs). Such orders can, for example, allow a person suspected of abuse to be removed from a home shared with the victim. The stage 1 report noted that:

“ Some submissions from third sector organisations representing female victims of abuse or violence, argued that the Bill had missed an opportunity to ensure that victims of domestic abuse are protected from immediate danger without having to vacate their homes, by providing courts with the power to make 'emergency barring orders' in appropriate cases. The purpose of such an order would be to ban a perpetrator of domestic violence from the home of their victim for as long as is considered necessary to secure the victim's safety. (para 131) ”

EBOs are short-term orders designed to protect victims who may otherwise feel compelled to flee their homes. The idea is that they can be applied quickly, allowing time for further steps to be taken to secure the safety of victims. Various forms of EBO are available in a number of countries. These include England and Wales where the police can issue temporary notices (domestic violence protection notices) lasting 48 hours and apply for court orders (domestic violence protection orders) lasting for up to 28 days.

Scotland currently has no direct equivalent of EBOs, although the police and criminal courts have various relevant powers (eg where the police release a suspect on an undertaking or a court releases an accused person on bail). There are also longer-term court orders which can be imposed by the civil courts.

During stage 2 consideration of the Bill, the Justice Committee took evidence on EBOs. This included oral evidence at its [meeting](#) on 31 October 2017.¹⁵ In November, the Scottish Government [wrote](#) to the Justice Committee outlining plans to consult on the possibility of introducing some form of EBO in Scotland:¹⁶

“ I can advise that the Scottish Government intends to formally consult on the introduction of new powers in this area in Scotland. This consultation will run parallel to the consultation we intend to issue in early 2018 on the review of Part 1 of the Children (Scotland) Act 1995 (on matters such as contact) with a view to informing consideration of development of future legislation within this session of Parliament.”

Proposed amendments considered at stage 2 did not include any seeking to include provision for EBOs in the Bill.

Specialist Domestic Abuse Courts

During stage 2 consideration of the Bill, Claire Baker MSP lodged an amendment seeking to give Scottish Ministers an order-making power to require the establishment of specialist courts, in particular parts of the country, to deal with domestic abuse offences. Use of the power would require the consent of the Lord President of the Court of Session.^{iv} The amendment was intended to encourage the spread of such courts across Scotland.

Specialist domestic abuse courts may include a number of elements designed to support the effective prosecution of such cases. For example:

- specific training for key personnel (eg judges and prosecutors)
- arrangements for relevant inter-agency working (eg with support services)
- systems which provide for the prioritisation of domestic abuse cases over other cases

Information on specialist approaches to dealing with domestic abuse is set out in a [toolkit](#) published by the Scottish Government.¹⁷

In putting forward her amendment, at the Justice Committee's meeting on 21 November, Claire Baker stated that:¹¹

“ there is frustration at the slow progress in the development of specialist domestic abuse courts. The one in Glasgow was established in 2004. That pilot resulted in a positive evaluation, and it was followed by the one in Edinburgh in 2012. We have four courts that cluster - Dunfermline, Ayr, Livingston and Falkirk - and although other courts operate a fast-track system there are large areas of the country that are not served by any kind of specialist court in domestic abuse cases. That is the case in Aberdeen and Dundee, and I know that members from across the Highlands and the Borders have raised the issue with the Cabinet Secretary in the chamber. In those areas a postcode lottery is operating in terms of victims’ access to justice. Cases of that type need the appropriate expertise and sensitivity to deal with them, and there is evidence to show that specialist courts can deliver that. (col 26)”

In response, the Cabinet Secretary for Justice stated that he had concerns about the proposal:

- that it might be seen as undermining the role of the Lord President, in being responsible for the management of the courts, and thus the independence of the judiciary
- that the Lord President, in consultation with relevant sheriffs principal, is better placed (than the Scottish Ministers) to determine where specialist provision would be helpful and to take appropriate action

He went on to say:

^{iv} The Lord President is the most senior judge in Scotland and chairs the Scottish Courts and Tribunals Service Board.

“ Although I understand why members might be interested in the issues surrounding the use of domestic abuse courts and the clustering of cases in non-domestic abuse courts, given the impact that that has on the independent role of the Lord President, his office should be fully consulted on the matter before any changes are agreed. For those reasons, I am happy to discuss the matter further before stage 3 in order to allow more detailed consideration of the issue and to ensure that the Lord President’s office has been given an opportunity to engage in the discussion and to consider the issues. (col 33)”

The Justice Committee voted against the amendment (for 2, against 6, abstentions 3) at its meeting on 12 December 2017. ¹³

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