OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 23 February 2021

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 23 February 2021

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JUSTICE COMMITTEE

8th Meeting 2021, Session 5

CONVENER

*Adam Tomkins (Glasgow) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Annabelle Ewing (Cowdenbeath) (SNP)
*John Finnie (Highlands and Islands) (Green)
*Rhoda Grant (Highlands and Islands) (Lab)
*Liam Kerr (North East Scotland) (Con)
*Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Shona Robison (Dundee City East) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con)
Humza Yousaf (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Committee Room 2

Scottish Parliament

Justice Committee

Tuesday 23 February 2021

[The Convener opened the meeting at 09:45]

Decision on Taking Business in Private

The Convener (Adam Tomkins): Good morning, everyone, and welcome to the Justice Committee's eighth meeting in 2021. We have apologies from Liam McArthur, who hopes to join us later. We are joined by the Cabinet Secretary for Justice, Humza Yousaf, and his officials, and by Rachael Hamilton. I welcome them all.

We have a congested agenda that consists of consideration of two legislative consent memorandums, one bill at stage 2, two affirmative instruments, one negative instrument and two further matters of business. Is the committee content to take the last item, which is consideration of a note from the clerks about malicious prosecutions and the Crown Office, in private?

Members *indicated agreement.*

Legislative Consent Memorandums

Financial Services Bill

Counter-Terrorism and Sentencing Bill

09:46

The Convener: The next item is consideration of legislative consent memorandums on two United Kingdom Government bills. I refer members to the relevant note on the bills from the clerks, which is in our pack. Do members have comments?

John Finnie (Highlands and Islands) (Green): I ask the cabinet secretary to expand on two matters. Will he give a simple explanation of whether the UK Government seeks to fetter ministerial decision making in relation to sentencing in Scotland? Will he please clarify the Scottish Government's position on the use of polygraphs?

The Convener: Those questions are for the cabinet secretary, but I am not sure whether he is with us. If he is, I ask him to address those points.

We will have to come back to the issues that Mr Finnie raised. The cabinet secretary will join us for later agenda items, including consideration of a bill at stage 2, but I am not sure whether we have access to him at the moment. Are members content to postpone consideration of the item until the cabinet secretary is with us?

I think that members are content to do that.

Domestic Abuse (Protection) (Scotland) Bill: Stage 2

09:48

The Convener: The next item is consideration of the Domestic Abuse (Protection) (Scotland) Bill at stage 2, for which we certainly need the cabinet secretary—[*Interruption*.] There is no need to stop broadcasting, but we will pause for a moment. [*Interruption*.] There is a severe danger that this is going to go viral.

I am being advised that the cabinet secretary is scheduled to join us from 10 o'clock, so we will transact as much of our business as possible that does not need his attendance and then pause until 10 o'clock, when Mr Finnie can put to the cabinet secretary his questions about the LCMs and we can proceed with the agenda. I apologise for mixing up the agenda in this way.

Subordinate Legislation

Restorative Justice (Prescribed Persons) (Scotland) Order 2021 (SSI 2021/40)

09:49

The Convener: The first item of business on our agenda that does not require the input of the cabinet secretary is item 8, which is consideration of a negative instrument, namely the Restorative Justice (Prescribed Persons) (Scotland) Order 2021. I refer members to paper 5 in the pack, which is a note by the clerk.

Do members have any comments on this negative instrument? Members are indicating that they do not. Are members content not to make any comments on this instrument to the Parliament? Members are content.

That concludes consideration of that instrument.

Justice Sub-Committee on Policing (Report Back)

09:50

The Convener: The next and, I think, final item of business that does not require the input of the cabinet secretary is consideration of a report back from the meeting of the Justice Sub-Committee on Policing that took place on 15 February. I refer members to paper 6 in our pack, which is a note by the clerk.

I invite John Finnie to indicate whether he wishes to supplement his written report—if there is anything further that he wants to add. You have up to 10 minutes, Mr Finnie. [*Laughter*.]

John Finnie: I can speak very slowly, if you like, convener.

I have nothing to add to the report but, as ever, I am very happy to take any questions that members may have on the content.

The Convener: Thank you, Mr Finnie. Do members have any questions for Mr Finnie about the content of the report? They have no questions, so that concludes our consideration of that item.

Legislative Consent Memorandums

Financial Services Bill

Counter-Terrorism and Sentencing Bill

09:51

The Convener: I await advice as to whether the cabinet secretary can join us now, or whether we have to pause until 10 o'clock.

The Cabinet Secretary for Justice (Humza Yousaf): I am here, convener, if that is helpful.

The Convener: Thank you, cabinet secretary. Are you content for us to proceed, even though we are a bit in advance of the time at which we asked you to join us?

Humza Yousaf: Yes. Forgive me—my apologies; I did not realise that you would be done so soon.

The Convener: There is nothing to apologise for—it is not on you at all.

We were considering the two legislative consent memorandums that we have in front of us. I know that you were not expecting to give evidence on either, but Mr Finnie has raised two questions about them, and I was wondering whether he could put those to you while everyone is here.

Humza Yousaf: Sure.

The Convener: Thank you. Mr Finnie, could you ask again your questions relating to those LCMs, so that the cabinet secretary can hear them?

John Finnie: Good morning, cabinet secretary. My questions are about two issues and perhaps will give you an opportunity to state something for the record.

Clause 33 of the Counter-Terrorism and Sentencing Bill is about polygraphs. They are a widely discredited system. Amnesty International—I should declare membership of that organisation—and others have expressed grave reservations about them. Will you state the Scottish Government's position?

In addition, on the generality of that LCM, is the bill an attempt by the UK Government to interfere with the existing powers of the Scottish ministers on sentencing?

Humza Yousaf: I will make a couple of points. I thank John Finnie both for his questions and for his long-standing interest in issues relating to counter-terror and the human rights implications. I will come on to that in a second.

You will of course remember the original proposal from the UK Government to extend the use of polygraph testing into the Scottish justice system. I took a very robust approach in opposition to that. As John Finnie rightly alludes to, that position was not just the Government's; a number of—[*Inaudible*.]—organisations and indeed a number of people in the legal profession had a fair degree of concern at the thought of the introduction into Scotland of polygraph testing in any way, shape or form. It would be unique. In fairness, it is not unique in England. Polygraph testing is used in a very limited way in the justice system in England and Wales. I was pleased of course that our argument was persuasive enough to the Lord Chancellor, Robert Buckland QC—with whom, in fairness, I have a very good relationship—that he agreed to remove those provisions from the legislation.

On the second, broader question that John Finnie asks, the bill does impinge on the Scottish Government's competence and powers in relation to sentencing; obviously, that is why we have it in front of us. I have agreed to the LCM in a limited way; the bill potentially affects the Scottish Government's sentencing powers, but, in that limited way, we are content to give consent. I will not go into greater detail on my reservations about the reserved areas of the bill, but it is fair to say that I associate myself with the remarks of Amnesty International and a few other organisations about some of the provisions of the bill that relate to reserved areas.

The Convener: Thank you. Mr Finnie, do you have anything further for the cabinet secretary?

John Finnie: I would just thank the cabinet secretary. Although there is a lot of information in our papers, that information is not necessarily very accessible to anyone who might be looking in, so it is very helpful to have the Scottish Government's position confirmed by the cabinet secretary.

The Convener: Thank you, Mr Finnie. I agree that it is important to get these matters on the record wherever possible.

If members have no further comments on either of the legislative consent memorandums that are in front of us, are we agreed that the Scottish Parliament should give its consent to the relevant provisions in the Financial Services Bill and the Counter-Terrorism and Sentencing Bill?

We are agreed.

Are members content to delegate to me the publication of a short factual report on the outcome of the committee's deliberations on the legislative consent memorandums today?

Members are agreed. Thank you very much.

Domestic Abuse (Protection) (Scotland) Bill: Stage 2

09:56

The Convener: Item 3 is stage 2 consideration of the Domestic Abuse (Protection) (Scotland) Bill. For that purpose, members should have with them a copy of the marshalled list and the groupings for debate. I also refer members to paper 2 in our pack, which is a letter about the bill from Police Scotland, which members will recall gave evidence to us at stage 1.

Before we start, I remind everyone that, as this is a fully virtual meeting, we will use the chat function on BlueJeans as the means of voting electronically. When I call a vote, I will ask members to type Y in the chat function to record any votes for yes. I will then do the same for votes for no, for which members should type N, and abstain, for which they should type A. Then the clerks will collate the results and I will read out and confirm how each member has voted. If a mistake is made and a member's vote is incorrectly recorded, or if there are any issues with voting, please immediately let me know by typing R in the chat box before I move on to another vote, as once we have moved to another vote, we cannot go back.

If we lose connection with a member at any point, I will suspend the meeting and try to get the member back into the meeting. If we cannot do so after a reasonable period of time, I will have to deem that member as not present and then consider with the deputy convener whether we can fairly proceed with the meeting or whether we will need to postpone until next week.

If that is clear and there are no questions, we will make a start.

Section 1—Persons to whom domestic abuse protection notices and orders may relate

The Convener: The first group concerns domestic abuse protection orders and notices and the requirement for persons A and B to live together. Amendment 1, in the name of the cabinet secretary, is grouped with amendments 2 to 4.

Humza Yousaf: Thank you, convener. I will speak to amendments 1 to 4, which were lodged in my name. I welcome this stage 2 session.

During the scrutiny of the bill, important consideration was given to the practical and operational challenges of the bill. The convener has referenced the Police Scotland letter on some of those challenges. In particular, there was concern about the potential volume of cases in which domestic abuse protection notices and orders may be used.

The primary purpose of the protection orders, as well as the protection notices, is to allow for short-term, emergency protection for a person who is at risk of domestic abuse. That provides them with breathing space and with time free from the risk of interference by their abuser to take their own longer-term steps to address their safety and possibly their housing situation. As members will be aware, the need for that protection is most acute when person A, the alleged abuser, and person B, the person at risk, live together. In that situation, person B is more likely to lack the freedom to take the action that is necessary to protect themselves.

It has always been anticipated that the DAPNs and DAPOs would be used predominantly where person A and person B live together. Recognising that, and following discussions with Police Scotland and Scottish Women's Aid, I ask members to support amendments 1 to 4. They add a requirement that person A and person B must live together some or all of the time as one of the conditions to be met in order for a DAPN or DAPO to be made.

10:00

Amendment 3 is the main amendment. It amends section 1(1) of the bill with the effect that DAPNs and DAPOs can be made only if, in addition to the existing conditions as to age and relationship, person A and person B live together some or all of the time. That approach ensures that a DAPN or DAPO can be used in a case where a person lives with their partner some of the time but may, for example, have another home where they sometimes live.

Amendments 1 and 2 make minor adjustments that are needed to pave the way for the new sub-paragraph that is inserted by amendment 3, and amendment 4 is a minor technical change to reduce the risk of confusion arising from a redundant reference elsewhere in section 1.

I move amendment 1.

The Convener: No members are indicating that they wish to speak in the debate on the group, so I invite the cabinet secretary to wind up and press amendment 1.

Humza Yousaf: I have nothing to add in winding up and I am happy to press the amendment.

Amendment 1 agreed to.

Amendments 2 to 4 moved—[Humza Yousaf]—and agreed to.

Section 1, as amended, agreed to.

Section 2 agreed to.

Section 3—What constitutes abusive behaviour

The Convener: The next group is on what constitutes abusive behaviour: additional examples. Amendment 28, in the name of Rachael Hamilton, is grouped with amendments 44 and 45.

I am not sure that we have Rachael Hamilton with us, so I will—

Rachael Hamilton (Ettrick, Roxburgh and Berwickshire) (Con): I am here.

The Convener: Oh, you are there. Would you like to move—

Rachael Hamilton: Yes. Would you like me to speak to the amendment? Convener, can you hear me?

The Convener: Yes.

Rachael Hamilton: I take the opportunity to explain the intentions behind amendment 28. It centres on the financial abuse that can arise when a perpetrator can still gain access to assets or money that belong to a survivor. An example of such would be a perpetrator, or person A, who can access a joint bank account in the name of the survivor, or person B, and coercively control them through financial means, even once the relationship has ended.

It has been widely recognised that financial abuse, which is a form of domestic abuse, can continue to occur post-separation. According to the Co-operative Bank and Refuge, one in five women and one in seven men in the United Kingdom have experienced financial abuse from a current or former partner, and one third of victims did not tell anyone at the time.

During the passage of the Domestic Abuse (Scotland) Bill, the question was raised as to whether financial abuse was sufficiently encompassed by the definition of "abuse". I engaged comprehensively with stakeholders on the ground work for amendment 28, including with the local charity, Border Women's Aid. I have incorporated action points that it raised.

The amendment uses the same definition as "economic abuse" in the UK Domestic Abuse Bill, which is going through Westminster. Amendment 149, tabled by Baroness Lister in the House of Lords, follows a similar line of motivation to my amendment.

I engaged with the Law Society of Scotland, which said:

"At the Society, we have not become involved in the detail of the conduct or behaviour which may form part of the reasonable grounds for a DAPN as we considered this was much for the Government in their policy objectives for the Bill.

We suspect that this is rather broadly framed but it could be useful to examine what is considered to be or amount to reasonable grounds which remains a concern as to exactly how much evidence is required before a decision by the police is made for a DAPN to be made.

The problem with money related matters is that it would need to be some form of continuing conduct—not on one occasion and also it may depend on other financial arrangements between both parties".

I clarify that I intend the provisions to cover continuing forms of conduct, not a one-off occasion.

Amendment 28 is a probing amendment. It seeks clarification from the justice secretary as to whether victims and survivors of domestic abuse are fully protected against coercive control in a financial context. In addition, it seeks to ensure that, when a DAPO or a DAPN is issued, financial abuse is taken into account under the powers in the bill.

I move amendment 28.

Humza Yousaf: I thank Rachael Hamilton for lodging what she has described as a probing amendment. It is helpful to have this discussion, so that we can provide absolute clarity on the record. I also thank Border Women's Aid for engaging with Rachael Hamilton, for raising the issues and for doing the good work that it does in its local area.

The amendments in the group are well intentioned, and Rachael Hamilton has raised the issues with me previously, in the chamber. It is important that the definition of abuse that is used in the bill is wide enough to ensure that financial abuse of the kind covered by amendment 28 and the sharing of intimate images covered by amendments 44 and 45 are included in it. I hope to give Rachael Hamilton an assurance that those aspects are absolutely covered in the definitions that we are using in the bill.

The amendments in this group are unnecessary. I am also concerned that they could have some unintended adverse consequences, and I will come to that in a second.

Members are aware that section 3, as it is currently framed, provides a description of "What constitutes abusive behaviour" by "person A". The test is very much modelled on the definition of "abusive behaviour" that is used for the domestic abuse offence contained in the Domestic Abuse (Scotland) Act 2018. That definition was developed following some extensive engagement with stakeholders, including Scottish Women's Aid, ASSIST, Police Scotland and the Crown Office and Procurator Fiscal Service. The intention

was to provide a comprehensive statutory definition of what constitutes domestic abuse.

Section 3 makes it clear that

"Behaviour which is abusive of person B includes (in particular)"

two types. The first is

"behaviour directed at person B that is violent, threatening or intimidating".

The second type, which is particularly relevant to Rachael Hamilton's amendments, is behaviour that is abusive of person B by reference to the effect that the behaviour is intended to have or that

"would be considered by a reasonable person to be likely to have"

on person B.

The approach is intended to bring all behaviour that is controlling, coercive and emotionally or psychologically abusive within the scope of DAPNs and DAPOs. The list of relevant effects includes

"controlling, regulating or monitoring person B's day-to-day activities"

and

"depriving person B of, or restricting person B's, freedom of action".

As such, the conduct that is set out in amendment 28 in particular is captured by the definition of "abusive behaviour" in the bill.

Amendments 44 and 45 are equally important in the matters that they probe. Where a partner or ex-partner threatens to disclose or discloses an intimate image of person B, that would already be captured by the definition of "abusive behaviour" under the bill. Specifically, section 3(2)(a) covers

"behaviour directed at person B that is violent, threatening or intimidating".

Also, section 3(3)(e) provides that abusive behaviour includes behaviour that has as its purpose, or is likely to have as its effects,

"frightening, humiliating, degrading or punishing person B."

That definition would capture sharing or threatening to share intimate images of person B without their consent. The definition in section 3(2)(a) may also capture such behaviour, depending on the exact circumstances.

It is important to remember that the description in section 3 is non-exhaustive. Therefore, it remains perfectly possible for the court to determine that behaviour is abusive, even if it does not fall within the scope of section 3, provided that the court is satisfied that a reasonable person would consider that the behaviour is likely to cause person B to suffer physical or psychological harm.

Although the definition of "abusive behaviour" in the bill already covers the areas included in the amendments, I have some concerns about the practical effects of those amendments. If they are agreed to, they would result in the definition of abusive behaviour in the bill being inconsistent with the widely supported definition of abusive behaviour that was used in the Domestic Abuse (Scotland) Act 2018. Its inclusion could have unintended consequences by calling into question the operation of the domestic abuse offence. That would not be at all desirable. Although specific further provision in those areas is well intentioned, it is not needed.

I hope that that answers Rachael Hamilton's questions. I note that Scottish Women's Aid has provided a briefing in which it raised similar concerns. In those circumstances, I ask Rachael Hamilton not to press amendment 28 or move the other amendments in the group. If she chooses to do so, I urge members to vote against them.

The Convener: I ask Rachael Hamilton to wind up, and to press or withdraw amendment 28.

Rachael Hamilton: I thank the cabinet secretary for that clarification. I want to comment on the current situation in which women, through mainstream media, are being held hostage to images in the possession of other people. Such images can be used to coercively control a victim by someone threatening to release or distribute them. Ultimately, they can be used as an instrument of control. I appreciate the cabinet secretary's acknowledgement of such serious matters.

I am satisfied that both financial abuse and the threat of revenge porn are covered by the 2018 act and that no further specific provisions are required. I will not press amendment 28.

Amendment 28 withdrawn.

Amendments 44 and 45 not moved.

Section 3 agreed to.

Section 4—Making of domestic abuse protection notice

The Convener: The next group of amendments concerns domestic abuse protection orders and notices: the requirement for immediate or imminent risk of abusive behaviour. Amendment 5, in the name of the cabinet secretary, is grouped with amendments 11, 12, 14 and 17.

Humza Yousaf: At stage 1, the committee heard from Police Scotland that there was some concern that the bill was not sufficiently clear that the DAPNs are intended to be emergency

measures to address those cases in which there is an immediate risk of harm. Detective Chief Inspector Sam McCluskey said

"There is no component of risk in section 4. That is really important. People use the term 'emergency order'; the police officer's decisions on such an order will be risk-based."—[*Official Report, Justice Committee*, 22 December 2020; c 28.]

On the back of that evidence session, we engaged extensively with Police Scotland—as we had prior to the introduction of the bill—and it expressed similar concerns regarding the test to be used by the court for making a DAPO and when it would be appropriate for the police to make an application for a DAPO. Following that engagement, we decided to introduce amendment 5.

As the bill stands, the police can make a DAPN only if they consider that there are reasonable grounds for believing that it is necessary to protect person B from abuse by person A during the period before a sheriff can make a DAPO or an interim DAPO. Similarly, when a court is considering whether to make a DAPO, it can only do so when it considers that that is necessary to protect person B from the risk of abuse.

By virtue of the necessity test and in view of the fact that a DAPO can run only for two months—extendable up to three months on application—I consider that it is implicit that the sheriff would have in mind whether person B was at an immediate or imminent risk of harm in deciding whether it was necessary to make a DAPO. However, in light of the concerns expressed, I consider that there is some merit in making that clear in the bill.

Amendment 5 adjusts the test for making a DAPN, so that the police are required to have reasonable grounds for believing that the DAPN is necessary to protect person B from the risk of immediate abusive behaviour by person A. "Immediately" is defined as meaning in the period before a sheriff could make a DAPO or an interim DAPO.

10:15

Amendments 11 and 12 make consequential changes to section 6 in respect of the information to be contained in relation to a DAPN.

Amendment 14 adds a third issue to the matters as to which the sheriff must be satisfied in order to make a DAPO. Its effect is that the sheriff can make a DAPO only when

"there is an immediate or imminent risk of person A engaging in further behaviour which is abusive of person B".

Amendment 17 provides that, in deciding whether it is necessary to make a DAPO to protect person B from abusive behaviour by person A, the sheriff can have regard to any risk of abusive behaviour that might occur at a later time, as well as to the immediate or imminent risk of abusive behaviour that requires to be present before a DAPO is made.

Members will be aware that other jurisdictions often refer to similar powers as "emergency barring orders". These amendments are intended to more clearly focus part 1 of the bill on cases in which the risk to person B from person A is likely to manifest itself immediately or imminently if protection is not put in place, while still allowing protection to be put in place as necessary for up to two months.

I move amendment 5.

Rhoda Grant (Highlands and Islands) (Lab): I am concerned about adding the term "immediately" to the bill, because it seems to me that someone who is in danger needs to be protected. The inclusion of "immediately" puts another barrier in front of the police, who might have to assess whether the threat is immediate or whether that person is in danger. If the person is in danger, they should have protection. I would like some clarification on that issue.

The Convener: As no other member has indicated that they wish to speak in the debate on this group, I invite the cabinet secretary to respond to what he has heard and to wind up.

Humza Yousaf: I can give some reassurance to Rhoda Grant, but if what I have to say does not reassure her, I highlight that we extensively discussed the issue with Scottish Women's Aid. The members will note from the briefing that they have received that Scottish Women's Aid is in support of these amendments for the reasons that I have already outlined. All that they do is clarify the use of, and the test for, a DAPN as an emergency order—which is its purpose.

You will remember that, in my stage 1 evidence, I discussed potentially lodging an amendment around the creation of a higher threshold of test—the significant harm threshold—but it became clear from our engagement with Scottish Women's Aid that such an amendment would not be supported. Therefore, we decided to clarify that the emergency powers of a DAPN are to be used only as an emergency order and that there has to be a risk of immediate or imminent harm.

Of course, a risk of harm in the future could also be taken into consideration, particularly when a sheriff is considering a DAPO, as I have already said. The addition of "immediately" should not do anything to alter the test at all but should make it

clear that a police officer has to consider the risk of immediate or imminent harm.

Amendment 5 agreed to.

The Convener: The next group of amendments is on a child living with person B being able to apply for a domestic abuse protection notice or a domestic abuse protection order. Amendment 46, in the name of Rhoda Grant, is grouped with amendment 47.

Rhoda Grant: Domestic abuse damages a child's life. Their resilience and self-esteem are damaged, as are their life chances. They do not need to be a victim of or to experience domestic abuse themselves—the tension and fear that surround them create fear and insecurity within them.

Although children are offered protection under the bill, it is attached to their parent. I truly believe that children must have access to such protection in their own right. The NSPCC in Scotland has reported a 30 per cent increase in referrals made to agencies regarding children in abusive households since last April. That comes at a time when children are more isolated. Children are trapped in abusive households without the respite and support that getting out to school brings.

The incidence of domestic abuse has increased, and therefore its impact on children has increased. If children are contacting agencies for support when they witness such abuse at home, surely they should be entitled to protection and to have the abusive parent removed. That happens in other countries, such as Australia and New Zealand. Such measures are very seldom used, but they can offer another protection for children. My amendments seek to do that.

Amendment 46 relates to domestic abuse protection notices and amendment 47 relates to domestic abuse protection orders. They would allow a child to seek a notice or order for the protection of a parent from domestic abuse. That protection would extend to the child with the removal of the abusive parent from the home.

I move amendment 46.

Humza Yousaf: I will speak to Rhoda Grant's amendments 46 and 47. I listened to her remarks, but I am still slightly unsure about what the practical implication or effect of the amendments is meant to be. I hope that she can clarify that in summing up.

It is important that we have heard from Rhoda Grant about the real and negative impact that domestic abuse can have on children. I know that she has a long history of efforts in the area, and the amendments seek to respond to a very important issue. However, as I have said, I am not entirely sure what is being sought by the amendments.

I know that Rhoda Grant said at stage 1 that she would lodge amendments to provide for a DAPN and a subsequent DAPO to directly protect a child, but I am not sure about the practical effect of amendments 46 and 47, because they would allow a child to apply for a DAPN or a DAPO on behalf of their abused parent or carer. We should be reminded that the bill does not allow that for the abused parent or carer themselves; it is the police who would issue a DAPN and then apply to the court for a DAPO.

If the intention of the amendments is to provide for a supplementary DAPN or DAPO to explicitly protect a child, such an approach would not be consistent with the nature of the short-term protective measures in the bill. As members know, those are concerned with protecting a person who is at risk of domestic abuse from further abusive behaviour by their partner or ex-partner in order to provide breathing space for the person who is at risk to consider their longer-term options. Any requirement or prohibition in a DAPN or a DAPO must be necessary for the purpose of protecting a person who is at risk of abusive behaviour by their partner or ex-partner. The operation of a DAPN or a DAPO may have the indirect effect of protecting a child who resides with person B from the effects of domestic abuse—for example, through the removal of person A from the shared home and the imposition of conditions that prohibit person A from contacting or approaching, or attempting to contact or approach, any children who usually reside with person B. However, if there is a need for direct protection of a child, there is a separate child protection regime. My view is that that regime should be used for seeking protective measures for a child where necessary.

If Rhoda Grant's intention is that a child should be capable of applying for a DAPN or a DAPO on behalf of a parent—that seems to be what the effect of her amendments would be—I cannot support that. I do not consider that it would be appropriate for the bill to contain provisions that would enable a child and, indeed, put the onus on a child to seek to engage in those processes on behalf of an abused parent. If a child is concerned about their parent or carer being the victim of domestic abuse, the appropriate mechanism would be for the child to report such concerns to the police directly or through a trusted adult, who may then respond appropriately to the individual facts and circumstances of the case. That may, of course, result in the imposition of a DAPN and application for a DAPO.

Such an approach would also create an inconsistency with the current approach in the bill,

whereby the person at risk could not apply for a DAPN or a DAPO, but a child could.

For all those reasons, and in order to get a bit more clarity on the intention behind the amendments, I ask Rhoda Grant to seek to withdraw amendment 46 and not to move amendment 47.

Rhoda Grant: One of the difficult things about domestic abuse is that the victim often hides the crime. The conduct that has gone on before the time when the victim decides to ask for help is often lost, simply because the victim has covered up that crime. However, a child will be aware of the crime that was committed and will be damaged by being a witness to it in some way. That does not mean that the child himself or herself is abused; it means that the child is living in a household in which domestic abuse occurs.

The bill does not offer a child any protection in their own right. The cabinet secretary has rightly said that there is child protection legislation for a child who is abused, but that legislation relates to physical abuse to a child. In this case, the child is damaged not by direct abuse but by the abuse of their parent. Therefore, there is a gap in which a child is not protected from the damage caused to them by the abuse of their parent.

My amendments seek to allow a child, possibly through a third party, such as the NSPCC, to ensure that the police will investigate and put a notice in place if the child raises the alarm to say that domestic abuse is occurring. The same should happen with an order through the sheriff court. It is important that a child can request and get that kind of protection for their parent if they are aware that that abuse is happening.

I do not intend to press the amendments at this stage. I wish that the cabinet secretary would discuss what I am trying to achieve, because there is a gap in the legislation. The last thing that I want is for us to need to go back to the legislation in future. That seems to happen every time we pass domestic abuse legislation—we realise that there is a gap, and we go back to fill it. There is a huge amount of domestic abuse legislation, and it is very piecemeal. I request discussions on the matter with the cabinet secretary. I will not press the amendments now, but I will probably bring them back at stage 3.

Amendment 46, by agreement, withdrawn.

The Convener: We move to the next group of amendments. Amendment 6, in the name of the cabinet secretary, is the only amendment in the group.

Humza Yousaf: Amendment 6 would strengthen the requirement that must be met for a domestic abuse protection notice to be imposed under section 4 of the bill. Members know that section 4 provides for a system of notices, which are short-term protective measures designed to keep a person safe from the immediate risk of domestic abuse. Given the nature and purposes of notices, it is critical that an appropriate balance be struck between the immediacy with which the need for such notices might arise and the procedural requirements that are placed on the police before a notice is imposed.

Unduly burdensome procedural requirements for making a notice might lead to delays in securing protection. In some cases, the aim of providing immediate protection for those at risk of domestic abuse could be compromised. Equally, the procedural requirements, especially in respect of views from those parties directly affected by a notice, should be sufficient to effectively inform police decision making.

Section 4(3) of the bill requires the police to take into account, among a number of other matters, any representations made by person A and any views of person B before making a decision to impose a notice. We have considered carefully whether the procedural requirements in that area should be clarified and made stronger. That is exactly what amendment 6 seeks to do.

10:30

Amendment 6 seeks to replace the current requirements that I have outlined and instead place an explicit responsibility on the police to

"take such steps as are reasonable in the circumstances"

to establish whether person A and person B have any views in relation to the notice that they wish to be taken into account and, if they do, to obtain those views. There is a requirement for the senior constable to take into account any such views before making a DAPN.

The new provision that is proposed in amendment 6 strikes a better balance in strengthening the procedural requirements, which will help to inform decision making, while acknowledging that DAPNs are very short-term notices that are used in cases in which the immediate risk of harm needs immediate action. In particular, the police will have the responsibility to

"take such steps as are reasonable in the circumstances".

Exactly what will be reasonable will depend on each situation. In our view, it would be unhelpful to be more prescriptive than requiring the police in each situation to assess what steps might be reasonable in the circumstances.

I consider amendment 6 to be sensible and pragmatic. It will improve the requirements that fall on the police before they can make a domestic abuse protection notice. That will help to

strengthen the decision-making process. I ask members to support the amendment.

I move amendment 6.

Amendment 6 agreed to.

Section 4, as amended, agreed to.

Section 5—Content and effect of notice

The Convener: Amendment 7, in the name of the cabinet secretary, is grouped with amendments 8, 9, 23 and 24.

Humza Yousaf: Amendment 7 responds to concerns expressed by Police Scotland that a suspected perpetrator could seek to frustrate the system of notices and orders by failing to comply with a request under section 6(4) of the bill to provide an address at which they can be notified with details of the hearing that must be held when a DAPN has been given.

Amendment 7 gives the police discretion to decide whether to make it a requirement of the notice for person A, at the time that it is delivered, either to provide an address at which person A can be notified with the details of the hearing, or to undertake to provide such an address within a specified time or attend a specified police station at a specified time for the purpose of being given the notice of the hearing. Person A would be required to comply with any undertaking that was given.

The purpose of that discretionary requirement of a notice is to allow the police to assess whether it is necessary to make use of that requirement to ensure that notice of the hearing for an order can be given in each case. If the police decided to use the requirement and person A failed to comply without reasonable excuse, an offence would be committed under section 7 of the bill.

Amendment 8 is consequential. It provides that, unlike other requirements of a notice, which take effect when the notice is given to person A, any requirement that amendment 7 introduces takes effect only at the point when person A fails to provide an address when asked to by the constable giving the notice.

Amendment 9 is consequential. It provides what is meant by the word “specified” in amendment 7.

Amendments 23 and 24 are also consequential. They adjust references to the responsibilities of the chief constable to give person A notice of the hearing to be held when a DAPN has been issued. The changes reflect the different ways in which notice might be given by virtue of amendment 7.

I move amendment 7.

Amendment 7 agreed to.

Amendment 8 moved—[Humza Yousaf]—and agreed to.

The Convener: Amendment 10, in the name of Rhoda Grant, is in a group on its own.

Rhoda Grant: Amendment 10 makes it clear that a domestic abuse protection notice takes precedence over any other orders that are in place. It would not be ordinary for a notice that was issued by the police to take precedence over a court order. Therefore, the amendment makes it clear that the notice has precedence in the specific circumstances in which the threat of abuse is immediate until it can be considered by a court.

At stage 1, the committee recommended clarifying that position explicitly in the bill. The amendment would ensure that there was no doubt for those who were subject to a notice or for anyone who issued and enforced a notice about the situation in relation to other rights and orders that might be in place.

Amendment 10 would apply for only a short period until a notice went to court. At that time, existing orders could be amended by the court to ensure that the correct protection was in place.

I move amendment 10.

Humza Yousaf: I thank Rhoda Grant for lodging amendment 10, which would add a provision to section 5 to make it clear that any prohibition or requirement in a DAPN must be complied with, notwithstanding any existing court order that made contrary provision. The issue was aired quite extensively during stage 1 scrutiny—I was certainly questioned on it during my oral evidence session.

The example of child contact orders was given during stage 1 scrutiny. The DAPN is a very short-term protective order for a person who is at risk of domestic abuse, and it is appropriate that the police have the powers to prohibit a person who is subject to a DAPN from approaching or contacting a child, who would usually be living with the person at risk. The effect of a contact or residence order is always subject to other lawful measures that may be taken in relation to a child.

As I said in my stage 1 evidence, my view is that it is a criminal offence to breach any provision in a DAPN without a reasonable excuse. The fact that a contact or residence order was in effect would not change that. However, having considered Rhoda Grant’s amendment 10, I agree that it might be useful to include the matter in the bill, solely for the avoidance of doubt.

I support the intention behind amendment 10, but there are some technical issues with it. The mechanism through which the bill requires that the measures that are imposed by a DAPN are complied with is the creation of an offence. We

would prefer to find a way to express the desired position that works with the mechanism rather than cuts across it by introducing a separate reference to the measure that is required to be complied with. We also wish to further check that a broad reference to any pre-existing court order will not have any unintended effects.

On that basis, I ask Rhoda Grant to seek to withdraw amendment 10. I commit to working with her ahead of stage 3 to deliver her policy intent, to which I am sympathetic, through a stage 3 amendment.

Rhoda Grant: I welcome the cabinet secretary's support for the intention behind amendment 10. I am willing to seek to withdraw my amendment and to do further work ahead of stage 3.

Amendment 10, by agreement, withdrawn.

Amendment 9 moved—[Humza Yousaf]—and agreed to.

Section 5, as amended, agreed to.

Section 6—Further requirements in relation to notice

Amendments 11 and 12 moved—[Humza Yousaf]—and agreed to.

Section 6, as amended, agreed to.

Section 7 agreed to.

Before section 8

The Convener: Group 8 is on enabling other agencies to apply for a domestic abuse protection order. Amendment 29, in the name of Liam Kerr, is grouped with amendments 30 to 33, 35 to 38, 42 and 43.

Liam Kerr (North East Scotland) (Con): Amendment 29 would introduce to the bill the concept of a supporting agency. A supporting agency is one that would have appropriate training to deal with cases of domestic abuse. The Scottish Government already works with various domestic abuse agencies and has a clear understanding of organisations that have such training.

Amendment 29 would allow those supporting agencies to apply for a domestic abuse protection order. Under the bill's current provisions, only the police will be able to make such an application. In its written submission, Police Scotland stated that it would be prudent to extend that power to other agencies that have experience of dealing with domestic abuse cases. It noted not only that those agencies have more expertise on the matter, but that the proposal would reduce the burden of work that the police would be obliged to conduct under the bill. Scottish Women's Aid was supportive of the idea of allowing relevant agencies to apply for a domestic abuse protection order.

Under amendment 29, the regulations that would set out which agencies could be included would be subject to the negative procedure. My amendments 30 to 33, 35 to 38, 42 and 43 would introduce provisions for the supporting agencies into the appropriate areas of the bill, such that the police and supporting agencies would be able to apply for domestic abuse protection orders. The amendments would ensure that the appropriate obligations for making an application for a domestic abuse protection order would apply to supporting agencies.

I move amendment 29.

The Convener: No other member has indicated that they wish to speak in the debate, so I call the cabinet secretary.

Humza Yousaf: [*Inaudible*.]—and the other amendments in the group, lodged by Liam Kerr. At present, the bill empowers the police, but no other agency or organisation, to apply for a DAPO. As Liam Kerr said, the issue has come up on a number of occasions during the committee's consideration of the bill. I am sympathetic to the idea of that power. The other amendments in the group are consequential to amendment 29 and would adjust the provisions of the bill to reflect the existence of the regulation-making power.

Again, I reference the committee's stage 1 report, which indicated that the majority of evidence that the committee heard supported the police as being the "appropriate body" to apply for a DAPO, and that

"The Committee also heard evidence that future consideration could be given to broadening out the scope of those who can apply for DAPOs, but only in circumstances where such bodies are properly resourced so as to avoid unintended consequences".

I listened carefully to what Liam Kerr had to say about training. I consider that there is merit in future proofing the legislation to allow other bodies, possibly, to be added to the list of those that can apply for a DAPO. We have to ensure that there is appropriate training. We know how much training Police Scotland has had in relation to domestic abuse, and therefore it would be incredibly important that any other body that had the power to apply for a DAPO was also well trained and appropriately resourced.

However, at this point, I ask Liam Kerr not to press his amendments. I will commit to working with him ahead of stage 3 to develop suitable amendments. The reason for that is to allow for consideration of how we best future proof through adding a regulation-making power. Such a power is the right approach. However, I might be the first cabinet secretary in history to suggest that the

scrutiny should be strengthened. I do not think that it should be done by negative procedure, as proposed in amendment 29. Given the importance and the issues that have to be considered, it would be better for the procedure to be affirmative. That would give Parliament a greater chance to scrutinise and be reassured that any bodies that were being added were fully ready to take that responsibility when it comes to training, resource and all the other matters that I have discussed.

There are also technical deficiencies in the proposed regulation-making power, but I do not need to go into those in detail.

I ask Liam Kerr not to press his amendments. I am sympathetic to what he is trying to achieve. I offer to work with him ahead of stage 3 to develop suitable amendments that can deliver the policy intent that he and I would like.

The Convener: Rhoda Grant has indicated that she wishes to speak. I remind members that, in debates, they should speak before the cabinet secretary responds, so that he can respond to all the points that have been made. I call Rhoda Grant.

10:45

Rhoda Grant: I am not making a substantive point—I simply want to say that I support the amendments. It is important to give visibility to organisations such as Scottish Women's Aid, because on many occasions they will know an awful lot more about domestic abuse than the police do, and they might be the first port of call for victims.

The Convener: I invite Liam Kerr to wind up and say whether he wishes to press or withdraw amendment 29.

Liam Kerr: I thank the cabinet secretary and Rhoda Grant for contributing to the debate, and for acknowledging that they are sympathetic to what my amendments are trying to achieve.

I recognise that there are challenges with training and resourcing in particular, and I listened carefully and favourably to the cabinet secretary's commitment to work to develop and future proof the legislation. I acknowledge his comments, and those of Scottish Women's Aid, which sent us a briefing last night, on the challenges with the negative procedure that I have included in the amendments.

I am pleased to confirm that I will seek to withdraw amendment 29, and that I will not move my other amendments. However, I look forward to working with the cabinet secretary to deliver the policy intent that I think that we all want to achieve.

Amendment 29, by agreement, withdrawn.

Section 8—Making of domestic abuse protection order

Amendments 30 and 47 not moved.

The Convener: We move to the next group. If we maintain this pace, I think that we can be optimistic that we can complete stage 2 consideration today, but I intend to take a short pause of no more than five minutes after this group.

Amendment 13, in the name of the cabinet secretary, is grouped with amendments 15, 16, 20 and 21.

Humza Yousaf: I confess that I wrestled with this group of amendments, and with amendment 15 as the substantive amendment, most of all. They deal with a particularly sensitive issue around coercive control. Amendment 15 will provide that consent from person B is required for a domestic abuse protection order. That is a new requirement, which has been developed following discussions with Scottish Women's Aid and after listening to evidence to the committee at stage 1.

A number of those who gave evidence during stage 1 scrutiny, including Scottish Women's Aid, made it clear that they view the system of orders as being about protection for a person who is at risk of domestic abuse, so that that person can be empowered to make their own decisions about their future situation. I agree with that, and that is how the system was envisaged.

However, Scottish Women's Aid has indicated directly to the Scottish Government and to the committee that, in order to ensure that the person at risk is fully empowered to make decisions about their situation, their consent should be required for the making of a full DAPO. In particular, Scottish Women's Aid suggests that if, by the time a court is considering an application for an order, the person at risk has not given their consent, it would not be appropriate or potentially proportionate for an order to be imposed.

The committee acknowledged in its stage 1 report that it may be difficult for the person at risk to provide consent because of the issues around coercive control, which we all know about and understand. The amendments do not change the fact that consent is not required for the making of a DAPN. In addition, amendment 21 adds to section 10 a provision to make it clear that consent is not needed for an interim DAPO to be made.

Decisions on any given application for an order will always be for the sheriff to determine. Depending on the precise circumstances of an application, the sheriff will have the ability, by making an interim order, to provide the person who is at risk with some time away from the

suspected perpetrator in order to fully consider their situation.

Scottish Women's Aid considers that any such time away that can be provided could be key in obtaining consent to the making of a full order. Its view is that, if consent is not given because the view of the person at risk is that an order would not benefit them in their situation, the court should respect that and should not impose an order against the person's wishes.

Amendment 13 is a technical amendment that will pave the way for amendment 15. Amendment 16 is a minor consequential amendment that reflects changes in structure and numbering. Amendment 20 is consequential to amendment 15 and will remove the provision that says that consent is not required.

We are dealing with a sensitive and important area of the bill. I have listened to the arguments that have been made and I have reached the finely balanced view that for a full order—but only for a full order—consent should be required.

At stage 1, I gave evidence that coercive controlling behaviour could result in consent being withheld. However, I am satisfied that the amendments will strike the appropriate balance by providing some flexibility when DAPNs and interim DAPOs are being considered and by very much respecting person B's autonomy by making consent a prerequisite for a full DAPO. If there is sufficient evidence that person A is using tactics of coercive control to prevent or inhibit person B from providing consent to a DAPO, the appropriate route will be for the police to report that to the Crown for consideration of prosecution.

I move amendment 13.

John Finnie: I agree with the cabinet secretary that we are dealing with a particularly sensitive aspect. An important element of including provisions on coercive and controlling behaviour in the Domestic Abuse (Scotland) Act 2018 was the training that not only the police but legal services would require to appreciate the nuanced abuse that the act addressed.

What discussions has the cabinet secretary had with the police? I imagine that the training programme has been rolled out. In the time between the granting of a notice and the application for an order, would the police be likely to deploy their specialist domestic violence staff to deal with the situation? Such staff use their understanding of coercive and controlling behaviour more regularly. Has that featured in discussions?

In no way do I disparage any officer, but we know that there are those who regularly address such situations. In many cases, Scottish Women's Aid deals with such people. Has that featured in discussions?

There could be tight timeframes for making a lot of important decisions. We must respect the individual's wish but not allow any suggestion that coercive and controlling behaviour has influenced their decision about an order. What discussions has the cabinet secretary had with the police about the handling of such sensitive issues in a potentially tight timeframe?

Humza Yousaf: I thank John Finnie for his incredibly important questions. I will make two substantive points. As he might be aware, after the 2018 act was passed, police officers undertook extensive training on domestic abuse—14,000 officers were given specialist training, which I confirm included coercive control. The vast majority of our police officers—14,000 who are on the front line—have had that extensive training.

John Finnie discussed matters that are of course operational but, to reassure him more, I note that I talked in my response to the committee's stage 1 report about an implementation board, which will include Police Scotland as a key member.

As a final reassurance, to make it absolutely clear, we are talking about requiring consent for a full DAPO. My amendment would not change what is currently in the bill on a DAPN or interim DAPO. I hope that, taken together, that gives John Finnie some element of reassurance.

Amendment 13 agreed to.

Amendments 14 to 17 moved—[Humza Yousaf]—and agreed to.

Amendments 31 to 33 not moved.

The Convener: We have reached the next group, colleagues. We will suspend to enable members to take a comfort break and will reconvene at one or two minutes past 11.

10:56

Meeting suspended.

11:02

On resuming—

The Convener: The next group concerns the making and extension of domestic abuse protection orders. Amendment 18, in the name of the cabinet secretary, is grouped with amendments 18A, 19, 25, 25A and 39.

Humza Yousaf: We have been making good pace, convener, so I hope that you and committee members will forgive me if I take some time on the amendments in this group.

Amendments 18 and 25 are a proportionate response to the recommendation in the stage 1 report on section 8(6)(d), which provides that, where a sheriff is

"considering making provision in an order which would relate directly to a child",

the sheriff must take into account

"any views of the child of which the sheriff is aware".

In its report, the committee recommended that I

"ensure that the provisions in this Bill are consistent with the Children (Scotland) Act 2020 and other relevant legislation."

It is important to note a fundamental difference between the 2020 act and the protective order scheme in the bill. Court proceedings affected by the 2020 act's provisions that relate to the views of children include contact and residence disputes, adoption and permanence cases and children's hearings cases. Proceedings of that nature are always and inevitably going to directly affect the children to whom they relate; in contrast, DAPNs and DAPOs are concerned with protecting persons aged 16 or older from the risk of domestic abuse and might or might not contain provisions that directly relate to a child. A DAPO can make provision that relates to a child, but only where that is necessary for the purpose of protecting the person who is at risk.

As members know, and as I have stressed throughout today's meeting, DAPNs and DAPOs are short-term, emergency notices and orders. As such, I am not persuaded that adopting in its entirety the approach taken in the Children (Scotland) Act 2020 would be appropriate. In the debate on an earlier grouping, I explained that we need to strike a careful balance between acknowledging the rights of all children to be heard effectively and the constraints of a scheme that is designed to react swiftly to situations in which adults are at risk of domestic abuse.

It is important to reflect on the committee's words. In paragraph 247 of its stage 1 report, the committee was clear:

"The legislation must work in practice if it is to be effective even if it is only used, as the police said, in exceptional circumstances. Passing legislation that cannot easily be used will not help victims of domestic abuse."

On balance, I am persuaded that a proportionate response would be to have a duty on sheriffs to

"take such steps as are reasonable in the circumstances to give the child an opportunity to express views"

where

"the sheriff is considering making provision in an order which would directly relate to a child."

Amendment 18 amends section 8 to provide for that.

On what steps it would be reasonable to take in the circumstances, the intention is that, where it is reasonably possible for the sheriff to give the child an opportunity to express views in the time available before making a DAPO, that should be done. However, where that cannot reasonably be done before making a DAPO, the sheriff is not prohibited from making provision directly relating to a child where that is necessary for the purpose of protecting the person at risk of domestic abuse. The sheriff is then obliged to take into account any views of the child of which they are aware, whether as a result of the steps taken to give the child an opportunity to express their views or otherwise. In taking account of the views of the child, the sheriff must take into account the child's age and understanding.

Amendment 25 makes equivalent provision where the sheriff is considering an application to extend, vary or discharge a DAPO.

Amendment 19, in the name of Rhoda Grant, also seeks to address the concerns that were expressed by the committee about how the views of children will be considered by the court. It creates a duty for the sheriff to provide an opportunity for the child to give their views in

"(i) the manner the child prefers, or

(ii) a manner that is suitable to the child if the child has not indicated a preference or it would not be reasonable in the circumstances to accommodate the child's preference."

That would apply in any case where the sheriff considers that there is a child whose interests are "relevant" to the making of an order or

"where the sheriff is considering making provision in an order which would directly relate to a child."

I have sympathy with the intent behind amendment 19 but I am deeply concerned that placing an absolute requirement on a sheriff to seek the views of the child in every case where they are considering the matters under section 8(6)(c) and (d) of the bill carries a serious risk of unintended consequences. As members will be aware, court decisions relating to, for example, child contact and residence can take a considerable amount of time to be determined by the courts. In contrast—and as supported by the committee—DAPOs are short-term, emergency orders that are intended to protect someone at immediate risk of domestic abuse, and they require to be made very quickly. The maximum time that an interim order can run for before a decision is made on a substantive order is three weeks.

Obtaining views from children on sensitive matters such as allegations of domestic abuse concerning their parents has to be done sensitively and professionally by people with expertise in doing such things. For that reason, it

is important that, rather than there being the absolute requirement provided for in amendment 19, the sheriff is able to consider whether it is reasonable to seek the views of a child, as would be the case under amendment 18 in my name, taking account of all the facts and circumstances of the case before them, including the timeframe in which a decision about a DAPO has to be made. That should provide a certain level of flexibility and ensure that a DAPO can still be made where necessary for the protection of a person at risk, even if it has not been possible within the timeframe to give the child an opportunity to express their views.

Amendment 39 makes an equivalent change to the provision concerning variation, extension and discharge of DAPOs. I have the same concern about amendment 39. I prefer my amendment 25, which gives a proportionate response to the committee's concerns.

I understand that amendments 18A and 25A in the name of Rhoda Grant have been lodged as alternatives to amendments 19 and 39. Those amendments, which would amend my amendments 18 and 25, seek to introduce a presumption that a

"child is capable of expressing a view"

in relation to the making of a DAPO. They would also give the child the opportunity to express their view

(i) the manner the child prefers, or

(ii) a manner that is suitable to the child if the child has not indicated a preference or it would not be reasonable in the circumstances to accommodate the child's preference.

Those amendments would not place the same inflexible additional burden on the courts that amendments 19 and 39 would.

However, as I have explained, we have to balance very carefully the importance of seeking the views of children in appropriate cases with the need to ensure that the system that we put in place is flexible and manageable enough to work as a means of quickly determining applications for emergency orders.

It is not clear, for example, what would be required for the sheriff to override the statutory presumption that a

"child is capable of expressing a view"

in the making of a DAPO. We would all recognise that there will be some children who, perhaps because they are very young, would not be capable of offering a view in the making of a DAPO and, in a situation where the court requires to obtain the views of a child very quickly, it may not always be realistic to establish, for example, the child's preferred manner of giving evidence.

To conclude, I have concerns that amendments 18A, 19, 25A and 39 would place further inflexible burdens on the court in cases that can be complex and require decisions to be made quickly. As such, while I sympathise with Rhoda Grant's motives in lodging the amendments, I ask members to support my amendments 18 and 25 and to reject amendments 18A, 19, 25A and 39.

I move amendment 18.

Rhoda Grant: My amendments in the group seek to strengthen the manner in which children's views are taken into account by a sheriff looking to put in place a domestic abuse protection order. Children are detrimentally impacted by domestic abuse and it is important that they are reassured during the process and have their views taken into account. Given that the hearings could be traumatic, the more protection that is in place for children, the better.

Amendments 19 and 39 lift provisions on taking the views of children from the Children (Scotland) Act 2020, which were considered and agreed by the Justice Committee only a short time ago. For that legislation, the committee considered how the views of a child should be taken into account by the court when considering disputes between parents, and it determined that, in those situations, it should be presumed that children had a view and the court should allow children an opportunity to express those views in their preferred manner. I see no reason why that principle should not also apply here. I believe that we all wish to ensure that, in such important circumstances, children's views are sought and that that happens in a manner that is suitable to them.

As similar language has been used in recent legislation, my amendments would keep a level of consistency for the courts in their approach to taking the views of children. I was in the process of drafting them when the cabinet secretary lodged amendments 18 and 25, which attempt to do the same thing. However, I believe that the cabinet secretary's amendments do not go far enough. The requirement to seek children's views is not as strong, and they leave too much to the subjective decision of the sheriff. I therefore lodged my amendments to those amendments.

Amendments 18A and 25A would add the important presumption in favour of a child's ability to form an opinion and a requirement to appropriately seek those opinions to the cabinet secretary's amendments, bringing them more in line with the Children (Scotland) Act 2020. My preference would be for the committee to agree to my amendments 19 and 39, because they are less ambiguous. However, I have also lodged the amendments to the cabinet secretary's amendments, which would, I hope, strengthen them and bring them into line with the 2020 act.

As I have said before, children are not bystanders. They are damaged by domestic abuse and they need to have their views taken into account. Sheriffs are not always experts in domestic abuse and they often do not understand its implications. We see that daily in our constituency case work, with people seeking custody orders in order to perpetrate domestic abuse and sheriffs agreeing to impose those orders, leaving both the victims and their children in danger.

I ask the committee to back my strengthening amendments to allow children's views to be taken into account.

I move amendment 18A.

11:15

John Finnie: I will first turn to practical matters, because I always want to understand what the implications are. Rhoda Grant is entirely right to talk about consistency of approach and the value that should be placed on children's views, and to say that children are damaged by domestic abuse. However, we must think of the timeframe. We are talking about DAPOs. I can see how, for an order with a longer term—[*Inaudible*.]—so with an extension of an order, there is a possibility. I cannot imagine anything that would traumatise a child more than being removed from their bed in the early hours of the morning to give an explanation to inform a decision. That in itself is potentially abusive.

I know that that is not the approach that anyone wants to take, but we have to try to understand the practical effects of things. In an ideal world, there would be time for reflective consideration and for things to be done appropriately. We know that all children are individuals and they all have different ways of seeing things and different ways in which they would be happy to relate what they have seen.

I have concerns about the approach, although not about the intention behind it, because I do not doubt for a second that Rhoda Grant wants to make things better and wants informed decision making. I am just not convinced that it would work in practice, because of the immediacy, which is what this is all about—an immediate response to an emergency. Perhaps she will comment on that.

The Convener: Thank you, Mr Finnie. I invite the cabinet secretary to wind up first, and then I will ask Rhoda Grant to wind up and to press or withdraw amendment 18A.

Humza Yousaf: I emphasise the point that was made by John Finnie. I do not think that anybody would question Rhoda Grant's motives or the intentions behind her amendments. She has spoken well and often during debates on domestic abuse, as she has done today, about the importance of children and the effect that domestic abuse can have on them. We all recognise that—I do not think that a single committee member takes a contrary view.

However, my concern is the fact that Rhoda Grant's amendments could have the unintended adverse consequence of derailing a DAPO, because of the very tight timeframe for a protective order. The inflexible approach in the amendments could derail a DAPO if a child's views could not be taken within the timeframe. That could happen if a child were scheduled to give evidence—or rather give their views in a sensitive way in an evidence suite—but, for whatever reason, they were unable to attend on that day and another date could not be scheduled. In such a case, a sheriff could not impose a DAPO even if they believed a person to be at risk. That is the danger of the inflexible approach, and that is why I request that members support my amendments. If Rhoda Grant presses amendment 18A and moves her other amendments, I hope that members will reject them for that reason.

Rhoda Grant: With reference to John Finnie's concerns, my amendments do not apply to a DAPN, so children would not be taken out of their beds and asked for their opinions.

Amendment 18A states that "the child's views" would be taken in

"a manner that is suitable to the child if the child has not indicated a preference or it would not be reasonable in the circumstances to accommodate the child's preference",

so there is still a get-out clause. Although my amendments strengthen what the cabinet secretary is saying, they do not insist that views are taken in the child's preferred way, only that their views are taken. I believe that that is reasonable and that it puts in a protection for children that the cabinet secretary's amendments do not.

I press amendment 18A.

The Convener: The question is, that amendment 18A be agreed to. Are we agreed?

Members No.

The Convener: There will be a division.

For

Grant, Rhoda (Highlands and Islands) (Lab)

Against

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Finnie, John (Highlands and Islands) (Green)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
Robison, Shona (Dundee City East) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 1, Against 7, Abstentions 0.

Amendment 18A disagreed to.

Amendment 18 agreed to.

Amendment 19 not moved.

Amendment 20 moved—[Humza Yousaf]—and agreed to.

Section 8, as amended, agreed to.

Section 9—Content and effect of order

The Convener: The next group concerns the maximum period for which a domestic abuse protection order or interim order may have effect. Amendment 34, in the name of Rhoda Grant, is grouped with amendments 40 and 41.

Rhoda Grant: When the committee took evidence, it was clear that the bill's timeframes for the length of time for which an order could be put in place were short. The bill's aim is to fill a gap in the law whereby victims of abuse have limited recourse or protection other than civil protective orders, for which the processes are often lengthy and costly. That would be the case in normal times but, at the moment, due to the pandemic, the length of time for which people have to wait to access the courts is even longer.

The concern is that the short timeframes in the bill undermine the intention to fill the current gap. If orders are too strictly time limited, there is a risk that the time will run out and victims will again be at risk of harm. Alternatively, where an immediate risk still exists—as is likely if other protections are not yet in place—there will simply be a perpetual cycle of interim orders. That is likely to be traumatic for victims and children, it would not prioritise their safety and, I suggest, it would not be a valuable use of court and police time.

In order to take that into account, amendment 34 would increase the maximum length of an order from two to six months. Such a timeframe is proposed to reflect the evidence that the committee heard, which was that applications for exclusion orders can take up to six months and those for other civil protection orders even longer.

Amendments 40 and 41 would alter the arrangements for extending an order. Amendment 40 would remove the one-month limit for extensions in order to limit the likely burden on the courts. Amendment 41 would remove the overall maximum limit for domestic abuse protection orders or, as an alternative, leave it to the sheriff to extend an order until such time as they believe is necessary. When setting that timeframe, the sheriff will know when the courts are likely to hear an application for a non-harassment order, an exclusion order or the like. That means that they could determine for how long an order should be in place, taking into account the specific circumstances of individual cases. If the sheriff believes that the subject of the order will not be able to obtain other protection, they can extend the domestic abuse protection order to provide such protection for the future.

Importantly, an order would still be time limited and it could not remain in effect once other suitable arrangements were in place and/or the protections of a DAPO were no longer necessary. Amendment 41 would also retain the three-week limit for interim orders given that, as their name suggests, they are intended to be short lived.

I commend that approach to the committee as it is more practical, given the reality of alternatives for victims of abuse. It would create a clearer distinction between the purpose of interim orders and that of full domestic abuse protection orders.

I move amendment 34.

The Convener: No other member wants to speak on the group, but I would like to say something. I recall that, when the committee took evidence on the issues at stage 1, significant European convention on human rights concerns were raised about the dangers of extending the duration of DAPNs or DAPOs. Perhaps the cabinet secretary could touch on that, or Rhoda Grant might respond to it in winding up.

Humza Yousaf: I will address that point at the end of my remarks, convener.

Rhoda Grant has articulated why she believes that amendments 34, 40 and 41 are necessary. Members have a briefing from Scottish Women's Aid, which does not support the amendments, and many of the reasons that it gives for that are the same reasons why I cannot support the amendments.

I remind members that, as I keep saying, DAPNs and DAPOs are intended to be short-term, emergency orders. As the committee put it in paragraph 209 of its stage 1 report,

"DAPNs may provide a useful, short-term tool to be used in emergency situations to complement existing civil measures and the current powers afforded to the police."

As such, the notices and orders are not replacements for the longer-term civil protective orders such as exclusion orders, interdicts and non-harassment orders, which a person who is experiencing domestic abuse might decide to take out to address a longer-term housing situation.

I am aware that the committee heard concerns that an application for an exclusion order or interdict would not necessarily be determined by the court within three months. That might be true, but courts can grant an interim exclusion order or

interim interdict much more quickly, and I am content that the three-month maximum time that the bill provides for is sufficient for that to happen.

I appreciate that there will be cases in which the long-term plan of a person at risk may not be to remain in the home that they previously shared with person A and that where, for example, they decide to sell a home that they own together, that could take longer than three months. It has always been the intention that, in such cases, the person at risk would be able to seek an interim exclusion order or interdict to provide protection during that period.

I am aware that the committee has heard specific concerns about the situation in which the landlord of a person at risk has made an application for a change of tenancy to remove the suspected perpetrator from the tenancy, where it is unlikely that that will be resolved within the three months for which a DAPO can run. In such a situation, the person at risk could apply for an interim interdict or interim exclusion order.

I accept that, in the very specific situation in which there is an on-going court action to remove a suspected perpetrator from a tenancy, there is possible merit in avoiding the person at risk having to initiate their own court action separately from the action that is taken by the landlord. As such, I commit to giving further active consideration to the issue and potentially to amending the bill to enable a DAPO to be extended beyond three months in the very specific case in which the landlord of a person at risk has made an application to the court to reassign a shared tenancy.

The final thing that I will say on Rhoda Grant's amendments in the group is on the issue that the convener raised. There is no doubt that there could be ECHR concerns in relation to the proportionality of having a six-month period. We are satisfied that the three-month period that is set out in the bill as the absolute maximum that a DAPO could apply for is proportionate. There is no doubt that, if we had open-ended DAPOs, which would be the effect of one of the amendments, there would be potential consequences or questions would be raised about whether that was proportionate, particularly given that we are talking about an individual who has not been convicted of a crime at that stage, or certainly not of a domestic abuse offence.

For those reasons, although I recognise the motives and the intention behind Rhoda Grant's amendments, we cannot support them.

11:30

The Convener: I invite Rhoda Grant to wind up and say whether she will press or withdraw amendment 34.

Rhoda Grant: I still have some concerns about the three-month period simply not being long enough, but I take on board that the cabinet secretary has today offered further discussion about extending the orders, albeit on very specific points. I will not press my amendment.

Amendment 34, by agreement, withdrawn.

Section 9 agreed to

Section 10—Interim domestic abuse protection order

Amendment 21 moved—[Humza Yousaf]—and agreed to.

The Convener: The next group is entitled "Domestic abuse protection orders and interim orders: appeals etc". Amendment 22, in the name of the cabinet secretary, is grouped with amendments 26 and 27.

Humza Yousaf: Amendment 27 inserts a new section into part 1 of the bill. It makes clear that decisions to make or refuse to make a DAPO and decisions to extend, vary or discharge a DAPO or refuse to do so are decisions that are appealable under section 110(1) of the Courts Reform (Scotland) Act 2014, meaning that an appeal may be taken without the need for permission.

The new section goes on to address the fact that, when a decision of a sheriff is appealed, the general default position is that the decision is suspended until the appeal is determined. That means that, where a decision to grant a DAPO is appealed, the order would not take effect until the appeal had been determined, unless the Sheriff Appeal Court chose to make an order departing from that position.

I think that, in this case, it is preferable for the default position to be that the original decision will continue, in effect, unless the Sheriff Appeal Court, taking account of all the facts and circumstances of the case, decides otherwise. That will ensure that the protection that is offered by the making of a DAPO will continue while any appeal is being considered.

Subsections (3) to (5) of the proposed new section therefore reverse the normal default position and provide that, in all appeal cases involving DAPOs, the original decision will continue, in effect, pending determination of the appeal. However, the Sheriff Appeal Court and the Court of Session, where the decision is remitted to that court, have the power to override that default position and suspend the effect of the original decision.

Subsections (6) to (8) set out a broadly similar position in relation to appeals to the Court of Session against decisions of the Sheriff Appeal Court.

Section 15(2)(b) of the bill provides that applications to extend, vary or discharge DAPOs or interim DAPOs under section 12(1) should be made to a sheriff of the same sheriffdom as the sheriff who made the order to which the application relates. It does not cover cases where the order is made by an appeal court. I do not think that it would be appropriate for applications under section 12(1) in relation to such cases to have to involve the appeal court that made the order. Amendment 26 therefore amends section 15(2)(b) to ensure that all applications for extension, variation or discharge, including in cases where the order was made in the course of appeal proceedings, should be made by a sheriff in the same sheriffdom where the original application for a DAPO was considered.

Amendment 22 is consequential to amendment 26.

I move amendment 22.

The Convener: No member has indicated that they wish to speak on the group. I invite the cabinet secretary to wind up, if he wishes.

Humza Yousaf: I have nothing to add other than to confirm that I will press the amendment.

Amendment 22 agreed to.

Section 10, as amended, agreed to.

Section 11—Hearing to be held where domestic abuse protection notice has been given

Amendments 23 and 24 moved—[Humza Yousaf]—and agreed to.

Section 11, as amended, agreed to.

Section 12—Extension, variation or discharge of order

Amendments 35 to 38 not moved.

Amendment 25 moved—[Humza Yousaf].

Amendment 25A not moved.

Amendment 25 agreed to.

Amendment 39 not moved.

Section 12, as amended, agreed to.

Section 13—Extension, variation or discharge of order: further provision

Amendments 40 and 41 not moved.

Section 13 agreed to.

Section 14—Interim extension or variation of order

Amendments 42 and 43 not moved.

Section 14 agreed to.

Section 15—Jurisdiction and competence

Amendment 26 moved—[Humza Yousaf]—and agreed to.

Section 15, as amended, agreed to.

After section 15

Amendment 27 moved—[Humza Yousaf]—and agreed to.

Section 16 agreed to.

After section 16

The Convener: The next group concerns a report on the operation of part 1. Amendment 48, in the name of Liam Kerr, is the only amendment in the group.

Liam Kerr: Amendment 48 seeks to introduce a reporting requirement for the Scottish ministers to examine and monitor the number of domestic abuse protection notices and orders that are made, the number of offences for breaches that are reported and the number of convictions obtained. The bill does not contain a duty to report on its operation. That is undesirable, particularly given that there is such a duty under section 14 of the Domestic Abuse (Scotland) Act 2018. It would seem reasonable to introduce a similar duty to the bill.

I note that the briefing from Scottish Women's Aid suggests that monitoring should be in line with identified good practice. I am also cognisant of the Law Society of Scotland's opinion that, if the notices and orders add to the number of existing criminal and civil law provisions, as per paragraph 24 of the policy memorandum, such reporting would allow scrutiny of their specific use. I look forward to hearing the cabinet secretary's thoughts on the issue.

I move amendment 48.

Humza Yousaf: It is the Scottish Government's intention to ensure that information and data are made available about the operation of the new powers in the bill. That will help to inform Parliament and the Government when it comes to future policy and it will help them to assess the effectiveness of the bill, assuming that we pass it, which I hope we will.

In recent years, it has become more common to include reporting requirements in legislation. On that basis, I accept the principle of amendment 48, but I ask Liam Kerr not to move it at this stage but instead to commit to work with the Government ahead of stage 3 to develop an agreed approach. That would be preferable, because we should take some time between stages 2 and 3 to assess what

it would be best to include in any reporting requirement.

What information do we need in order to deliver useful information on the effectiveness of the legislation? Some of that might be very similar to what is proposed in amendment 48—for example, the numbers of notices and orders that have been imposed. That is reasonably sensible. However, it would be advantageous to assess whether all the information is strictly needed and, crucially, whether the criminal justice agencies are capable of delivering it.

The requirements of amendment 48 seem to be very focused on data. Data is important, but effectiveness of outcomes is also important. In addition to binary data—for example, the number of DAPOs that have been made and the number that have been breached—we might require qualitative research to be undertaken, for example with people for whose protection DAPOs have been made.

On that basis, I ask Liam Kerr not to press amendment 48. I commit to working with him ahead of stage 3 to develop an amendment that will deliver the policy intent of a reporting requirement that is not only meaningful, but deliverable.

Liam Kerr: It makes sense to ensure that data can be collected from agencies and it entirely makes sense to consider whether we need extra information. Have I correctly captured everything that needs to be in such a report? I am persuaded by the cabinet secretary's representations and I will be pleased to work with him before stage 3 to ensure that what we ultimately produce will be both meaningful and deliverable. For those reasons, I will seek to withdraw amendment 48.

Amendment 48, by agreement, withdrawn.

Section 17 agreed to.

Section 18—Additional ground for ending tenant's interest in house

The Convener: The next group concerns termination of Scottish secure tenancies. Amendment 49, in the name of Rhoda Grant, is grouped with amendments 50 and 51.

Rhoda Grant: Amendment 49 aims to protect victims from landlords who could move to evict what they see as problematic tenants. There are antisocial behaviours that can be linked to domestic abuse cases—things like rent arrears or drug or alcohol misuse—[*Inaudible*.] When proceedings have already been raised by landlords against tenants subject to action, the amendment aims to give the victims breathing space while dealing with the fallout from that action. The provision would apply irrespective of the grounds for recovery of possession that the landlord sought to rely on, as it is impossible to know how the impact of domestic abuse could be manifesting itself. Pausing proceedings would allow the victim to get support to deal with the issues that were a cause for concern.

11:45

Amendment 50 would allow for a victim's tenancy to be regarded as a new tenancy rather than a continuing tenancy. That would mean that, if there were rent arrears, the victim would not be left solely liable for them. The rent arrears could be sought from the victim and the abuser separately, and the victim could begin afresh without the burden of the past affecting their home.

Amendment 51 would ensure that, if a victim was not at risk of losing their home, the decision would not be left solely to the landlord, because unscrupulous landlords could use the action as an opportunity to get all tenants out of a property, and there is no duty on them to provide alternative accommodation. The amendment would add a requirement for the victim to be offered a tenancy.

I move amendment 49.

Humza Yousaf: I will speak to Rhoda Grant's amendments 49 to 51. One of the intentions of amendment 49 is to address the issue of coerced debt—cases in which rent arrears have been accrued as a result of financial abuse and coercive control. I recognise the importance of providing domestic abuse victims with tenancy support, including through payment of rent and managing rent arrears that were accrued prior to the transfer of a tenancy and the end of a perpetrator's interest in it.

The planned guidance to support social landlords to use the provisions in section 18 will include details of the steps that landlords should take to support victims who are left with rent arrears as a result of their partner's actions or who are unable to meet rent payments because of the perpetrator's economic abuse. The Scottish Government also intends to amend the pre-action requirements that are set out in the Housing (Scotland) Act 2001 to require that social landlords recognise the effect and impact that financial coercion can have on rent arrears, and to ensure that domestic abuse must be fully considered before any court action for rent arrears can be raised.

Amendment 49 would mean that landlords would not have the option of raising eviction proceedings against a tenant in any circumstances for a period of six months following a court action to transfer a tenancy and end a perpetrator's interest in it. Landlords need to be able to raise

eviction proceedings at any time—for example, to deal with serious cases of criminal activity or antisocial behaviour that has an impact on surrounding neighbours. They also need to have legal remedies for dealing with significant rent arrears when a tenant does not take up offers of support and refuses to engage with the landlord. Agreement to amendment 49 would impact a landlord's right to access those remedies and could adversely impact the safety of other tenants.

Amendment 50 would create a new tenancy from the date on which an order was made. If a perpetrator's interest in a joint tenancy was ended by a court order, the remaining joint tenant would continue as a sole tenant under the existing tenancy agreement. As such, there would be no new tenancy agreement to enter into, and entering into a new tenancy agreement would not be required. In cases in which a sole tenant perpetrator was evicted, the landlord would enter into a new tenancy agreement with the victim, who would become the sole tenant as part of that process. I hope that my observations are sufficient to give Rhoda Grant some reassurance about what will happen following the operation of the provision in the bill, and to persuade her that amendment 50 is not necessary or appropriate.

Amendment 51 proposes that, in cases in which the perpetrator is the sole tenant, an order that recovers possession must specify that a landlord offers the victim a tenancy agreement in respect of the house to which the eviction action relates. As drafted, there is no specific legal requirement for a landlord to offer the tenancy to the victim when the existing tenancy is a sole tenancy, although the ground of recovery requires that the landlord intends to do so. Creating a legal requirement for the landlord to offer a tenancy to the victim would provide further certainty for victims and strengthen their protection in such cases.

However, although I support the principle of amendment 51, there are some technical issues that need to be worked through. On the basis of an agreement in principle, I ask Rhoda Grant not to move amendment 51, and I will work with her between stage 2 and stage 3 to develop a suitable amendment that will deliver the policy intention.

I thank Rhoda Grant for lodging the amendments and ask her not to press them. If she presses amendments 49 and 50, I invite members to reject them. I commit to working with her before stage 3 to produce a suitable amendment on the issues that amendment 51 raises. If that amendment is pressed, I ask members to reject it.

Rhoda Grant: I welcome the cabinet secretary's offer to work with him on the issues that amendment 51 raises and see whether we can put in place further protection. I will reflect on what he said about amendments 49 and 50. I will not press them now, but I reserve my right to bring back those amendments or versions of them at stage 3.

Amendment 49, by agreement, withdrawn.

Amendments 50 and 51 not moved.

The Convener: Amendment 52, in the name of Rhoda Grant, is in a group on its own.

Rhoda Grant: Amendment 52 would remove the time period for a victim to have lived at an address before they have the right to protection in their home. Six months is an arbitrary figure. If someone is being abused in their normal and sole residence, they should not face the loss of their home because a protection order is put in place. The bill's very aim is to protect people from homelessness. The amendment would provide such protection.

I move amendment 52.

Humza Yousaf: The policy objective of the transfer of tenancy in social housing is to support and enable victims to remain in the family home and prevent the injustice of victims and their families having to leave their home, their belongings and their community to seek safety, while the perpetrator remains undisturbed in the family home.

As Rhoda Grant said, amendment 52 would remove the requirement for the parties to have lived together for a cumulative period of at least six months in the 12 months before eviction action was taken. The concern is that, if that threshold was eliminated, action could be taken to evict the tenant when the two parties had lived together for any period in the 12 months before the action was initiated—for example, if the victim had lived under the tenancy for only a week or a few days or even just overnight. In such cases, the property would clearly not be the victim's family home.

It is appropriate to have a minimum period for the two parties to have lived together. Our approach to setting a minimum threshold of a cumulative six months recognises that abusive relationships can be volatile and unsettled—victims can flee and return on many occasions before finally deciding to end a relationship permanently.

If amendment 52 were agreed to, court action could be taken to end a tenancy and evict a tenant when the property was clearly not the victim's family home. We would have concerns about the proportionality of using the provisions in such circumstances.

For those reasons, I urge Rhoda Grant to seek to withdraw amendment 52. If the amendment is pressed, I ask the committee to reject it.

Rhoda Grant: I am disappointed by what the cabinet secretary said. It is clear that, if somebody

has to live in the home for six months to get protection, we will fail to protect quite a large number of people. Domestic abuse might not become apparent in years to come; after three months of cohabiting, it might become apparent that domestic abuse is an issue. If we only protect people who have lived together for longer than six months, the bill will not be doing the right thing. Therefore, I intend to press amendment 52.

The Convener: The question is, that amendment 52 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Grant, Rhoda (Highlands and Islands) (Lab)

Against

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Finnie, John (Highlands and Islands) (Green)
Kerr, Liam (North East Scotland) (Con)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Robison, Shona (Dundee City East) (SNP)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 1, Against 8, Abstentions 0.

Amendment 52 disagreed to.

Section 18 agreed to.

After section 18

The Convener: The final group of amendments to be debated is on Scottish secure tenancies in cases involving abusive behaviour. Amendment 53, in the name of Rhoda Grant, is the only amendment in the group.

Rhoda Grant: It is important that the victim has a right to stay in their home, if that is what they wish, but it is also important that they have the right to move, whether due to emotional, safety or economic concerns. Amendment 53 aims to make a separate provision in relation to victims who do not want to stay in their home that aims to ensure that they are rehoused without having to be made homeless. The obligation should fall on all registered social landlords and housing associations, and in respect of council tenancies.

The bill aims to keep victims in their own homes, but in certain situations that could be unsafe. Provision should be made to rehouse them in suitable accommodation, although only if that is requested by the victim.

I move amendment 53.

The Convener: As no other member has indicated that they wish to speak on amendment 53, I invite the cabinet secretary to respond.

Humza Yousaf: I note from the briefing that the committee received from Scottish Women's Aid that they do not support amendment 53. I will articulate similar concerns to those that are outlined in the briefing.

The primary purpose of section 18 is to enable social landlords to transfer the tenancy to a victim of domestic abuse, and to support and enable them to live in the family home. Amendment 53 broadens section 18 into new territory and would place a legal obligation on a social landlord to rehouse a victim in a different tenancy at their request, where they do not wish the landlord to pursue a transfer of tenancy of the family home on their behalf. Legal safeguards are already in place to support the rehousing of domestic abuse victims, with social landlords having to give reasonable preference to certain categories of applicants in allocating tenancies, including those who are homeless or threatened with homelessness.

Social landlords routinely work with victims and other support agencies in determining the best housing option to provide safety and stability in the long term; that includes the question whether staying in the family home or moving to another tenancy elsewhere would be the best option. Where a move to a different tenancy is considered to be the best option, that could mean that the victim would be housed by a different social landlord, to ensure that victims, for their safety and security, are not housed in the vicinity of the perpetrator.

Putting a legal requirement on a social landlord to provide a different tenancy could be challenging for landlords, and particularly for smaller community-based housing associations. The availability and location of their housing could put victims in further danger if such organisations are required to offer them a different tenancy within their own housing stock. For that reason, I ask Rhoda Grant to withdraw amendment 53. If the amendment is pressed, I ask the committee to reject it.

12:00

Rhoda Grant: I am disappointed with the cabinet secretary's response. The amendment concerns victims of domestic abuse who wish to move out of the scope of homelessness legislation. The cabinet secretary stressed that there is homelessness legislation that covers people who are homeless and people who are threatened with homelessness, but that could lead to a situation where a victim of domestic abuse is living in temporary homeless accommodation with their family, rather than being rehoused in suitable accommodation.

I will not press amendment 53 today, but at stage 3 I might lodge a similar amendment that offers protection to victims of domestic abuse such that they do not end up in temporary homeless accommodation.

Amendment 53, by agreement, withdrawn.

Sections 19 to 21 agreed to.

Long title agreed to.

The Convener: That ends stage 2 consideration of the bill. The bill will now be reprinted as amended at stage 2, and that version will be published tomorrow morning. The Parliament has not yet determined when stage 3 will be held, but members will be informed of the date in due course, and of the deadline for lodging stage 3 amendments. In the meantime, stage 3 amendments can be lodged with the clerks in the legislation team.

Subordinate Legislation

Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 [Draft]

12:02

The Convener: We have two more public pieces of business to transact this morning, before we move into private to consider our last remaining item. Those two remaining pieces of public business are to consider two affirmative Scottish statutory instruments, the first of which is the draft Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021. I refer members to the relevant paper in our pack, which is a note by the clerk.

The Cabinet Secretary for Justice and his officials are still with us, and I invite the cabinet secretary to make a brief opening statement on the draft order.

Humza Yousaf: Forgive me, convener: I lost you at what was probably the important point. Do you wish me to speak to the draft Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 first?

The Convener: Yes, please.

Humza Yousaf: I am happy to so. Thank you for inviting me to speak in support of the affirmative instrument. Victims of certain crimes are currently eligible to make a victim statement—a written statement that tells the court how a crime has affected the victim physically, emotionally and financially. The judge or sheriff takes the statement into account when it comes to sentencing.

The list of offences for which a statement can be made was prescribed in 2009. Since then, a number of new offences have been introduced—stalking, for example—for which a statement cannot be made. Statements are currently limited to solemn proceedings.

We consulted in 2019 on widening the scope of the current scheme to give more victims the opportunity to have their voices heard. The findings of that consultation make it clear that there is an appetite for change, such as widening the list of eligible offences and piloting new ways for victim statements to be made.

Section 14 of the Criminal Justice (Scotland) Act 2003 provides ministers with the power to prescribe the courts and offences where victim statements can be made, and indeed their form and manner. It does not provide that different provisions can be made under those powers for different purposes. That means that some of the

options that were favoured in the consultation cannot be implemented. For example, statements could not apply to a combination of all solemn offences and a subset of summary cases. Furthermore, we cannot develop pilots to explore issues such as take-up by victims and the resource implications for the criminal justice system and third sector organisations.

The draft order will address that by allowing the powers relating to victim statements that are contained in the 2003 act to be used in a flexible manner in terms of which courts such statements may be made in and for which offences they will apply. If the draft order is approved, it will, once it comes into force, allow for further engagement with key partners on the detail of proposed changes to the scheme.

The consultation demonstrates that there is an interest in enabling all victims to make a statement; that would represent a significant change to the scheme. In its consultation response, Victim Support Scotland said that it would have to consider whether additional resources would be required to enable it to address an increase in demand from victims seeking help with completing their statement. It is therefore sensible for us to take a phased approach in widening the scope of the scheme, and to investigate issues such as the resource implications for victims' organisations and, most importantly, the impact on victims themselves. The order will allow for that flexibility.

By supporting the order, the committee will ensure that powers relating to victim statements can be used in that flexible manner, and it will, ultimately, provide more victims with an opportunity to have their say.

The Convener: Cabinet secretary, can you explain why the Scottish Government is using the process that it appears to be using? I am not sure that I fully understand the technical implications of the issue, but the Delegated Powers and Law Reform Committee has drawn it to this committee's attention.

What appears to be happening, unless I have misunderstood it, is that the Scottish ministers propose to engage in what the DPLR Committee described as

"an unusual or unexpected use of"

delegated powers

"conferred on ... Ministers"

by using a power in section 84 of the Criminal Justice (Scotland) Act 2003 to substitute provisions in section 14 of the same act, as amended by the Victims and Witnesses (Scotland) Act 2014. That is not clear, but I hope that it is accurate.

In other words, it appears that delegated powers are being used to expand the scope of ministers' delegated powers. The DPLR Committee concluded that, while that is "within vires" and is therefore, in its view, lawful, it is nonetheless, as I have just said,

"an unusual or unexpected use of"

delegated powers.

The DPLR Committee went on to say that that is

"something the lead committee"—

namely, the Justice Committee—might wish

"to raise with the relevant minister when taking evidence on the instrument."

I am therefore raising it now, to get on the record the Scottish Government's explanation of why it is using that rather convoluted procedure. I hope that I have understood and summarised the points correctly.

Humza Yousaf: I do not disagree with the DPLR Committee's description of the process as "unusual", or the use of the power in section 84(1) of the 2003 act as "unexpected". To answer the convener's question, we are using the process because it is probably the most expedient way to proceed. We do not think that introducing primary legislation would be the most effective way to proceed, and, to be frank, we are not sure that we can achieve the outcome that we wish, in the manner and at the pace that we would hope to do so, without taking the action that we propose to take.

The convener is right to highlight that the DPLR Committee said that there is no suggestion that the instrument is outwith vires; it is important to put that on the record. However, as I said, the process is the only way by which we feel that we can achieve the outcome that we wish to achieve without having to introduce primary legislation.

The Convener: No other member of the committee has indicated that they wish to ask any questions or make any comments, so we move straight to item 5, which is the formal business in relation to the instrument.

Motion moved,

That the Justice Committee recommends that the Criminal Justice (Scotland) Act 2003 (Supplemental Provisions) Order 2021 [draft] be approved.—[*Humza Yousaf.*]

Motion agreed to.

Community Orders (Coronavirus) (Scotland) Regulations 2021 [Draft]

The Convener: We move to item 6, which is consideration of another affirmative instrument. I refer members to the relevant paper in their pack,

and to the letters from the Howard League Scotland and Dr Hannah Graham. I invite the cabinet secretary to make a brief opening statement on the instrument, and I will then take questions from members.

Humza Yousaf: Thank you for inviting me to give evidence on the draft Community Orders (Coronavirus) (Scotland) Regulations 2021. It might help the committee if I briefly set out the Scottish Government's position. We are seeking parliamentary approval to reduce the unpaid work or other activity requirements of some existing community payback orders, in order to ease pressure on local authorities as the pandemic continues and to ensure that the community justice system can continue to operate effectively.

Committee members will be well aware of the enormous impact that the Covid-19 pandemic has had on the justice system. I have been impressed with the continued adaptability, resilience and hard work that have been demonstrated across the system. In particular, I am extremely grateful to the justice social work unpaid work teams, third sector partners and others, who have all continued to deliver community justice services and related support in the context of necessary public health restrictions.

Throughout the pandemic, justice social work has continued to deliver many of the requirements of CPOs and to prioritise high-risk cases. However, one area that has proved to be particularly challenging—for reasons that I hope are understandable—has been the delivery of unpaid work hours. Due to capacity constraints that have resulted from adhering to local and national restrictions, it has not been possible to deliver unpaid work hours at the pace that is usually expected. The latest data suggests that there are likely to be more than 800,000 hours outstanding across Scotland. A significant reduction in justice social work capacity means that there is a high risk that those hours will not be deliverable within the timescales that are expected by the courts. That could lead not only to the system being completely overwhelmed, but to sheriffs and the public losing confidence that CPOs can deliver justice at all.

Significant barriers will remain to areas operating at full capacity once the latest restrictions are eased, because, inevitably, some restrictions will remain in place until the vaccine roll-out is complete. At the same time, we expect the volume of unpaid work hours to rise significantly as court business resumes. As has been highlighted to the committee in previous correspondence, Social Work Scotland has indicated that the system could become overwhelmed if no action is taken. Similar concerns have also been raised by Community Justice Scotland and the Scottish Association of Social Work. In addition, Scottish Government analysis suggests that, if court business returns to pre-Covid levels while the capacity to deliver unpaid work remains constrained, in excess of one million unpaid work hours could be outstanding by July if no other action is taken. That means that there is clear potential for what is already a challenging situation becoming significantly worse.

I take those concerns seriously, which is why I consider that action is necessary to ensure that existing orders can be delivered safely within a reasonable timescale and that new orders can be started promptly once restrictions ease. The regulations propose to vary all unpaid work hours and other activity requirements in CPOs by reducing the number of hours that are imposed in each order by 35 per cent. The reduction would apply to all CPOs that were imposed prior to the regulations coming into force, with an unpaid work or other activity requirement when hours are outstanding.

The only exceptions are CPOs that were imposed, either entirely or partially, for domestic abuse, sexual offences or stalking. The exclusion of those offences is intended to mitigate risks arising from the particular barriers that exist to reporting those offences, some of which we discussed during the stage 2 proceedings earlier today. Those barriers are not found to the same extent with other offences. The Scottish Government and other justice organisations have taken steps to reduce such barriers in recent years.

I acknowledge that the regulations contain extraordinary powers, which are intended to be used only when absolutely necessary. Under ordinary circumstances, we would never propose—or even consider proposing—altering sentences that have been imposed by the courts. It is a sign of just how much of an impact the pandemic has had that we are proposing to do that today. I assure victims of crime and others that the justice system continues to hold those who commit offences to account, and to keep our communities safe.

The regulations focus specifically on unpaid work or other activity requirements only; all other requirements will remain in place. That means that individuals who require supervision or specific interventions to address their offending will continue to receive that. The regulations strike an appropriate balance between removing enough hours to assist justice social work services and ensuring that individuals complete the majority of their unpaid work requirement, as imposed by the courts. The regulations are a proportionate and necessary response to a global pandemic. They will help to ensure that Scotland's justice system

can function effectively in extraordinary circumstances.

I hope that that is helpful. I am happy to answer questions.

12:15

The Convener: Four members have indicated that they have questions. If I may, I will take all the questions before coming back to the cabinet secretary to allow him to respond to them.

Liam Kerr: There are two parts to what I will ask. To be clear, so that viewers understand exactly what is happening, in practical terms, the proposals mean that a criminal—part of whose punishment a court felt should be in the form of unpaid work—will have that punishment written off and nothing will be put in its place as punishment for the crime. If I am right on that, I am not sure that victims will see that as holding criminals "to account", as the cabinet secretary said.

Having confirmed that that is the case, will the cabinet secretary also confirm precisely what the Scottish Government has been doing during this period to anticipate and address these issues in order to try to ensure that we did not find ourselves in the position that we appear to be in today?

Rhoda Grant: We all understand that we are in a pandemic—[*Inaudible*.]—regard to people's safety; I think that we take that as read. Nonetheless, I have some concerns, because punishments as well as actions to divert people from offending behaviour were handed down by the courts. What discussions has the cabinet secretary had with sheriffs to ensure that they remain confident in community disposals? The last thing that we want is the Government's action leading to an increase in the number of people who are in prison, which has its own risks in a pandemic. We therefore need to be very careful.

What consideration has the cabinet secretary given to putting alternative provision in place, such as online education? That could take the same time commitment as unpaid work, but it might leave people with a qualification or something that they could build on in the future, and it would use the time that was to be set aside for reparation.

How will the cabinet secretary ensure that the action that was to be taken to divert people from offending behaviour as part of the sentence still takes place? We need to address offending behaviour and make sure that it is not repeated; otherwise, we will put people on a merry-go-round that takes them in and out of court. What steps has he taken to ensure that the Government's action will not in any way detrimentally affect that approach?

John Finnie: I have a few comments and a couple of queries for the cabinet secretary. I fully endorse his position. A pragmatic approach is being taken. Indeed, it would be blissfully naive to assume that unpaid work hours would not be impacted in any way by a global pandemic, as everything else has been.

We have had representations from the Howard League with regard to the exclusions. The cabinet secretary knows that I am a very strong supporter of all measures that are taken against perpetrators of domestic violence. However, if a decision has been taken on a disposal that involves unpaid work, surely that will have been informed by a risk assessment. I would like to think that risk assessment is an on-going process. Is it therefore populist to exclude some of those categories? Of course, I understand the pernicious nature of domestic violence, stalking and crimes to which there is an almost psychological aspect. However, I presume that that is taken account of when the sentencing sheriff reaches their disposal. Will the cabinet secretary comment on that, please?

With regard to the letter that we received from Dr Hannah Graham on ECHR compliance, are you content that there is a robust legal basis for the proposals? Although I know that you do not, by convention, share your advice with us, will you comment on that as well, please?

As a general principle, I of course agree with my colleague Rhoda Grant about activity being meaningful and about exploring potential alternatives, but we have to be realistic. We are aware of the challenges that exist throughout our criminal justice system, which are no different from the challenges in every other walk of life.

I absolutely support the pragmatic approach, but I ask the cabinet secretary to address those few issues, please.

Fulton MacGregor (Coatbridge and Chryston) (SNP): Like John Finnie, I completely agree with the cabinet secretary's proposals. We need to be pragmatic. I disagree with Liam Kerr, who opened the discussion by talking about how justice could be brought into disrepute. The cabinet secretary is right that that is exactly the effect that there could be come July or August, or whenever it might be, if we do not do anything and millions of hours of unpaid work have not been done. That is more likely to mean that sheriffs would lose faith in CPOs. It is also important to note that the cabinet secretary said that the deduction will be brought into play only for unpaid work.

I have a different concern from those of Liam Kerr and Rhoda Grant, in that I question whether the cabinet secretary thinks that the 35 per cent reduction will, in fact, be enough. I say that

because we do not know for how long restrictions will continue or whether new restrictions will be needed, although we all hope that they will not be needed. I apologise if I have missed this, but is provision for a review built in, so that we can consider whether further reductions might be needed at some point or whether—as Rhoda Grant and John Finnie said—unpaid work hours could be replaced with something else that might work?

I should declare my interest as a registered social worker with the Scottish Social Services Council.

Liam McArthur (Orkney Islands) (LD): As other colleagues have suggested, the proposals appear from my perspective to be a pragmatic response to one of the many challenges that have been thrown up by the pandemic. As Fulton MacGregor said, doing nothing, sticking our fingers in our ears and wishing the issue away is not a response that the public would be terribly grateful for, either. Given the reports over the past week of significant Covid outbreaks in our prison estate, which is already bursting at the seams, a pragmatic approach to the orders along the lines that the cabinet secretary has suggested is a reasonable one to take.

I hope that the cabinet secretary will address John Finnie's point about exclusions. As he rightly said, all this has to be done on the basis of risk. If the risk has been assessed and the orders have been deemed appropriate, it is difficult to see how an intervention that excludes some offences and not others can be justified in relation to the approach towards discounting that is being taken. Although I am sure that the cabinet secretary will address that, I want to back up what John Finnie said in that regard.

The Convener: We do not often have such a lengthy debate on an affirmative SSI, but the question that has been puzzling me as I have been listening to the debate is: given that this situation was wholly predictable, why has the budget for criminal justice social work been frozen? Perhaps the cabinet secretary could respond to that question as well as to the others that committee members have asked in relation to the SSI.

Humza Yousaf: I am happy to address that point as well as all the other points. I will try to go through all the questions in the order that they were put to me, but if I miss anybody out, please tell me, and I will be happy to listen.

I do not agree with Liam Kerr's premise that we are writing off community orders. We clearly are not writing them off; we are reducing the unpaid work element by 35 per cent. That means that the majority of the hours that are imposed—65 per cent—will still have to be completed by individuals. It is not a case of the orders being written off.

I am not exactly sure what Liam Kerr means with his question on why the issue could not have been anticipated. We all realise the effects of the global pandemic and the challenges that it has brought. Nobody could have anticipated the length of time for which we have had to live under restrictions or the full impact or effect on organisations. It is not just about being able to get people back into groups of five, six, seven or eight and getting them into a minibus to go off and paint a local community centre; it is about the fact that resources at local authority level have had to be diverted away from criminal justice social work and put into other departments in order to respond to the Covid-19 pandemic. Those are the reasons why we are in the situation that we are in.

Rhoda Grant made some excellent points. I have had discussions with sheriffs, as have my officials. Along with Community Justice Scotland, we are talking to sheriffs about our plans. Our concern is that, if the system was overwhelmed, sheriffs would have no alternative but to give people a custodial sentence. As Liam McArthur suggests, that would not be a wise move at a time when some of our prisons are already full.

Rhoda Grant made other helpful remarks. I can give her an absolute assurance that the interventions that are in place in a community order to address somebody's offending behaviour will not be affected by the reduction in unpaid work hours. For example, if interventions are still necessary to address a person's substance abuse issues, they will continue. At the very least, they will not be affected by the 35 per cent reduction. Some local authorities have pursued alternatives where that is possible.

On John Finnie's questions, I could probably be accused of many things, but being populist on the issue is perhaps not one of them. This is not a particularly popular policy, generally speaking, but it is a necessary policy for us to implement. It involves pragmatic and sensible governance, and it is important for us to address the issue head-on.

On the question that John Finnie and Liam McArthur asked, which was also asked by the Howard League and Dr Hannah Graham, I listen to organisations such as the Howard League and to individuals such as Hannah Graham carefully, and I can give an absolute assurance that we have a legal basis for what we are doing. Under article 14 of the ECHR, there can be objective justification for treating various people and categories differently. We are excluding certain offences because of the unique dynamic involved—in the majority of cases, that tends to be the dynamic of men's power over women and the barriers that exist to reporting domestic abuse,

sexual offences and stalking, which are different from the barriers in relation to other offences. That is not to say that there are not barriers to reporting other offences—for example, I know that there are barriers to reporting hate crime—but there is a unique dynamic when it comes to the offences that we are excluding. We believe that we are legally justified in making the exclusions that we are making.

Fulton MacGregor made a fine point. He will probably have noted that Social Work Scotland asked us to go further than we are going. There is no review mechanism built in per se, but we will keep the issue under review.

On the convener's question about the budget, we have allocated £50 million in our recovery, renewal and transformation project. Understandably, a lot of the focus of that £50 million is on the backlog of court cases, but I can confirm that the £50 million will also be used to bolster the community justice arm of the justice system.

The Convener: We move to formal consideration of motion S5M-24033. I ask the cabinet secretary to move the motion.

Motion moved,

That the Justice Committee recommends that the Community Orders (Coronavirus) (Scotland) Regulations 2021 [draft] be approved.—[*Humza Yousaf*]

The Convener: The question is, that motion S5M-24033, in the name of Humza Yousaf, be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For

Ewing, Annabelle (Mid Scotland and Fife) (SNP)
Finnie, John (Highlands and Islands) (Green)
Grant, Rhoda (Highlands and Islands) (Lab)
MacGregor, Fulton (Coatbridge and Chryston) (SNP)
Mackay, Rona (Strathkelvin and Bearsden) (SNP)
McArthur, Liam (Orkney Islands) (LD)
Robison, Shona (Dundee City East) (SNP)

Against

Kerr, Liam (North East Scotland) (Con)
Tomkins, Adam (Glasgow) (Con)

The Convener: The result of the division is: For 7, Against 2, Abstentions 0.

Motion agreed to.

The Convener: I invite the committee to agree to delegate to me the publication of a short factual report on our deliberations on both the affirmative SSIs that we have considered today.

That concludes the public part of the meeting. Our next meeting is scheduled to take place a week today, but that will be confirmed in due course.

12:31

Meeting continued in private until 12:48.

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