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Official Report

JUSTICE COMMITTEE

Tuesday 26 October 2010

Session 3

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JUSTICE COMMITTEE
28th Meeting 2010, Session 3

CONVENER

*Bill Aitken (Glasgow) (Con)

DEPUTY CONVENER

*Bill Butler (Glasgow Anniesland) (Lab)

COMMITTEE MEMBERS

*Robert Brown (Glasgow) (LD)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Nigel Don (North East Scotland) (SNP)
*James Kelly (Glasgow Rutherglen) (Lab)
*Stewart Maxwell (West of Scotland) (SNP)
*Dave Thompson (Highlands and Islands) (SNP)

COMMITTEE SUBSTITUTES

Claire Baker (Mid Scotland and Fife) (Lab)
John Lamont (Roxburgh and Berwickshire) (Con)
Mike Pringle (Edinburgh South) (LD)
Maureen Watt (North East Scotland) (SNP)

*attended

THE FOLLOWING ALSO ATTENDED:

Rhoda Grant (Highlands and Islands) (Lab)
Rhoda Grant (Highlands and Islands) (Lab)

THE FOLLOWING GAVE EVIDENCE:

Lesley Dowdalls (Law Society of Scotland)
Katie Hay (Law Society of Scotland)
Anne Marie Hicks (Crown Office and Procurator Fiscal Service)
Assistant Chief Constable Iain Livingstone (Association of Chief Police Officers in Scotland)
Christopher Macintosh (Crown Office and Procurator Fiscal Service)

CLERK TO THE COMMITTEE

Andrew Mylne

LOCATION

Committee Room 1

Scottish Parliament

Justice Committee

Tuesday 26 October 2010

[The Convener *opened the meeting at 10:03*]

Decision on Taking Business in Private

The Convener (Bill Aitken): Good morning, ladies and gentlemen. I ask everyone to ensure that their mobile phones are switched off. We have a full attendance this morning and have therefore received no apologies.

Our first item is a decision on taking business in private. Does the committee agree to take in private item 3, which is consideration of potential witnesses for our draft budget scrutiny?

Members *indicated agreement.*

Domestic Abuse (Scotland) Bill: Stage 1

10:04

The Convener: Item 2 is the second evidence session on the Domestic Abuse (Scotland) Bill. The bill has been introduced by Rhoda Grant MSP, who is attending this morning's proceedings. Our first panel of witnesses is from the Law Society of Scotland and I welcome to the meeting Lesley Dowdalls, from the family law subcommittee, and Katie Hay, who is a law reform officer. I particularly welcome Ms Dowdalls on what is, I think, her first appearance before the committee.

We will move straight to questions. How effective are the existing mechanisms for dealing with domestic abuse? In general terms, will the bill increase access to justice for victims of domestic abuse?

Lesley Dowdalls (Law Society of Scotland): The difficulty is that there has been no great take-up of the remedies that are available for breach of the existing orders. Obviously, the bill is trying to address that situation, but I think that it raises other issues related to certain practical difficulties that solicitors who are trying to deal with breaches of interdicts and achieve some kind of practical outcome in these matters are finding on the ground.

The Convener: Do you have anything to add, Ms Hay?

Katie Hay (Law Society of Scotland): No.

The Convener: Will removing the course of conduct requirement benefit victims of domestic abuse? Will the definition of harassment still cover an element of recurrence even with the removal of that element and, if so, will section 1 change the law in practical terms?

Lesley Dowdalls: The proposal to remove the course of conduct requirement is sensible, but it will depend on the interpretation of harassment by the sheriff or judge listening to the application or case.

The Convener: I think that the unanimous view around the table is that, although we agree that we should be doing everything that we possibly can to help women, in particular, who find themselves in this position, there is evidence to suggest that the present legislation is pretty impotent. Obviously, that concerns us. Will the bill significantly improve matters in that respect?

Lesley Dowdalls: As I have said, the difficulty is with the uptake of remedies to deal with breaches of interdicts, but I suppose that the

starting point should be the actual application process for an interdict. When a person seeks advice on raising interdict proceedings, all sorts of practical considerations have to be taken into account and dealt with, not least the question of how the action will be funded. However, although many seek legal advice on interdicts and on how to deal with unacceptable behaviour, they do not all necessarily want to go through the process of obtaining one. For instance, they might not want the person they are seeking the interdict against to receive a copy of the proceedings, to be given the opportunity of arguing against the application and so on and, once the procedure is explained, people often decide not to embark on it.

Secondly, the police take a fairly robust approach to domestic incidents, which means that, when I am approached for advice on conduct that could be interdicted, I quite often find that a criminal prosecution is also on-going. Bail orders are very effective in such matters. As I say, many practical issues arise when someone initially seeks advice on raising interdict proceedings.

The next layer of difficulty comes up when people go through the process and then obtain an interdict that is subsequently breached. Obviously, the process of dealing with such breaches is cumbersome, because people have to apply for legal aid to fund the proceedings and ensure that they gather evidence to support, first, their legal aid application and, secondly, their application to the court.

The Convener: However, the bulk of problems will be picked up by the criminal law through breach of the peace or assault.

Lesley Dowdalls: Yes. A robust approach is now taken. In general, offenders are removed from the situation quickly and put in custody immediately. From there, I understand that the prosecution service has strict rules about how offenders are dealt with. That robust approach represents a complete change in the past few years.

Robert Brown (Glasgow) (LD): I have a supplementary question on the future element. I will develop your point. The change in section 1 is partly about taking away the need for a repeat incident. What will that mean in practice? The obtaining of the order would have to be reasonably justified and harassment has an on-going element to its definition. Would the proposed change make any difference in practice?

Lesley Dowdalls: In practice, the process would be easier, because we would not have to say immediately to someone, "I'm sorry—one incident isn't enough." That would be an immediate benefit. The interpretation of harassment will always be a bit of an issue.

Robert Brown: I am getting at what else would be needed to obtain an order, if section 1 were implemented.

Lesley Dowdalls: Are you asking what other conduct would be needed?

Robert Brown: Would one incident be enough to obtain an order, or would one incident with other evidence of an on-going situation be needed?

Lesley Dowdalls: My interpretation of section 1 is that one incident would be sufficient, as long as the conduct in that one incident was sufficient to constitute harassment.

Robert Brown: I accept that but, because the concept of harassment includes the idea of an on-going element and because the court has a duty to consider whether an order is necessary, would it be necessary to have something more than one incident or to have at least one serious incident?

Lesley Dowdalls: My interpretation of the bill is that that would not be necessary, but it certainly would be preferable in arguing the necessity for an order. Part of the approach is to show an intention to continue to act in the fashion that has been described. That is always the way with interdicts, too—it is argued that the conduct can be reasonably expected to continue unless interdicted.

Robert Brown: My point is that some evidence of the intended future conduct would be needed, notwithstanding section 1.

Lesley Dowdalls: That would be for the courts to interpret—the position would be set out in case law that arose thereafter. At this point, it is difficult to say how the issue would be dealt with.

The Convener: You mentioned the impact on legal aid, which James Kelly will pursue.

James Kelly (Glasgow Rutherglen) (Lab): Section 2 amends the Legal Aid (Scotland) Act 1986 to widen the provisions for granting legal aid in domestic abuse cases. The tightening budget and other issues that could have an impact on the legal aid budget increase the focus on those proposals. Would removing the financial eligibility test for civil legal aid in cases that involve domestic abuse represent a good use of available resources?

Lesley Dowdalls: The suggested provision is laudable. I understand why it is attractive, because it would ensure that people were not barred for financial reasons from raising proceedings. However, the test to obtain legal aid is not simply financial; it involves merits, too. I understand that removing the merits test has not been suggested. That means that, regardless of their financial position, not everyone who wants to proceed with interdict proceedings will be able to do so,

because they will still have to satisfy the Scottish Legal Aid Board on the reasonableness test and the probable cause test. The issue is not simply financial.

James Kelly: Do you think that the terms of section 2 are appropriate?

Katie Hay: The point follows on from your initial question. In addition to the point that Lesley Dowdalls raised is the issue of whether the finances that are made available will actually increase solicitors' take-up of work in this area. There is a potential issue from that perspective. In its evidence, the Family Law Association referred to the fact that having access to the funds does not necessarily mean having access to the remedy.

10:15

James Kelly: Looking at the matter from the point of view of the victim, is it appropriate for victims of domestic abuse in certain circumstances to pay to take action to be protected from such abuse?

Lesley Dowdalls: They would not have to do so in a perfect world, but the difficulty is that there are financial constraints on the legal aid budget, which has to be distributed among all sorts of legal remedies.

This is not simply a matter of financial eligibility; there also has to be sufficient evidence and information to support applications.

There are other remedies. Often, the conduct in relation to which an interdict is sought is also a criminal offence, and it can be dealt with through the police and the criminal justice system. The bill's provisions are not the only available remedy.

James Kelly: Is the bill sufficiently clear on whether section 2 applies to any action that includes a crave for protective orders, such as those concerning divorce, residence and contact, or whether it applies only to stand-alone actions for protective orders?

Lesley Dowdalls: My reading of the bill is that it would relate only to stand-alone orders. It specifically refers to the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Protection from Abuse (Scotland) Act 2001. If there is to be free legal aid in relation to certain craves in an action, but not to others, that will cause great complexity.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I will continue on the same theme. In previous evidence we heard from such organisations as ASSIST—the advice, support, safety and information services together project—which indicated that the declining number of solicitors who are prepared to take on cases in this area was a barrier to justice. To what extent do non-financial barriers, including that shortage of solicitors and the lack of probable cause, prevent access to justice in domestic abuse cases?

Lesley Dowdalls: I cannot comment in relation to any statistics on that. However, as Katie Hay has already said, the point is not just about the availability of legal aid; there is also an issue about the level of remuneration relating to cases of this type.

Given the nature of such cases, emergency proceedings apply, and the solicitor is required to drop everything else and deal with them until the interim interdict is obtained. That can involve a lot of work in the office to get to the stage of producing and preparing the writ, with a legal aid application submitted and so on, and then going to court, waiting until a sheriff is available and having a hearing about the interim interdict.

Those processes are highly time consuming and, by their nature, they cannot be predicted and slotted into a particular time. They involve rearranging other work and diary commitments. In that regard, solicitors are not adequately remunerated. Although legal aid can become available, a large number of solicitors will still have concerns about being able to afford to take on such work, given the level of remuneration for the actions that are taken.

Cathie Craigie: How does the Law Society support solicitors who find themselves in a position in which they cannot take on cases? What guidance and support does the society offer?

Katie Hay: Obviously, the society cannot compel solicitors to take on work. However, we have a criminal legal aid negotiating team and a civil legal aid negotiating team. Certainly, the criminal legal aid negotiating team is involved in a good tripartite working relationship with the Scottish Government and the Scottish Legal Aid Board. The civil legal aid negotiating team was set up more recently and I do not think that it has established that relationship yet. All that the society can hope to do in such circumstances is improve conditions for legal aid solicitors within the available means.

Cathie Craigie: Moving on a bit, if the financial eligibility test for civil legal aid in cases involving domestic abuse is to be removed for pursuers, would there be an obligation under human rights legislation to remove the financial eligibility test for defenders, too?

Lesley Dowdalls: Yes. The perceived approach of the Legal Aid Board and, in my experience, its actual approach have always been to attempt to provide equality of arms. We could not have a situation in which defenders were not given the

same rights as pursuers to access legal representation.

Robert Brown: I want to pursue the question of options because there are a number of financial and other implications. I presume that the vast bulk of the orders are interim orders. Am I right that very few cases go to proof on the issues that we are discussing?

Lesley Dowdalls: Yes.

Robert Brown: So the issue is about access to justice in relation to emergency orders primarily. I wonder whether there are other ways to get at the issue. Are there perceived infelicities in the operation of the emergency legal aid arrangements? It has been suggested that a woman who is involved in a domestic dispute might be put out of the house, might not be able to go to work temporarily because she is upset, and might not have access to the joint bank account. Although resources might be lurking about, they might not be immediately available to her, and the legal aid contribution that eventually emerged might be a deterrent to her proceeding. Are there ways in which we can improve the situation without necessarily going down the line that is proposed in the bill?

Lesley Dowdalls: That is a matter for the Scottish Legal Aid Board to consider. However, at the moment I cannot see a way of getting round the requirement to satisfy the Legal Aid Board about financial eligibility. If the test is changed in relation to domestic abuse proceedings, other equally important proceedings will need to be looked at too—I am thinking about children's referral proceedings in particular. There are other important family actions, never mind other types of action, that require a financial eligibility test.

Robert Brown: That was the other point that I was going to ask you about: does the Law Society think that domestic abuse, important though it is, should be picked out from access disputes and given particular treatment? Perhaps the things that you have talked about or cases that involve fatal accidents or racial abuse should also be included.

Katie Hay: The research that we carried out into civil legal aid in 2007 identified family law as a problem area. It is difficult to identify areas within family law that take priority over others.

Lesley Dowdalls: All such areas compete in terms of importance—they are all important and relevant to the people involved.

The Convener: We now need to look at section 3, on the breach of interdicts with powers of arrest. Bill Butler will pursue that matter.

Bill Butler (Glasgow Anniesland) (Lab): Good morning, colleagues. You will know that the evidence supplied by Scottish Women's Aid states that women currently have no confidence in the ability of interdicts to tackle domestic abuse. Does the Law Society believe that existing mechanisms for dealing with breach of interdict in domestic abuse cases are adequate?

Lesley Dowdalls: The evidence suggests that they are not, because there is such a small take-up rate in relation to breach of interdict.

Bill Butler: I thought that you would say that.

ASSIST argued that criminalising a breach of an interdict in domestic abuse cases would provide additional protection to victims of domestic abuse by taking the matter out of the hands of victims and placing it in the hands of the police. Basically, that is what section 3 provides for. What is the Law Society's view of the proposals in section 3? Would they improve the situation?

Lesley Dowdalls: Yes—as long as the criminal standard of proof, as opposed to the civil standard of proof, applied. That issue has been addressed in the Law Society's submission.

Bill Butler: Indeed. That leads nicely on to my next question.

The Law Society has grave concerns about relaxing the standard of proof and corroboration, but we heard in evidence from Scottish Women's Aid that there are already exceptions to the corroboration requirement, for example in relation to breaches of probation orders, restriction of liberty orders, community service orders, drug treatment and testing orders and supervised attendance orders. Does that counter-argument carry any weight with the Law Society?

Lesley Dowdalls: I understand that response, but the difference in those cases is that it is not the victim but officers of court who carry the responsibility of reporting a breach. The orders that you mentioned tend to follow on from a court order. For example, if there is a breach of a community service order, a community service officer will report that breach. In effect, they are an extension of the court—I cannot remember the word that I am looking for. They are court officials whose role is to monitor compliance.

In the situation under discussion, if the uncorroborated evidence of a victim were sufficient to establish that there had been a breach, we would be talking about a different role altogether, because it would not be performed by an officer of the court or someone whose role it was to monitor compliance with a particular court order.

Bill Butler: It would be performed by someone—

Lesley Dowdalls: It would be the victim—the person who obtained the order—who would

monitor compliance and who would provide the only evidence that was required to establish that the order had been breached.

Bill Butler: So you would say that the argument of Scottish Women's Aid is understandable but that, in the Law Society's view, it does not bear scrutiny.

Katie Hay: We discussed the issue earlier. Any decision to relax the rules of corroboration would be one for someone considerably above my pay grade or that of Lesley Dowdalls. I do not think that we would suggest relaxing the rules of corroboration.

Bill Butler: It is a policy matter. I was simply asking for the Law Society's view, which you have expressed. You have nothing further to add.

Katie Hay: No.

Bill Butler: Thank you very much.

The Convener: There is a slight difference in emphasis between what you have said this morning and what was said in the submission, which I see is dated 13 September. It said that the society's criminal law and family law committees

"would request clarification on what standard of proof criminal liability would be imposed in such cases. In the committees' view, any criminal liability without the criminal standard of proof together with corroboration cannot be accepted—no matter how superficially sympathetic a pursuer's cause may be."

Katie Hay: Yes, that is our official line.

The Convener: It is the official line.

Katie Hay: Yes. I think that I said the same thing; it is just that I said it in a slightly less legalistic and definitive way.

The Convener: That is fine. Your position on the matter is reasonably clear.

Katie Hay: Without a doubt.

The Convener: Your submission also mentioned the law of contempt of court, which carries a significant criminal penalty. Is that not adequate to deal with situations of the type that we are discussing?

Lesley Dowdalls: It ought to be, but experience seems to be that it is not used very often. Contempt of court ought to be an appropriate remedy if there is a breach of a court order.

The Convener: It seems that it could save people from having to go through quite a convoluted process and could bring about a much more immediate remedy for the pursuer.

Lesley Dowdalls: Yes. We discussed earlier that, when a defender is brought before the court and the sheriff has to consider matters, if there are to be no criminal proceedings in situations in which the person can be kept in custody for two days, at that point contempt of court could be considered. I do not know why that does not happen.

The Convener: The contempt that would be complained about would be the contempt of a judgment that was made by the sheriff who heard the original case. Since the law of contempt of court was changed, that sheriff cannot hear the case and has to remit the matter for consideration elsewhere. Could that be some of the thinking that has led to the situation?

10:30

Lesley Dowdalls: The legislation that allows for the two days was introduced before the review of contempt of court. In practice, it is unlikely that the sheriff whom somebody is brought before will necessarily be the sheriff who granted the original order in any event. That is not always the way in which it works. It could be a different sheriff who hears the case.

The Convener: I hear what you say, but there has been a thread of evidence throughout the process that there is a particular difficulty in the north of Scotland, where there are jurisdictions in which there is only one sheriff. That could be an issue, could it not?

Lesley Dowdalls: Yes, I can understand that it could be an issue in remote locations.

The Convener: I am just trying to tease out the difficulties that could arise.

Lesley Dowdalls: I do not know why contempt of court is not used more often in such proceedings. Contempt of court is entirely at the discretion of the sheriff who hears the circumstances. That is perhaps a matter that the Sheriffs Association could address.

The Convener: We might pursue that in other directions.

Nigel Don (North East Scotland) (SNP): Good morning, ladies. Is the current common-law definition of "domestic abuse" adequate? Do we need section 4?

Lesley Dowdalls: The Law Society response makes it fairly clear that there are concerns about the definition in section 4.

Nigel Don: I will turn the question round, then. There may be concerns about the definition in section 4, but can we start by considering whether the current definition in the common law is adequate? Are there problems with the common-law definition that we need to address, hence we need to get section 4 right, or are there no problems, hence we do not need section 4?

Lesley Dowdalls: On a practical basis, as a practitioner applying the law, I do not think that there is necessarily a difficulty. People understand what is meant by "domestic abuse". I wonder whether the intention of section 4 is to broaden the definition so that it covers more than is generally understood. In general, people understand what "domestic abuse" means and have a fairly clear understanding of whom it relates to.

Nigel Don: I want to pick up on the issue of minorities. In some ethnic environments, there are extended families, different family structures and other ways of living. Our law is gradually catching up with that, although perhaps too slowly. Are there issues there that section 4 should address, or are those matters covered adequately by the common law?

Lesley Dowdalls: It depends on whether there is an acceptance of what the common-law definition is. The dictionary definition of the word "domestic" is just that it relates to the running of a home or to family relations. That is broad enough to cover the kind of situations to which your question relates. It covers a broad enough family relationship.

Nigel Don: You feel that the courts understand the nature of the extended family, perhaps involving the relationships of nephew and niece, and the circumstances in which the whole stratum constitutes a family, who may well be under one roof for some of the time but not all of it. However, that does not cause the law any complications, as you see it.

Lesley Dowdalls: It might be an oversimplification to say that the issue does not cause any complications, but if there is a general acceptance of a definition of "domestic", that should be broad enough to encompass the situations that you anticipate. Obviously, as happens with all statutory law, thereafter there comes case law in decisions about how the definition is to be dealt with.

Katie Hay: The family law sub-committee has been involved in the development of the Forced Marriage etc (Protection and Jurisdiction) (Scotland) Bill and I know that cultural issues were given a great deal of consideration in the lead-up to the publication of that bill. If the Domestic Abuse (Scotland) Bill wants to deal with domestic abuse in a wider sense that encompasses different cultural situations, such situations may need to be given more consideration. I do not know whether that has been taken into account in the drafting of the bill. Such further consideration might be helpful.

Nigel Don: That seems to suggest that you think that the definition in the bill might be too narrow.

Katie Hay: I do not know whether it is too narrow. Having a broad definition that you can fit a lot into is a double-edged sword. All I am saying is that if you are going to have a broad definition, you at least want to be reassured that it has been tested for several types of situation.

Nigel Don: A question that arises in relation to many cultures is whether domestic abuse should be defined widely enough to cover the intrusive behaviour of—dare I say it—mothers-in-law and folk who might be living under the same roof. Domesticity has an element of being under the same roof—roughly anyway. Is the definition before us wide enough to cover that? I fear that it is not. Does the common law provide us with a way forward or do we need to widen section 4? I guess that that is the question that is exercising the committee.

Lesley Dowdalls: Is your concern about the definition of "abuse" or about the definition of "domestic"?

Nigel Don: It is about the adjective "domestic", rather than about "abuse", but I take the point that that might cover different issues.

Lesley Dowdalls: Yes, because "abuse" is given quite a specific definition, which seems to cover most types of conduct that would give rise to a need for intervention.

Nigel Don: I think that the issue is the definition of "domestic".

Lesley Dowdalls: The "Oxford English Dictionary" definition of "domestic" seems to cover family in the wider sense. I suppose that definition would be required as case law developed, which is always a difficulty. If the definition of "domestic" is in terms of family relations and the running of a family home, that might be sufficient.

Nigel Don: Am I entitled to draw the conclusion that you are suggesting that we retain the definition of "abuse" as a very long string but take away the definition of the relationships and "domestic" and allow the common law to work that through? Is that where we have got to?

Lesley Dowdalls: On a practical basis, that would be my approach. I think that it would be a better approach.

Katie Hay: We discussed the fact that, although the bill has only five sections, when we start scratching the surface, more and more issues seem to arise. One of the concerns is that, although previous witnesses said that they did not want a definition to be in the bill, if you are going to provide legal aid for domestic abuse, you will have to limit the definition somehow. If you have an unlimited statutory definition, that could give rise to difficulties in that sense.

The Convener: There seems to be an absence of case law in relation to these definitions. I remarked to Mr Butler that the most abused word in the English language is in fact "abuse", which can range from fairly mild verbals to quite serious physical and sexual violence at the extreme end of the scale. We do not have a legal definition of "abuse". "Domestic" can be taken to refer to the narrow confines of what happens in a private dwelling-house or to the wider circle including a situation where, for example, a woman who has been in a relationship with a man is subjected to pressure well away from the family home. We do not have any tight legal definitions, do we?

Lesley Dowdalls: Not of "domestic", no.

Katie Hay: The family law sub-committee has also been looking at the Children's Hearings (Scotland) Bill, which is being considered by the Education, Lifelong Learning and Culture Committee. That bill proposes that domestic abuse should be one of the grounds for referral, but we have suggested that it should not be a stand-alone ground as we are concerned that, because of the lack of statutory definition, it might detract from the child's position at the centre of proceedings. It might give rise to a difficulty of interpretation, so we have suggested that it should be moved to something to do with parental—

Lesley Dowdalls: Lack of parental care.

Katie Hay: Exactly. That would give more of a context and help to remove some of the interpretational difficulties.

The Convener: It perhaps makes our task more difficult that there has not been any case law on the matter. That is unfortunate, but we have to proceed as accords.

I ask the member in charge of the bill, Rhoda Grant, who has sat here patiently all morning, whether she has any questions that she would like to pursue with the witnesses.

Rhoda Grant (Highlands and Islands) (Lab): I will ask a couple of questions, if that is okay.

Earlier in the evidence, the witnesses talked about bail orders and the conditions attached to them as being quite robust protection, and they said that some people might not have taken out interdicts with powers of arrest because there were bail orders in place. Can bail orders and interdicts run in conjunction with each other?

Lesley Dowdalls: Yes. However, if there is a requirement to satisfy the necessary test, I suppose the Scottish Legal Aid Board would be entitled to say, "If this person is subject to a bail order at present, you don't need an interdict."

Rhoda Grant: But if somebody pleads guilty, bail orders tend to fall at that point.

Lesley Dowdalls: Yes, unless sentence is deferred to a later date. That is the difficulty that we come to in the end when the case is dealt with and finally disposed of.

Rhoda Grant: Okay. Moving on, I am giving a great deal of thought to actions with multiple craves, because it seems unfair that those who want to deal with other things are not offered the same protection under the bill. I have spoken to some folk in the legal profession who believe that it would be possible to negotiate a block fee when the work to deal with the interdict is part of an action with multiple craves. The block fee would be agreed by the Scottish Legal Aid Board and your negotiating panel.

Other people have said that it would be necessary to go through a legal accountant who can account for the part of the process that is to do with the interdict and the parts that are not, but that seems very complicated. It has been suggested to me that the simplest method is to have a block fee for that part. Do you regard that as satisfactory or do you see problems with the idea?

Lesley Dowdalls: I can see why it has been suggested as a way forward, but I see problems with it. If an action is raised and there are a number of interim craves that require to be resolved—not just protection from abuse, but contact, residence or other interim matters—they will all be dealt with at one hearing. It would be really difficult to separate out what was covered by the block fee and what was not.

Rhoda Grant: But what if the block fee were a finite amount and did not require to be separated out? I do not envisage a legal accountant going through and separating it out, as that seems hugely complicated and probably costly. It could be agreed that a block fee—the figure that has been put to me is £500—would cover part of an action.

Lesley Dowdalls: There are two issues with that. One is that a block fee of £500 would be exceptional because nothing else attracts a block fee of anything like that amount of money. The other is that, when someone submitted an account for the other matters, the Legal Aid Board would be able to say, "You were there for the hearings in relation to the interim interdict or whatever other protective measure and you were already paid for that under a block fee, so we are not paying you for the additional matters that need to be done." The hearings would all take place contemporaneously so, if there were issues to do with children or other interim matters, they would all be dealt with at the same time.

10:45

Rhoda Grant: That would be the case only when someone already qualified for legal aid. If they did not qualify for legal aid, they would not be claiming.

Lesley Dowdalls: I would anticipate that, if someone did not qualify for legal aid, they would not raise all the proceedings as one action. If they were entitled to legal aid without means testing in relation to the protective measures, that would probably be a stand-alone action and they would need to consider their funding position if they wanted to raise any other proceedings.

Rhoda Grant: Sorry, I know that my questions are coming out of the blue, so you have not prepared for them. If someone was granted legal aid, there would be no problem with that, because not only would their interdict be covered but so would all their other actions and they would go on as normal.

Lesley Dowdalls: The situation would be the same as it is now.

Rhoda Grant: The only people who are really affected are those taking out multiple craves who are not covered by legal aid, because they would be looking for the protection that is covered by legal aid in the bill but would not be entitled to any further legal aid for the other things that they seek. The anomaly in the system relates to the people who fall through the safety net that I am trying to create or who are forced to take out a separate action for protection that does not run alongside their other craves, which might not be helpful either. In a way, the Legal Aid Board could not say, "We have already given you legal aid for this," because it would not have and those people would be getting legal aid only for that part of the process. In that case, would a block fee be appropriate?

When I suggest a fee of £500, lawyers laugh at me and say, "I have never heard of such a high block fee," while the Legal Aid Board says, "But it has to be much more expensive than that." There is obviously an issue there that needs to be teased out but, to use another figure as an example, if the block fee were even £200, that could be claimed and the rest would be paid for by the pursuer.

Lesley Dowdalls: Yes, I can see how that would operate, but it completely contradicts the basic principle for the receipt of legal aid, which is that the recipient has no other means of financing their court action. From the Legal Aid Board's perspective, what is proposed would represent a sea change in its approach, because it is currently not possible for someone to receive funding for part of an action and to privately fund the rest of it. It is all or nothing: either someone is privately funded or they are legal aided.

Rhoda Grant: But there is nothing legally preventing what I propose from happening.

Lesley Dowdalls: There is currently no provision for that to happen. Currently, either someone is legal aided or they are not. Obviously, your proposal would completely change the system. It is a matter for the Legal Aid Board to comment on, but it would completely change the basis on which legal aid is provided and it could give rise to other interests saying, "Hang on a second. Why is this more important than other aspects of family law or other types of action?"

The Convener: As there are no further questions, I thank you both very much for your attendance this morning. Your evidence has been very useful and is much appreciated.

10:48

Meeting suspended.

11:02

On resuming—

The Convener: I apologise for the slight hold-up, but I have explained to the witnesses the reason why we had to suspend for longer than we normally would. The next panel is Assistant Chief Constable Iain Livingstone, of Lothian and Borders Police, who is representing the Association of Chief Police Officers in Scotland; Christopher Macintosh, principal depute of the policy division of the Crown Office and Procurator Fiscal Service; and Anne Marie Hicks, deputy divisional fiscal for the east division, Glasgow, of the COPFS. Mr Livingstone has been here before. I welcome Ms Hicks and Mr Macintosh. We will move straight to questioning.

Dave Thompson (Highlands and Islands) (SNP): The aims of the bill are to increase access to justice and to allow police and prosecutors to provide a more robust response to breach of civil protection orders. How effective are the existing mechanisms for dealing with domestic abuse? In more general terms, will the bill increase access to justice for victims of domestic abuse?

Assistant Chief Constable Iain Livingstone (Association of Chief Police Officers in Scotland): We support the bill's purpose of putting some compliance measures behind the civil process, in terms of powers of arrest and creating a specific offence. The recently introduced Forced Marriage etc (Protection and Jurisdiction) (Scotland) Bill has a similar intention in that the Scottish Parliament is seeking to create an offence with a power of arrest, to give that level of compliance as a statement of intent.

The bill will assist not only by allowing a power of arrest to be attached to an interdict for harassment, but by introducing an automatic power of arrest when such an interdict is breached. At the moment, when a power of arrest attaches, unless there is an assault, a breach of the peace or some other stand-alone criminal offence, we simply report the matter to the Crown to be considered in the context of the protection of the victim from harm. In general, the bill's direction is consistent with other recent statutory provisions in introducing an automatic power of arrest, rather than a secondary process, when there is a breach of civil order. That will increase compliance as well as clarity for operational police officers on the ground.

Christopher Macintosh (Crown Office and Procurator Fiscal Service): Although policy is really a matter for others, the criminalisation of breach of interdict would not provide the Crown Office and Procurator Fiscal Service with any difficulty. From my experience as an operational prosecutor, I can see that that would increase access to justice for victims of domestic abuse.

Anne Marie Hicks (Crown Office and Procurator Fiscal Service): I currently head up the domestic abuse unit in the Glasgow procurator fiscals' office. The situation can be problematic when there is not sufficient evidence for a separate criminal offence. A robust approach is taken by the police and by us so that, when there is evidence of a breach of the peace, an assault or some other offence, we have well-established ways of dealing with that—we can prosecute and it is generally fine. The difficulty arises when there is a civil interdict.

If the police are called and someone is arrested but there is not enough evidence of another offence such as a breach of the peace or an assault, all that we, as prosecutors, can do under the current law is present a petition to the court and potentially have the person remanded for two days. They will be remanded only if the sheriff is satisfied that there would be a substantial risk of further abuse and, generally, only if a solicitor turns up to indicate that there will be breach of interdict proceedings to follow. The longest that someone can be remanded for is two days; thereafter, they are out and there is no protection. The civil breach-of-interdict proceedings, which can be lengthy, must then follow.

The benefit of making breach of interdict a criminal offence would be that we would be able to bring the person before the court for something that was not an offence, such as breach of the peace, but that might be circumstances such as their going to a place where they should not be. The interdict might prevent them from approaching the victim at their home address or their place of work, and the person could be arrested for breaching that interdict even if they had not gone as far as committing a breach of the peace or an assault. We could prosecute them for breaching the interdict and ask for protective bail conditions at the same time, which would give the victim an additional protection during the process.

Dave Thompson: Thank you for that. There seems to be general agreement that the bill would improve the current situation.

Let us move on to the issue of harassment. The bill wants to add a new section to the Protection from Harassment Act 1997, which would remove the requirement to show a course of conduct in relation to a non-harassment order. What do you feel about that? Is one incident on its own sufficient to constitute harassment, or would there need to be other evidence to bolster that? What is your general view about that proposed change in the law in relation to harassment?

Anne Marie Hicks: That is a civil issue, so that side of it would not affect us. However, it is mirrored with the changes to the criminal non-harassment provisions in the Criminal Justice and Licensing (Scotland) Act 2010, which remove the requirement to show a course of conduct and allow for there to be one incident.

In the current criminal law, the issue of having to show a course of conduct to get a criminal non-harassment order has been problematic at times. It is absolutely right that we have set up our systems in such a way that, as soon as there is an incident, someone is arrested and brought before the court. We do not often have time to wait for several incidents to build up. You could find people before the court with only one incident if there is a history and if the nature of the incident is such that it is likely that there will be further incidents.

I can see a benefit in reducing the requirement to show a course of conduct. Obviously, any sheriff would have to be satisfied that the incident amounted to harassment and that it was appropriate to grant such an order, but it would allow them to consider the full circumstances.

Dave Thompson: Would the incident have to be serious before it was acceptable, and does the bill specify how serious the incident would have to be? How would an incident be judged to constitute harassment?

Christopher Macintosh: Normal standards of civil evidence would presumably apply, in which the judge has to make a decision according to the rules about whether the barrier has been reached. It is important to realise that we are talking about just giving someone a protective order. We do not require corroboration of an incident to give

somebody a protective order. The breach of that order would of course require corroboration.

Assistant Chief Constable Livingstone: In general terms, the police service supports anything that aids victims of domestic abuse. Experience tells us that the reporting of domestic abuse may be delayed. There may have been incidents and suffering prior to an incident being reported to us or to other agencies. As was indicated earlier, the circumstances of each case would still need to be established in front of a sheriff. We would not support the continuation of the need for a course of conduct. An order could be granted on a single incident because our experience shows that, often, victims have suffered before coming forward.

Dave Thompson: That is interesting. As you say, it is likely that there has been a build-up before someone decides to call the police. They may have evidence of previous conduct and witnesses to testify to it. In practical terms, although it is the first reported incident, it might be easy to show that there had been a course of conduct. Is that a fair presumption?

Assistant Chief Constable Livingstone: It is fair to say that it is likely that there would have been a build-up to the incident, but it is not necessarily fair to say that it would therefore be easier to prove it. As Christopher Macintosh said, we are talking about a single witness in a civil process. If the order, once granted, was breached, that is where the police would come in.

This is another tool, like the stalking legislation and the revision of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. Whatever the issues are, if the bill is enacted this enhancement of the civil process will make victims better protected in Scotland than they were two years ago.

Nigel Don: I come back to something that Ms Hicks said about an application to get someone locked up for two days. I know what the two days means, but if the first day happened to be a Friday, would the person be out on the Sunday, before there was any possibility of getting back in court on the Monday, or do weekend rules apply?

Anne Marie Hicks: I understand that Saturdays and Sundays are excluded from that. The person would be brought to court the next lawful day, and the two days would be two working days from that day. If they appeared in court on a Friday, they would be kept in until the Tuesday.

The Convener: Saturday and Sunday are known as dies non. I have been through that particular process before.

Stewart Maxwell (West of Scotland) (SNP): Section 2 would remove the financial eligibility test for civil legal aid in cases involving domestic abuse. In other words, there would be no means test and civil legal aid would be given regardless of the person's disposable income. What is the panel's view on the provision?

Christopher Macintosh: The Crown Office does not have a view on that. It is a policy matter, on which we would not offer an opinion.

Stewart Maxwell: Do the police say the same thing?

Assistant Chief Constable Livingstone: I spoke with colleagues and other chiefs before the meeting. We are keen that there should be as much opportunity as possible to access the law, but how that is delivered, in relation to the intricacies of civil and criminal legal aid, is probably outwith the police's remit.

11:15

Stewart Maxwell: I have two other questions on the same area, but the witnesses might not feel able to comment. First, do you have a view on the overall cost to the legal aid budget of enacting the provision and whether that would represent a good use of available resources in the current economic climate? Secondly, if the legal aid budget were to be opened up and income disregarded in relation to the offence that we are considering, would people clamour for the same approach to be taken in relation to other, equivalent offences?

The Convener: If the witnesses have no opinion, feel free to say so, but we require an answer of some sort.

Assistant Chief Constable Livingstone: There is a limited budget and there are many genuine and vulnerable individuals who require access to civil and criminal legal assistance—earlier the committee talked about honour-based violence and other matters. If there is to be a limited fund of money, as is clearly the case with the legal aid budget, there must be a level of consistency, because the suggestion that some victims are more worthy than others would put people in an invidious position. Such an approach would be difficult to pursue in the police's daily interaction with communities.

Anne Marie Hicks: I do not have figures on the number of civil interdict applications that are made, so I have no idea what the volume of applications would be or what costs would be involved for the Scottish Legal Aid Board. I am a huge supporter of anything that will enable victims of domestic abuse to get protection but, like Mr Livingstone, I am conscious that there are probably equally deserving causes. It is for the committee to determine what is appropriate.

Stewart Maxwell: On a connected but separate issue, SLAB and ASSIST said in evidence that there are non-financial barriers to access to justice in domestic abuse cases, such as the shortage of solicitors who are prepared to act and lack of probable cause. To what extent do such barriers, as opposed to the financial aspect, cause difficulties in taking cases forward?

Anne Marie Hicks: I do not know how many solicitors in Glasgow, for instance, do civil legal aid work. There is anecdotal evidence that a number of years ago some solicitors refrained from taking on such work and restricted their practice to criminal work, but I cannot say how many have done so or how difficult it is for people to engage a solicitor.

Stewart Maxwell: Have you no knowledge or experience of difficulties in bringing forward domestic abuse cases because of the non-financial barriers that SLAB and ASSIST identified?

Anne Marie Hicks: No. In criminal matters, with which we deal, there is no difficulty, because people get criminal legal aid and the rules are different. There is no barrier to an accused person engaging a solicitor on the criminal side. The civil side is different, but I do not have a feel for that.

Stewart Maxwell: Mr Livingstone, what is your experience?

Assistant Chief Constable Livingstone: In the past five, 10 or 20 years, there has been a significant change, in both society and the police service, in our attitudes to domestic abuse. There have been a number of cultural barriers. We were conscious of how victims were treated in the criminal justice process, in which the accused person often has legal representation. In the past, there was not the right level of support in the criminal process from the voluntary sector, the police and the fiscal service. In recent years, we have made an absolute commitment to remove from the criminal process barriers arising from lack of support or the formality of the process, to get some equality of arms.

I recognise the issue, but I am not in a position to comment on the availability of civil advice. In the criminal process, traditionally victims and witnesses did not have the right level of support, but in recent years we have made significant progress both on a statutory basis and in practice.

The Convener: We turn to section 3, on the breach of an interdict with power of arrest.

Bill Butler: You know that section 3 of the bill makes it a criminal offence to breach an interdict with power of arrest in domestic abuse cases. What is your view of existing measures, such as those relating to contempt of court? Are they adequate to deal with breach of interdict in domestic abuse cases?

Assistant Chief Constable Livingstone: Probably not, for the sake of clarity and given the complexity with which the Crown is faced when arresting people. We support the creation of a criminal offence in situations where an interdict is breached. We have a power of arrest, but the position would be much clearer to operational officers and the wider public if they knew that breach of interdict constituted an offence. Although there is good work in practice and the issue is mostly a challenge for the Crown, I support the introduction of the provision, which makes it clear that breach of interdict is an offence for which people can be arrested.

Bill Butler: That is a clear answer.

Christopher Macintosh: The existing provisions are slightly anomalous. Normally, the procedure is for a prosecutor to put an accused person into court. The procedure for breach of interdict is slightly different. We put a petition before the court and must contact the pursuer's solicitor beforehand. In my experience, few cases end with a positive decision that someone should be kept in custody to enable breach proceedings to be carried out.

Bill Butler: You are saying that, in practice, they are useless.

Christopher Macintosh: I am not saying that they are useless—it is not for me to say that. However, in my experience, take-up of such proceedings is limited.

Bill Butler: So they are of limited use.

Christopher Macintosh: I am normally the person who is accused of putting words into people's mouths. Yes, they are of limited use.

Bill Butler: I try my best.

Anne Marie Hicks: I agree with Christopher Macintosh. If we cannot prove a criminal offence for some other circumstances, the powers are limited. A person can be remanded for two days, at most. By its nature, civil procedure is cumbersome.

If we were talking about a criminal offence under summary justice, someone would be arrested, go before the court and dates would be fixed with bail conditions or remand in custody. If they were convicted, they would have something on their criminal record. That would affect what happens to them later.

Bill Butler: So your view is that this aspect of the bill relates in a much more realistic way to what actually happens in the real world.

Anne Marie Hicks: I suppose it would give the interdict some teeth. There is an interdict and the power of arrest—it is a serious matter. Someone can be arrested by the police and brought before the court.

At times, the current process can seem a bit toothless. People think that the most that happens is that someone is remanded or even liberated by the sheriff. If they are remanded, it is only for two days. Some other procedure then takes over. The proposal would give the process a bit more bite.

Bill Butler: You have just taken the next question out of my mouth. Obviously, you agree with Scottish Women's Aid that this is

"a toothless and ineffectual remedy".

You have already said it; you do not have to say it again.

Anne Marie Hicks: Whether or not it is entirely toothless or ineffectual, it could be made more effective. Certainly, criminalising the offence could improve things.

Bill Butler: I gave you the opportunity to be more lawerly.

Anne Marie Hicks: I always take that opportunity.

Bill Butler: Perhaps I should not have asked the question.

The Law Society of Scotland has real concerns about the standard of proof and corroboration in respect of criminal offences under section 3 of the bill. Does the Crown Office have a view on that?

Christopher Macintosh: Again, whether rules of corroboration were required would be a policy decision for others. I have heard the arguments that have been put forth previously, such as the argument about having someone akin to a court official in a single piece of evidence offences, but there is also the argument—it is in the same direction—that when we are talking about breaches of these orders, we are talking about people who have already been convicted of a criminal offence on corroborated evidence. If the proposal is to be seriously considered, we are talking about convicting someone of a criminal offence on one piece of evidence. These are two entirely different matters.

Bill Butler: So you would have concerns.

Christopher Macintosh: I think that we would have concerns.

Bill Butler: Do you agree with that, Miss Hicks?

Anne Marie Hicks: Yes, I do.

There is another issue that we always bear in mind as prosecutors. Other acrimonious disputes can often be going on in the background, including those that involve contact with children. If we receive a report that someone is allegedly breaching their bail conditions, the matter can be put before the court for a bail review. If no proof is available, it can be put on the basis of one source of evidence. One party may be using bail conditions to try to stop the other party having contact with the children. In terms of prosecuting criminal offences, corroboration is a safeguard. It is an important safeguard in this respect.

Bill Butler: So we should have that safeguard.

Anne Marie Hicks: Yes.

Bill Butler: Do you have anything to say on the matter, Mr Livingstone?

Assistant Chief Constable Livingstone: We would not have any objection to including a requirement for corroboration in terms of the creation of the offence. Clearly, our duty is to find the corroboration. In terms of the law and our practice, we know that a more flexible and open approach is needed. Corroboration can be found by way of general circumstances, demeanour of the victim and so forth. If the consensus is that corroboration is a necessary safeguard, we will have no difficulty in working within that. Corroboration is a principle of Scots law.

Bill Butler: I am grateful, Mr Livingstone. I should have asked the question of you earlier.

Does the panel have anything to say about the resource implications of enforcing the provision? I seek both police and Crown Office points of view.

Christopher Macintosh: We already get these cases. At the moment, we put them into court on petition. There are no resource implications for the Crown Office in terms of the bill as drafted.

Bill Butler: I was hoping that you would say that. Thank you, Mr Macintosh.

Assistant Chief Constable Livingstone: You might find it rare that police officers are not demanding more resources for new legislation—

The Convener: Not rare, Mr Livingstone, unique.

Assistant Chief Constable Livingstone: I had a discussion with colleagues before I came here today—we are all discussing the current situation—and our view was that we are already arresting people and seeking compliance. Domestic abuse is a primary, key priority for all operational police officers in Scotland. Therefore, creating a criminal offence just provides clarity.

When somebody is arrested by the police, there is a public perception that that is for a criminal offence. For the police, there is an intuitive practicality about creating a criminal offence.

There is no significant resource implication and it provides clarity.

11:30

Bill Butler: I am obliged.

Robert Brown: I want to pursue two further aspects. On corroboration, am I right in thinking that the vast bulk of, if not all, the breaches of interdict would be breaches of interim interdict granted on allegation, rather than after a proof in the court?

Anne Marie Hicks: It varies. I have certainly seen breaches of full interdict, but a lot would be breaches of interim interdict.

Robert Brown: The full interdict—at least after a proof—would be a number of months down the line, so would not a breach of full interdict be relatively unusual?

Anne Marie Hicks: That is not necessarily so, because some incidents can go on for a long time after. We receive both types of case.

Robert Brown: Nevertheless, would the bulk of what you would proceed on be breaches of interim interdicts?

Anne Marie Hicks: I do not know, to be honest. I would need to look through the cases: I have seen both types. Quite a large proportion would be breaches of interim interdict, but I do not know whether it would be the bulk of them.

Robert Brown: On the two days' imprisonment and prosecution, imprisoning the defender for two days has the advantage of getting them out of the house and therefore provides a minor breathing space. However, as you rightly said, there is the question of what happens thereafter, the lack of bail conditions and so forth. Would that make a difference to prosecution practice? It seems to me that if you are arresting people and following the two-day arrangement, you would not necessarily do it in every case, but in cases in which you felt that there had been a substantial breach of the interdict. The power of arrest is a power, not a duty, is it not? Does Assistant Chief Constable Livingstone think that, if section 3 of the bill were passed, there would be a difference between the prosecution's approach in relation to the number of cases that are dealt with under the current two-day arrangement and its approach to those that would be dealt with under the new arrangements for breach of the order?

Assistant Chief Constable Livingstone: Robert Brown's point that the power of arrest is a power rather than a duty is right. However, in practice, over the years since the current legislation came into place, arrests have de facto become mandatory if there is sufficient suspicion. Universally across the country, the individual who was in breach of an interdict would be remanded in custody for presentation in court the next morning. Thereafter, the complexity of the civil process coming up against the criminal process is a matter for the Crown. In truth, although there is only a power of arrest, if there is sufficient suspicion, the police would always utilise that power and bring the individual before the court. Our position is that the creation of a criminal offence would provide clarity and probably makes the Crown's position easier in that the behaviour would fall under the criminal procedure, as opposed to its falling into the quite complex mix with which my colleagues have to deal.

Robert Brown: I think that I am right in saying that you operate under either the Lord Advocate's guidelines or internal police arrangements to do what you have described, because of the enhancement of the domestic abuse provisions, which you talked about before.

Assistant Chief Constable Livingstone: Absolutely. The joint Crown Office and ACPOS protocol drives all our business. It has definitely come from the leadership of the Crown Office, and all the police service is united behind it. What happens after we have arrested an individual and they have come to court is more complex than I have been aware of.

Robert Brown: We are dealing with circumstances in which you would not be justified in charging someone with breach of the peace, assault or something else. There is no criminal offence—just the breach of the order. Will you elaborate on the sorts of circumstance in which the approach has been helpful? It would be useful for the committee to get a flavour of that.

Assistant Chief Constable Livingstone: The arrangement helps in dealing with an individual's presence. The person might be entirely compliant and perfectly polite. There might be no evidence of disturbance or assault and no witnesses, and the complainer might be semi-reluctant or reluctant. However, because the court order exists and has specific terms, we enforce the interdict and report the matter to the Crown Office.

As colleagues have said, if suspicion is sufficient for a stand-alone criminal offence or offences, officers are encouraged to investigate that and not simply to arrest the person under the interdict. If a collateral criminal offence is committed at the same time, it is vital that we investigate and report that.

Robert Brown: At the moment, the Crown does not decide on the two-day arrangement. If the bill were passed, you would have to decide whether to prosecute when you received a report. Do you

anticipate any difficulties or changes in practice or numbers as a result?

Christopher Macintosh: I do not anticipate difficulties. When the police make a report to the procurator fiscal, he examines it in the normal way to identify a criminal offence. Only when he decides not to take criminal proceedings does the legislation operate. If the fiscal does not take criminal proceedings, the legislation imposes on him a duty to put the accused before the court on a petition: he has no discretion on that.

If we were to criminalise breaches of interdict—and if we assume that no further obligations are put on the Crown and that its discretion is not fettered in any way—the Crown would consider such cases in the same way that it considers every other case; it would consider, based on the facts and circumstances of the case, whether prosecution was appropriate in the public interest.

Robert Brown: Following the police line, your approach would be to prosecute if the evidence were sufficient from your technical point of view to justify that.

Christopher Macintosh: Yes. That would be the preferred course of action.

Nigel Don: Good morning—it is still morning. As with the previous panel, I will ask about the definition of domestic abuse in section 4. Do we need that section or is the current common-law definition of domestic abuse adequate?

Christopher Macintosh: I understand that there is no common-law definition, although we certainly have definitions with which we work. The Crown Office and Procurator Fiscal Service and ACPOS protocol on domestic abuse contains a definition that is based on the Scottish Government's definition of domestic abuse, which is clearly understood and well worked with.

Do we need a definition? That depends on whether section 3 comes into effect. If breaches of interdicts that deal with domestic abuse were criminalised, we would have to know what was meant by "domestic abuse". That could not be left to the softer understanding of its meaning and would have to be defined. The matter could be dealt with in other ways, without a definition, but we must have some way of understanding what exactly is being criminalised.

Nigel Don: Can I challenge that? My doing so is a risky business when I am dealing with someone who is as experienced as you are. If a court issues an interdict for a breach, surely the court would have defined that breach, so it does not matter what it is, as long as the court is happy to provide that. If your concern is with the breach of the interdict, is not the interdict's substance presumed?

Christopher Macintosh: If the interlocutor contains the term "domestic abuse", that is fine, but often, it does not contain that phrase.

Nigel Don: So, it is beholden on the court to ensure that it produces a valid interdict with which you can work.

Christopher Macintosh: I am not saying that such interdicts are not valid, but if we are considering criminalising breaches of certain interdicts, we need to be clear about how we define them. What interdicts are we talking about? If we are talking only about interdicts in domestic abuse cases, we must define what domestic abuse is and we must have some way of telling from the interdict that it is a domestic abuse interdict.

Nigel Don: So, if we do not have a section that defines domestic abuse, the only solution would be for the bill to refer to domestic abuse and for the court to say in every relevant interdict that the issue is domestic abuse. In other words, domestic abuse would be mentioned in both places, so you could prosecute for breach of the interdict without having to define it because the court would have done that.

Christopher Macintosh: Yes. If the bill makes it clear in another section what domestic abuse means then, if the court defines what is in the interdict, that should settle the matter. I am not sure that I made myself entirely clear.

Nigel Don: I will try to get to the bottom of the matter. If I have read you right, you still believe that we need to define domestic abuse. I am still toying with the idea that, as long as the statute is about domestic abuse, if the court considered what it believed to be domestic abuse and produced an interdict that referred to domestic abuse alone, you would not have a problem with defining it in dealing with a breach of the interdict because the court would have dealt with the definition and you would not have to.

Christopher Macintosh: If the statute uses the term "domestic abuse", it must define what that means because words mean different things in different statutes. If the statute said—I cannot imagine that it would—"A domestic abuse interdict shall be certified as domestic abuse by the sheriff," that would be fine because, if a sheriff certified an interdict as a domestic abuse interdict, we would know that it fitted in with the statute. There must be some link-up within the statute so that it is clearly understood what interdicts we are talking about.

Nigel Don: Okay. I think that I have grasped your concern.

Does Assistant Chief Constable Livingstone have another perspective on that question? Do the

police have operational difficulties in defining domestic abuse?

Assistant Chief Constable Livingstone: We do not. The definition in the bill is probably broader than the one that we would use because it brings in parental abuse and other matters that we would deal with as child protection issues. A system in which there were multiple definitions of domestic abuse, as at the moment, and in which the bill's was the only statutory definition, might cause some confusion. Rather than say simply that a case relates to domestic abuse, the alternative would be to attach the power of arrest to all interdicts under the Protection from Abuse (Scotland) Act 2001. That would obviate the need for the definition because, as you said, if the courts granted an interdict, we would just need to enforce it.

Nigel Don: Okay. That makes it slightly more complicated than we perhaps thought.

How wide should the protection be? I think that the witnesses were all here for the earlier discussion about the wider family relationships in some ethnic communities and the wide range of folk who are sometimes under the same roof or very close to one another. Does the law cover such domestic relationships at the moment?

Anne Marie Hicks: We would still prosecute someone for an assault on a child or grandparent; we would still take the matter seriously. When we prosecute someone for a domestic abuse offence, the offence is not domestic abuse but assault or breach of the peace. We may have an aggravation that attaches to their criminal record and says that it is a domestic abuse case, but we do not have a specific offence of domestic abuse. We operate that between ourselves, the police and the courts through our definition of domestic abuse, which is generally that it involves partners or former partners.

I do not think that that aspect of definition would make any difference to how the police would treat an incident—they would still investigate it as they do at the moment—or how we would treat it.

Assistant Chief Constable Livingstone: That reflects one of the difficulties that we have when we talk about matters such as detection rates for domestic abuse. The situation is exactly as Anne Marie says it is. We record on the basis of the primary offence, whether that is assault, rape or breach of the peace. Because there is no stand-alone offence of domestic abuse, the issue is more to do with our practice.

As far as the wider family is concerned, a great deal of police work is done at the pre-criminal stage. It is to do with child protection and it involves working with social work and health services to ensure early identification of people who are vulnerable. That remains a priority, regardless of whether there is a specific criminal sanction. The existing criminal sanctions are available if people are abused, are left exposed or are not treated properly.

11:45

Nigel Don: So in dealing with legislation that is fundamentally civil, we need to get our definitions right, but as far as criminal matters are concerned, when it comes to injuring or committing other offences against an individual, the relationship between the parties is largely—in fact, it is almost always—completely irrelevant. What counts is the fact that someone has been assaulted, abused or whatever. That is the fact that matters, regardless of whether the incident is domestic or otherwise.

Anne Marie Hicks: Yes. As far as proving an offence is concerned, the rules of evidence will apply and we will simply prosecute someone.

However, the emphasis that has been placed on domestic abuse in recent years has been important. A huge amount of work has been done by the Crown Office and ACPOS to highlight the issue. It was recognised that 20 years ago, such cases might have been seen as just domestics. All our organisations perhaps did not appreciate the seriousness of domestic abuse. The emphasis that has been placed on domestic incidents—by which I mean incidents between partners or former partners—over the past 15 to 20 years has been extremely important in giving the issue a name and highlighting how serious and widespread a problem domestic abuse is.

Nigel Don: Some kind of definition that enables you to tick the right column so that you can get meaningful statistics and send the right messages to the public might be useful.

Anne Marie Hicks: I will give the example of the domestic abuse court in Glasgow, which deals with incidents between partners or former partners, whether married, cohabiting or in same-sex relationships. It is beneficial to have a court that deals solely with domestic abuse. There may be ancillary offences—someone might have assaulted their wife and child—and the court will deal with them, but a domestic offence must be involved. The court has been extremely beneficial in highlighting the issue and bringing home the problems that are associated with it, and it has meant that parties such as ASSIST have been able to provide services to and work with victims. We know from ASSIST that many victims of domestic abuse have to overcome textbook symptoms. It has been highly beneficial to focus on the issue and to call it what it is.

As an operational prosecutor and someone who works in the domestic abuse court in Glasgow, I

would be concerned if domestic abuse suddenly meant abuse of anyone in the perpetrator's family. That would water down what is a distinct offence—abuse of a partner or former partner. I do not want to undermine the seriousness of those other offences, which are dealt with severely in the criminal system, but I think that domestic abuse in the sense that we understand it—in other words, abuse of a partner or former partner—merits particular focus.

Robert Brown: I am sorry to pursue the definition of domestic abuse, but I am not sure that I have entirely bottomed it out in my own mind.

As I understand it, section 3 of the bill applies when a power of arrest has been attached to an interdict under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. There is no problem there because domestic abuse is not required; that is not an issue with a matrimonial homes act order. However, it is an issue under section 3(1)(a)(ii), when a power of arrest has been attached to an interdict under the Protection from Abuse (Scotland) Act 2001. I am not familiar with that act. What sort of situations does it cover, beyond domestic abuse-type incidents, which we would normally understand to involve partners?

Anne Marie Hicks: I understand that it covers anyone—it does not have to be a family member. It could be two people who are not related and who are suffering abuse from somebody. It is not restricted to family members or partner relationships. I suppose that that is why the restriction has been put in section 3(1)(a)(ii)—to try to bring it back to domestic abuse.

Robert Brown: Mr Macintosh said that there is no definition of domestic abuse in the common law, because it is not a phrase that you require to consider in other contexts, in considering whether something is a crime or what the definition of that crime might be.

Christopher Macintosh: We have a definition in our protocol with the police under which we recognise a certain category of cases that are dealt with in a particular way. However, as my colleague said, we do not require that to take proceedings in any case.

Robert Brown: So, for example, it is used to sort out an assault of a domestic abuse-type from another type of assault.

Christopher Macintosh: Yes.

Robert Brown: Am I right that that deals with issues between partners—husband and wife, cohabitees, same-sex couples or whatever—but that it does not cover children, which you have talked about, and it does not cover, say, an offence against a mother-in-law who has the care of a child briefly? That is not regarded as domestic abuse in that sense.

Christopher Macintosh: The definition in the protocol does not cover that.

Robert Brown: So the extension about

"the perpetrator's parent, child, grandparent or grandchild"

would go beyond any current definition that you use for those purposes.

Christopher Macintosh: Yes.

Robert Brown: And that would be an extension of the law. It might or might not be good, but it would be different from the current law.

Christopher Macintosh: Yes.

Robert Brown: Is there a need to have particular powers in such situations? I can see that there are arguments both ways. Do you deal with episodes in which what we might describe as the fall-out from domestic problems takes place against a relative, such as a niece, auntie or mother-in-law?

Christopher Macintosh: My colleague will have more up-to-date operational experience on those matters.

Anne Marie Hicks: There can be incidents that involve not only the partner but children or the partner's mother or father. However, those are not common. Generally, domestic abuse involves just the partner. Perhaps if a friend is there, they might be subjected to abuse, too.

Robert Brown: I suppose that, under section 3, there would in a sense be the consequence of an interdict that is taken in other circumstances and defined in the civil process, rather than by you.

Anne Marie Hicks: As Mr Livingstone said, one option would be simply to criminalise a breach of any interdict that was granted under the Protection from Abuse (Scotland) Act 2001, regardless of who the parties were. That would certainly negate the need for a definition and make the situation simpler. No matter what is done, there is a need for clarity for the police in enforcing the law and for the prosecutor in knowing whether there is something for which there is a new criminal offence. There would be a need for clarity.

Robert Brown: I have another point about the offence of harassment amounting to domestic abuse, under section 1, which will require prosecutors in effect to define what is and is not domestic abuse. Proposed new section 8A(2) in the Protection from Harassment Act 1997 states:

"Subsection (1) only applies where the conduct referred to amounts to domestic abuse."

Police and prosecutors would have to identify whether something fell within the new offence of

harassment amounting to domestic abuse, so you would need a definition for that.

Anne Marie Hicks: That would be a civil order. At present, when a non-harassment order is granted, we can prosecute for a breach of that, so in a sense there would be no change, in that we already have an offence. However, on the question of what is needed to satisfy that, it would be a civil non-harassment order and we would not be involved in obtaining that.

Robert Brown: So, in summary, following on from Nigel Don's point, the issue of a definition would probably not be a problem for you as prosecutors per se, but, at an earlier stage in proceedings, whether harassment ones or breach of interdict ones, the court would have to get to grips with whether it was a domestic abuse incident and what domestic abuse is.

Christopher Macintosh: Yes, that is my impression.

Anne Marie Hicks: There could be difficulties for the police and prosecutors if it were not clear. If only some breaches of interdicts under the Protection from Abuse (Scotland) Act 2001 were criminal offences, the police as enforcers and we as prosecutors would need to be able to see clearly that there were criminal offences in particular cases. Otherwise, we might raise criminal proceedings where there were no offences.

Robert Brown: Would it help you if the civil court in some way certified that the case was a domestic abuse case, regardless of the definition of that? Would it help you to clarify what you could and could not do if you had a clear statement on the interdict that the case involved domestic abuse?

Anne Marie Hicks: There would have to be something of that sort if a distinction was drawn between some interdicts under the 2001 act and others. Otherwise, the police and prosecutors would not know whether there was an offence or not.

Robert Brown: Thank you.

The Convener: Are there any other questions from the committee? There being none, I ask Rhoda Grant whether she has any further questions.

Rhoda Grant: Just one. In answer to the question from Bill Butler, everyone said that no other resources will be required if the bill is enacted and that the current use of resources will continue. Can I push you a little further on that? Given that 61 per cent of domestic abuse cases involve repeat victimisation, might there be a small saving of resources if cases are dealt with in the first instance?

Anne Marie Hicks: There is potential for that. There would be a slight increase in the required resources if we prosecuted offences that we currently put through in a petition for two days, after which our involvement ceases. If we took a criminal prosecution, the procurator fiscal would be involved in the process for much longer. Obviously, the intention of the current approach is that we succeed and that the person turns their behaviour around or whatever. There is potential for what you suggest, but I do not know how we would measure it.

Assistant Chief Constable Livingstone: I agree. The ideal is to intervene early, as soon as we can, to protect people from harm. Working with our partners, we want to protect people even before it gets to the level of criminality. I reiterate what colleagues have said about the need for clarity, which is one of the great attributes of the current provision. Whatever is enacted, we need to maintain that clarity. There has to be absolute clarity about what domestic abuse is and a common understanding of it. We must ensure that the bill does not dilute the definition by making it too broad. As you suggest, however, there is an opportunity. The earlier and more direct the intervention, the more likely that we will not need to come back with the same intervention again.

The Convener: Thank you for your attendance this morning. Your evidence has been exceptionally valuable. Inevitably, there are complexities where the criminal justice aspects cross over to the civil aspects, and some of your answers this morning have certainly helped us in that respect. Thank you once again for your attendance.

The committee will now move into private session.

11:58

Meeting continued in private until 12:54.

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