

Law Society of Scotland submission of 19 October 2023

PE1968/G: Restrict the perpetrators of domestic abuse from using family court proceedings to continue tormenting their victims

PE1981/E: Ensure perpetrators of domestic abuse, who have been excluded from the matrimonial home, cannot force the sale of the property

Thank you for giving our Child and Family Law Sub-Committee the opportunity to comment on the above mentioned petitions.

PE1968

Having looked at this, the Sub-Committee understand that the effect of this petition would be to prohibit contact for any perpetrator of domestic abuse irrespective of circumstances, and without recourse. There is a very difficult equilibrium of rights at issue in such cases, not least the child's right to maintain contact/direct relations with a parent (subject, of course, to welfare considerations). The issues raised here are neither straightforward nor clear-cut, and the Sub-Committee consequently believe that a blanket ban is unlikely to be appropriate.

Domestic abuse should be at the forefront of every Sheriff's mind in any applicable cases in relation to substantive decision making. As mentioned in the SPICe briefing which your Committee has already had sight of, the current law relevant to this petition is found in the Children (Scotland) Act 1995 ('the 1995 Act'), as amended by the Children (Scotland) Act 2020 ('the 2020 Act'). This recognises that the occurrence, risks, and effect of domestic abuse on both a child and on another person with parental rights and responsibilities must be taken into account, (see s.11(7A) to (7C)). This often dovetails with the issue of whether parents can cooperate, or be expected to cooperate, see (s.11(7D)).

The concern that family court actions can, themselves, be a traumatising experience for victims of domestic abuse is a legitimate and important

one. Appropriate and sensitive procedural rules should address this. Examples include a Sheriff being able to bring an appropriate case to an end at a child welfare hearing, and even at a first child welfare hearing (OCR 33.22A.), meaning that, contrary to the common assumption, cases of this type do not need to be long and drawn out; the Sheriff being able to excuse attendance of a party at a child welfare hearing in appropriate circumstances; and that the occurrence of domestic abuse must be taken into account in deciding whether to refer a case to mediation.

The Sub-Committee believes that training is a key issue here, with judicial training considered a vital component. Increasing awareness of the effect of domestic abuse on children should enable practitioners and the court to respond to the particular circumstances of each case.

PE1981

The relevant legal issues here are well summarised in the SPICe briefing which, again, we believe your Committee have already had sight of, and we would suggest our comments are read in conjunction with said.

There is a complex set of rights and issues in play here. Interdicts can last for lengthy periods of time, and sometimes even be granted in perpetuity. There is a difficult balance to strike between the rights of a property owner and the rights of a victim of domestic abuse to be protected from their abuser. A blanket position would not strike that balance in the Sub-Committee's view.

The view of our Sub-Committee is that this would be better and more proportionately addressed when looked at as a 'case by case' issue both in terms of the scope of the interdict awarded and at the stage of a court considering whether to order division and sale.

Training, again, is also considered a key issue. A better understanding by lawyers of the effects of domestic abuse (including more nuanced issues like financial control) might be relevant to how, for example, a Solicitor frames a letter, so that in representing their client's interests they are not corresponding in an unduly aggressive or confrontational manner.

In conclusion, and with regard to both Petitions, the Sub-Committee understand the strength of feeling, and is aware of the relationship between criminal allegations and civil procedure becoming a material issue, something we will look to explore further in our work. There is a very difficult balance to be struck in these matters. The view of the Sub-Committee is that there is already a solid framework in the law that regard must be given in circumstances where there has been domestic abuse and to take early steps to make sure a case is dealt with expediently, not going to proof if unnecessary, and that there is a full suite of powers available to judges to deal with these matters early on. For us, training is vital to make sure these laws and powers are fully understood and therefore better used. These matters are case specific, though, and it is not the view of our Sub-Committee that a blanket approach is a suitable solution.

I hope this is helpful in your discussions and please do let us know should you require further clarification.