

Citizen Participation and Public Petitions Committee

15th Meeting, 2023 (Session 6), Wednesday
25 October 2023

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

Lodged on 9 November 2022

Petitioner Caroline Gourlay

Petition summary Calling on the Scottish Parliament to urge the Scottish Government to strengthen legislation to stop perpetrators of domestic abuse, who have been excluded from the matrimonial home by a court order, being able to cause further trauma and distress to their victims by trying to force the sale of the property.

Webpage <https://petitions.parliament.scot/petitions/PE1981>

Introduction

1. The Committee last considered this petition at its meeting on [8 February 2023](#). At that meeting, the Committee agreed to write to the Law Society of Scotland, the Family Law Association, Shared Parenting Scotland, and the Scottish Law Commission.
2. The petition summary is included in **Annexe A** and the Official Report of the Committee's last consideration of this petition is at **Annexe B**.
3. The Committee has received new responses from the Scottish Law Commission, Shared Parenting Scotland, and the Law Society of Scotland, which are set out in **Annexe C**.

4. Written submissions received prior to the Committee's last consideration can be found on the [petition's webpage](#).
5. Further background information about this petition can be found in the [SPICe briefing](#) for this petition.
6. The Scottish Government's initial position on this petition can be found on the [petition's webpage](#).
7. Every petition collects signatures while it remains under consideration. At the time of writing, 234 signatures have been received on this petition.
8. Members may wish to note that the Scottish Law Commission intend to publish a Discussion Paper for consultation in the first part of 2024 as part of its review on the law of civil remedies for domestic abuse.
9. Members will be aware from its consideration of the related petition PE1968 that Pam Gosal MSP has secured the right to introduce the Proposed Domestic Abuse (Prevention) (Scotland) Bill. Details of this proposal are available on the Scottish Parliament [website](#).

Action

The Committee is invited to consider what action it wishes to take.

Clerk to the Committee

Annexe A

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

Petitioner

Caroline Gourlay

Date lodged

9 November 2022

Petition summary

Calling on the Scottish Parliament to urge the Scottish Government to strengthen legislation to stop perpetrators of domestic abuse, who have been excluded from the matrimonial home by a court order, being able to cause further trauma and distress to their victims by trying to force the sale of the property.

Previous action

I have written to my MSP, and the Cabinet Secretary for Justice, Keith Brown MSP.

I have also contacted the Justice Committee, as well as organisations including the Law Society of Scotland, Sheriff Court, Shelter Scotland, Scottish Women's Rights, Rape Crisis, and Women's Aid.

Background information

There appears to be a loophole in existing legislation which allows perpetrators of domestic abuse, who have been excluded from the matrimonial home by a court order, to contact their victim via a solicitor. This can add to the distress experienced by the victim. A perpetrator of domestic abuse, who is removed from the property, should be unable to

force sale of that property until the interdict put in place to keep the victim safe has expired.

In my case, the perpetrator was found guilty by a high court jury of rape and sexual assault but was acquitted due to the Moorov doctrine. The court granted an interdict and exclusion order preventing the perpetrator from contacting me or causing me mental injury or distress. Within weeks of the exclusion order being issued I received solicitors letters about the sale of the property. I have contacted dozens of people but no one can tell me if the interdict and exclusion order prevents him from doing that. It should not be this difficult for a victim to find the information about this or to get someone to help stop it.

Annexe B

Extract from Official Report of last consideration of PE1981 on 8 February 2023

The Convener: We move to petition PE1981, which is on ensuring that perpetrators of domestic abuse who have been excluded from the matrimonial home cannot force sale of the property. The petition has been lodged by Caroline Gourlay, and calls on the Scottish Parliament to urge the Scottish Government to strengthen legislation to stop perpetrators of domestic abuse, who have been excluded from the matrimonial home by a court order, being able to cause further trauma and distress to their victims by trying to force the sale of the property.

Caroline Gourlay highlights a potential loophole in existing legislation that enables perpetrators of domestic abuse to contact their victims through a third party to force the sale of a property. In responding to the petition, the Scottish Government notes that section 4 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 provides protection to a spouse or children who are at risk of physical or mental injury because of the other spouse's conduct. That is achieved by applying to the court for an exclusion order. The Scottish Government also notes that, where a court action has been raised in relation to the division and sale of the matrimonial home, the 1981 act also includes provisions for the court to refuse to grant the decree or to postpone its being done for a period that it considers to be reasonable. The court may also grant a decree subject to conditions.

Although the Scottish Government has indicated that it has, at present, no plans to reform the 1981 act or equivalent provisions for civil partners, it is expected that phase 2 of the Scottish Law Commission's review of aspects of family law will focus on civil remedies for domestic abuse. Following the Scottish Government's response, we have also received a submission from the petitioner, which highlights that being contacted by a third party, such as a solicitor, can be a distressing and traumatic experience for victims, even where exclusion orders and interdicts are in place.

It is for that reason that Caroline Gourlay believes that individuals who are subject to interdict and exclusion orders should not be permitted to contact their victim directly or indirectly while the court order remains in place. It is a technical legal thing. Are there any suggestions?

David Torrance: Could the committee write first to the Scottish Law Commission to ask whether the issues that are raised in the petition will be looked at in phase 2 of its review of aspects of family law?

The Convener: Are there any other suggestions, colleagues?

Alexander Stewart: It would be also useful to gather more information from organisations that you have talked about in the past. The Law Society of Scotland has a role, as do the Family Law Association and Shared Parenting Scotland. Their views and opinions would be useful, in addition to what David Torrance said we should ask the Scottish Law Commission.

The Convener: I note that the Scottish Government says in its response that if a couple who are married or cohabiting own a home together both must agree to its sale, otherwise the party who wants to sell the property will need to raise a court action seeking an order for division and sale. Under section 19 of the 1981 act, where a spouse has raised an action of division and sale involving the matrimonial home, the court may refuse to grant the decree or postpone doing so for a period that it considers to be reasonable, or it may grant the decree subject to conditions. You are a lawyer, Mr Ewing. Are you able to add any nuance to all this?

Fergus Ewing: I hesitate to opine because I have not really given the matter sufficient consideration, but I will just make a couple of remarks. In not every case is title held in joint names. In many cases title is solely in the name of the excluded person, who is usually—almost always—the husband or partner.

Where title is solely in the name of the person who has been excluded, the argument that has rightly been put forward by the Scottish Government—that an action for division and sale would be required—will not apply because such action applies only where there is joint title. That would normally be the case, but title is not infrequently solely in the name of the husband. It could be that the property was acquired by him before the marriage or it could be that it was taken only in his name, perhaps because he was the wage earner and so on.

There is a loophole. If it is right to exclude a male for violent behaviour towards his wife—an exclusion order will not readily be granted unless there is real substance and evidence—I do not see how it can be right and permissible for that person to be allowed to sell the property from underneath the wife's feet. That seems to be plainly wrong. Therefore, in the interests of female rights and justice, the loophole should be closed. That is just an off-the-cuff personal view, but I hope that it helps.

The Convener: That does help. I think that we agree to write to various organisations, in the first instance. That wee synopsis is good context for us when we consider the issue as we proceed. Are members content to proceed on that basis?

Members *indicated agreement.*

Annexe C

Scottish Law Commission submission of 15 March 2023

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

Thank you for your letter of 16 February. The Citizen Participation and Public Petitions Committee asks the Scottish Law Commission whether issues, such as those raised in the petition, will be looked at in Phase Two of the review on aspects of family law.

The petition called for the legislation to be strengthened to stop perpetrators of domestic abuse, who have been excluded from the matrimonial home by a court order, being able to cause further trauma and distress to their victims by trying to force the sale of the property.

Although our 11th Programme of Law Reform (which will run from January 2023 to December 2027) has not yet been published, we expect that Phase Two of our aspects of family law project will be focusing on a review of the civil remedies available for domestic abuse. This review will consider, among other matters, whether the existing legislative framework is adequate and sufficient to provide victims of domestic abuse and violence with prompt and effective protection.

The family law team is currently carrying out a scoping exercise for Phase Two, in order to determine the precise extent of our review of the law in this area. The issue of perpetrators of domestic abuse, who have been excluded from the matrimonial home by a court order, trying to force a sale of the property, has already been raised with us informally by stakeholders. It will therefore be one of the topics considered by us as we reach a determination on the scope of the project.

I trust that this is of assistance.

Shared Parenting Scotland submission of 17 March 2023

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

Shared Parenting Scotland takes domestic abuse seriously and recognises that both mothers and fathers who have suffered from domestic abuse require protection to prevent further abuse.

The circumstances described by the petitioner indicate that she found it difficult to establish whether the sale of property could be forced, or whether communications of this type were covered by the exclusion order. The Committee could call for better public information on this and other related matters to be provided by Scottish Government

According to her second submission, the petitioner has established that communications by a third party relating to issues raised by her ex-partner cannot be stopped. If an interdict is in place it should still prevent the third party making threats or abusive statements within the messages, even if it doesn't stop the sending of communications.

Our experience in this area relates to communications about child contact arrangements made in similar situations. Unless contact with children has been stopped by the court, we consider that such third-party communication is likely to be in the interests of the children, as long as the person or agency sending the communication is doing it in a professional manner that is not threatening.

Communication about housing arrangements including sale of property may also be necessary if arrangements need to be made in order for children to be able to stay overnight with both parents. Any such communication should be civil and restricted to the matter at hand.

Shared Parenting Scotland has just started to offer the [New Ways For Families® training and coaching programme](#) to separated parents in Scotland. This course covers communication between ex-partners and teaches them to use the BIFF technique (Brief, Informative, Friendly and

Firm). The course is intended for high-conflict separations and helps these separated parents to communicate and reach agreement.

ABOUT SHARED PARENTING SCOTLAND

Shared Parenting Scotland had just over 1,000 active enquiries during 2022. We staff a daily telephone helpline for individual enquiries. We run monthly support group meetings in Edinburgh, Glasgow, Stirling, Dundee and Aberdeen. We run one online meeting a month for people who are still uncomfortable with in person gatherings. All our meetings now have a family law solicitor in attendance on a pro bono basis for general advice about the law and legal procedures.

We publish several free 'user guides' to help inform individuals about rights and responsibilities of parents in relation to maintaining and nurturing a meaningful relationship with their children after divorce or separation. [Downloadable guides and publications from Shared Parenting Scotland - Shared Parenting Scotland](#)

Law Society of Scotland submission of 19 October 2023

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

[Note from the Clerk – This is an extract of the Law Society of Scotland submission which responded jointly to petitions PE1968 and PE1981]

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

...

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.