

Justice Committee

Domestic Abuse (Scotland) Bill: Stage 2

Written evidence from the Law Society of Scotland

Stage 1 Report on Domestic Abuse (Scotland) Bill: Emergency Barring Orders (EBOs)

We are grateful for the opportunity to provide evidence as to views on EBOs. It may be useful to set out the context in which the issues surrounding EBOs have arisen, their purpose and to consider the potential implications for Scotland.

Context

The Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)¹ has been signed by the UK but it has not been to date not ratified. It was described as a 'landmark' treaty of the Council of Europe to open the path for creating a legal framework at pan-European level to protect women against all forms of violence and prevent, prosecute and eliminate violence against women and domestic violence.

The Istanbul Convention was adopted by the Council of Europe on 7 April 2011 and opened for signature on 11 May 2011 at the 121st Session of the Committee of Ministers in Istanbul. It came into force on 1 August 2014.

The UK signed the Convention on 8 June 2012. The Government indicated that it is committed to ratification but indicated that amendments to domestic law such as extra-territorial jurisdiction over a range of offences are necessary before that can take place.

Section 1 of the Preventing and Combating Violence Against Women and Domestic Violence (Ratification of Convention) Act 2017 requires the Home Secretary to lay a report before Parliament on the steps to be taken to enable the UK to ratify and the appropriate timescale. The first report is due to be laid by 1 November 2017. Thereafter, annual reports should be laid until ratification is achieved (and such reports under section 2 (c) of that Act should include the legislative proposals brought forward including those from the Scottish Parliament).

Any question of failure in Scotland to comply with the Istanbul Convention does not therefore arise. That still means that Scottish legislation can and should have regard to provisions of the Istanbul Convention, for instance, when considering the introduction and content of legislation in the field of domestic abuse.

The UK Government has indicated its intention to introduce new measures to protect women and girls from crimes committed overseas as part of its Domestic Violence and Abuse Bill. That has not yet been introduced. The policy intentions indicate that it will directly refer to enabling ratification of the Istanbul Convention. Furthermore, measures are to be included that will extend 'extra-territorial jurisdiction' so that

¹ <https://rm.coe.int/168046031c>

certain offences committed by British citizens can be prosecuted in UK courts regardless of where they take place in the world. There will be implications for the Scottish Government to consider once the Bill is introduced insofar as provisions affect Scotland.

Purpose of EBOs

Article 52 of the Istanbul Convention refers to EBOs². The Istanbul Convention is of course much broader and extensive in its scope than just EBOs.

EBOs refer to legislative or other measures necessary to ensure that authorities are granted power to order in *situations of immediate danger* (our emphasis), a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Such measures should give priority to the safety of victims or persons at risk.

The motivation behind Article 52 is twofold.

- It relates to the provision of practical advice on how EBOs should be introduced as an effective measure of protection for victims of domestic violence in situations of immediate danger of further violence from the perpetrator.
- It is also about raising awareness of this important issue internationally and promoting comparative studies with other countries' policies and procedures.

Potential Implications of EBOs for Scotland

We do support the intention behind the Article 52 of the Istanbul Convention to ensure the safety of victims or persons at risk in situations of immediate danger. We ask the Committee to consider if current Scottish legislation may already adequately protect such victims or persons at risk. Provisions exist to support such victims or persons at risk at present.

Non-harassment orders

The Domestic Abuse (Scotland) Act 2011 strengthened the law relating to such orders. The identity of the perpetrator must be known. There is no longer a need to show a course of conduct to obtain such an order. Such orders can be obtained at the sheriff court to prevent persons from carrying out certain types of behaviour deliberately to cause alarm or distress. Such behaviour is not necessarily in itself unlawful or abusive but causes someone to feel upset or afraid (so extends beyond the domestic abuse situation). Such conduct includes 'speech' and 'presence in any place or area' and 'harassment' of a person including causing the person alarm or distress. One incident of harassment suffices (section 8A of the Protection from Harassment Act 1997).

That does cover the situation envisaged by Article 52 once the non-harassment order is obtained but may not have the immediacy being sought. Continued behaviour may result in criminal action as breaches of such orders are offences where persons, if convicted, face the full sanction of sentencing such as a fine or imprisonment. We are unable to comment on the operation of the current law with

² <https://rm.coe.int/convention-istanbul-article-52/168073e0e7>

regard to non-harassment orders as there are no publicly available statistics on their incidence.

Interdict

The Domestic Abuse (Scotland) Act 2011 also provided that a specific 'domestic abuse' interdict with a power of arrest can be granted where the applicant is experiencing domestic abuse. Breach is a criminal offence. An interdict can require a person not to do something or to stay away from a person(s) or a place.

Criminal

Under section 14 of the Criminal Procedure (Scotland) Act 1995, the police have powers to detain a person where they have reasonable grounds for suspecting that a person has committed or is committing an offence punishable by imprisonment. Frequently, these circumstances arise and come to the police's attention when the perpetrator has behaved in a manner to pose a threat to the safety of the victim, again the sort of circumstances outlined under Article 52.

Such behaviour will result in either arrest at the outset or after detention. Police Scotland's domestic abuse guidelines³ and the Joint Protocol between the Crown Office and Procurator Fiscal Service and Police Scotland⁴ are relevant here. Incidents of domestic abuse are treated as high priority to ensure that, as far as possible, where reported, they are met with an immediate response by police officers. Every effort will be made to provide attending officers with relevant background information.

Most often, such offenders are reported in custody for the following court day. They are, in effect, withdrawn from the situation so that the immediacy issue is addressed. Thereafter, once they appear in court, the question of bail is a matter for the court where a number of factors are relevant such as the offender's previous criminal record, the likelihood of re-offending and interference with witnesses. The judge will frequently be met with a request from the Crown to impose special conditions of bail including a requirement to stay away from a place and/or a person. These bail conditions will stay in place until such time as the trial is resolved. The judge will hear arguments from the Crown and the defence in considering whether such conditions should be imposed and indeed, in the interests of justice, the offender should be remanded in custody pending trial. Appeal procedures in respect of both the Crown and defence exist to the Sheriff Appeal Court to consider any refusal/imposition of bail conditions.

Imminent substantial changes in relation to criminal procedure in respect of detention and arrest as Part 1 of the Criminal Justice (Scotland) Act 2016 are due to come into force on 25 January 2017. The introduction of a new provision, investigative liberation, provides in certain circumstances that a person can be released from custody. Any condition can be imposed that the police consider necessary (rather like bail above). Such condition must be necessary and proportionate for the

³ <http://www.scotland.police.uk/keep-safe/advice-for-victims-of-crime/domestic-abuse/reporting-domestic-abuse/>

⁴ <http://www.copfs.gov.uk/images/Documents/Our%20Priorities/Domestic%20abuse/Joint%20Domestic%20Abuse%20Protocol.pdf>

purpose of ensuring the proper conduct of the investigation into a relevant offence. That could include, for example, a condition aimed at securing that the person does not interfere with witnesses or evidence. Conditions may require the person (i) not to be in a specified place, or category of place, at a specified time, and (ii) to remain outwith that place, or any place falling within the specified category (if any), for a specified period.

It is not known exactly how these provisions will work in practice or indeed how often they will be used, but they would cover the situation where the perpetrator is released from custody without being held in custody. Again, if they work well in practice, should be able to deal with the situation envisaged by Article 52.

Conclusion

Article 52 is concerned with the immediacy of the perpetrator's removal from the premises. The combination of legal measures at present comprising provisions of non-harassment, interdict and criminal bail proceedings are designed to achieve the removal and prevention of the perpetrator's return. Such actions do of course depend on the victim or person at risk complaining about the conduct. The problem envisaged by Article 52 arises when the conduct or behaviour does not result in detention or arrest (where the evidence is not sufficient or criminal according to the law of Scotland).

We would submit that the following factors are relevant to consideration about EBOs:

- Under the Criminal Justice (Scotland) Act 2016, the perpetrator can be released on conditions as part of investigative liberation. These changes in the law are designed to address these types of situations. Perhaps monitoring of the implementation of that Act's commencement may provide more information to assess the likely incidence.
- Part 2 of The Domestic Abuse (Scotland) Bill, as introduced, envisage 'placing a duty on the court to consider automatically whether to make a non-harassment order against a person convicted of a domestic abuse offence'. That covers the situation post-trial when bail conditions will have ended.
- There are also powers under the Matrimonial Homes (Family Protection) (Scotland) Act 1981, specifically section 4, around exclusion orders and section 14, around matrimonial interdicts

If EBOs are to be considered, we would question whether the requisite procedures would be criminal or civil, sanctions to be applied for breach and the appeal mechanisms. It is essential that there is adequate support for the victim or person at risk. However the legal procedures do need to protect the alleged perpetrator, who must have access to legal advice and representation. There should be adequate safeguards in place to ensure that any measures are proportionately used. There may be access to justice and legal aid implications, as well as equality of arms, to be considered. There would also need to be practical support provisions in place, as any alleged perpetrator may well be made homeless.

We trust that this response is helpful for your scrutiny of the Domestic Abuse (Scotland) Bill and will be happy to answer any questions or provide any further information as required.

Andrew Alexander
Head of Policy
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