



OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 12 January 2021

Session 5



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CONTENTS

| | Col. |
|---|-------------|
| DOMESTIC ABUSE (PROTECTION) (SCOTLAND) BILL: STAGE 1 | 1 |
| SUBORDINATE LEGISLATION | 29 |
| Criminal Justice and Data Protection (Protocol No 36) Order (Amendment) (Scotland) Regulations 2020 (SSI 2020/386) | 29 |

JUSTICE COMMITTEE

1st Meeting 2021, Session 5

CONVENER

*Adam Tomkins (Glasgow) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

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

*attended

THE FOLLOWING ALSO PARTICIPATED:

Humza Yousaf (Cabinet Secretary for Justice)

CLERK TO THE COMMITTEE

Stephen Imrie

LOCATION

Committee Room 5

Scottish Parliament

Justice Committee

Tuesday 12 January 2021

[The Convener opened the meeting at 10:00]

Domestic Abuse (Protection) (Scotland) Bill: Stage 1

The Convener (Adam Tomkins): Good morning and happy new year to everyone who is joining us. Welcome to the Justice Committee's first meeting in 2021. We have received no apologies this morning.

Agenda item 1 is to continue to take evidence on the Domestic Abuse (Protection) (Scotland) Bill. I refer members to the relevant papers in our pack.

I welcome to the meeting the Cabinet Secretary for Justice, Humza Yousaf, and his officials, all of whom are attending remotely—indeed, all committee business in the Scottish Parliament will be remote for the foreseeable future. I intend to allow up to an hour and a half for questions to the cabinet secretary and his officials on the bill. As we normally do, we will direct our questions to the cabinet secretary, but he can bring in any of his officials at any point if he wishes to do so.

I invite the cabinet secretary to make any opening remarks that he wishes to make before we get under way with the questions.

The Cabinet Secretary for Justice (Humza Yousaf): Good morning, and happy new year to you all—I think that we can still get away with saying that, although it is mid-January. I hope that you all had a restful break, and I look forward to the evidence session ahead.

I thank the committee for inviting me to give evidence on the Domestic Abuse (Protection) (Scotland) Bill. I have heard with interest the evidence that has been presented to the committee, and I think that it would be helpful if I briefly set out the intended scope and purpose of the protective order scheme. I hope that that will assist the committee in its scrutiny of the bill.

The proposed scheme of domestic abuse protection notices and orders is intended to provide protection and breathing space—I will probably use that phrase fairly often in my evidence—for people who are experiencing domestic abuse, which will enable them to take steps to address their longer-term safety and, indeed, their longer-term housing situation. In particular, it might be quite difficult for a victim of

domestic abuse who is living with the perpetrator to take steps to address their longer-term safety, especially if that involves taking action in the civil courts to remove that individual from their home. As some of those who have given evidence to the committee have noted, that could result in a victim of domestic abuse having no alternative to making themselves homeless to escape an abusive partner. I suspect that we, as members of the Scottish Parliament, have all dealt with such cases.

The scheme is not intended to replace existing criminal and longer-term civil measures to protect people who are at risk of domestic abuse; it addresses a very specific situation in which it is not possible to use criminal justice measures such as bail conditions or undertakings to provide protection to a person at risk and the police consider it necessary to take action to provide emergency protection to the person and provide them with breathing space to take longer-term steps to address their safety and their housing situation. That could, of course, include making an application for a civil order, an interdict or, indeed, an exclusion order.

The bill also makes provision to enable social landlords to transfer a tenancy to a victim of domestic abuse. It does that by creating a new ground on which a social landlord can apply for a court order to end the tenancy of the perpetrator with a view to transferring it to the victim of domestic abuse or, if the perpetrator and the victim are joint tenants, to end the perpetrator's interest in the tenancy and enable the victim to remain in the family home as the sole tenant.

Those provisions will help to improve the immediate and longer-term housing outcomes for domestic abuse victims who live in social housing and wish to continue to live in the family home, including by helping to avoid homelessness. They also help to address the real issue of why victims and their families rather than the perpetrator should have to leave their homes, belongings and, indeed, communities to seek safety, with the perpetrator remaining undisturbed in the family home.

Having the legal ability to end a perpetrator's tenancy in domestic abuse cases without the victim being required to commence the process themselves will allow landlords to take a more proactive role in supporting and protecting victims of domestic abuse and will enable the victim to remain permanently in the family home.

I am happy to take any questions that the committee has about the bill, and I apologise in advance if members can hear some screaming children in the background.

The Convener: Thank you very much, cabinet secretary. No apology is necessary, nor will one be accepted, on that front. A number of us are struggling with juggling family responsibilities and work.

Rona Mackay will open the questioning.

Rona Mackay (Strathkelvin and Bearsden) (SNP): Good morning. I want to ask you about the Law Society of Scotland's view. You will know that it has questioned whether there is a gap in the existing powers that are available to the police and the criminal courts that necessitates the introduction of the domestic abuse protection notice. What is your response to that?

Humza Yousaf: I have looked over the Law Society's evidence. I did not get to watch the evidence session with the society live, but I have seen its written evidence. The issue of whether there is a gap in the law has been raised on a number of occasions. For me, the biggest gap in the law relates to the civil orders that are in place at the moment. The onus to apply for an interdict, an interim interdict or an exclusion order is on the victim, and that can be exceptionally difficult. I suspect that, as members of the Scottish Parliament, all of us have experience of domestic abuse cases, and we can well imagine how difficult it must be for a victim in having to apply to a court in such circumstances. There are a number of processes that they must go through before they can apply for a civil order—for example, it must be determined whether they are eligible for legal aid. The scheme under the bill is different, because it will be for the police to apply a domestic abuse protection notice, a DAPN, and then to apply to the court for a domestic abuse protection order, a DAPO. The onus to do so will not be on the victim. That is where I think the biggest gap is.

A number of the other protective measures that are in place require the investigation of a criminal offence. With investigative liberation, as soon as an investigation into a criminal offence had concluded, the suspected perpetrator would be free of any conditions on them. I think that what is proposed in the bill addresses the gap; that is not to say that it might not overlap with bail conditions or investigative undertaking conditions. However, DAPNs and DAPOs are very different. They are unique in that they do not rely on a criminal offence having to have taken place. Those are probably the two areas where I think there is a gap that the protection orders plug.

Rona Mackay: So you do not believe that there is a risk of overlegislation or duplication of powers. Do you think that there will be clear pathways for the police and for victims to use with domestic abuse protection orders?

Humza Yousaf: As I said, I would not consider what is proposed to be a duplication. There could end up being an overlap. If a criminal investigation takes place, there could be investigative liberation, but when the criminal investigation comes to an end, a DAPN could be applied. There will, I hope, be a seamless transition between investigative liberation and a protection notice being put in place, which should mean that there will be no gap in protection for the victim.

I would not say that the bill will result in a duplication of powers. I hope that it will lead to a seamless transition, where that is necessary.

Rona Mackay: So a domestic abuse protection notice could be described as a safety net for the victim until longer-term measures could be put in place.

Humza Yousaf: Yes.

Rona Mackay: Thank you.

The Convener: Police Scotland has given the committee its views on the matters that you have been discussing with Rona Mackay. Police Scotland feels that the new powers in part 1 of the bill provide an "exceptional" tool for use in exceptional circumstances, and that those powers should not constitute a routine response. Some of the supporting information that the Government published with the bill, such as the financial memorandum, talks about the new powers being used in only 1 to 5 per cent of domestic abuse incidents recorded by the police. Do you stand by the view that the new powers will be used in only one in a hundred, or perhaps five in a hundred, call-outs? Given our current circumstances, is it really a priority for Parliament to legislate on a matter that will be used in only one in a hundred domestic abuse call-outs?

Humza Yousaf: As you were talking, I looked back at the financial memorandum. It is important to put on record that we are not making specific estimates. If you have the financial memorandum in front of you, you can see that it provides a range of illustrative estimates of what the likely costs would be for certain levels of use of the power. There is no central estimate of what the level of use will be, but there are estimates of what the cost would be if the power was used in, for example, 1 per cent of cases.

You are essentially correct. Use of the power will depend on Police Scotland's operational approach. We can look at other jurisdictions where there are similar protective orders, although those are different policing landscapes, but, ultimately, it is the operational approach taken by Police Scotland that will determine how often the notices or orders are used.

The question of whether this is the best use of parliamentary time is interesting. I did a bit of quick arithmetic. I have statistics that show that Police Scotland attended over 60,000 domestic abuse incidents in 2018-19. If applications for orders are made in only 1 per cent of incidents, then 600 orders will be made every year, affecting 600 families and their children. If you multiply that by five to reflect the upper end of the anticipated usage, thousands of families will be helped and will be protected from harm, so my answer is that this is a good use of Parliament's time and resources.

Depending on the approach that Police Scotland takes, these orders and notices might be used far more frequently than in 1 to 5 per cent of incidents, in which case we would be talking about tens of thousands of people. They are designed to be used in exceptional circumstances. I hope that that answers the question.

The Convener: It does.

If it is your view that the new powers are exceptional tools for exceptional circumstances, and if that is also Police Scotland's view and mine—which it is—should the bill not be amended to reflect that and to say so? Should the bill not say that those powers are intended to be exceptional, rather than routine?

Humza Yousaf: How would you define "exceptional" in the law? We could debate what "exceptional" means, but that would affect operational matters. If we put something directly into the wording of the bill, we would limit Police Scotland's operational flexibility because we would have to define what "exceptional" means and might have to produce an exhaustive list of exceptional circumstances. That might leave gaps.

Police officers have had training that relates to the new act. We must trust them to use their judgment. It might be that, because of the efficacy of protection notices in providing immediate breathing space even for a couple of days, the protection notices and orders are used a lot more frequently than we think they will be. If it is the judgment of police officers that an order is necessary for the protection of potential victims, we have to allow the police to apply that judgment.

10:15

The Convener: Police Scotland told us that the bill should also be clear about the interaction of part 1 with pre-existing requirements in the criminal justice system such as home detention curfew and electronic monitoring. Several witnesses, including the witness from Police Scotland, said that the bill needs to be clear on how the new measures in part 1 will interact with other requirements in criminal law for a person to

remain a minimum distance from their home, including where there is electronic tagging, for example. What is your view on that? Is that a legitimate concern? If so, does the fix need to be in the bill?

Humza Yousaf: It is a legitimate question, and I certainly would not close my mind to having that in the bill. I will consider that. I read the evidence from Police Scotland about its concerns on the issue. However, I do not think that the challenge is particularly unique. At the moment, we could well envisage a situation in which somebody is issued with an exclusion order and has a child contact order. Ultimately, there has to be a balance between how those matters interact with each other.

I will set out how I envisage the process working. If somebody who is on home detention curfew with electronic tagging, as you mentioned, is issued with a DAPN—and, after that, potentially a DAPO—it will be for Police Scotland to communicate that to the Scottish Prison Service and, ultimately, it will be up to the SPS to make a judgment call.

The SPS would have to take two things into consideration. First, if the person who is subject to the DAPN and who is under HDC has to move to another address, the SPS will have to consider whether, operationally, the HDC can continue. Can we fit the radio frequency box at a different address, and how quickly can we do that? Will it be suitable for the person to remain on HDC from a logistical perspective? Secondly, and probably more importantly, the SPS will have to ask itself whether a person who is subject to a DAPN and who is therefore suspected of engaging in abusive behaviour towards person B is in effect in breach of their conditions. Are they a suitable candidate to stay in the community or should they be recalled to custody?

Where HDC is involved, those conversations will have to happen between Police Scotland and the SPS. With release on licence, there will have to be conversations with the local authority. It is pretty routine for Police Scotland to have such conversations with the SPS on potential breaches of HDC. However, if it is Police Scotland's view that there needs to be a specific provision in the bill, I am happy to consider that.

The Convener: You make it sound so easy. You just used the word "routine". Police Scotland told us:

"We are asking police officers to respond to emergency situations, to risk assess and make judgment calls on matters that might counter court-imposed orders. It needs to be really clear what takes primacy there, and that is not for us to decide; it needs to be explicit in the legislation."—*[Official Report, Justice Committee, 22 December 2020; c 26.]*

If it is as easy, straightforward and routine as you have implied, why did we hear that from Police Scotland? Why is Police Scotland so anxious about the matter?

Humza Yousaf: You are asking me a different question. The quote that you reference mentions a court order. HDC is obviously not a court order. In your previous question, you referenced electronic tagging, which is very much a decision for the SPS to take. That was why I answered the question in that way.

In relation to court orders, I assume that you are talking about child contact orders or other orders relating to children. My opinion and the Government's opinion is that a DAPN would supersede any other court order. A breach of a DAPN and, in time, a DAPO would be a criminal offence. It would not be legitimate for a person to express a view of wanting to contact their children because of a previous court order and then breach a DAPN or a DAPO. It would be pretty unusual if clarity was needed that a sheriff, for example, could impose a DAPO regardless of what other court orders might be in place, but we could consider providing that clarity if that would give all those involved some reassurance. A court order is very different from HDC or being released on licence.

The Convener: That is very helpful. Rhoda Grant wants to pick up that line of questioning.

Rhoda Grant (Highlands and Islands) (Lab): The confusion relates partly to the fact that notices will be imposed by the police; it appears that there will be something of a pecking order, if a notice will supersede what has been imposed by the court. I think that the bill will need to include reference to the fact that that will happen, otherwise the whole justice system will be put in a difficult place. If it is the case that somebody who has access to children through the courts could be issued, by the police, with a notice preventing them from getting that access, that needs to be clear in the bill. Will the cabinet secretary consider stage 2 amendments that would make that clear?

Humza Yousaf: I am always open minded about stage 2 amendments that the committee might suggest or that committee members might lodge. Rhoda Grant has described what is probably an unlikely scenario, in the sense that we are dealing with situations in which a potential perpetrator and victim live together. If they have children together, they will probably be in that house. One would think that it would be less likely that there would be a child contact order in such a case, because they are all living and, therefore, interacting together. However, I appreciate that we could envisage other situations in which a DAPN or, in time, a DAPO might, as you say, interact with a child contact order.

My clear opinion is, given that a breach of a DAPN or a DAPO will be a criminal offence, that there would be no legitimacy in a person simply expressing that their having a civil order allows them to see their children and that that takes primacy; that would not be the case. I am certainly happy to consider whether we could clarify that in the bill. Equally, if members were to lodge stage 2 amendments, we would certainly give them consideration.

Rhoda Grant: You said that a notice or order would be put in place only when people were living together. Is not it the case that one could be put in place if people had recently parted after a relationship? One imagines that, if there was clear evidence of domestic abuse taking place, the person would not be issued with a notice but would be arrested, taken into custody and charged with that offence. I am talking about the gap that exists when there is, perhaps, not evidence to charge someone with an offence, but there is a strong indication that abuse is taking place.

Humza Yousaf: You are absolutely right that notices and orders could also apply to ex-partners. I am certainly not saying that that would never be the case; I am saying that I do not envisage that there would be that interaction. You are right that there will almost certainly be cases in which a DAPN or a DAPO will interact with a child contact order or another order relating to children, so we have to discuss that matter.

My argument is that it is pretty clear that a DAPN—or, in time, a DAPO—would supersede any civil order. Bear in mind, also, that the sheriff must take into account representations made by the person to whom a DAPO applies, as they must equally take into account any that are made by the individual to whom a DAPN applies. We would expect that individual to say, "By the way, I have a court order to see my children"; that would have to be taken into account. A more general question is whether we can do anything to give greater clarity on that in the bill, which I will consider.

Annabelle Ewing (Cowdenbeath) (SNP): Good morning. Section 4 deals specifically with DAPNs. The cabinet secretary will be aware from having noted the evidence that has been taken thus far that some concerns have been raised about the scope and clarity of that provision, which raises issues about proportionality. Specifically, the concerns include concerns about the evidential threshold, which is "reasonable grounds for believing", but there is no further fleshing out of the scope, or reference to risk.

Police Scotland, I think, said in its evidence that its initial understanding was that the provision would apply to cohabiting couples, but that it seems to have been extended to include, for example, couples in an intimate relationship who

are not cohabiting. Their concern is that there might be a lack of clarity that will impact on the police on an operational front and will, therefore, potentially raise issues about proportionality in terms of the European convention on human rights. What is your response to those concerns?

Humza Yousaf: Again, those are legitimate questions to ask. Proportionality is an important element to consider in the bill. We are talking about restricting somebody's liberty in some way—quite severely, actually—without a criminal offence having been committed. Therefore, proportionality and necessity are absolutely imperative.

ECHR compliance has been a key consideration. Obviously, I cannot delve into legal advice, but I am not giving away any state secrets in suggesting that we are, as for any bill that we bring forward, assured that it complies with ECHR and human rights obligations.

We might discuss this later, but that is why it is our view that a DAPN can last only for the 48 hours that we have recommended in the bill. I noticed in evidence—from Scottish Women's Aid or Police Scotland; I cannot remember—the suggestion to increase the time for a DAPN to four days, five days or even a week. For me, that would have serious ECHR implications. We want to make sure that there is appropriate judicial and court oversight of the action that has been taken, as soon as is practically possible. The person has not technically committed a criminal offence.

The first part of Annabelle Ewing's question was about making domestic abuse protection notices. Without going into too much detail, I contend that section 4 is pretty clear about when a notice should be applied and what the tests are for that. If there are concerns about areas that we could make clearer or strengthen, I will, of course, take those concerns away and look at them.

Annabelle Ewing: Thank you. A colleague will look at the duration of notices in more detail. I welcome the cabinet secretary's undertaking to look again at section 4.

10:30

Police Scotland gave strong evidence at our meeting on 22 December; it is, of course, the police who will have to carry out the actions that the bill proposes. The police want to be assured, to the extent that that is possible on a matter of law, that what they will be asked to do is clear and will brook no real argument, or will result in as little argument as possible. It is therefore incumbent on us all to work together to see what can be done in that regard.

Police Scotland's understanding has been that domestic abuse is about a course of conduct, but the bill's focus is on a single act. Police Scotland is keen that we reflect on such matters in order to get the bill as right as we can, which we have an obligation to do. I very much welcome the cabinet secretary's undertaking today to look again at the evidential threshold. We look forward to the outcome of those further deliberations.

The Convener: I invite John Finnie to pick up the questioning from here. Liam Kerr will follow him.

John Finnie (Highlands and Islands) (Green): Good morning, cabinet secretary and officials. I advise that I am a member of the cross-party group in the Scottish Parliament on men's violence against women and children. That is pertinent, given the issues that I will raise with the cabinet secretary regarding Police Scotland's response to the bill, and which my colleagues Rhoda Grant and Annabelle Ewing have already touched on.

A suite of measures is available to Police Scotland at the moment to deal with the scourge of domestic violence. Can the cabinet secretary explain what would be different, were the bill to pass unamended, from what happens at the moment in the response of police officers who go to a scene? We know, for example, that a DAPN would have to be authorised by someone of the rank of inspector or above, who would likely not be at the locus.

Humza Yousaf: I suppose that there would not, in the initial phases, be much difference. Again, we can look at how similar orders unfold in other legal jurisdictions and different policing landscapes, such as in England and Wales, where, we know, the majority of similar protective notices are issued when an individual is in police custody or detention.

I envisage a similar situation in Scotland, whereby police officers will attend an incident and determine whether there are reasonable grounds to take somebody into police custody because they suspect that a crime has been committed. The police will charge that individual if, on further investigation, they believe that they have enough evidence that the person has committed a crime. However, if the police believe that there is not enough evidence but that the individual meets the test in section 4—which we just discussed through the previous question—they can make that case to an inspector and then apply a domestic abuse protection notice, which will eventually result in an application to a court for a protective order.

I do not know whether that helps Mr Finnie; I believe that that is how things will work in the majority of, but not all, cases.

John Finnie: Thank you. When there is insufficient evidence to charge the individual, where would the suspect be when deliberations take place between the police officers who attended the locus and the inspector?

Humza Yousaf: In the majority of cases for similar orders in England, the person is in police detention. As we have discussed, the police can hold a person in custody—of course, I have no need to tell John Finnie this, given his experience—when there are reasonable grounds to suspect that a crime has been committed. The police might decide, on further investigation of the facts, that there is not enough evidence to determine whether the person has committed a crime and must be released. However, if the test in section 4 is met, the police will go to someone with the rank of inspector or above to apply for a DAPN.

The other scenario would be that officers attend a locus to which they have been called for a suspected domestic abuse incident, but do not arrest the individual or take them into police custody. On return to the police station, the officers might determine that the threshold that is set out in section 4 has been met, so they will speak to an inspector or to somebody whose rank is above that, a DAPN will be issued and the officers then return to the locus. The perpetrator might no longer be there, in which case the immediate harm to person B no longer exists. It is not unusual for Police Scotland to want to speak to a person who is not in the locus where the police expect them to be. The police would then use their normal procedures to track down the person and issue them with a DAPN.

John Finnie: As the convener said at the outset, the process has been presented as being straightforward. I get that, and I most certainly want the option to be available. However, I see in it some frailties that are, perhaps, about the relationship between the status of the individual to whom the notice is to be issued—including their location and whether they are a witness, suspect or accused at the time—and their level of compliance with the police.

The cabinet secretary will know that Police Scotland believes that it is necessary to have further discussion on the circumstances that might amount to a breach of a DAPN, and it gave some examples in its written submission. It said:

“Where an officer wants to issue a DAPN”

but an arrest has not been made,

“the officer has no powers to require the perpetrator to remain with them while the process is completed.”

Police Scotland continued that it is unclear whether,

“If the perpetrator refuses to remain with the officer”,

the perpetrator could be “arrested for a breach”, which I imagine would be challenging if a DAPN had not been issued.

As a headline, we all want the best protections and good law, but we also want practical law; we do not want to make things more difficult. We have already heard from Police Scotland that there would be challenges. What do you think would happen in those circumstances?

Humza Yousaf: I agree with what John Finnie said about all the stakeholders who have presented evidence having an overarching desire to ensure that we do everything that we can do to protect victims of domestic abuse. There is no doubt that Police Scotland and the other stakeholders that are probing and scrutinising, as the committee is doing, have every right to do so.

As John Finnie was talking, I was looking over some material that I have in front of me. The test for making a DAPN would be that there were “reasonable grounds for believing” that the person had been abusive to the person at risk. That is very similar to the test that the police must apply when they arrest somebody—they must have reasonable grounds to suspect that the person has been involved in commission of a crime.

I think that, in most instances, as has been the case in England and Wales, an arrest would be made and the attending constables would make a determination as to whether there was further evidence of commission of a crime. If not, they might go to an officer of the rank of inspector or above to issue a DAPN.

In cases where the police do not have that power, or in which they think that it is inappropriate to make an arrest, there could be no breach of a DAPN until a DAPN was imposed. If an individual who had not been issued with a DAPN stayed in the family home, they would not be in breach of a DAPN. There is no dubiety about that. However, if that needs to be looked at and strengthened, I am, of course, happy to do that.

John Finnie: Is there any possibility of the notice being seen as an alternative in situations where there is an insufficiency of evidence to confirm that domestic violence has taken place? It could be described as a poor second, if you like.

Humza Yousaf: I would not characterise it as a poor second—if anything, it is a good substitute. I suspect that, as MSPs, we have all dealt with a case involving an individual who is a victim of domestic abuse but where the police are unable to act. I can think of one such case in my constituency. A constituent came to see me about their daughter—the police had said to her, “We genuinely believe that you are a victim of domestic

abuse but, having gone through the facts of the case, we cannot back it up with corroborative evidence.”

I would not describe the notice as a poor second. It provides a safety net—as Rona Mackay described it—for victims of domestic abuse where there may not be sufficient evidence to bring a case. Instead of allowing the abuse to be perpetuated and the situation to become worse for the person who has to live with the abuser, a notice—and, eventually, an order—can be put in place to protect them.

The Convener: Before I bring in Liam Kerr, I have a follow-up question on the current line of questioning. Cabinet secretary, I completely share the view that you and John Finnie have expressed that we all—not just the stakeholders who have given evidence, but every member of the committee—want to have in place effective rules and procedures to tackle domestic abuse. There is no doubt about that in my mind. However, I am very disturbed by the evidence that we have had from Police Scotland on the detail of the bill.

In light of what you said to John Finnie, I will quote a bit more evidence. Police Scotland said in its written evidence that not just “further guidance” but further “consultation” is “required” on how DAPOs, and DAPNs in particular, will relate not only to how the courts impose orders, but to other aspects of ordinary family law, including rights of contact and custody. In oral evidence to the committee on 22 December 2020, Police Scotland said:

“We have engaged frequently with the drafters”

of the bill

“and have tried to emphasise our concerns. We need clarity about where the”

new measures

“will sit in relation to court-imposed orders”

as well as ordinary family law rights. It went on to say:

“We are not clear, and we need that clarity on how the orders”—

the DAPOs—

“are going to work together.”—[*Official Report, Justice Committee*, 22 December 2020; c 36.]

The committee has also heard evidence on those matters from the Faculty of Advocates, the Sheriffs Association, the Summary Sheriffs Association, Social Work Scotland and the Scottish Women’s Rights Centre.

You know all that, cabinet secretary. You know what evidence is on record and what the committee has heard. In the three weeks that have elapsed since the committee heard evidence from

Police Scotland, what conversations have you had with Police Scotland in order to ensure that you and your officials fully understand its concerns? What have you said to Police Scotland to try to alleviate those concerns?

Nobody should be under any illusion about how seriously the committee takes the evidence that we have heard from Police Scotland on the practical operability of the bill. Nobody doubts the good intentions that underlie the bill, but we are talking about its practical operability, and the concerns that we have heard from those on the front line are really quite worrying.

Humza Yousaf: Again, I hope that I have not given the impression during this evidence session that I am dismissive of those concerns, as I certainly am not. On the question of how DAPNs, and potentially DAPOs, interact with current orders, I have said on a number of occasions that I am more than happy to look at how we can make that more clear in the text of the bill. In addition, if members lodge amendments at stage 2, we will give those serious consideration.

My officials have been speaking to Police Scotland; most recently, I raised the matter directly with the chief constable in conversation, and we agreed to continue the discussion at official level. I also told him that he is more than welcome to continue to discuss the issue with me directly.

You are right to say that there are operational concerns from Police Scotland; it would be silly for me to deny that, having seen the evidence that is on record. Nonetheless, I give the committee an absolute assurance that we are more than happy to look at what we can do to provide further clarity in the text of the bill. I hope that, in this session, I am able to give you the Government’s view on where we think that clarity exists in relation to the primacy of a DAPN and a DAPO, in particular because a breach of either is a criminal offence.

10:45

Liam Kerr (North East Scotland) (Con): Good morning, cabinet secretary. I wish to pick up on the lines of questioning from both John Finnie and the convener, sticking with the practicalities and the interrelationships between the DAPN and the DAPO.

In its submission, Police Scotland raised a point about what would happen if a perpetrator refused to provide an address so that they could receive notice of the DAPO hearing, and specifically whether that would constitute a breach of the DAPN, even though the requirement to provide an address is not a condition in the notice. Can you advise us on that point, so that Police Scotland can have some clarity on it? Picking up on the

convener's question, where will that clarity be set out, so that there is no ambiguity?

Humza Yousaf: I am looking at the bill now. Under section 6(4), the police

"must ask ... for an address"

so that the notice of the hearing can be provided. You would think that it would be in the interests of the person on whom a DAPN has been served to provide an address. If they refuse an address, that means that they would not receive any notice of a DAPO hearing.

The member is of course correct in his articulation that, technically, there is no legal requirement for the person to provide such an address, so I can see some merit in our considering additions to the list of requirements and prohibitions contained in notices under section 5—in particular, the question whether to include the provision of an address. That is a good point; I would welcome the committee's further view on it, but I will take it away. The member is right: the police must ask for an address, but what if an address is not provided? Technically, what people must provide is not set out in the bill. That is a good point, and I will examine it in further detail. Perhaps we can clarify the matter.

Forgive me: what was the second question? *[Interruption.]* I thought that there was a follow-up question.

The Convener: I am not quite sure what happened there, but it looks like we are done with Liam Kerr's questions. Rhoda Grant is next, followed by Shona Robison.

Rhoda Grant: The obligations under the domestic abuse protection notice relate to the person at risk and to any children, but there is no opportunity for it to relate to anybody else, such as family members or close friends, who can often become a target. If somebody cannot get at the person they were abusing, they often turn to loved ones or other people who are close to that person, continuing their abuse against them, almost in substitution for the abused person. Does that create a situation where abuse can continue, with family members lacking protection? Will you examine that as something on which there could be a stage 2 amendment, in order to assist people who will be at risk when someone is being put out of a house, which is a difficult time?

Humza Yousaf: I have been looking through the bill again in relation to the point that Rhoda Grant makes. Although I sympathise with the point, the challenge lies in the question of proportionality, which Annabelle Ewing discussed. It is important for us to consider that, particularly in relation to the DAPN, which does not have judicial oversight. The balance must be between

empowering the police to protect the person at risk from domestic abuse and any children who might be involved, and respecting the rights of a person against whom a DAPN has been issued but who has not committed a criminal offence.

It is a delicate and challenging balance to get right but, in relation to Ms Grant's question, we must ask ourselves whether it is right to give the police a power to prevent a person from seeking to communicate or communicating with their partner's colleagues or mutual friends without any judicial oversight.

The answer to that question might be yes, for the protection of the individual or other people. However, I would have to take legal advice on the matter in relation to the ECHR implications, because it would be quite challenging to impose that level of restriction without any judicial oversight.

Indeed, how wide would that circle of people with whom the individual would be prevented from communicating be? What is the definition of other family members—an uncle or auntie—friends and colleagues? In light of the evidence, I would of course consider the committee's views on the question, but proportionality would be my key concern.

Rhoda Grant: I understand that. I am thinking of where a victim would go for support. Anyone who knows anything about domestic abuse knows that support structures are often the first to disappear before abuse takes place, because the abuser tries to alienate family members. A victim might turn to one or two people as a bolthole or somewhere to go. Those people are at huge danger at a time in the relationship when the abuser is forced out of their home. If the number of those people was limited, could the bill consider their protection, not only for themselves but for the victim, who might go to them?

[Interruption.] I am not sure whether we have lost the cabinet secretary.

The Convener: We might have lost him. I hope that we can get him back, because we cannot really take evidence from the cabinet secretary without the cabinet secretary.

10:51

Meeting suspended.

10:57

On resuming—

The Convener: Welcome back, everyone. I am sorry about that. I think that we have the cabinet secretary back with us. I cannot see anything on my screen at the moment, but I hope that I can be

heard. Rhoda Grant was questioning the cabinet secretary when we lost the connection. I ask her to start her question again and we will pick up from there.

Rhoda Grant: I was asking about close family and friends. Where there is domestic abuse, friends and family tend to be the first who are pushed away. Someone who is suffering from abuse tends to have very few contacts who provide a place of safety or bolthole for them, and their abuser will be very aware of who they are. In those circumstances, can steps be taken to protect those people in order to allow the victim of abuse to access that support? It would not apply to everywhere that the victim was likely to be, but the victim would be clear about who was in danger at that critical point.

Humza Yousaf: I hope that you can now see and hear me. I apologise to the committee for the connection problem. I think that my Government officials have also dropped off, so I suspect that it is probably a problem with the Scottish Government network. I am now joining you via a different network.

You are absolutely right, of course, Ms Grant. We know well that, in many instances, a perpetrator of domestic abuse will try to alienate the victim's family and friends from them. That point is indisputable and you articulate it well. I absolutely guarantee that I will give consideration to what you have said in advance of stage 2. My primary consideration in that regard will of course be the protection of the victim, but the secondary consideration—actually, I think that it will be of equal importance—will be whether we have the balance right between proportionality and protection in terms of the ECHR, particularly for a DAPN, for which there will not be any judicial oversight.

I take the points that Ms Grant makes; she makes them well and clearly from an informed perspective, so I will take those away and consider them in advance of stage 2.

11:00

Rhoda Grant: These notices and orders are with regard to the victim, but in other countries children can access such notices and orders in their own right, with an advocate working on their behalf under child protection. Have you given any thought to allowing these orders and notices to be issued on behalf of a child, with the correct support in place?

Humza Yousaf: As you know, the police issue a DAPN and then apply to a court for a DAPO, but they would take into consideration the children who are present in any family circumstance. The DAPN can be applied to protect somebody who is

16 if they are the victim, but you make a good point; in a family circumstance, excluding the perpetrator from the home will then protect any children who are there. If there are other protective orders in other countries and jurisdictions that would give further protection for children, I would be open to looking at those. We all know that—this was part of the debate on the recent Domestic Abuse (Scotland) Act 2018—the impacts of domestic abuse on children are fundamental and can affect them very much, not only in the present but in later life. I am happy to take that point away and consider whether there are any gaps in that part of the bill.

The Convener: Cabinet secretary, it looks as if a number of your officials are back with us now so, as before, if you want to bring them in, please feel free to do so.

Shona Robison (Dundee City East) (SNP): I will pick up on an area that we touched on earlier, particularly in the questioning by Annabelle Ewing: the duration of a DAPN which, as you know, can be as little as two days, depending on where the weekend falls. I am sure that you will be aware of the evidence from Police Scotland and Professor Burton, who say that that is not long enough and that it could create significant practical problems in relation to the police's ability to apply for a DAPO. Professor Burton goes on to say, with reference to what happened in England and Wales, that there is a risk that the new powers will be significantly underused in practice because of that. I hear what you have said so far on the ECHR implications and the need for judicial oversight, but are you willing to revisit the proposed duration of a DAPN on the basis of those criticisms? Is there a way of balancing the need to apply the ECHR and judicial oversight with having some flexibility around the 48 hours?

Humza Yousaf: I have seen and heard a fair bit of the evidence on the question of whether 48 hours is long enough; it depends on where the weekend falls, but the question in general is whether 48 hours is long enough for a DAPN. I refer back to my previous answer; what we are talking about is pretty serious: legislating to severely restrict somebody's liberty in a way that excludes them from their family home and possibly takes them away from their children without them having been charged for a criminal offence. They have not, by the state's recognition, committed an offence. It is important for us, as a state, to have judicial oversight of that restriction of liberty and of the interference in their privacy and their right to a family life as soon as is practically possible. Any extension of that causes me concern. That is not to say that I would not revisit it, based on the evidence that I have heard. We have been discussing whether we have the right balance here.

Professor Burton's evaluation of domestic violence protection notices in England and Wales suggested that the 48-hour timespan was a barrier to police using those powers. The United Kingdom Government stuck to the 48 hours, despite that evaluation evidence. I do not know definitively, but I suspect that that was because there were similar ECHR concerns to those that we have.

I take the point that having only 48 hours available can create a significant barrier. We should remember that the courts can grant interim domestic abuse protection orders. That three-week period can give more time for the police to speak to other agencies, for discussions between agencies, for reports to be provided to the court and for there to be assessment of any other current civil orders. A full DAPO can be applied after that.

Shona Robison: That is helpful. I welcome the fact that you are looking at that again. I note that the same issues have arisen in England and Wales with regard to the two-day restriction and concerns about the ECHR. The committee will have to look further at the idea of an interim DAPO.

You will have seen that the weight of opinion from those who gave evidence was that the proposed maximum duration of three months for a DAPO was likely to be too short. A number of organisations pointed to court proceedings relating to longer-term safety that would not be concluded in that timeframe. For example, any eviction proceedings by social landlords would not be concluded within that timeframe. In the light of what the committee has heard, is that something that you would reconsider as the bill progresses?

Humza Yousaf: In short, yes; I found that evidence persuasive. There are still ECHR considerations. Judicial oversight is important, but we must also consider whether any extension of the order would interfere with a person's right to a family life. Notwithstanding that, the arguments that I have heard about eviction and transfer of tenancy have reminded me that those processes can take longer than three months. The individual could apply for an exclusion order or an interim interdict, but the onus to do that would be on them. Therefore, there is a persuasive argument for us to revisit whether DAPOs could be extended in specific circumstances.

I do not have a definitive answer on whether we will do that. I will have to discuss the proportionality of that proposal, and its ECHR implications, with the law officers. However, I found the evidence compelling and I will look, in advance of stage 2, at whether it might be possible to extend a DAPO beyond three months in certain circumstances.

The Convener: Rona Mackay wanted to ask questions in the same area. I do not know whether she has anything to add or whether her questions have been covered.

Rona Mackay: I have a brief question, convener.

The bill team confirmed in our first evidence session that a DAPO could be breached by stalking, which, obviously, could carry on for some time. Does that add weight to your decision to reconsider the issue of extension of orders? Might sheriffs want to extend an order in cases in which there is stalking?

Humza Yousaf: Potentially. Forgive me, but I will have to look again at how the issue interacts with stalking, although the point is well made. For me, the extension of a DAPO would probably be aligned to whether other court proceedings were taking place and whether there were criminal proceedings. If the individual involved was under criminal investigation for stalking, for example, we might wish to consider that.

I am talking somewhat off the top of my head. We would need to think about how we would legislate for an exception—it would have to be an exception—to enable a DAPO to be extended beyond three months. However, the points that Rona Mackay makes are well made. I know that she has an interest in the issue of stalking and has raised it over the years. We will certainly consider that as part of considering extension of DAPOs.

Liam Kerr: I am conscious of time, so I shall put one quick question to the cabinet secretary, on multi-agency working. Police Scotland told the committee that it would value multi-agency input to the processes, particularly when it is preparing to apply for a DAPO. However, as you know, the bill does not expressly provide for that and—according to Police Scotland, anyway—nor does it include timescales that would support multi-agency working in practice. How do you respond to that? Are Police Scotland's concerns valid and, if so, how will you address them?

Humza Yousaf: Again, I certainly do not dismiss the questions that Police Scotland has raised and the concerns that it has articulated. It is important for not just the committee but the Government to understand, probe and listen to those points.

I would have concerns if we were to mandate operational practice in the bill. I am not saying that the member is suggesting that we should do that, but mandating interagency working and the timeframe for it to happen would be of concern to me, and I would not want to do it. There is a two-day window for the DAPN, which could make multi-agency working difficult, because 48 hours can be challenging. However, the court will be

able to provide an interim order for a three-week period, which could assist with multi-agency working and give Police Scotland more time to pick up the phone to local authorities, social landlords and so on. I hope that the three-week period is an adequate timeframe.

I think that, as MSPs, we can all agree that it is not unusual for Police Scotland to take a multi-agency approach locally. In fact, in the majority of cases that the police deal with that involve domestic incidents, there is multi-agency working with the local authority social work department and potentially the school when children are involved. It is not an unusual operational practice. However, if the member is suggesting that we should have something on that in the bill, I would need to give that serious consideration, because I am not sure how that would look.

I suppose that the short answer to the question is that we will of course listen to the concerns that Police Scotland has and will try to work through them as we approach stage 2.

Fulton MacGregor (Coatbridge and Chryston) (SNP): I have a brief question on training. The financial memorandum suggests that police training on the bill might be delivered through a two-hour course making use of an e-learning package. Will that be enough to ensure that front-line officers have a good awareness of the new powers, or will the training be implemented through existing training channels as well?

11:15

Humza Yousaf: I am just getting the financial memorandum up on my screen.

It is worth stating that, in recent years, Police Scotland has had extensive training on domestic abuse, in relation to the Domestic Abuse (Scotland) Act 2018 in particular. You will remember that there was a delay—well, it was not so much a delay, but there was a period of one year between the passing of the bill and the commencement of the act. The purpose of that was to allow training on coercive control and so on to be completed. It would be fair to say that police officers have had a fair degree of very recent training on domestic abuse.

On the point about training through e-learning, I stress again that that is a matter for Police Scotland, which will determine whether an e-course or in-person training is more suitable. We are happy to work with Police Scotland in that regard, but it should be said that the information in the financial memorandum is very much based on the information that Police Scotland provided as it pertained to the organisation.

Fulton MacGregor: I have a quick follow-up question. If, as the bill makes its way through Parliament, further concerns are raised about how police officers might be trained in relation to the new orders, will the Government be open to discussions with the police with regard to what is currently in the financial memorandum?

Humza Yousaf: Yes—again, it is not unusual for there to be amendments at stage 2, or even at stage 3, that may give a different shape or feel to a bill, or in this case add an additional pressure on Police Scotland, so we continue to discuss such matters with Police Scotland as the bill progresses through the parliamentary process.

Annabelle Ewing: I turn to the issue of the victim's consent. As things stand, that is not a requirement in the bill with regard to either the DAPN or the DAPO. It seems, from the evidence that we received, that there is a strong feeling that, in respect of the DAPO, there should be a requirement to obtain the victim's consent. Some felt that that should be the case for the DAPN as well. What is your view on that evidence?

Humza Yousaf: I listened to and read the evidence to the committee with great interest. Again, I emphasise that I am not dismissive of the concerns that have been raised. I am probably less minded to consider such a requirement for a DAPN. The DAPN comes, in effect, in the heat of an incident, in particular where coercive control is involved. If consent was required, one could imagine—knowing about domestic abuse, as we all do—that that could be manipulated by a perpetrator. For the DAPN, therefore, I am not minded to revisit the issue of consent—although if the committee has a strong view on that, I would reconsider.

With the DAPO, the issue is more finely balanced and more challenging, but I would still have the same overriding concern. From everything that we know about coercive control in particular, a perpetrator could continue to perpetrate their abuse by manipulating the victim to ensure that she—it would often be “she”; it is in 80 per cent of cases—does not give her consent.

The evidence from Scottish Women's Aid in that regard was particularly interesting. It said that, when it comes to a DAPO, there should be a requirement for consent, but the court should have the flexibility to override that where it believes that coercive control is at play. Having considered that matter over the past few weeks, I find it quite difficult to understand how we could legislate for that. Flexibility would have to be given to courts and the judiciary through guidance or perhaps through court rules—I am not sure.

I will certainly consider the issue of consent in relation to a DAPO, but I have an overarching

concern and an overriding worry about how an individual might be manipulated into not giving their consent.

Annabelle Ewing: In relation to the operability of a DAPN, it is a fair point to make that the need for prior consent could, I imagine, present sometimes insurmountable difficulties and would place yet another burden on Police Scotland. However, there is a case for requiring consent for a DAPO, not least because the order could last three months. It is difficult to see how it would all pan out in practice if the DAPO was not issued in accordance with the wishes of the victim. As the cabinet secretary said, I imagine that there are ways of recognising the importance of that issue from a practical perspective while perhaps allowing the courts some discretion in the matter. I look forward to, potentially, having sight of a stage 2 amendment in that regard.

Fulton MacGregor: My questions follow on from Annabelle Ewing's line of questioning. Over the years, the committee has heard quite a lot of evidence on the importance of having child-friendly ways of taking children's views. I know that the cabinet secretary has committed to that, as have all committee members, through the barnahus work that is taking place and the recent Children (Scotland) Act 2020. In the context of this bill, how will we ensure that the courts take children's views in a child-friendly way and that children feel supported in the process?

Humza Yousaf: You are right that there has been a lot of progress on the matter over the years. Again, I reference the evidence suite in Glasgow city centre, which committee members might have visited. It is a very child-friendly space, which includes a sensory room and appropriate facilities that are built around taking evidence from a child. That is one example of how things have moved on from previous years.

In relation to a DAPO or, indeed, an interim DAPO, it would be for the independent judiciary and, ultimately, the Lord President to decide how children's views are taken in a child-friendly manner. I note that, as part of their work, judges get training on how to handle such matters. They also have what they call their equal treatment bench book, which includes extensive guidance on how to treat children in a court setting.

I am happy to consider the matter. Fulton MacGregor will be aware of the work that we are doing through incorporation of the United Nations Convention on the Rights of the Child. Such issues are at the forefront of our mind, but we have to accept that, quite rightly, how a number of those matters are dealt with in court is for the judiciary to determine, rather than for us to mandate in law.

Liam Kerr: The bill will make Police Scotland the sole body that can apply for a DAPO. During our evidence sessions, we have heard some concerns about that—specifically, whether that risks cutting off options for affected individuals. I am interested in the cabinet secretary's thoughts. Does the fact that Police Scotland will be the sole body that can apply for a DAPO risk cutting off options for affected individuals who might be reticent about going to the police? Could that put undue pressure on police resources?

Humza Yousaf: On the second point, we have the financial memorandum. If, for example, as the convener asked about in his opening question, there is much greater usage of DAPNs and many more applications for DAPOs than we have estimated, that will be part of future budgetary discussions with Police Scotland.

The wider question whether we should enable other bodies to apply for a DAPO is an interesting one. There would be some potential unintended consequences, which we have to be really alive and alert to. Scottish Women's Aid, for example, articulated some of those concerns. This is not to diminish the work of social landlords or social housing providers at all, but I ask whether they have the same knowledge and training as Police Scotland around domestic abuse.

I have just talked about how Police Scotland officers attend 60,000 domestic abuse incidents a year and will have had the extensive training that I spoke about in relation to the Domestic Abuse (Scotland) Act 2018. It is unlikely that a social landlord or social housing provider would have the same extent of training or knowledge of domestic abuse incidents that Police Scotland has. Therefore, there could be some unintended consequences.

In considering the matter, I read the evidence with great interest and noted that there is an order-making power in the UK bill to allow other bodies to be added at a future date, after consultation and discussion. We may want to consider at stage 2 whether to add a similar order-making power to the bill that would allow other bodies to be added, so that they could apply for DAPOs at a future stage. I am probably more attracted to that course of action, as opposed to adding specific bodies to the bill at this stage.

Liam Kerr: I am grateful for that answer. I will move on.

Throughout this session, we have talked a lot about the financial memorandum and the costs that will be associated with the bill. As well as the one-off training costs that we have heard about, I think—off the top of my head—that the financial memorandum estimates that there will be recurring annual costs to Police Scotland of

between £700,000 and nearly £4 million, depending on how often officers use the powers in practice. The obvious question is whether the Scottish Government will give Police Scotland any extra funding to support its role in relation to the bill.

Humza Yousaf: Discussions would, of course, take place between Police Scotland and the Scottish Government. If Police Scotland said to the Scottish Government that there is far greater usage of the notices and far more applications for the orders than was estimated in the original financial memorandum, the Government would have to take that into account in future budgetary discussions and ensure that Police Scotland was awarded the appropriate resource to do its duties. In essence, therefore, the answer would be yes. We would ensure that Police Scotland was funded appropriately to take forward all its duties, including in this area. However, that will clearly depend on what Police Scotland's operational practice is and whether it goes above and beyond what is in the financial memorandum.

Liam Kerr: Can I press you on that, cabinet secretary, so that I am absolutely clear on what you have just said? I think that you said that if the use is greater than what is covered in the financial memorandum, there is the potential for Police Scotland to get more money. If the bill is brought in in its current form, you say that it will incur one-off training costs and annual costs of £700,000 to £4 million for Police Scotland. Do I take it that, if that is what it costs, Police Scotland will be given no more funding to implement the bill? Is that correct?

Humza Yousaf: No, that is not the case. Again, you are delving into the territory of spending reviews. If issuing of DAPNs and applying for DAPOs were within the range in the financial memorandum—the £0.7 million to £4 million that you quoted—that would, of course, have to be part of considerations during a budgetary discussion in a budgetary process. That would absolutely be part of that conversation and consideration. However, you are asking me whether I can nail down exactly what the Police Scotland budget will be come 2022-23 or any other future year. Based on the financial memorandum, we would, of course, have to discuss that at the appropriate time.

The short answer to your question is yes, we would ensure that Police Scotland is appropriately resourced to carry out its duties.

11:30

Liam Kerr: So new money will be given to Police Scotland for the implementation of the bill,

and it is not expected to find that money out of its existing budget.

Humza Yousaf: No. On financial memorandums, if there is a recurring cost, it is helpful for us to understand how much we would need to ensure is available for funding Police Scotland in future years. However, we cannot, of course, take just one element of Police Scotland's budget and say that X amount needs to be given because a cost is being incurred in light of this particular issue. There might be savings in other areas, and additional income that Police Scotland gets in any given year—because of events that take place, for example. The budget would have to be balanced appropriately. However, that element of the budget would, of course, be part of any discussion about future policing resources.

John Finnie: I want to talk about DAPOs and where they sit in the range of available options. DAPOs are relatively short-term orders, and it is clear that the existing system remains very important. The existing system is also, of course, very complex, and take-up of some orders is very low. I am interested in what impact assessment of DAPOs you will do. We are at the stage in the parliamentary cycle at which forward planning might be a bit challenging, but if your Government were to be returned, would the existing system of civil orders be the subject of a review? I see merit in that. If so, what would be the likely timeframe?

Humza Yousaf: I am not considering a wholesale review of civil orders, and I would be careful not to pre-empt any manifesto commitment or to presume that we will be returned to government.

However, there have been consultations on civil orders in recent years. I am sure that committee members will be aware that, for example, the Government consulted in 2018 on changes to improve the effectiveness of exclusion orders. The matter has been considered. The Scottish Law Commission is working on a project on cohabitants' rights, which will no doubt touch on some civil remedies and civil orders.

Some of the work has, therefore, already been done, and I am not convinced that there is a need for a wholesale review of civil orders if the bill is passed. Forgive me, but I do not have a definitive answer at this stage on whether we would do such a review in future years. I would not rule it out, but I would have to be convinced of its merit and that it would be the best use of the Government's time and resource.

John Finnie: Do you acknowledge that introducing something else into the mix has the potential to overlap—I think that that word was used earlier—and therefore has wider implications?

Humza Yousaf: Yes—I accept that that is the case. If the bill is passed, there will be consistent and constant monitoring and evaluation of how DAPNs and DAPOs interact with current civil orders. We would do that with the provisions of any bill that is passed. I would not rule out a wider review if that is merited, but at this stage I need to be convinced that it would be the best use of our Government resource and time.

John Finnie: Okay. Many thanks.

Annabelle Ewing: The cabinet secretary referred a moment ago to exclusion orders—in what some might view as a somewhat cluttered landscape—which I believe were introduced by the Matrimonial Homes (Family Protection) (Scotland) Act 1981. For a number of reasons, uptake has not set the heather on fire. Are exclusion orders being used more since the 2018 review took place? The issue of overlap is important; if exclusion orders are not the way forward, perhaps some elements of that approach that are still relevant should be carried forward into the bill. The two issues are interlinked.

Humza Yousaf: Forgive me—I would have to look at the detail. I do not have the information in front of me, so I will write to the committee on how often exclusion orders are used. Annabelle Ewing is absolutely right, though; I bow to her superior knowledge of the introduction of exclusion orders.

One issue that came out clearly in the consultation in 2018 was that there was not great awareness that exclusion orders exist and are a remedy that people can seek. We have been working on raising awareness of exclusion orders and must do more on that.

I suppose that the big difference between an exclusion order and a domestic abuse protection order is that with a DAPO the onus is not on the victim of domestic abuse. Again, we can perfectly well envisage how difficult applying for an exclusion order might be for a victim of domestic abuse—especially if they are in a toxic and controlling relationship in which their every movement is under scrutiny by the perpetrator, as is often the case in domestic abuse relationships. We hope that it will make a big difference that the DAPO will be applied for by Police Scotland.

Ms Ewing is absolutely right that there are common issues between exclusion orders and DAPOs. We have to be alive and alert to those, but the big difference will be that the onus is not on the victim, but on Police Scotland, to apply for a DAPO.

The Convener: We move to part 2 of the bill, on social landlords. John Finnie has questions.

John Finnie: I have just one question. As you know, committees always enjoy getting competing

evidence on an issue. We have that in respect of the ground that can be used under section 18. We heard from Homeless Action Scotland that there needs to have been a criminal conviction or at least a police investigation. The Chartered Institute of Housing Scotland, however, thinks that that is too high an evidential threshold and puts greater emphasis on the judgment of housing professionals and the person at risk.

I noted your comment that housing professionals have some knowledge. What evidence will be required before a social landlord can use the new ground? How will the Scottish Government ensure that social landlords know what is expected of them in that regard?

Humza Yousaf: I read the evidence with great interest; you are right to suggest that it is somewhat conflicting. My overriding concern is that requiring a criminal conviction—which some have suggested we should, as the committee heard in evidence—would severely limit the usefulness of the provisions. We are trying to address a gap in the law that often, unfortunately, affects domestic abuse cases in which there might be insufficient evidence, but in which there is a strong suspicion that domestic abuse is taking place and reasonable grounds to believe that there is abusive behaviour. I am not in favour of moving to that threshold.

As members of the Scottish Parliament, we probably all have often experienced social housing landlords collecting evidence to support criminal or civil court actions. It is not unusual for social housing landlords to be part of evidence gathering—in particular, when it comes to children and domestic abuse cases.

I take the point; if Parliament passes the bill, we will have to work closely with social landlords and other key stakeholders to develop guidance on the provisions. That work will have to cover the type of evidence that will be required when social landlords look to raise proceedings to end or transfer tenancies. We have to make that clear. We will work with the appropriate social landlords to do that, and we will provide the necessary guidance to assist with it.

John Finnie: That is very reassuring. I am finished. Thank you, convener.

The Convener: Thank you, John.

I do not think that there are any further questions from members of the committee about the bill, so I thank the cabinet secretary for his evidence this morning. I am sorry that we had one or two technical glitches along the way, but I think that we got there in the end.

Subordinate Legislation

Criminal Justice and Data Protection (Protocol No 36) Order (Amendment) (Scotland) Regulations 2020 (SSI 2020/386)

11:40

The Convener: The next item on our agenda is consideration of a negative instrument—the title of which has too many nouns in a row.

I refer members to the relevant paper in the pack and ask members who have comments on the statutory instrument to attract my attention in the usual way in the chat box.

No member has indicated that they wish to comment. Members therefore appear to be content not to make any comments to Parliament on the statutory instrument.

That concludes consideration of the SSI, and brings the public part of the meeting to a close. Our next meeting will be on Tuesday 19 January 2021.

11:41

Meeting continued in private until 12:19.

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