

“THERE IS A LACK OF AWARENESS OF EXCLUSION ORDERS AND BECAUSE IT IS NOT BEING USED THERE IS NOT THE BUILD UP OF EXPERIENCE - LIKE A MUSCLE NOT BEING USED, OVER THE YEARS.”

EXECUTIVE SUMMARY

The use and effectiveness of exclusion orders under the Matrimonial Homes (Family Protection) (Scotland) Act 1981 in preventing homelessness

INTRODUCTION

Scottish Women's Aid commissioned research to consider how effective exclusion orders have been in preventing homelessness of women, children and young people in the context of domestic abuse. Exclusion orders were introduced by the Matrimonial Homes (Family Protection) (Scotland) Act 1981, (MHA). Although they might prevent homelessness for women and their children, little was known about how many women use them, in what circumstances and whether they are effective at keeping women safe in their home.

RESEARCH QUESTIONS

Initial scoping of the research with women's aid groups and in local courts identified that there is little use of exclusion orders. The research then focused primarily on identifying why women are not using exclusion orders as a remedy. The research explored five main questions:

How effective are exclusion orders in preventing the homelessness of women, children and young people in the context of domestic abuse?

Why are women not using exclusion orders?

What factors influence women's decision to pursue an exclusion order?

What factors influence women's decision to leave the home and settle elsewhere?

What changes are required to make exclusion orders a more viable, sustainable option?

METHODOLOGY

The research took place between November 2009 and May 2010. A combination of methods was used.

Desk based research

A contextual literature/policy review to understand policy changes that might influence women's choice of remedy, and data analysis of existing national data sets.

Survey of local women's aid groups

Thirty six local groups (in 27 local authority areas), from a possible 45 groups, participated in a telephone survey to identify if exclusion orders were used by women in contact with women's aid groups, the factors which respondents thought influenced their use and any changes which might be required to increase use of exclusion orders.

Following the survey, four local authority areas were identified for further study. The areas included a mix of rural and urban areas. In these areas, data was collected from the Sheriff Courts and an interview programme conducted.

Court data

The research team were given access to six courts in the four local authority areas. Case papers from a sample of family law cases registered in the court during 2009 were reviewed to identify cases that included a crave for an exclusion order.

Interview programme

Thirty-four women in contact with women's aid groups and a specialist service, all of whom had experienced domestic abuse, were interviewed. Sixty practitioners from a range of services were interviewed; they included police officers, solicitors, housing/homelessness staff (in both voluntary and statutory sectors), social work staff (children and families, and criminal justice), staff from Violence against Women Partnerships (VAWPs), women's aid groups and some other specialist services. All were involved in directing strategy or delivering services used by women leaving abusive partners.

Meetings were also held with representatives from national and specialist stakeholder bodies. This provided a useful opportunity to discuss emerging themes and helped to refine a range of possible recommendations.

EXCLUSION ORDERS

An exclusion order is a civil legal order, which can be used by women to:

- remove an abuser from the home she currently shares with him
- prevent the return of an abuser who has left the home but still has rights to return; remove an abuser from a home that she has left so she can return safely to the home.

An exclusion order can regulate the occupancy of the home until divorce or the ownership/tenancy of the home is resolved. It does not affect ownership or tenancy rights.

Women entitled to seek an exclusion order include married women, civil partners, cohabitees who have joint title (joint owners or tenants) and those cohabitees who have gone to court and have been granted occupancy rights (initially for a period not exceeding 6 months).

Although exclusion orders are intended to provide protection in the home, the MHA also directed courts to consider whether exclusion of an abuser would be unjustified or unreasonable taking into account a range of factors including the needs and

resources of both parties. The legal test for an exclusion order is based on necessity for protection, but that necessity can be superseded by a range of other factors.

Interdicts and powers of arrest are generally sought alongside exclusion orders to prevent an excluded person from returning to the home. Breach of an interdict with a power of arrest is not of itself a criminal act, but does give the police powers to arrest the abuser on breach.

RESEARCH FINDINGS

How effective are exclusion orders in preventing the homelessness of women, children and young people in the context of domestic abuse?

Exclusion orders are currently not contributing to the prevention of homelessness; they are used by very few women leaving an abusive partner. This is evidenced by the findings of the survey, the court data and the interview programme.

The survey of local women's aid groups revealed that:

- nine local women's aid groups reported that they had no recent experience (within the past three years) of women seeking exclusion orders
- nineteen women in contact with local groups in 2008/09 made applications to a court for an exclusion order. Of these, 17 were granted. Four of those orders were not effective in the long term and women had to move because of either continued harassment or the longer-term sustainability of staying in the home.

Exclusion order work represented just over 1% of the reviewed caseload in the courts in the study. There were 3,227 family law cases registered in 2009 in these courts; 2,831 were reviewed (88% of all registered cases). Only 34 cases included a crave for an exclusion order.

Despite the inclusion of rural and urban courts in the study and some local differences in the response to domestic abuse, the percentage and number of applications for exclusion orders/family cases in these local courts varied within a very small range (between 1% and 1.8%).

Exclusion orders were granted in 13 cases. Undertakings to remove and/or stay away from the home were given to the court in a further six cases. A refusal to grant an exclusion order was noted in only one case. In the court sample:

- exclusion orders were not sought disproportionately by either owner-occupiers or tenants in social housing
- when the order was granted, it rarely changed the occupation of a family home (only two cases in our sample), more often the court regulated an existing situation

- most successful cases relied on evidence from more than one source but some were successful without any evidence or uncorroborated evidence.

Of the 34 women interviewed as part of the research, three had applied for an exclusion order. All were successful. All were tenants or joint tenants in social housing; all were staying away from the home when they decided to take action for exclusion order and they were all eligible for legal aid. All had returned to and remained in the family home.

The evidence from practitioners and the survey was that even when exclusion orders were obtained by women, occupation of the home was not always sustainable. Affordability is an issue for women particularly in owner-occupation who may be forced to sell the home at a later stage to resolve longer-term housing or because the home is unaffordable. Continued occupation may also prove unsustainable where the abuser breaches orders and continues to abuse or harass a woman in her home.

Why are women not using exclusion orders?

Demography

Cohabiting women who are sole owners or sole tenants of the home did not require an exclusion order to remove the abusive partner. A combination of a criminal justice response, especially special bail conditions, and interdicts and powers of arrest if necessary, has the same practical effect for women in this situation. Alternatively, women can use court orders of ejection to remove non-entitled cohabiters.

Information and advice

Women did not always get information and advice about all their options. This is true whether they were in contact with the police, social work, housing services, specialist services and/or lawyers.

Decisions about using exclusion orders includes balancing the cost and effort required to pursue legal action against the support available to keep her safe and the continuing cost of staying in the home. These factors are highly variable according to each woman's specific legal situation and their assessment of the risk posed by the abuser. This adds to the complexity of information and advice-giving. Staff providing services to women reported that they were not always sufficiently confident about advising women regarding exclusion orders.

Access to legal remedies

There has been a decline in the number of lawyers offering civil legal aid. Data from the Scottish Legal Aid Board confirmed that there has been a reduction in the number of outlets supplying legal aid for protective orders. Some women struggled to find lawyers prepared to do any protective order work on legal aid, and services they were in contact with did not signpost them to specialist lawyers known to provide legal aid. Even when legal aid is available, some women decided against legal action for protective orders because of the legal aid contribution they would have been required to pay.

Lawyers recognised that working with clients in crisis requires time and effort that most felt was not financially compensated by the legal aid system. However, those lawyers that continued to both provide legal aid and raise exclusion order actions reported a reduction in demand for exclusion orders from clients.

Legal approach and response to domestic abuse

Pessimism about the courts' response to domestic abuse and the value of any protective orders from the courts, was identified as a factor which influenced women's decisions.

There was a perception that corroboration was always required and that this disadvantaged women. Although it is clear from court data that cases proceeded without corroborative affidavits or other evidence and were successful, this was not reflected in the advice women received.

Aspects of the court process and legal approach had an impact on women and advisers when deciding whether to use the law when leaving an abuser, these are:

- the court's approach at the interim stage where some reported that exclusion order applications stalled because decisions were deferred so the court could assess the evidence and witnesses at a full hearing
- a perceived conflict between special bail conditions and other civil remedies, which resulted in advice that women could not apply for civil orders whilst special bail conditions were in place.

Perceptions and experience of enforcement of court orders and powers of arrest also influenced women and practitioners. There were examples of both reporting repeated breach of interdicts and powers of arrest without any effective deterrent.

The legal test for obtaining powers of arrest was changed by the Family Law (Scotland) Act 2006 which applied the onus of proof from the Protection of Abuse (Scotland) Act 2001 to most powers of arrest. Prior to 2006 the onus was on the defender to prove that a power of arrest was unnecessary, the onus is now on the pursuer to establish that powers of arrest are necessary. This was identified as a barrier for women.

Child contact applications also deal with issues arising from domestic abuse and some women experienced contact as another opportunity for the abuser to continue the abuse. Some women thought that their concerns about domestic abuse were not taken seriously when courts tried to establish or maintain the abuser's contact with children.

Women and practitioners expressed concern about the disposal of domestic abuse cases in the criminal justice response and thought that increased use of probation or deferred sentencing to manage offending behaviour would increase the likelihood that women could remain safe in their home.

What factors influence women's decision to pursue an exclusion order?

The few women we interviewed who decided to pursue exclusion benefited from:

- access to a place of safety to allow time and space to consider options
- good information and advice and access to lawyers and legal aid
- the prospect of long term sustainability because they were tenants in the social housing sector.

What factors influence women's decision to leave the home and settle elsewhere?

Women and services identified a complex mix of factors influencing women as they make decisions about how best to leave an abusive partner.

Safety

A primary factor when women choose to leave the home is an assessment of whether she would be safe in the home, even if he was excluded or left the home. An assessment of safety includes perceptions about the abuser's behaviour, his likely reaction and the law's ability to protect her from that reaction.

Practitioners were not confident about women staying at home with legal and other protections. This was based on their experience and perception of the justice response.

Homelessness services

At the point of crisis, accessing homelessness services is likely to be more straightforward and quicker than the process of approaching the courts. There have been improvements in crisis/temporary accommodation provided by both local authority homelessness services and women's aid groups.

Accessing homelessness services involves minimal re-telling of the details and history of abuse, there is no need to involve anyone else as a witness, there is less concern about cost and if a woman wants to proceed it will result in a change of circumstances. By contrast, remaining in the home and using legal remedies involves giving statements to a lawyer, asking witnesses to become involved, may involve cost and the outcome is uncertain.

Access to refuge or other temporary accommodation can be a step to consider options including returning to the home to live safely without the abuser. Increasing the use of exclusion orders may not reduce the demand from women for temporary housing.

Affordability

The cost of remaining in the home after excluding a partner was an issue, particularly for women who jointly owned their home. Women in that situation focussed on the

long-term sustainability of the choices they made and the effort and cost of obtaining an order that is not sustainable in the long term. This makes exclusion orders less useful to them.

Focus on moving

There are widespread assumptions across a number of services that when a woman leaves or wants to leave an abusive partner that moving away is the safest and easiest option for women. A focus on child protection in domestic abuse cases had influenced this view in some services. This focus on moving was apparent in written material distributed to women and in discussions with practitioners from a range of services.

Recommendations

The recommendations seek to make exclusion orders better understood, more accessible, and an effective means of protecting women in their home for those who choose this option. In making recommendations we have taken account of the Scottish Government and COSLA framework for service developments and improvements to local responses to violence against women, Safer Lives: Changed Lives¹ which encourages local partnership working and support for the development of local responses to tackling violence against women. We envisage a crucial role for local VAW partnerships and their members in developing and planning services and as a source of local intelligence about the legal response to domestic abuse. Some partnerships may already be doing all or some of this.

Recommendation 1: Improve advice and information

The provision of clear and comprehensive information on the range of remedies including exclusion orders should be produced, be publicly available and provided to women and staff. It should incorporate information about legal remedies available that allow the court to order payment of household outgoings and other remedies to shift or share the financial burden of remaining in the home.

Recommendation 2: Extend the scope of local VAW partnerships

VAW Partnerships review their membership to broaden their scope to include representation or regular feedback in this area of civil law. This could include:

- any difficulties in obtaining legal aid and access to legal services
- the response of the courts
- any problems with enforcement of breaches.

VAW Partnerships could consider mechanisms to disseminate that information across all services working with women.

¹ *Safer Lives: Changed Live, A Shared Approach to Tackling Violence Against Women in Scotland, The Scottish Government, Edinburgh 2009*

Recommendation 3: Increase transparency in the justice system

Each VAW partnership should seek access to more detailed information, which could be useful for local planning fora, about the criminal justice response in their area including:

- the number of reports of crimes associated with domestic abuse incidents
- number of associated prosecutions
- outcomes of any prosecutions for domestic abuse aggravated prosecutions
- disseminate the information.

Additional data, which we understand is not extractable from COPFS data, includes the use of special bail conditions, and reports on the number and outcome of breaches of powers of arrest. Some local intelligence could be gathered qualitatively from partners in the criminal justice system.

Partnerships should devise a framework for recording and monitoring information on protective orders, their use and effectiveness in their area to monitor data, identify trends and design local service responses. This may involve seeking data from local solicitors.

Recommendation 4: Focus on an advocacy role

VAW Partnerships should consider how support can be provided with legal matters and with advocacy and liaison with agencies and services including lawyers in their area.

Recommendation 5: Make use of funding from other sources to fund legal actions

Local authorities should consider the possibility of expanding the remit of any legal services they fund (e.g.as part of their prevention of homelessness role) to include protective orders work.

Local authorities should consider alternative forms of funding and supporting women to take action to exclude the abuser under the MHA if women want take action but are prevented from doing so because of cost.

Recommendation 6: Home security measures

There should be clear routes for women to access home security services regardless of their involvement in other services. Consideration should be given to a standard service available to all women in civil court proceedings.

Recommendation 7: A review of existing legislation

A review of existing legislation with the intention of redrafting the range of orders available, clarifying the tests at the interim stage, the evidential requirements, the process, the interrelation between criminal and civil processes and the costs involved.

Any review should:

- take account of the UN Handbook for Legislation on Violence against Women² which provides a model framework for legislation on violence against women and is a useful template against which to consider the law and practice of exclusion orders
- consider the option of combining civil and criminal responses to domestic abuse in one court, for a consistent response in criminal and civil cases, including child contact cases
- consider simplified applications similar to those available in some jurisdictions, which then allow advisers other than lawyers to make applications for women and which focus on those orders required for immediate protection and sustainability of the order, leaving longer term issues to be resolved in a different procedure
- consider measures to encourage solicitors to provide legal aid services and prevent further withdrawal from the delivery of these important services. This should also consider access to legal aid: there are problems in both access and eligibility
- ensure that the change in the onus of proof and the procedures following breach for powers of arrest be repealed and that powers of arrest attached to all domestic interdicts revert to the previous position and an effective enforcement procedure for powers of arrest be introduced.

The UN recommends the use of orders to remove a perpetrator, ex parte where there is risk of violence. The current Scottish system can operate to allow that, but only where there is sufficient evidence to support a criminal prosecution and special bail conditions are imposed. Further measures not in place in Scotland but recommended by the UN for inclusion in civil protection orders include,

- restraining the perpetrator from causing further violence to the woman's dependents, other relatives and relevant persons in one action
- require that the movements of the offender be electronically monitored
- protection orders should be capable of being issued in both criminal and civil proceedings. Although non-harassment orders fit this criteria, the full range of protection orders does not
- evidence (oral or in the form of an affidavit) of the woman seeking protection is sufficient evidence
- there should be no requirement that independent evidence – medical, police or otherwise – is necessary to support an order

2 *The UN Handbook for Legislation on Violence against Women, United Nations, New York, 2009*

- once in force, breaches of protection orders should be a criminal offence; we note however that the criminalisation of breach is by no means straightforward in the Scottish system as the requirement for corroboration in Scots criminal law may act to limit women's choices.

The future for exclusion orders

Women face a complex and personal range of factors as they make decisions to leave abusers. The multi-agency approach envisaged by both the National Domestic Abuse Delivery Plan and the VAW framework could help support women to use exclusion orders and enable them to remain in the home, make it easier for women to make informed decisions in a place of safety and then help them access and negotiate legal services. In addition legal reform could produce a remedy that is simpler, quicker and cheaper than that currently available and which would increase the options available to women.

A copy of the full report can be downloaded from
www.scottishwomensaid.org.uk

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