

## Briefing for the Public Petitions Committee

**Petition Number** [PE01756](#)

**Main Petitioner:** James Mackie

**Subject:** Review current housing legislation to protect people experiencing domestic or elder abuse.

Calls on the Parliament to urge the Scottish Government to review current housing legislation in circumstances where a non-tenant has been responsible for domestic or elder abuse.

### Background

#### Elder abuse

[The World Health Organisation](#) defines Elder Abuse as:

‘a single, or repeated act, or lack of appropriate action, occurring within any relationship where there is an expectation of trust which causes harm or distress to an older person. Elder abuse can take various forms such as financial, physical, psychological and sexual. It can also be the result of intentional or unintentional neglect’

#### Domestic abuse

The current legal approach to tackling domestic abuse in Scotland involves both the criminal and civil law. There is a range of potentially relevant (statutory and common law) criminal offences. There are also a variety of civil law remedies available to tackle abuse, including those provided by housing law and family law.

Not all legal definitions of abuse cover psychological abuse or coercive or controlling behaviour, as opposed to abuse taking the form of physical violence. The [Domestic Abuse \(Scotland\) Act 2018](#) created a statutory criminal offence of domestic abuse against a partner or ex-partner. It is a recent example of legislation where ‘abusive behaviour’ is defined to include a wide range of behaviour not falling into the category of physical violence.

Scottish Woman’s Aid has published a good practice [domestic abuse guide for social landlords](#) which outlines the realities and legal issues faced by victims of domestic abuse. This was a partnership project between ALACHO, Shelter Scotland, Scottish Federation of Housing Associations, the Chartered Institute of Housing and Scottish Woman’s Aid.

## Housing law and practice

In practice, housing professionals are likely to consider elder abuse in the same way as they would domestic abuse in assessing a housing or homeless application.

For social housing tenancies, the [Housing \(Scotland\) Act 2001](#) outline the rights of landlord and tenant in relation to ending the tenancy. For tenancies in the private rented sector, the position of the landlord and tenant is either determined by the [Housing \(Scotland\) Act 1988](#) or the [Private Housing \(Tenancies\) \(Scotland\) Act 2016](#), depending on the date the tenancy was created.<sup>1</sup> There are grounds set out in the legislation which specify the reason a tenancy is able to end.

Under these pieces of legislation, there are no specific grounds available to the landlord to recover possession of the property relating to domestic abuse or elder abuse. However, there are grounds which relate to criminal or antisocial behaviour. Depending on the circumstances, these may be relevant in the context of domestic or elder abuse.

Sections 12 and 13 of the [Housing \(Scotland\) Act 2014](#), which apply to social housing tenancies, come into force on 1 November 2019. These provisions alter the circumstances in which someone can be added as a joint tenant to a tenancy. They also alter the circumstances in which a tenancy can be assigned or sublet<sup>2</sup> and the circumstances under which someone else can inherit the tenancy (on the death of the original tenant).

In relation to the 2014 Act, the Scottish Government has published [guidance](#) for social landlords, which includes information (at paras 6.4 and 6.5) about circumstances when the Scottish Government considers it may not be suitable to award a joint tenancy. Examples of relevant circumstances include where one party has a history of antisocial behaviour or domestic abuse.

The [Homelessness etc. \(Scotland\) Act 2003](#) provides that applicants presenting as homeless, who have fled any kind of abuse, are unlikely to be found to be intentionally homeless and can be provided with alternative housing and support by the local authority.

A homeless person or household fleeing abuse is able to present to any local authority in the United Kingdom. This is because it may not be safe for them to reside in the area in which they have formerly lived.

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<sup>1</sup> Tenancies created on or after 1 December 2017 (when the 2016 Act came into force) are private residential tenancies. Those tenancies created before that date will usually be assured or (more commonly) short assured tenancies.

<sup>2</sup> When a tenancy is assigned, the tenant's interest is transferred to another person and the original tenant drops out of the picture. When a tenant sub-lets, they lease the property to another person (who occupies the property). However, the original tenant retains his or her legal relationship with the social landlord.

If the abused person is the tenant, they may be able to receive housing benefit for both the home that they have fled from and their new accommodation, whilst ending any tenancy agreement. Housing benefit can be paid for two homes for up to 52 weeks if someone has left their home because of domestic abuse, even if they are the sole tenant.

## **Occupancy rights**

A person living with a tenant may have statutory 'occupancy rights', even though they are not a tenant. This is because of important provisions in the [Matrimonial Homes \(Family Protection\)\(Scotland\) Act 1981](#) ('the 1981 Act'), applying to spouses and cohabitants, and the [Civil Partnerships Act 2004](#) ('the 2004 Act'), applying to civil partners. The person who is a tenant is referred to in the legislation as 'entitled' and the person who is not a tenant is referred to as 'non-entitled'.<sup>1</sup>

For spouses and civil partners, the occupancy rights of the non-entitled spouse or civil partner are automatic. They last until removed or restricted by court order (for example, by a court order for eviction).

For a non-entitled cohabitant, an application must be made to the court to have occupancy rights declared. The court will consider the circumstances of the case, including how long the couple have been living together and potentially the behaviour of the person asking for the rights.

Occupancy rights in favour of a cohabitant can only be granted for a period not exceeding six months with the possibility of a six-month extension after a further application to the court. They can also be removed or restricted by a court order (for example a court order for eviction).

If a person living in a property does not have these statutory occupancy rights (or another legal right to occupy), the Shelter Scotland website says tenants can use 'self-help' measures to make that person leave the property. For example, changing the locks and not letting the person back in. They can also apply to the court for an ejection order.<sup>2</sup>

## **Other legal remedies relating to abuse**

The [Adult Support and Protection \(Scotland\) Act 2007](#) gives local authorities powers to apply to the sheriff court for various court orders with the aim of protecting "adults at risk".<sup>3</sup> Depending on the circumstances, these powers can be relevant in the context of elder abuse.

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<sup>1</sup> This legislation applies to the 'matrimonial home' (for spouses) or the 'family home' (for civil partners and cohabitants). These terms are defined in statute.

<sup>2</sup> [https://scotland.shelter.org.uk/get\\_advice/advice\\_topics/families\\_and\\_households/domestic\\_abuse/making\\_your\\_partner\\_leave](https://scotland.shelter.org.uk/get_advice/advice_topics/families_and_households/domestic_abuse/making_your_partner_leave)

<sup>3</sup> These are adults (aged 16 or over) who are i) unable to safeguard their own well-being, property, rights or other interests; ii) are at risk of harm; and iii) because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than adults who are not so affected (2007 Act, section 3). Each limb of this test must be satisfied before the powers in Part 1 of the 2007 Act can be used.

Other civil court orders can be applied for by the victim. Relevant court orders relating to a shared family home include:

- **an exclusion order** which can exclude a victim's spouse, civil partner and (in some circumstances) cohabitant from the matrimonial or family home. It overrides his or her other legal rights to occupy. Applications for these orders are rare in practice.
- a court order to **transfer a tenancy** from one person to another. This is geared towards the situation where the abuser is a joint or sole tenant in the property (which does not seem to be the petitioner's main area of interest).

Other court orders are geared towards protection of the victim in other circumstances (e.g. at their place of work). Different types of interdict can be applied for in relation to abuse, including a 'domestic abuse interdict'.<sup>1</sup> It is also possible to apply for a 'non-harassment order' under the Protection from Harassment Act 1997. A breach of this order is a criminal offence.

## Policy Developments

### Work by the Scottish Government

Last year, the Scottish Government carried out a [consultation](#) on a new form of protective court order (known in some other countries as an 'emergency barring order'). It can be applied for by someone other than the victim (such as the police). The same consultation also consulted on possible changes to exclusion orders and the circumstances in which cohabitants could be given occupancy rights. The consultation acknowledged the risk of giving occupancy rights to abusers.<sup>2</sup>

The [Family Justice Modernisation Strategy](#), published this month, said the Government will publish responses to the consultation and an analysis of consultation responses "in due course". It also said there was initial support for emergency barring orders among consultees, with some differing views around related practical questions. It explained that the Government was still considering whether legislation on exclusion orders was necessary. However, it stated that consultees were strongly in favour of further public information promoting the availability of exclusion orders.<sup>3</sup>

The [Scottish Law Commission](#) (SLC), the independent statutory body which makes recommendations for law reform to Scottish Ministers, is currently undertaking work on the law relating to cohabitants.<sup>4</sup> The SLC has described a possible second phase of their project, as follows:

"The team has in mind a review of civil remedies for domestic abuse, which would consider, among other matters, whether the existing

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<sup>1</sup> An interdict is a court order preventing the person named in the order from the conduct described in the order.

<sup>2</sup> See paras 2.37-2.39.

<sup>3</sup> See paras 4.37-4.41.

<sup>4</sup> See: <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/aspects-of-family-law/>

legislative framework is adequate and sufficient to provide the victims of abuse and violence with prompt and effective protection. A decision as to the content of the second phase of the project will be taken at a later date.”

## **Parliamentary Questions**

There have been several questions asked in the Scottish Parliament regarding domestic abuse and the policy work being done on this issue. The Scottish Parliament has also recently highlighted its support for organisations working with elder abuse<sup>1 2</sup>.

### **Question S5W-24712: Alex Cole-Hamilton, Edinburgh Western, Scottish Liberal Democrats, Date Lodged: 13/08/2019**

To ask the Scottish Government, in light of *Scotland's Domestic Abuse and Forced Marriage Helpline Annual Report 2017-2018*, what action it will take in response to the finding that a quarter of people who contact the helpline reported that they were experiencing difficulties with housing issues.

### **Answered by Christina McKelvie (06/09/2019):**

We understand the impact of domestic abuse on survivors' housing situation, whether they require emergency accommodation, temporary or permanent accommodation. We know that the National Helpline and the local services we fund through the Equally Safe Fund can provide support in this area, but we are clear that more needs to be done

In terms of systematic change, our Ending Homelessness Together Action Plan published in November, will transform how those at risk of homelessness receive help. Our work in this area include a commitment to developing a pathway to prevent homelessness for survivors of domestic abuse. The response to Parliamentary Question S5W-23871 on 15 July 2019 provides more detail. All answers to written parliamentary questions are available on the Parliament's website, the search facility for which can be found at <http://www.parliament.scot/parliamentarybusiness/28877.aspx>.

On 26 August 2019 the Cabinet Secretary for Local Government and Communities attended the launch of Domestic Abuse: a good practice guide for social landlords, which aims to support social landlords in recognising and supporting survivors of domestic abuse. This is a joint publication of the Association of Local Authority Chief Housing Officers (ALACHO), the Chartered Institute of Housing (CIH), the Scottish Federation of Housing Associations (SFHA), Shelter Scotland and Scottish Women's Aid and supported by the Convention of Scottish Local Authorities (COSLA).

### **Question S5W-24284: Graham Simpson, Central Scotland, Scottish Conservative and Unionist Party, Date Lodged: 09/07/2019**

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<sup>1</sup> [Motion S5M-18064: Alexander Stewart, Mid Scotland and Fife, Scottish Conservative and Unionist Party, Date Lodged: 03/07/2019](#)

<sup>2</sup> [Motion S5M-17694: Alex Cole-Hamilton, Edinburgh Western, Scottish Liberal Democrats, Date Lodged: 11/06/2019](#)

To ask the Scottish Government, further to the publication of its Homelessness in Scotland: 2018 to 2019 statistics on 26 June 2019, what its response is to the increase in homeless applicants leaving a violent/abusive household.

**Answered by Kevin Stewart (05/08/2019):**

While the number of homelessness applications from people leaving previous accommodation due to violent or abusive dispute within the household has decreased by 26% over the last 10 years (2008-2009 to 2018-2019), the 3% increase in the most recent statistics published on the 26 June is disappointing.

We want to prevent homelessness as a result of a violent or abusive dispute within the household. Our Ending Homelessness Together Action Plan, published in November, includes our commitment to developing a pathway to prevent homelessness for survivors of domestic abuse. We are working with third sector partners to help us understand the reasons for the recent increase in applications and to scope the pathway. Work will complete next year.

**Question S5W-23871: Alex Cole-Hamilton, Edinburgh Western, Scottish Liberal Democrats, Date Lodged: 18/06/2019**

To ask the Scottish Government, further to the answer to question S5W-23552 by Kevin Stewart on 5 June 2019, what scoping work has been carried out in relation to people experiencing domestic abuse.

**Answered by Kevin Stewart (15/07/2019):**

“Policy officials have started preliminary work to understand the experience of people who are homeless as a result of domestic abuse, alongside a wider piece of work on equalities across the Ending Homelessness Together Action Plan. A number of internal meetings have taken place with teams from across the Scottish Government to understand more about the context, raise awareness, and identify the right external stakeholders to take the work forward. In addition, we are currently considering an appropriate platform to develop a domestic abuse prevention pathway by summer 2020”.

**Alex Marks and Sarah Harvie-Clark  
Senior Researchers, SPICe  
08 October 2019**

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