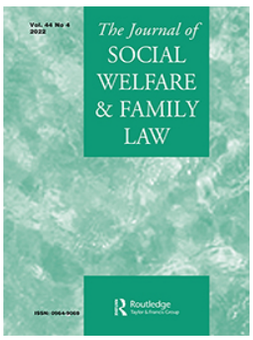

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Unintended consequences of non-harassment orders: child contact decision-making

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ABSTRACT

This paper considers the implications and unintended consequences of the increased use of non-harassment orders in criminal proceedings. In particular, it considers how non-harassment orders co-exist with the existing framework for decisions related to child contact proceedings. In this paper it will be shown that while non-harassment orders are needed for the protection of the victim and any child of the family, such orders may impact upon the traditional routes in which child contact decisions are made. This fact has not been the subject of consideration but is very significant given the inherent tension which results in a landscape where there is a trend towards respect for the views of children in Scottish child contact proceedings. It is recommended that priority must now be given to the use of such orders in cases involving children. Opportunities to consider this issue in more detail are highlighted.

KEYWORDS

Child contact; civil protection orders; domestic abuse; hybridisation; interdicts; non-harassment orders

Introduction

In line with other jurisdictions, Scotland has experienced a 'hybridisation' (Bates and Hester 2020) of legal responses to domestic abuse: that is to say, a coming together of criminal and civil law remedies. This hybridisation has occurred in the context of increased awareness and understanding of domestic abuse and improved legal responses, the most recent and significant of which has been the Domestic Abuse (Scotland) Act 2018. This introduced a distinct, gender neutral offence of domestic abuse against a partner or ex-partner. Hailed as the 'gold standard' of criminalisation (Scott 2020), conviction under the Act must be followed by consideration as to whether a non-harassment order is appropriate. Moving forward, it would appear that the existing trend towards using non-harassment orders as a response to domestic abuse will not only continue but will become more significant. Against this backdrop, this paper considers the consequences that non-harassment orders in criminal proceedings could have on decisions relating to child contact. It will draw upon data relating to the use of non-harassment orders in practice, will provide an analysis of Scottish case law on this subject and will contextualise this analysis with reference to empirical studies which have considered women's and children's experiences of both civil protection orders and child contact proceedings in Scotland. It will conclude that increased use of non-harassment

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orders must now be given closer consideration, given that they impact upon the traditional routes through which child contact decisions are made in family law courts (governed by section 11 of the Children (Scotland) Act 1995). It will also conclude that the current approach towards their use is inconsistent with the move in Scotland towards increased respect for the views of children in contact proceedings. It is recognised that further opportunities to consider this crucial issue will exist in the forthcoming report to Scottish Ministers on the Domestic Abuse (Scotland) Act 2018, the sentencing guidelines on domestic abuse which will be developed by the Scottish Sentencing Council (Scottish Sentencing Council 2021) and any future discussion around the use of integrated domestic abuse courts in Scotland (Scottish Government 2019).

The development of civil protection orders in Scotland

The landscape of civil protection orders in Scotland is underpinned by the Matrimonial Homes (Family Protection) (Scotland) Act 1981. The result of long-standing feminist activism in Scotland (McPherson 2021), the 1981 Act was introduced with the specific aim of providing civil remedies in cases of domestic abuse. At the time of its inception, it was a radical piece of law – at its most serious allowing husbands to be removed from property they owned at a time when the rape of a wife by a husband was not recognised under the common law (*S v HM Advocate* 1989). Specifically, the Act provided a framework of regulatory orders (section 3), exclusion orders (section 4) and matrimonial interdicts (section 14) to protect those suffering from domestic abuse. Breach of an order under the Act was treated as a contempt of court and the burden of responding to the breach of an order lay with the order holder, who would once again have to embark upon slow and costly civil proceedings – something Connelly and Cavanagh described as the 'Achilles' heel' of the process (2007, p. 284).

Following the 1981 Act, the landscape as it related to civil protection orders remained stationary in Scotland until the Protection from Harassment Act 1997. The 1997 Act introduced the first hybrid civil protection order to the UK (section 1). However, the Act applied to Scotland in a limited manner, providing a civil action of harassment (section 8), breach of which was a criminal offence (section 9). A distinct offence of harassment was not enacted under Scots law, unlike in England and Wales. The suggestion of such an offence was rejected in Scotland on the basis that the common law offence of breach of the peace covered such behaviour (House of Commons Library 2017, p. 9).

Around the time of the Protection from Harassment Act 1997, increased attention was paid to civil protection orders in Scotland. In particular, it was recognised that enhanced police protection was necessary for those experiencing domestic abuse (Justice Committee 2000). This ultimately led to the Protection from Abuse (Scotland) Act 2001 which facilitated a 'power of arrest' being attached to interdicts which fell outside the category of matrimonial interdict (section 1). This was significant since the definition of a matrimonial interdict under the 1981 Act excluded a wide category of people: divorced spouses, same-sex cohabitants, non-cohabitant partners, other family members such as parents or grandparents. The 2001 Act also provided police with the ability to detain those in breach of an interdict (section 4). However, a subsequent review of the Act concluded that there existed a:

> lack of fit between the intention of the new legislation and its actual operation. In mirroring the matrimonial homes legislation, the new Act reproduces the limitations inherent in hybrid civil/criminal orders designed to respond to cases of domestic violence, where responsibility is split between the pursuer and the state. Civil law interdicts may place an unfair burden on victims of abuse to pursue actions due to strict eligibility criteria for legal aid and the cost of privately funding civil court actions. Powers of arrest assist the police in responding to domestic abuse but do not guarantee that prosecution will follow (Scoular *et al.* 2003, p. 4).

The Criminal Justice (Scotland) Act 2003 further reformed non-harassment orders, granting the police powers to arrest for a breach of a non-harassment order without a warrant (section 49). However, more significant reform of the legal landscape did not occur until 2011, when two important pieces of legislation were passed. The first of these was the Domestic Abuse (Scotland) Act 2011 which inserted section 8A into the Protection from Harassment Act 1997. Whereas previously a 'course of conduct' was required to satisfy harassment, under section 8A, harassment on just one occasion in the context of domestic abuse would be sufficient to give rise to protections under the Act. Section 2 of the Domestic Abuse (Scotland) Act 2011 also allowed for an interdict of a power of arrest to be designated a 'domestic abuse' interdict, breach of which was a criminal offence in and of itself. The second significant piece of legislation introduced at this time was the Forced Marriages etc. (Protection and Jurisdiction) (Scotland) Act 2011 which introduced a forced marriage protection order (section 1), breach of which was a criminal offence (section 9). These changes further cemented the landscape of hybridisation in Scotland and represented a shift of approach underpinned by recognition that civil protection orders were not able to offer an effective legal response to domestic and honour abuse, unless breach of such orders would invoke the penal powers of the criminal law.

Hybridisation experienced a further shift as a result of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 and the Domestic Abuse (Scotland) Act 2018. Following conviction for abuse against a partner or ex-partner under the 2018 Act (section 1) or following conviction of an offence aggravated by section 1(1)(a) of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (an offence involving the abuse of a partner or ex-partner), a non-harassment order must be considered (234AZA of the Criminal Procedure (Scotland) Act 1995). Until this point, hybridisation involved the civil law strengthening its responses through the use of criminal law powers. Thereafter, it evolved to include the use of existing hybrid civil law remedies in the criminal law's response to domestic abuse.

Since the 2018 Act, there has been further development of the landscape of civil protection orders. The Domestic Abuse (Protection) (Scotland) Act 2021 introduced domestic abuse protection notices (DAPNs) and domestic abuse protection orders (DAPOs) – breach of either being a criminal offence. DAPNs can be issued by the Police (section 4) for short-term emergency protection and may require a perpetrator to leave the place where they live or prohibit them from entering a certain place (section 5). DAPOs can be granted by a sheriff (section 6) and can similarly stipulate requirements or prohibitions required to protect someone from abuse (section 6). These can last for up to two months. This legislation was introduced in recognition of the risk of

homelessness faced by many women experiencing domestic abuse (Scottish Government 2010a) and brings Scotland into line with the rest of the UK.

Throughout this period of change, exclusion orders have also available under section 76 of the Children (Scotland) Act 1995. These can be sought by the local authority and allow for a named person to be removed from a child's family home in order to safeguard a child's welfare. However, in practice such orders are rarely used.

As can be seen, the landscape of civil protection orders is now extremely complex in Scotland, and it is unlikely to be obvious to survivors of domestic abuse which specific remedies are available under civil law and/or are most appropriate to their circumstances. It is also clear that hybridisation itself has evolved, with the current approach now including the use of hybrid civil protection orders in criminal law responses to domestic abuse.

Materials and methods

The secondary data analysis presented in this paper draws on three sources: data from the Scottish Courts and Tribunal Service, data from the Scottish Government, and reported appeal judgements from Scottish criminal courts. Specifically, searches were undertaken to identify reported criminal appeal judgements where a non-harassment order had been imposed (regardless of whether the imposition of the order was the basis of the appeal). The focus was on those cases reported since the introduction of the Abusive Behaviour and Sexual Harm Act 2016. Five relevant cases were identified and one further case decided shortly before the introduction of the 2016 Act was also included for analysis. These cases were subject to critical feminist analysis and are discussed in further detail within the paper.

The data included is contextualised by reference to empirical research studies which have investigated the experiences of women and children in Scotland in the context of applications for civil protection orders and child contact proceedings.

This study is exploratory in nature and seeks to illuminate how non-harassment orders may impact upon the traditional routes in which child contact decisions are made. It is suggested that this issue can and should be the subject of closer scrutiny in two forthcoming projects: the report to Scottish Ministers which will lead from the introduction of the Domestic Abuse (Scotland) Act 2018 (section 14) and the developing of sentencing guidelines in relation to domestic abuse (Scottish Sentencing Council 2021). It can also inform further discussion on the use of integrated domestic abuse courts in Scotland, if, and when, this issue is revisited.[1]

Non-harassment orders in practice

Although non-harassment orders have been a consistent strategy for responding to domestic abuse in Scotland for some time, the legislative changes discussed above have encouraged the use of such orders in practice. Figure 1 below shows the rising number of non-harassment orders issued by criminal courts in Scotland between 2010 and 2021.

This trend towards increased use of non-harassment orders is in keeping with the rest of the UK (Hester *et al.* 2008, Bates and Hester 2020). The number of non-molestation orders made in England and Wales has increased since 2012 and in 2018 was at its highest

Figure 1. Non-harassment orders issued under the criminal procedure (Scotland) Act 1995 and protection from harassment act 1997 between 2010 and 2022.[2]

level since 2003 (Bates and Hester 2020: Figure 2), and the number of restraining orders issued in criminal proceedings has increased steadily since 2011 (with a slight drop between 2016 and 2017) (Bates and Hester 2020): (Figure 1). It is currently unknown how many domestic abuse cases result in a non-harassment order in Scotland; however, this information should be included in the report to Scottish Ministers which will be prepared on the Domestic Abuse (Scotland) Act 2018 (section 14(2)(d)).

In addition to the increased use of civil protection orders, criminalisation of the breach of such orders has become routine. In their evaluation of the Domestic Violence, Crime and Victims Act 2004 (which related to England and Wales but not Scotland), Hester *et al* found that the criminalisation of civil protection order breaches had been welcomed by survivors of domestic abuse and that such criminalisation encourages the reporting of breaches (Hester *et al.* 2008). Freedom of information requests made to the Scottish Government (2021a) show the number of people prosecuted in Scottish courts for breaches of non-harassment orders (Table 1) between the period 2010 and 2020.

A small number of people (five in total) also received a fiscal warning for breaches of non-harassment orders between 2012–13 and 2019–20 (Scottish Government 2021a). The increased number of breaches of non-harassment orders over this period is something which would be expected and coincides with the provisions of the Domestic Abuse (Scotland) Act 2011 and Abusive Behaviour and Sexual Harm (Scotland) Act 2016 coming into force. The fact that the number of prosecutions relating to civil non-harassment orders is significantly smaller that prosecutions for breaches of non-harassment orders made by the criminal court might suggest that breaches of orders passed in the civil courts are generally considered to be less serious than breaches of orders passed by criminal courts or that breaches of orders granted in criminal courts are

Table 1. People prosecuted in Scottish courts for breaches of non-harassment orders 2010–11 to 2019–20.

Crime	Charge	2010–11	2011–122	2012–13	2013–14	2014–15	2015–16	2016–17	2017–18	2018–192	2019–20
Total		10	20	31	65	133	157	199	209	269	269
Breach of non-harassment order (civil court)	Protection from Harassment Act 1997s. 9(1)(A)	3	6	4	12	13	18	27	26	28	29
	Protection from Harassment Act 1997s. 9(1)(B)	2	-	1	3	1	5	6	8	10	7
Breach of non-harassment order (criminal court)	Criminal Procedure (Scotland) Act 1995s.234A(4)	5	14	26	50	119	134	166	175	231	233

more commonly reported. However, without knowing how many non-harassment orders were issued by civil courts overall, this is difficult to confirm.

The legal test for non-harassment orders

Under section 8 of the Protection from Harassment Act 1997, the test for making a non-harassment order is whether it is 'appropriate for [the court] to do so in order to protect the person from further harassment' (section 8(5)(b)(ii)). Early case law on non-harassment orders had cause to reiterate that a person may not be subjected to the same prohibitions in an interdict or interim interdict and a non-harassment order at the same time (*McCrann v McGurran* 2002; section 8(5)(b)(ii)).

Section 8 of the Protection from Harassment Act 1997 and section 244A of the Criminal Procedure (Scotland) Act 1995 make no mention of the consideration which should be given to children. This can be contrasted with section 242AZA of the 1995 Act: under the Domestic Abuse (Scotland) Act 2018, a child cannot be the victim, but an offence under the Act can be aggravated by the presence of a child. Section 234AZA(5) of the 1995 Act provides that a non-harassment order can apply to a child, in addition to the victim, if 'the court is satisfied that it is appropriate for the child to be protected by the order'.

Due to the fact that only appeal cases are the subject of formal legal reporting, it is difficult to ascertain patterns in relation to the making of non-harassment orders. However, some case law has provided insight into the operation of the test. For example, *Oswald v HM Advocate* 2015 involved an appeal against a non-harassment order in a case which involved children, before the introduction of section 234AZA. The order had been imposed following a conviction for stalking, and a conviction for breaching an existing non-harassment order against an ex-partner. Discussion of the previous conviction leading to the breached non-harassment order makes clear that the parties shared two children. The incidents which were the subject of the appeal occurred four days after the appellant was released from prison for assaulting his ex-partner. It is noted in the appeal that: 'Both children had seen the appellant and, being aware of the past history, were frightened. The complainer was terrified' (para 4).

Following the Domestic Abuse (Scotland) Act 2018, several appeal cases detail the use of a non-harassment order in circumstances which involve children, but where children were not named as victims in the charges of which the accused was convicted. For example, in *Wilson v HM Advocate* 2019, a non-harassment order was ordered following a conviction for assault which was aggravated by section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (involving the abuse of a partner or ex-partner). The basis of the appeal was corroboration (particularly as it relates to a course of conduct). However, reference is made to a violent incident in which the complainer was forced to attend at the appellant's grandmother's house to draw up a separation agreement regarding child contact, suggesting that the appellant was their father. Although neither child was named directly as a victim in the charges, the impact of the appellant's abuse on them is made clear:

> The complainer moved through to the bedroom with her son, who had woken up, followed by her daughter. The appellant was watching that she "was not going to run away". He

> poured a bottle containing coca cola, ash and cigarette ends over her and the boy, whom she was holding. He began breaking everything in the room; pulling clothes out of drawers before attacking her once more. He pushed her repeatedly onto a bed and again "strangled" her. He punched her repeatedly. He pulled her hair; tearing out her hair extensions. He threw a television at her. He hit her on the legs with a bit of wood, which she kept to barricade the door. The complainer was crying hysterically. Her son was screaming. Her daughter looked on unmoving, as she was "used" to it (para 7).

Similarly, *Brand v HM Advocate* 2019 involved an appeal against the sentence discount afforded to the appellant in circumstances where he had been convicted of serious assaults of his ex-partner and a non-harassment order had been imposed. Two child witnesses aged 8 and 10 are referenced in the appeal. It is not clear from the appeal whether the appellant was the father of the children, but it is made clear that threats were made to the complainer following the assault and that one of the assaults was especially violent, rendering her unconscious and endangering the sight in one of her eyes (para 4).

More recently, *Finlay v Procurator Fiscal, Perth* 2021 considered the test required for the imposition of a non-harassment order in domestic abuse cases. The case involved an appeal against the imposition of a non-harassment order following a conviction for assault of the appellant's former partner. The test for the imposition of a non-harassment order was confirmed: whether it is appropriate to protect the victim from further harassment (section 234A(2) Criminal Procedure (Scotland) Act 1995). It was further commented that the wording of the legislation was clumsy, but that its essence was 'that the court must make a non-harassment order unless of a negative conclusion of the question; a negative conclusion of the question being that the court concludes that there is no need for the victim (or where there are any, the children) to be protected by such an order' (paragraph 11). The court also clarified that a complainer's views do not have to be taken into account when considering whether this test has been met. In the reported appeal it was noted that in reaching the view that a non-harassment order was appropriate the Sheriff had regard to:

> the appellant's offending history including two previous convictions with a domestic aggravation involving a different partner; the fact that the appellant had deliberately breached a special condition of bail in relation to the complainer; that this had been a relatively short relationship; that there were no children of the relationship; and that the appellant had described the complainer as complicit in the commission of both offences, thus indicating that he sought to minimise his culpability (para 9).

Finlay gives direction as to the test for a non-harassment order, since this was the focus of the appeal. But there did not appear to be children of the relationship. Contrastingly, *Oswald* and *Brand* involved children, and although the appeals themselves did not relate to the non-harassment order, it appeared that in both cases, the children's role was non-existent, with their experiences of domestic abuse being included only to support the female complainer's account. Their experiences were not central to the decision-making of the court, despite the risk posed to them by their fathers' behaviour. This can be related to broader problems with how children are conceptualised under the Domestic Abuse (Scotland) Act 2018. The Act does not explicitly recognise children as victims of domestic abuse; instead it is focussed on conduct between intimate partners and ex-partners. Section 2(2) of the Act stipulates that behaviour which is abusive includes behaviour directed at the child of the intended victim. Separately, section 5 of the Act provides that

an offence under section 1 can be aggravated by reason of involving a child. This position has been the subject of criticism, with it being said that it creates a hierarchical distinction between victims of domestic abuse, 'rooted in traditional and narrow understandings of how children experience coercive control' (Cairns and Callander 2022, p. 7). Cairns and Callander argue that further reform of the 2018 Act is required so that children can be treated as 'adjoined victims' (2022),

Domestic abuse and child contact

Decisions relating to child contact in Scotland are governed by section 11 of the Children (Scotland) Act 1995. The court is guided by the principles of minimum intervention and welfarism (s 11(7)(a)). The child must also be given an opportunity to express their views (s 11(7)(b)). The court must in addition have particular regard for the need to protect children from abuse or the risk of any abuse (s 11(7B)). Under the Act 'abuse' is defined as: violence, harassment, threatening conduct or any conduct likely to give rise to physical or mental injury, abuse of a person other than the child and domestic abuse (s 11(7C).

Further provisions relating to the making of orders under section 11 will soon be introduced through the Children (Scotland) Act 2020. The 2020 Act will bring Scotland in line with the rights granted to children under the United Nations Convention on the Rights of the Child and, amongst other things, will ensure that children's views are able to be heard. Under section 18 of the 2020 Act, it is enacted that:

(3)The court must –
(a) give the child an opportunity to express the child's views in –
(i) the manner that the child prefers, or
(ii) a manner that is suitable to the child if the child has not indicated a preference or it would not be reasonable in the circumstances to accommodate the child's preference . . . .

Therefore, the starting point will be that all children are able to give their views in some way, even if that includes less typical forms of communication (such as writing a letter or drawing a picture). As such, there is a move towards increased respect for the views of children in child contact proceedings in Scotland.

Although only around ten per cent of parental separations reach court proceedings in Scotland (Whitecross 2017), concern has been raised about child contact decision-making in the context of domestic abuse. In keeping with other jurisdictions (Hester 2011), historically it has been shown that contact with the father is not only seen as preferable by the family courts, but that the mother is often viewed as being responsible for facilitating such contact, that domestic abuse is often minimised (Mackay 2013, 2018), and that contact is often promoted even where evidence of abuse exists (Macdonald 2016). Citing the work of Heward-Belle, Cairns and Callander also note the false perception that perpetrators of domestic abuse can be poor partners but good father simultaneously (2022, p. 7).

In a recent Scottish study of child contact disputes involving domestic abuse, Mackay (2018) found that the views of younger children were often not taken into account. Her article draws on court-based analysis carried out in 2011 of 208 child contact disputes and interviews with sheriffs. In one case where contact with the father was advised, the

children had told the reporter they did not want to see their father and that he had left them outside a pub during contact. Their mother also told the reporter that the younger child had started bed wetting and was soiling herself out of fear of seeing her father. Despite this, the reporter concluded:

> There appear to be no child welfare based reasons why contact should not operate [. . . .] I do not feel that either of the girls are sufficiently mature to be able to evaluate their feelings objectively. [. . . .] The girls are obviously fearful of their father, but I do suspect this is a result of the perception of their mother's reaction rather than a genuine fear of spending time with the pursuer (Mackay 2018, p. 491).

This example also emphasises the role and influence of reporters in decision-making. Child welfare reporters have an increasingly important role in proceedings; their report will inform the court and assist the judge in their decision-making.

Whitecross has also highlighted the role of sheriffs in Scottish child contact cases involving domestic abuse. His research found that lawyers working in specialist courts noted how well sheriffs picked up concerns related to domestic abuse and contact, but that these experiences could be contrasted with those of lawyers working in different sheriff courts. He concludes:

> a significant barrier to raising concerns about domestic abuse is the attitudes and understanding of some sheriffs. Training was viewed as a first step to remedying these concerns, and to challenging understandings of domestic abuse (for example that it is "more than a black eye"). Until then, judicial attitudes appear to remain a barrier to implementing fully the intentions underlying section 11(7A)-(7E) (Whitecross 2017, p. 274).

Recent empirical research by Morrison, Tisdall and Callaghan found that current legal mechanisms in Scotland are ill equipped to deal with complex issues such as domestic abuse that children's views are sought on and that the court may give little to no regard to children's views if they are perceived to be in situations involving manipulation, domestic abuse or situations which may give rise to harm (2020). As such, Morrison *et al* conclude that the family law system and associated court procedures in Scotland 'fail to sufficiently recognise the participation rights of numerous children in contested contact cases' (2020, p. 416). Later work by Morrison and Tisdall has similarly found that direct involvement in Scottish child contact proceedings is rare and where children's views are considered 'too informed' their authenticity is often called into question (Tisdall *et al*. 2021). Tisdall *at al* question how such attitudes can be aligned with Article 12 of the United Nations Convention on the Rights of the Child and section 11 of the Children (Scotland) Act 1995. These findings arose out of empirical research involving semi-structured interviews with 17 legal and advocacy professionals with experience of children's participation in family actions and analysis of case law relating to section 11 of the Children (Scotland) Act 1995, reported before 2019.

Non-harassment orders and child contact

The issue of how non-harassment orders are likely to interact with child contact proceedings long term is something which has been given limited consideration in Scotland, despite recent legislative changes related to domestic abuse. Some recent case law has grappled with the issue more explicitly.

In *S v HM Advocate* 2016, the court allowed an appeal against the imposition of non-harassment order which prohibited contact for a period of three years with both the victim of the offence (his wife) and their three children. Here, the children had originally been named as victims in relation to an incident of threatening and abusive behaviour (a statutory offence contained under section 38 of the Criminal Justice and Licencing (Scotland) Act 2010), but this charge was withdrawn by the prosecutor. Although the children reported being distressed by their father's behaviour, and frightened of him, it was nevertheless held, that because the convictions in question did not relate to them directly, the making of a non-harassment order was excessive:

> even if the children in the present case were distressed by the conduct specified in charge 1 and, indeed, might be said to be harassed by it, they cannot be regarded as victims as the term 'victim' is used in sec 234A(2) . It follows from that that while the sheriff did have power to make an order in respect of [his wife], he did not have power to make an order in respect of the children A, B or C (at para 8).

This would suggest that, prior to the Domestic Abuse (Scotland) Act 2018, whether the child or children were direct victims in a criminal charge was significant. In the aforementioned cases of *Oswald, Wilson* and *Brand*, this was the position adopted when the non-harassment order was the subject of challenge, but it can be presumed in principle that the same position was taken into account during initial decision-making about whether to impose a non-harassment order.

More recently, the case of *W(G) v HM Advocate* 2019 considered the same issue. W was convicted of four assaults against his wife and son and was sentenced to two years' imprisonment. A non-harassment order was also issued, which stipulated that the appellant was not to approach or contact the complainer or the children or enter their home for a period of three years. The appellant appealed against the non-harassment order on the basis that:

> The court had to be satisfied that it was appropriate for the children to be protected by the order. It was not appropriate because the views of the children had not been properly and independently investigated. It was further submitted that the appellant intended to raise civil proceedings for contact and that would be the appropriate forum in which to decide whether contact should be allowed, taking account of the children's views (para 13).

The position advanced here regarding the need to investigate the views of the child is at odds with the position expressed elsewhere (that the views of victims do not need to be sought by the court when making decisions relating to the granting of a non-harassment order).

On refusing the appeal it was commented that where 'such a child has witnessed, overheard or been a victim of domestic violence, it will only be rarely that the court should not have that child "in mind" for the purposes of addressing the question posed in section 234AZA(4)' (para 23). The court referred to the earlier case of *S v HM Advocate*, stating that:

> Amongst the effects of the legislation is that the problem identified in *S* v *HM Advocate* 2016 JC 1 will no longer arise. In that case it was held to be incompetent for a sheriff to make a non-harassment order under Section 234A not only in respect of the victim named in the charges but also in respect of her children. While they were doubtless distressed by the

> conduct which they witnessed, the charge libelled could not be said necessarily to involve misconduct towards them (para 15),

However, this position is inconsistent with section 11(7C) of the Children (Scotland) Act 1995 which includes the abuse of others and domestic abuse under its definition of abuse which a child should be protected from.

W(G) is also illuminating due to the approach taken by both the sheriff and appeal court. During proceedings it had become clear that there were times where the children had wished to see the appellant:

> He reasoned that it is not uncommon for children in the middle of domestically abusive relationships to feel conflicted, so he was not surprised to be told that there were times when the children wished to see the appellant . . . It was necessary to try to remove from them the burden of carrying any responsibility for the decision as to whether they should have contact with the appellant for an appropriate period of time (para 16).

The appeal court, however, held that such concerns were not relevant and instead the question was one of the appropriateness of the order (at para 24). In keeping with the fact that a complainer's views do not have to be taken into account, children's views are similarly not relevant when assessing whether the test for the imposition of a non-harassment order has been satisfied.

Discussion

Although the granting of civil protection orders has been associated with a feeling of empowerment for many women (Connelly and Cavanagh 2007), it has also been recognised that issuing orders without victim consent my disempower women (Hitchings, 2005). These concerns are highly relevant to criminal proceedings related to domestic abuse in Scotland. Because women's views do not have to be taken into account when decisions related to the imposition of a non-harassment order are made in criminal proceedings,[3] and because they may not have initiated criminal proceedings, the imposition of such an order may disempower women and leave them feeling as though they have no control. This is particularly important for women who have previously felt powerless in an abusive relationship (Connelly and Cavanagh 2007, p. 267). It is clearly significant, therefore, that non-harassment orders can be issued without reference to the complainer's views in the context of a conviction for domestic abuse, which may have been initiated by someone other than the woman herself. Indeed, it should be recognised that many women do not wish to engage with the criminal law and that domestic abuse is one of the most under-reported crimes (Brooks-Hay and Burman 2018). Although conviction rates under the Domestic Abuse (Scotland) Act 2018 are analogous to other offences (Scottish Government 2021b), problems related to evidential standards are likely to exist, particularly in Scotland where the requirement for corroboration presents an additional barrier to those wishing to engage with the criminal justice system. This can be illustrated by the case of *Spinks v Harrower* where it was held on appeal that where there were separate incidents of assault, the normal requirement of corroboration applied to each incident. In convicting Spinks, the sheriff had accepted that there was no corroboration for some assaults but that it was legitimate to treat these assaults as a course of conduct involving the abuse of a partner in a domestic context. The *Moorov* doctrine has

been developed in order to offer a special means of offering corroboration in cases where conviction may be difficult. This doctrine allows for separate charges to corroborate one another where there is a similarity in terms of time, place and circumstance (*MR v HM Advocate*). Cairns has argued that the direction of recent reform of the *Moorov* doctrine has the potential to assist with prosecutions under the Domestic Abuse (Scotland) Act 2018, but that deeply engrained attitudes and gender stereotypes may nevertheless limit the benefit of such development of the doctrine (2020).

Other problems exist in a criminal setting, such as the fact that giving evidence can be stressful and traumatic. Failure to give evidence can also have consequences for the victims of domestic abuse as the case of Donna Kiddie illustrates. Kiddie was sentenced to 14 days' imprisonment in 2016 for contempt of court after refusing to give evidence against her husband who was accused of assaulting her (The Independent 2017). Kiddie served four nights in prison before an appeal was lodged and succeeded. It was recognised by Scottish Women's Aid at the time that this is an increasingly unusual approach to take towards reluctant witnesses, but it is a risk that exists (The Independent 2017). Connelly and Cavanagh have previously noted that it is often assumed that women do not co-operate with proceedings in order to protect the abuser or preserve the family unit, but that repeated studies have found that the main reason for non co-operation is fear of reprisal (2007, p. 276). Following Kiddie's case, which received significant press attention at the time, it would be helpful for victims of domestic abuse in Scotland to be formally assured that they will not be subject to punishment if they refuse to give evidence against their abuser.

Despite these problems, there are potential benefits, or at least unintended consequences, of the increased use of non-harassment orders in criminal proceedings. It has long been recognised that the cost associated with civil protection orders can be a barrier for women (Connelly and Cavanagh 2007, Mackay 2018). The making of a non-harassment order through criminal proceedings removes financial barriers to women experiencing domestic abuse and so is one of the clear benefits of using civil remedies in the context of criminal proceedings brought by the state.

Whilst the purpose of a non-harassment order is the protection of the victim and any child of the family, as shown, it may well be that such orders impact upon the traditional routes in which child contact decisions are made. Non-harassment orders have the potential to stop contact for significant periods of time and this will often be in a child's best interests. Case law on child contact proceedings has demonstrated that maintaining the status quo has been an influential factor in judicial decision-making in cases related to child contact. Often cited on this point is the case of *Breingan v Jamieson* 1993, in which a father was unsuccessful in his petition for child custody in a situation where the child's mother had died, and the child had gone to live with her aunt:

> Her life in my opinion has been disturbed enough so far. To remove her now to a totally different environment would be disruptive of her settled, happy life and detrimental to her best interests.

Although the (gendered) assumption that a woman would be a better parent than a child's father would likely not influence the court's reasoning to the same extent as it did in earlier residence cases, the issue of prolonged absence or of sporadic contact has also been something which the courts have found contrary to the best interests of a child.

For example, in *R v M* 2010, the court refused to grant an unmarried and unregistered father rights and responsibilities to his daughter:

> For the moment . . . [the child] requires structure and routine. She requires to settle into and enjoy nursery school. She will need time to relax at weekends with her close family circle and to gain confidence as she heads towards the start of primary school to be able to interact with other children. She does not at this point of time need the further distraction to add to those she has already had throughout her young life of being forced to have contact with a father whom she does not know (para 54).

In the recent case of *LRK v AG* 2021, a sheriff's interlocutor for child contact was recalled on appeal. Initially, supervised contact had been awarded to the respondent on a restricted basis, despite the fact that the respondent had not seen the child for five years. This in itself was unusual and a cause for concern, but especially against the background of a relationship characterised by domestic abuse 'which included assaulting the appellant by trying to make her eat dog faeces and putting petrol through the appellant's door and threatening to set fire to the house, when incidentally the child was in residence' (para 4). Amongst the criticisms made of this decision, the Court noted that the test of impracticability as it regarded the child's views as having been 'swept away' by the sheriff (para 12).

Where criminal procedure is initiated and where a criminal conviction is achieved, sentencing will be informed by a Criminal Justice Social Work Report which may involve third party accounts and participation from family members and children where appropriate (Scottish Government 2010b, p. 18). However, there is no statutory obligation for the views of a child to be taken into consideration and as seen, the court is under no obligation to take into the account the views of complainers and children when making decisions regarding whether a non-harassment order is appropriate. This is in contrast to the principles contained in the Children (Scotland) Act 1995/2020 and the general trend in family law matters to respect the views of children. As such, there is an emerging tension between criminal and civil law with regards to children's rights: their participation in decisions about their lives and their rights to an on-going relationship with a non-resident parent. This, therefore, impacts more broadly on how children's best interests are conceptualised in Scots law.

Conclusion

The data presented in this paper evidences the increased use of non-harassment orders in Scotland and increased criminal proceedings for breach of non-harassment orders. The implementation of the Domestic Abuse (Scotland) Act 2018 is likely to lead to an even greater increase in future years. Non-harassment orders have been consistently used in cases which involve children, but the governing legislation does not require the court to consider the experiences of children. Following from *W(G) v HM Advocate*, it is likely that in all criminal domestic abuse cases, where there are children, it is highly likely that such an order will be passed, regardless of whether the child is the named victim in the charges alleged. Such a position certainly circumvents the problems which might arise from the fact that the Domestic Abuse (Scotland) Act 2018 does not provide a specific offence of abuse towards a child and the fact that psychological and emotional aspects of domestic abuse remain under-criminalised for children under Scots law. However, it

remains to be seen whether the position suggested in *W(G)* will be adopted by the Scottish courts moving forward.

Further data relating to the use of non-harassment orders should be available in the near future, since section 14 of the Domestic Abuse (Scotland) Act 2018 puts in place a reporting requirement which demands that Scottish Ministers make available a report to the Scottish Parliament after the end of the reporting period (three years). It is recommended that future research should also seek the views of women and children on this matter since the issue of using non-harassment orders in criminal proceedings is complex and under-researched in a Scottish context. Following the Scottish Sentencing Council's review of sentencing of domestic abuse cases (McPherson *et al.* 2022), work will commence on developing a sentencing guide for cases of this type (Scottish Sentencing Council 2021). Elsewhere, the Scottish Government has also produced an initial report on the use of Integrated Domestic Abuse Courts that use the 'one family, one judge' model (Scottish Government 2019). This report makes no mention of non-harassment orders specifically, but it is recommended that the issue of non-harassment orders in cases involving children be given careful consideration if discussion on the use of integrated domestic abuse courts is revisited.

In conclusion, there exist several opportunities in Scotland for this issue to be given the attention it needs and for courts to be guided in future decision-making in a way which accords with the needs of women and children who are primarily the victims of domestic abuse. This issue should also be given priority before the legal and policy tensions in the participation of children in the Scottish justice system, which are already evident, become more pronounced – something which is likely to happen with the implementation of the Children (Scotland) Act 2020.

Notes

1. The Scottish Government's 2019 report on the use of integrated domestic abuse courts concluded that the evidence on such courts is weak as a result of there being few studies conducted outside the USA. Issues of consent and data sharing were also highlighted. Wider consultation and further research were advised and so it is likely that this issue will be revisited.
2. These figures refer only to non-harassment orders from criminal courts and the data excludes non-harassment orders from civil proceedings. The figures are also at individual charge level and so may not correspond with other official data released under a main charge approach. Data provided by the Scottish Courts and Tribunal Service, March 2022 for the Scottish Sentencing Council in preparation of the report *The Sentencing of Cases Involving Domestic Abuse in Scotland* (McPherson *et al.* 2022).
3. In practice, COPFS, through Victim Information and Advice, will seek the victim's view on whether a non-harassment order is desired and this will usually be relayed to the court, but this view does not have to be taken into account.

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