



Law Society
of Scotland

Scottish Parliament Justice Committee Call for Evidence

8 December 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee and Property and Land Law sub-committee welcome the opportunity to consider and respond to the Call for Evidence in relation to the Domestic Abuse (Protection) (Scotland) Bill¹ (the Bill). The committee has the following comments to put forward for consideration.

General

The policy objectives of the Bill are to improve “the protections of available for people who are at risk of domestic abuse, particularly where they are living with the perpetrator of the abuse.”² This is to be achieved by providing new powers to:

- the courts to make a Domestic Abuse Protection Order (DAPO) and
- the police to make a Domestic Abuse Protection Notice (DAPN).

The DAPNs and DAPOs are both intended to present short term measures to provide protection to a person at risk of abuse. It gives that person space to take steps to address longer term issues of safety and housing situation without continuing to be abused by their partner/ex-partner.³

The powers to be created are intended to fill a “gap” in legislation for those who may be experiencing abuse, to reduce the risk that a person has to make themselves homeless to find protection and to provide them with a safe solution to seek out other forms or means of longer term safety.

1 <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/domestic-abuse-protection-scotland-bill/introduced/domestic-abuse-protection-scotland-bill-as-introduced.pdf>

2 Paragraph 4 of the Bill's Policy Memorandum <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/domestic-abuse-protection-scotland-bill/introduced/policy-memorandum-domestic-abuse-protection-scotland-bill.pdf>

3 Paragraph 7 of the Policy Memorandum <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/domestic-abuse-protection-scotland-bill/introduced/policy-memorandum-domestic-abuse-protection-scotland-bill.pdf>

We refer to our response⁴ to the Scottish Government consultation in March 2019 on “Protective orders for people at risk of domestic abuse” where we stated that “domestic abuse is a situation that must not be tolerated in our law or society.” That is very firmly our view. Setting out measures to reduce that risk is important. That ties in with the message at paragraph 16 of the Bill’s Policy Memorandum which states:

“that violence against women and children will not be tolerated and a bold and unapologetic approach is needed, which links systematic gender inequality with the root causes of violence against women in order to achieve necessary improvements.”

We consider that it is important to emphasise the gender-neutral drafting of the Bill as domestic abuse arises for men as well as women. It is important that this is fully reflected.

Significant steps have been taken over several years to revise and update the law and improve the public’s understanding of domestic abuse. Effective measures that help to prevent domestic abuse and support victims and potential victims are vital to deal with those people who may be at in situations of immediate danger. The provenance of the creation of these powers can be seen in the context of the 2012 Istanbul Convention,⁵ a ‘landmark’ treaty for creating a legal framework at pan-European level to protect women from all forms of violence including domestic violence.

We have concerns about the creation of the DAPO and DAPN.

There is a need to ensure that they improve the law and work effectively. They need to add “meaningful additional options to those that already exists.”⁶ What would have been helpful would have to identify exactly where, , sin what circumstance out the inter-relationship with how the DAPNs and DAPOs will add to the raft of already existing remedies, both civil and criminal.

To that extent, we note that paragraph 10 of the Bill’s Financial Memorandum (FM) is unable to provide exact parallels to estimate how many DAPOs, following the Bill’s enactment, would be granted. Estimated numbers for such DAPOs vary from 600- 3060 since the English and Welsh DAPO model currently existing does not allow for an exact comparison. In practice we have concerns that there will be many more given that an application for a DAPO is compulsory where a DAPN has been issued. The police may, as outlined in our answer to Question 1, use these DAPN measures often, potentially by adopting these measures when cases do not reach the criminal standard for action. We outline these standards below for clarity.

This presents an issue as no modelling has been done nor scenarios identified to be available to show exactly when and how the creation of a DAPO will provide that short-term remedy and provide a remedy of something that does not already exist.

⁴ <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/criminal-law/>

⁵ Council of Europe Convention on preventing and combating violence against women and domestic violence.

⁶ <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-responses-to-consultations/criminal-law/>

Furthermore, the Criminal Justice (Scotland) Act 2016 (2016 Act)⁷ provided the police with “investigative liberation.”

Though paragraphs 25 and 26 of the Bill’s Policy Memorandum⁸ provide a background of what these measures are, exactly how they are to work together remains unclear. Given such provisions only came into force on 25 January 2018 and the COVID-19 pandemic has since arisen, how these provisions are working and what use is being made of them has not been fully articulated. We suggest that evaluation of such measures is needed to avoid duplication or complications in the process when what we want to achieve is effective protection for the victims of domestic abuse. We would like the Bill’s FM to have included an evaluation of how such measures will avoid duplication or complications. On the assumption that the Bill is implemented, would a reporting on that evaluation be a useful monitoring exercise?

We are all united in the policy aim of achieving effective protection for the victims of domestic abuse.

We continue to have concerns about a proliferation of potentially overlapping measures and want to ensure that the Bill’s provisions add to the range of measures being provided. As paragraph 24 of the Policy Memorandum of the Bill recognises, “there are a number of existing criminal and civil law provisions currently in effect which can be used to remove a suspected perpetrator of abuse from a home they share with a person at risk or otherwise prevent them from contacting the person at risk.”

Our Child and Family Law Committee has also queried section 1(1) with regard to the fact that the perpetrators must be over 18. As the current law allows someone to get married or enter a civil partnership at 16, this seems to be an anomaly.

These additional measures need to be proportionate (in relation to the risk posed), fair and measured. That concerns and involves all parties including the person against whom the DAPN or the DAPO order is to be taken.

Call for Views

Question 1: Do you agree that a senior police officer should be able to impose a short-term Domestic Abuse Protection Notice (DAPN) without first seeking court approval as proposed in section 4-7 of the Bill? If so, what advantages would a DAPN have over the existing police and court powers?

⁷ 25 January 2018

⁸ <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/domestic-abuse-protection-scotland-bill/introduced/financial-memorandum-domestic-abuse-protection-scotland-bill.pdf>

Under sections 4- 7 of the Bill, a DAPN can issued where the circumstances are satisfied that the police officer has more than one reasonable ground (reasonable grounds) to believe that:

- the person to be subject to the notice has been abusive towards their partner or ex-partner and
- the making of the notice is necessary to protect the other person from abusive behaviour carried out by the person to be subject to the order.

There is an immediacy provided in the issue of a DAPN which has then to be justified when a sheriff will make an interim DAPN or a DAPO. That is their purpose.

We appreciate that DAPNs can only be issued by a senior constable. They are defined under section 17 of the Bill as being a constable holding the rank of inspector or above. This provides a similar decision-making powers for decisions that require to be made by the police at inspector or above grade under the 2016 Act. Exactly how this will operate in practice is not fully understood so that the issue of scenarios would help to illustrate this from the Scottish Government. Is there an intention to issue or publish guidance?

It would not be common for an Inspector to be present at the actual scene as they tend to be office based. Does this mean that the officers would require to take the person back to a station to issue a DAPN? We can understand that there may be a scenario where the person was taken back /arrested to the police station for a police interview etc. That means sufficient evidence in law for that action of arrest/detention to result.

The threshold seems to be that the senior officer has 'reasonable grounds to believe' that there has been abusive behaviour. What will that mean in practice? Does that mean the police could serve a notice based on an anonymous tip off from a neighbour, even where the victim disputes the claim? Should there not be a requirement for some evidence – even if not corroborated – before an order of this nature is made? That could be the evidence of the complainer, or a neighbour, or from CCTV. At least there would need to be something tangible.

What may be envisaged here by the policy is to permit a DAPN to be issued in circumstances where any action of removal to a police station would not be justified in terms of the 2016 Act. There is also no requirement in terms of section 3 of the Bill for corroboration as this is not a criminal matter.

In allowing the police to exercise these powers, which are considerable, there are important questions as to what and how developed the training and guidance that is going to be provided for the police on the Bill. This will require to advise them where and when they should seek to exercise these powers. In other words, the constraints on their discretion. The success of the Bill seems to hinge round exactly this issue of the role and exercise of powers by the police.

Where the police seek to exercise their powers under a DAPN, this is going to have a fundamental effect on the person who is subject to the notice. This has a major effect on that person's freedom which are in effect going to be subject to restriction.

We are concerned over the ramifications for the person who is the subject of the notice. They are likely to be or could be made homeless in the short term. There are equality implications such as those falling into the category of “protected characteristics” under the Equality Act 2010. The question of vulnerability is one which we have addressed from the Society before which may be wider and encompass such categories as poverty, addictions, and those with ACE.⁹ How are or is it intended that their interests/ rights are to be safeguarded?

What we need addressed would be a requirement for immediate signposting/ensuring that those affected can access relevant and appropriate advice and support there and then. Such advice may include access to legal advice for which the provision of legal aid would be required. Is this similar to the advice at the police station and though civil should be free from means testing?

Regarding section 4(4) of the Bill, there is no requirement to obtain consent from the person affected to a DAPN. We understand that and that ties into with the victim of domestic abuse where they do not want a case to proceed to court. Consent to proceedings is not relevant. But criminal prosecution is in the public interest and the criminal context is not necessarily the same as in this situation.

There still needs to be respect for personal autonomy by working with individuals to provide support and assistance. Obtaining their consent to a DAPN should be the preferred course of action and should be the first approach. We recognise that this is one of the trickiest aspects in the Bill in considering whether the person affected / victim should consent to the order. Proceeding without that person’s consent raises serious concerns their agency /autonomy / empowerment; and their trust in the state. It may also raise issues in relation to their safety. By requiring the consent of the person affected / victim, power may inadvertently be transferred back to the perpetrator. Furthermore, there are safety concerns too – for example, the perpetrator may blame for the affected person for the imposition of the order.

The Bill does not provide no real clarity about the role of the views and wishes of the person affected – but this is a very important and nuanced issue. More needs to be done to explain in full what consideration has been to these issues (including victim safety here if for example the DAPO is not given; or where it is breached (but before the person is then arrested for that offence)).

There is still no real clarity about the role of the views and wishes of the potential victim should play in deciding whether to make any order. In addition, there are human rights implications in imposing administrative orders with significant effects on an individual as a preventative measure.

Question 2: Do you agree that the civil courts should be given powers to make a Domestic Abuse Protection Order as proposed in section 8-16 of the Bill? If so, what advantages would a DAPO have over the existing police and court powers?

⁹ <https://www.lawscot.org.uk/news-and-events/law-society-news/greater-consistency-needed-for-vulnerable-accused-people/>

We refer to our earlier comments. We think it is important to identify how the measures will work in practice and add to what already exists.

We do not condone domestic abuse of any kind. We have concerns that in providing these powers that these may be disproportionate though it is essential that any decision to issue a DAPN must be reviewed at the first opportunity as outlined under section 11(2) and (3).

By our reading of these provision this appears that someone who is given a DAPN on Friday would only have their hearing on the following Tuesday. The default may be that the police issue a DAPN leaving the position to be sorted out by the courts the following week. This will have considerable implications for all involved. Not least if the DAPO is not given, there may be immediate safety implications for the person to be protected by the order. What is the responsibility going to be to advise the victim?

Inevitably, there will require to be time before any new measure will find its place, the police become familiar with it and the judiciary can make appropriate decisions. Training will be required for the judiciary as well in the provisions of this Bill.

Given the importance, we suggest that there should be some monitoring and evaluation provisions included from a parliamentary scrutiny perspective.

Extension of the Provisions to the types of family relationship or circumstance

Question 3: Section 1 of the Bill requires the two people covered by the DAPN or the DAPO to be spouses, civil partners or in an “intimate personal relationship” with each other. In addition, the suspected perpetrator must be 18 or over and the person at risk must be 16 or over. Do you agree with this approach or do you wish to suggest changes? In the Domestic Abuse Bill that is currently making its way through the UK Parliament, a broader approach is proposed for England and Wales, extending to other family relationships and people sharing a house in other circumstances.

We are content with the approach outlined at present.

This approach is consistent with the approach of the Domestic Abuse (Scotland) Act 2018 where section 1 is restricted to partners and ex-partners, which includes spouses, civil partners, cohabitants ‘living together as if spouses of each other’ and those in an ‘intimate personal relationship’ under section 11 of that Act. It is also consistent with other legislation such as the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

If the Bill were to extend to other relationships here, it would probably become the outlier in terms of the overall approach that the Scottish Government has taken to the relationship parameters being covered.

Processes to be used for imposing or granting of an order, timescales and the role of the police

Question 4: Under section 8 of the Bill, a police officer would be able to apply to the court for a DAPO. Do you agree with this approach or do you think the power to apply should be extended to other individuals or organisations and if the latter who would you wish to include?

We refer to our response to Question 2.

We do not know who else would wish to apply for these measures who may not be able to apply for other existing measures such as protection from harassment orders.

Subject to any case being made out, these provisions should be restricted to the police – and were another group to be considered, a case made out and justified in due course.

Question 5: Do you agree with the test (set out in section 4 and section 8 of the Bill) which must be satisfied for the making of a DAPN and a DAPO respectively?

We refer to our comments above. We have reservations about the “reasonable grounds” test to be applied.

We also wonder how the actual evidence is to be produced in relation to section 4(2) of the Bill where the abusive behaviour took place outside Scotland.

Question 6: Do you support the definition of “abusive behaviour “(in sections 2 and 3) which is a key component of those tests?

We have no comments to make as this is best informed by practice. We have concerns over the quality of the evidence to be put forward.

Question 7: Under the Bill, a DAPN lasts until a DAPO (or interim DAPO) is made. A DAPO can last a maximum of three months. Do you agree with the proposed maximum periods the DAPN and DAPO can last for?

We would prefer a shorter period. In practical terms surely other measures can be obtained more quickly. If the Bill is being designed for immediacy and protection, it should provide just that.

If granted, a domestic abuse protection order can last up to two months, which can be extended by the court for one further month if deemed necessary. The sheriff can make an interim order whilst a decision on a "full" order is pending, which can last up to three weeks.

Given that such an order can involve serious deprivation of a person's rights in relation to their place of residence and/or their child, the test in the legislation is whether on the "balance of convenience." If this legislation is enacted, it will be interesting to note the evidential requirements expected by courts before granting such an important interim order.

Question 8: Do you agree that a breach of a DAPN and a breach of a DAPO should be a criminal offence as proposed in sections 7 and 12 of the Bill? Do you support the penalties for breach of a DAPN and breach of a DAPO?

We agree generally if a DAPN and DAPO is to be introduced that any breach should be subject to criminal sanctions, following the satisfaction of the necessary criminal standard of proof i.e. corroboration and proof beyond reasonable doubt.

The sanctions included seem commensurate with summary prosecution which is the correct forum.

These are also generally in line with other measures such as the breach of a non harassment order (obtained through either the civil route or by the criminal courts) which is a criminal offence under the Protection from Harassment Act 1997 section 9(1). When it comes to domestic abuse interdicts, a person who breaches a domestic abuse interdict or interim interdict can be guilty of an offence where certain conditions are met. This is the case where an interdict has been granted against a person; a determination has been made that it is a 'domestic abuse interdict' and that determination is in effect; and a power of arrest is attached to the interdict and that power of arrest is in effect under the Domestic Abuse (Scotland) Act 2011 section 2.

The content of the notice and order – including how the Bill impacts on children

Question 9: Sections 5 and 9 of the Bill say which obligations a DAPN and a DAPO can include. As well as obligations relating to the person at risk's home and contact with the person at risk both a DAPN and a DAPO can impose obligations relating to a child usually living with a person at risk. Do you agree with the approach of the Bill under sections 5 and 9 or do you wish to suggest any changes?

The DAPN and DAPO may well offer further protections, not only for victims of domestic abuse. Taking account of the position of the child seems important to properly protect the children who are living in these challenging environments. They should be safe in their own homes and there is a duty as a society to do everything to ensure that they are.

However, Section 5(g) of the Bill prohibits person A from approaching or contacting, or attempting to approach or contact, any child usually residing with person B. We wonder if that the provision of these powers are particularly unusual in terms of our existing law, given that this could interfere with person A's parental responsibilities and rights in relation to a child.

Question 10: Do you think the Bill is clear about what should happen when the terms of a notice or order conflicts with an order relating to children imposed under family law?

There may be a need for guidance.

Removal of a domestic abuse perpetrator interests in a Scottish secure tenancy

Question 11: Do you agree with the approach in section 18 of the Bill introducing an additional ground to end a social housing tenants' interest in a tenancy? If so, what benefits does this power have over and above the existing statutory powers?

Part Two of the Bill will allow social landlords to end or transfer a tenancy of a perpetrator of domestic abuse to prevent a victim becoming homeless and enabling them to remain in the family home. This is achieved by section 18 of the Bill inserting an "additional ground for ending tenant's interest in house."

We have concerns how these provisions will operate in practice without making the situation worse and while still ensuring that the privacy and safety of all parties are protected.

As well as seeking that necessary clarification, there is a need for guidance and training to be provided to landlords as to how and when these provisions can be involved. We suggest that this needs to be undertaken centrally in conjunction with the commencement of the Bill as otherwise there is a risk that this will be interpreted in an inconsistent way.

What is also important is the need to stress transparency so that all involved in the situation understand the rights and responsibilities.

We also query when and how the landlord will know that a tenant falls into scope of section 18 provisions?

Additional issues not covered by the above

Your response does not need to cover all of these areas and you can focus on those that are relevant to you or your organisation

Question 12: If you are responding on behalf of an organisation what impact (if any) would the Bill have on your organisation? Is there any issue you wish to comment on not already covered by questions 1-9?

We are the representative body for Scottish solicitors. As such we will not be impacted directly by the Bill's measures.

However, our members are involved in advising clients on issues coming out of the Bill and we are concerned that access to justice considerations are fully taken account of for both parties. That means those who may well seek the protections of a DAPN or DAPO but those that are the subject of it.

Legal aid provision advice and assistance should be factored into these considering at this early stage of the Bill.

Our members will also be involved in court in relation to any allegations of breaches of the DAPO and DAPN and thereafter for criminal sanction on breach.

We consider as the Bill is implemented that there may well be legal challenges to these orders/notices. The question will be how courts deal with these issues, when there is little guidance in the Bill.



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