



Law Society
of Scotland

Consultation Response

Domestic Abuse (Protection) (Scotland) Bill

27 January 2021



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 previously responded to the Call for Evidence¹ on 8 December 2020 the Domestic Abuse (Protection) (Scotland) Bill² (the Bill) which was introduced to the Scottish Parliament on 2 October 2020. The Justice Committee published its Stage 1 Report on the Bill³ on 21 January 2021. The Stage 1 debate which is scheduled to take place on Thursday 28 January 2021.

The Bill includes important provisions in relation to the campaign against domestic abuse to which the Scottish Government has committed. We consider that there are a number of aspects of the Bill where the Bill's Stage 1 Report referred to "compelling evidence from [us among others] that further consultation and clarity is still required on how [Domestic Abuse Protection Notices] are expected to work in practice."⁴

Though the Cabinet Secretary for Justice provided some information in his response to the Stage 1 Report dated 26 January 2021 to the Convener of the Justice Committee (the Response)⁵ there are a significant number of operational, resourcing and practical matters that need addressed in relation to the Bill which we address below:

¹ <https://www.lawscot.org.uk/media/370129/2020-12-08-crim-domestic-abuse-protection-s-bill.pdf>

² <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/domestic-abuse-protection-scotland-bill/introduced/domestic-abuse-prot>
<https://www.scottishhousingnews.com/uploads/Domestic%20Abuse%20%28Protection%29%20%28Scotland%29%20Bill%20Stage%201%20Report%20%28FINAL%29%20%28002%29.pdf>

³ <https://www.scottishhousingnews.com/uploads/Domestic%20Abuse%20%28Protection%29%20%28Scotland%29%20Bill%20Stage%201%20Report%20%28FINAL%29%20%28002%29.pdf>

⁴ Paragraph 211 of the Bill's Stage 1 Report

⁵ https://www.parliament.scot/S5_JusticeCommittee/Inquiries/20210126_DomesticAbuseProtectionScotlandBill_SGResponse.pdf

General

The policy objectives of the Bill are to improve “the protection for those who are at the risk of domestic abuse, particularly where they are living with the perpetrator of the abuse.”⁶ These are to be achieved by providing new powers to allow in certain circumstances for the courts to make a Domestic Abuse Protection Order (DAPO) and the police to make a Domestic Abuse Protection Notice (DAPN).

These are both short term measures to provide protection to a person at risk of abuse. Powers included in the Bill would seek to remove a perpetrator from the home that they share with a person at risk and prohibit them from contacting or otherwise abusing the person at risk while an order is in effect.

The Bill’s powers bridge a gap for those experiencing abuse by reducing the risk that a person has to make themselves homeless to find accommodation. Reducing that risk is important and is part of the approach outlined 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...”

Domestic abuse must not be tolerated in our law or society.

What must be stressed is the importance of the gender-neutral drafting of the Bill as domestic abuse affects men as well as women. This should be fully acknowledged. That message is important too when stressing to accompany the Bill must be an important focus on the training and education to ensure that all involved, including the police and the public to understand in order to abide by the law.

Operational: There is in our view a risk of proliferation of potentially overlapping measures. The Bill must add to the range of measures being provided. Paragraph 24 of the Policy Memorandum of the Bill recognises that:

“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.”

Paragraph 6 of the Response does indicate that discussions are continuing with Police Scotland and others on various matters to ensure that these orders should only be made only in exceptional circumstances.

What would have helped is prior modelling to identify how and in what circumstances that a DAPO will be used to provide effective short-term remedies. Though we appreciate that some of matters may be picked up by the Scottish Government-chaired Implementation Board to be created,⁷ we would also suggest that there needs to some effective scrutiny, monitoring and evaluation provisions within the Bill including reporting to the Scottish Parliament. This is especially so where Police Scotland in their evidence at Stage 1 referred to better use being made of existing powers as this Bill should form a raft of measures only to be

⁶ 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>

⁷ Paragraph 21 of the Cabinet Secretary for Justice’s Response

used where absolutely required. That endorses that the use of these measures should not a “routine response.”⁸ What needs to be clear is how often and exactly when and where these will be used.

It remains unclear how a DAPN will be issued in practice. Senior officers are typically desk-based and do not routinely attend at the scene. The Bill does not appear to have a specific power available to the police to remove a suspected perpetrator to the police station relating to a DAPN. We have concerns of the circumstances where a DAPN can be issued where any action of removal to a police station would not be justified in terms of the Criminal Justice (Scotland) Act 2016”.

Threshold: We have questioned the threshold to be applied under Section 4 of the Bill and whether a DAPN is a proportionate measure in the context of relevant rights under the European Convention on Human Right. That threshold seems that the senior officer has “reasonable grounds” to believe that there has been abusive behaviour. What does that mean in practice? Does that mean the police could serve a notice on an anonymous tip off from a neighbour even where the victim disputes the claim?

The Response refers to the possible consideration of a test of future harm before a DAPN or DAPO can be imposed so that it is more clearly focused on those who are at risk of ‘significant’ harm as a consequence of domestic abuse. Exactly what that means in practice would necessary clarity which is required as the . provides the police considerable powers where someone could be deprived of their home. What are sufficient grounds for the making of a notice and exactly what kind of evidence would be required.

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 “on the balance of convenience.” What evidential requirements are then expected by courts before granting such an important interim order⁹ should be provided now rather than await clarification with case law in due course.

Primacy over existing rights: the order: The relationship between DAPNs and DAPOs and the existing rights of perpetrators or any court orders in place relating to their children need to be stated. That means that all involved can be sure of the parliamentary intention.

⁸ Paragraph 35 of the Bill’s Stage 1 Report

⁹ Paragraph 100 of the Bill’s Stage 1 Report



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