



Law Society
of Scotland

Scottish Parliament Stage 3 Briefing

Domestic Abuse (Protection) (Scotland) Bill

16 March 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law Committee has previously responded to the Scottish Parliament's Justice Committee's Call for Evidence¹ on the Domestic Abuse Protection (Scotland) Bill (the Bill)² that was introduced on 2 October 2020. Now the Bill has reached Stage 3 where we have the following comments ahead of the Stage 3 debate on the Bill scheduled to take place on Wednesday 17 March 2021.

Our comments concern various operational, resourcing and practical aspects in relation to the Bill.

The Bill's Message

Domestic abuse is a situation that must not be tolerated in our law or society. We fully endorse what paragraph 16 of the Bill's Policy Memorandum 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 to achieve necessary improvements."

What must be highlighted is that the gender-neutral drafting of the Bill is respected as importantly, domestic abuse arises for men as well as women.

The Bill therefore introduces important provisions in relation to the campaign against domestic abuse to which the Scottish Government is fully committed. 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." Its powers provide for:

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

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-protection-scotland-bill-as-introduced.pdf>

Both present short-term measures intended 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.

The Bill's Purpose

What is important to remember is that the powers in the Bill are intended to bridge a “gap” in legislation for those who may be experiencing abuse, to reduce the risk that a person must 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.

From the outset, we have been concerned about exactly what that “gap” is and where these Bill provisions will sit in what seems to us to remain a risk of a proliferation of potentially overlapping and as a result confusing measure. Education and training for all involved from Police Scotland to COPFS is essential to understand what DAPN and DAPOs are as well as where breaches and subsequently, convictions may result. For success, they should act both as protection and a deterrent. The Bill must add to the range of measures that are currently available. 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.”

We stress our support for the “reporting” amendment introduced at Stage 3 which if accepted should help to measure just exactly what and where use is made of these measures. That will help understand in what circumstances they have been used.

Use of the Bill's provisions

Our continuing concerns lie down the potential use of the DAPN. These are to be imposed by Police Scotland but how do they intend to operate under Sections 2 and 3 of the Bill? That remains a question. Exactly what will amount to a sufficiency of evidence and indeed the quality of that evidence in relation to abusive behaviour in terms of which a DAPN is sought is crucial.

discussions are continuing with Police Scotland and others on various matters to ensure that these orders should only be made only in exceptional circumstances.³ It would be useful to receive an update on how these safeguards are to be secured. What are the exceptional circumstances?

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

These measures should be obtained when they are proportional in terms of section 4 of the Bill, respecting the interests of both parties. Both sides have the same concerns as to possible non-use/over-use of the bill's provisions that depend on the operational decisions to be taken on a day by day and case by case basis by Police Scotland.

We fear this will lead to inconsistent practices across Scotland as well as a lack of certainty when these DAPNs are being/will be taken.

We understand that these concerns will now need to be addressed by the work to be undertaken by the post Bill Implementation Group being set up. We suggest that it will need to be concerned with ensuring the publication of Police Scotland Standard Operating Practices to provide initial guidance on the operational aspects of how and when the Notices are to be issued to support the roll out and use of these Notices.

These would need to be amended over time as the use develops. We had called for modelling at the outset to help with the types of scenarios in which a DAPN would be obtained and again we would call for these when considering such Notices are to be issued. This would help all involved in providing clarity. The Report as envisaged by the amendment at Section 16 of the Bill would have use too to allow for that future degree of scrutiny and evaluation.

Though the Scottish Government has brought forward a number of amendments both at Stage 2 and 3 of the Bill, it still seems to us unclear exactly where these measures may be bedded in within the legislative landscape.

Resourcing required by the Bill

Other measures need addressed such as resourcing which includes:

Legal aid: We understand that the Implementation Board will be considering the precise mechanism for enabling access to legal aid for a person upon whom a DAPN has been served. We suspect that this will require secondary legislation to amend the existing legal aid rules to ensure that those against whom a DAPN or DAPO is obtained can secure access to legal advice. There is a question of means testing which remains a concern as no one against whom a DAPN is obtained should be denied justice just where they cannot afford legal advice.

Advice: We touched on the proportionality of these measures. There is a need to ensure additional information is provided more than what is outlined in section 6 of the Bill. Where a DAPN is served, this should be accompanied by a requirement on the police to ensure the provision of basic information and advice. That basic information and advice should include:

- Access to legal aid to secure advice and assistance prior and at the court hearing
- Advice as to how to seek accommodation such as local authority homeless accommodation
- Access to basic personal items such as a coat, phone, wallet credit cards and money

What has been stressed as the Bill's policy objective is the need to ensure the safety of the person who is at risk of harm. However, no judicial process other than the reasonable grounds of the police are required to serve a DAPN, this policy objective therefore takes no account of the effect on the alleged perpetrator.

Domestic abuse cannot be tolerated but in the short term there is a need to address the balance to ensure that the alleged perpetrator is safe, can access legal advice and assistance and obtain advice plus access to personal items to make their alternative arrangements, no matter the rights and wrongs.

This balancing of interests is fundamental and required in the interests of justice while still giving effect to the policy and does not prejudice the safety of the person at risk of harm or the effectiveness of the DAPN.

We accept that the provision of basic information and advice for the alleged perpetrator is probably best not included in the Bill unless in very general terms. There are different ways in which this may be achieved but this should form a part of mandatory guidance to Police Scotland on the operation of a DAPN.

This could include the issue of a letter of rights similar to that issued to those in custody regarding their rights. Though many police officers exercise discretion, there is no requirement on them so to do and having a consistent and transparent approach may be the best and fairest approach in the interests of justice.

Reporting on Operation of the measures to be introduced by the Bill

We refer to amendment 22 to Section 16⁴ of the Bill which if accepted, will require Scottish Ministers to report on a range of provisions specified in sub-section 1 regarding the number of DAPNs and DAPOs which are made and related offences for breaches in respect of which convictions are obtained.

By introducing reporting provisions to the Scottish Parliament which are similar to those included under section 14 of the Domestic Abuse (Scotland) Act 2018, that effective scrutiny can be undertaken. The Scottish Government-chaired Implementation Board which is to be created may resolve some of these issues, however the amendment will ensure that a Report is to be made to the Scottish Parliament for that purpose. That endorses that the use of these measures should not a "routine response." What needs to be clear is how often and exactly when and where these will be used.

Additional Parties to apply for a DAPO

We note the amendment 20 which provides power to specify additional applicants for a DAPO.

⁴ <https://beta.parliament.scot/-/media/files/legislation/bills/current-bills/domestic-abuse-protection-scotland-bill/stage-3/marshalled-list-of-amendments-at-stage-3.pdf>

These would be added by means of use of the regulation making power to the Scottish Ministers to prescribe certain persons who can apply for a DAPO under section 8(1)(b) of the Bill or for the extension, variation or discharge of a DAPO under section 12(1) of the Bill in circumstances specified in the regulations.

As there is a provision requiring consultation that seems to provide a degree of necessary scrutiny along with the affirmative nature of any such regulations.

It would be useful to be aware to which such rights may be appropriate to be given. This echoes some of our reservations about the appropriate use of these powers and the need for training. Though it merely relates to the making of such applications, the courts will only wish to see applications appropriately being made.

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