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Domestic Abuse (Protection) (Scotland) Bill

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The Domestic Abuse (Protection) (Scotland) Bill aims to better protect people at risk of domestic abuse by introducing new powers for the police, the courts and social landlords. This briefing provides an overview of the Bill, including what was said in response to the associated Scottish Government consultation and how similar protective powers have worked in other countries.



ABUSE

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Executive Summary

The [Domestic Abuse \(Protection\) \(Scotland\) Bill](#) would add to the legal remedies available to help protect people at risk of domestic abuse.

New protective powers

Part 1 of the Bill, the main part of the Bill, proposes two new powers, which do not require the consent of a person at risk to be exercised:

- the power available to a senior police officer to impose a **Domestic Abuse Protection Notice** (DAPN) on a suspected perpetrator of abuse
- the power available to the civil court, on application by the police, to grant a **Domestic Abuse Protection Order** (DAPO) in relation to a perpetrator of abuse.

The DAPN is intended to be **very short-term in its effect** lasting until the court reaches a decision about whether to impose a DAPO (or an interim DAPO). The Bill proposes that a DAPO could last **up to three months** in total.

Preventing contact - including with children that live with the person at risk

Under the Bill, a DAPN and a DAPO could impose a range of requirements and restrictions on the suspected perpetrator. This includes preventing him or her from approaching or contacting the person at risk, or a child who lives with the person at risk, including a child of the person subject to the measure.

Exclusion from the home

A DAPN and a DAPO could also require an individual to leave, and stay away from, a place where the person at risk lives. This power to exclude would extend to a property where the person subject to the measure is the (sole or joint) owner or tenant.

Other features of the DAPN and a DAPO

Despite the role for the police under Part 1, DAPNs and DAPOs would be protections provided by civil law. Accordingly, there is no requirement in the Bill for the individual in question to have been charged with, or convicted of, a criminal offence before such a notice or order could be imposed. Such a charge or conviction may happen as well though, as part of existing criminal law processes.

Separately, breach of a DAPN or a DAPO without reasonable excuse would, of itself, be a **criminal offence** (and could be investigated as such by the police).

Policy aims

These proposed measures have several policy aims. One aim is to protect a person at risk in the immediate situation. Another aim is to create time for any further legal steps to be taken to ensure the longer-term safety of the person at risk.

Yet another aim is to give that person space to consider his or her housing options. The Government wants to reduce the chances that the person at risk becomes homeless or feels that he or she, rather than the suspected perpetrator, must find somewhere new to

live.¹

The Scottish Government's consultation

When [the Scottish Government consulted in 2018 on what is now in Part 1 of the Bill](#), there was strong support for the concepts of both a DAPN and a DAPO.^{2 3}

There were mixed views on some topics, such as who should be covered by the protective measures - partners and ex-partners, or a broader category of people sharing the same household. The Government also received a variety of responses on who should be able to apply for a DAPO - just the police or other organisations and individuals as well.

The Government also received a range of responses in relation to how long both DAPNs and DAPOs should last for. One key policy choice was between a DAPO functioning as a short-to-medium term measure only or a longer-term measure as well.²

On the question of which courts should be able to grant a DAPO, a significant majority of the respondents who answered the relevant consultation question thought that the criminal courts (as well as the civil courts) should have this power.² However, the Bill restricts the power to the civil courts. In the [Policy Memorandum](#), the Government noted that, while individuals were overwhelmingly in favour of criminal courts having the power, organisations were fairly evenly divided on what the approach should be.¹

New powers for social landlords

Although most of the Bill relates to DAPNs and DAPOs, Part 2 of the Bill also proposes a **new power for social landlords** to end a tenant's interest in a tenancy where there has been domestic abuse. Here the Scottish Government wants to help tenants affected by domestic abuse remain in the family home. It wants them to avoid a move into temporary emergency accommodation and then, longer-term, having to be rehoused permanently.

Section 18, which was not part of the main consultation on the Bill, has its origins in the recommendations of two Scottish Government working groups. The first working group, the [Homelessness and Rough Sleeping Action Group](#), consulted on wide-ranging proposals. The work of the second group, co-chaired by [Scottish Women's Aid](#) and the [Chartered Institute of Housing](#), was disrupted by the pandemic. The second group strongly supports section 18 but has not consulted externally on it.

Introduction and overview

The [Domestic Abuse \(Protection\) \(Scotland\) Bill](#) ('the Bill') was introduced in the Scottish Parliament on 2 October 2020, along with a [Policy Memorandum](#)¹, [Explanatory Notes](#)⁴ and a [Financial Memorandum](#).⁵

Part 1 of the Bill provides a power, where necessary, for a senior police officer to impose a very short-term **Domestic Abuse Protection Notice** (DAPN). Part 1 also provides the civil courts with a new power, on application by the police, to make a **Domestic Abuse Protection Order** (DAPO). The civil courts can also make an **interim DAPO** under Part 1 to offer protection from harm pending full consideration of the case.

Section 18, the sole provision in Part 2 of the Bill, [contains a separate power for social landlords relating to a tenant's abusive behaviour](#).

The story so far

Calls for the reforms now contained in Part 1 of the Bill began in earnest during the parliamentary passage of what became the [Domestic Abuse \(Scotland\) Act 2018](#). This legislation overhauled the criminal law, creating a specific stand-alone criminal offence of domestic abuse. The new offence covers not just physical abuse but other forms of psychological abuse and coercive and controlling behaviour that were previously difficult to prosecute.

At Stage 1 of the [Justice Committee's consideration of this earlier legislation](#) (in 2017), a number of third sector organisations argued there was a gap in the existing law. They said a person wishing to obtain protection from domestic abuse, particularly in relation to keeping a perpetrator away from their home, could only do so in two sets of circumstances. First, [where the perpetrator enters the criminal justice system](#). Second, [if the person at risk applies for a civil court order against the perpetrator](#).

Following [a committee evidence session on this topic at Stage 2 of the Bill](#),⁶ the then [Cabinet Secretary for Justice, Michael Matheson MSP, wrote to the Justice Committee](#). He confirmed that the Scottish Government intended to publish a consultation on what additional protections (if any) might be necessary.⁷

This [Scottish Government consultation followed in late 2018](#)³ and an [analysis of the consultation responses was then published in July 2020](#).² Individual consultation responses, where permission has been given for them to be published, [also appear on the consultation's webpage](#).

In September 2020, the [Programme for Government for 2020-21](#) was published. In it, the Government commented:

“ The experience of lockdown reiterated the importance of protecting women and girls who are isolated and vulnerable during unprecedented times, and facing domestic abuse.”

Scottish Government, 2020⁸

The [Programme for Government](#) then describes the Bill as part of a suite of measures

which would continue to implement the Scottish Government's [Equally Safe Strategy](#) in this parliamentary year.

The [Justice Committee](#) was designated lead committee on the Bill. On 10 November 2020, it issued a [call for views](#) with a closing date of 4 December 2020. Where permission for their publication has been given, [written submissions are published on the Committee's webpage](#).

What this briefing covers

This briefing provides [the background to the reforms](#). It also includes a description of [the existing law](#), both civil and criminal, which applies to domestic abuse.

The briefing [provides a summary of the Bill's provisions](#). It also discusses [the Bill in detail](#), referring to views from [the Scottish Government's consultation](#).

As the Justice Committee's call for views on the Bill closed on 4 December 2020, it has not been possible to incorporate a discussion of the written submissions to the Committee into this SPICe Briefing.

The briefing also describes consultation proposals from 2018 that did **not** make it in to the Bill. These include [a statutory duty on the police to refer the person at risk to domestic abuse support services](#) (when making an application to the courts for a DAPO or putting in place a DAPN).

Other consultation proposals which did not make it into the Bill include those which [aimed to improve the effectiveness of an existing type of civil court order](#), known as [an exclusion order](#). This can exclude a suspected perpetrator from his or her home for the long term. Despite its potential importance, at present, an exclusion order is rarely applied for in practice.

What the Bill does - a summary

This section of the briefing summarises the main provisions of the Bill. [Later sections of the briefing discuss the Bill in more detail](#), including key policy issues associated with the Bill.

The people affected by the new powers (section 1)

Section 1 of the Bill sets out who would be protected by a (police-imposed) DAPN or a (court-imposed) DAPO and who would be subject to that notice or order. Section 1 requires the two people concerned to be **spouses, civil partners or in an 'intimate personal relationship' with each other** (or formerly in such relationships with each other). Other family relationships, or sharing a home in other circumstances, for example as flatmates, are not covered.

Under section 1, to be able to be covered by a DAPN or DAPO, a suspected perpetrator ('person A') must be **aged 18 or over** and the person at risk ('person B') must be **16 or over**.

Abusive behaviour (sections 2, 3, 4 and 8)

Sections 2 and 3 of the Bill describe what would constitute abusive behaviour, a term important in the context of a DAPN or DAPO. Abusive behaviour extends beyond physical harm to include psychological harm and coercive and controlling behaviour.

Sections 4 and 8 of the Bill say abusive behaviour occurring outside Scotland, including overseas, can be taken into account.

Domestic Abuse Protection Notices (sections 4-7)

Section 4 of the Bill also says a DAPN can be made by a **senior police officer** (an inspector or above). Section 4 also sets out the proposed test which must be met before a DAPN can be made. This includes that a DAPN must be necessary to protect the person at risk from abusive behaviour in the period before the court can make a DAPO (or interim DAPO).

Sections 5 and 6 of the Bill set out the required content and legal effect of a DAPN. A DAPN can **exclude the suspected perpetrator from a home and impose wider restrictions on contact**.

Section 5 (in conjunction with **section 11**) proposes that a DAPN lasts until a DAPO or interim DAPO is made - or, if no such order is made, until the associated court hearing ends.

Section 7 of the Bill says a person commits a **criminal offence** if they breach a DAPN, without reasonable excuse. This would be punishable by imprisonment (up to 12 months) or a fine (up to £1,000) or both.

Domestic Abuse Protection Orders (sections 8-16)

Section 8 of the Bill sets out who would be able to apply for a DAPO. The application would be in the name of the chief constable, but, due to the effect of other existing legislation⁹, various ranks of police officer could prepare the application.

Section 15 of the Bill says who can grant a DAPO, namely the local sheriff court, in civil (but not criminal) court proceedings.

Section 8 also sets out **the issues or views that the sheriff must take into account**, including the views of the person at risk and the welfare of a child relevant to the application.

In addition, section 8 also sets out **the test which the sheriff must apply** before a DAPO can be made. A key requirement is that a DAPO is necessary for protecting the person at risk from abusive behaviour.

Section 9 of the Bill sets out the proposed content and effect of a DAPO. The requirements and restrictions which could be imposed in the order include, but are not limited to, the measures which can be imposed in a DAPN.

Section 9 says **the initial duration of a DAPO** is up to two months (pending any extensions authorised by sections 12 and 13).

Section 10 of the Bill would allow the sheriff to make **an interim DAPO** if, on the balance of convenience, it is just to do so. One of the issues which the sheriff must consider is the risk that, if such an order is not made, the suspected perpetrator will cause 'harm' (not further defined in that context) to the person at risk.

Section 11 of the Bill applies where a DAPN has been made. It makes provision about **the initial court hearing** to determine whether a DAPO or interim DAPO should be made, including in what time frame it must happen. A hearing can be as little as two days after the DAPN is imposed, although it may be longer, depending on where a weekend or a public holiday falls.

Sections 12 to 14 of the Bill set out the circumstances in which DAPOs - and interim DAPOs - can be varied, extended or terminated (discharged). Under these provisions, the maximum permitted duration of a DAPO (plus any extensions) would be three months. For an interim DAPO, its maximum permitted duration (plus any extensions) would be three weeks.

Section 16 of the Bill says that breaching a DAPO, without reasonable excuse, would be a criminal offence. This would be punishable by imprisonment (up to 5 years) or a fine (or both).

A new ground to end a tenancy where there has been abusive behaviour (section 18)

Where there is abusive behaviour, **section 18 of the Bill** creates a new ground under which social landlords can end a tenant's interest in a tenancy. The new ground covers the

situation where there is the suspected perpetrator is the a sole tenant and the person at risk is another occupier. It also covers where the couple (or ex-couple) are joint tenants.

Part 1 of the Bill: Domestic Abuse Protection Notices and Orders

This section of the briefing considers Part 1 of the Bill (the bulk of the Bill in practice). Part 1 would create the system of (police-imposed) DAPNs and (court-imposed) DAPOs. [A later section of the briefing considers Part 2 of the Bill](#), which would create a new power for social landlords.

Background to Part 1 of the Bill

Before [Part 1 of the Bill is considered in detail](#), this section of the briefing covers various topics considered helpful to understanding Part 1. This includes [the existing law](#) and [the experience of other countries](#).

A note on terminology

The term **protective order** is used in this briefing to refer to court measures, both existing and proposed, which aim to offer protection from domestic abuse (or other forms of harm).

When court orders are protections offered by the civil law, as opposed to the criminal law, they are often described as **civil protective orders**, an approach also followed in this briefing.

The term **emergency barring order** (EBO) is what some other countries, as well as some academic and policy commentators, call a short-term protective order of the type now proposed in the Bill. This term does not appear in the Bill or indeed elsewhere in this briefing.

The Istanbul Convention

An important piece of background to the Bill is that UK has **signed, but not yet ratified**, an international treaty called the [Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence](#) (usually referred to as **the Istanbul Convention**).¹⁰

An ongoing policy issue for both the UK and Scottish governments is getting to the stage where the UK can ratify the Istanbul Convention, so it is binding on the country as a matter of international law.

Article 52 of the Convention says countries must ensure protection to **victims of domestic violence** via a **short-term protective order**, suitable for situations of "immediate danger".

A [2017 paper published by the Council of Europe on the Istanbul Convention](#) comments:

“If the victim has to wait ... even for 24 hours, it may be too long in cases of immediate danger ...”

Logar, 2017¹¹

The potential limitations of Scotland's current system, in terms of compliance with Article 52, is explored [later in this briefing](#).

A key message from the academic material on the Istanbul Convention is that short-term protective orders should **only be viewed as one of a wide range of measures** (legal and non-legal) which make up an effective response to the issue of domestic abuse.¹¹ The Convention specifies a range of other necessary features of an effective system, including:

- longer-term protective orders
- strong multi-agency co-operation
- sufficient financial and human resources for the implementation of integrated policies.

Cross-border effect

Another preliminary issue worth noting is that the DAPNs and DAPOs proposed for Scotland **would only have legal effect in Scotland**. So, for example, it would **not** be a criminal offence in Scotland to do something in another part of the UK which contravenes a Scottish DAPN or DAPO.

In contrast, DAPNs and DAPOs proposed in the [UK Bill](#) for England and Wales would have **cross-border legal effect**. Accordingly, it would be a criminal offence in England and Wales to do something in Scotland (or Northern Ireland) which contravenes a DAPN or DAPO created under the [UK Bill](#).¹²

The [2017 paper on the Istanbul Convention](#) argued that cross-border protection is a desirable feature of short-term protective orders.¹³ However, it does not specifically mention the situation in the UK where there are different legal systems in place and, therefore, there are internal borders to consider as well.

Existing protective powers

This section of the briefing describes the existing powers available to the police and the courts in Scotland in relation to domestic abuse.

Civil protective orders

As noted earlier, when court orders are protections available under the system of civil law, as opposed to the criminal law, they are often described as **civil protective orders**.

Sometimes a civil protective order can be granted by **a criminal court** at the end of a successful prosecution, for example, as is the case with a [non-harassment order](#).

The criminal court will make the order if satisfied 'on the balance of probabilities' this is appropriate (i.e. the standard which also applies in civil cases). The matter does **not** have to be proved 'beyond reasonable doubt' (i.e. the standard which usually applies in criminal cases).

An overview

At present, Scotland has an established system of civil protective orders. The main categories of civil protective order currently available to protect against abuse, including domestic abuse, are:

- [non-harassment orders](#)
- [interdicts](#)
- [exclusion orders](#).

There are also civil protective orders for specific types of harm, such as the forced marriage protection order (created in 2011)¹⁴ and the female genital mutilation protection order (created earlier 2020, with most relevant statutory provisions not yet in force).¹⁵ In the context of this Bill, these are useful examples of modern civil protective orders for comparative purposes.

The main types of civil protective order relating to domestic abuse at present are [described in more detail later](#). First, there are a number of general points which can be made about the current system.

Possible future reform

The [Scottish Law Commission](#), which makes recommendations for law reform to Scottish Ministers, [has said it may review available civil protective orders for domestic abuse at some future date](#). At the time of writing, no final decisions have been taken.

A complex system

The existing system of civil protective orders has evolved piecemeal through successive reforms over a period of nearly thirty years. The end result is arguably very complex.¹⁶

One issue is that some types of civil protective order still focus on **one specific category of person at risk** (e.g. spouses or civil partners) - wholly or partially excluding other vulnerable individuals.

There is also something of a **split in existing civil protective orders, in terms of their function**. For example, exclusion orders focus on excluding the suspected perpetrator from the person at risk's home (and the vicinity of it). Other protective orders (e.g. interdicts) prohibit contact with, and harm to, the person at risk.

This contrasts with an approach where one court order performs both functions, as is now proposed in the Bill. The [2017 paper on the Istanbul Convention](#) argues a single order offering this two-fold protection is more desirable.¹¹

The role of the person at risk and a court-based system

At present, civil protective orders often have to be **applied for by the person at risk**, rather than by a public body, through the civil courts. Unless all the legal costs are fully met

out of the legal aid budget, this has cost implications for that person, as well as being potentially very stressful.

The system also places an exclusive reliance on orders **imposed by the court**, as opposed to by the police or another public body. It has been argued that an entirely court-based approach cannot fulfil the role envisaged by the [Istanbul Convention](#), i.e. emergency protection from immediate danger. For example, the [2017 paper on the Istanbul Convention](#) commented:

“ This solution presents several disadvantages. The protection can hardly be provided immediately, unless courts are accessible around the clock, which is rarely the case. Even if the law requires a court to make the decision within 24 hours, as in Bulgaria, victims or persons at risk have to wait to get protection, which can be dangerous because during this time the perpetrator has full access to them.”

Logar, 2017¹¹

Under this analysis, the existing Scottish system of civil protective orders is predominantly a system offering longer-term (not immediate or short-term) protection to the person at risk.

The main civil protective orders in more detail

This section of the briefing considers the main types of civil protective order in more detail.

Non-harassment orders (NHOs)

An important power the court has is to impose **a non-harassment order** (NHO).¹⁷ Harassment is something which causes alarm or distress and can be one-off conduct where the harassment amounts to domestic abuse.¹⁸

An NHO can be applied for through the civil court by a person at risk (but this is quite rare in practice). Although a civil court order, it can also be granted by the criminal court **at the end of a criminal case**. Since April 2019, at the conclusion of a domestic abuse case, the criminal court has been strongly encouraged by statute to grant such an order.¹⁹ For domestic abuse cases, the court is also strongly encouraged by legislation to include a restriction relating to **a child involved in the case**.²⁰

Breach of an NHO, without reasonable excuse, is a criminal offence (and can be investigated as such by the police). It is punishable by fine and/or imprisonment of up to **five years**.

NHOs and the person at risk's home

An important limitation of an NHO is that it can **only impose a restriction** on the suspected perpetrator, not a positive obligation.

Accordingly, if a suspected perpetrator has already left the person at risk's home, **the criminal courts**, when imposing an NHO, will sometimes require him or her to stay away from that home (or the vicinity of it).

However, such an NHO could **not** empower the removal of a suspected perpetrator from a home he or she currently owns, rents or otherwise shares with the person at risk.

The Scottish Government advises that the **civil courts** do not usually make NHOs containing any restrictions relating to a person at risk's home.²¹ The difference of approach appears to be a matter of practice, rather than a difference in the scope of the criminal and civil courts' discretion in this regard.

Interdicts

An **interdict** aims to stop or prevent behaviour by another person, including abusive behaviour. Types of interdict include:

- a **common law interdict**, available under the branch of law developed by decisions in court cases, rather than by legislation
- an **interdict under the 1997 Act**, which can be granted instead of an NHO
- a **matrimonial interdict**, only available between spouses²²
- a **relevant interdict**, only available between civil partners²³
- a **domestic interdict**, only available between cohabitants²⁴
- a **domestic abuse interdict**,²⁵ discussed in more detail below.

In 2005, during the parliamentary passage of what became the [Family Law \(Scotland\) Act 2006](#), the [then Justice 1 Committee](#) (unsuccessfully) recommended in its [Stage 1 Report](#) that the then Scottish Executive should consult stakeholders “as a matter of urgency” with a view to simplifying the law on interdicts.²⁶

It is possible, as part of the application for an interdict, to apply for **powers of arrest** (without a warrant from the court) to be attached to that interdict. On breach of such an interdict, the perpetrator can be detained in police custody. The court can later imprison the person for **up to two days**.²⁷

It is also possible to apply to the court to have an interdict labelled a **domestic abuse interdict**. Where a power of arrest is also attached to a domestic abuse interdict, breach

of that interdict is, of itself, a **criminal offence**. That offence is punishable by fine and/or imprisonment (up to **five years**).²⁸

Exclusion orders

Spouses and civil partners or, in some circumstances, cohabitants, can apply for an **exclusion order** in relation to a perpetrator of abuse.²⁹ This **suspends a person's right to occupy their home** and overrides their legal occupancy rights, for example as tenant or owner.

Part of the legal test which must be satisfied when applying for an exclusion order is based on the **necessity for protection** but necessity can be overridden by a range of other factors, including the **needs and resources of both parties**.

Breach of an exclusion order is not, of itself, a criminal offence. In practice though, an exclusion order can be granted with an **interdict**. If this happens, and there is then a breach, there are more enforcement options.

The number of exclusion orders being applied for and granted is low.³ [As discussed in more detail later](#), the Scottish Government [consulted on](#), but did not proceed with, reforms in the context of this Bill.

Police and criminal court powers

This part of the briefing discusses existing powers that the police and criminal courts can use, **in the context of an ongoing criminal investigation**, to:

- remove a suspected perpetrator of domestic abuse from the home of a person at risk
- prevent him or her from returning to it.

Note that [Police Scotland, in response to the consultation which preceded the Bill, supported the power on the police to impose a DAPN](#). It saw a legal gap in the existing powers available to police officers when there was a) insufficient evidence to charge the perpetrator; and b) suspicions of ongoing risk which require immediate action.³⁰

The rest of the consultation responses, not all of which were supportive of the proposed new powers, [are discussed in more detail later in the briefing](#).

Release on an undertaking

Where a suspected perpetrator of domestic abuse has been **charged with a criminal offence**, the police can release them on what is known as an **undertaking** prior to a bail hearing. An undertaking is in place until the accused person first appears in court.

Such undertakings can include a condition imposed by the police that may require the accused person not to approach the complainer and/or not to return to their shared place

of residence. Any breach of these conditions is a criminal offence, with powers of arrest associated with it.³¹

Investigative liberation

Another option available to the police at the time of the incident is to arrest the perpetrator and remove them to a police station. Where that person is suspected of committing a relevant criminal offence, punishable by imprisonment, but the police wish to carry out further investigations to gather additional evidence, they can release the individual on **investigative liberation**.³²

Investigative liberation can last up to 28 days. In practice, conditions attached to it can prevent the person in question from approaching victims, witnesses or specific areas that continue to be subject to police investigations. Any breach of the imposed conditions is a criminal offence with a power of arrest attached.^{32 30}

Remand a suspect in custody prior to trial

Once an accused person appears in court, either immediately after being charged, or following release on undertakings, the court can **remand a suspect in custody prior to trial**.

There is a **statutory presumption in favour of granting bail** to an accused person, but this may be overridden where certain criteria are met. This includes, for example, where the court has reason to believe that the individual may interfere with witnesses. Another example is where there are reasonable grounds to believe the accused person would commit further offences before their trial.³³

The [Domestic Abuse \(Scotland\) Act 2018](#) added domestic abuse offences to the list of offences where a) if the accused has previously been convicted on indictment; and b) is charged on indictment with a further offence, there is a **presumption against bail**. Here bail will only be granted in exceptional circumstances.³⁴

Special bail conditions

Where a court decides to release an accused person on bail, the court will impose standard bail conditions and can, in addition, add **special bail conditions**. These special bail conditions could require that the accused person does not attempt to approach or contact the complainer, or return to a place of residence that they share with the complainer.³⁵

Any breach of court imposed bail conditions is a criminal offence with a power of arrest attached.³⁶

The experience of other countries

This part of the briefing considers the experience of other countries in introducing short-term protective orders equivalent to those proposed in the Bill. The [system in England and Wales](#) (both existing and proposed) is examined in detail.

An overview

A range of other countries, such as **England and Wales**, the **Netherlands**, **Austria**, **Germany** and **Spain** have introduced short-term protective orders aimed at tackling domestic abuse.

Article 52 of the [Istanbul Convention](#) does not specify which body should make an order for this purpose, referring only to a 'competent authority.'

Most countries allow an administrative order to be made by public authority which takes immediate effect, without first requiring to be approved by the court. That authority can be the police, although, in some jurisdictions, it is the local authority or mayoralty.

This order usually runs for a short period of time during which the authority in question can apply to the court to put a protective order in place for a longer period of time (an approach which the Bill also proposes).

However, some countries do require an application to the court for any protective order, with a court decision required a short time after. Bulgaria and Spain are the examples given in [the paper](#) published by the [Council of Europe](#) in 2017. [As noted earlier](#), an entirely court-based approach was criticised in this paper as not able to adequately respond to 'immediate danger', as required by the [Istanbul Convention](#).¹¹

Domestic abuse support services

[The Scottish Government consulted in 2018](#) on a statutory duty to refer a person at risk to support services. However, [it did not include this proposal in its Bill](#).

A number of European jurisdictions introduced protective orders with **state-funded domestic abuse support services** in the same legislation. In some countries (including Austria, the Netherlands and the Czech Republic) referral to these support services is mandatory under the relevant legislation, although this is not the case in Germany, for example.³⁷

The mandatory provision of domestic abuse support is also not part of [the current legislative scheme in England and Wales](#). The English academic, [Professor Burton](#), commented in 2015:

“ The value of integrating support into the ... process may ... be a key lesson for other jurisdictions like England and Wales.”

Burton, 2015³⁸

However, mandatory referral to, or provision of, support services is also **not** part of the [the proposed legislative scheme for England and Wales](#) (a scheme discussed in more detail later). The relevant [UK Bill](#) does propose a requirement on local authorities to publish, and

keep under review, **a strategy** relating to the provision of such services.³⁹

England and Wales

England and Wales' system of short-term protective orders was introduced in pilot form in 2011 and rolled out across the jurisdiction in 2014.⁴⁰ The [Domestic Abuse Bill](#), currently being considered by the UK Parliament, proposes reforms to that system.⁴¹ Against this background, it is thought helpful to provide more detail on England and Wales.

The existing law

At present, the police in England and Wales can issue a **Domestic Violence Protection Notice** (DVPN), usually subject to a time limit of 48 hours.⁴² The police can also apply to the magistrates' court for a **Domestic Violence Protection Order** (DVPO) which can last up to 28 days.⁴³

Unlike what is proposed in the (Scottish) Bill, breach of a DVPN or a DVPO in England and Wales is not, of itself, a criminal offence.

The 2013 and 2016 research evaluations

The pilot system was [independently evaluated](#) at the request of the Home Office in 2013.⁴⁴ After the nationwide rollout, the system was [evaluated](#) again by the Home Office in 2016.⁴⁵

Researchers in the 2013 study attempted to evaluate the effect of DVPOs on the number of repeat incidents of abuse. They found DVPOs had some **positive effect of reducing police call-outs to repeat incidents**, which was particularly pronounced in so-called 'chronic cases.'

The 2013 evaluation also found **a majority of police and victims interviewed supported the new powers**. A significant minority of police officers thought them "disproportionate" and a minority of people at risk were critical of decisions made without their participation.⁴⁴

The **48 hour time limit** for a DAPN also attracted criticism for various reasons, including that it gave police officers insufficient time to prepare a case for a DAPO.

The 2016 evaluation showed **a wide variation in the use of the new powers by police** between different geographical areas during the reporting period (8 March 2014 to 31 December 2014), ranging from three made in Cambridgeshire to 229 in Essex.

Stakeholder workshops showed that **the new powers had been positively received** but some issues were discussed. These included **varying levels of awareness** among frontline police officers in relation to the new powers.⁴⁵

The 2017 report

More recently, in a [2017 report on the police response to domestic abuse](#), [HM Inspectorate of Constabulary and Fire & Rescue Services](#) noted:

“ Many forces are still not using DVPOs as widely as they could, and opportunities to use them are continuing to be missed. Over half of the forces that were able to provide data on the use of DVPOs reported a decrease in the number of DVPOs granted per 100 domestic abuse related offences in the 12 months to 30 June 2016 compared to the 12 months to 31 March 2015.”

Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services, 2017⁴⁶

The 2018 UK Government consultation

In its [2018 consultation on the response to domestic abuse](#), the UK Government proposed to replace DVPNs and DVPOs with new **Domestic Abuse Protection Notices** (DAPNs) and **Domestic Abuse Protection Orders** (DAPOs).⁴⁷ The UK Government observed that the existing scheme can cause confusion:

“ Different parties, including victims, agencies and the police, can apply for different orders and there is no single order that is applicable across the criminal, family and civil court jurisdictions. This can lead to confusion for victims and practitioners in domestic abuse cases and problems with enforcement. ”

HM Government, 2018⁴⁷

The UK Government considered that replacing the existing scheme with new DAPNs and DAPOs would create “a single, flexible pathway for victims, police and other practitioners.”⁴⁷

The Domestic Abuse Bill for England and Wales

The current UK Government Bill, the [Domestic Abuse Bill 2019-21](#), follows on from the [consultation](#).^{41 47} It proposes a new system of DAPNs and DAPOs which has the following features:

- It would link to a new statutory definition of domestic abuse and would not be limited to circumstances involving violence or threats of violence.
- The new definition covers situations involving partners and ex-partners, however, it also covers domestic abuse affecting other family members sharing a home and indeed anyone sharing a household.
- DAPOs would be available in a variety of courts on application by the police; the person at risk; local authorities; independent abuse advisers; as well as others who have the permission of the court.
- [Despite the issues raised with the DVPN time limit under the existing system](#), DAPNs would also typically last for 48 hours.
- On the other hand, in a policy shift from the existing regime, there is no general

maximum time limit proposed on a DAPO.

- DAPOs could include both prohibitions (for example, not to contact or come within a specified distance of the victim) as well as positive requirements (for example, participation in drug and alcohol programmes).
- Breach of a DAPO (but not a DAPN) would, of itself, be a criminal offence, punishable by up to five years' imprisonment.
- Breach of a DAPN would allow the police to arrest the person in breach without a warrant and hold them in custody until they could be brought before the court.

More detail about this Bill can be found in the [research briefing](#) published by the House of Commons Library.⁴⁸

Part 1 of the Bill: in more detail

This section of the briefing discusses Part 1 of the Bill, and [associated consultation responses](#), in more detail. The section is organised according to key policy issues associated with the Bill. As such, it has not always been possible to follow the numbering of the individual sections in Part 1.

As a reminder, a [summary of the Bill](#), largely following the chronological order of the sections, can be found at the start of the briefing.

DAPNs - the concept of a short-term notice imposed by the police

Sections 4-7 of the Bill propose a new power for a senior police officer to impose a very short-term notice (a DAPN) without prior court approval. Applying to the court for a DAPO must promptly follow the making of a DAPN.

The Scottish Government's consultation

[In its consultation](#), the Scottish Government asked whether the police should have a new power to bar the suspected perpetrator from the home they share with the person at risk.³

The great majority of respondents, including [Police Scotland](#), supported this. Of those respondents that offered a view, **86% of respondents** were in favour, **8%** were opposed and **6%** were unsure.² As an example of a response in favour, one victims' group commented:

“ It is absolutely crucial that there's an immediate short term solution available. [The notices] ... would allow police to take the necessary proactive steps to protect victims in their home, without the victim having to leave (perhaps with children) for their own safety ... It will allow the Police and other key support agencies an opportunity to establish the level of risk and give the victim much needed time to consider her options and choices and for other protective measures to be implemented.”

Scottish Government, 2020²

Respondents to this question raised a number of points about how the proposed new power should be implemented, including **the importance of ensuring that appropriate training and guidance** on the use of such powers is put in place for police officers.

Of those respondents opposed, half were individual respondents, who highlighted what they regarded as the risk that the existence of such powers would **encourage people to make false allegations**.

The [Law Society of Scotland](#) highlighted **the importance of judicial oversight of any power** to remove suspected perpetrators from their own home. It commented:

“ The courts play an essential role in ensuring fair, transparent and proportionate exercise of powers. This is particularly important in situations where preventative measures are being sought, where an individual has not been charged with any offence. The orders being proposed could result in a significant restriction of an individual's right to private and family life and right to enjoy their property and should therefore be handled with proper oversight and due process. Were this power to exist it would require to be a truly exceptional situation and would need to be subject to judicial determination at the earliest opportunity.”

Scottish Government, 2020²

DAPOs - the concept of a court-imposed order

Sections 8-16 of the Bill propose a power available to the civil court to grant a **Domestic Abuse Protection Order (DAPO)** in respect of a perpetrator of abuse.

The Scottish Government's consultation

The [Scottish Government's consultation](#) asked whether the court should have the power to grant a protective order prohibiting the perpetrator from returning to the person at risk's home. ³ (Note the DAPO in the Bill arguably goes further than this as it can require a perpetrator to leave a home he or she is currently living in.)

The great majority of respondents supported the scope of the proposed power, including a small number who were opposed to the concept of a DAPN. In total, **88% of respondents** supported the proposed powers, with 6% opposed and 6% unsure. ²

The small number opposed were concerned with the risk of encouraging false allegations, including allegations by people who were actually perpetrators of abuse. One health and social care respondent questioned whether the new powers would add to the courts and police's existing powers to deal with domestic abuse:

“ if [the] Scottish Government are considering an additional power to work alongside bail, special bail and use of remand it would be useful to have sight of the research which supports the need for this and better understand what is not working in the present system.”

Scottish Government, 2020²

The consent of the person at risk

Neither **section 4 of the Bill** (setting out the test for the making of a DAPN) nor **section 8 of the Bill** (setting out the test for the making of a DAPO) require the consent of the person at risk. This is in keeping with the approach to short-term protective orders imposed by a number of other countries.

The Scottish Government's consultation

The [Scottish Government's consultation](#) asked whether the consent of the person at risk should be required before an application is made to the court for a protective order by a third party (whether the police or another body).³

There were mixed views on this question. **Twenty eight per cent of respondents** who answered the relevant question thought consent should be required, **46% did not think this was necessary**, and 26% didn't know or provided an ambiguous response.²

Those respondents who thought consent should be required were concerned that imposing an order without it was unlikely to be effective. For example, one health, social work and social care respondent commented that:

“ Yes [consent should be required], otherwise the person at risk may seek to make contact with the alleged perpetrator which may lead to the victim enticing (even if unknowingly) the perpetrator to breach ... conditions”

Scottish Government, 2020²

On the other hand, those who thought that consent should not be required were concerned that people at risk may not always recognise the extent to which they are at risk. One individual respondent, typical of a number of responses received, commented:

“ Sometimes a victim can be unsure, as the perpetrator has worn them down so much that they no longer have the ability to make a rational decision at the time as fear can be overwhelming ... Therefore it is important that for the wellbeing and safety of the victim that they are protected and decisions made for them ...”

Scottish Government, 2020²

Which individuals are covered by a DAPN or DAPO

Section 1 of the Bill explains who is covered by a (police-imposed) DAPN and by a (court-imposed) DAPO.

Section 1 of the Bill requires a suspected perpetrator (Person A) to be **18 years or over** and the person at risk (Person B) to be **16 years or over** before they can be the subject of a DAPN or a DAPO. This mirrors the approach in the [UK Domestic Abuse Bill](#) for England and Wales.

Person A and B must be **married, cohabiting** or otherwise in an **intimate personal relationship** with each other (or formerly in those relationships with each other). Other family relationships (such as between adult children and their parents) or other types of relationship (such as between friends or flatmates) are not covered.

This is consistent with the approach taken by the Scottish Government in the 2018 Act, which created a specific criminal offence of domestic abuse. It differs from the approach taken, for example, in England and Wales and the Netherlands, where protections can apply in other situations where people are sharing a household.^{40 3}

The Scottish Government's consultation

The Scottish Government **did not consult on specific age limits** for the people covered by DAPNs or DAPOs.

The Scottish Government did consult on who should be covered by the proposed protective orders and **received mixed responses**.³

Of those respondents answering the relevant question, **47%** thought it should be partners (and ex-partners) only. **Fifteen per cent** thought any family members in the same household should be covered and **24%** thought anyone living in a shared home should be within the scope of the proposed protection. (**Fourteen per cent** did not know).²

Those respondents in favour of a wide definition highlighted that abuse could occur between, for example, parents and adult children, or people living in shared accommodation and argued the powers should be wide enough to take in such cases.

Respondents representing victims' groups and violence against women and gender-based violence partnerships were particularly likely to support restricting the scope of the power to partners and ex-partners.

In this regard, they often referred to the fact that the domestic abuse offence in the 2018 Act is also restricted to partners and ex-partners. Some of these respondents thought there may be a need to consider separate legislation to address intra-familial abuse, with one respondent commenting this was a "challenging and complex issue", where the dynamics should be explored in a different consultation.²

The term 'abusive behaviour'

Section 2 of the Bill sets out the proposed meaning of **abusive behaviour**, a term which would be a key part of the test for making a (police-imposed) DAPN and a (court-imposed) DAPO. **Section 3 of the Bill** elaborates on the description of abusive behaviour (in a non-exhaustive way).

Key points to note from sections 2 and 3 are as follows:

- Abusive behaviour is that which a reasonable person would consider is likely to cause physical or psychological harm. In this context, psychological harm includes fear, alarm or distress (section 2(2) and (5)).
- Behaviour may consist of a single incident or course of conduct (section 2(6)).
- It includes coercive and controlling behaviour (see especially section 3(3)).
- It includes behaviour directed at a third party for the purpose of causing physical and psychological harm to the person at risk. For example, it includes behaviour directed at a child of the person at risk (section 3(2)(b)).
- The behaviour can also be directed at property (section 2(4)). Property includes pets or other animals and can belong to a third party (e.g. the parents of the person at risk).⁴
- As well as things said, done or otherwise communicated, the behaviour can include an intentional failure to do, say or otherwise communicate something (section 2(3)).
- The behaviour can be carried out by, or with the help of, a third party, including where that third party is acting unwittingly or unwillingly (section 2(4)).

Section 10 of the Bill sets out the test for making an interim DAPO. Abusive behaviour is not referred to in that test. Instead, 'harm' is the key concept.

Harm is not defined in section 10. The Scottish Government said to SPICe that the ordinary dictionary definition of this term applies, with the references to harm in section 2 (as described in the first bullet above) likely to be a further guide to interpretation for the courts.⁴⁹

The Scottish Government's consultation

[The Scottish Government's consultation](#) sought views on the test for imposing a DAPN or DAPO. In particular, whether there should be a requirement that the person has threatened violence, or whether there should be a wider test of what constitutes domestic abuse, including behaviour likely to cause psychological, as well as physical, harm.³

Many individual respondents, in particular, referred to the importance of ensuring the test covered **controlling behaviour, financial abuse, emotional abuse and psychological abuse**, as well as physical harm. A significant number of respondents (around 30% of the total number of respondents to the consultation) referred to the definition in the 2018 Act as an important starting point for the definition associated with a DAPN or DAPO.²

Victims' group respondents were particularly likely to say that any test of 'harm' to the person at risk, does not include a 'severity threshold' (for example, requiring a risk of serious harm).

A minority of respondents referred to the importance of ensuring the test was not more wide-ranging than necessary. A small number of respondents (four) said it was important the test was objective and designed to deter false or malicious allegations.

One legal sector organisation said that if it is to be made a criminal offence for such an order to be breached ([as is now proposed in the Bill](#)) it is important that the test for imposing an order is "a high one".²

Who can apply for a DAPO

Section 8 of the Bill says that the police, but no other organisation or person, would be able to apply to the sheriff court for a DAPO.

This contrasts with the [UK Domestic Abuse Bill](#) for England and Wales, where the policy intention is that **a range of individuals and organisations**, including the police, can apply for a DAPO. It also contrasts with the approach taken by the Scottish Government in relation to the new female genital mutilation protection order (FGM protection order) introduced by separate legislation earlier this year.¹⁵

On the rationale for the Scottish Government's policy position, the [Policy Memorandum](#) notes (at para 72):

“ In this regard the Scottish Government recognises while others have a role in advising the police when a person may be at risk, it is considered there is benefit to having a single prescribed lead on the application process in order to ensure clarity and consistency in the operation of the Bill's protective measures.”

Scottish Parliament, 2020¹

The Scottish Government's consultation

[In its consultation](#), the Scottish Government asked for views on which individuals or organisations should be able to make an application to a court to impose a DAPO.³

A wide range of bodies were suggested by respondents, including **the person at risk** themselves, **family members** of the person at risk, **local authorities**, **housing associations**, **third sector support organisations** for victims of domestic abuse, **healthcare professionals** and others.²

The most commonly suggested individuals and organisations, and the number of respondents who referred to them, are noted in Table 1 below:

Table 1: Individuals or organisations who should be able to apply for a DAPO

Organisation or individual	Number of respondents
Local authority/social work	34
Third sector/domestic abuse/women's aid groups	24
The person at risk themselves	22
Restrict to the police	7

(Note that totalling up the second column in the table gives a number of respondents which is greater than the number of respondents to the consultation. This is because many respondents referred to more than one individual or organisation in their response.)

Individual respondents were particularly likely to refer to local authority/social work officials as people who should be empowered to make applications.

Some respondents raised the concern that allowing individuals or their family to apply directly to the courts for such orders could **increase the risk of false allegations of abuse** from individuals who were actually perpetrators of abuse (but who wanted the person at risk out of the shared home). One respondent also questioned whether third sector organisations had **appropriate governance arrangements** in place to decide whether to make an application.

Other respondents saw **advantages in widening out who could make an application** beyond the police. For example, one legal respondent noted:

“ A person at risk, family members and local authority professionals should also be given the opportunity to apply to the court for a protective order which would provide flexibility. Where a person at risk is reluctant to involve the police, this would be beneficial, and the court could act as the gate-keeper to ensure such an application is appropriate and proportionate.”

Scottish Government, 2020²

Which court can grant a DAPO and in what circumstances

Under **section 8 of the Bill**, it is the sheriff court acting as a **civil court**, not a criminal court, that would have power to grant a DAPO.

This contrasts with, for example, the position with a [non-harassment order](#) and the new FGM protection order. These can be applied for in the sheriff court when acting as a civil court, but can also be imposed by the sheriff court acting as a criminal court at the end of a successful prosecution.^{17 15} Likewise, the DAPO proposed for England and Wales can be imposed by a criminal court.⁴¹

Under **section 8 of the Bill**, a DAPO also requires **an application** to the (civil) court. This requirement contrasts with the approach to the new FGM protection order, which will be able to be made by the criminal or civil court **on its own initiative**, without such application.⁵⁰

Likewise, since 2019, a criminal court in Scotland has been able to make a [non-harassment order](#) in a domestic abuse case on its own initiative, without an application by the prosecutor in the case.⁵¹

The Scottish Government's consultation

The [Scottish Government consultation](#) sought views on whether a criminal court on conviction should be able to grant a DAPO.³ (No question was asked relating to whether a court should be able to act on its own initiative, rather than on application to it.)

On whether a criminal court should have power to impose a DAPO, **75% of respondents** answering the relevant question were in favour and 20% were opposed. (Five per cent were unsure or provided an ambiguous response.) Individual respondents were overwhelmingly in favour, but organisations were fairly evenly divided on this point.²

Those respondents in favour thought this was a useful tool, which avoided a further, separate civil court process. Those against, noted that a [non-harassment order](#) (NHO) can

be imposed at the end of a criminal case. They thought an alternative power might be confusing and potentially counter-productive.

Note that a DAPO and an NHO do not share identical characteristics. For ease of reference, the characteristics of the two types of order (a DAPO and an NHO) are summarised in Table 2:

Table 2: The characteristics of a DAPO compared to an NHO

DAPO	NHO
Short to medium-term order	Can be a long term or indefinite order
Can remove someone from a home and prevent them from returning	Can only prevent someone from returning to a home he or she has already left

The content of a DAPN and a DAPO

This section considers the legal restrictions and requirements which can go into a (police-imposed) DAPN and into a (court-imposed) DAPO.

DAPNs

Section 5 of the Bill sets out (**in an exhaustive fashion**) what a DAPN can require the suspected perpetrator to do, or refrain from doing.

The home and the vicinity of it

A number of the obligations proposed for the DAPN relate to **the home of the person at risk**. They would apply regardless of whether it is also the home of the suspected perpetrator (for example, he or she is an owner or tenant).

The obligations can require the suspected perpetrator to leave the home, surrender his or her keys and not return to the home or the vicinity of it.

One obligation also prevents a suspected perpetrator from "excluding" a person at risk. The Scottish Government believes this term (not further defined in the Bill) includes eviction of a tenant as well as behaviour such as changing locks or using physical force to remove someone.⁴⁹

Contact, or attempted contact (including with a child)

Other obligations relate to **contact more generally**. One obligation prohibits the suspected perpetrator from approaching or contacting (or attempting to approach or contact) the person at risk.

Another obligation imposes the same requirements on the suspected perpetrator in respect of **a child who usually lives with a person at risk**, including a child of the suspected perpetrator.

All other obligations which can be imposed under a DAPN **relate to the person at risk directly**.

For example, a prohibition on contacting or approaching **other family members or friends** of the person at risk (or attempting to do these things) does not appear to be possible under a DAPN.

DAPOs

Section 9 of the Bill says that, under a DAPO, a suspected perpetrator can be required to do (or to refrain from doing) anything which can be covered by a DAPN ([as set out in the list in section 5](#)).

However, section 9 also says that what is possible under a DAPO is **not limited to the list associated with a DAPN** - the sheriff may impose **any positive or negative obligation** that they consider necessary for the purpose of protecting the person at risk from the abusive behaviour. No further examples of relevant obligations to guide the court are included in section 9.

Court powers to impose positive and negative obligations follows the approach for other modern protective orders, such as the new FGM protection order⁵² and the forced marriage protection order.⁵³ It also follows the proposed approach for DAPNs and DAPOs in England and Wales in the [UK Domestic Abuse Bill](#).⁵⁴

On the other hand, as discussed earlier, [non-harassment orders](#) in Scotland can only impose negative obligations on the suspected perpetrator.⁵⁵

The Scottish Government's consultation

As discussed earlier in the briefing ([in relation to the concept of a DAPN](#) and [the concept of a DAPO](#)) there was majority support on consultation for the idea that DAPNs and DAPOs should contain measures relating to the person at risk's home.

The [Scottish Government consultation](#) also asked for views on whether **wider obligations** should be able to be imposed by a DAPN or DAPO relating to contact.³ **Sixty five respondents** agreed this should be possible under a DAPN or DAPO, with **two respondents** opposed.²

Consultation respondents highlighted for example, that it was important that the suspected perpetrator could be prevented from approaching **the place of work or study** of the person at risk. Also respondents said, that, under a DAPN or DAPO, he or she should be able to be prevented from entering **the homes of family members or close friends**.

Consultees suggested a range of supplementary obligations associated with the person at risk's home. For example, that the suspected perpetrator should not be able to **evict, or otherwise exclude, the person at risk** from his or her home. Another suggestion was an obligation not to **damage the personal property** of the person at risk contained within the

home.

The [Scottish Government consultation](#) also sought views on whether **a child living with the person at risk** should be covered by a DAPO. **Eighty five per cent of respondents** answering the relevant question supported this approach, **6% were opposed** to doing so and **9% of respondents** didn't know or were unsure.²

A number of respondents highlighted their view that children in such situations will face a direct risk of harm. For example, one victims' group respondent commented:

“ Children experience all the same effects and risk as the non-abusive parent, and should be subject to the same protections. Children are also often used as part of the abuse, especially where there is on-going contact.”

Scottish Government, 2020²

Three respondents raised the question of **how any protective order put in place would interact with existing child contact orders that may be in place**. One respondent said that they considered it important that the requirements of any protective order should take precedence if there was any conflict between the requirements contained in it and any child contact order.

The duration of a DAPN and a DAPO

This section of the briefing considers how long a (police-imposed) DAPN can last for and how long a (court-imposed) DAPO can last for. Somewhat different considerations apply to each.

For the proposed duration of a DAPN, human rights considerations are particularly pertinent because the notice is imposed without sanction from the court. On the other hand, any notice must last long enough to be effective in achieving the Government's policy aims.

For the proposed duration of a (court-sanctioned) DAPO, a key policy choice is between an order lasting for the short-to-medium term, and one having longer-term effect.¹

The duration of a DAPN

Section 5 of the Bill, in conjunction with section 11, proposes that a DAPN lasts until a DAPO or interim DAPO is made (or, if no such order is made, until the associated court hearing ends).

Section 11 of the Bill says that, where a DAPN has been imposed, the court hearing about a DAPO must be held not later than the first court day after an application is made (and must conclude on the day it begins). Furthermore, the police must apply for a DAPO not later than the first court day after making a DAPN.

The effect of the relevant provisions is that a DAPN could last as little as **two days**, but it does depend on whether a weekend or public holiday affects the timing of the process.

In most European countries, the relevant time limits for short-term notices vary from **one week to one month**.¹¹ However, in England and Wales, police-imposed notices usually last **48 hours**.⁴²

As noted earlier, the approach for England and Wales was criticised in the 2013 [research evaluation](#) commissioned by the Home Office, for reasons including that it did not leave enough time to prepare the legal case for any (follow up) court order.⁴⁴ However, the typical 48 hour time limit has been largely replicated in the current [UK Bill](#).⁵⁶

The Scottish Government's consultation

The mixed views expressed in response to [the Scottish Government's consultation](#) on the desirable duration of a DAPN are broken down in Table 3:²

Table 3: The preferred duration of a DAPN

The time a police-imposed order should have effect for before requiring confirmation by the court	Number of respondents
Up to a week	13
One week to two weeks	9
More than two weeks, up to a month	11
Longer than a month	7

A number of respondents highlighted concerns that the period of 48 hours currently applicable in England and Wales is insufficient to enable a case to be prepared for court.

On the other hand, one respondent from the justice and legal sector background highlighted concerns that too long a period could raise human rights issues if an alleged perpetrator of abuse was unable to challenge the imposition of an order in court.

The duration of a DAPO

Sections 9 and 13 of the Bill say a DAPO could last **up to two months** initially and a maximum of **three months** in total.

Section 13 of the Bill also says an interim DAPO's maximum permitted duration must not exceed **three weeks**, including any extension to the interim DAPO.

A key point here is that the proposed policy approach to DAPOs in Scotland contrasts with that proposed for DAPOs in England and Wales.

Under the [current UK Bill](#), there is no general maximum time limit proposed for a DAPO.⁵⁷ Consequently, a DAPO could function in England and Wales as an indefinite or long-term court order, as well as a short-to-medium term one.

On the Scottish approach to the DAPO, the Scottish Government noted in the [Policy Memorandum](#) (at para 135):

“ The order is intended to complement but not replace the existing suite of other longer term civil orders which may be sought for the protection of the person at risk. ”

The Scottish Government's consultation

In the responses to [the Scottish Government's consultation](#) on the duration of DAPOs, there was a broad split between the views of respondents.

Some respondents took the view that such court orders should be a short-to-medium term measure, buying time for other longer-term legal measures to be explored, as well as other housing options.

Other respondents wanted such orders to be a longer-term or indefinite measure, presumably taking over the role of some of the existing civil protective orders which are used at present.

Table 4 gives a broad summary of the range of views on this issue: ²

Table 4: The preferred duration of a DAPO

The time a court order should last	Number of respondents
Short-term (up to one month)	6
Medium-term (one to three months)	10
Longer-term (more than three months, but for a fixed period)	6
Capable of running indefinitely	14

Breach of a DAPN/DAPO: a criminal offence

Sections 7 and 9 of the Bill says that a person commits a **criminal offence** if they breach a DAPN or a DAPO without reasonable excuse.

Note that, under the [UK Domestic Abuse Bill](#), breach of a DAPN in England and Wales would **not** be a criminal offence. It would allow the police to arrest the person in breach, without a warrant, and hold in them custody, pending a court appearance within 24 hours.
58

The Scottish Government considered and rejected relying on a power of arrest alone, commenting in its [Policy Memorandum](#) (at para 79):

“ The Scottish Government considers that breach of both a police issued notice and a court imposed order should be a criminal offence in order to aid enforceability by the police and enhance their deterrent value”

Scottish Parliament, 2020¹

Penalties for breach of a DAPN

Under **section 7 of the Bill**, breach of a DAPN would be punishable by **imprisonment (up to 12 months) or a fine (up to £1,000) or both**.

The proposed penalty is the same as the law at present where there is a summary conviction for breach of bail conditions (in all courts but [the justice of the peace courts](#)).³⁶

Penalties for breach of a DAPO

The proposed penalties for breach a DAPO depend on the criminal court procedure used in respect of the breach.

For the most serious cases

Section 16 of the Bill says that for the most serious cases, where there is a conviction 'on indictment' for a breach, this is punishable **by imprisonment (up to 5 years), an unlimited fine or both**. This mirrors the penalty for a breach in the most serious cases for:

- the proposed DAPO under the [UK Domestic Abuse Bill](#) for England and Wales⁵⁹
- a [non-harassment order](#),⁶⁰ a [domestic abuse interdict](#)²⁸ and a FGM protection order in Scotland.⁶¹

On the other hand, note that for a forced marriage protection order in Scotland, the penalty in the equivalent situation is up to **two years' imprisonment** (or unlimited fine, or both.)⁶²

Other cases

In other cases relating to a breach of a DAPO (i.e. where there is a summary conviction) **section 16 of the Bill** proposes a penalty of **imprisonment for up to twelve months, a fine not exceeding £10,000, or both**, reflecting the current sentencing limits of the summary courts in Scotland.

Accordingly, the proposed penalty for a breach of a DAPO mirrors the current penalty where there is a summary conviction in respect of a breach of a [non-harassment order](#),⁶³ a [domestic abuse interdict](#),²⁸ a forced marriage protection order⁶² and an FGM protection order.⁶¹

The Scottish Government's consultation

The [Scottish Government consultation](#) asked whether breach of a DAPN or DAPO should be a criminal offence and, if so, what the maximum penalties should be.³ The vast majority of respondents were **supportive of a breach constituting a criminal offence**, with **93% of those responding** to the relevant question in favour, 3% against and 4% who did not know.²

A small number of respondents made a distinction between a DAPO and a DAPN, supporting a breach of a DAPO being a criminal offence, but not a breach of a DAPN.

There were mixed views on what **the maximum penalties** should be for breach of a DAPN or a DAPO. A significant number of respondents (around 30% of those responding to the question) drew attention to the maximum penalty for other court orders such as [non-harassment orders](#) and [breach of a bail order](#). In terms of the maximum possible prison sentence, responses ranged from **three months to five years** (with the latter now appearing in the Bill.)³

What's not in Part 1 of the Bill

This part of the briefing considers policy issues discussed in the course of the consultation but which **do not** feature in Part 1 of the Bill.

Statutory duty of referral to support services

The [Scottish Government's consultation](#) asked for views on whether there should be a **statutory duty on the police to refer a person at risk to support services**, when making an application to the courts for a DAPO, or putting in place a DAPN. ³

Fifty six per cent of respondents who answered the relevant question were in favour of this. A further **23%** thought that, as a matter of operational practice (rather than because of a statutory duty) the police should offer to refer a person at risk to such services. **Six per cent** simply stated there should be no such statutory duty. (Fifteen per cent provided an ambiguous response or said they did not know). ²

Of those not in favour of the statutory duty, victims' groups were particularly likely to say that it was important the person at risk retain control as to whether a referral is made. Other respondents raised other concerns including whether support service provision is sufficiently comprehensive in some parts of the country to make this requirement practical.

On the other hand, some of those who supported a duty to refer persons at risk to support services were concerned that there was a risk that the imposition of a protective order without accompanying support could actually increase the person at risk's longer-term risk of abuse.

Exclusion orders

As noted earlier, an [exclusion order](#) is an existing civil protective order which can be applied for by a spouse, a civil partner and, in some circumstances, a cohabitant. Its main purpose of is to remove a perpetrator of abuse from the family home and prevent him or her from returning.

[In its consultation](#), the Scottish Government sought views on the reform of exclusion orders, with the aim of making them more effective. ³ Areas covered included:

- the test for granting an exclusion order - broadly speaking, whether it should be weighted more in favour of protecting the person at risk
- whether wider-ranging restrictions should be able to be imposed in the context of an exclusion order than is possible at present, for example, those relating to children
- whether exclusion orders for cohabitants should be available in the same circumstances as for spouses or civil partners.

The [analysis of the consultation responses](#) did not include this part of the consultation and the Scottish Government did not proceed with any proposals on exclusion orders in the Bill. As noted earlier, the [Scottish Law Commission](#) has said it [may do further work in this area](#), although no decisions have been taken on this.

Legal aid

The [Scottish Government consultation](#) gave respondents the opportunity to make any other comments relating to the proposed scheme now contained in the Bill.³ The most frequently raised issue related to **access to legal aid** for the person at risk.²

Respondents who raised this were keen that a person at risk's situation could be resolved for the longer term, highlighting that part of this process might involve the person at risk applying for one of [the existing longer-term civil protective orders](#) (which would ultimately replace the DAPO). For example, one victims' group respondent commented:

“ Access to free legal advice and representation around obtaining civil protecti[ve] orders should be available from the very beginning of [a short-term protective order] ... Free legal advice and representation is crucial for women to achieve access to justice, realise their right to protection, and effectively provide support and empower women during this transitional stage.”

Scottish Government, 2020²

Related to this, note that **automatic legal aid** is [currently available to applicants in Scotland in some specified circumstances](#), without any financial eligibility tests being applied - but **not** for civil protective orders.

Automatic legal aid was proposed for [domestic abuse interdicts](#) in the [Member's Bill](#)⁶⁴ which became the [Domestic Abuse \(Scotland\) Act 2011](#), but was removed at a later stage of the Bill's parliamentary passage.

The Scottish Government considered whether there should be automatic legal aid as part of its deliberations on possible reforms to exclusion orders. It said in the [consultation paper](#) it was against taking this step, for reasons including increased expenditure for the "hard-pressed" legal aid budget.³ In this regard it commented:

“ Exclusion orders could be ... ancillary ... to a wider family action. Free legal aid in relation to exclusion orders could lead to free legal aid for the wider family action too. This would be a major expense to the legal aid budget, given the number of family actions in court. If free legal aid should be given to those seeking exclusion orders, it is likely that, to ensure equality of arms, free legal aid would have to be given to those seeking to oppose the granting of an exclusion order.”

Scottish Government, 2018³

Part 2 of the Bill: a new power for social landlords

Section 18, the sole provision in Part 2 of the Bill, creates a new ground under which social landlords can end a tenant's interest in a tenancy. This is aimed at preventing victims of domestic abuse from becoming homeless or having to find somewhere new to live. On this, the Scottish Government said in the [Policy Memorandum](#) (at para 152):

“ Currently it is often the perpetrator of domestic abuse who remains in the family home undisturbed with no change to their housing circumstances and without having to go through the upheaval of moving to alternative accommodation. The new ground for ending a tenant's interest...will make it easier for social landlords to help victims of domestic abuse who live in social housing to remain in the family home and avoid them having to move out into temporary emergency accommodation, and in the longer term be rehoused permanently elsewhere.”

Social landlords are local authorities, registered social landlords (i.e. housing associations or housing co-operatives) and [Scottish Water](#).⁶⁵

The policy background

The [consultation paper](#) relating to Part 1 of the Bill³ did not cover the proposal now contained in section 18.

The [Policy Memorandum](#) describes two main areas of policy work associated with section 18.

The Homelessness and Rough Sleeping Action Group

First, the work of the [Homelessness and Rough Sleeping Action Group](#) (HARSAG). This group was set up in 2017 to make recommendations to Scottish Ministers on what was needed to transform temporary accommodation and end homelessness in Scotland. It carried out several consultation exercises on wide-ranging proposals.⁶⁶

Scottish Ministers accepted the recommendations in the Group's [final report](#) in full,⁶⁷ including **recommendation 23** which reads, in part:

“ All social landlords to have clear policies on domestic abuse, and ensuring that experience of abuse or violence does not lead to someone losing their tenancy - for example, arrangements should be put in place so that tenancies can transfer seamlessly to the person who has experienced abuse...”

The working group co-chaired by Scottish Women's Aid and the Chartered Institute of Housing

Second, in summer 2019, a further working group, co-chaired by [Scottish Women's Aid](#) and the [Chartered Institute of Housing](#), was set up by the Scottish Government to look at actions needed to improve housing outcomes for women and children experiencing domestic abuse.

This group began work in early 2020 but, due to the pandemic, its work was curtailed until **summer 2020**.⁶⁶

The [Policy Memorandum](#) (at para 162) notes the group's strong support for:

“ taking forward arrangements to enable social landlords to take legal action to end a perpetrator's interest in a tenancy with a view to transferring the tenancy to a victim of domestic abuse”

This second working group has not carried out any separate consultation exercise on the proposal contained in section 18 of the Bill.

The existing law

There are a variety of existing statutory powers which can be used by the person at risk or the social landlord with the aim of removing a perpetrator of abuse from a tenanted property. These are considered below, along with some potential policy issues associated with them.

Matrimonial Homes (Family Protection) (Scotland) Act 1981, section 13

Section 13 of the [Matrimonial Homes \(Family Protection\) \(Scotland\) Act 1981](#) applies to spouses or civil partners and, **in more limited circumstances**, to cohabitants.

It covers the situation where i) the tenancy is in the name of a **sole tenant** and the wish is to have it transferred to the other person; and ii) there are **joint tenants** and one of them wants the tenancy to be in their sole name.

The application to the court for transfer must be made by **the person who wants the change** (rather than the landlord). A copy of the application is served on the landlord and, before the court grants an order, the landlord must be given an opportunity to be heard by the court.

The court process can be stressful, particularly as the applicant is already vulnerable due to experiencing domestic abuse. There are legal costs incurred associated with the court action, unless the person qualifies for legal aid and these are entirely met from the legal aid budget.

The **application is not automatically granted** – a test must be satisfied. Crucial factors the courts will consider include the availability of alternative accommodation and the

relative responsibility of the parties for the breakdown of the relationship.

The person taking over the tenancy must also pay “**just and reasonable**” compensation to the other person.

Housing (Scotland) Act 2001

The [Housing \(Scotland\) Act 2001](#) ('the 2001 Act') sets out powers for social landlords to end a joint tenant's interest in a tenancy by notice in limited circumstances ([under section 20](#)). It also provides a range of grounds for the social landlord to end an existing tenancy by court action ([contained in schedule 2](#)).

In respect of the grounds contained in schedule 2, the Scottish Government advises that the court action for recovery of possession of the property would be against **all tenants in the property**.⁴⁹ Where the suspected perpetrator and person at risk are the joint tenants, this would involve the person at risk being one of the individuals against whom court action is raised. On this issue, the Government has commented to SPICe:

“ This causes additional stress and trauma with victims feeling stigmatised and vulnerable by having to be involved in a negative court process through circumstances which are not of their making and subsequently having a negative court judgement against them.”

Scottish Government, 2020⁴⁹

Note that, in practice, a short time after the court proceedings, a social landlord would typically grant a new tenancy to the person at risk.

The individual powers available under the 2001 Act are considered in more detail in the remainder of this section of the briefing.

Section 20 - notice to end an interest in a joint tenancy

The power under **section 20** of the 2001 Act is available where the social landlord has reasonable grounds for believing one joint tenant has abandoned the property. A social landlord can serve a sequence of two notices on that tenant to end his or her interest in the tenancy. This means that person cannot later return and live in the property.

The obvious limitation of section 20 is that it does not cover the situation where the joint tenant is in the property and wishes to remain there.

Ground 1 - ending a tenancy where there is a breach of a tenancy agreement

As noted earlier, the grounds on which a social landlord can **recover possession of a property** (and bring to an end an existing tenancy) are set out in [schedule 2 of the 2001 Act](#).

Ground 1 allows a social landlord to recover the possession of the property on the basis a term of the tenancy agreement has been broken. The application must be assessed by the

court according to reasonableness.

Social housing landlords are being encouraged by 2019 [best practice guidance](#) to insert a specific ground relating to domestic abuse into their tenancy agreements.⁶⁸ However, the Scottish Government has argued that, at present, landlords do not normally view domestic abuse as a breach of a tenancy agreement.⁴⁹

Grounds 2, 7 and 8 - ending a tenancy based on the conduct of a tenant

Various grounds allow a social landlord to apply to the court to bring a tenancy to an end based on **the conduct of one or more of the tenants**.

Ground 2 can be used in various circumstances including where there has been a conviction for an offence punishable by imprisonment which took place in the house. Eviction is mandatory where ground 2 is established.

Ground 7 can be used where there is a course of conduct amounting to anti-social behaviour or harassment. **Ground 8** can be used where there is a nuisance, annoyance or, again, a course of conduct amounting to harassment. For both grounds 7 and 8 the court has discretion as to whether to evict and must assess the reasonableness of the application.

Grounds 7 and 8 use the term **locality** to refer to *where* the relevant behaviour must take place. There may be a legal ambiguity as to whether the term includes behaviour **inside the home**. The meaning of the term has not been tested in court.⁶⁹

Ground 15 - ending a tenancy where one person no longer wishes to live with the other

Ground 15 applies to spouses, civil partners (or former spouses and civil partners) and, **where the parties have lived together for six months**, cohabitants. It covers the situation where one person no longer wishes to live with the other.

This ground can only be used where it is reasonable to grant the order and **suitable alternative accommodation** will be provided for the existing tenant. The Scottish Government has argued that, at a time when social housing is a scarce resource and allocated on housing needs, social landlords are unlikely to use this power as they would need to rehouse the perpetrator.⁴⁹

Section 18 of the Bill - a new ground to end a tenancy where there has been abusive behaviour

Section 18 would insert a new ground into the 2001 Act. It would empower a social landlord to apply to the court to end a tenant's interest in a property where a tenant has behaved in a way which is **abusive of a partner or ex-partner**.

The notice period the landlord must give the tenant

Under the 2001 Act, the social landlord is required to **give notice** to the tenant of its intention to recover possession of the property. Then a **notice period** must elapse before the landlord is able to raise court proceedings. The length of notice period under the 2001 Act depends on the ground being used to recover possession.

In policy terms, the length of the notice period for the new ground is important, as the social landlord is aiming to help avoid the person at risk from having to leave the property.

The Government has advised that that, for both sole and joint tenants, the landlord will have to give **28 days' notice** to the perpetrator of abuse before using the new ground contained in section 18.⁷⁰

This means that, as a power, it lacks the immediacy of, say, a DAPN. However, on the other hand, use of police powers under Part 1 of the Bill could happen in conjunction with action by a social landlord under section 18.

Other key features of section 18

Various other conditions must be satisfied before the social landlord can make the application including under section 18:

- the house is the person at risk's only or principal home
- the person at risk wishes to continue living in that property
- where the perpetrator is the sole tenant, the landlord must wish to recover possession of the property in order to then enter into a tenancy with the person at risk instead.

In contrast to ground 15 under the 2001 Act, there is no requirement on the social landlord to provide alternative accommodation for the perpetrator before using the new ground. However, the social landlord is required to provide **advice and assistance** to that person in relation to finding alternative accommodation.

Section 18 says the landlord can apply to the court for an order terminating one tenant's interest in the property (in the case of a **joint tenant**) or recovery of possession of the property (in the case of a **sole tenant**).

For **joint tenants**, from the Government's perspective, one policy innovation is that the social landlord no longer has to raise court proceedings against the person at risk.

On the other hand, where there is a **sole tenant**, one point to note is that **the court does not authorise the transfer of the tenancy** from the existing tenant to a new tenant. After the court order is obtained, the social landlord must take the further legal step of creating a new tenancy for the person it wishes to remain in the property. This is the also case with the existing grounds available under schedule 2 of the 2001 Act.

Under section 18, a court must make the relevant court order where:

- it is reasonable to make that order, **or**
- the perpetrator has been convicted of an offence (in the last twelve months) relating to his or her abusive behaviour which is punishable by imprisonment.

In relation to the first bullet point, reasonableness must be assessed with regard to any risk that the perpetrator will behave again in a way which is abusive of the person at risk.

On the second bullet point, note the substantial overlap with [the content of ground 2 under the 2001 Act](#).

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