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Domestic Abuse (Protection) (Scotland) Bill: consideration prior to Stage 3

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This briefing looks at the Domestic Abuse (Protection) (Scotland) Bill prior to Stage 3. This Bill would add to the legal remedies available to help protect people at risk of domestic abuse.

ABUSE

10 March 2021
SB 21-18

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Executive summary

This briefing looks at the parliamentary consideration of the [Domestic Abuse \(Protection\) \(Scotland\) Bill](#) ('the Bill') in advance of Stage 3.

Part 1 of the Bill, the main part 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).

One policy aim associated with Part 1 is to protect a person at risk in the immediate situation. Another aim is to create time for any further steps to be taken to ensure the longer-term safety of the person at risk.

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 and reduce the risk of them becoming homeless.

Policy issues going to Stage 3 include:

- [what a court should be required to do in relation to the views of a child who would be affected by a DAPO](#)
- [whether organisations other than the police should be able to apply for a DAPO](#)
- [what the maximum duration of a DAPO should be](#)
- [what reporting duties should be placed on the Scottish Government in relation to legislation.](#)

Key dates and documents

The [Domestic Abuse \(Protection\) \(Scotland\) Bill](#) ('the Bill') is a Scottish Government Bill. It was introduced in the Scottish Parliament by the [Cabinet Secretary for Justice](#) ('the [Cabinet Secretary](#)') on 2 October 2020.

The Bill and its related documents, including the [Policy Memorandum](#), [Explanatory Notes](#) and [Financial Memorandum](#), are available on the [Parliament's website](#).

The [SPICe briefing](#) on the Bill as introduced provides more detailed information on the Bill's provisions.¹ This briefing also covers the background to the reforms and provides information on equivalent measures in other legal systems, including England and Wales.

The [Justice Committee](#) was designated as [lead committee](#) for Stage 1 and Stage 2 scrutiny of the Bill.

Part 1 of the Bill, on Domestic Abuse Protection Notices (DAPNs) and Domestic Abuse Protection Orders (DAPOs), was the subject of [a Scottish Government consultation in 2018](#).² Responses to the consultation, where permission has been given for these to be published, [appear on the Scottish Government website](#). The Scottish Government also published [an analysis of responses](#) in July 2020.³ Consultation responses showed strong support for the key concepts of a DAPN and a DAPO.

Part 2 of the Bill, proposing a new power for social landlords, was not part of the main consultation. Instead it has its origins in the recommendations of two Scottish Government working groups. First, the [Homelessness and Rough Sleeping Action Group](#), which carried out a consultation on wide-ranging topics, including the proposal in Part 2.

Second, a group which began work in 2020, co-chaired by [Scottish Women's Aid](#) and the [Chartered Institute of Housing](#). The group did not carry out a separate consultation exercise on what is now Part 2 of the Bill, but, like the Homelessness and Rough Sleeping Action Group, was supportive of the proposal now contained in Part 2. In December 2020, on the website of [Scottish Women's Aid](#), the group published its final report, [Improving Housing Outcomes for Women and Children Experiencing Domestic Abuse](#),⁴ focusing on social landlords.

Consideration at Stage 1

As mentioned earlier, the [Justice Committee](#) was responsible for Stage 1 scrutiny of the bill.

The Committee issued [a call for views](#) between 10 November and 4 December 2020. The Committee received 40 submissions in response, and, where permission has been given for them to be published, [these are available on the Scottish Parliament website](#).

The Committee then held three oral evidence sessions at Stage 1, a challenging timetable for a significant piece of legislation:

- [15 December 2020](#) - with Scottish Government officials from the Bill Team
- [22 December 2020](#) - with three panels of organisations representing a range of interests affected by the Bill
- [12 January 2021](#) - with the Cabinet Secretary.

The Committee published its [Stage 1 report](#) on 21 January 2021⁵ and [the Scottish Government responded on 15 January 2021](#).

The Stage 1 report

In its [Stage 1 report](#), the Committee recommended that the general principles of the Bill were agreed to. The Committee said, however, that it looked forward to close working with the Scottish Government and others to resolve the issues expressed to the Committee before the Bill was finally considered at Stage 3.

In particular, the Committee believed that further consultation was necessary with [Police Scotland](#) to address the organisation's concerns about the operational challenges in implementing this legislation effectively.

The Committee also said it was important that the powers in the Bill were proportionate and provided a balance between protecting those who were being abused with the rights of anyone being accused. This, the Committee said, was because the powers being granted to the police to issue a DAPN were substantial, as were the restrictions that came with the notices and orders.

The Stage 1 debate

[The Stage 1 debate took place on 28 January 2021](#). Members from all parties supported the general principles of the the Bill. However, key themes from the Committee's Stage 1 report featured strongly in the debate.

On the operational and resourcing challenges for the police, the Cabinet Secretary said that:

- he was liaising with [Police Scotland](#) in relation to their concerns

- the Scottish Government was going to set up an 'implementation board' relating to the Bill, involving a range of organisations.

The Cabinet Secretary also said the Scottish Government were considering changes to the test that must be met before a DAPN could be imposed. He noted that domestic abuse organisations had concerns about such changes.

Consideration at Stage 2

The Justice Committee ('the Committee') considered the Bill at Stage 2 on 23 February 2021. To support Stage 2, the Scottish Government published [notes on the purpose and effect of the Scottish Government amendments in advance of Stage 2](#).

This briefing does not attempt to deal with all of the amendments lodged. Instead, it discusses the main issues associated with the Bill, and how they have progressed through Stage 1 and Stage 2 consideration.

The issues covered in this briefing are:

- [the test which must be satisfied before a Domestic Abuse Protection Notice \(DAPN\) or a Domestic Abuse Protection Order \(DAPO\) can be imposed](#)
- [what the relationship should be between the DAPNs and DAPOs and other legal measures, such as court orders affecting children](#)
- [for DAPOs, whether the person at risk's consent should be required before a DAPO can be imposed](#)
- [aside from the specific issue of consent, how the views of adults and children are considered as part of the processes set out in Part 1 of the Bill](#)
- [who should be able to apply for a DAPO, i.e. just the police or other agencies and individuals as well](#)
- [how long a DAPO should last for once imposed](#)
- [whether the Bill should contain a duty on the Scottish Government to report on Part 1 of the legislation's operation in practice](#)
- [various points associated with the new power available to social landlords contained in Part 2 of the Bill.](#)

The test which must be satisfied before a DAPN or DAPO can be imposed

Section 4 of the Bill sets out the test which must be satisfied before a DAPN can be imposed by a senior police officer. The test includes that the officer has reasonable grounds for believing:

- there has been abusive behaviour by the suspected perpetrator towards the person at risk
- a DAPN is necessary for the purpose of protecting the person at risk before the court can make a DAPO (or an interim DAPO).

Section 8 of the Bill contains a similar test relating to the making of a DAPO by the sheriff court.

At Stage 1, members of the judiciary and the [Law Society](#) told the Committee they were

concerned about the proposed tests, particularly the test relating to a DAPN.

They were worried both about the threshold imposed by the test and whether a DAPN would be a proportionate measure in the context of relevant rights under the [European Convention of Human Rights](#). They questioned the evidence which would be required in practice before the test would be met.

In its [Stage 1 report](#), the Committee called on the Cabinet Secretary to reflect on the evidence received on those topics.

During the [Stage 1 debate](#), the Cabinet Secretary said the Government was looking at whether the test of future harm (that requires to be met before a DAPN can be imposed) should be set at a risk of **significant** future harm. However, he also said that domestic abuse organisations were concerned about any such change to the Bill in this regard.

Stage 2 amendments

Table 1: Stage 2 amendments

Purpose and effect of amendment	Result
<p>Scottish Government amendment 5 would alter the wording of the test for making a DAPN in section 4.</p> <p>One element of the test in section 4 would be revised so that there must be reasonable grounds for believing that there is a risk of further abusive behaviour immediately. In this context, 'immediately' means before the sheriff can make a DAPO or interim DAPO.</p> <p>The Scottish Government consider that this new wording makes it clearer that a DAPN is an emergency measure.</p> <p>Note amendment 5 would not introduce the higher threshold of significant future harm (discussed earlier).</p>	<p>This amendment was agreed to.</p>
<p>Scottish Government amendment 14 would alter the test for making a DAPO contained in section 8. As well as the existing elements of this test, the sheriff must be satisfied there is an immediate or imminent risk of further abusive behaviour.</p>	<p>This amendment was agreed to.</p>

The relationship of DAPNs and DAPOs to other legal measures, including those relating to children

The obligations imposed under a Domestic Abuse Protection Notice (DAPN) or a Domestic Abuse Protection Order (DAPO) can relate to the person at risk and a child of the person at risk, including a child of the perpetrator. So, for example, the perpetrator could be required to stay away from such a child under a DAPN or DAPO.

One policy issue that arose at Stage 1 was how the proposed new measures would interact with other legal measures, including those relating to children. For example, court orders imposed under the child protection system or those made to resolve disputes between parents about contact.

In its [Stage 1 report](#), the Committee said that, if DAPNs and DAPOs were to take priority over the existing rights of perpetrators, or any court orders in place relating to their children, then this should be explicitly stated in the Bill and accompanying guidance.

Stage 2 amendments

Table 2: Stage 2 amendments

Purpose and effect of the amendment	Result
Amendment 10 , in the name of Rhoda Grant MSP, seeks to make explicit on the face of the Bill that any requirement under a DAPN must take priority over any pre-existing court order that makes contrary provision.	This amendment was withdrawn. The Cabinet Secretary agreed to work with the Member on a possible amendment delivering the same policy intent in advance of Stage 3.

The consent of the person at risk to a DAPO being imposed

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**. They do contain a requirement to consider the views of the person at risk, [an issue dealt with in the next section of the briefing](#).

At Stage 1, one policy issue was whether the consent of the person at risk should be required before a DAPO can be imposed. A number of organisations argued that consent should routinely be obtained, where possible.

However, in its [Stage 1 report](#), the Committee acknowledged that, in circumstances of coercive control, it may be difficult for consent to be obtained from some individuals at risk. Accordingly therefore, the Committee suggested, there may need to be an element of flexibility factored in where circumstances dictate.

Stage 2 amendments

Table 3: Stage 2 amendments

Purpose and effect of the amendment	Result
Scottish Government amendment 15 (with associated consequential amendments) would require the consent of the person at risk before the court could make a DAPO (but not an interim DAPO).	These amendments were agreed to.

The views of adults and children who would be affected by DAPNs and DAPOs

Section 4 of the Bill, relating to Domestic Abuse Protection Notices (DAPNs), requires the senior police officer to take into account various matters, including the views of the person at risk in relation to the proposed notice.

Likewise, **section 8 of the Bill**, covering the initial imposition of a Domestic Abuse Protection Order (DAPO), as well as **section 12 of the Bill**, covering a variation, extension or discharge of a DAPO, require the court to take into account the views of the person at risk. They also require the court to take into account the views of any children who would be affected by a DAPO.

In all cases, the requirement on the decision-maker is take account of views of which the decision-maker "is aware." **At Stage 1**, [Scottish Women's Aid](#) expressed concern about this wording, arguing there should always be a requirement on the police and the courts to actively seek views. They also said that the requirements in the Bill relating to the taking of children's views should mirror the wording of the [Children \(Scotland\) Act 2020](#) on the same topic.

In its [Stage 1 report](#), the Justice Committee agreed the wording could be improved, where children's views were concerned. It urged the Government to ensure that the provisions in this Bill were consistent with the [Children \(Scotland\) Act 2020](#) and other relevant legislation. The Committee also sought clarity from the Government on the process for obtaining the views of the person at risk and emphasised this process should be properly resourced.

Stage 2 amendments

Table 4: Stage 2 amendments

Purpose and effect of the amendments	Result
Scottish Government amendment 6 requires the police, prior to the making of a DAPN, to, first, take reasonable steps to ascertain the views of both the person at risk and the suspected perpetrator and, second, to take any views ascertained into account.	This amendment was agreed to.
Scottish Government amendments 18 and 25 would require the sheriff, prior to the making of a DAPO which relates directly to a child (or the extending, varying or discharge of such a DAPO), to take reasonable steps, first, to give the child an opportunity to express a view and, second, to take into account any views expressed.	Amendment 18 was agreed to.
<p>Amendments 19 and 39, in the name of Rhoda Grant MSP, would require the sheriff, before making a DAPO (or extending, varying or discharging a DAPO), to:</p> <p>a) presume that a child is capable of expressing a view, and</p> <p>b) give a child an opportunity to express a view in the child's preferred manner or in a manner suitable to the child (if the child has not expressed a preference or it is not reasonable to accommodate their preference).</p>	Amendments 19 and 39 were not moved.
<p>Amendments 18A and 25A, in the name of Rhoda Grant MSP, would amend amendments 18 and 25 (and were alternatives to amendments 19 and 39). They would require the court to:</p> <p>a) presume the child is capable of expressing a view, and</p> <p>b) give a child an opportunity to express a view in the child's preferred manner or in a manner suitable to the child (if the child has not expressed a preference or it is not reasonable to accommodate their preference).</p>	This amendment was disagreed to.

Who should be able to apply for a DAPO

Under **section 8 of the Bill**, the police (but not any other individual or organisation) can apply for a Domestic Abuse Protection Order (DAPO).

At Stage 1, the Committee heard mixed views about whether other individuals and organisations (for example, local authorities) should be able to apply for a DAPO. A range of respondents, including [Social Work Scotland](#), were content with the proposed approach. On the other hand, others, including [Police Scotland](#), thought the power to apply for a DAPO could be extended, as they were concerned about the resource implications of being the sole body which could make an application.

In its [Stage 1 report](#), the Committee said it would welcome reassurances from the Scottish Government that [Police Scotland](#) would be properly resourced to make applications for DAPOs. It also noted that, if, in future, other organisations might be given power to apply for DAPOS, it was important these organisations were properly resourced, to avoid unintended consequences.

Stage 2 amendments

Table 5: Stage 2 amendments

Purpose and effect of the amendments	Result
Amendments 29-33, 35-38 and 42-43 , in the name of Liam Kerr MSP, would extend the power to apply for a DAPO (as well as the power to apply for an interim DAPO or a variation, extension or discharge of a DAPO) to a 'supporting body.' Scottish Ministers would be able to establish a list of supporting bodies by regulations.	These amendments were withdrawn. The Cabinet Secretary agreed to work with the Member, in advance of Stage 3, to create alternative amendments with the same policy aim.
Amendments 46 and 47 , in the name of Rhoda Grant MSP, would allow a child usually living with a the person at risk to apply for a DAPN or a DAPO.	These amendments were withdrawn.

The duration of a DAPO

Section 9 says the initial duration of a DAPO is up to two months. Section 12 allows a DAPO to be extended. Section 13 says the maximum permitted duration of a DAPO (plus any extensions) is three months.

At Stage 1, the Committee heard some views (including from the [Scottish Women's Rights Centre](#), [Scottish Women's Aid](#)) that a DAPO should be able to last longer, to allow other legal steps to be completed, that is to say those associated with ensuring the person at risk's longer-term safety. On the other hand, the [Law Society](#), for example, thought the proposed duration of a DAPO was too long. In its [Stage 1 report](#), the Committee said that, on balance, it was content with the proposed (initial and maximum) duration of a DAPO.

Stage 2 amendments

Table 6: Stage 2 amendments

Purpose and effect of the amendments	Result
Amendment 34 , in the name of Rhoda Grant MSP, would extend the initial duration of a DAPO to six months.	The amendment was withdrawn.
Amendments 40 and 41 , also in the name of Rhoda Grant MSP, would extend the maximum permitted duration of a DAPO until the point alternative measures were in place to ensure the safety of the person at risk.	These amendments were withdrawn.

A duty on the Scottish Government to report on the operation of Part 1 of the legislation

At Stage 1, one of the issues the Committee considered was what the legislative gap in powers there was that the Bill was trying to fill. The evidence here was mixed - some stakeholders said there was a clear gap, others were more doubtful.

Questions were raised by those giving evidence as to the extent to which the new powers would be used in practice. Concerns were expressed about both possible overuse (given the extent of the powers available to the police without the sanction of the court) and about them not being used enough to justify legislation on the topic.

Stage 2 amendments

Table 7: Stage 2 amendments

Purpose and effect of the amendment	Result
<p>Amendment 48, in the name of Liam Kerr MSP, would impose a duty on the Scottish Government to report every three years on the operation of Part 1 of the legislation in practice.</p> <p>Specifically, the Government would be required to provide information on the number of DAPNs, DAPOs and interim DAPOs granted during the reporting period, as well as the the number of offences committed during that period because of breach of the notices and orders.</p>	<p>Amendment 48 was withdrawn.</p> <p>The Cabinet Secretary agreed to work with the Member, in advance of Stage 3, to create alternative amendments which would achieve the same policy aim.</p>

The social landlord's power to end a tenant's interest in a property

Section 18, the sole provision in Part 2 of the Bill, 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. This proposed power is aimed at preventing victims of domestic abuse from becoming homeless or having to find somewhere new to live.

Section 18 can apply to the situation both where the person at risk is a **joint tenant** (with the perpetrator of abuse) and the situation where the person at risk is living with a perpetrator who is the **sole tenant** to the property. In the latter situation, the court order brings the tenancy to an end but it is **the landlord** who must take the further legal step of creating a new tenancy for the person at risk.

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. Whether there should be a duty to rehouse **the perpetrator** was an issue that came up at Stage 1, although the Committee did not make a specific recommendation on this topic in its [Stage 1 report](#).

Stage 2 amendments

Table 8: Stage 2 amendments

Purpose and effect of the amendments	Result
<p>Amendments 49 and 50, in the name of Rhoda Grant MSP, aim to give extra protection to the person who remains in the property (who has been a victim of abusive behaviour).</p> <p>Amendment 49 would prevent the landlord from raising proceedings to end that person's tenancy for six months from the date of the court order against the perpetrator of the abuse.</p> <p>Closely related to this, amendment 50 would stipulate that, from the date the court order is made against the perpetrator of abusive behaviour, the tenancy in favour of the person remaining is to be treated as a new tenancy.</p>	<p>These amendments were withdrawn.</p>
<p>Amendment 51, in the name of Rhoda Grant MSP, would mean that a court order relating to a perpetrator who is the sole tenant must explicitly say that a new tenancy is to be offered to the person remaining in the property.</p>	<p>This amendment was withdrawn. The Cabinet Secretary agreed to work with the Member, in advance of Stage 3, to create an alternative amendment which would achieve the same policy aim.</p>
<p>Amendment 52, in the name of Rhoda Grant MSP, would remove the requirement for the person at risk and the perpetrator to have lived together for six months before the power in section 18 can be used.</p>	<p>This amendment was disagreed to.</p>
<p>Amendment 53, in the name of Rhoda Grant MSP, would impose a duty to rehouse the person at risk (if that is the person's preference) without them having to become homeless.</p>	<p>This amendment was withdrawn.</p>

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