

Response ID ANON-T1MF-2JA8-D

Submitted to **Domestic Abuse (Protection) (Scotland) Bill**

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Are you responding as an individual or on behalf of an organisation?

Organisation

Organisation:

Faculty Of Advocates

Support for the Bill in general and the main provisions

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

Please enter your comments in the box provided::

1.1. We agree. The principal advantage to such a power is the speed with which protection can be put in place. Another advantage is that the person at risk does not need to act to achieve immediate protection

1.2. In relation to the specific proposed provisions in sections 4-7, we make the following observations:

Section 4:

1.3. Section 4(1) provides that "A senior constable may make a domestic abuse protection notice in relation to person A if the constable has reasonable grounds for believing that [...]". 'Senior constable' is defined as a constable holding the rank of inspector or above (section 17). 'Constable' is defined as a constable within the meaning of section 99(1) of the Police and Fire Reform (Scotland) Act 2012 (section 17). For the avoidance of doubt, the Bill should make clear that it is the senior constable proposing to make the order who requires to have the reasonable grounds for belief which the Bill requires, rather than a police officer of the rank of constable (who may, for example, be attending the incident giving rise to concern).

Section 6:

1.4. Section 6(2) sets out the necessary content of a DAPN. This includes at 6(2)(e) "person A will be given notice of the hearing". In our view, person A ought also to be given notice that they are entitled to attend or be represented at any such hearing and that it may be in their interests to seek independent legal advice.

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

Please provide your comments in the box below::

2.1. We agree. The possibility of such an order meets the concern that an individual in a situation of coercive control may lack the freedom of action initially to take steps themselves. As with a DAPN, the advantage is the speed with which protection can be put in place if appropriate. There is also the advantage that the person at risk need not incur expense to achieve protection in the short-term. Another advantage is that the person said to be at risk (person B) is entitled to make representations to the sheriff or otherwise to have their views conveyed. This will help inform the sheriff as to whether the test for an order is actually met. In addition, it will enable the sheriff, if they consider the test is met, to tailor any order to fit the specific circumstances of person B, rather than the circumstances of a person at risk in general.

2.2. In relation to the specific proposed provisions in sections 8-16, we make the following observations:

Section 8:

2.3. Section 8 does not identify the standard of proof to be applied to the 'fact finding' exercise required by section 8(2)(a) (that person A has engaged in behaviour which is abusive of person B). It is our view that the legislation should identify the standard of proof to ensure consistency of approach and avoid unnecessary debate on the issue before the sheriff.

2.4. There is precedent for applying the criminal standard of proof – proof beyond reasonable doubt – to analogous orders. For example, in the case of R

(McCann & Others) v Crown Court at Manchester and another [2003] 1AC 787, the House of Lords concluded that in civil proceedings in relation to making an anti-social behaviour order, the criminal standard of proof should apply. As Lord Hope noted at paragraph 82, "...there are good reasons, in the interests of fairness, for applying the higher standard when allegations are made of criminal or quasi-criminal conduct which, if proved, would have serious consequences for the person against whom they are made."

Lord Hope went on to provide examples of civil proceedings where the criminal standard applied in respect of determination of questions of fact (see para 83).

2.5. McCann was followed in Scotland in relation to the equivalent Scottish legislation in Stirling Council v Harris 2009 SLT (Sh Ct) 106, at paragraph 36 (per Sheriff Cubie).

2.6. In England and Wales, in relation to Risk of Sexual Harm Orders (RSHO), the criminal standard is also applied. See Commissioner of the Police of the Metropolis v Robert Ebanks [2012] EWHC 2368 (Admin).

2.7. While it is a matter for Parliament, we would observe that, as with ASBOs and RSHOs, the making of a DAPO has significant consequences for the person made subject to it, including serious penal consequences for breach. Although DAPOs are designed to protect a specific individual, rather than a wider section of the public, DAPOs are to be obtained on the application of a public authority, here the Chief Constable, and they serve a similar preventative and protective function to ASBOs and RSHOs, with similar consequences in the event of a breach.

2.8. The authorities (in particular McCann) support the proposition that the application of the higher standard of proof assists in justifying the scheme in terms of Article 8(2).

2.9. Section 8(4) empowers the sheriff to permit person B to be a party to the proceedings. We consider that it would be inappropriate for person B to have the status of party to proceedings. The power to apply for an order (as seen below in response to question 4) ought to reside only in the police. The purpose of the legislation is to provide protection to person B while they are unable, for whatever reason, to pursue other available remedies. If they are in a position to become a party to proceedings, it would seem likely that they would be in a position to initiate the appropriate civil proceedings themselves. Where the objective of the DAPO is to "fill a gap" in the provision of protection on a short-term basis, allowing person B to become a party to the proceedings risks the process becoming overly cumbersome and being seen by person B as a substitute for more appropriate long term remedies. It is our view that the right to make representations or to have their views conveyed is sufficient to ensure that the sheriff is able to take proper account of person B's situation and their wishes in determining the necessity of an order.

2.10. Section 8(5) provides that the sheriff must give an opportunity to the Chief Constable, person A and person B to make representations. It is unclear how it is envisaged this will be done. The Bill should perhaps clarify whether it is intended that the sheriff is to determine the issue on the basis of ex parte statements, on the basis of affidavits, or on the basis of parole evidence (should the chief constable's averments about the behaviour of person A be in dispute).

Extension of the provisions to other types of family relationship or circumstance

3. Do you agree with this overall approach or do you wish to suggest any changes?

Please enter your comments in the box provided::

3.1. We agree with the proposed approach. In our view, it is appropriate that this Bill should be aligned with the approach taken in the Domestic Abuse (Scotland) Act 2018. This Bill also has the advantage of being able to protect children living with the person at risk.

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

4. Do you agree with this approach or do you think the power to apply should be extended to other individuals or organisations? If the latter, who would you wish to include?

Please enter your comments in the box provided::

4.1. We agree with the approach. The police are trained to gather and assess evidence. The police are best placed to make the decision as to whether there is a proper basis for and a need to make an application for an order. The police can bring an element of objective assessment to the circumstances and help ensure proper and appropriate application of the legislation. The police have extensive experience of applying to the sheriff for preventative/protective orders.

4.2. We note that there are other remedies available to person B, and agencies available to provide support to them in pursuing such remedies. Such remedies include domestic abuse interdicts, civil non-harassment orders, and exclusion orders under the Matrimonial Homes (Family Protection) (Scotland) Act 1981. It will also be possible for person B, or an agency providing support, to make representations to the police that DAPO should be sought and to provide the relevant information.

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

Please enter your comments in the box provided::

We agree with the test, subject to the comments above about the requirement in section 4 for the senior constable themselves to have reasonable grounds; and subject to the comments about the standard of proof in relation to the fact-finding exercise under section 8(2)(a).

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

Please enter your comments in the box provided::

As a generality we support the definition. However, given the extent of the impact of DAPNs and DAPOs on Article 8 rights, we reiterate that we consider it important to distinguish between situations of coercive control and instances of "common couple violence". The interference with Article 8 rights is more easily justified if the requirement is for a course of conduct, rather than allowing for an order based on a single incident (particularly where that single incident need not have involved conduct that is violent, threatening or intimidating, and need not have had any actual effect on person B). Requiring a course of behaviour or conduct would bring the Bill into alignment with the Domestic Abuse (Scotland) Act 2018, and the approach adopted with other civil remedies.

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

Please enter your comments in the box provided::

7.1. In order to comply with Article 8, the maximum period should not be arbitrary, but rather should be based on evidence that such a period is required.

7.2. We note that as presently drafted, the Bill may give rise to a period of time within a DAPN/DAPO process during which person B becomes unprotected. At the hearing, the sheriff may determine the application, make an interim DAPO or continue the proceedings without determining the application or making an interim DAPO (section 11(7)). The hearing must be concluded on the day on which it begins (section 11(4)). A DAPN ceases to have effect if the sheriff makes a DAPO, an interim DAPO, or otherwise when the hearing ends (section 11(9)). It therefore appears to us that where the sheriff continues the proceedings in terms of section 11(7)(c), without determining the application or making an interim DAPO, the DAPN ceases to have effect leaving person B unprotected, in circumstances where the sheriff may yet make a DAPO. It is not clear to us whether this is what was intended by the drafters.

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

Please enter your comments in the box provided::

8.1. We agree that breach of a DAPN and DAPO should be a criminal offence but we question whether it is necessary to make provision for proceedings on indictment given the temporary nature of the DAPN and DAPO and the potential content of any order in terms of requirement or prohibitions. The availability of conviction on indictment and a maximum penalty of 5 years' imprisonment would appear potentially disproportionate when one considers the analogous position in respect of breach of bail. Namely, if person A were to be prosecuted for the abusive behaviour and made the subject of special conditions of bail of an identical nature to those contained within a DAPN/DAPO, in the event of breach of any condition, he would be subject to a maximum penalty of 12 months' imprisonment (section 27(2) of the Criminal Procedure (Scotland) Act 1995).

8.2. We recognise that breach of a domestic abuse interdict to which a power of arrest is attached carries a maximum penalty on indictment of 5 years' imprisonment (Domestic Abuse (Scotland) Act 2011, section 2(3)(b)). However, such interdicts are in contrast to the temporary nature of a DAPN and DAPO, in that the power of arrest can attach to an interdict for a period of up to three years (Protection from Abuse (Scotland) Act 2001, section 1(3)), which period may also be extended. One can envisage a situation where the person interdicted repeatedly breaches the order over an extended period, ultimately giving rise to the need for significant punishment to put a stop to the conduct and act as a deterrent. The same situation could not easily arise under a DAPN or DAPO.

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

9. Do you agree with the approach of the Bill under sections 5 and 9 or do you wish to suggest any changes?

Please enter your comments in the box provided::

We agree that it is appropriate that there is scope to extend the protection of a DAPN or DAPO to a child usually residing with the person at risk

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

Please enter your comments in the box provided::

10.1. We do not think the Bill is clear about what should happen. We cannot see any provisions within the Bill that address the question of what order should take precedence where there is conflict between a DAPN/DAPO and a family law order.

10.2. In considering which order should take precedence, it is important to bear in mind that, while children need to be protected from witnessing domestic violence, it is also important that the child's relationship with the other parent (person A) is maintained provided that it is safe and is in the child's best interests. The term of a DAPN is sufficiently short that we would not expect it to have an impact on the operation of any order relating to children under family law. There is scope however, for a DAPO to disrupt arrangements put in place under family law which will have been reached after a full consideration of the welfare issues affecting the child, including as a matter of law, consideration of the risk of exposure to abuse (Children (Scotland) Act 1995 s.11(7A) - (7E)). There is a concern that the existence of a DAPO, unless clear in its terms in this regard, will prevent a parent from being able to have any contact with a child where there is no court order regulating the matter, and the existence of a DAPO is seen as a bar to obtaining such an order. A protracted interruption can have an adverse effect on the parent/child relationship, and as a consequence, can have an adverse effect on the ability of a parent, who presents no risk to the child, to obtain suitable contact orders.

10.3. In the event that the DAPO is to take precedence (which seems appropriate), in our view the sheriff ought to have to take account of any existing family law order, when determining the prohibitions to be imposed in terms of the DAPO. Where there is no new material to suggest the child's welfare is at such risk as to necessitate a condition in the DAPO, the sheriff ought to ensure the family law order is able to be respected. This reflects the position that the risk to the child of exposure to abuse, or of being abused, will already have been considered in the determination of the family law order.

Removal of a domestic abuse perpetrator's interest in a Scottish secure tenancy

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

Please enter your comments in the box provided::

The ending of a social housing tenant's interest in a tenancy on a permanent basis is a very significant interference with Article 8 rights. It is for Parliament to decide whether such a measure is appropriate. It is a matter of policy on which Faculty offers no comment

Any further issues or views

12. If you are responding on behalf of an organisation, what impact (if any) would the Bill have on your organisation? Is there any issue associated with the Bill you wish to comment on, not already covered by questions 1-11?

Please provide any further issues or views you wish to raise in the box below::

N/A

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Extremely easy to use

Why did you feel it was, or was not, easy to use?:

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