

SPICe Briefing

Domestic Abuse (Scotland) Bill: Stage 3

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The Domestic Abuse (Scotland) Bill (“the Bill”) is a Member’s Bill introduced by Rhoda Grant MSP which aims to increase access to justice for victims of domestic abuse and to enable police and prosecutors to provide a more robust response to breached civil protections orders.

Stage 3 proceedings are scheduled to take place on 16 March 2011.

This briefing considers the main points that arose at stage 1, including the recommendations made by the Justice Committee in its stage 1 report, and the main amendments that were lodged and debated at stage 2.



CONTENTS

INTRODUCTION	3
STAGE 1	3
<i>Removing the course of conduct requirement</i>	<i>4</i>
<i>Removing the means test for domestic abuse related interdicts</i>	<i>4</i>
<i>Breach of interdict with power of arrest</i>	<i>4</i>
<i>Definition of “domestic abuse”</i>	<i>5</i>
<i>Costs and financial implications</i>	<i>5</i>
STAGE 2	6
<i>Definition of “domestic abuse”</i>	<i>6</i>
<i>Removing the means test for domestic abuse related interdicts</i>	<i>6</i>
<i>Breach of interdict with power of arrest</i>	<i>6</i>
<i>Maximum penalty on summary conviction for breach of interdict with power of arrest</i>	<i>7</i>
<i>Ancillary provisions and commencement</i>	<i>7</i>
STAGE 3	7
SOURCES	8
RELATED BRIEFINGS	12

INTRODUCTION

The Domestic Abuse (Scotland) Bill (“the Bill”) is a Member’s Bill and was introduced by Rhoda Grant MSP on 27 May 2010. It has two main policy objectives—

- I. to increase access to justice for victims of domestic abuse; and
- II. to enable police and prosecutors to provide a more robust response to breached civil protections orders.

To achieve these objectives, the Bill [as introduced] seeks to remove the requirement to show a course of conduct for a non-harassment order to be granted in domestic abuse cases (section 1). The Bill will also remove the means test for legal aid applications in respect of certain civil domestic abuse-related proceedings (section 2) and create a new criminal offence of breaching a domestic abuse related interdict (section 3). The Bill also provides a statutory definition of domestic abuse (section 4).

It should be noted that the Bill was significantly amended at stage 2, resulting in the removal of section 2 and section 4.

Further background to the Bill [as introduced] is provided in the Justice Committee’s [stage 1 report](#) (Scottish Parliament Justice Committee 2011a) and in the [SPICe Briefing on the Bill](#) (Hough 2010).

The Justice Committee (“the Committee”) was designated as the lead committee for stage 1 consideration of the general principles of the Bill. The Committee’s [stage 1 report](#) was published on 12 January 2011. The Committee agreed, with some caveats, to recommend to the Parliament that the general principles of the Bill be agreed to. The Bill completed stage 1 scrutiny with the [stage 1 debate](#) on 19 January 2011, when the general principles of the Bill were unanimously agreed to by Parliament (Scottish Parliament 2011).

Stage 2 (detailed consideration of the Bill by the Committee) took place on [8 February 2011](#) (Scottish Parliament Justice Committee 2011b).

Stage 3 proceedings are scheduled to take place on 16 March 2011.

STAGE 1

The Committee took oral evidence on the general principles of the Bill from a range of stakeholders (including Scottish Women’s Aid, the Law Society of Scotland, the Association of Chief Police Officers in Scotland, the Crown Office and Procurator Fiscal Service, the Scottish Legal Aid Board (SLAB) and the Family Law Association), as well as from the Minister for Community Safety (“the Minister”) and the Member in charge of the Bill. The Committee also received 28 written responses on the Bill.

There was general agreement at stage 1 that the existing civil remedies for tackling domestic abuse are insufficient and underutilised.

The Committee did not support section 2 of the Bill which would, in effect, make legal aid free to all for applications to a civil court for an interdict with a power of arrest, or a non-harassment order, where domestic abuse was involved. In the view of the Committee, this provision would create an inequality of arms between the pursuer and the defender. Additionally, the Committee was not persuaded that domestic abuse cases should be prioritised above other cases for the

purposes of legal aid. The Committee also noted that further work was to be undertaken in relation to the definition of domestic abuse. The preliminary view of the Committee was that it would be necessary to include a definition of domestic abuse in this Bill but that it should probably be restricted to the generally accepted categories of partners and should not be extended to cover other family relationships. The main issues to be raised at stage 1 are considered in further detail below.

Removing the course of conduct requirement

The Criminal Justice and Licensing (Scotland) Act 2010 removed the precondition to show a course of conduct amounting to harassment for criminal non-harassment orders. Section 1 of the Bill introduces a new section (section 8A) to the Protection from Harassment Act 1997 (“the 1997 Act”) to remove the requirement to show a course of conduct before a non-harassment order can be granted in civil proceedings involving domestic abuse. This new section would only apply when the conduct which led to a non-harassment order being sought was conduct that constituted or involved “domestic abuse”. A person would only need to prove one occasion of harassment, not that there had been a course of such conduct. This section of the Bill received wide support on the basis that it would bring civil provisions into line with criminal provisions and would remove the requirement for a victim to go through a period of repeated abuse before being able to access a protective court order. The Committee recognised the wide support for this proposal and supported it, but noted that a statutory definition of domestic abuse is likely to be required in order for this section to be operational.

Removing the means test for domestic abuse related interdicts

Section 2 of the Bill would amend the Legal Aid (Scotland) Act 1986 to make legal aid available without means testing in respect of all applications for an interdict with a power of arrest or a non-harassment order where domestic abuse is involved.

It was noted during stage 1 that eligibility for legal aid is not assessed merely on the basis of a means test. In fact, there is a three-part eligibility test: the means test, a legal basis for the case test and a reasonableness test. Although the Bill proposes removing the means test for domestic abuse cases, the two other tests would still apply. SLAB told the Committee that it had a very low refusal rate for legal aid on means grounds, probably only 1% of applications, but that it had no way of knowing how many did not get as far as submitting an application.

Indeed, this section gave rise to a number of questions and concerns about what the effect might be on the numbers of cases that might be brought and the resultant increase in costs, primarily for the Legal Aid Fund but also the Scottish Court Service. A range of views were expressed on these issues. The Committee noted the evidence questioning whether removal of the means test represented the best use of resources given the pressures on public spending. Furthermore, the Committee considered that this section would produce an inequality of arms between pursuers and defenders in such cases. The Committee was not persuaded that there was a compelling case to single out domestic abuse cases from other cases within the legal aid system and did not, therefore, support the provisions of section 2.

Breach of interdict with power of arrest

Section 3 would make it a criminal offence to breach an interdict with a power of arrest in domestic abuse cases. This new criminal offence would be punishable on summary conviction

by imprisonment for a term not exceeding six months¹, or a fine not exceeding the statutory minimum, or both.

Evidence was presented at stage 1 that existing mechanisms for dealing with breaches of interdict were regarded as inadequate and take-up was low. The Committee accepted that, in many cases, the granting of a protective order would be sufficient to deter the behaviour complained of, and that the current two day detention under existing powers of arrest provided a useful respite to victims. However, the Committee supported the view that a criminal sanction for breach of a domestic abuse interdict was necessary to give victims proper protection. The Committee was content that this provision would represent a strengthening of the current system and was of the view that the criminal standard of proof, together with corroboration, must apply. The Committee noted that, in order to identify breaches of interdict with a power of arrest in cases of domestic abuse and, as for the Bill's proposal to remove the course of conduct requirement, it was likely that a statutory definition of domestic abuse would be required.

Definition of “domestic abuse”

There is currently no statutory or common law definition of “domestic abuse”. However there are a number of commonly accepted and understood definitions and statements of what domestic abuse is.

Section 4 provides a statutory definition of “domestic abuse”. It sets out that where behaviour falls within the meaning of abuse (including violence, harassment, threatening conduct and any other conduct giving rise, or likely to give rise, to physical or mental injury, fear, alarm, or distress) and occurs in any of the listed relationships, it will be considered to be domestic abuse. The listed relationships are where a person is (or was) married to, or the civil partner of, or a partner in an established relationship of any length with, the person who carried out the abuse, or is the perpetrator's parent, child, grandparent or grandchild (whether by blood or adoption). Section 4(3) provides that Scottish Ministers may, by order, add further types of relationships to this list.

The evidence presented at stage 1 raised a number of potential difficulties and questions in relation to this section of the Bill, including, most fundamentally, whether a statutory definition of domestic abuse is necessary. The Committee was impressed by the argument that a definition is necessary in order that accused persons, courts and solicitors and indeed victims have clarity as to whether the breach of a particular order is to be a criminal offence. The Committee was also inclined to the view that the definition should cover the normally accepted categories of partners rather than wider family relationships.

Costs and financial implications

In relation to the costs and financial implications, it was acknowledged in the Financial Memorandum that, in part due to the different sources of data not being directly comparable, it was not possible to accurately quantify the costs arising from the Bill. The potential increase in costs for the Legal Aid Fund was acknowledged by some of those who gave evidence at stage 1. On the other hand, it was also argued that the Bill could give rise to savings for other agencies at different points in the process (for example, fewer call-outs for the police). The Committee noted that there was no agreement on what the costs of implementing this Bill might be. However, it suggested that deletion of section 2 from the Bill would remove much of the uncertainty.

¹ A term subsequently amended (see below).

STAGE 2

Stage 2 (the first amending stage of the Bill) was carried out by the Committee on [8 February 2011](#). In total, 22 amendments were lodged (including a number of amendments to amendments) by the Minister and the Member in charge (no other Members lodged amendments to the Bill). The Bill was significantly amended at stage 2, resulting in the removal of section 2 and section 4. The following paragraphs consider some of the main issues that were debated at stage 2. Following the conclusion of stage 2 proceedings, [the Bill \(as amended at stage 2\)](#) was published.

Definition of “domestic abuse”

The first group of amendments to be debated (amendments 1, 2, 3 and 8) were lodged by the Member in charge of the Bill and related to section 1 of the Bill (which inserts a new section into the 1997 Act). Amendment 1 makes a minor change to what is meant by conduct which amounts to harassment. Amendment 2 provides greater consistency between the 1997 Act and the Bill, by referring to conduct being “engaged in” rather than “pursued”.

Amendment 8 removes the section of the Bill (section 4) that provides a definition of domestic abuse. Amendment 3 removes the proposed reference in the 1997 Act to the definition provided in the Bill.

The amendments in this group were supported by the Minister and were agreed to by the Committee.

Removing the means test for domestic abuse related interdicts

The second group of amendments (amendments 13, 4, 14 and 12) related to the provisions that remove the means test for legal aid in relation to applications for domestic abuse related interdicts (section 2).

Amendment 4 (by the Minister) proposes the removal of section 2 from the Bill. Amendment 12 (also by the Minister) makes a consequential amendment to the long title. Amendment 13 (by the Member in charge) also proposes the removal of section 2 and replaces it with a compromise provision that would make emergency legal aid available to certain victims of domestic abuse. Amendment 14 (by the Member in charge) places a duty on the Scottish Legal Aid Board to report on the availability of legal services to victims of domestic abuse who are seeking protection from such abuse through the use of civil remedies (adding to the general duty to report on access to justice already created by the Legal Services (Scotland) Act 2010).

Following debate, amendment 13 was withdrawn by the Member in charge. Amendment 4 and consequential amendment 12 were agreed to by the Committee. Amendment 14 was not moved.

Breach of interdict with power of arrest

The next group of amendments (amendments 15, 15A, 15B, 15C, 16, 5, 5A, 17, 7 and 18) relate to the section of the Bill that would make it a criminal offence to breach an interdict with a power of arrest in domestic abuse cases (section 3). In particular, this group of amendments address the difficulties associated with defining “relationship” within the context of domestic abuse.

Amendments 5 and 7 (by the Minister) are intended to provide clarity on when breach of an interdict is a criminal offence. In particular, amendment 5 limits the categories of interdict to

which section 3 applies by reference to the “normally accepted” categories of partners (spouses, civil partners and cohabiting couples). Amendment 5A (by the Member in charge) seeks to amend Government amendment 5 by extending it to a partner in an established relationship of a non-platonic nature. Amendments 5 and 7 were agreed to by the Committee. Amendment 5A was disagreed to (by division).

Amendments 15 and 16 (by the Member in charge) would make it an offence to breach an interdict that protects a person from domestic abuse by a partner in an established relationship of a non-platonic nature and prohibit that partner from entering or remaining in a place, for example, the family home. Amendments 15A and 15B (by the Member in charge) offer alternative interpretations to an established relationship, and amendment 15C (also by the Member in charge) seeks to define what is meant by a sexual relationship. Amendment 15 was disagreed to (by division). Amendment 16 was not moved. Amendment 15A was withdrawn and amendments 15B and 15C were not moved.

The Minister expressed some sympathy with the policy aims of amendment 18 (by the Member in charge), which sought to provide greater clarity on when a breach of interdict is a criminal offence, and agreed to discuss with the Member in charge how this might be achieved. The Minister also indicated his willingness to have further discussions about the issues relating to abuse of people who are not married, not in a civil partnership or not cohabiting and the other ideas behind amendment 18. Amendment 18 was disagreed to (by division).

Maximum penalty on summary conviction for breach of interdict with power of arrest

Amendment 6 (by the Member in charge) was in a group of its own. Amendment 6 is intended to bring the Bill into line with the Criminal Proceedings etc (Reform) (Scotland) Act 2007. It provides for a maximum penalty of 12 months imprisonment on summary conviction for breach of interdict with power of arrest (instead of the six months provided for in the Bill). Amendment 6 was agreed to by the Committee.

Ancillary provisions and commencement

The final group of amendments related to ancillary provisions and commencement. In particular, amendment 9 (which was requested by the Subordinate Legislation Committee²) allows for the ancillary provisions to be made under the affirmative procedure. Amendment 10 provides for those powers to commence once Royal Assent has been received. Amendment 11 allows for the Bill to commence three months after the day on which it receives Royal Assent.

STAGE 3

Stage 3 proceedings are scheduled to take place on 16 March 2011.

² The Subordinate Legislation Committee noted that the Bill does not provide for power to make transitional, transitory or savings provision. The Committee suggested that the Member in charge may wish to consider whether these might be appropriate in case further provision is required as a result of the changes the Bill makes to the existing law.

SOURCES

Domestic Abuse (Scotland) Bill [as introduced] Session 3 (2010). SP Bill 45. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/bills/45-DomesticAbuse/b45s3-introd.pdf> [Accessed 14 February 2011]

Domestic Abuse (Scotland) Bill [as amended at stage 2] Session 3 (2010). SP Bill 45A. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/bills/45-DomesticAbuse/b45as3-stage2.pdf> [Accessed 14 February 2011]

Domestic Abuse (Scotland) Bill: Explanatory Notes (and other accompanying documents) Session 3 (2010). SP Bill 45-EN. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/bills/45-DomesticAbuse/b45s3-introd-en.pdf> [Accessed 14 February 2011]

Domestic Abuse (Scotland) Bill: Policy Memorandum Session 3 (2010). SP Bill 45-PM. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/bills/45-DomesticAbuse/b45s3-introd-pm.pdf> [Accessed 14 February 2011]

Hough, R. (2010) *Domestic Abuse (Scotland) Bill*. SPICe Briefing 10/53. Available at: <http://www.scottish.parliament.uk/business/research/briefings-10/SB10-53.pdf> [Accessed 15 February 2011]

Scottish Parliament. (2011) *Official Report 19 January 2011*. Col. 32301. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/apps2/business/orsearch/ReportView.aspx?r=6002&mode=html> [Accessed 14 February 2011]

Scottish Parliament Justice Committee. (2011a) *1st Report 2011, Session 3: stage 1 report on the Domestic Abuse (Scotland) Bill*. SPP 556. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/committees/justice/reports-11/jur11-01.htm> [Accessed 14 February 2011]

Scottish Parliament Justice Committee. (2011b) *Official Report 5th meeting 2011, Session 3, 8 February 2011*. Col 4172. Edinburgh: Scottish Parliament. Available at: <http://www.scottish.parliament.uk/s3/committees/justice/or-11/ju11-0502.htm#Col4172> [Accessed 14 February 2011]

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