

PROTECTION FROM ABUSE (SCOTLAND) ACT 2001

EXPLANATORY NOTES

INTRODUCTION

1. These Explanatory Notes have been prepared by the Non-Executive Bills Unit of the Scottish Parliament on behalf of the convener of the Justice 1 Committee. They have been prepared in order to assist the reader of the Act. They do not form part of the Act and have not been endorsed by the Parliament.

2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or a part of a section does not seem to require any explanation or comment, none is given.

SUMMARY OF AND BACKGROUND TO THE ACT

3. The Bill for this Act was the first Committee Bill (i.e., a Bill initiated by a parliamentary committee under Rule 9.15 of Standing Orders) to be introduced in the Scottish Parliament. The Bill arose from a proposal contained in a report published on 23 November 2000, *Proposal for a Protection from Abuse Bill* (9th Report 2000, SP Paper 221) by the then Justice and Home Affairs Committee. This proposal was debated and agreed to by the Parliament on 24 January 2001.

4. The Bill arose from the committee's conclusion that the law afforded inadequate protection to individuals at risk of abuse from other individuals and the desire to give the police more powers to protect such individuals.

5. As the law then stood, the courts had the power to grant interdicts to protect individuals from abusive conduct. (An interdict is a court order prohibiting a person or persons from engaging in conduct that infringes the applicant's legal rights.)

6. It was not necessary to prove any particular personal relationship with the abuser in order to obtain the interdict. However, unless the interdict was a matrimonial interdict (see below), the courts had no power to attach a power of arrest to an interdict. This meant that unless a criminal offence had been committed, the police had no power to arrest an abusive person, who was in breach of interdict, and to take the person away from the scene.

7. The courts have the power to attach a power of arrest to interdicts classified as matrimonial interdicts, within the terms of the Matrimonial Homes (Family Protection) (Scotland) Act 1981 (“the 1981 Act”). The 1981 Act at section 14 defines “matrimonial interdict”. In general the definition applies to an interdict brought either by one spouse against another, or an interdict brought by one individual against another individual, where both individuals have been cohabiting as if they were man and wife. But neither the 1981 Act nor any other legal rule – statutory or non-statutory – gave the courts the power to attach powers of arrest to interdicts not coming within the category of matrimonial interdict.

8. The definition of a matrimonial interdict excludes a wide category of people who may wish to have a power of arrest attached to an interdict against an abusive person. Among these are divorced spouses, same-sex cohabitants, non-cohabitant partners, other family members such as parents or grandparents, or neighbours of abusive people.

9. The effect of the Act is to entitle any individual who has obtained, or who is applying for, an interdict against another individual for the purpose of providing protection from abuse to apply to the court to have a power of arrest attached to the interdict. This is regardless of whether the interdict is a matrimonial interdict or not. In other words, in order to obtain a power of arrest it is no longer necessary to demonstrate any particular personal relationship to the alleged abuser. Instead the court simply has to be satisfied that granting the power is necessary to protect the applicant from the risk of abuse through a breach of interdict. If so satisfied, the court will grant the order.

10. The effect of attaching a power of arrest to an interdict is that in the event of the interdicted person being suspected of breaching the interdict, a constable is entitled to arrest the interdicted person, and take him or her away from the scene. The constable also has to be satisfied that if he or she did not arrest the interdicted person, there would be a risk of the person causing or continuing to cause abuse in breach of the interdict.

11. The Act also makes provision for procedure to be followed following the arrest, including provision for the arrestee to be detained for two days, if the court is satisfied that doing so would minimise the risk of any abuse.

12. The provisions in this Act are generally in line with the equivalent procedures under the 1981 Act for matrimonial interdicts. They do however differ in certain respects. The most important differences are explained in the following paragraphs; others are accounted for by the different context and some are drafting alterations.

COMMENTARY ON SECTIONS

Section 1: Attachment of power of arrest to interdict

13. Subsection (1) sets out that a person may apply to have a power of arrest attached to an interdict if the purpose of the interdict is to provide protection against abuse. “Person” means an individual person, not e.g., a company or a partnership (see section 7). As subsection (1) makes clear, the person applying for the power of arrest must be the person applying for, or who has obtained, the interdict.

14. In practice, an individual may apply both for an interdict and for a power of arrest in one court application, or may apply to have a power of arrest attached to a pre-existing interdict. There is nothing in the Act to prevent an application for a power of arrest being made in respect of an interdict granted before the Act comes into force.

15. Subsection (2) requires the court to grant the application if it is satisfied that the conditions set out in paragraphs (a) to (c) have been met. First, the interdicted person must be given an opportunity to be heard by, or represented before, the court. The precise rules as to what constitutes an “opportunity” will be set out in rules of court, but it is expected that the interdicted person would be given a copy of the application and notice of the hearing. This means that a power of arrest could not be attached until at least the expiry of the period set in court rules. The equivalent period under the 1981 Act is seven days.

16. Secondly, a court cannot attach a power of arrest to an interdict under the Act where a power of arrest has already been attached to the same interdict under the 1981 Act. For this to be the case, the interdict would have to be a “matrimonial interdict” within the terms of the 1981 Act.

17. The rationale behind this second condition is that it could be confusing and complicated – especially from the point of view of the police – to allow a person to have two different types of power of arrest in respect of the same interdict. Although the broad effect of a power of arrest under each legislative route is the same – the police being given a right to arrest the interdicted person on suspicion of breaching the interdict – there are a number of differences between the two types of power. For instance, the post-arrest procedure under this Act differs slightly from that set out under the 1981 Act, and the rules on the duration of powers of arrest under this Act are different from those set out in the 1981 Act. There is nothing to prevent an individual asking a court to grant either a power of arrest under the 1981 Act or a power of arrest under this Act. But in the event of the court deciding that the applicant would be entitled to a power of arrest under either piece of legislation, the applicant would have to elect which power of arrest to choose.

18. The final condition is that the court must be satisfied that the attachment of the power is necessary to protect the applicant from a risk of abuse. In accordance with normal civil rules, the applicant is the person for whom the protection is sought, this would be the child or a person suffering from mental illness should a parent or guardian apply on their behalf. If so satisfied the court must grant the application. The interdict and the risk of abuse must be causally connected: it would not be enough to prove (a) that one has an interdict against another person, and (b) that

that person is abusive or potentially abusive. The court would have to be satisfied that there is a risk of conduct occurring, in breach of the interdict, which would be abusive.

19. Subsection (3) requires the court when attaching a power of arrest to set a period for its duration. The longest a power of arrest can last for (although an application for extension may be made – see subsection (3)) is three years. It should be noted that the maximum three-year life-span of a power of arrest runs from the time of the power being granted, not from the time of the power having effect.

Section 2: Duration, extension and recall

20. Unless otherwise provided for, court orders generally come into effect when they are granted. Subsection (1) sets out that a power of arrest under the Act will only come into effect once it and any other documents prescribed by rules of court are served on the interdicted person. Such documents could include a copy of the writ or summons. This rule ensures that a power of arrest will not come into effect until the person in respect of whom it was granted is made aware that it has been granted.

21. Subsection (2) sets out when a power of arrest, once granted, ceases to have effect.

22. As paragraph (a) makes clear, the power of arrest will last until the date of expiry set by the court. Paragraph (b) makes clear that if the power of arrest is recalled, it ceases to have effect from the time of recall.

23. Paragraph (c) provides that a power of arrest is terminated either when the interdict to which it is attached is varied or when it is recalled. The rationale for the power terminating where an interdict is varied is that the power was initially granted having regard to the terms of the interdict. If the interdict is varied, the appropriateness of the power would also require to be reconsidered. In any application to have an interdict varied by the person who originally obtained the interdict there would be nothing to stop that person also applying for the grant of a new power of arrest in respect of the varied interdict.

24. If an interdict ceases to exist (which is what recall means in this context) then any order attached to it must also terminate.

25. Subsections (3) and (4) deal with applications for extending the duration of a power of arrest. An application for an extension is made by the person who obtained the power of arrest. Again, in accordance with normal civil rules, where a representative acted for a child or an adult without capacity when the power of arrest was granted, the child or adult is regarded as the person who obtained the power of arrest. An application for an extension may therefore be made by their representative, or, alternatively, they may make the application themselves if they have capacity to do so. The test applied by the court in deciding whether or not to grant the application is identical to that applied in deciding whether or not to allow the application for the power in the first place under section 1(2)(c). As with the original application for the power, the interdicted person must be given a reasonable opportunity to be heard by or represented before the court. There is no limit to the number of times an application may be made to extend the duration of a power of arrest although the maximum duration that may be granted at any one time is restricted to three years by subsection (4).

26. Subsection (5) sets out two further requirements with regard to extending the duration of a power of arrest. The first is that, as with the original power of arrest itself, the extension only comes into effect when it is served on the interdicted person. This is to ensure that the interdicted person is made aware of any extension to the power of arrest before it comes into effect. Secondly, it provides when any extension of a power of arrest ceases to have effect: this will be in the same circumstances as an original award and is achieved by applying subsection (2).

27. Subsection (6) makes clear that the same requirements covering the duration, intimation and test for the granting of an initial extension apply to any further extensions that might be sought.

28. Subsection (7) sets out requirements on applications for recall of a power of arrest. The court must recall the power of arrest if requested by the person who obtained it. In any application for a recall of a power of arrest by the interdicted person, the person who obtained the power of arrest must be given an opportunity of opposing the application. In order to allow the application, the court must be satisfied that the power is no longer necessary to protect that person from a risk of abuse (i.e. that the test for granting the power is no longer satisfied).

Section 3: Notification to police

29. Section 3 sets out a duty to notify the police whenever a power of arrest, or an extension of a power of arrest is served, when a power of arrest is recalled, or when an interdict to which a power is attached is varied or recalled. The section is framed so that the duty will initially lie on the person who has obtained such power, extension, variation, or recall. However, the section is also framed so as to provide that the duty might be prescribed by rules of court as lying on some other person. This is to take account of possible future development of court electronic communications systems, which might allow the clerk of court to intimate documents, etc., instantaneously, by means of electronic communication (section 7 defines “documents” as including electronic documentation). In the event of such a system being developed, rules of court may prescribe that the duty to notify falls on the clerk of court or the sheriff clerk.

30. The duty is to notify the Chief Constable of any police area in which the interdict has effect. This may mean notifying more than one Chief Constable (such as where the interdict is in terms of avoiding both the applicant’s home and place of work, which are in different police areas). An order by the sheriff is only normally effective within the sheriffdom although this could cover two or three police areas. The requirement in relation to an interdict granted by the Court of Session could result in there being a duty to inform every Scottish Chief Constable unless, for example, the interdict was restricted to particular locations.

Section 4: Powers and duties of police

31. Section 4 sets out what the power of arrest entitles the police to do, and the procedure to be followed after the interdicted person has been arrested but before he or she is brought to court.

32. Subsection (1) sets out the two-step test that must be satisfied if a police constable is to carry out an arrest. First, the constable must have reasonable cause for suspecting the interdicted person of being in breach of interdict. Secondly, the constable must consider that there would be a risk of abuse, or further abuse, in breach of the interdict, if the interdicted person was not

arrested. In other words, it is not sufficient that the constable suspects that the interdict has been breached. He or she must in addition be satisfied that there is a potentially abusive situation that the victim needs to be protected from. This must be abuse in breach of the interdict; it would not be enough merely for the constable to suspect that the interdicted person would be likely to be abusive if not arrested where the abusive behaviour is not prohibited by the interdict.

33. The reference to “abuse or further abuse” acknowledges that the interdicted person might be breaking the terms of the interdict without causing abuse, as where, for instance, the interdicted person is shouting abuse through the applicant’s window, in breach of interdict, when no-one is at home. Even though no one is in fact being abused by that conduct, that should not prevent the constable from arresting the interdicted person. However, as noted, the constable would have to be satisfied that there was a risk of abuse being caused if he or she did not arrest the interdicted person. In the example given above, the absence of anyone in the home might make it harder for the constable to be so satisfied.

34. Subsections (2) to (5) cover the procedure to be followed in the period between arrest and appearance in court. The rights of the arrested person are essentially the same as the normal rights of an arrested person under sections 15 and 17 of the Criminal Procedure (Scotland) Act 1995. Subsection (2) provides that the arrested person must be informed of the reason for the arrest immediately and taken to a police station as soon as is reasonably possible, they must be detained until either the court hearing or until they are accused on petition or charged on complaint with a criminal offence arising from the incident for which they were arrested. Subsection (3) sets out a series of entitlements that may be accessed by the arrested person, including the right of access to a solicitor. Subsection (4) makes provision in cases where the person who is arrested appears to be under the age of 16.

35. Subsection (6) requires that where a person has been arrested under these provisions, the facts and circumstances giving rise to the arrest must be communicated to the procurator fiscal as soon as is practicable. This is linked to the procurator fiscal’s duty to present a petition to the court setting out the relevant facts and circumstances on the first available court day after the arrest (see section 5(2)).

Section 5: Court appearance

36. Subsections (1) and (2) make clear that the procedure under the Act only applies where the procurator fiscal is not taking criminal proceedings against the arrested person as a result of the facts leading to the arrest. The subsection requires that the arrested person is brought to court without delay and sets out the period within which this must happen.

37. Subsection (3) sets out the matters that should be referred to in the procurator fiscal’s petition to the court. The subsection enables the procurator fiscal to present to the court matters which will assist the sheriff in coming to a view as to whether it would be appropriate to order the arrested person’s further detention on prevention of abuse grounds. Subsection (3) also requires the procurator fiscal to request the court to consider whether a further period of detention is justified.

38. Subsection (4) provides that the arrested person must be given an opportunity to make representations.

39. Subsection (4) also sets out the test that the sheriff must apply in deciding whether or not to order the detention of the arrested person for a further two days. The test is that both of the following conditions are satisfied:

- that the information presented shows that there has been a prima facie breach of interdict. In other words, the reference to a “prima facie” breach recognises that information that is presented to the court at the hearing will not be tested in the normal way. The sheriff will require to decide whether there has been a breach at first impression (“prima facie”) on the basis of the information presented by the procurator fiscal and any representations by the arrested person; and
- that if such further detention was not ordered there would be a substantial risk of the arrested person causing abuse or further abuse in breach of the interdict.

40. The reference to “abuse or further abuse” in the second part of the test takes account of the fact that the interdicted person, when arrested on suspicion of being in breach of interdict, may not in fact have been causing any abuse. For instance, the arrested person might have been shouting abuse through the applicant’s window, in breach of interdict, when the applicant was away.

41. It should also be noted as regards the second part that the risk of further abuse has to be a risk of abuse that would be in breach of the interdict. If both parts of the test are satisfied the sheriff has a discretion whether to order detention and as to the length of such detention up to a maximum of two days.

Section 6: Amendment to the Matrimonial Homes (Family Protection) (Scotland) Act 1981

42. Section 6 amends the Matrimonial Homes (Family Protection) (Scotland) Act 1981, so as to provide that an individual cannot be granted a power of arrest under that Act if he or she has already been granted a power of arrest under this Act. This is consistent with section 1(2)(b) of the Act, which provides that an individual cannot be granted a power of arrest under the Act if he or she has already been granted a power of arrest under the 1981 Act. The rationale for this is explained earlier at paragraph 17.

Section 7: Interpretation

43. Section 7 defines a number of terms used in the Act.

- “Abuse”: A number of areas which would constitute abuse under the Act have been included to ensure in particular that psychological as well as physical abuse is covered. This is not an exhaustive definition of what constitutes abuse but an inclusive approach to ensure that the areas defined are included by the courts within the understanding of abuse.
- “Conduct” has been defined to help ensure that the Act covers a relatively wide category of behaviour. Defining conduct as including presence in a specified place or area makes clear that conduct does not have to be active for it to be abusive.

- “Court”: The Act applies to both the Court of Session and the Sheriff Courts. In section 5 “the court” will always be the Sheriff Court.
- “Documents”: The definition of documents as including documents in electronic form is intended to encompass future circumstances where courts may intimate, notify, or communicate documentary information by means of electronic communications. This definition makes clear that in the event of the civil courts adopting these practices, documentary evidence conveyed in this way would come within the definition of documents found in the Act. The Lord Advocate advised the Justice and Home Affairs Committee that an integrated information system would shortly be in place in the criminal justice system.¹ Such a system will allow for electronic transmission of documents by the clerk of court to the police and would enable the granting of a power of arrest to be notified immediately. Such a system is not yet in place in the civil courts.
- “Interdict” is defined as including interim interdict. Interim interdict is interdict granted on an interim basis, without the need for a full hearing to determine the relevant facts. Once granted it has the same effect as an interdict. Although granted on an interim basis, an interim interdict lasts until it is recalled or varied, and in practice, where an application for interdict is not opposed, an interim interdict will last for an indefinite period. A court can grant interim interdict without requiring to give the party against whom interdict is sought the opportunity to contest the application. In practice however it does not become enforceable until the granting has been intimated to the interdicted person. Before granting a power of arrest, the court must give the person against whom the interdict is sought, or has been obtained, the opportunity to be heard on the application (see section 1(2)).
- “Parental responsibilities and rights” is given the same meaning as in the Children (Scotland) Act 1995. This applies in respect of section 4(4) in relation to the intimation of detention of a person who appears to be under 16 years and the subsequent access to them while being detained.
- “Person” means individual person: this definition is intended to make it clear that companies, partnerships, etc. are excluded from relying on the Act, or from being made the subject of a power of arrest. Interdicts can be obtained by, or granted against, non-individual legal persons. However, the subject matter of the Act concerns individuals at risk of abuse from other individuals.

Section 8: Short title and commencement

44. This section gives the Act its short title and also provides for it to come into force automatically three months after the date of Royal Assent (6 November 2001). The period of three months is to enable rules of court to be made by the Lord President for both the Court of Session and the Sheriff Courts. In addition it is to give time for users and court staff to become familiar with the provisions in the Act.

¹ *Proposal for a Protection from Abuse Bill*, Annexe C, page 77, paragraph 4.

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