

# **DOMESTIC ABUSE (PROTECTION) (SCOTLAND) ACT 2021**

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## **EXPLANATORY NOTES**

### **THE ACT**

3. The Domestic Abuse (Protection) (Scotland) Act 2021 (“the Act”) provides the courts with a new power to impose protective orders (“domestic abuse protection orders” or “DAPOs”) which can impose requirements and prohibitions on a suspected perpetrator of domestic abuse (“person A”), including removing them from the home of a person at risk (“person B”) and prohibiting them from contacting or otherwise abusing person B while the order is in effect. The Act provides a power for the police to impose a very short-term notice (a “domestic abuse protection notice” or “DAPN”) ahead of applying to the court for a DAPO in circumstances where such a notice is necessary for protecting person B from abusive behaviour by person A before an interim or full DAPO can be made. The Act requires the police to apply to a court for a DAPO no later than the next court day after giving a DAPN.
4. The orders are intended to fill the gap that exists in that where someone is experiencing domestic abuse, they are likely to lack the freedom of action to pursue other longer term remedies to address their situation such as seeking a civil order through the courts themselves, and the police and criminal courts would only have powers to impose restrictions where the alleged perpetrator has been arrested on suspicion of having committed a criminal offence or convicted of a criminal offence. The DAPNs and DAPOs can provide the person at risk with immediate protection which does not require any action to be taken by the person at risk and which is independent of any criminal investigation.
5. The police notices and court-issued orders are intended to provide another means by which action can be taken to protect someone who is at risk of abuse from their partner or ex-partner. The intention is that during the time in which the police notices and court-imposed protection orders are in place, the person at risk would be protected from harm and would have time and space to consider their long-term housing options and take steps to secure their safety. Depending on the circumstances, this could involve moving home, pursuit of an exclusion order, non-harassment order or interdict or steps to remove a person from shared tenancy. The Act also creates a new ground on which a social landlord can apply to the court for recovery of possession of a house from a perpetrator of domestic abuse and transfer it to the victim or, where the perpetrator and victim are joint tenants, to end the perpetrator’s interest in the tenancy and enable the victim to remain in the family home as sole tenant.

## **Part 1 – Domestic abuse protection notices and orders**

### **Persons to whom, and behaviour to which, notices and orders may relate**

#### ***Section 1 – Persons to whom domestic abuse protection notices and orders may relate***

6. Section 1 describes who can be protected by the operation of domestic abuse protection notices (DAPNs) and domestic abuse protection orders (DAPOs) as well as describing the persons against whom such notices and orders may be made. The person who is protected is person B and the person against whom the DAPN or DAPO is imposed is person A.
7. Section 1(1)(a) provides that person A must be at least 18 years old.
8. Section 1(1)(b) provides that person B must be at least 16 years old. In addition, person B must be the partner or ex-partner of person A and person A must live with person B some or all of the time. The DAPN or DAPO must be for the purpose of protecting person B from abusive behaviour by person A.
9. Section 1(2) provides a definition of partner. Person A and person B are partners if they are each other's spouse or civil partner or in an intimate personal relationship with each other. Former relationships of the specified types are covered in addition to current relationships.
10. The phrase "intimate personal relationship" is intended to cover relationships between boyfriends and girlfriends (including same-sex and non-binary relationships), although the relationship need not be sexual. Other family relationships and other types of relationship (e.g. between friends or business partners or work colleagues) are not covered.
11. Section 1(4) provides that the reference to person A living with person B at section 1(1)(b)(ii) is a reference to those persons living together at the same time in any place where either person A or person B live, to any extent. As such, it applies regardless of whether the place where they are living together is the principal home of person A, person B, or both or neither of those persons.

#### ***Section 2 – Meaning of abusive behaviour***

12. Section 2 provides the meaning of abusive behaviour by person A towards person B.
13. Section 2(2) provides that behaviour by person A is abusive of person B if a reasonable person would consider the behaviour is likely to cause person B to suffer physical or psychological harm. References to psychological harm include fear, alarm or distress by virtue of section 2(5).
14. Under section 2(2), there is no requirement for person B to actually suffer physical or psychological harm.
15. Section 2(3) provides that "behaviour" includes things said or otherwise communicated as well as things done. It also encompasses an intentional failure to do, say or otherwise communicate something (e.g. a failure to pass on times and dates of appointments or social occasions, or a failure to feed a family pet).
16. Section 2(4)(a) provides that behaviour directed at a person includes behaviour directed towards property. It is not a requirement that the property must belong to person B. It could, for instance, be shared property or property belonging to a third party, such as person B's parents. Property includes pets or other animals (for example agricultural livestock) whether belonging to person B or others.
17. Section 2(4)(b) provides that behaviour directed at person B includes behaviour carried out with or through a third party. This might include, for example, getting another

person to spy on or report on the activities of person B. The third party's involvement could possibly be unwitting or unwilling, as they may be entirely unaware that their behaviour was helping person A to abuse person B or may have been coerced into participating in the abuse of person B.

18. Section 2(6) provides that for the purpose of Part 1, "behaviour" may consist of a single incident or a course of conduct, and so in determining whether behaviour is abusive, where behaviour consists of a course of conduct, regard is to be had, not only to whether individual incidents of behaviour are likely, on their own, to cause person B to suffer physical or psychological harm, but whether the course of conduct as a whole is likely to do so.

### ***Section 3 – What constitutes abusive behaviour***

19. Section 3 provides a description of what constitutes abusive behaviour. The description is non-exhaustive and it therefore remains possible in any individual case that person A's behaviour was abusive in some other way.
20. Section 3(2) provides that behaviour which is abusive of person B includes behaviour directed at person B which is violent, threatening or intimidating (for example, assault or threats). It also covers behaviour directed at person B or at any other person (in particular, a child of person B) which has as its purpose, or among its purposes, or would be considered by a reasonable person likely to have, one or more of the effects on person B that are listed in section 3(3).
21. Section 3(3) provides a list of effects on person B that are relevant in order to indicate behaviour is abusive in connection with DAPNs and DAPOs. This is intended to ensure that, for example, psychological abuse or coercive and controlling behaviour falls within the definition of abusive behaviour.
22. Section 3(3)(a) provides that behaviour which makes person B dependent on or subordinate to person A can be considered to have a relevant effect. This could include, for example, preventing person B from having access to money, forcing person B to leave their job, taking charge of household decision-making to the exclusion of person B or treating person B as a domestic slave.
23. Section 3(3)(b) provides that behaviour which has the effect of isolating person B from friends, relatives or other sources of support can be considered to have a relevant effect. This could include, for example, controlling person B's movements or access to their phone or other forms of communication, not allowing visits from or to person B's friends or family, or deliberately failing to pass on messages from friends or family.
24. Section 3(3)(c) provides that behaviour which has the effect of controlling, regulating or monitoring person B's day-to-day activities can be considered to have a relevant effect. This could include, for example, checking person B's phone, e-mail or social media use, controlling what clothes person B can or cannot wear, or placing unreasonable requirements on person B to, for example, prepare meals in a particular way at a particular time every day.
25. Section 3(3)(d) provides that behaviour which has the effect of depriving person B of, or restricting person B's, freedom of action is behaviour which can be considered to have a relevant effect. This addresses behaviour which robs person B of their autonomy, for example, preventing person B from attending work or college, preventing person B from leaving the house alone, insisting on accompanying person B to medical appointments, or taking decisions for person B in relation to private, individual matters that a person would normally decide for themselves.
26. Section 3(3)(e) provides that behaviour which has the effect of frightening, humiliating, degrading or punishing person B is behaviour which has a relevant effect. This could include, for example, abusive name-calling, threats of self-harm, manipulating person

B into doubting their sanity, controlling person B's access to the toilet or forcing person B to eat food off the floor.

27. Section 3(4) provides that references to violent behaviour includes sexual violence as well as physical violence. It should be noted that non-violent sexually abusive behaviour may be considered abusive under section 3(2)(b) and (3) where it is behaviour that is intended, or likely to have, one of the relevant effects on person B; for example, behaviour which has the effect of frightening, humiliating, degrading or punishing person B. Non-violent sexually abusive behaviour may also be considered threatening or intimidating in terms of section 3(2)(a).

## **Domestic abuse protection notices**

### ***Section 4 – Making of domestic abuse protection notice***

28. Section 4 sets out the test for making a DAPN and the process by which a senior constable can make a DAPN. A definition of a “senior constable” is provided at section 21. A senior constable is a constable holding the rank of inspector or above.
29. Section 4(1) sets out the conditions which must be met for a senior constable to make a DAPN.
30. Section 4(1)(a) provides that the senior constable must have reasonable grounds for believing that person A has engaged in behaviour that is abusive of person B. A definition of abusive behaviour is contained at sections 2 and 3.
31. Section 4(1)(b) provides that the senior constable must have reasonable grounds for believing that it is necessary for a DAPO to be made for the purpose of protecting person B from abusive behaviour by person A. Only a sheriff can make a DAPO but this part of the test reflects the fact that a DAPN can only exist as a precursor to an application for a DAPO under section 8(1).
32. Section 4(1)(c) provides that the senior constable must also have reasonable grounds for believing that there is a risk of person A engaging in further abusive behaviour towards person B immediately and it is necessary to make a DAPN to protect person B from that abusive behaviour.
33. Section 4(2) makes clear for the purposes of section 4(1)(c), “immediately” means in the period before the sheriff can make an interim DAPO or a full DAPO.
34. Section 4(3) provides that, in determining whether person A has been abusive towards person B, it does not matter whether the abusive behaviour occurred in Scotland or elsewhere.
35. Section 4(4) sets out the steps which the senior constable must take and factors which the senior constable must take into account before making a DAPN.
36. Section 4(4)(a) provides that they must take such steps as are reasonable in the circumstances to establish whether person A and person B have any views in relation to the notice which they wish to be taken into account, and if so, to obtain those views. It does not need to be the senior constable who personally obtains the views from person A and person B but could, for example, be a constable who attends an incident involving person A and person B.
37. Section 4(4)(b) provides the senior constable must take into account any views of which the senior constable is aware as a result of the duty contained in section 4(4)(a) and the welfare of any child whose interests the senior constable considers to be relevant to the making of a DAPN. In the majority of cases, this is likely to be a child who normally resides with person B.
38. Section 4(5) provides, for the avoidance of doubt, that the senior constable does not require to obtain the consent of person B before making a DAPN.

***Section 5 – Content and effect of notice***

39. Section 5 sets out what conditions may be included in a DAPN and the period for which it has effect.
40. Section 5(1) provides a list of prohibitions and requirements that may be included in a DAPN. The list is exhaustive and a DAPN cannot include a prohibition or requirement that is not listed in this subsection.
41. Section 5(2) provides that a prohibition or requirement listed at section 5(1) can only be imposed in a DAPN if the senior constable who makes the notice considers that it is necessary to do so to protect person B from abusive behaviour by person A.
42. For example, a senior constable may consider that it is not necessary to require person A to leave a home where person B lives only some of the time, if it appears to the senior constable that person B could live at their other residence for the period in which the DAPN is in effect.
43. Section 5(3) allows the senior constable to make it a requirement of a DAPN for person A, at the time the notice is delivered, to either: provide an address at which person A can be notified with details of the hearing to be held on the application for a DAPO; or undertake to provide such an address within a specified time or to attend a specified police station at a specified time for the purpose of being given notice of the hearing. Person A would then be required to comply with any undertaking given.
44. Section 5(4)(a) generally provides that a DAPN takes effect when it is given to person A in accordance with section 6(4), which requires that it must be delivered in person to person A by a constable. The exception is that the requirement mentioned in section 5(3) takes effect only if and when person A fails to provide an address in response to a request under section 6(5), which places a duty on the constable, when giving the notice, to ask person A for an address at which person A may be given notice of the hearing on the application for a DAPO. Even where the DAPN includes the requirement mentioned in section 5(3) therefore, person A can avoid that particular requirement taking effect by voluntarily providing an address.
45. Section 5(4)(b) provides that a DAPN ceases to have effect in accordance with section 11(9). That section provides that if the sheriff makes a DAPO or interim DAPO at the hearing under section 11(3) then the DAPN ceases to have effect when the sheriff makes the order. If the sheriff does not make a DAPO or interim DAPO at the hearing then the DAPN ceases to have effect when the hearing ends.
46. Section 5(5) makes clear that the term “specified” as contained in section 5(3) means specified by the constable delivering the notice to person A under section 6(4).

***Section 6 – Further requirements in relation to notice***

47. Section 6 sets out further requirements regarding the content and giving of a DAPN.
48. Section 6(1) provides that a DAPN must be in writing.
49. Section 6(2) sets out the information that must be included in a DAPN.
50. Section 6(2)(a) provides that a DAPN must state that the senior constable who made the notice had reasonable grounds for believing that: person A has engaged in behaviour which is abusive of person B; it is necessary for a DAPO to be made to protect person B from abusive behaviour by person A; and there is a risk of person A engaging in further behaviour which is abusive of person B immediately and it is necessary to make the DAPN to protect B from that behaviour. Section 6(3) makes clear that the reference to “immediately” in section 6(2)(a)(iii) has the same meaning given by section 4(2) which means in the period before the sheriff can make an interim DAPO or a full DAPO.

51. Section 6(2)(b) provides that a DAPN must state that the person against whom it has been made commits an offence if, without reasonable excuse, they fail to do anything that they are required to do by the notice, or do anything which they are prohibited from doing by the notice (see section 7).
52. Sections 6(2)(c) to (g) set out the information about the procedure for applying for a DAPO that requires to be included in a DAPN. It must explain that the police will make an application to the sheriff for a DAPO no later than the first court day after the day on which the DAPN is given to person A, that person A will be given notice of the hearing on the application for a DAPO which, in accordance with section 11(3), will be held no later than the first court day after the day on which the application is made, that the DAPN ceases to have effect when the sheriff makes a DAPO or interim DAPO, or otherwise when the hearing ends and that a DAPO may impose such requirements and prohibitions as the sheriff considers to be necessary for the purpose of protecting person B from abusive behaviour by person A. Section 6(4) requires the DAPN to be given in person to person A by a constable.
53. Section 6(5) places a duty on the constable to ask person A for an address at which they can be contacted in order to give them notice of the hearing on the application for a DAPO. If an address is not voluntarily provided in response to such a request and the DAPN includes the requirement mentioned in section 5(3), person B then becomes obliged to provide such an address (or alternatively to undertake to provide an address at a later point in time or to attend a specified police station at a specified time to be given notice of the hearing).

### ***Section 7 – Offence of breaching notice***

54. Section 7 provides that it is a criminal offence for a person to breach the terms of a DAPN without reasonable excuse. The maximum penalty (on summary conviction) is 12 months imprisonment or a fine not exceeding level 3 on the standard scale (or both).

## **Domestic abuse protection orders**

### ***Section 8 – Making of domestic abuse protection order***

55. Section 8 sets out the process for applying to the court for a DAPO. The application will be made in the name of the chief constable but section 18(1) of the Police and Fire (Reform) (Scotland) Act 2012 enables the chief constable to direct or authorise any other constable to carry out any of his functions.
56. Section 8(1)(a) provides that where a senior constable has made a DAPN, the chief constable must apply to the sheriff for a DAPO in relation to the person to whom the DAPN has been given. Section 8(1)(b) further allows the chief constable to make an application for a DAPO in any case in which a DAPN has not been given (see also discussion of section 18 below).
57. Section 8(2)(a) sets out the tests which the sheriff must apply in determining whether to make a DAPO. These are that: person A has engaged in behaviour which is abusive of person B; there is an immediate or imminent risk of person A engaging in further behaviour which is abusive of person B; and that it is necessary to make the order to protect person B from abusive behaviour by person A. The sheriff may make a DAPO only if satisfied on all of these points.
58. If the sheriff is so satisfied, they may make a DAPO, even if person B has expressed a wish for the DAPO not to be made. This is by virtue of section 8(2)(b), which provides that a sheriff may make a DAPO without the consent of person B. This does not mean that person B's views are irrelevant: under section 8(6), the sheriff must give person B an opportunity to make representations about the application for a DAPO and under section 8(7)(a), the sheriff is under a duty, in determining an application for a DAPO, to take into account whether person B wishes a DAPO to be made or not (in so far as

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the sheriff is aware of those views). Where person B does not wish a DAPO to be made, the sheriff must also take into account the reasons for that view (again, in so far as the sheriff is aware of such reasons).

59. The duties under section 8(7) only apply in so far as the sheriff is aware of person B's views and the reasons for them, although the sheriff does not need to have become aware of the views or reasons directly from person B. For example, the sheriff might be aware from representations made by the chief constable that person B's expressed wish that a DAPO not be made may be due to coercive and controlling behaviour by person A. In such a case, the sheriff would need to take account of all of that information in determining the application.
60. Section 8(3) provides that, in determining whether person A has been abusive towards person B, it does not matter whether the abusive behaviour occurred in Scotland or elsewhere.
61. Section 8(4) provides that, in deciding whether it is necessary to make a DAPO to protect person B from abusive behaviour by person A, the abusive behaviour the court has in mind must include, but need not be limited to, the behaviour that the sheriff considers there is a risk of occurring immediately or imminently. This means that the sheriff can also have regard to any risk of abusive behaviour that may occur at a later point in time (although this needs to be read in the context of the DAPOs only lasting for a maximum of two months, which may be extended on application to three months).
62. Section 8(5) provides that the sheriff may permit person B to become party to proceedings.
63. Section 8(6) provides that, before determining the application, the sheriff must give an opportunity to the chief constable, person A and person B to make representations about the application, although section 10(5) enables the sheriff to make an interim order even if such an opportunity has not been given.
64. Section 8(7)(a) has already been discussed above at paragraph 58. Section 8(7)(b) provides that the sheriff must also take into account any other views of person B in relation to the application of which the sheriff is aware. This would include, for example, any particular requirements or prohibitions that person B may or may not wish to be included in such an order, or the length of time for which person B thinks it should have effect. Person B may, for example, have plans to move to alternative accommodation and wish for the order to have effect only until they have moved away from the accommodation they share with person A.
65. The requirements under section 8(7) apply in so far as the sheriff is aware of those views, and any reasons for them, as a result of representations made to the sheriff by person B or otherwise, such as person B expressing them to the police, or to a support agency worker.
66. Section 8(8) sets out other matters which the sheriff is required to take into account in determining an application for a DAPO. The sheriff is required to take into account any representations made to the sheriff by the chief constable or by person A and the welfare of any child whose interests the sheriff considers to be relevant to the application. In the majority of cases, this is likely to be a child who normally resides with person B.
67. Section 8(8)(b) applies in all cases where there is a child whose interests the sheriff considers to be relevant. Section 8(9) and (10) then impose additional duties on the sheriff which apply only where the sheriff is considering making provision in an order which would relate directly to a child (such as a requirement that person A should not contact or approach the child). These additional duties do not apply where provision in an order indirectly affects a child (for example, a provision prohibiting person A from entering or coming within a specified distance of person B's home, at which the child lives, although as already noted, the requirement to consider the child's welfare at section 8(8)(b) must still be complied with in such a case). The first additional duty

where provision would relate directly to a child is a duty on the sheriff to take such steps as are reasonable in the circumstances to give a child an opportunity to express views in relation to any matters relating directly to the child on which the sheriff is considering making provision in a DAPO. The sheriff is then required to take into account any views of the child of which the sheriff is aware, whether as a result of the steps taken to give an opportunity to express their views or otherwise.

68. Section 8(11) provides that in taking account of any such views of the child, the sheriff must take into account the child's age and understanding.

### ***Section 9 – Content and effect of order***

69. Section 9 sets out the provisions that may be included in a DAPO and the period for which it has effect.
70. Section 9(1) provides that a DAPO is an order which requires person A to do, or prohibits A from doing, a thing or things specified in the order.
71. Section 9(2) provides that the requirements and prohibitions may include, but are not limited to, any requirement or prohibition which can be imposed by a DAPN under section 5(1). This might include, for example, a requirement to leave the place where person B is living, or a prohibition on contacting or approaching person B. In contrast with the DAPN, there is no exhaustive list of provisions which may be included in a DAPO and the sheriff may impose any prohibition or requirement that they consider necessary for the purpose of protecting person B from abusive behaviour by person A.
72. Section 9(3) provides that the sheriff can only include a prohibition or requirement in a DAPO if they consider it is necessary for the purpose of protecting person B from abusive behaviour by person A.
73. Section 9(4) provides that a sheriff can make provision in a DAPO which has effect outside the sheriff's sheriffdom so, for example, a prohibition on person A contacting or approaching person B could apply anywhere in Scotland, even if that is outside the sheriff's sheriffdom.
74. Section 9(5) provides for the period of time for which a DAPO has effect. Section 9(5)(a) provides that a DAPO has effect for such a period as is specified in the order, and that this period must not exceed two months. It should be noted that the duration of an interim order does not count towards the maximum duration of a DAPO. Section 9(5)(b) provides that an order may specify different periods for which different requirements or prohibitions may have effect. This provides flexibility to address any anticipated changes to person A or person B's circumstances which the sheriff is aware of at the time that they make the DAPO. By way of example, a sheriff may consider it necessary to prohibit person A from coming within a specified distance of person B's place of work or study but if it is known that person B will not be attending this place of work or study for the full duration of the order then it would not be necessary for such a prohibition to have effect for the full duration of the order.

### ***Section 10 – Interim domestic abuse protection order***

75. Section 10 makes provision for a sheriff to make an interim DAPO where an application for a DAPO has been made under section 8(1). An interim DAPO may be made regardless of whether a DAPN has been given.
76. Section 10(2) provides that a sheriff may make an interim DAPO if the sheriff considers that, on the balance of convenience, it is just to do so. In deciding where the balance of convenience lies, the sheriff will balance the competing interests of those affected with a view to reaching a decision which causes the least harm to the persons affected in the interim period.



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77. Section 10(3) provides that, in deciding whether to make an interim DAPO, the sheriff must have regard to all the circumstances, including any risk that person A will cause harm to person B if an interim order is not made pending determination of the application for a full order.
78. Section 10(4) provides that an interim DAPO can include any prohibition or requirement that could be included in a DAPO.
79. Section 10(5) provides that the sheriff may make an interim order notwithstanding that person A or person B have not been given notice of proceedings as is required by section 11(5) (which applies when a DAPN has been given) or by rules of court, or been given an opportunity to make representations about the interim order. Read with section 8(6), the effect of this is that, where person A or person B have not been given an opportunity to make representations, the sheriff may make an interim DAPO to protect person B but not a final order. Section 10(5) also makes clear that, as is the case with the making of a full DAPO (see section 8(2)(b)), the consent of person B is not required for an interim DAPO to be made.
80. Section 10(6) provides that where a sheriff makes an interim order in the circumstances described in section 10(5)(a) or (b), they must hold a hearing in relation to the application for a DAPO as soon as is reasonably practicable.
81. Section 10(7) provides for the period of time for which an interim DAPO has effect. Section 10(7)(a) provides that an interim DAPO has effect for such a period as is specified in the order, and that this period must not exceed 3 weeks. It is implicit in the wording of section 9(5)(a) that the duration of an interim order does not count towards the maximum duration of a DAPO as the reference to a DAPO in section 9(5) does not include a reference to an interim DAPO and section 9(5)(a) does not require the court to take account of the time for which any interim DAPO may have been in effect in determining how long a DAPO may have effect for. Section 10(7)(b) provides that an interim order ceases to have effect, if it has not already done so, when the application for a DAPO under section 8(1) has been determined.

***Section 11 – Hearing to be held where domestic abuse protection notice has been given***

82. Section 11 makes provision with regard to the hearing which must take place where the chief constable applies to the sheriff for a DAPO under section 8(1)(a) after a senior constable has made a DAPN against person A.
83. Section 11(2) provides that, where the police make a DAPN, they must make an application under section 8(1)(a) to a sheriff for a DAPO not later than the first court day after the day on which the DAPN is given to person A as set out in section 6(4). “Court day” is defined at section 21. It is any day which is not a Saturday or Sunday or a court holiday.
84. Section 11(3) requires the sheriff to hold a hearing in relation to the application no later than the first court day after the day on which the application is made and section 11(4) requires that the hearing must be concluded on the day on which it begins. The sheriff is still entitled to continue proceedings on the application as set out at section 11(7) but, when considered alongside section 11(9)(b), section 11(4) provides a clear point at which a DAPN will cease to have effect.
85. Section 11(5)(a) places a duty on the chief constable to give person A notice of the hearing either by (i) leaving it at the address which person A has provided to the police whether given in accordance with section 5(3) or 6(5) or otherwise in connection with the giving of notice under this subsection or (ii) giving it to person A on person A attending a police station in accordance with section 5(3) or otherwise by delivering it to person A in person. Section 11(5)(b) places a duty on the chief constable to give person

B notice of the hearing by leaving it the address at which person B usually resides, or by delivering it to person B in person.

86. Section 11(6) provides that the sheriff must hold the hearing even if the requirement at section 11(5) is not met. In such a case, the sheriff could make an interim order by virtue of section 10(5), but could only make a full order if the requirement for persons A and B to be given an opportunity to make representations at section 8(6) is met, for example, where they have made representations after having been notified of the hearing otherwise than in accordance with section 11(5).
87. Section 11(7) sets out the options available to the sheriff at that hearing. The sheriff can determine the application, providing the requirement to give an opportunity to person A, person B and the chief constable to make representations has been met, can make an interim DAPO or can continue proceedings, setting a date for a further hearing, without determining the application or making an interim DAPO.
88. Section 11(8) provides that the sheriff may not make an interim DAPO or a DAPO before the hearing is held.
89. Section 11(9) provides that a DAPN ceases to have effect if the sheriff makes a DAPO or interim DAPO at the hearing or otherwise, when the hearing ends. Because the hearing must come to an end on the day it begins and by virtue of section 11(2) and (3), the DAPN will cease to have effect no later than the second court day after the day on which it is given to person A.

### ***Section 12 – Extension, variation or discharge of order***

90. Section 12 makes provision to enable an application to be made to extend, vary or discharge a DAPO. By virtue of section 10(8) references in section 12 (and sections 13 and 14) also include reference to an interim DAPO.
91. Section 12(1) provides that the chief constable, person A and person B may apply to the sheriff to extend, vary or discharge a DAPO or interim DAPO. The effect of this is that person B may apply to extend, vary or discharge the order even where person B was not a party to the proceedings for the order under section 8.
92. Section 12(2) provides that the sheriff may permit any person referred to in section 12(1) to become party to proceedings relating to an application made by another person mentioned in that section. In practice, this enables the sheriff to permit person B to become party to proceedings in relation to an application made by either person A or the chief constable and to permit the chief constable to become party to proceedings in relation to an application made by person A or person B – person A will anyway be a party to proceedings in all cases by virtue of the fact that they are the subject of the order.
93. Section 12(3) provides that, before determining an application to extend, vary or discharge a DAPO or interim DAPO, the sheriff must give an opportunity to make representations on the application to the chief constable, person A and person B (whether or not the chief constable or person B is a party to proceedings).
94. Section 12(4)(a)(i) provides that in determining an application under section 12(1), the sheriff must take account of any views of which the sheriff is aware as to whether person B wishes the DAPO or interim DAPO to be extended, varied or discharged. In certain cases (those listed in section 12(5)), section 12(4)(a)(ii) also requires the sheriff to take into account any reasons of which the sheriff is aware for person B's views on whether the DAPO or interim DAPO should or should not be extended, varied or discharged. The cases listed in section 12(5) are the cases most susceptible to person B's expressed wishes having been influenced by coercive or controlling behaviour by person A (specifically cases where person B wishes for the order not to be extended, not to be varied so as to add a requirement or prohibition as proposed in the application, to be varied so as to remove a requirement or prohibition as proposed in the application, or

to be discharged). This means that, for example, where the sheriff is aware that person B's views may indeed have been influenced by coercive and controlling behaviour by person A then the sheriff must take that into account, along with person B's views, in determining the application.

95. Section 12(4)(b) requires the sheriff take into account any other views of person B in relation to the application for extension, variation or discharge of which the sheriff is aware.
96. Section 12(4)(a) and (b) both apply whether the sheriff is aware of those views, and any reasons for them, as a result of representations made to the sheriff by person B or otherwise (for example, as a result of representations by the chief constable).
97. Section 12(6) provides that, in determining an application to extend, vary or discharge a DAPO or interim DAPO, the sheriff must also take into account any representations made to them by the chief constable or by person A and the welfare of any child whose interests the sheriff considers to be relevant to the application.
98. As with the equivalent provision in section 8, section 12(6)(b) applies in all cases where there is a child whose interests the sheriff considers relevant to the application, with section 12(7) and (8) then imposing additional duties that only apply where the sheriff is considering an action in relation to an order which would relate directly to a child (see paragraph 67). Specifically, section 12(7) when read together with section 12(8) places a duty on the sheriff to take such steps as are reasonable in the circumstances to give a child an opportunity to express views where the sheriff is considering extending or discharging a DAPO or interim DAPO which contains provision relating directly to the child, or where the sheriff is considering varying a DAPO or interim DAPO by including, removing or altering provision that relates directly to the child. The sheriff is then required to take into account any views of the child of which the sheriff is aware, whether as a result of the steps taken to give an opportunity to express their views or otherwise.
99. Section 12(9) provides that in taking account of any such views of the child, the sheriff must take into account the child's age and understanding.
100. Section 12(10) provides that any reference to extending a DAPO or interim DAPO in sections 12, 13 and 14 includes a reference to extending the period for which a particular provision of the order has effect. For example, if some provisions in a DAPO as originally made have effect for a period of two months and others for a shorter period, an application could be made under section 12(1) for the provisions which were originally to have effect for less than two months to be extended so that they also have effect for two months.

### ***Section 13 – Extension, variation or discharge of order: further provision***

101. Section 13 makes provision regarding the sheriff's powers to extend, vary or discharge a DAPO or interim DAPO following the making of an application under section 12(1).
102. Section 13(1) provides that when a sheriff is considering an application to extend a DAPO or interim DAPO, they may extend the order only if it is necessary to do so and must vary the order to remove any requirement or prohibition that is no longer necessary, and must discharge the order if satisfied that it is no longer necessary. Section 13(7) provides a definition of "necessary."
103. Sections 13(2) and 13(3) make provision regarding the length of time for which a DAPO or interim DAPO can be extended. They provide that a DAPO can be extended for a period not exceeding one month (though this does not apply to an interim DAPO) and that the maximum period for which the order may have effect, including any period for which it is extended, is 3 months for a DAPO, and 3 weeks for an interim DAPO.

104. Section 13(4) provides that where an application is made under section 12(1) to vary the terms of a DAPO or interim DAPO, the sheriff may vary the order so as to add a prohibition or requirement if satisfied that it is necessary to do so (“necessary” is defined at section 13(7)) and must vary the order to remove any requirement or prohibition which the sheriff is satisfied is no longer necessary and must discharge the order if satisfied that it is no longer necessary.
105. Section 13(5) provides that where an application is made under section 12(1) to discharge a DAPO or interim DAPO, the sheriff must discharge the order if satisfied that it is no longer necessary, and, if the sheriff does not discharge the order they must vary the order so as to remove any requirement or prohibition which the sheriff is satisfied is no longer necessary.
106. Section 13(6) provides that the sheriff may extend, vary or discharge a DAPO or interim DAPO without person B’s consent, though there is a requirement at section 12(4) for the sheriff to take into account the views of person B (including, in certain cases, any reasons for those views of which the sheriff is aware) (see paragraph 94 above).
107. Section 13(7) provides that, for the purpose of section 13, “necessary” means necessary for the purpose of protecting person B from abuse by person A.

#### ***Section 14 – Interim extension or variation of order***

108. Section 14 makes provision enabling a sheriff to extend or vary a DAPO or interim DAPO on an interim basis, pending determination of the application, when considering an application to extend or vary a DAPO or interim DAPO made under section 12(1).
109. Section 14(2) provides that the sheriff may vary or extend the order on an interim basis only if they consider, on the balance of convenience that it is just to do so.
110. Section 14(3) provides that, in deciding whether it is, on the balance of convenience, just, the sheriff must have regard to all the circumstances including any risk that if the order is not extended or varied on an interim basis, person A will cause harm to person B or, in the case of an application to vary an order, that if the order is varied on an interim basis, person A will cause harm to person B before the application is determined. This may be especially relevant in a case where person A applies to the court to vary the order by removing a prohibition or requirement.
111. Section 14(4) provides that the sheriff may extend or vary the DAPO or interim DAPO on an interim basis even if the chief constable, person A or person B has not been given notice of the proceedings, and without giving the chief constable, person A, or person B the opportunity to make representations about the interim extension or variation of the order. Section 14(5) provides that where the sheriff does so, they must hold a hearing in relation to the application under section 12(1) as soon as reasonably practicable. Section 14(4)(c) provides that the consent of person B is not required in order for a DAPO or interim DAPO to be extended or varied on an interim basis.
112. Section 14(6) provides that the extension or variation of a DAPO or interim DAPO on an interim basis has effect for such a period as is specified by the sheriff, subject to the limits on the extension of a DAPO or interim DAPO set out at section 13(3) and that it ceases to have effect, if it has not already done so, when the application under section 12(1) has been determined.

#### ***Section 15 – Jurisdiction and competence***

113. Section 15 makes provision as regards the sheriff to whom an application for a DAPO under section 8(1) or an application to vary, extend or discharge a DAPO under section 12(1) should be made.
114. Section 15(2)(a) provides that an application for a DAPO may be made to a sheriff in whose sheriffdom either person A or person B is ordinarily resident. Section 15(2)

(b) provides that an application to extend, vary or discharge a DAPO may be made to a sheriff of the same sheriffdom as the sheriff who considered the application for a DAPO which resulted (whether or not after appeal) in the making of the DAPO or interim DAPO to which the application under section 12(1) relates. This ensures that all applications for extension, variation or discharge, including applications in cases where the order was made in the course of appeal proceedings, should be made to a sheriff in the same sheriffdom where the original application for a DAPO was considered.

115. Sections 15(3) to 15(6) make provision to enable a sheriff to make an order to transfer proceedings to a sheriff of another sheriffdom.
116. Section 15(4) provides that the sheriff may do so if they are satisfied that it would be more appropriate for the proceedings to be dealt with by a sheriff of another sheriffdom.
117. Section 15(5) provides that the sheriff may make an order under section 15(4) on the application of a party to proceedings, or on the sheriff's own initiative.
118. Section 15(6) provides that where an order is made under section 15(4), a sheriff of the sheriffdom to which the proceedings are to be transferred has jurisdiction and competence to consider and determine the proceedings.
119. Section 15(7) provides that nothing in section 15 affects any power that a sheriff has to decline jurisdiction in any case.
120. Section 15(8) amends schedule 1 of the Courts Reform (Scotland) Act 2014 so as to provide that a summary sheriff has competence with respect to proceedings relating to a DAPO or an interim DAPO.

### ***Section 16 – Effect of making of appeal on decision appealed against***

121. Section 16 concerns appeals against decisions made in DAPO proceedings.
122. Section 16(1) and (2) make clear that, for the purposes of section 110 of the Courts Reform (Scotland) Act 2014 (“the 2014 Act”), decisions to make or refuse to make a DAPO and decisions to extend, vary or discharge, or refuse to extend, vary or discharge a DAPO are decisions constituting final judgments in civil proceedings. This means that these decisions are appealable under section 110(1) of the 2014 Act and that an appeal may be taken without the need for permission. Appeals against other decisions (for example, an appeal against a decision to make or refuse to make an interim DAPO), while possible, will require the permission of a sheriff (section 110(2) of the 2014 Act).
123. Subsections (3) to (5) provide that, in all appeals relating to DAPOs and interim DAPOs under section 110 of the 2014 Act, the original decision appealed against continues in effect until the determination of the appeal unless the decision is suspended by the Sheriff Appeal Court. In the case of an appeal which is remitted to the Court of Session under section 112 of the 2014 Act, the power to suspend the original decision may be exercised by either the Sheriff Appeal Court or the Court of Session.
124. Subsections (6) and (7) set out a similar position in relation to appeals to the Court of Session made under section 113 of the 2014 Act against a decision of the Sheriff Appeal Court in an appeal under section 110 of the 2014 Act. Again, all appeals relating to DAPOs and interim DAPOs are covered. The decision appealed against continues in effect until the appeal is disposed of, unless suspended by the Sheriff Appeal Court, or the Court of Session. Subsection (8) provides that, where the decision appealed against under section 113 is a decision to remit the case back to the sheriff, the sheriff may not take any further action in the case until the appeal is disposed of. This avoids the possibility of proceedings with potentially different outcomes taking place simultaneously.

### ***Section 17 – Offence of breaching order***

125. Section 17 makes provision relating to breach of a DAPO or an interim DAPO.
126. Section 17(1) provides that breach of a DAPO or an interim DAPO, without reasonable excuse, is a criminal offence. Section 17(2) provides that the maximum penalty on summary conviction is a term of imprisonment of up to 12 months or a fine not exceeding the statutory maximum or both; and the maximum penalty on conviction on indictment is a term of imprisonment of up to five years or a fine or both.

### ***Section 18 – Applications under sections 8(1) and 12(1): power to specify additional applicants***

127. Section 18 provides power for the Scottish Ministers to make regulations specifying additional persons who can apply to a court for a DAPO under section 8(1)(b), or to extend, vary or discharge a DAPO under section 12(1). The power is subject to affirmative procedure. Persons specified in regulations under section 18 cannot apply for a DAPO in a case where a DAPN has been given – such applications must be made by the chief constable (section 8(1)(a)).
128. Section 18(2) provides that the persons whom the Scottish Ministers can empower to make an application under sections 8(1) and 12(1) include local authorities, local authority landlords, registered social landlords and any other person whom the Scottish Ministers consider it appropriate to provide with such a power. “Person” has the meaning given in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010.
129. Section 18(3)(a) places a duty on the Scottish Ministers to consult with each person to whom it is proposed to provide a power to apply for DAPOs or to apply to extend, vary or discharge DAPOs. This is qualified in section 18(3)(a)(ii) so that where it is proposed to enable a particular type of persons, the Scottish Ministers may instead consult such persons as appear to the Scottish Ministers to represent that type of person. So, for example, they may consult with the Convention of Scottish Local Authorities instead of consulting with individual local authorities, or with a body representing registered social landlords, such as the Scottish Federation of Housing Associations, instead of consulting with each individual registered social landlord. The Scottish Ministers may also consult any other persons they consider appropriate.
130. Section 18(4) provides that regulations made under this section may modify any enactment (including this Act), may make incidental, supplementary, consequential, transitional, transitory or saving provision and may make different provision for different purposes.

## **Relationship with orders regulating contact and residence**

### ***Section 19 – Relationship of notice or order with order regulating contact or residence***

131. Section 19(a) provides, for the avoidance of doubt, that provision in any order regulating contact with, or residence of, a child does not limit the requirements or prohibitions that may be imposed in a DAPN or DAPO. As such, the fact that a person against whom a DAPN or DAPO is made has, for example, a contact order in relation to a child does not prevent provision being made in a DAPN or DAPO to prohibit that person from approaching or contacting the child if the senior constable or sheriff considers that it is necessary to make such provision for the purpose of protecting person B.
132. Section 19(b) provides, further to the provision at section 19(a) and again for the avoidance of doubt, that the existence of such an order entitling a person to do something such as maintain contact with a child, is not a defence to a charge of breaching a DAPN or DAPO.

## **Reporting**

### ***Section 20 – Reporting on operation of Part***

133. Section 20 places a duty on the Scottish Ministers to report on the operation of Part 1 of the Act. The report must cover a 3 year period beginning with the date on which Part 1 comes into force and must be laid before Parliament as soon as practicable after the reporting period.
134. Section 20(1) provides that the report must include information about the number of DAPNs, DAPOs and interim DAPOs that are made, the number of extensions of DAPOs that are granted, the number of cases and convictions in respect of the offences at sections 7(1) and 17(1) relating to breach of a DAPN or DAPO and information about the experiences of people for whose protection a DAPN or DAPO was made.
135. Section 20(2) provides that the report may also include any other information that the Scottish Ministers consider appropriate about the operation of Part 1 and the experience of any other people affected by its operation during the reporting period.

## **Interpretative provision**

### ***Section 21 – Interpretation of Part***

136. Section 21 defines certain terms used in Part 1.

## **Part 2 – Termination of Scottish secure tenancies in cases involving abusive behaviour**

137. The Housing (Scotland) Act 2001 (“the 2001 Act”) creates and regulates a class of residential tenancies known as Scottish secure tenancies. These are tenancies in the social sector, where the landlord is either a local authority landlord, a registered social landlord (such as a housing association) or Scottish Water. A Scottish secure tenancy may not be brought to an end except in the circumstances specified in section 12(1) of the 2001 Act. One of those circumstances is where a landlord obtains a court order under section 16(2) of the 2001 Act for recovery of possession. A landlord is only entitled to recover possession on certain grounds, set out in schedule 2 of the 2001 Act. Section 14 of the 2001 Act sets out a process which a landlord must follow before the landlord can raise proceedings (by way of summary cause) for recovery of possession. The landlord must serve notice on the tenant specifying a ground or grounds on which recovery is sought. Proceedings may not be raised until the period of time specified in section 14(4) of the 2001 Act has passed after service of the notice.
138. Part 2 of the Act creates one new ground for recovery of possession by a landlord, namely that the tenant, who is a sole tenant, has engaged in behaviour which is abusive of a partner or ex-partner. This is to allow the landlord to enter into a new tenancy with the partner or ex-partner who is the victim of the abusive behaviour.
139. Part 2 also allows a landlord to apply for an order terminating a tenant’s interest in a Scottish secure tenancy, where that tenant is a joint tenant with the partner or ex-partner, and has engaged in behaviour which is abusive of the partner or ex-partner.

### ***Section 22 – Additional ground for ending tenant’s interest in house***

140. Section 22 amends sections 14 and 16 and schedule 2 of the 2001 Act to make provision for recovery of possession, or termination of a joint tenant’s interest, on that ground.

## **Additional ground**

141. Section 22(4) inserts paragraph 15A into schedule 2 of the 2001 Act, creating a new ground on which the landlord under a Scottish secure tenancy may raise court proceedings under section 14 of the 2001 Act. On this new ground, the landlord may

raise proceedings either: for recovery of possession of the house (in the case of a sole tenant), or for termination of the tenant's interest in the tenancy (in the case of a joint tenant).

142. Sub-paragraphs (1) and (2) of the new ground require that a person ("person T") who is the tenant or one of the joint tenants has engaged in behaviour which is abusive of a person ("person P") who is a partner or ex-partner of person T. In addition, the house to which the tenancy relates must be person P's only or principal home, and person P must wish to continue living in the house. Where person T is the sole tenant, the landlord must also wish to recover possession of the house from person T for the purpose of entering into a tenancy with person P instead.

### **Proceedings by the landlord for possession**

143. Where person P and person T are joint tenants (whether with or without others) (see paragraph 15A(2)(a) of schedule 2 of the 2001 Act, as inserted by section 22(4)), then the landlord may raise proceedings for an order to terminate person T's interest in the tenancy. Section 22(2)(a) and (b) amends section 14(1) of the 2001 Act, and inserts a new section 14(1A), accordingly. Section 22(2)(d) makes consequential amendments to section 14(4) of the 2001 Act.
144. Where person T is the sole tenant, then the new paragraph 15A is added (by section 22(4)) to the other grounds in schedule 2 of the 2001 Act on which a landlord may raise proceedings for recovery of possession, by virtue of section 14(1)(a) of the 2001 Act. As set out in paragraph 15A(2)(d)(i) of schedule 2 of the 2001 Act, the purpose of recovering possession from person T is to enter into a tenancy with person P instead.
145. Sub-paragraph (3) of the new ground defines the "partner or ex-partner of person T" to be either a spouse or former spouse, or civil partner or former civil partner, or a person with whom person T has lived with in the house to which the tenancy relates as if a spouse, for a period of at least six months in the twelve months prior to the proceedings being raised. This can include intermittent periods that amount to six months in total within the last twelve months. It also ensures that references to abusive behaviour by person T are construed in accordance with sections 2 and 3 (in Part 1 of the Act).
146. Section 22(2)(c) makes a number of amendments to subsection (2B) of section 14 of the 2001 Act. The effect of these amendments is that a landlord must have regard to any relevant guidance issued by the Scottish Ministers before raising proceedings on the new ground set out in new paragraph 15A of schedule 2 of the 2001 Act. This applies regardless of whether the proceedings are raised under section 14(1)(a) (recovery of possession – that is, where person T is the sole tenant) or 14(1)(b) (termination of person T's interest in the tenancy – that is, where person T is a joint tenant). Before publishing any such guidance, the Scottish Ministers must consult as they consider appropriate, by virtue of existing subsection (2C) of section 14.
147. Section 22(2)(e) inserts new subsections (5C) to (5E) into section 14 of the 2001 Act. Where a landlord raises proceedings under section 14 which include the additional ground at paragraph 15A of schedule 2 of the 2001 Act, new subsection (5C) requires the landlord to give the tenant, as well as any qualifying occupier, advice and assistance regarding alternative accommodation. This advice and assistance must be provided as soon as is reasonably practicable after raising the proceedings. In providing such advice and assistance, the landlord must have regard to any relevant guidance issued by the Scottish Ministers (new subsection (5D)). Before publishing any such guidance, the Scottish Ministers must consult as they consider appropriate (new subsection (5E)).

### **Powers of court in possession proceedings**

148. Section 22(3) amends section 16 of the 2001 Act.



149. Section 22(3)(a) amends section 16(1) of the 2001 Act so that the court can also adjourn proceedings on the new ground at paragraph 15A of schedule 2 of the 2001 Act.
150. Section 22(3)(b) inserts new paragraphs (d) and (e) into section 16(2) of the 2001 Act to give the court the powers necessary, if it appears to the court that the new ground at paragraph 15A of the 2001 Act is established, to grant an order for recovery of possession (where person T is the sole tenant). New paragraphs (d) and (e) are inserted into section 16(2) of the 2001 Act by section 22(3)(b)(ii), setting out additional circumstances in which the court must make an order for recovery of possession. They require the court to make the order if the landlord has a ground for it under the new ground at paragraph 15A of schedule 2 of the 2001 Act, the tenant is the sole tenant, and either: it is reasonable to make the order, or the tenant has in the preceding year been convicted of an offence in respect of the abusive behaviour referred to in the new ground which is punishable by imprisonment. Section 22(3)(b)(i) makes a consequential amendment to section 16(2) of the 2001 Act.
151. Section 22(3)(c) inserts new subsection (3ZA) into section 16 of the 2001 Act, requiring the court, where person P and person T have a joint tenancy (whether or not with others), to make an order for termination of person T's interest in the joint tenancy if the landlord has a ground for it under the new ground at paragraph 15A of the 2001 Act and either: it is reasonable to make the order, or the tenant has in the preceding year been convicted of an offence in respect of the abusive behaviour referred to in the new ground which is punishable by imprisonment. Section 22(3)(d) makes a consequential amendment to section 16(3A) of the 2001 Act.
152. Section 22(3)(c) also inserts new subsection (3ZB) into section 16 of the 2001 Act, requiring the court, when considering whether it is reasonable to make an order under section 16(2)(d)(iii) or (3ZA)(a)(ii) of the 2001 Act, to have regard to any risk that the tenant will engage in further behaviour of the kind mentioned in the new ground at paragraph 15A of the 2001 Act.
153. By virtue of new subsection (5C) of section 16 of the 2001 Act (inserted by section 22(3)(e)), the effect of an order made under new subsection (3ZA) is that person T's interest in the joint tenancy ends on a date specified in the order.
154. Section 22(3)(f) adds new subsections (7) to (10) to section 16 of the 2001 Act. As explained above, where person T is the sole tenant, one of the conditions for the new ground for recovery of possession set out in new paragraph 15A of schedule 2 of the 2001 Act to be met is that the landlord wishes to recover possession of the tenancy in order to instead enter into a tenancy with person P (so enabling person P to stay in their home). New subsection (7) of section 16 applies where an order is made under that section terminating person T's tenancy. It ensures that the landlord then acts on the intention referred to in paragraph 15A(2)(d)(i) of schedule 2, by requiring the landlord to offer the tenancy to person P within 28 days of the termination of person T's tenancy. That new tenancy is to begin as soon as reasonably practicable. But new subsection (8) of section 16 provides that this need not be done where it would be impossible or inappropriate (for example, because the landlord cannot locate person P in order to offer the tenancy to them). New subsection (9) of section 16 requires landlords to have regard to any guidance issued by the Scottish Ministers about new subsections (7) and (8).
155. [Section 22\(5\) to \(8\)](#) make consequential changes to titles and headings in relation to sections 14 and 16, and schedule 2, of the 2001 Act.

### **Part 3 – Final provisions**

#### ***Section 23 – Ancillary provision***

156. Section 23 provides a power for the Scottish Ministers to make, by regulations, incidental, supplementary, consequential, transitional, transitory or saving provision

*These notes relate to the Domestic Abuse (Protection) (Scotland)  
Act 2021 (asp 16) which received Royal Assent on 5 May 2021*

that they consider appropriate for the purposes of, in connection with or for giving full effect to the Act.

***Section 24 – Commencement***

157. Section 24 provides that section 21 and Part 3 come into force on the day after Royal Assent. All other provisions are to come into force on a day appointed by regulations made by the Scottish Ministers, and those regulations may make transitional, transitory or saving provision related to commencement and may make different provision for different purposes.