

DRAFT DOMESTIC ABUSE BILL
DELEGATED POWERS MEMORANDUM

Introduction

1. This memorandum has been prepared by the Home Office and Ministry of Justice to assist the pre-legislative scrutiny of the draft Domestic Abuse Bill. The memorandum identifies the provisions of the draft Bill which confer new powers to make delegated legislation. It explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

Background and purpose of the draft Bill

2. There are some two million victims of domestic abuse a year and more than one in ten of all offences recorded by the police are domestic abuse related. The Government is committed to introduce a landmark Domestic Abuse Bill to transform the approach of the justice system and wider statutory agencies to ensure that victims have the confidence to come forward and report their experiences, safe in the knowledge that the state will do everything it can to support them and their children, and pursue the abuser.
3. The draft Bill includes measures to:
 - a) Provide for a statutory definition of domestic abuse;
 - b) Establish the office of Domestic Abuse Commissioner and set out the Commissioner's functions and powers;
 - c) Provide for a new Domestic Abuse Protection Notice and Domestic Abuse Protection Order;
 - d) Prohibit perpetrators of abuse from cross-examining their victims in person in the family courts and give the court discretion to prevent cross-examination in person where it would diminish the quality of the witness' evidence or cause the witness significant distress;
 - e) Create a statutory presumption that complainants of an offence involving behaviour which amounts to domestic abuse are eligible for special measures in the criminal courts;
 - f) Enable domestic abuse offenders to be subject to polygraph testing as a condition of their licence following their release from custody;
 - g) Place the guidance supporting the Domestic Violence Disclosure Scheme on a statutory footing;
 - h) Ensure that where a local authority, for reasons connected with domestic abuse, grants a new secure tenancy to a social tenant who had or has a secure lifetime or assured tenancy (other than an assured shorthold tenancy) this must be a secure lifetime tenancy; and
 - i) Extend the extraterritorial jurisdiction of the criminal courts in England and Wales to further violent and sexual offences.

Overview of the delegated powers

4. The measures at items (b) to (d) and (g) above contain eight new regulation-making powers, one power to issue directions and four new powers to issue statutory guidance or codes of practice. In addition, the Bill includes standard powers (including to provide for piloting) relating to commencement.

Clause 13(4): Power to amend clause 13

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Context and purpose

5. Part 2 of the Bill establishes the office of Domestic Abuse Commissioner and sets out the functions of the Commissioner. The Commissioner's role will be to encourage good practice in the prevention and detection of domestic abuse; in the prevention, detection, investigation and prosecution of offences involving domestic abuse; and in the identification of, and provision of support to, victims and survivors of domestic abuse and their children.
6. The Commissioner will provide public leadership on domestic abuse, standing up for victims and survivors and their children. They will map and monitor the provision of domestic abuse services across England and Wales, and publish the results. In doing this, they will highlight areas of best practice, point out service provision which falls short of what is expected and make recommendations to public bodies to improve their service provision, thereby driving improvements to the response to domestic abuse across England and Wales.
7. Clause 13 places a duty on specified public authorities to cooperate with the Commissioner at the Commissioner's request. Such public authorities are further required, under clause 14, to respond to any report, published by the Commissioner under clause 7, containing recommendations in relation to them. The relevant public authorities are listed in subsection (3) of clause 13. Clause 13(4) includes a power to add to this list of relevant public authorities, remove a public authority previously added to the list by regulations and vary any description of a specified public authority. The power to amend the clause as a whole, rather than just subsection (3), would in particular enable regulations to amend subsection (7) so as to add a definition of a new authority inserted in to the list of relevant public authorities. It will not be possible to use the regulation-making power to remove a public authority listed in clause 13(3) as enacted.

Justification for the delegated power

8. Clause 13(3) specifies on the face of the Bill those public authorities which are initially to be subject to the duty to co-operate with the Commissioner. The list includes policing, criminal justice, health and social care bodies and local authorities which are considered to be the principal public bodies involved in tackling domestic abuse and providing services to the victims. Having established this list of public authorities in primary legislation and recognising that this list is central to the scope and effect of clause 13, the Government accepts that the removal of any public bodies from this core list should similarly require primary legislation. It is possible, however, that over time the Commissioner or the Home Secretary will identify other public authorities to which the duty should attach. Having established the principle of the duty in primary legislation, the Government considered that secondary legislation is an appropriate mechanism to add new public authorities to the list (and, if necessary, remove any authority so added) so that the duty to co-operate can be extended as quickly as practicable once the case for this has been established.
9. The regulation-making power also enables regulations to vary the description of a public authority listed in subsection (3). The Government's expectation is that where a specified public authority was renamed, it would normally be for the legislation renaming the body to make the necessary consequential amendment to subsection (3), but this may not always be the case and it may be that it is necessary to change the description of a public authority for other reasons, for example, to take account of changes to the jurisdiction of British Transport Police made by the Scottish Parliament.
10. Section 43 of the Modern Slavery Act 2015 ("the 2015 Act") contains an analogous power to amend the list of public authorities' subject to the duty to co-operate with the independent Modern Slavery Commissioner. However, it is important to note that the scope of the power in clause 13 is narrower than the power in section 43 of the 2015 Act as, in this instance, there is no power to remove a public authority from the existing list in clause 13(3).

Justification for the procedure

11. By virtue of clause 59(4), the regulation-making power is subject to the negative procedure. Having established on the face of the Bill the principle of a duty to co-operate and also set out in clause 13 the core list of public authorities that are subject to the duty, the Government considers that the negative procedure affords an appropriate level of parliamentary scrutiny given the constraints on the regulation-making power, notably the fact that it cannot be used to remove a body listed in the clause on enactment. It is also relevant here that the Home Secretary must consult the Commissioner before making any regulations under clause 13 and, in

practice, the Home Office would also consult any public authority which it is proposed to add to the list in subsection (3). In applying the negative procedure, the Government has taken into consideration the recommendation of the Delegated Powers and Regulatory Reform Committee in its report on the Modern Slavery Bill (10th Report of session 2014/15), having regard to the difference between the two powers referred to in paragraph 10 above.

Clause 25(2)(c): Power to specify additional persons who may apply for a domestic abuse protection order

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Negative procedure

Context and purpose

12. Part 3 of the Bill provides for new civil orders to protect victims of domestic abuse - the Domestic Abuse Protection Notice (“DAPN”) and the Domestic Abuse Protection Order (“DAPO”). The DAPN is a short-term measure, given to an alleged perpetrator by a police officer not below the rank of inspector, designed to give immediate protection for a victim of domestic abuse while a court-made DAPO affords longer term protection. A court making a DAPO may impose any requirements that the court considers necessary to protect the person for whose protection the order is made from domestic abuse.

13. A DAPO may be obtained through a variety of routes. First, a DAPO may be granted by a court on application by certain categories of person (clause 25(1)). Second, where a DAPN has been given to an alleged perpetrator, there is a duty on the relevant chief officer of police to apply to a magistrates’ court for a DAPO (clause 25(3) and 26). Third, a DAPO may be made by a family court, criminal court or (in prescribed circumstances – see below) county court during any ongoing proceedings (which do not have to be domestic abuse-related) (clause 27).

14. In the case of a DAPO made on application, clause 25(2) provides that an application may be made by: (a) the person for whose protection the order is sought (namely the victim); (b) the appropriate chief officer of police; (c) a person specified in regulations made by the Secretary of State; or (d) any other person with the leave of the court.

Justification for the power

15. Applications for existing protective orders (for example Domestic Violence Protection Orders (which will be repealed by the Bill), restraining orders and non-molestation orders) have been open to different persons. The

Government's consultation, "*Transforming the response to Domestic Abuse*", asked consultees who they felt should be able to apply for a DAPO and why.

16. Respondents to the consultation said that a wide range of people should be able to apply for a DAPO, with 60% choosing the victim, 62% choosing the police, 54% choosing relevant third parties and 44% choosing certain other persons with permission of the victim and/or court. However, respondents raised concerns about allowing persons associated with the victim, such as family members or friends, to apply because this route may be open to abuse by those who wish to interfere in relationships about which they do not approve.
17. Reflecting these views, the Bill enable victims, the police and other persons (with the leave of the court) to apply for a DAPO, but leaves it to regulations to specify other relevant third parties who may apply. Such relevant third parties could include local authorities, probation service providers, specialist domestic abuse advisers and specialist non-statutory support services (for example, refuge support staff). Given the wide range of potential suitable third parties, it is appropriate to leave the specification of such persons or bodies to secondary legislation so that further consultation may take place with the persons or bodies concerned prior to such designation and to enable additional persons and bodies to be added (or removed) over time in the light of experience. An analogous power is contained in section 100(5) of the Criminal Justice and Immigration Act 2008 which enables the Secretary of State, by order, to add to the persons or bodies that may apply for a violent offender order.

Justification for the procedure

18. By virtue of clause 59(4), regulations made under clause 25(2)(c) are subject to the negative procedure. The principle that a variety of persons may apply to a court for a DAPO (albeit, for persons other than the victim, those specified in regulations or the police, this must be with the leave of the court) is established on the face of the Bill. Moreover, it is for the court to decide whether to make a DAPO in response to any given application. Given these factors, the negative procedure is considered to provide an appropriate level of parliamentary scrutiny for regulations made under this power. The order-making power in section 100(5) of the Criminal Justice and Immigration Act 2008 is similarly subject to the negative procedure.

Clause 27(8): Power to specify civil proceedings where a domestic abuse protection order may be made

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by Statutory Instrument</i>
<i>Parliamentary procedure:</i>	<i>Negative procedure</i>

Context and purpose

19. Clause 27 provides that a DAPO may be made by: the High Court or the family court in any family proceedings in which the perpetrator and victim of domestic abuse are parties; a magistrates' court or the Crown Court in any criminal proceedings involving the perpetrator; and in the county court in relevant civil proceedings in which the perpetrator and victim of domestic abuse are parties. Relevant civil proceedings for these purposes are proceedings of a description prescribed by the Secretary of State (clause 27(8)).

Justification for the power

20. There are a wide range of civil proceedings which may be considered by the county courts. Enabling a DAPO to be made in any civil proceedings could potentially catch any proceedings involving a person suspected of domestic abuse, even if the subject-matter of the proceedings was wholly unrelated to any allegations of domestic abuse. It could, for example, apply to employment or immigration proceedings or property disputes. Given this, it is considered appropriate to restrict the type of civil proceedings in relation to which the county court could make a DAPO of its own volition. This regulation-making power is designed to this end as it would enable the Secretary of State to specify appropriate civil proceedings; initially the Government intends to specify only housing-related proceedings where it is considered that domestic abuse is most likely to be alleged or revealed in evidence. The power would enable other categories of civil proceedings to be specified over time in the light of evidence that domestic abuse is an underlying factor in non-housing related proceedings.

Justification for the procedure

21. By virtue of clause 59(4), regulations made under clause 27(8) are subject to the negative procedure. Clause 27(7) establishes the principle that a county court may make a DAPO in civil proceedings to which the perpetrator and victim of domestic abuse are parties. The judiciary, the Domestic Abuse Commissioner and other relevant parties would be consulted before such regulations were made. Given this, the Government considers that the negative procedure affords an appropriate level of parliamentary scrutiny.

Clause 33(7): Power to specify description of “responsible person”

Power conferred on:

Secretary of State

Power exercisable by:

Regulations made by Statutory Instrument

Parliamentary procedure:

None

Context and purpose

22. A court making a DAPO may impose any requirements that the court considers necessary to protect the person for whose protection the order is made from domestic abuse. Amongst the requirements that may be attached to a DAPO is an electronic monitoring requirement. An electronic monitoring requirement may be imposed to support the monitoring of an individual's compliance with other requirements of the order (for example, the operation of an exclusion zone around the victim's home). Electronic monitoring is undertaken using an electronic tag usually fitted to a subject's ankle.
23. The tag worn by the subject transmits data to a monitoring centre where it is processed and stored. The monitoring centre, operated by a "responsible person", reviews this data to see whether an individual is complying with the conditions of the DAPO being electronically monitored. Where a subject has failed to comply, the responsible person provides information to the relevant authority, in this case the police, responsible for the enforcement of the order.
24. Clause 33 sets out further provision about electronic monitoring requirements. Subsection (6) provides that a DAPO which includes an electronic monitoring requirement must specify the person who is responsible for the monitoring ("the responsible person"). Subsection (7) provides that the responsible person must be of a description specified in regulations made by the Secretary of State. Similar enabling powers are contained in, for example, section 3AC(2) of the Bail Act 1976 and section 215(3) of the Criminal Justice Act 2003. The relevant statutory instrument made under that power is the Criminal Justice (Electronic Monitoring) (Responsible Person) Order 2017 (SI 2017/235).

Justification for the power

25. The regulations will effectively specify which service provider or providers are contracted for the time being to provide electronic monitoring services for the purposes of Part 3 of the Bill. The selection of one or more suitable contractors is properly an administrative procedure. In addition, such contractors will change over time and may need to be changed at short notice. For these reasons, the designation of the responsible person is considered an appropriate matter for secondary legislation.

Justification for the procedure

26. Regulations made under clause 33(7) are not subject to any parliamentary procedure (see clause 59(4)(b)). The primary purpose of these regulations

is simply to put into the public domain the name of one or more persons contracted to provide electronic monitoring services for the purposes of Part 3; as indicated above, the selection of the contractor(s) is properly an administrative matter for the executive. Given this, no form of parliamentary scrutiny is considered necessary. This mirrors the approach with the analogous delegated powers in section 3AC(2) of the Bail Act 1976 and section 215(3) of the Criminal Justice Act 2003.

Clause 37(6): Power to add to the list of notification requirements

Power conferred on: Secretary of State

Power exercisable by: Regulations made by Statutory Instrument

Parliamentary procedure: Affirmative procedure

Context and purpose

27. Clause 37 requires a person subject to a DAPO to supply certain information to the police and keep such information up to date. The relevant information is the person's name (if the person uses one or more other names, each of those names) and home address. Such information will assist the police in monitoring the person's compliance with the provisions of the DAPO and assessing the risk they may pose to the victim. Clause 37(6) enables the Secretary of State, by regulations, to specify further notification requirements which a court may impose when making or varying a DAPO. Such regulations may also specify how any such additional requirement(s) is to be complied with (albeit, in practice, regulations are expected to apply the provisions in clause 38(1) which specifies how the subject of a DAPO is required to notify details of their name and address).

Justification for the power

28. The domestic abuse consultation sought views on what personal details should be provided under the notification requirements. Of those that answered, 76% of respondents agreed that courts should be able to require individuals subject to a DAPO to notify personal details to the police. Many respondents thought this would help the police to protect victims, but there were also concerns about proportionality and the resources that would be needed to support this proposal.

29. Respondents were most keen on individuals providing their name and home address (as clause 37 provides) but also supported the idea of providing details about new relationships, their household and child arrangement orders. Some respondents provided other suggestions, including workplace details, firearms licence details and details of new applications for dependent or spousal visas.

30. There are notification regimes in Part 2 of the Sexual Offences Act 2003 in respect of sex offenders and Part 4 of the Counter-Terrorism Act 2008 in respect of terrorism offenders. Both these regimes require a wider range of information to be provided by those subject to the notification requirements (the Counter-Terrorism and Border Security Bill adds to the list of information that terrorist offenders must provide to the police). In each case, the more expansive list of requirements, in part, reflects the fact that they are imposed on persons who have been convicted of an offence. This is not necessarily the case with the subject of a DAPO, consequently limiting the standard notification requirements to the person's name and address is considered appropriate. However, the Government indicated in response to the domestic abuse consultation that "we will also enable the court to impose additional notification requirements on a case-by-case basis...[and] will work with police and courts to make sure additional notifications are effective and will test this new approach through a pilot". Leaving the suite of case specific notification requirements to be prescribed in regulations will enable the list to be revised from time to time as may become necessary in the light of new evidence gathered through the pilots, subsequent practical experience of operating these new orders and changing patterns of abuse.

31. There are comparable powers in section 83(5)(h) of the Sexual Offences Act 2003 and section 47(2)(h) of the Counter-Terrorism Act 2008, although these take the form of a power to add to the standard list of notification requirements that apply to all registered sex offenders and registered terrorist offenders respectively.

Justification for the procedure

32. By virtue of clause 59(5), regulations made under clause 37(6) are subject to the affirmative procedure. The affirmative procedure is considered appropriate given that such regulations would enable the courts to impose additional notification requirements on persons subject to a DAPO, which would not have previously been considered by Parliament and which might be applied to individuals who have not been convicted of any offence. The analogous powers under the Sexual Offences Act 2003 and the Counter-Terrorism Act 2008 are also subject to the affirmative procedure.

Clause 38(4)(b): Power to direct the form of acknowledgment of a notification under clause 37

Power conferred on: Secretary of State

Power exercisable by: Direction

Parliamentary procedure: None

Context and purpose

33. Clause 37 requires a person in respect of whom a court makes a DAPO, within three days of the order being made, to notify the police of their name or names, and home address. There are similar requirements where the person uses a name which has not previously been notified or changes address.
34. Clause 38 sets out the process for notification including an acknowledgment that notification has taken place. Clause 38(4)(a) provides for the acknowledgment of the notification to be in writing and clause 38(4)(b) provides for the notification to be 'in such form as the Secretary of State may direct'.
35. Similar provisions appear in section 87 of the Sexual Offences Act 2003 in relation to the notification requirements under Part 2 of that Act and in section 50 of the Counter-Terrorism Act 2008 in relation to the notification requirements under Part 4 of that Act.

Justification for the delegated power

36. The notification requirement, including the information that must be provided by a person subject to a DAPO, is provided for on the face of the Bill, as is the requirement to acknowledge a notification in writing. The acknowledgement provides protection to the person notifying and it is appropriate for the notification to be in a standard format, recording specified information. The precise form of the written acknowledgment is an administrative matter and, as such, may sensibly be left to be determined by a direction of the Secretary of State.

Justification for the procedure

37. Given the purely administrative nature of such directions, which will not affect the notification requirement, it is not considered necessary to make them subject to any parliamentary procedure; this is consistent with the equivalent provisions in the Sexual Offences Act 2003 and Counter-Terrorism Act 2008.

Clause 45: Duty to issue code of practice relating to data from electronic monitoring

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Statutory code of practice</i>
<i>Parliamentary procedure:</i>	<i>None</i>

Context and purpose

38. Amongst the requirements which a court may attach to a DAPO is an electronic monitoring requirement (see clause 33). Clause 45 requires the

Secretary of State to issue a code of practice on the processing of data gathered in the course of an electronic monitoring requirement of a DAPO.

39. The processing of such data will be subject to the requirements in the General Data Protection Regulation and the Data Protection Act 2018. The code of practice issued under clause 45 is intended to set out the appropriate tests and safeguards for the processing of such data, in order to assist with compliance of the data protection legislation. For example, the Government envisages that the code will set out the length of time for which data may be retained and the circumstances in which it may be permissible to share data with the police to assist with crime detection. It is intended that the code will cover the storage, retention and sharing of personal data gathered under a requirement that is imposed for the purpose of monitoring compliance with another requirement.
40. Similar provision for a code of practice in respect of the processing of data from electronic monitoring is included in section 215A of the Criminal Justice Act 2003 (as inserted by the Crime and Courts Act 2013). The code is available [here](#).

Justification for the power

41. The Government considers that a code of practice is the most appropriate vehicle to set out expectations and broad responsibilities in relation to the processing of data gathered under the electronic monitoring requirement. There is a vast range of statutory guidance issued each year and it is important that guidance can be readily updated to keep pace with events and operational good practice.

Justification for the procedure

42. Given the likely content and nature of the code, and in particular the fact that it will not define or create new legal responsibilities and that the processing of data must be in accordance with the requirements of data protection legislation, the Government does not consider it is necessary for the code to be subject to any Parliamentary procedure. This approach is consistent with the analogous code provided for in section 215A of the Criminal Justice Act 2003.

Clause 46: Power to issue guidance about the exercise by relevant persons of their functions under Part 3

Power conferred on: Secretary of State

Power exercisable by: Statutory guidance

Parliamentary procedure: None

Context and purpose

43. Part 3 of the Bill places a number of powers and functions on police officers, including in respect of the giving of DAPNs and the making of an application for a DAPO. Functions in relation to applications for DAPOs may also be extended to other persons specified in regulations made under clause 25(2)(c). Clause 46 enables the Secretary of State to issue guidance to the police and other such relevant persons on the exercise of these and other functions under this Part. Police officers and other relevant persons are required to have regard to (rather than follow) any guidance when exercising functions to which the guidance relates.

Justification for the power

44. The purpose of guidance is to aid policy implementation by supplementing the legal framework provided for in Part 3 of the Bill. Amongst other things, the statutory guidance will provide clear information about how the various pathways for applications work and provide practical toolkits for professionals to use when making applications. There is a vast range of statutory guidance issued each year and it is important that guidance can be updated rapidly to keep pace with events and operational good practice.

45. The requirement for the guidance to be published in such manner as the Secretary of State sees fit will ensure that it remains accessible to those who need to refer to it.

Justification for the procedure

46. Such guidance is not subject to any parliamentary procedure on the grounds that it will be prepared in consultation with the Domestic Abuse Commissioner and practitioners, it will not conflict with the statutory framework in Part 3 of the Bill and chief officers and other relevant persons will not be under a statutory duty to follow the guidance. This approach is consistent with similar guidance, for example, that provided for in sections 103J(1) and 122J(1) of the Sexual Offences Act 2003 in respect of sexual harm prevention orders and sexual risk orders (available [here](#)).

Clause 50: New section 31R(5) of the Matrimonial and Family Proceedings Act 1984 - Prohibition of cross-examination in person in family proceedings: power to specify meaning of “specified offence”

Power conferred on: Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Context and purpose

47. Clause 50 inserts new sections 31Q to 31X into the Matrimonial and Family Proceedings Act 1984 (“MFPA 1984”). New section 31R prohibits cross-examination in person by a party to family proceedings where that person has been convicted of, given a caution for, or is charged with, a “specified offence”, where the witness to be cross-examined is the victim, or alleged victim, of that offence. In turn, the victim or alleged victim may not cross-examine the perpetrator or alleged perpetrator. New section 31R(5) defines a “specified offence” to mean an offence specified in, or of a description specified in, regulations made by the Lord Chancellor.

48. The purpose of this regulation-making power is to enable the Lord Chancellor to establish a list of “specified offences” for the purposes of new section 31R.

Justification for the power

49. It is intended that the offences specified in regulations specified under the power in new section 31R(5) of the MFPA 1984 should be a comprehensive list of all relevant sexual, violent and child abuse offences where it is considered that direct cross-examination of a victim (or alleged victim) by a perpetrator (or alleged perpetrator) in person, or vice versa, would be inappropriate.

50. It is intended to mirror the domestic violence and child abuse offences which are set out in a non-statutory list published by the Lord Chancellor under section 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and referred to in regulations 33 and 34 of the Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098). The lists are available at <https://www.gov.uk/government/publications/domestic-violence-and-child-abuse-offences>. Those lists include offences under the law of England and Wales, Scotland and Northern Ireland. The intention is that the position should be the same in regulations made under new section 31R of the MFPA 1984. In addition, it is intended to make provision in relation to any service disciplinary offences involving violence or abuse by one person against another.

51. The Government considers that, in order to keep the details of the specified offences comprehensive and up to date, it is appropriate to set them out in regulations, rather than in primary legislation, which would be harder to amend and keep current.

Justification for the procedure

52. Regulations under new section 31R(5) will be subject to the negative procedure by virtue of new section 31X(2) of the MFPA 1984. The Government considers that this level of scrutiny is appropriate given that the regulations will simply list, or describe, offences which are relevant for the purposes of the new section. If errors or omissions are identified in the provisions, or if new relevant offences are enacted, then the details will be readily amendable, such that they will be as up to date and comprehensive as possible.

Clause 50: New section 31S(4) of the Matrimonial and Family Proceedings Act 1984 - Prohibition of cross-examination in person in family proceedings: power to specify meaning of “protective injunction”

Power conferred on: Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Context and purpose

53. New section 31S of the MFPA 1984 prohibits cross-examination in person by a party to family proceedings where that person is someone against whom an on-notice protective injunction is in force, where the witness to be cross-examined is the person protected by the injunction. In turn, the person protected by the injunction may not cross-examine the person who is subject to the injunction. New section 31S(4) defines a “protective injunction” to mean an order, injunction or interdict specified, or of a description specified, in regulations made by the Lord Chancellor.

54. The purpose of this regulation-making power is to enable the Lord Chancellor to establish a list of “protective injunctions” for the purposes of new section 31S.

Justification for taking the power

55. It is intended that the types of protective injunctions specified in regulations under the power in new section 31S(4) of the MFPA 1984 should be a comprehensive list of all relevant provisions where it is considered that cross-examination of a person protected by the injunction by the person subject to the injunction, or vice versa, would be inappropriate.

56. It is intended to mirror the definition of the term “protective injunction” set out in regulation 33 of the Civil Legal Aid (Procedure) Regulations 2012 (augmented by the new orders provided for in Part 3 of the Bill – the Domestic Abuse Protection Notice and the Domestic Abuse Protection Order). That definition includes interdicts and orders issued under the law of Scotland or Northern Ireland.

57. As with the specified offences under new section 31R(5) of the MFPA 1984, the Government considers that, in order to keep the details of protective injunctions comprehensive and up to date, it is appropriate to set them out in regulations, rather than in primary legislation, which would be harder to amend and keep current.

Justification for the procedure

58. Regulations under new section 31S(4) will be subject to the negative procedure by virtue of new section 31X(2) of the MFPA 1984. The Government considers that this level of scrutiny is appropriate given that the regulations will simply detail types of injunction which are relevant for the purposes of the new section. If omissions are identified in the regulations, or if new types of injunction are enacted, then the regulations will be readily amendable, such that they will be as up to date and comprehensive as possible.

Clause 50: New section 31W(1) of the Matrimonial and Family Proceedings Act 1984 - Prohibition of cross-examination in person in family proceedings: power to make provision about costs of court appointed legal representative

Power conferred on: Lord Chancellor

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Negative procedure

Context and purpose

59. New section 31V(6) of the MFPA 1984 gives the court power to appoint a legal representative to undertake cross-examination of a witness in specified circumstances. New section 31W of the MFPA 1984 enables the Lord Chancellor, by regulations, to make provision for the payment out of central funds of sums to cover the properly incurred fees, costs and expenses of a legal representative appointed under new section 31V(6) of the MFPA 1984.

Justification for taking the power

60. The intention is that the regulations should make provision similar to that in Part 3 of the Costs in Criminal Cases (General) Regulations 1986 (SI 1986/1335), as applied with modifications by Part 3A of those Regulations, in that it is intended that the regulations under section 31W of the MFPA 1984 should address issues such as who should determine the costs to be paid and how they should do so, how claims for costs should be structured and submitted, and how decisions in relation to payments may be reconsidered or challenged.

61. The regulations are intended to focus on the processes involved in determining costs payable to court-appointed legal representatives and in making such payments. It is considered that this level of procedural detail is most appropriately included in secondary legislation, rather than primary. Further, setting out this detail in secondary legislation will make it

more readily amendable should this prove necessary once the new provisions are in practical use.

Justification for the procedure

62. Regulations under new section 31W(1) will be subject to the negative procedure by virtue of new section 31X(2) of the MFPA 1984. The Government considers that this level of scrutiny is appropriate given that the intention is that the regulations will be largely setting out matters of practice and procedure. The regulations that provide for funding of legal representatives under the Youth Justice and Criminal Evidence Act 1999 (YJCEA), on which these provisions are modelled, are similarly subject to the negative procedure (see section 40 of the YJCEA and section 29 of the Prosecution of Offences Act 1985).

Clause 53: Power to issue guidance about the disclosure of information by police forces

Power conferred on: Secretary of State

Power exercisable by: Statutory guidance

Parliamentary procedure: None

Context and purpose

63. The Domestic Violence Disclosure Scheme (“the scheme”), often referred to as “Clare’s Law”, was implemented across all police forces in England and Wales in March 2014.

64. The scheme has two elements: the “right to ask” and the “right to know”. Under the scheme an individual or a relevant third party can ask police to check whether a current or ex-partner has a violent past or a history of abuse. This is the “right to ask”. If records show that an individual may be at risk of domestic abuse from a partner or ex-partner, the police will consider disclosing the information.

65. The “right to know” enables the police to make a disclosure if they receive indirect information regarding the current or ex-partner that may impact the safety of the individual, such as information arising from a criminal investigation, through statutory or third sector agency involvement, or from another source of police intelligence.

66. In each case, a disclosure can be made lawfully by the police under the scheme if the disclosure is based on the police’s common law powers to disclose information where it is necessary to prevent crime and if the disclosure also complies with data protection legislation and the Human Rights Act 1998. It must be reasonable and proportionate for the police to make the disclosure based on a credible risk of violence or other harm.

67. Non-statutory guidance for the police on the operation of the scheme was first published by the Home Office in July 2012 and which, following an [assessment report](#) of the pilot scheme in November 2013, was updated in December 2016. The updated [guidance](#) took into account the findings of an assessment by the Home Office of the first year's operation of the scheme.
68. Her Majesty's Inspectorate of Constabulary and Fire and Rescue Services domestic abuse thematic reports, published in [2015](#) and [2017](#), concluded that "opportunities were being missed [through the scheme] to provide better support and protection for victims". Both reports identified inconsistencies surrounding the use of the scheme by police forces and noted the low volume of disclosures. The 2017 report concluded that "it is important that both members of the public and officers are aware of the scheme's purpose and the application process". The Government aims to drive greater use and consistent application of the scheme by putting the guidance underpinning the scheme on a statutory footing and placing a duty on the police to have regard to the guidance, as provided for in clause 53 of the Bill. The Home Secretary is under a duty to consult the Domestic Abuse Commissioner, the National Police Chiefs' Council and such other persons as he or she considers appropriate before issuing or revising the guidance.

Justification for the power

69. The purpose of the guidance is to support the delivery of the Domestic Violence Disclosure Scheme and assist front line officers and those who work in the area of public protection with the practical application of the scheme.
70. The Domestic Violence Disclosure Scheme did not introduce any new powers for the police to disclose personal data; the same is true of clause 53. The scheme is based on the police's common law powers to disclose information where it is necessary to prevent crime, as explained above at paragraph 66. The scheme and the accompanying guidance provides structure and processes for the exercise of the powers. It does not, of itself, provide the power to disclose or to prevent disclosures being made in situations which fall outside the scheme. Given this, it is appropriate for such practical advice to be included in guidance which can readily be revised from time to time, as necessary, to reflect evolving good practice and relevant case law.
71. Topics which may be covered in the statutory guidance include:
- Recommended minimum levels of knowledge and experience required by practitioners to discharge their functions under the scheme effectively;
 - Suggested step-by-step processes and timescales for the two disclosure routes under the scheme (the "right to ask" and the "right to

know”), including example scenarios for each route;

- Minimum standards of information to be obtained from the applicant;
- Minimum standards of intelligence checks to be completed;
- Guidance on effective engagement with a multi-agency forum such as a Multi-Agency Risk Assessment Conference to inform decision-making;
- Guidance on robust risk assessment and safety planning in order to safeguard the individual or individuals potentially at risk of domestic abuse;
- Suggested types of information which may be disclosed under the scheme, such as details of allegations, charges, prosecutions and convictions for relevant offences;
- Guidance on what constitutes a “reasonable and proportionate” disclosure in line with case law, relevant human rights and data protection legislation; and
- Suggested forms of wording for communicating outcomes at each stage of the DVDS process.

Justification for the procedure

72. Any guidance issued under clause 53 would not be subject to any parliamentary procedure on the grounds that it would provide practical advice on the effective operation of the Domestic Violence Disclosure Scheme and would be worked up in consultation with the Domestic Abuse Commissioner, the police and any other persons the Home Secretary considered appropriate. As indicated above, the guidance will not of itself create any new powers to disclose personal information. Moreover, whilst chief officers of police must have regard to the guidance, the guidance will not be binding to the extent that this requirement falls short of a duty to follow the guidance.

Clause 57(1): Power to issue guidance about operation of the Act

Power conferred on: Secretary of State

Power exercisable by: Statutory guidance

Parliamentary procedure: None

Context and purpose

73. As set out in paragraphs 2 and 3 above, the Bill includes a number of measures to tackle domestic abuse, including by better protecting and supporting victims. Clause 1 of the Bill provides for a statutory definition of domestic abuse for the purposes of the Bill, although it will also have wider application to inform the response to domestic abuse by statutory and third

sector agencies. The definition of domestic abuse makes clear that such abuse is not confined to physical violence. It includes concepts, such as “controlling or coercive behaviour” and “economic abuse”, which may not be readily understood by practitioners and others without further explanation.

74. To complement this and other provisions, clause 57 confers power on the Secretary of State to issue guidance about the effect of any of the provisions in the Bill. Such guidance would explain the different types of relationships and abuse that are covered by the definition in clause 1, the prevalence of female victims and the impact of domestic abuse on children. Such statutory guidance would, amongst other things, help promote understanding amongst public authorities of domestic abuse and the powers available to them to protect and support victims.

75. In preparing the guidance, the Secretary of State would be under a duty to consult the Domestic Abuse Commissioner, the Welsh Ministers so far as the guidance is to a body exercising devolved Welsh functions, and such other persons as he or she considers appropriate (for example, the police and other practitioners). Persons exercising public functions to whom the guidance is given will be under a duty to have regard to the guidance when exercising such functions.

76. A similar such power is contained in section 5C of the Female Genital Mutilation Act 2003 (as inserted by Serious Crime Act 2015).

Justification for the delegated power

77. The Bill itself provides for a statutory definition of domestic abuse and makes other substantive provision to enable criminal, civil and family justice agencies and others to protect and support victims. The purpose of any guidance under clause 57 is to support relevant public authorities in giving effect to the provisions in the Bill. There is a vast range of statutory guidance, such as this, issued each year and it is important that guidance can be updated quickly to keep pace with operational good practice.

Justification for the procedure

78. Any guidance issued under clause 57 would not be subject to any parliamentary procedure on the grounds that it would provide practical advice on the application of the definition of domestic abuse and other provisions in the Bill and would be worked up in consultation with all interested stakeholders and practitioners. The guidance will not conflict with, or alter the scope of, the definition in clause 1. Moreover, whilst a person exercising public functions will be required to have regard to the guidance when exercising those functions, the guidance will not be binding to the extent that this requirement falls short of a duty to follow the guidance. The approach taken in clause 57 is consistent with other legislative provisions providing for statutory guidance, including section 5C of the Female Genital Mutilation Act 2003 and section 77 of the Serious

Crime Act 2015 (which provides for guidance about the investigation of the offence of controlling or coercive behaviour in an intimate or family relationship).

Clause 58(1): Power to make transitional or saving provision

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>None</i>

Context and purpose

79. Clause 58(1) confers power on the Secretary of State to make such transitional or saving provisions as he or she considers appropriate in connection with the coming into force of the provisions in the Bill. Such regulations may, amongst other things, make necessary adaptations of any provisions in the Bill brought into force in consequence of other provisions not yet having been commenced (clause 58(2)).

Justification for the power

80. This standard power ensures that the Secretary of State can provide a smooth commencement of new legislation and transition between existing legislation (for example, the existing civil preventative measures provided for in the Crime and Security Act 2010 which are to be superseded by the provisions in Part 3) and the Bill, without creating any undue difficulty or unfairness in making these changes. There are numerous precedents for such a power, for example, section 183(9) of the Policing and Crime Act 2017.

81. Amongst other things, this power would enable transitional measures to be put in place if guidance prepared under clause 57 of the Bill was issued before the Domestic Abuse Commissioner had been appointed (clause 57(4)(a) requires the Commissioner to be consulted about such guidance before it is issued).

Justification for the procedure

82. As indicated above, this power is only intended to ensure a smooth transition between existing law and the coming into force of the provisions of the Bill. Such powers are often included as part of the power to make commencement regulations and, as such, are not subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them.

Although drafted as a free-standing power on this occasion, the same principle applies and accordingly the power is not subject to any parliamentary procedure (see clause 59(4)(b)).

Clause 61(3): Commencement power

<i>Power conferred on:</i>	<i>Secretary of State</i>
<i>Power exercisable by:</i>	<i>Regulations made by statutory instrument</i>
<i>Parliamentary procedure:</i>	<i>None</i>

Context and purpose

83. Clause 61(3) contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations. Subsections (4) to (6) augment this standard power to enable certain provisions to be piloted, namely the provisions in Part 3 (which provides for DAPNs and DAPOs) and clause 52 (polygraph testing). The piloting power would enable these provisions to be brought into force in relation to a specified area or areas and for specified purposes (for example, in relation to clause 52, the piloting of polygraph testing could be confined to persons convicted of certain specified domestic abuse-related offences); regulations may also specify the period over which the pilot is to run. In the case of Part 3, section 33 of the Crime and Security Act 2010 made similar provision for piloting the precursor Domestic Violence Protection Notice and Order. Similarly, section 41 of the Offender Management Act 2007 provided for the piloting of polygraph testing regime as it applies to sex offenders.

Justification for the power

84. Leaving provisions in the Bill to be brought into force by regulations will afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

85. Before implementing the new DAPN and DAPO across the whole of England and Wales it is proposed to pilot their operation. Such pilots will, in particular, enable the Government to test the effectiveness of positive requirements (such as attendance at alcohol and drug treatment programmes) and the electronic monitoring requirement. It is similarly proposed to test the use of polygraph testing with high risk domestic abuse perpetrators to establish whether the benefits that have been seen with

polygraph testing of sex offenders translates to the domestic abuse setting.

86. Given the nature of a pilot – namely that it will be time bound and limited to one or more particular areas – it is appropriate to leave to secondary legislation the determination of the area or areas where the pilot is to be conducted and over what period (in the case of Part 3, for example, both of these matters will be a matter for negotiation with one or more police forces and other stakeholders).

Justification for the procedure

87. As is usual with commencement powers, regulations made under clause 61 are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

88. In accordance with normal practice, the power to make pilot schemes is similarly not subject to any parliamentary procedure. Again, Parliament will already have approved the provisions to be commenced by enacting them, and partial commencement through the making of a pilot scheme affords the opportunity to assess the effectiveness of the provisions prior to national roll-out. This approach is consistent with the analogous provision (as regards Part 3 of the Bill) in section 33 of the Crime and Security Act 2010.

89. It is accepted that, in relation to polygraph testing, this position contrasts to that in section 41(4) of the Offender Management Act 2007 which provided that an order commencing sections 28 and 29 of that Act (which provides for polygraph testing of sex offenders on licence) to be subject to the affirmative procedure. However, given that polygraph testing is now established in the context of managing sex offenders on licence, it is considered that the normal procedural arrangements should apply to any regulations bringing clause 52 into force across England and Wales.

**Home Office/Ministry of Justice
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