DOMESTIC ABUSE ACT 2021

After a protracted journey through Parliament, commencing in 2019, on 29 April 2021 the Domestic Abuse Act was signed into law. This legislation has been heralded as a landmark reform in the area of domestic violence and abuse, although criticised for leaving substantial gaps in its provision: perhaps most significantly, in respect of those with no recourse to public funds, whose difficulties in accessing refuge accommodation and other support services have not been specifically addressed by the Act.

Whilst the Domestic Abuse Act 2021 is unlikely to bring about wholesale change in the way the family courts address issues of domestic abuse - and will not remedy the broader concerns identified in *Re HN* [*2021] EWCA Civ 448* concerning, for example, the use of Scott schedules - there are a number of provisions which will be of interest to practitioners of family law. The purpose of this article is set to set out those reforms and consider how these may come to impact the family courts in the future.

Dates for commencement of some of the Act's most noteworthy provisions have yet to be set (although the government's factsheet suggests that 'most of the provisions in the Act will come into force during 2021/22'[1]), and regulations not yet drafted – and therefore this consideration is undertaken with a certain degree of speculation.

Definition

The Domestic Abuse Act 2021 places a comprehensive definition of domestic abuse on a statutory footing, setting out how such abuse is to be defined for the purpose of the Act. This does not differ in its substance from that already contained within Practice Direction 12J and

[1] https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-bill-2020-overarching-factsheet

mirrors the discussion of coercive and controlling behaviour in *Re HN* and other recent case law (*s 1(3)*).

The Act also confirms the approach adopted by the family court, in that a child who 'sees or hears, or experiences the effects of' domestic abuse and is related to the victim or perpetrator is also considered to be a victim of that abuse (*s3*). Family practitioners may also wish to note that 'for the purposes of this Act A's behaviour may be behaviour "towards" B despite the fact that it consists of conduct directed at another person (for example, B's child)' (*s1(5)*).

If the implementation of this definition does result in an amendment to PD12J, the impact in practice is likely to be limited.

Cross examination

One of the areas addressed by the Act, which has been subject to most frequent comment by the press and practitioners alike, is the cross examination of alleged victims by litigants in person. This is an issue which arises most frequently within the context of applications under Part II Children Act 1989, where factors including the limitation on legal aid provision have resulted in a large number of unrepresented parties appearing in cases involving domestic abuse.

The current law

The issue was addressed by Hayden J in the case of *PS v BP [2018] EWHC 1987 (Fam)*, where the court (now almost three years ago) offered a 'forensic life belt until a rescue craft' in the form of parliamentary action became available (para 34). Hayden J set out that there was no presumption against cross examination of an alleged victim by an accuser, and the court must ensure fairness to both sides.

The court must consider if the cross examination would be abusive in nature, and the likely impact upon children of the family. The possibility of appointment of a r16.4 Guardian, to in effect undertake cross examination on behalf of both parties, was considered, and the method adopted by many courts – of questions being reduced to writing and put by the judge – was endorsed, if fair on consideration of the other factors set out.

In practice, it appears that the vast majority of cross examination continues to be put by the court in cases of this nature, with the court and Cafcass infrequently supporting the r16.4 approach.

The test: a prohibition

The Domestic Abuse Act 2021, however, will fundamentally alter this approach when implemented. In the context of family proceedings, the Act will insert sections 31R-Z into the Matrimonial and Family Proceedings Act 1984 and provide as follows:

31R Prohibition of cross-examination in person: victims of offences

(1) In family proceedings, no party to the proceedings who has been convicted of or given a caution for, or is charged with, a specified offence may cross-examine in person a witness who is the victim, or alleged victim, of that offence.

(2) In family proceedings, no party to the proceedings who is the victim, or alleged victim, of a specified offence may cross-examine in person a witness who has been convicted of or given a caution for, or is charged with, that offence.

Similar provision is made by section 31S, where an on-notice injunction is in place, and by 31T, '*where **specified evidence** is adduced that a person who is a witness has been the victim of domestic abuse carried out by a party to proceedings'*.

The prohibition applies to both parties; presumably to provide equality of arms if both parties are unable to access legal aid (see eg. *GR [2020] EWHC 3140*), and to reflect the reality that cross examining an alleged perpetrator is unlikely to be less traumatic than answering questions put by them.

The legislation makes clear that if the court was not aware of any such conviction, for example, then this will not affect the validity of the decision of the court if cross-examination is permitted (how this provision might be applied on appeal will need to be tested).

'Specified offence' is to be defined by regulations (the power to do so, already being in force). An o notice injunction is defined by section 31S(5) to include an injunction where a return hearing, or other hearing of which the respondent has had notice, has taken place. The type of injunction to which the prohibition applies will again be defined by regulations.

The most significant provision in family proceedings may prove to be section 31T: when 'specified evidence is adduced'. As above, this definition is to be set out in regulations, and those regulations will likely determine the efficacy of this blanket prohibition. S31T(4) provides:

> *(4) Regulations under subsection (3) may provide that any evidence which* ***satisfies the court that domestic abuse, or domestic abuse of a specified description, has occurred*** *is specified evidence for the purposes of this section.*

If the test for 'satisfying the court' that domestic has occurred is set too high, there will likely be many cases which fall through the cracks and which do not benefit from the automatic prohibition on cross-examination. Section 31S (on notice injunctions) may go some way to plugging the gap, but it should not be presumed that in all cases under Children Act 1989 for example, an application under eg. Family Law Act 1996 will also be made. Those who practice in this area of law will be aware that police involvement in cases of domestic violence often

does not lead to either charge, conviction or caution - for a litany of reasons. Perhaps the test will echo that applied in respect of legal aid? At the moment, this remains unclear.

What is apparent, however, is that a court being asked at FHDRA to consider how a fact-finding might proceed is unlikely to have before it much 'evidence' at all, and it seems that pre-trial reviews may (and should, if the issue is to be addressed appropriately) proliferate in dealing with this issue.

The test: a discretion

If a party cannot satisfy the court in respect of the above issues, the Act also provides for section 31U, a 'catch all' provision, giving the court with a discretion to impose a prohibition if the following conditions are met:

- the quality **or** significant distress conditions are met;
- **and**, it would not be contrary to the interests of justice to do so (*s31U(1)*).

The quality and significant distress conditions can be found in section 31U(2) and (3), and consider the quality of a witness' evidence, and the distress which would be caused by cross examination by the litigant in person in particular.

The court can make such a direction of its own motion, or on application by a party to proceedings. It shall consider the factors in section 31U(5), which are non-exhaustive. The direction under s31U may be revoked if in the interests of justice, and if there has been a material change in circumstances (*s31V*).

If the concerns identified in respect of section 31T above are well founded, section 31U will take on an increased importance. It will be interesting to see if the courts apply factors similar to those identified in *PS*, or if an approach more akin to that currently applied on an application for special measures will be taken. Any approach will likely be heavily influenced by the

implications of the prohibition of cross-examination, which were not previously available to the court.

The solution?

Section 31W Matrimonial and Family Proceedings Act 1984 will provide that if there is no alternative means for the witness to be cross-examined, nor obtaining the evidence which might have been given (and if the litigant in person does not notify the court that a qualified legal representative is to act for them for that purpose):

> *(5) The court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party.*
>
> *(6) If the court decides that it is, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the party.*

This scheme appears to be similar to that already in place under the Youth Justice and Criminal Evidence Act 1999, which makes similar provision for victims of specified offences in the criminal courts. As under the YCJEA 1999, a court appointed advocate will not be responsible to the party for whom they are appointed (*s31W(7)*). Readers may note with interest a document produced by the Bar Council, in respect of the ethical obligations of such an advocate under the YJCEA scheme[2].

Potential issues which might arise include: the extent to which an advocate has sight of the papers in the case, their knowledge of the case which is being run by the party, and their inability to take direct instructions. At the present, judges will often fill in the gaps of a cross examination written or conducted by a litigant in person; and it may be the case that this will

[2] 'Court Appointed Legal Representatives', Bar Council

continue to be required if an advocate is hampered by only a limited knowledge of the case and its background.

Costs will be met out of central funds, with rates to be set by regulations (section 31X).

Civil proceedings

Similar provisions are to be enacted as s85E onwards of the Courts Act 2003, in the context of civil proceedings. (This will prove relevant in, for example, cases involving TOLATA claims in the family context). These echo the rules in the family jurisdiction, save that the automatic prohibition does not apply on charge, only conviction or caution (s85F), but any charge must be considered when the catch-all provision is being relied upon (s85I).

Special Measures

Section 63 makes provision for the amendment of the Family Procedure Rules such that where a person 'is, or is at risk of, being a victim of domestic abuse' it is to be assumed that the quality of their evidence and their participation in proceedings are likely to be diminished by reason of their vulnerability. This is in effect a presumption of eligibility for the special measures already set out in Part 3A and PD3A of the FPR.

As was set out above, it is unclear how the court is to establish that a person is a victim of, or at risk of being a victim, of domestic abuse prior to a fact-finding hearing when this issue will be the most pressing.

It is noted that by section 63(4) the assumption will not apply when a person does not wish to be deemed eligible. This presumably is enacted to ensure that no adverse inferences are drawn as to the quality of a witness' evidence, if and when they decline to have the benefit of special measures.

As above, similar provisions are made in respect of the civil jurisdiction by section 64. Here there is no assumption that the quality of evidence or participation will be adversely affected, but rather the court must consider 'whether' this is the case and if so, whether it is necessary to make a special measures direction.

Conversely, the civil provisions are wider in that they apply also if a person is a 'victim, or alleged victim, of a specified offence'. This appears to suggest that even those who are not the victims of domestic abuse as so defined by the Act (perhaps, for example, a victim of harassment who is not 'personally connected' (s1(2)) to the perpetrator) will be able to take advantage of this protection. Special measures are found in PD1A to the Civil Procedure Rules.

Domestic Abuse Protection Orders

Another significant amendment to the way in which family courts respond to domestic abuse was subject to less comment during the passage of the Act, but has the potential to make a significant difference to how courts deal with (and how practitioners advise their clients) in relation to domestic abuse.

Domestic Violence Protection Notices (DVPN) and Domestic Violence Protection Orders (DVPO) have been in place for some time and will likely have been encountered in the family context as a short-term measure imposed by the police (a DVPN for 48 hours, a DVPO for up to a period of 28 days on application to a magistrates court).

The Domestic Abuse Act 2021 brings in a new regime of Domestic Abuse Protection Notices (which will replace DVPNs), and most importantly for family lawyers: **Domestic Abuse Protection Orders** ('DAPO') (which will replace DVPOs). These will be piloted, before implementation throughout England and Wales.

Who can apply?

An application may be made by the police (s28(6)), by a victim (s28(2)(a)), a 'person specified in the regulations' (s28(2)(c)), or 'any other person with leave of the court'. Applications must be made by the police in magistrates courts, and by any other person to the family court or in the civil proceedings which are defined as 'relevant proceedings' by regulation (s31(7)).

The court in family, relevant civil or criminal proceedings may also make orders of its own motion. The person to be protected by an order does not need to consent (s33(3)).

Effect of an order

Section 28:

In this Part a "domestic abuse protection order" is an order which, for the purpose of preventing a person ("P") from being abusive towards a person aged 16 or over to whom P is personally connected—

> *(a) prohibits P from doing things described in the order, or*
> *(b) requires P to do things described in the order.*

Specific examples are suggested at section 35, and this includes preventing P from contacting a person, not coming within a certain distance of a person's address, or specific premises, prohibiting P from entering premises or excluding or evicting another from them, or requiring P to leave the premises.

Non-mol by another name?

The immediate question which arises is: to what extent does a DAPO add to non-molestation and occupation orders under the Family Law Act 1996? These orders will not be repealed, but

the government considers that DAPOs will become the 'go-to' order in cases of domestic abuse[3].

In terms of the ability of the police to apply for such orders, the Domestic Abuse Act 2021 will increase their ability to apply for longer lasting protection for victims of abuse.

It will also allow specified persons, and those with leave of the court, to make such applications. It is assumed that such specified persons might include domestic abuse workers, social workers or other professionals. It may also perhaps include family members, or others known to a party (although any such provision would need to be carefully defined, and the regulations may leave much of the work to 'any other person with leave of the court').

However, it seems unlikely that the provision of legal aid funding will be extended to such persons for the purpose of making such an application and for that reason alone, the onus is likely to fall back upon the victim of the alleged abuse.

Similarities

The test for the making of a DAPO is found in section 32. The court may make an order if satisfied on the balance of probabilities that P has been abusive towards a person aged 16 or over to whom P is personally connected **and** that it is necessary and proportionate to protect that person from abuse carried out by P. The court must also consider the factors set out in section 33, which include the welfare of any person under 18 whose welfare the court considers relevant.

This is framed more specifically in terms of domestic abuse, rather than 'molestation', but is unlikely to alter the nature of the evidence being considered by the court when considering

[3] https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-protection-notices-orders-factsheet

protective orders in practice. Those personally connected are defined almost identically to 'associated persons'; save that an intimate relationship need not be of 'significant duration' (although the extent to which this requirement is adjudicated in practice remains unclear).

Breach of a DAPO will be an arrestable offence punishable by five years in prison (s39, s40), and the subject of the order or any other person with leave may apply for a warrant (s40(3)). Specific provision is made for applications without notice (section 34).

Potential differences (and difficulties)

'Occupation orders': As compared to non-molestation orders, the most significant difference is a DAPO's ability to impose a mandatory requirement on P (s27(1)(b)), and in this respect is more akin to an occupation order. It appears that the without notice provisions for DAPOs do not exclude those requirements, and as such it appears there is potential here for a without notice 'occupation order', unless otherwise constrained by case law or regulations.

It is also of note that a DAPO regulating occupation of the family home could be made without consideration of the detailed requirements set out within sections 33-38 Family Law Act 1996; particularly factors such as the financial and housing resources of each party, and the 'balance of harm' test set out therein. Whilst the test under the 2021 Act appears much simpler – and may make it easier for protection to be sought and granted by the court - it does raise the possibility of the test under the Family Law Act 1996 mandating a different order; particularly problematic if parties have made cross-applications under the different legislation. Might, for example, the courts incorporate some of those factors under the FLA 1996 when considering a DAPO with the same effect, to address this issue?

Mandatory requirements: The imposition of mandatory requirements appears to extend far wider than that previously contemplated by the Family Law Act, however. Provision is made for a person to be allocated to monitor compliance with a DAPO (s36(2)), and to report that compliance to the police. Further, the Act empowers the family court to impose an electronic

monitoring requirement for 12 months – although how the family court would monitor or enforce such an order (particularly subsequent to the end of proceedings) remains unclear.

In particular, the government's factsheet suggests that a DAPO may require: 'the perpetrator to attend a behaviour change programme, an alcohol or substance misuse programme or a mental health assessment'.

It should be noted at this stage, that the mandatory parts of an occupation order are not, at present, arrestable offences on breach in the same way as a non-molestation order – and as such that extension alone is a departure from the previous scheme. The 2021 Act then appears to take this one step further and make punishable by up to five years imprisonment failure to attend a perpetrator programme or similar provision. This, it would seem, would also be subject to monitoring conditions, resulting in report to the police for non-compliance.

Such a provision no doubt increases the protection offered to victims of abuse, and it is not disputed that attendance at a perpetrator programme or other assessment may have the capacity to reduce the risk of abuse from P in the future. However (although not the author's area of specialism), it is difficult to locate a parallel situation currently in force in respect of the criminal law, where imposing a positive duty to act is not the norm. Conditions might be placed, for example, on the imposition of a suspended sentence or community order, but at a stage where guilt has already been established beyond a reasonable doubt.

It appears that family courts will need to act cautiously in imposing mandatory requirements within DAPOs, if not they may well be open to challenge; not least given that attendance on at a DVIP is often contingent upon acceptance of abuse, and the course provider's own assessment of the same. Specific provision is made within the Act that the court must receive evidence about the suitability and enforceability of a positive requirement before imposing it (s36(3)), and in respect of appeals (s 48). It remains to be seen if a balance can be struck between such orders being properly and fairly imposed (such as to insulate against challenge

on appeal), and their being able to provide meaningful and additional protection to victims of abuse.

Public law proceedings: one benefit which is offered by the DAPO regime may be the ability of local authorities (if they are to be specified persons – the factsheet suggesting this is the case) to make applications for DAPOs, in public law proceedings or otherwise. Local authorities would not, then, be reliant on the alleged victim or the court to make the order of its own motion. Taken to its extremity however, the 2021 Act, as drafted, opens up the possibility of a court imposing a mandatory requirement, in care proceedings, on application by the local authority - with criminal sanctions for breach. On its face, this appears an incredibly draconian order; it remains to be seen how this might operate in practice.

Children: the test for the making of an order makes clear that 'domestic abuse protection order" is an order which, for the purpose of preventing a person ("P") from being abusive **towards a person aged 16 or over** to whom P is personally connected' (*s22(1)*). As such, it does not seem possible for a DAPO to include the prohibition common in non-molestation orders, as regards the harassment, threat of violence towards or communication with children, which is specifically contemplated by the Family Law Act (*s42(1)(b)*). This seems a compelling reason that many may still seek to utilise non-molestation orders, over the new DAPO, unless the protection of the person over the age of 16 might be construed to require those provisions.

Section 91(14) Children Act 1989

A section 91A is added to the 1989 Act, confirming that the court is permitted to make a section 91(14) order where the making of an application under Children Act 1989 would put 'the child concerned or another individual at risk of harm'. Harm is to be read as a 'reference to ill-treatment or the impairment of physical or mental health'.

New offences

Are found in sections 69 and 70: strangulation or suffocation, and threats to disclose private sexual photographs and films with intent to cause distress ('revenge porn'). Whilst the court in *Re HN* was clear that domestic abuse need not be proved to the criminal standard or definition in the family court, it might assist in certain cases to be able to point to such behaviours as being considered abusive by statute.

Contact centres

The Secretary of State must, before the end of the relevant period, prepare and publish a report about the extent to which individuals, when they are using contact centres in England, are protected from the risk of domestic abuse or, in the case of children, other harm. This report is due on 29 April 2023.

Clare's Law

Is placed on a statutory footing, by section 77 of the Domestic Abuse Act 2021[4].

Medical Evidence

Finally, section 80 of the 2021 Act prohibits medical professionals from charging a fee when providing evidence of domestic violence. This provision does have a commencement date, and will assist those applying for legal aid from 1 October 2021.

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[4] https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet