

Written evidence submitted by the Magistrates Association (DAB17)

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About the Magistrates Association

The Magistrates Association (MA) is the independent membership body for the magistracy. We work to promote the sound administration of the law, including by supporting our members, informing the public about the courts and the role of magistrates, producing and publishing research on key topics relevant to the magistracy, and contributing to the development and delivery of reforms to the magistracy, the courts and the broader justice system. With 14,000 members across England and Wales, we are a unique source of independent insight and information on the magistracy.

Introduction

1. The MA welcomes the underlying aims of the Domestic Abuse Bill, particularly with regard to its intentions to promote awareness and understanding of domestic abuse and to reform the justice system with victim¹ safety as a priority. We do, however, have concerns around some specific proposals put forward in the Bill. We have limited our comments to those that relate most directly to the expertise and remit of the MA.

Section 1: The statutory definition of domestic abuse

2. We welcome the government's decision to introduce a statutory definition of domestic abuse, which has the potential to help ensure that all agencies and bodies are able to operate under a commonly understood framework. We would, however, like to make the following observations on the proposed definition:
 - a) We have some concerns with the term 'economic abuse' being used in place of 'financial abuse', the latter of which is used in the current cross-government definition. We would suggest that without clear guidance there is potential for confusion between the two concepts. With financial abuse arguably being more generally understood, there is a risk that the definition could inadvertently narrow instead of widen how domestic abuse is understood. We welcome the assurances that the government has put forward on this, indicating that the statutory guidance will expand further on the different types of abuse covered and the forms that they can take. This will be crucial in ensuring that the definition is widely understood and consistently applied.
 - b) When considering how the definition may be interpreted in practice in the courts, we would also like to note that the inclusion of economic abuse may give the impression that

¹ Throughout this briefing we refer to 'victims' or 'perpetrators' of domestic abuse, for the purposes of readability. In practice, however, this definitive labelling is only appropriate if there has been a criminal case establishing guilt, or in family proceedings if there has been an admission or finding of fact that the allegations took place.

issues of child maintenance can be dealt with and resolved during family proceedings. It is important that these issues are raised, so the court can take account of alleged abuse through withholding child maintenance. If, for example, child maintenance is withheld, and it has an adverse effect on a party's ability to acquire, use or maintain money or property, or to obtain goods or services, this could impact on the decision of the court. However, the court cannot actually resolve the issues around the payment of child maintenance and it could cause confusion if parties do not understand that. We do not have a view on whether family proceedings should be able to deal with these types of disputes, but would suggest that as the definition is formulated and statutory guidance developed, clarity on the issue as it currently stands should be ensured to manage expectations of all parties.

Section 19 - Section 46: Domestic Abuse Protection Notice and Domestic Abuse Protection Order

3. While acknowledging that more can be done to protect victims of domestic abuse, the MA has concerns with the proposals to create a new Domestic Abuse Protection Order (DAPO), which could lead to disproportionate outcomes if taken forward as proposed.
4. DAPO can include both positive and negative requirements, can be placed on an individual without a specific time limit, and can include a range of notification and electronic monitoring requirements (with the latter being restricted to up to 12 months). While many of these components are to be welcomed, in that they can help to provide robust assurances for victims, we believe that very clear guidance will be required to ensure that the orders are used proportionately and without setting up individuals to fail. This is all the more pressing because the orders can be put in place without a finding of guilt for a criminal offence or finding of fact in a family jurisdiction and will lead to criminal sanctions if breached.
5. With regard to those that are able to make an application for the order, we do have some reservations about allowing a DAPO to be made without the victim's approval; this risks putting the victim in danger, or having adverse implications for their later engagement with any court proceedings. We note the requirement for courts to take into account the wishes of a victim before making an order, and the fact that the third parties allowed to apply will be restricted to police and other specialist services, which are important and welcome safeguards. We also acknowledge that this approach does have the potential to take the burden away from the victim in having to apply for the order, which in some circumstances will clearly be beneficial. However, we would suggest that this issue should be monitored closely if taken forward, to ensure it does not inadvertently lead to adverse outcomes for those that the order seeks to protect.
6. We would also like to highlight the specific challenges that the DAPO may create in the context of the family court. The introduction of the DAPO would mark a significant shift in the powers available to the court, when compared to the use of other disposals such as non-molestation orders (which do not include positive or notification requirements). With the potential for a DAPO to provide more onerous restrictions on the respondent, and with the family court only requiring a civil standard of proof when considering domestic abuse allegations, it is likely that more applications for DAPOs will be challenged than is currently the case for non-molestation orders. Ultimately, we are concerned that this could place additional burdens on court time, not to mention the possibility of additional stress for the victims.
7. A further concern for the family court is with regard to the suitability of a Domestic Abuse Perpetrator Programme (DAPP) being placed on an alleged offender as part of a DAPO prior

to any finding of fact, or without any previous finding of guilt in a criminal court. As is widely acknowledged, DAPPs are most effective when culpability has been accepted by the participant, and the offender in question has shown a willingness to change their behaviour. Imposing such requirements without engagement from the respondent could be counterproductive and, given the limited availability of DAPPs, an ineffective use of valuable resources.

Section 59: Prohibition of cross-examination in person in family proceedings

8. The MA strongly welcomes the proposals to prohibit the cross-examination in the family courts of alleged victims of domestic abuse by their alleged abusers. This change is long overdue. It is also positive that the provisions not only set out specific instances in which cross-examination should be prohibited (i.e. where the accused has been convicted of or given a caution for a domestic abuse offence, or where an on-notice protective injunction is in force) but also give the court specific powers to prevent cross-examination in other specified circumstances i.e. via the 'quality condition' and the 'distress condition'.
9. With regard to how the prohibitions may work in practice, we would like to emphasise that the structure of family proceedings differs significantly from that of criminal proceedings (which has an existing scheme of prohibitions that this framework appears to be based on). For example, in criminal proceedings a complainant and defendant will only come together once (i.e. at the trial itself), but during the course of family proceedings the parties are likely to be in attendance for several hearings. It is not currently clear as to whether advocacy will be provided for the duration of proceedings, or only for specific hearings where requirements under the 'quality' or 'distress' conditions are most pronounced, or where oral evidence will be heard.
10. It is also important to note that in instances where the court appoints a qualified legal representative to cross-examine a witness, the draft legislation states that the representative is not responsible to the party. A legal representative may also only be instructed for a relatively small proportion of the proceedings (potentially mid-way through). This may raise questions around the ability of the representative to advocate effectively. While the proposed measures for the court to appoint a legal representative are overwhelmingly positive and to be welcomed, these issues will need to be monitored closely.

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