Ministry of Justice

Lord (David) Wolfson of Tredegar, QC
Parliamentary Under-Secretary of State

Baroness Hamwee and Lord Paddick
House of Lords
London
SW1A 0PW

MoJ ref: SUB85483

15 February 2021

Dear Baroness Hamwee and Lord Paddick,

DOMESTIC ABUSE BILL: DOMESTIC ABUSE PROTECTION ORDERS

I am grateful to you and all Peers who spoke at the third day of Committee on 1 February 2021. During the debate, you both raised several questions with regards to the Government's position, which I committed to respond to by way of this letter. In doing so I have not sought to repeat the points that I already made in the debate, but to provide further information to explain our intentions on outstanding points.

Comparisons with existing orders

You (Lord Paddick) rightly pointed out that in some instances, the Government had argued against amendments on the basis that they would be inconsistent with other protective orders, whilst also challenging other amendments that would make the Domestic Abuse Prevention Order (DAPO) more consistent with other protective orders, such as the Knife Crime Prevention Order (KCPO). The reason for taking a similar approach to existing protective orders in some instances, but not *all* instances, is that our intention in creating the new DAPO is to bring together the strongest elements of the existing protective order regime into a single, comprehensive, flexible order. As such, there will be many correlations but also differences between various protective orders.

We do not agree that, where a DAPO is made without notice, a five-day maximum limit for a return hearing is necessary. A specific time limit such as this would be problematic in cases where more time may be required if, for instance, the respondent's preferred counsel were only available on the sixth day rather than the fifth, or if similar availability applied to the judge who had made the initial order. We therefore think it right to take a consistent approach with other orders such as the KCPO, which do not apply time limits for return hearings.

When making a DAPO without notice, the court can impose both positive and prohibitive requirements in order to protect the victim from domestic abuse or the risk of domestic abuse. When made without notice, these are still "final orders" but, as noted above, are subject to a return hearing where the person subject to the DAPO can make representations. You (Lord Paddick) have pointed out that there are some orders that provide for interim orders being made, such as the KCPO and the Stalking Protection Order (SPO). You (Lord Paddick) have asked why a similar approach was not taken with the DAPO, particularly where a DAPO is made without notice.

T 020 3334 3555
F 0870 761 7753

E https://contact-moj.dsd.io/
www.gov.uk/moj

102 Petty France
London
SW1H 9AJ

We do not consider similar provisions regarding interim orders to be necessary for the DAPO, because where a DAPO is made without notice (which would be in exceptional circumstances where the court considers it necessary to make an order without notice), a return hearing must be scheduled as soon as just and convenient, of which all parties will have notice. At that hearing all of the provisions of the order can be reconsidered, including the addition or removal of positive requirements. Any positive requirements imposed by a DAPO will be included by the court, based on the evidence provided by the responsible person, to safeguard the perpetrator from ill-considered positive requirements being imposed on them. Additionally, a person's actions cannot constitute an offence if they are not aware of the existence of the order and so could not be criminally liable for breach of the order before they became aware of it (a point I discuss further below).

Providing the court with full powers to impose the measures necessary, even where a DAPO is made without notice, is one of the strengths of the order as it allows for immediate protection to be provided to a victim where that is necessary and proportionate. The DAPO therefore does differ from the KCPO in that, where an application for a KCPO is made without notice and an interim order is made, that order cannot impose positive requirements. We consider this difference to be necessary to provide adequate protection for victims of domestic abuse and their children, whilst also balancing the risk of inappropriate positive requirements being imposed on the perpetrator.

Evidence from probation and youth offending teams

You (Lord Paddick) also raised a point about ensuring that the court has all the necessary evidence when it is considering whether to impose positive requirements. Specifically, you advocated for the court to hear from youth offending teams and probation.

As mentioned at Committee, we do not consider it necessary to require the court to obtain such evidence for several reasons. First, evidence from youth offending teams is unlikely to be necessary given that a DAPO cannot be made against anyone under the age of 18. I am aware that, in relation to KCPOs, there is a statutory requirement for police to consult with youth offending teams before making an application for an order against a person under the age of 18. This additional protection is required because KCPOs can be made against individuals over the age of 12. Secondly, there is no similar requirement in the KCPO regime for there to be consultation with probation services before making applications for orders against adults. Indeed, to include such a requirement in either the KCPO or DAPO regime is likely to go outside the "probation purposes" set out at section 1 of the Offender Management Act 2017, which are limited to dealing with those charged with or convicted of criminal offences.

I therefore remain of the view that evidence from the responsible person, who is likely to be a representative of the organisation delivering the programme being considered, would be both sufficient and more appropriate. We will consider providing further guidance on how this evidence should be provided ahead of implementation.

New and existing orders

Where a DAPO already exists, you (Lord Paddick) asked whether a new DAPO with the same provisions would be dealt with under clause 42, or 36; and asked for clarity on whether the application to vary an existing DAPO has to be made to the same court that made the original DAPO.

There are a number of circumstances in which an existing DAPO might need to be varied, and therefore the Bill provides a number of different routes for this to happen. The first and most obvious route is for the perpetrator, victim or the police to make an application to vary a DAPO. This is provided for at clauses 42 (which specifies who can make an application to vary) and 43 (which specifies where such an application

should be made). As set out at clause 43(1), such applications should usually go to the court which made the original DAPO. An alternative route for varying an order is provided by clause 42(2)(b), which allows a court to vary a DAPO of its own motion (i.e. without an application to vary having been made). This does not need to be the same court that made the DAPO in the first place – it just needs to be a court that otherwise has the power to make a DAPO. This provision ensures that a court which is hearing other proceedings involving the parties to the DAPO can vary the existing DAPO, where the court sees a need to do so. For instance, where a family court is hearing family proceedings and is aware of an existing DAPO made in a magistrates' court, the family court can vary that DAPO as necessary to provide adequate protection for the victim. A further route for variation of an existing DAPO is on appeal. Clause 45(4)(a) allows a court hearing an appeal of a decision made in relation to a DAPO to vary the order.

It is also, of course, possible for a new DAPO to be made rather than an existing DAPO varied. A new DAPO can be made either on application or on the court's own initiative. Clause 36 deals with the transition between orders in this scenario. The default position is that a DAPO takes effect on the day it is made (clause 36(1)). However, where a DAPO already exists, the court may provide that the new DAPO takes effect on the existing DAPO ceasing to have effect. The court making the new order therefore has the option of either overlapping the two orders or sequencing them one after the other.

The reason there are various different routes to both make and vary a DAPO is to ensure that there are no gaps – that courts have the powers they need to take protective action wherever it is needed. This goes to the flexibility of the DAPO, which is one of its key benefits.

Reasonable excuse

The Bill specifies at clause 37 that, where an order is made without notice, the person who is subject to the DAPO cannot commit an offence of breaching it until they are aware of the existence of the DAPO. The Bill also specifies that breach of any DAPO without reasonable excuse is an offence. The point you (Lord Paddick) raised is that, if the Bill specifies that not being aware of an order prevents the person subject to the DAPO from being liable for breach, not being aware of the requirements imposed by the order should also be included so that the person is similarly not liable for breach.

Firstly, we disagreed with amendment 86 which sought to state explicitly that the person must not only be aware of the existence of the order, but also the *requirements* of the order, because the current drafting is consistent with the approach taken in existing protective orders, such as non-molestation orders and forced marriage protection orders made under the Family Law Act 1996 (FLA). As explained above, a DAPO without notice will be made in exceptional circumstances where the court considers it necessary. In most cases however, the court will provide notice to the perpetrator when an application for a DAPO is made and before the hearing. Once a DAPO is made, as with other court orders, it is the responsibility of the perpetrator to understand and comply with the order. If we were to provide that the *requirements* must also be understood by the perpetrator in relation to a DAPO, provision for which has not been made in relation to FLA orders, the awareness test for those subject to non-molestation orders and forced marriage protection orders would be called into question. We see no reason for such a difference between these orders.

Secondly, when an order is made without notice, as stated above, the court will be required to schedule a return hearing, which would notify the perpetrator of the DAPO and the subsequent hearing. This means that there will be evidence that the person subject to the DAPO is aware of its existence. The perpetrator will then be responsible for ensuring they understand the measures against them and have the opportunity to make representations about the order at the return hearing. If the DAPO is breached after the person subject to the order has been made aware of the existence of the DAPO, I think it is right that

this would be a matter for the court to decide whether the order has been breached without reasonable excuse.

Warrant for arrest

You (Lord Paddick) rightly pointed out that the police are able to make an arrest without warrant if they have reasonable grounds for suspecting that an offence has been committed (see clause 38(9)). In light of this, you (Lord Paddick) asked whether it was necessary to also include a provision enabling the victim to apply for a warrant of arrest under clause 38, given that the person being protected by the DAPO is able to notify the police who can take this action themselves under clause 37. This would avoid any risk of harm to the victim if they seek a warrant of arrest themselves. The reason we have included in the Bill a power to apply for an arrest warrant at clause 38 is because we want to ensure the victim can obtain protection whatever their circumstances. Some people may not be able to, or may not wish to, involve the police. The victim may also not want to pursue criminal charges and may prefer for a breach to be dealt with as a civil contempt of court. While we would of course encourage people to seek help and assistance from the police, we want to also empower them to take action themselves if this is what they would prefer.

Views of the victim

You (Lord Paddick) pointed out that, where an application to vary or discharge an order is made, clause 42 states that the court must “hear” from the victim, and asked whether this would involve forcing the victim to appear in court.

To be clear, clause 42 only requires the court to hear from the victim where the victim has themselves applied for discharge of the order or to vary the order to make it less onerous. In such circumstances, it is essential for the court to understand the victim’s reasons for seeking removal or variation of existing protections. I absolutely agree that the victim should not be forced to provide evidence in person if they do not wish to do so. As with other cases involving vulnerable witnesses, the court can “hear” evidence from the victim in the form of a written statement or submission, which means the victim would not have to provide evidence in person unless they wish to do so. For victims who would prefer to provide evidence in person, the Bill contains several provisions around special measures that the court can use to safeguard the victim when providing evidence. The Bill also prohibits the perpetrator from cross-examining in person the victim in family and civil proceedings to prevent further abuse occurring during proceedings.

Where the court is considering an application to vary or discharge an order which does not engage the clause 42 requirement to hear from the victim, the victim still has the opportunity to present their views should they wish. Clause 42(6) incorporates clause 31 into the variation/discharge process, with the effect that the court must consider the views of the victim where the court is made aware of those views.

Criminal standard of proof

I also undertook to respond to your (Baroness Hamwee) query regarding the criminal standard of proof for breach.

The DAPO is a civil order and breach of a DAPO is a criminal offence. We want to send a clear message to perpetrators that breach of an order will be acted upon. However, I should emphasise that a breach will not result in an automatic prosecution. Instead, as with all criminal offences, the breach will need to be reported to the police, who will then investigate and refer to prosecutors for a decision on whether to pursue a prosecution. Criminal sanctions will only be imposed following a conviction for the breach offence in the criminal court, which would need to be proved to the criminal standard in the usual way. By

this, I mean that the matter will be dealt with by a criminal court which will automatically apply the criminal standard of proof when deciding whether to convict.

This is the same approach taken with other civil orders that carry criminal liability, such as non-molestation orders, stalking protection orders, and KCPOs. In clause 37, we have taken the standard approach to legislative drafting, in that statutory criminal offences don't include specific reference to the criminal standard of proof. By way of example, I would refer you to section 29 of the Offensive Weapons Act 2019 (which relates to KCPOs), and section 42A of the FLA (which relates to non-molestation orders).

Contempt of court

As I have already mentioned, we recognise that some victims may not want their perpetrators to be criminalised, or want the police involved at all. For this reason, we have provided that victims can obtain a DAPO from the family court, and that a breach of a DAPO can be dealt with as a civil contempt of court, rather than a criminal offence. You (Baroness Hamwee) asked about the experience of using contempt of court orders.

Currently, there are various civil orders used in cases of domestic abuse that, upon breach, either carry criminal liability (such as non-molestation orders and forced marriage protection orders) or are treated as civil contempt of court (such as the Domestic Violence Protection Order (DVPO)). The DAPO combines the strengths of these orders so that there is a route for criminal prosecution, as well as civil contempt of court, so that victims can obtain the protection they require based on their individual circumstances.

I hope my explanations have provided clarity and reassurance on the points about which I undertook to write rather than address fully during Committee. I am copying this letter to Lord Ponsonby and all others who spoke in the debates on DAPOs. I will place a copy in the library of the House.

Yours sincerely,

LORD (DAVID) WOLFSON
OF TREDEGAR, QC