



PUMP COURT

CHAMBERS

Domestic Abuse Act 2021

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Overview

- Definitions – s.1 & s.2
- Children as victims of domestic abuse – s.3
- Domestic Abuse Commissioner – Part 2
- Powers of Dealing with Domestic Abuse – Part 3
- Local Authority Support – Part 4
- Protection for Victims, Witnesses Etc in Legal Proceedings – Part 5
- Offences Involving Abusive or Violent Behaviour – Part 6
- Miscellaneous and General – Part 7



Definitions

“Domestic abuse” – s.1(2)

- Behaviour of a person (“A”) towards another person (“B”) is “domestic abuse” if
 - A and B are each aged 16 or over and are personally connected
 - The behaviour is abusive

Definitions

“abusive” – s.1(3)

- Behaviour is “abusive” if it consists of any of the following
 - Physical or sexual abuse
 - Violent or threatening behaviour
 - Controlling or coercive behaviour
 - Economic abuse – see s.1(4)
 - Psychological, emotional or other abuse
- Does not matter whether single incident or course of conduct



Definitions

“Economic abuse” – s.1(4)

- Any behaviour that has a substantial adverse effect on B’s ability to
 - Acquire, use or maintain money or other property, or
 - Obtain goods or services



Definitions

Behaviour “towards” B – s.1(5)

- 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)

Definitions

“Personally connected” – s.2(1)

- Two people are “personally connected” if
 - They are or have been married
 - They are or have been civil partners
 - They have agreed to marry (whether or not agreement terminated)
 - They have entered into a civil partnership agreement (whether or not terminated)
 - They are or have been in an intimate personal relationship
 - They each have, or there was a time when they each had, a parental relationship to the same child
 - They are relatives

Parental relationship – s.2(2)

- A person has a parental relationship in relation to a child if
 - The person is a parent of the child, or
 - The person has parental responsibility for the child

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Definitions

Other definitions – s.2(3)

- “Child” = person under 18
- “Civil partnership agreement” as defined by s.73 Civil Partnership Act 2004
- “Parental responsibility” as in s.3 Children Act 1989

Definitions

Other definitions – s.2(3)

- “Relative” as in s.63(1) Family Law Act 1996, i.e.
 - Mother, father, stepfather, stepmother, son, daughter, stepson, stepdaughter, grandmother, grandfather, grandson, granddaughter of the person or person’s spouse, former spouse, civil partner or former civil partner, or
 - Brother, sister, uncle, aunt, niece, nephew or first cousin of the person or the person’s spouse or former spouse
 - Includes relatives of cohabitee or former cohabitee

Children as victims

Section 3

- Section applies where behaviour of A towards B is domestic abuse
- Any reference to a victim of domestic abuse includes a reference to a child who
 - Sees or hears, or experiences the effects of domestic abuse, and
 - Is related to A or B
- Child is related to a person if
 - The person is a parent or has PR
 - The child and the person are relatives

Commissioner

Part 2

- Secretary of State must appoint a Domestic Abuse Commissioner – s.4
- Commissioner must encourage good practice in
 - Prevention of domestic abuse
 - Prevention, detection investigation and prosecution of offences involving domestic abuse
 - Identification of people who carry out domestic abuse, victims of domestic abuse and children affected by domestic abuse
 - Provision of protection and support to people affected by domestic abuse – s.7

Local authority support

Part 4

- Each relevant local authority in England must
 - Assess, or make arrangements for the assessment of, the need for accommodation-based support in its area
 - Prepare and publish a strategy for the provision of such support, and
 - Monitor and evaluate the effectiveness of the strategy – s.57
- Each local authority must appoint a domestic abuse local partnership board – s.58

Participation directions

- Section 63 Domestic Abuse Act 2021 – special measures in family proceedings: victims of domestic abuse:
 - Where P is, or is at risk of being, a victim of domestic abuse carried out by a party to proceedings, a relative of a party (other than P) or a witness in proceedings
 - Assumed that the quality of P’s evidence and, where P is a party, P’s participation in the proceedings are likely to be diminished by reason of vulnerability
 - Rules may provide for an exception where P does not wish to be deemed eligible for special measures

Participation directions

- New FPR r.3A.2A reflects s.63 DAA 2021:
 - Where it is stated that a party or witness is, or is at risk of being, a victim of domestic abuse carried out by a party, a relative of another party or a witness in the proceedings
 - The court must assume that the quality of the party or witness's evidence and, in relation to a party, their participation in the proceedings is diminished.
 - The party or witness can request that the assumption does not apply to them if they do not wish it to
 - Where the assumption applies, the court must consider whether it is necessary to make one or more participation directions

Participation directions

- Rule 3A.7 – What the court must have regard to when deciding whether to make participation direction(s)
 - Impact of actual or perceived intimidation
 - Mental disorder or significant impairment of intelligence or social functioning
 - Physical disability or disorder
 - Medical treatment
 - Nature and extent of information before the court
 - Issues arising in the proceedings, including concerns arising in relation to abuse
 - Whether matter contentious
 - Age, maturity and understanding

Participation directions

- Rule 3A.7 – What the court must have regard to when deciding whether to make participation direction(s) - continued
 - Social and cultural background and ethnic origins
 - Domestic circumstances and religious beliefs
 - Any questions the court is putting or causing to be put in accordance with s.31G(6) Matrimonial and Family Proceedings Act 1984
 - Any characteristic relevant to participation direction
 - Whether any measure is available to the court

Participation directions

- Rule 3A.7 – What the court must have regard to when deciding whether to make participation direction(s) - continued
 - Any other matter in PD 3AA, e.g. the ability of the party or witness to
 - Understand the proceedings and their role in them
 - Put their views to the court
 - Instruct their representative/s before, during and after the hearing
 - Attend the hearing without significant distress

Participation directions

- Rule 3A.8 – measures, including:
 - Screens
 - Live link
 - Use of a device to help communicate
 - Intermediary
- Rule 3A.9 – when court’s duties apply & recording reasons for decisions made under this part
 - Duties arise as soon as possible after the start of proceedings and continue until resolution of proceedings
 - Record reasons on the court order

Cross-examination

- Section 65 DAA 2021 introduces Part 4B to the Matrimonial and Family Proceedings Act 1984, including:
- Section 31R:
 - (1) *In family proceedings, no party to the proceedings who has been convicted 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.*



Cross-examination

- Does not apply to a conviction or caution that is spent for the purposes of the Rehabilitation of Offenders Act 1974, unless evidence in relation to the conviction or caution is admissible in, or may be required in, the proceedings of by virtue of s.7(2), (3) or (4) of that Act – s.31R(3)
- Cross-examination in breach of s.31R(1) or (2) does not affect the validity of a decision of the court in the proceedings if the court was not aware of the conviction, caution or charge when the cross-examination took place – s.31R(4)

Cross-examination

- Section 31S:
 - (1) *In family proceedings, no party to the proceedings against whom an on-notice protective injunction is in force may cross-examine in person a witness who is protected by the injunction.*
 - (2) *In family proceedings, no party to the proceedings who is protected by an on-notice protective injunction may cross-examine in person a witness against whom the injunction is in force.*
- “protective injunction” = an order, injunction or interdict specified, or a description specified, in regulations made by the Lord Chancellor – s.31S(4)



Cross-examination

- A protective injunction is an “on-notice” protective injunction if
 - The court is satisfied that there has been a hearing at which the person against whom the protective injunction is in force asked, or could have asked, for the injunction to be set aside or varied, or
 - The protective injunction was made at a hearing of which the court is satisfied that both the person who applied for it and the person against whom it is in force had notice – s. 31S(5)



Cross-examination

- Cross-examination in breach of s.31S(1) or (2) does not affect the validity of a decision of the court in the proceedings if the court was not aware of the protective injunction when the cross-examination took place – s.31S(3)

Cross-examination

- Section 31T
 - (1) *In family proceedings, where specified evidence is adduced that a person who is a witness has been a victim of domestic abuse carried out by a party to the proceedings, that party to the proceedings may not cross-examine the witness in person.*
 - (2) *In family proceedings, where specified evidence is adduced that a person who is a party to the proceedings has been the victim of domestic abuse carried out by a witness, that party may not cross-examine the witness in person.*



Cross-examination

- “Specified evidence” = evidence specified, or of a description specified, in regulations made by the Lord Chancellor – s.31T(3)
- 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

Cross-examination

- Section 31U:

(1) In family proceedings, the court may give a direction prohibiting a party to the proceedings from cross-examining (or continuing to cross-examine) a witness in person if

a) None of sections 31R to 31T operates to prevent the party from cross-examining the witness and

b) It appears to the court that –

i. The quality condition or the significant distress condition is met, and

ii. It would not be contrary to the interests of justice to give the direction.

Cross-examination

- The “quality condition” is met if the quality of evidence given by the witness on cross-examination –
 - (a) is likely to be diminished if the cross-examination (or continued cross-examination) is conducted by the party in person, and
 - (b) would be likely to be improved if a direction were given under this section. – s.31U(2)

Cross-examination

- The “significant distress condition” is met if –
 - (a) the cross-examination (or continued cross-examination) of the witness by a party in person would be likely to cause significant distress to the witness or the party, and
 - (b) The distress is likely to be more significant than would be the case if the witness were cross-examined other than by the party in person. – s.31U(3)



Cross-examination

- In determining whether the quality condition or significant distress condition is met, the court must have regard to, among other things:
 - (a) any views expressed by the witness as to whether they are content to be cross-examined in person
 - (b) any views expressed by the party as to whether they are content to cross-examine in person
 - (c) nature of the questions likely to be asked, having regard to the issues in the proceedings
 - (d) any behaviour by the party in relation to the witness in respect of which the court is aware that a finding of fact has been made in the proceedings or other proceedings

Cross-examination

- Factors to which the court must have regard, continued:
 - (e) any behaviour by the witness in relation to the party in respect of which the court is aware that a finding of fact has been made in the proceedings or other proceedings
 - (f) any behaviour by the party at any stage in the proceedings, both generally and in relation to the witness
 - (g) any behaviour by the witness at any stage of the proceedings, both generally and in relation to the witness
 - (h) any relationship (of whatever nature) between the witness and the party. – s.31U(5)

Cross-examination

- Any reference in this section to the quality of a witness' evidence is to its quality in terms of completeness, coherence and accuracy – s.31U(6)
- “Coherence” refers to a witness' ability to give answers which –
 - (a) address the questions put to the witness, and
 - (b) can be understood, both individually and collectively. – s.31U(7)



Cross-examination

- Section 31W
- Applies where a party to family proceedings is prevented from cross-examining a witness in person by virtue of ss.31R to 31U
- The court must consider whether (ignoring this section) there is a satisfactory alternative means –
 - (a) For the witness to be cross—examined in the proceedings, or
 - (b) of obtaining evidence that the witness might have given under cross-examination in the proceedings.

Cross-examination

- If the court decides that there is not, it must invite the party to arrange for a qualified legal representative to act for the party for the purpose of cross-examining the witness and require the party to notify the court, by the end of a period specified by the court, whether a qualified legal representative is to act for the party for that purpose – s.31W(3)

Cross-examination

- If the party notifies that no legal representative or there is no notification, 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 – s.31W(4) & (5)
- If the court decides that it is, it must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the party – s.31W(6)

Cross-examination

- A qualified legal representative appointed by the court under subsection (6) is not responsible to the party
- The Lord Chancellor may by regulations provide for the payment out of central funds of the costs properly incurred by a qualified legal representative appointed under s.31W(6) and expenses properly incurred in providing such a person with evidence or other material in connection with the appointment – s.31X

Cross-examination

- The Lord Chancellor may issue guidance in connection with the role which a qualified legal representative appointed under s.31W(6) is to play in proceedings, including guidance about the effect of s.31W(7)

Cross-examination

- Draft guidance for court-appointed qualified legal representatives, circulated in May 2022
 - Must not attempt to present the prohibited party's entire case
 - Should not take instructions from the prohibited party in the manner that a party's own lawyer ordinarily would
 - Expected in most cases to meet with the prohibited party to elicit relevant information to form the basis of cross-examination and inform the drafting of the position statement
 - Appointment comes to an end at the conclusion of cross-examination
 - *"Thus, there are unlikely to be ethical complexities for court appointed qualified legal representatives who are not responsible to the prohibited party and who do not have a contractual relationship with them"*

Cross-examination

- Draft guidance, continued
 - The qualified legal representative must put the essence of the prohibited party's case to the witness, on those parts of the witness' case that may have a significant impact on the outcome of the proceedings
 - Prohibited party may suggest questions
 - Qualified legal representative may take such questions into consideration but ultimately questions should only be put if they relate to the essence of the prohibited party's case and they are on those parts of the witness' evidence which may have a significant impact on the outcome of the proceedings
 - Qualified legal representative will need to undertake such preparatory work as is necessary to conduct the cross-examination – bundle to be provided and read

Cross-examination

- Draft guidance, continued
 - Recommended that the qualified legal representative should prepare a brief position statement to help identify and narrow issues that will be the focus of the cross-examination
 - The court will make clear to the prohibited party that the qualified legal representative is not their lawyer and they are appointed only to cross-examine a certain witness or certain witnesses
 - The qualified legal representative must also clearly communicate the limited nature of their role and their relationship with the prohibited party
 - Qualified legal representative must make clear that they cannot give advice or represent the prohibited party throughout the case
 - Cannot promise confidentiality

Cross-examination

- Proposed fixed fee scheme based on FAS
- Indication given in MoJ email attaching draft guidance that s.65 DAA 2021 would be brought into force “later in June”
- No further information and no definite commencement date
- Watch this space!

Cross-examination

- Rule 3A.13 introduced on 6 April 2022, by The Family Procedure (Amendment Rules) 2022 – SI 2022/44:
 - A Practice Direction may make provision in relation to prohibition of cross-examination in person under Part 4B of the Matrimonial and Family Proceedings Act 1984 – not yet in force – in May 2022, MoJ indicated “later in June”



Section 91(14)

- Section 67 DAA 2021 introduces s.91A Children Act 1989
- In force on 19 May 2022 by The Domestic Abuse Act 2021 (Commencement No. 4) Regulations 2022 (SI 2022/553), reg.2(1)(b)

Section 91(14)

- Section 91A Children Act 1989:
 - (1) Further provisions about orders under s.91(14)
 - (2) The circumstances in which the court may make a s.91(14) order include, among others, where the court is satisfied that the making of an application for an order under CA 1989 of a specified kind by any person who is to be named in the s.91(14) order would put –
 - (a) The child concerned, or
 - (b) Another individual (“the relevant individual”) at risk of harm.

Section 91(14)

- Section 91A Children Act 1989:
 - (3) The reference to “harm” is to be read as a reference to ill-treatment or the impairment of physical or mental health.
 - (4) Where a person named in a s.91(14) order applies for leave to make an application of a specified kind, the court must, in determining whether to grant leave, consider whether there has been a material change of circumstances since the order was made.

Section 91(14)

- Section 91A Children Act 1989:
 - (5) S.91(14) order may be made by the court -
 - (a) on an application made -
 - (i) by the relevant individual
 - (ii) by or on behalf of the child concerned
 - (iii) by any other person who is a party to the application being disposed of by the court;
 - (b) of its own motion.
 - (6) “the child concerned” = the child referred to in s.91(14)



Domestic abuse findings of fact

- Fact Finding Hearings and Domestic Abuse in Private Law Children Proceedings - Guidance for Judges and Magistrates
- Issued on 5 May 2022
- Paragraph 10:
“Allegations that can be defined (such as specific incidents of physical abuse) may be suitable for reduction to a schedule. Other allegations that require the court to take a broad overview and look at patterns of behaviour (such as coercive and controlling behaviour) are likely to require a statement. A hybrid of the two, dividing types of abuse into clusters to provide an overview akin to a threshold document in public law proceedings might be appropriate.”