

## **Chapter 4 updates: September 2021**

This update addresses:

- Various sections of chapter 4: the Domestic Abuse Act 2021
- 4.9: Recent case law on forced marriage and the issue of victim autonomy

## The Domestic Abuse Act 2021

The Domestic Abuse Bill was introduced into Parliament in summer 2019. The original version of the Bill, which had received some consideration in the Commons' [Public Bill Committee](#), fell with the end of the Parliament, but was revived in 2020 following the December 2019 general election as the Domestic Abuse Bill 2019-21: a copy of the Bill and all associated parliamentary materials and debates can be found [here](#).

We address two key aspects of the Act in this update:

- its definition of 'domestic abuse' (cf the current policy definition outlined at 4.2.1 of the main text), including the scope of relationships to which it applies (cf the FLA 1996 concept of 'associated person, discussed at 4.5.1 of the main text), and
- the associated Domestic Abuse Prevention Notices and Orders (DAPN and DAPO), the arrival of which we forecast at 4.8 of the main text, and which would replace the DVPN/DVPO regime described at 4.7.

### 4.2.1 and 4.5.1: Definition and scope of 'domestic abuse'

The Act contains a definition of domestic abuse, which is particularly pertinent for our purposes as defining the scope of the DAPN/DAPO regime – both in terms of the types of abuse covered, and the range of relationships deemed to be 'domestic' for these purposes. Notably, while the list of abuse-types is substantial, the range of relationships covered is less comprehensive than the 'associated person' concept that defines the scope of the civil law remedies contained in the FLA 1996 and the DVPN/DVPO scheme in the 2010 Act that will be repealed once the Act comes into force.

#### Domestic Abuse Act 2021

##### 1 Definition of "domestic abuse"

- (1) This section defines "domestic abuse" for the purposes of this Act.
- (2) Behaviour of a person ("A") *towards* another person ("B") is "domestic abuse" if –
  - (a) A and B are each aged 16 or over and are *personally connected* to each other, and
  - (b) the behaviour is *abusive*.
- (3) Behaviour is "abusive" if it consists of any of the following –
  - (a) physical or sexual abuse;
  - (b) violent or threatening behaviour;
  - (c) controlling or coercive behaviour;
  - (d) economic abuse (see subsection (4));
  - (e) psychological, emotional or other abuse;and it does not matter whether the behaviour consists of a single incident or a course of conduct.
- (4) "Economic abuse" means any behaviour that has a substantial adverse effect on B's ability to –
  - (a) acquire, use or maintain money or other property, or
  - (b) obtain goods or services.

- (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).
- (6) References in this Act to being abusive towards another person are to be read in accordance with this section. [See, in particular, the DAPN/DAPO regime, below]
  
- (7) For the meaning of "personally connected", see section 2. [emphases all added]

## 2 Definition of "personally connected"

- (1) For the purposes of this Act, two people are "personally connected" to each other if any of the following applies –
  - (a) they are, or have been, married to each other;
  - (b) they are, or have been, civil partners of each other;
  - (c) they have agreed to marry one another (whether or not the agreement has been terminated);
  - (d) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);
  - (e) they are, or have been, in an intimate personal relationship with each other;
  - (f) they each have, or there has been a time when they each have had, a parental relationship in relation to the same child (see subsection (2));
  - (g) they are relatives.
  
- (2) For the purposes of subsection (1)(f), a person has a parental relationship in relation to a child if –
  - (a) the person is a parent of the child, or
  - (b) the person has parental responsibility for the child.
  
- (3) In this section –
  - "child" means a person under the age of 18 years;
  - "civil partnership agreement" has the meaning given by [CPA 2004, s 73];
  - "parental responsibility" has the same meaning as in the [CA 1989, see s 3];
  - "relative" has the meaning given by [FLA 1996, s 62(3)].

While the definition of "personally connected" may look familiar, there are notable omissions: cohabitants and those who have shared a household other than in a commercial relationship e.g. of tenant. Whilst cohabitants will, presumably, come within the scope of 'intimate personal relationship', not all home-sharers will do. This means that the DAPN/DAPO regime which rests on these foundations will not extend to platonic, unrelated home-sharers (or indeed to others who do *not* share a household) whose relationship cannot in any sense be described as 'intimate'. It remains to be seen whether a non-sexual carer/dependant relationship will be considered 'intimate' – notably, the factsheet accompanying the Bill paraphrased this as 'intimate *partners*', which appears to assume a romantic relationship.<sup>1</sup> But note also that, unlike in the FLA 1996 where the same term appears, there is no requirement that such relationship be of 'significant duration'.

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<sup>1</sup>[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/817435/Factsheet\\_Definition\\_FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817435/Factsheet_Definition_FINAL.pdf)

#### 4.8: The DAPN/DAPO regime

At part 4.8 of the main text, we outlined the proposals to replace the Crime and Security Act 2010 provisions (described at 4.7.1) with a new scheme. Those proposals, with only a few changes, have now been enacted by the 2021 Act. They will be piloted in some areas over a two-year period for their effectiveness and impact to be evaluated prior to any national roll-out. The footnotes to the summary below direct readers to particular sections of the Act, but readers are advised to read all of sections 21-56 in order to obtain a comprehensive grasp of the new scheme.

In some basic respects, the DAPN/DAPO regime is similar to the replaced 2010 provisions:

- A potentially two-stage process, initiated by a police-issued Notice, following which the matter will be brought promptly to court for considering the making of an Order.
- Breach of a DAPN, like a DVPN, will result in arrest without warrant.<sup>2</sup>
- Two basic preconditions must be satisfied before making a notice or order: one backward-looking to past harm, the other forward-looking and concerned to protect the victim from future harm.<sup>3</sup>
- Notices and orders can be made without the consent of the person whom they are designed to protect, though their view must be considered at both stages.<sup>4</sup>
- Notices and orders can both prohibit molestation and control the occupation of property.<sup>5</sup>

But in many ways the Act's scheme is very different from – generally more extensive than – the 2010 scheme:

- The preconditions turn not on the occurrence/threat/fear of future *violence* committed by 'P' on V, but much more broadly on the occurrence/future risk of *domestic abuse* of V by P, as defined above. However, as noted above, in one respect the Act is narrower than the 2010 scheme, in so far as the latter's scope is defined by reference to the FLA 1996 concept of 'associated person'.
- DAPO, unlike DVPO, can go further than non-molestation<sup>6</sup>/occupation order<sup>7</sup>-type provision, to include 'any requirements [positive, as well as negative] that the court considers necessary to protect the person for whose protection the order is made from domestic abuse or the risk of domestic abuse', subject to ensuring 'so far as practicable' that the requirements do not conflict with particular rights/interests of P.<sup>8</sup>

<sup>2</sup> S 26.

<sup>3</sup> S 22(1)-(4), s 32.

<sup>4</sup> Ss 24(1)(b), (3)-(4) and 33(1)(b),(3).

<sup>5</sup> Ss 23 and 35(4)(5).

<sup>6</sup> S 35(4) – no contact and exclusion zones.

<sup>7</sup> S 35(5) – control of occupation.

<sup>8</sup> Ss 35(1), 36(1).

- The court is specifically empowered to order electronic monitoring of P for up to 12 months,<sup>9</sup> and any person subject to a DAPO will be required to notify the police of their name and address.<sup>10</sup>
- The DAPO can last for a fixed term or indefinitely (contrast the very limited duration of a DVPO).<sup>11</sup> On an application to vary or discharge an order, the court will be required to maintain the order in place if still necessary to protect V from the risk of domestic abuse from P, but conversely will be required to remove or reduce a requirement in an order if the conditions necessary for the requirement to be imposed no longer subsist.<sup>12</sup>
- The DAPO can be sought not just by the police following the issue of a DAPN, but can also be sought directly from the family court by victims, by other categories of third party to be identified in regulations, by others with the leave of the court, and by the court of its own motion in various types of criminal, civil and family proceedings (as the family court can currently make NMOs under the FLA 1996).
- Breach of a DAPO will be a criminal offence punishable by up to 5 years imprisonment,<sup>13</sup> as well as a contempt of court – though, as with NMOs under the FLA 1996, can only be dealt with as one or the other, not as both.<sup>14</sup> This will therefore be the first sort of order to criminalize breach of orders controlling occupation of property (cf the contempt-only enforcement of occupation orders under the FLA 1996).

The declared policy intention in creating the new DAPNs and DAPOs ‘is to bring together the strongest elements of existing protective orders into a single, comprehensive, flexible order which will provide more effective and longer-term protection to victims of domestic abuse and their children’.<sup>15</sup> However, the Act repeals only the 2010 scheme – not NMOs and OOs under the FLA or restraining orders under the PHA 1997. This leaves open the question of how these different types of order will be used in future. Of course, the DAPN/DAPO scheme will only be as effective as is police commitment to use it, and to use it appropriately, as far as they can within limited resources... As recent research by Bates and Hester into the pre-2021 Act options indicates, there are reasons to be sceptical about that.<sup>16</sup>

The Government’s consultation and other documents leading up the publication of the Bill were notably deficient in two respects:

- Failure to engage with the issue of victim autonomy: should the court be empowered to make orders if the victim is opposed to that course of action? See 4.7.2 of the main text for extended discussion of this point.

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<sup>9</sup> Ss 36-37, 38(5).

<sup>10</sup> S 41.

<sup>11</sup> S 38(3)-(5).

<sup>12</sup> S 44(11)-(12).

<sup>13</sup> S 39.

<sup>14</sup> S 39(3)-(4).

<sup>15</sup> HO factsheet on DAPO/DAPN, update July 2021: [www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-protection-notices-orders-factsheet](http://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-protection-notices-orders-factsheet)

<sup>16</sup> Bates and Hester (2020). ‘No longer a civil matter? The design and use of protection orders for domestic violence in England and Wales’ *Journal of Social Welfare and Family Law* 42: 133.

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- Failure to explain the intended interaction of the DAPN/DAPO scheme with existing orders under the FLA 1996 (and under the PHA 1997) which, unlike the 2010 Act scheme, will not be repealed.

### *The question of victim autonomy*

As noted above, police when considering issuing a DAPN and the court when considering making a DAPO will have to consider the opinion of V about that proposed course of action, but can ultimately proceed against V's wishes. The same is currently true under the 2010 Act, but there the maximum duration of the intervention is 28 days – contrast the potentially indefinite orders allowed by the 2021 Act. Rather than to provide V with a short breathing space to decide what action to take herself (as the 2010 Act does), this scheme appears designed to take the entire matter out of V's hands. As our discussion in 4.7.2 of the main text explores, there are pros and cons to this sort of intervention, and it is surprising that the Government offered no in-depth commentary on this issue in originally presenting its proposals. Some of the most extensive engagement with the topic came from the Joint Parliamentary Committee charged with scrutinising the draft Bill. It concluded as follows:

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**Report of the Joint Parliamentary Committee on the Draft Domestic Abuse Bill**, 14 Jun 2019, available at <https://publications.parliament.uk/pa/jt201719/jtselect/jtddab/2075/207502.htm>

85. Our witnesses were generally supportive of the provision that orders may be made without the victim's consent. Kate Ellis, of the Centre for Women's Justice, welcomed the move telling us that it "took some of the onus off victims" which was particularly important for migrant women who were particularly vulnerable. Nazir Afzal [Welsh Government Adviser on Violence against Women] said that one of the key weaknesses of other protective orders such as non-molestation orders was:

They all rest entirely on the victim's shoulders. She – invariably she – has to pursue them, support them and pay for them, if she is not legally aided in any way, shape or form. If they are breached, she has to come forward. We don't do that for some other things.

86. Olive Craig, of Rights of Women, told us that they had heard some concerns over the inclusion of third parties as potential applicants for DAPOs: "We have some concerns about possible abuse, in terms of family members being able to apply for them, and about there being unknown third parties; the suggestion is that it will be probation or the local authority, although that is not in the actual Bill."

87. **[DAPO] may be applied for without the victim's consent by the police, specialist agencies and third parties with the consent of the court. We believe it is a key strength of the proposed orders that they can be made by the police without the victim's consent: the nature of domestic abuse is such that pressure not to take action against the perpetrators will often be overwhelming and it would significantly weaken the protective effect of the orders if only victims were able to apply for them. We note the concerns about third parties being able to apply for orders and [to] potentially [be] subject to abuse by family members or others. We believe that the fact that any such application is at the discretion of the court will prevent instances of abuse.**  
[bold text as in original]

The Government addressed the matter directly only in its ECHR memorandum accompanying the publication of the Bill, in considering the impact of the Bill on rights under Art 8:

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**Domestic Abuse Bill: European Convention on Human Rights Memorandum**, available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/772189/Draft\\_Domestic\\_Abuse\\_Bill\\_-\\_ECHR\\_Memorandum.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772189/Draft_Domestic_Abuse_Bill_-_ECHR_Memorandum.pdf)

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37. ... The ability of the court to make orders where the victim is not supportive is to safeguard against the risk that a victim may be subject to coercion from or pressure by the perpetrator into withdrawing or withholding their consent. Making an order against the victim's wishes is likely to interfere with their Article 8 right for as long as the order remains effective....

38. ... [M]aking an order against the victim's wishes ... is proportionate to meet the legitimate aims of protecting the victim from further acts of domestic abuse and preventing crime and disorder. [T]he interference with victim's rights will last only as long as the court deems it is both necessary and proportionate to protect the victim. The victim has the opportunity to explain their views to the court before the order is made. They may apply to vary or discharge the order, and they also have a right of appeal against the decision of a court following any such application. The Government considers that the Article 8 right of the victim, in cases where they do not consent to the order, is adequately protected.

For judicial attention to a related issue in the context of forced marriage, see below.

### ***The interaction of the DAPO with the FLA 1996***

Another significant issue considerably underplayed in the Government's publications is the intended interrelationship of the DAPO – for which victims, as well as police and others, will be able to apply directly – and the orders available to victims (and only to them) under the FLA 1996, which we explore in the main text of chapter 4. Of course, given the more limited range of relationships covered by the DAPO scheme, some victims will have to use the FLA, but others who *are* covered by the DAPO scheme might still prefer to use the FLA scheme, not least given the fact that – save for the criminalization of breach of NMOs – FLA applications and the enforcement of FLA orders lie within the victim's sole control. Indeed, Bates and Hester recently found continuing appetite for NMOs amongst victims.<sup>17</sup> The Government has merely stated that 'other protective orders ... such as non-molestation orders and restraining orders [under the PHA 1997] ... will remain in place so that they can continue to be used in cases which are not domestic-abuse related, such as cases of stalking and harassment'.<sup>18</sup> This statement is rather inadequate: whilst the PHA remedies are certainly aimed at non-domestic cases (given the lack of any restriction about the relationship between the parties), the FLA remedies exist specifically to deal with domestic cases, including domestic abuse cases. Stalking and harassment between 'associated persons' surely counts as domestic abuse dealt with by the FLA, by contrast with the sort of 'stranger' cases which are the bread and butter of the PHA scheme.

And what about occupation orders? As we noted at page 256 of the main text, these do indeed have a function outside the domestic *abuse* arena, to help ease the inevitably difficult transitions and tensions arising on relationship breakdown. But that is far from their only function, as the 'balance of harm' test that commonly determines the outcome of those cases indicates. Indeed, it is curious that Parliament should have devised such a carefully structured (over-structured?) scheme of occupation orders – with different sections applying to different relationships and according to different patterns of property ownership, with different criteria then shaping the

<sup>17</sup> (2020), *op cit*.

<sup>18</sup> HO/MOJ Domestic Abuse Bill 2019, Domestic Abuse Protection Notice Face Sheet, p 2:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/817440/Factsheet - DAPN.FINAL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817440/Factsheet_-_DAPN.FINAL.pdf)

court's discretion and different maximum durations for orders – only to have that all effectively rendered in large part redundant by the DAPO scheme. Whilst many might applaud the effective part-abandonment of all the niceties of the FLA scheme, which might well be thought to be over-sensitive to property ownership and relationship status where basic safety from abuse is at stake, it is curious that the Government has not seen fit to explain (or even acknowledge) this significant transition. Whilst it has catalogued what it perceives to be the deficiencies of the 2010 Act's DVPO scheme,<sup>19</sup> it has not explained in any depth why the FLA 1996 remedies should be thought to be inadequate.

Compare the length of FLA 1996 ss 33-38, with the following, particularly subsection (5):

### Domestic Abuse Act 2021

#### 35 Provision that may be made by orders

- (1) A court may by a domestic abuse protection order impose any requirements that the court considers necessary to protect the person for whose protection the order is made from domestic abuse or the risk of domestic abuse...
- ...
- (3) Subsections (4) to (6) contain examples of the type of provision that may be made under subsection (1), but they do not limit the type of provision that may be so made.
- (4) A domestic abuse protection order may provide that the person against whom a domestic abuse protection order is made ("P") –
  - (a) may not contact the person for whose protection it is made;
  - (b) may not come within a specified distance of any premises in England or Wales in which that person lives....
- (5) If P lives in premises in England or Wales in which the person for whose protection the order is made also lives, the order may contain provision –
  - (a) prohibiting P from evicting or excluding that person from the premises;
  - (b) prohibiting P from entering the premises;
  - (c) requiring P to leave the premises.

So, it would seem that P's property rights may be abrogated for an indefinite period of time by a DAPO, regardless of what – if any – property rights V has in the property and regardless of the nature of the relationship between them (provided that it is one falling within the scope of the Act's concept of domestic abuse).<sup>20</sup> The non-technical nature of subsection (5) is striking compared with, for example, s 33(3) of the FLA, which much more specifically adverts to the need formally to 'prohibit, suspend or restrict' the exercise of respondents' rights to occupy based on proprietary or other rights, and to 'restrict or terminate' statutory home rights (held by spouses/civil partners under s 30). Will spouses in these cases need also to apply under the

<sup>19</sup> See for example its response on 20 May 2019 to a question from the Joint Committee on Human Rights (letter, 10 April 2019) about the effectiveness of existing civil law remedies, which notably fails to address the FLA scheme: [www.parliament.uk/documents/joint-committees/human-rights/correspondence/2017-19/190520\\_Letter\\_from\\_Edward\\_Argar\\_MP\\_and\\_Victoria\\_Atkins\\_MP\\_to\\_Chair\\_re\\_draft\\_Domestic\\_Abuse\\_Bill.pdf](http://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2017-19/190520_Letter_from_Edward_Argar_MP_and_Victoria_Atkins_MP_to_Chair_re_draft_Domestic_Abuse_Bill.pdf)

<sup>20</sup> Note that not only would this expand the protection to cohabitants, but also allow non-entitled applicants in a relationship other than spouse/civil partnership/cohabitation to obtain occupation protection.

FLA 1996 for an occupation order expressly restricting those rights? Or does the DAPO simply obliterate them once made? And what about ancillary orders under s 40 FLA, governing such matters as use of furniture in the home? Will the DAPO court have power to make orders pertaining to that, or will an FLA application be required?

These technical points aside, the Joint Committee that scrutinized the draft Bill expressed concern that the DAPO scheme may not meet its objectives for various reasons, including the currently patchy use by the police of the DVPN/DVPO scheme, the cost to the police of applying for orders (though here government has announced that the Home Office will cover the fees at least during the two-year piloting), the reluctance of victims to engage with a process that would potentially criminalize their partner, and the family courts' traditionally tendency to regard occupation orders under the FLA 1996 as a 'Draconian' measure, which might be expected to carry over to the new legislation, not least given the criminalization of breach, such that the courts might be 'reluctant to impose the orders in all by the most exceptional of circumstances'.<sup>21</sup>

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<sup>21</sup> Joint Committee (2019), above at <https://publications.parliament.uk/pa/jt201719/jtselect/jtddab/2075/207502.htm>, para 115, and paras preceding.

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## 4.9 Forced marriage protection orders and victim autonomy: *Re K (Forced Marriage: Passport Order)* [2020] EWCA Civ 190

This important Court of Appeal decision explores the place of victim autonomy – specifically the wishes of competent adult victims of actual or potential forced marriage – to the FLA 1996 regime for FMPOs. While specific to that context, what the Court says has relevance to the DAPN/DAPO regime discussed above, as that regime (cf the 2010 Act) would permit the making of indefinite orders for such individuals’ protection.

The decision can be summarised in one sentence of the judgment: “In short, the court can make an order protecting a person from themselves”.<sup>22</sup>

To set out the reasoning more fully, the Court found that the FMPO regime does empower the court to make orders against the wishes of competent adults, and that the latter’s wishes cannot be “an automatic trump card or determining factor”.<sup>23</sup> This is a consequence of the state’s positive obligations under Art 3 ECHR, which, nevertheless, do need to be “accommodated” alongside its obligations under Art 8.<sup>24</sup> The Court went on to provide a “route map” for judges to use in reaching their decisions on applications for FMPOs in such cases:

### ***Re K (Forced Marriage: Passport Order)* [2020] EWCA Civ 190**

#### **SIR ANDREW MACFARLANE P:**

46. Stage One is for the court to establish the underlying facts based upon admissible evidence and by applying the civil standard of proof. The burden of proof will ordinarily be upon the application who asserts the facts that are said to justify the making of a FMPO...

50. At Stage Two, based on the facts that have been found, the court should determine whether or not the purpose identified in FLA 1996, s 63A(1) is established, namely that there is a need to protect a person from being forced into a marriage or from any attempt to be forced into a marriage, or that a person has been forced into a marriage.

51. At Stage Three, based upon the facts that have been found, the court must then assess both the risks and the protective factors that relate to the particular circumstances of the individual who is said to be vulnerable to forced marriage. This is an important stage and the court may be assisted by drawing up a balance sheet of the positives and negatives within the circumstances of the particular family in so far as they may relate to the potential for forced marriage.

52. At the conclusion of Stage Three, the court must explicitly consider whether or not the facts as found are sufficient to establish a real and immediate risk of the subject of the application suffering inhuman and degrading treatment sufficient to cross the ECHR, Article 3, threshold.<sup>25</sup>

53. At Stage Four, if the facts are sufficient to establish a risk that the subject will experience conduct sufficient to satisfy ECHR, Article 3, the court must then undertake the exercise of achieving an accommodation between the necessity of protecting the subject of the application from the risk of harm under Article 3 and the need to respect their family and private life under Article 8 and, within that, respect for their autonomy. This is not a strict “balancing” exercise as there is a necessity for the court

<sup>22</sup> [2020] EWCA Civ 190, [65].

<sup>23</sup> *Ibid*, [35].

<sup>24</sup> *Ibid*, [37].

<sup>25</sup> On this, see *ibid*, [23]-[25].

to establish the minimum measures necessary to meet the Article 3 risk that has been established under Stage Three.

54. In undertaking the fourth stage, the court should have in mind the high degree of flexibility which is afforded to the court by the open wording of FLA 1996, s 64A. In each case, the court should be encouraged to establish a bespoke order which pitches the intrusion on private and family life at the point which is necessary in order to meet the duty under Article 3, but no more. The length of the order, the breadth of the order and the elements within the order should vary from case-to-case to reflect the particular factual context; this is not a jurisdiction that should ordinarily attract a template approach.