Date	**13 June 2023**
Response to	**Pilot Practice Direction for Domestic Abuse Protection Orders**
Issued by	**Family Procedure Rules Committee**
Link to consultation	**N/A**
Notes	**For additional information please contact, helen.richardson@magistrates-association.org.uk**

About the Magistrates Association

The Magistrates' Association is an independent charity and the membership body for the magistracy. We work to promote the sound administration of the law, including by providing guidance, training and support for 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 courts and the broader justice system. With over 14,000 members across England and Wales, we are a unique source of information and insight and the only independent voice of the magistracy.

Magistrates Association

Consultation questions

Q1: When considering the draft Pilot Practice Direction in its entirety

a. Does the Pilot PD provide sufficient detail and clarity?

Additional information and clearer signposting of the option of interim DAPOs (as referenced in paragraph 14) would be useful.

There is limited information or guidance in the draft pilot Practice Direction on the factors to consider for making a DAPO other than reference to Section 32(2) of the 2021 Act. There is also little information or guidance as to the factors to consider for the duration of a DAPO. For example, we note in particular the potential need to consider proportionality if there is no maximum duration of a DAPO.

In terms of clarity, whether this order can be made in a similar way to a NMO, i.e. by agreement without findings made.

As a general comment, we note that DAPOs will rely on programmes for perpetrators, but that provision of perpetrator programmes is inconsistent across England and Wales at present and that there is a lack of confidence among survivors in the efficacy of these programmes. The reliance on programmes under DAPOs will therefore require full resourcing, better provision and work to build confidence in the efficacy of the programmes if the DAPOs are to be effective.

We also note that there is a perception amongst survivors that family court proceedings can be used by perpetrators as part of coercive and controlling behaviour. We make comments in our response to question 2 about a specific instance of the process which has the potential to be used by perpetrators to perpetuate coercive and controlling or other abusive behaviours. We emphasise that the guidance still in development should acknowledge this and highlight the possibility that perpetrators may continue to try and use the DAPO process in family court proceedings as part of a pattern of abuse.

b. Are there any procedural gaps or specific areas that would benefit from further expansion? Please provide specific information on these areas; and

None identified.

c. Are there any difficulties in the interpretation of the proposed Pilot PD? If so, please set these out.

As for question 1 and question 8, clarity around considerations for duration of an order, and specifics around the making of interim DAPO orders.

Q2: Paragraph 3 – Application for a DAPO on notice

This paragraph covers the application procedure for both victim applications and applications by third parties, who may be either individuals (such as lay friends and family) or representatives from professional organisations. We feel that making an application on a bespoke form will allow for all the necessary information the court needs to be captured, while enabling the facts to be set out more freely in the supporting witness statement. We have also made it clear that certain details

should only be provided if known, in order not to deter applications from victims where such information may not be known.

a. Do you agree with our suggested approach that applications ought to be on an application form supported by a witness statement?

Agree.

b. Do you consider that the additional information required under paragraph 3.4 of the PD is appropriate and clear enough?

We are concerned that the information required at 3.4 d)i) could put the the person to be protected at further risk by providing the respondent with additional details about the person to be protected and their movements. Unless, when information is known and provided under 3.4(d)(i) details there therefore confidential the provision of this information represents risk and we are unconvinced that the provision of such information is necessary for the order to be effective.

Q3: Paragraph 5 – Permission to apply for a DAPO

Under section 28(2)(c) of the DA Act, the Secretary of State has the power to specify in regulations third party organisations who can apply for a DAPO in the family court on the victim's behalf. These powers will not be exercised for the DAPO pilot, however anybody can still ask for permission of the court to apply for a DAPO under section 28(2)(d), and this paragraph explains the intended procedure. The pilot will inform our views about the organisations which ought to be specified in regulations for the national roll-out.

a. Do you agree the procedure as set out is clear enough?

Agree.

b. Do you agree with our suggested approach that applications for permission should be submitted on a bespoke form as opposed to using the FPR Part 18 procedure?

Agree.

Q4: Paragraph 6 – Application for a DAPO in existing proceedings

Where an application in existing proceedings is made in writing, at paragraph 6.3(a) we have provided that it should be made on an application form which will be a different form to the application form used for a standalone DAPO application. This is because we would like to allow for a simpler and shorter form to be used, taking into account how such applications may arise, balanced with the information the court needs to have available in order to reach a decision on whether a DAPO should be granted.

a. Do you agree that a separate form should be used?

We are concerned that, particularly for any litigants in person, having two separate forms, one for existing proceedings and one for standalone applications, may be a source of confusion and additional stress. On balance, perhaps consistency in the form used would be more beneficial holistically- there could be a tick box on the form to confirm whether there were ongoing proceedings, and the data captured that way.

Q5: Paragraph 7 – Parties

As a DAPO application can be made by a third party, and the victim can be under 18 (but must be 16 or over), this paragraph provides how the court can protect the victim's interests and consider whether they need to be made a party to the proceedings and, if so, whether they need a litigation friend. No provision is made for appointment of a children's guardian, and it is therefore not anticipated that Cafcass will be involved in this capacity.

a. Do you believe the interests of those victims are adequately protected by the intended procedure?

Yes, Cafcass involvement would be disproportionate at that stage, unless there were exceptional circumstances. This is covered in any event in the provisions as detailed in the questions below.

b. Do you believe that the provisions of FPR Part 16 and Practice Direction 16A relating to the appointment of a litigation friend sufficiently provide for such appointments, taking into account that a children's guardian will not be appointed specifically for these purposes?

Yes

Q6: Paragraphs 8 – 10 on service of a DAPO application and paragraphs 17 – 19 on service of a DAPO

These paragraphs cover in-depth procedure related to all possible scenarios, including service of a DAPO application and order when made on notice or without notice and when an application or an order is made in existing proceedings. They also deal with service when a third party is applying on behalf of a victim and service on a victim who is a child, as well as service on a mortgagee or landlord, where relevant. As our intention is to follow the case progression route as far as possible, the service paragraphs are spilt between service of applications and service of orders, which come later in the Pilot PD.

The primary method of service is personal service, but the court is reminded of their powers under FPR 6.35 and 6.36 to dispense with service or allow service by alternative means where it is anticipated that personal service will be difficult to effect. We have taken great care to make explicit provision that service for unrepresented individual applicants will rest with the court bailiff, and with a solicitor, for represented applicants. The provisions are set out in greater detail than it has sometimes been the case in other FPR, because the FPRC wanted to make these provisions as accessible and clear as possible.

a. Do you agree with this approach?

Yes

b. Is there anything else that the service provisions would benefit from?

No additional comments

c. Do you agree with the suggested inclusion of service on a mortgagee or landlord, which are loosely based on the FPR Part 10 provisions that relate to Occupation Orders, given that DAPOs can include requirements related to property?

Yes

Q7: Paragraph 11 – Hearings

This paragraph provides for DAPO hearings to be heard in private, unless the court orders otherwise or a DAPO application is being heard within existing proceedings that are already being heard in public. We have favoured this approach, to keep DAPO hearings heard in the family court consistent with the majority of family proceedings, in order to protect the privacy of children and vulnerable families. However, the rights of legal publishers and bloggers to attend such hearings will be preserved under FPR 27.11(2)(ff). It is understood that DAPO applications heard in the magistrates' court will be routinely heard in public.

a. Do you agree with our suggested approach?

Yes

Q8: Paragraph 14 – Including a positive requirement in a DAPO

This paragraph provides for an interim DAPO to be made, while allowing the court the necessary time to request evidence of suitability and enforceability of a particular programme. The procedure therefore envisages the court giving directions as to how the evidence of suitability and enforceability is to be obtained. It is our intention for the evidence to be provided by the most appropriate programme provider available in that area.

We are working to develop a more detailed process for how these referrals will be managed. We also intend to provide a guidance/reporting framework document for participating programme providers, which will set out how they will be expected to meet their obligations under section 36(5) of the DA Act, including how they will report on compliance and non-compliance to the police as required by section 36(5)(c) of the DA Act. Therefore, the Pilot PD does not provide for this level of detail, and it is drafted in line with similar provisions in the CrimPR, including provisions for DAPOs at CrimPR 31.10.

a. Do you have any comments on these provisions?

We note that the current paragraph is drafted in line with the CrimPR. However, more detail on interim DAPOs will be necessary for courts to make these orders and to give directions as to how evidence of suitability and enforceability will be obtained.

b. Do you think anything else needs to be included which relates to the court's communication with programme providers and the flow of information between the two?

No additional comments.

Q9: Paragraph 15 – Electronic monitoring requirements

This paragraph aligns with the procedural approach taken to this same requirement under CrimPR 14.12 for court bail and CrimPR 31.10 for DAPOs made in criminal proceedings.

It is our intention to follow the court bail model for electronic monitoring as closely as possible. We will develop more detailed guidance and procedure for court staff, police and electronic monitoring providers, which will include guidance on how appropriate consent of relevant occupants may be taken, as required under section 37(3), how address validity will be verified, and how the electronic monitoring provider will report breaches to the police.

Unlike for positive requirements, where the court is considering imposing electronic monitoring, the perpetrator's presence will be necessary at court, as required by section 37(2), so that the perpetrator can confirm their address and advise the court whether consent needs to be obtained from the principal occupiers of the premises where the equipment needs to be installed. Where the perpetrator is not present at court, the court will rely on the FPR Part 37 procedure to secure their attendance.

a. Given that electronic monitoring is being introduced for the first time in the family court, do you have any observations on these provisions?

The provisions are welcome and have the capacity to increase the confidence of the family court in the imposition of enforcement provisions where these are appropriate, which may have a positive impact on curtailing delay and encouraging compliance with orders more generally.

We note that detailed guidance is being developed and encourage the authors of the guidance to recall that some family magistrates will have been directly recruited to the family court and will therefore not have experience of bail decision making processes. Guidance therefore should not rely on pre-existing knowledge of or comparison to bail decisions for illustration in guidance for electronic monitoring under a DAPO.

Our only reservation is that, in the context of the criminal courts, electronic monitoring has not been seen as a reliable protection against domestic abuse. Electronic monitoring must not therefore be overly relied upon in the DAPO to provide personal protection.

Q10: Paragraphs 20 and 21 – Notification to the police

These paragraphs depart from the standard procedure under FPR Part 10, which places the onus on the applicant or their solicitor to serve an order on the police after service has been effected on the respondent.

Under these provisions, the responsibility will shift to the court for all cases and the notification will be made within 1 day of the order being sealed to a dedicated email address nominated by the piloting police forces. This will expedite police notifications and ensure greater consistency in comparison to how the police are currently notified. It still remains the case that a certificate of service confirming the perpetrator is made aware of the terms of order will have to be notified to the police by whoever effected service, and this will follow the same notification process.

In the longer-term, it is our intention to explore more sophisticated digital solutions for such notifications, with the Home Office leading a preliminary scoping exercise in this space.

a. Do you have any comments specific to these provisions?

No additional comments

Q11: Paragraph 22 – Variation or discharge of a DAPO

The provisions reflect requirements under sections 44 and 45 of the DA Act, in particular those provisions that have been developed to protect the victim from being coerced to apply to vary to make an order less onerous or to bring it to an end. Under section 44(4)(a), the court is obliged to confirm whether the police wish to give evidence, and this would apply to all DAPOs being varied in the family court, even where the police were not involved in the DAPO. In paragraph 22.5, we have provisionally included the words 'where practicable' where we refer to this evidence being provided within 1 day of the police being notified that an application to vary or discharge has been made, and we are working with the police to confirm how the process will operate in practice.

a. Do you have any comments on the proposed procedure?

No additional comments.

Q12: Section X – Enforcement (paragraphs 23 to 29)

These provisions are modelled on similar provisions in FPR Part 10 and Part 11, where the civil contempt of court route has also been preserved.

a. Do you have any comments on these provisions, including how they currently operate in practice?

Contempt of court is very rarely used in the family court by magistrates. The Law Commission are currently conducting a project on reform to the law on contempt of court. We therefore suggest that the Law Commission is consulted directly about the enforcement provisions relating to contempt of court and ensure that enforcement provisions would have longevity in the event of any law reform recommendations made by the Law Commission including the consideration of other enforcement options.

In addition, we note that our members rarely encounter contempt of court and that, in general, there is a judicial aversion to using contempt of court processes within the family jurisdiction. We agree that the contempt of court provisions should be preserved, with the caveat of discussing Law Commission reform proposals, but we also suggest further exploration of other enforcement routes.