EXPLANATORY MEMORANDUM TO

THE LEGAL AID, SENTENCING AND PUNISHMENT OF OFFENDERS ACT 2012 (LEGAL AID: DOMESTIC ABUSE) (AMENDMENT) ORDER 2024

2024 No. 715

1. Introduction

1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of His Majesty.

2. Declaration

2.1 Lord Bellamy KC, Parliamentary Under Secretary at the Ministry of Justice, confirms that this Explanatory Memorandum meets the required standard.

2.2 Claire Cooper and Lizzie Checkley, Joint Deputy Directors for legal aid policy at the Ministry of Justice, confirm that this Explanatory Memorandum meets the required standard.

3. Contact

3.1 Nicholas Craigen at the Ministry of Justice, email Civil.LegalAidPolicy@justice.gov.uk, can be contacted with any queries regarding the instrument.

Part One: Explanation, and context, of the Instrument

4. Overview of the Instrument

What does the legislation do?

4.1 This Statutory Instrument (SI) will make advocacy (for those persons who are protected by a Domestic Abuse Protection Order (DAPO) or for those who are subject to a DAPO) under civil legal aid available in the magistrates' courts (and in subsequent appeals to the Crown Court) in DAPO cases where the application for the DAPO is made by the police in the magistrates' courts. This Order complements the changes made by The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid: Family and Domestic Abuse) (Miscellaneous Amendments) Order 2023 ("SI 2023/150") of 7 February 2023[1].

Where does the legislation extend to, and apply?

4.2 The extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law of) is England and Wales.

4.3 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales.

[1] https://www.legislation.gov.uk/uksi/2023/150/made

5. Policy Context

What is being done and why?

5.1 This Order complements the changes under SI 2023/150. That SI made provision for civil and criminal legal aid, including advocacy for the majority of proceedings under Part 3 of the Domestic Abuse Act 2021. This Order makes further provision for legal aid for advocacy. Namely, it allows civil legal aid for advocacy for the person protected by the order or for a person against whom a DAPO is sought or has been made in DAPO proceedings in the magistrates' courts and in the Crown Court originating from a police led application for a DAPO.

5.2 By way of background, Part 3 of the Domestic Abuse Act 2021[2] (DA Act) legislated for DAPOs, amongst other protective measures, to enable police forces and the courts to deal with all forms of domestic abuse, as defined by the DA Act (including, for example, physical violence, sexual abuse, violent or controlling behaviour, and emotional abuse). Breach of a DAPO is a criminal offence. In accordance with s.28 of the DA Act, an application for a DAPO can be made in a number of courts, but where the application is made by the police (including transport and military), it must be made in the magistrates' courts as a civil application. In accordance with s.46 of the DA Act, where a DAPO is made in the magistrates' courts, any appeal must then be made to the Crown Court.

5.3 SI 2023/150 will bring DAPOs into scope of legal aid when Part 3 of the DA Act is commenced via a separate SI (for more background on SI 2023/150, please see paragraphs 6.12-6.15 and paragraphs 7.11-7.14 of the Explanatory Memorandum that accompanied it[3]). With regard to civil legal aid, article 4 of SI 2023/150 will amend the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) to explicitly provide that civil legal aid, including advocacy, is available for DAPO proceedings in the family court, on application by victims (or third parties on their behalf) for the benefit of both victims (or the third party) and the person who is the subject the DAPO application or proceedings. SI 2023/150 makes similar provision for legal aid, including advocacy, for all parties in relation to DAPOs in existing family or civil proceedings, thus ensuring consistency with other types of protective injunctions.

5.4 However, those changes do not go far enough to permit the use of civil legal aid for advocacy for DAPOs in the magistrates' courts in relation to the making, varying or discharge of the order and in the Crown Court in relation to appeals from the magistrates' court where the police have made the application for a DAPO. This additional SI is therefore required to amend Part 3 of Schedule 1 of LASPO, to ensure that advocacy is not excluded as a form of legal aid available.

What was the previous policy, how is this different?

5.5 There has been no change in Government's policy since SI 2023/150 in relation to the provision of legal aid for DAPOs. In fact, the Government reaffirmed on 25 May 2023[4] its commitment to provide legal aid for DAPOs (as well as for breach of Domestic Abuse Protection Notices (DAPNs) also established under the DA Act). The changes made by this Order are technical and complement the changes made by SI 2023/150 to

[2] https://www.legislation.gov.uk/ukpga/2021/17/part/3
[3] https://www.legislation.gov.uk/uksi/2023/150/memorandum/contents
[4] See paragraph 146 of the Government's response to the Legal Aid Means Test Review, https://www.gov.uk/government/consultations/legal-aid-means-test-review/outcome/government-response-to-legal-aid-means-test-review--3

ensure that there is no gap in the provision of legal aid further to the commitment (see paragraphs 5.1-5.4 above).

6. Legislative and Legal Context

How has the law changed?

6.1 As set out in paragraphs 5.1-5.5 above, Part 3 of the DA Act established new protective measures, DAPOs and DAPNs, to combat domestic abuse in all its forms. SI 2023/150 made provision for both civil (article 4) and criminal (article 8) legal aid in DAPO cases (and breach of domestic abuse protection notices in relation to criminal legal aid alone). This included the requisite legal aid for advocacy except for civil legal aid for persons protected by or subject to a DAPO application/proceedings where the police apply to the magistrates' court to make (or vary or discharge) a DAPO, and except on appeal against such an order to the Crown Court. This Order makes provision for that civil legal aid to be available by amending Part 3 of Schedule 1 to LASPO.

6.2 Section 9 of LASPO sets out that civil legal services are to be available to an individual if they are in scope (sub-section (1)(a)) and if they are determined as eligible (sub-section(1)(b)). Section 9(1) is supplemented by Part 1 of Schedule 1 to ascertain scope. For the purposes of this Order, paragraph 11 (Family homes and domestic violence) of Part 1 of Schedule 1 to LASPO is relevant and SI 2023/150 amended that paragraph to widen the scope of civil legal services to include DAPO proceedings. That SI inserted (3A) into that paragraph 11 for the exclusions in relation to advocacy which, in turn, is addressed in Part 3 of Schedule 1 to LASPO. This Order is making provision for advocacy in the Crown Court and magistrates' courts so that it is paragraphs 6 and 7 of Part 3 that have required amending by inserting further text. This Order adds the specific DAPO proceedings, as set out above, into both these paragraphs. Furthermore, the Order adds provision, in those paragraphs, that this legal aid is to be available to those who are protected by or subject to a DAPO or prospective DAPO.

6.3 Legal aid changes introduced by this Order will come into force on the day after the day on which it is made. This means that the changes in this instrument, together with those made by SI 2023/150 will ensure legal aid is available from the outset for proceedings under Part 3 of the DA Act, as per the commitment detailed in 5.2 above.

Why was this approach taken to change the law?

6.4 This Order is necessary to amend primary legislation (LASPO) to effect the necessary changes ensuring that civil legal aid is available for advocacy for police-led DAPO proceedings in the magistrates' courts and on appeal in the Crown Court and is consistent with the changes made by SI 2023/150.

7. Consultation

Summary of consultation outcome and methodology

7.1 No consultation was undertaken for the changes in this Order because Government policy in relation to the provision of legal aid for DAPOs has not changed (see paragraphs 5.1-5.5 above) and because the Government carried out a public consultation on the draft Domestic Abuse Bill in 2018 before its introduction in Parliament[5], and Parliament fully considered the DAPO provisions during the passage of the Bill. As indicated in the Government's response to the consultation[6] in 2019, the

[5] https://www.gov.uk/government/consultations/domestic-abuse-bill-consultation
[6] Page 3 of https://www.gov.uk/government/publications/domestic-abuse-consultation-response-and-draft-bill

consultation aimed at harnessing the knowledge and expertise of victims and survivors, as well as charities, specialist organisations, and experts across policing, criminal justice, health, welfare, education, social services, employment and local authorities who deal with the effects of domestic abuse every day. The consultation received over 3,200 responses from across the UK. During the consultation period, a large number of events were held across England and Wales, engaging over 1,000 people including victims, charities, local authorities and professionals from other organisations. The majority of those who responded to the consultation agreed with the proposals within it, which included the creation of a new DAPO. In its response to the consultation[7], the Government also indicated that it would pilot the new DAPOs. In the subsequent response of May 2023 to the Legal Aid Means Test Review, the Government indicated that it would provide legal aid for both DAPNs and DAPOs[8].

7.2 The Government will consider the outcome of the pilot, which will also provide an opportunity to address any issues arising from the legal aid provision for DAPNs and DAPOs.

8. Applicable Guidance.

8.1 General factsheets on the Domestic Abuse Act 2021 are publicly available on GOV.UK[9]. The factsheet related to DAPNs and DAPOs confirms that these measures will be piloted before being implemented throughout England and Wales.

8.2 The Ministry of Justice and the Legal Aid Agency will amend technical guidance on legal aid funding and guidance for providers on how to claim payments for these new measures during the pilot. These changes will be reflected in the Lord Chancellor's Guidance[10] which sets out some of the factors that should be considered when making decisions about legal aid funding and will be in place for the commencement of the pilot.

Part Two: Impact and the Better Regulation Framework

9. Impact Assessment

9.1 A full Impact Assessment has not been prepared for this instrument because it was addressed in the Impact Assessment already published for SI 2023/150[11], together with an Equalities Statement[12].

Impact on businesses, charities and voluntary bodies

9.2 There is no significant impact on business, charities or voluntary bodies because the legal aid changes in this Order for DAPOs are expected to affect those legal services providers that cover domestic abuse in civil and criminal proceedings.

9.3 The legislation impacts small or micro businesses to the extent that they are legal services providers dealing with DAPOs. These small and micro businesses are not exempted because the impact will be a positive one as the legislation makes civil legal

[7] Page 26 of https://www.gov.uk/government/publications/domestic-abuse-consultation-response-and-draft-bill
[8] Paragraph 146 of https://www.gov.uk/government/consultations/legal-aid-means-test-review/outcome/government-response-to-legal-aid-means-test-review--3
[9] https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets
[10] https://www.gov.uk/guidance/funding-and-costs-assessment-for-civil-and-crime-matters
[11] https://www.legislation.gov.uk/ukia/2023/27/pdfs/ukia_20230027_en.pdf
[12] https://www.legislation.gov.uk/uksi/2023/150/pdfs/uksipes_20230150_en.pdf

aid funds available for advocacy for police-led DAPO proceedings in the magistrates' courts and on appeal in the Crown Court.

9.4 The impact on the public sector is in the form of an additional annual legal aid fund for DAPNs and DAPOs estimated at between £3.7m and £6.4m, with a best estimate of £5m per annum.

9.5 The Equalities Statement associated with SI 2023/150 did not identify direct discrimination concerning the provision of legal aid in relation to DAPOs and DAPNs. However, it acknowledged the potential for indirect discrimination in the use of these measures, as protective injunctions are predominantly utilised by female clients, while men are more likely to be subjects of DAPNs. The Statement, acknowledging the potential for indirect discrimination, justified policy changes based on overarching aims. For DAPOs, the legitimate policy objective is to ensure all domestic abuse victims have access to legal aid for protective injunctions, regardless of their protected characteristics. This is achieved by expanding the scope of legal aid. Concerning DAPNs, the legitimate policy aim is to provide criminal legal aid for those detained in police custody and ensure equal access for DAPN respondents compared to other detainees in police custody. The measures in this SI expand this policy aim by ensuring that the defendant and the victim in police-led DAPO proceedings has access to civil legal aid for advocacy.

10. Monitoring and review

What is the approach to monitoring and reviewing this legislation?

10.1 The Ministry of Justice and the Legal Aid Agency together monitor the operation and expenditure of the legal aid scheme in England and Wales, thus including the provision, by this Order, of civil legal aid for DAPOs.

10.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015, the Parliamentary Under Secretary of State at the Ministry of Justice, Lord Bellamy KC, has made the following statement: "It would not be appropriate in the circumstances to make provision for a statutory review of this instrument because of the relatively low impact on business, and because the pilot will be evaluated.".

Part Three: Statements and Matters of Particular Interest to Parliament

11. Matters of special interest to Parliament

11.1 None.

12. European Convention on Human Rights

12.1 Lord Bellamy KC, Parliamentary Under Secretary of State, has made the following statement regarding Human Rights:

"In my view the provisions of The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid: Domestic Abuse) (Amendment) Order 2024 are compatible with the Convention rights."

13. The Relevant European Union Acts

13.1 This instrument is not made under the European Union (Withdrawal) Act 2018, the European Union (Future Relationship) Act 2020 or the Retained EU Law (Revocation and Reform) Act 2023 ("relevant European Union Acts").