EXPLANATORY MEMORANDUM TO

THE PROHIBITION OF CROSS-EXAMINATION IN PERSON (CIVIL AND FAMILY PROCEEDINGS) REGULATIONS 2022

2022 No. 568

1. Introduction

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

2. Purpose of the instrument

2.1 Sections 65 and 66 of the Domestic Abuse Act 2021 introduce new Part 4B into the Matrimonial and Family Proceedings Act 1984 ('MFPA 1984') and new Part 7A into the Courts Act 2003 ('CA 2003'), respectively. Those provisions operate in family and civil proceedings to prohibit cross-examination in person between a party and a witness in defined circumstances, including where there is evidence of domestic abuse between them. The prohibition will apply automatically where there has been a conviction, charge (in relation to family proceedings only) or caution for a specified offence, where an on-notice protective injunction is in force between the party and witness or where there is other specified evidence of domestic abuse between them.

2.2 These Regulations specify the types of offences, protective injunctions and forms of evidence which will trigger the automatic prohibition of cross-examination in person between the party and witness.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is England and Wales.

4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

6.1 This instrument is being made as part of the implementation of Part 5 of the 2021 Act. Section 65 of the 2021 Act makes provision to automatically prohibit perpetrators of abusive behaviour from cross-examining their victims in person, and vice versa, in family proceedings in specified circumstances. Section 66 of the 2021 Act makes similar provision in civil proceedings. Power is conferred on the Lord Chancellor to specify, in regulations, the offences, protective injunctions and types of evidence that will 'trigger' the automatic prohibition of cross-examination in person and it is under those powers that this instrument is made.

7. Policy background

What is being done and why?

7.1 While judges in civil and family courts have a wide range of case-management powers to assist vulnerable parties or witnesses and control evidence in proceedings, prior to the 2021 Act there were no express powers available to them to prevent an alleged perpetrator of abuse from cross-examining their alleged victim in person. Being cross-examined in person by their abuser has the potential to cause the victim significant further distress and affect the quality of their evidence. In contrast, specific powers were introduced into criminal legislation in 2000 which prevented a defendant charged with a sexual offence from personally cross-examining the complainant[1].

7.2 The Government committed to legislate to address this issue in relation to family proceedings in its consultation 'Transforming the Response to Domestic Abuse'[2] and the draft Domestic Abuse Bill published in January 2019 included clauses similar to those in section 65 of the 2021 Act. Separately, the Civil Justice Council conducted a consultation on the support available (in civil courts) to vulnerable parties and witnesses in September 2019 and its final report was published in February 2020[3]. Various recommendations were made, including that the proposed prohibition of cross-examination in person in the family courts be extended to civil courts, which led to the provision made by section 66 of the 2021 Act.

7.3 Section 65 of the 2021 Act introduces a new Part 4B into the MFPA 1984 which contains provision that prohibits a party to family proceedings from cross-examining a witness in person in specified circumstances. Section 66 of the 2021 Act introduces new Part 7A into the CA 2003 which makes similar provision in civil proceedings. The prohibition on cross-examination in person will automatically apply in three situations:

(i) where a party has been convicted of, given a caution for, or (in relation to family proceedings only) is charged with a "specified offence";

(ii) where a witness is protected by an on-notice "protective injunction" against another party; and

(iii) where "specified evidence" is adduced showing there has been domestic abuse between the party and witness.

7.4 The automatic prohibition operates reciprocally, meaning that the victim of the abusive behaviour may not cross-examine the perpetrator in person.

7.5 As indicated during passage of the 2021 Act, the list of offences specified in this instrument for the purposes of inserted sections 31R MFPA 1984 and 85F CA 2003 are largely based on the list of offences set out by the Lord Chancellor in a non-statutory document published under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 for the purposes of demonstrating eligibility for civil legal aid. The types of protective injunctions and forms of evidence in Schedules 2 and 3 to these Regulations are largely based on the contents of Schedule 1 to the Civil Legal Aid (Procedure) Regulations 2012. The tables in this instrument have been further

1 Section 34 of the Youth Justice and Criminal Evidence Act 1999.
2 The joint Home Office and Ministry of Justice consultation 'Transforming the Response to Domestic Abuse' available at https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/
3 https://www.judiciary.uk/wp-content/uploads/2020/02/VulnerableWitnessesandPartiesFINALFeb2020-1-1.pdf

developed, including following engagement with the Ministry of Defence andthe Home Office, to ensure the accurate inclusion of offences and protective orders under service legislation, and those under any new relevant legislation across the United Kingdom passed since the legal aid lists were last updated. While this instrument extends only to England and Wales, offences under the laws of Scotland and Northern Ireland are included as 'specified offences' for the purposes of the prohibition (as is also the case in the legal aid list referred to above), and officials have updated the tables following engagement with those in the devolved administrations.

7.6 The types of offences specified in Schedule 1 to these Regulations go beyond those relating to domestic abuse between personally connected adults, and include child abuse, sexual abuse, and other violent offences in order to meet the underlying policy objective of also protecting witnesses in family and civil proceedings who may be vulnerable for reasons other than domestic abuse. This also meets the same commitment made in the Government's Implementation Plan[4] published in response to the 'Harm Panel' report[5].

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 As this instrument does not amend another instrument, no consolidation of legislation is required.

10. Consultation outcome

10.1 No formal consultation was undertaken on the list of specified offences, evidence and protective injunctions. However, the Ministry of Justice has undertaken detailed engagement with other government departments such as the Ministry of Defence, the Home Office and (in relation to offences under the laws of Scotland and Northern Ireland) the devolved administrations when considering other offences, protective injunctions and orders and the types of evidence for inclusion in the existing list, so that the lists remain as comprehensive as possible.

11. Guidance

11.1 There are no plans to issue specific guidance for this instrument, but the judiciary and Her Majesty's Courts and Tribunals Service staff in the family and civil courts will be provided with operational guidance. The Lord Chancellor will also issue Statutory Guidance on the role of the qualified legal representative who may be appointed by the court under inserted section 31W(6) MFPA 1984 and section 85K(6) CA 2003 to conduct cross-examination on behalf of prohibited parties in either civil or family proceedings.

4 Assessing Risk of Harm to Children and Parents in Private Law Children Cases – Implementation Plan available at Assessing Risk of Harm to Children and Parents in Private Law Children Cases - Implementation Plan (publishing.service.gov.uk)

5 Assessing Risk of Harm to Children and Parents in Private Law Children Cases – Final Report available at Assessing Risk of Harm to Children and Parents in Private Law Children Cases (publishing.service.gov.uk)

12. Impact

12.1 There is no direct impact on business, charities or voluntary bodies from this instrument.

12.2 There is no direct impact on the public sector from this instrument.

12.3 As such, an Impact Assessment has not been prepared for this instrument. This instrument is being made as part of the implementation of Part 5 of the 2021 Act. However, our current estimate of the annual costs in England and Wales of appointing publicly funded qualified legal representatives in civil and family proceedings is approximately £10m - £11m

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Ministry of Justice and Her Majesty's Courts and Tribunals Service plan to monitor implementation of the provisions in sections 65 and 66 of the 2021 Act to check their effective operation once they come into force.

15. Contact

15.1 Shan Maraj at the Ministry of Justice email: Shan.Maraj@justice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Abigail Plenty and Laura Beaumont (Jobshare), Deputy Director for Vulnerability Policy, at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.

15.3 James Cartlidge, Parliamentary Under Secretary of State at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.