DOMESTIC ABUSE BILL

DELEGATED POWERS MEMORANDUM

Introduction

1. This memorandum has been prepared by the Home Office, Ministry of Justice and Ministry of Housing, Communities and Local Government for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Domestic Abuse Bill. The Bill was introduced in the House of Commons on 3 March 2020. The memorandum identifies the provisions of the Bill which confer new powers to make delegated legislation. It explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

Background and purpose of the Bill

2. There are some 2.4 million victims of domestic abuse a year (aged 16 to 74) and more than one in ten of all offences recorded by the police are domestic abuse related. The Government committed to introduce this landmark Domestic Abuse Bill to transform the approach of the justice system and wider statutory agencies to ensure that victims have the confidence to come forward and report their experiences, safe in the knowledge that the state will do everything it can to protect and support them and their children, and pursue the abuser.

3. The Bill includes measures to:

    a) Provide for a statutory definition of domestic abuse;
    b) Establish the office of Domestic Abuse Commissioner and set out the Commissioner's functions and powers;
    c) Provide for a new Domestic Abuse Protection Notice and Domestic Abuse Protection Order;
    d) Place a duty on tier one local authorities in England to provide support to domestic abuse victims and their children in safe accommodation;
    e) Provide that complainants of an offence involving behaviour which amounts to domestic abuse are eligible for special measures in the criminal courts in England and Wales;
    f) Prohibit perpetrators or alleged perpetrators of abuse from cross-examining their victims in person in the family courts (and vice versa) and provide, in certain circumstances, for the appointment of a publicly funded legal representative to conduct the cross-examination;
    g) Extend the extraterritorial jurisdiction of the criminal courts in England and Wales, Scotland and Northern Ireland to further violent and sexual offences;
    h) Enable domestic abuse offenders to be subject to polygraph testing as a condition of their licence following their release from custody;
    i) Place the guidance supporting the Domestic Violence Disclosure Scheme on a statutory footing;

j) Ensure that where a local authority, for reasons connected with domestic abuse, grants a new secure tenancy to a social tenant who had or has a secure lifetime or assured tenancy (other than an assured shorthold tenancy) this must be a secure lifetime tenancy; and
k) Confer power on the Secretary of State to issue guidance about domestic abuse.

Overview of the delegated powers

4. The measures at items (b), (c), (d), (f), (i) and (k) above contain 12 new regulation-making powers, one power to issue directions, one power to issue a framework document and six new powers to issue statutory guidance or codes of practice. In addition, the Bill includes three standard regulation-making powers to make consequential amendments, transitional or saving provision, and relating to commencement (including to provide for piloting of certain provisions).

Clause 10(1): Duty to issue Domestic Abuse Commissioner framework document

Power conferred on: *Secretary of State*

Power exercisable by: *Statutory document*

Parliamentary procedure: *Laying only*

Context and purpose

5. Part 2 of the Bill establishes the office of Domestic Abuse Commissioner, makes provision for the appointment of the Commissioner by the Secretary of State (in practice, the Home Secretary), funding and the appointment of staff, and sets out the functions of the Commissioner.

6. Clause 10 requires the Secretary of State to issue a framework document, in consultation and with the agreement of the Domestic Abuse Commissioner, which deals with matters relating to the Commissioner, including matters relating to governance, funding and staffing. The Commissioner must have regard to the framework document when exercising any of the Commissioner's functions and the Secretary of State must have regard to it when exercising any functions in relation to the Commissioner. Before issuing the first framework document or any other which the Secretary of State views as being significantly different from the one that it replaces, the Secretary of State must consult with the Welsh Government.

7. The provisions of clause 10 are modelled on those in Schedule 2 to the Crime and Courts Act 2013 which provide for a framework document in respect of the National Crime Agency (NCA).

Justification for the power

8. The provisions in Part 2 of the Bill set out the overarching framework under which the Domestic Abuse Commissioner will operate. They provide for the Commissioner to be appointed by the Home Secretary, for the Home Secretary to provide funding for the Commissioner and for the running of their office, for the Home Secretary to provide staff and accommodation for the Commissioner, and for the Commissioner to establish an Advisory Board and to prepare a strategic plan. Further provisions set out the functions of the Commissioner, provide for the publication of reports and enable the Commissioner to provide advice and assistance. Clauses 7(4), 8(6) and 13(4) enable the Home Secretary to direct that information which might jeopardise the safety of any person or might prejudice a criminal investigation or prosecution be redacted from a report or advice before it is published.

9. Having established this overarching legal framework on the face of the Bill, the Government considers it appropriate for the Secretary of State to issue a framework document in order to set out how the Secretary of State and the Domestic Abuse Commissioner plan to work together, including on such matters as setting the budget for the Commissioner, the arrangements for the recruitment and appointment of the Commissioner's staff, and the process by which the powers in clauses 7(4), 8(6) and 13(4) will be exercised (it is envisaged that the framework document will set out time limits which the Secretary of State will adhere to in reaching decisions on the exercise of such powers). While the Commissioner's principal accountability will be to the Home Secretary, the framework document will also provide that the Commissioner will additionally be subject to scrutiny by the UK Parliament and, insofar as the Commissioner's work touches on devolved matters in Wales, the Senedd Cymru. It is further envisaged that the framework document will set out how the Commissioner will cooperate with other office holders, including the Victims' Commissioner and the National Advisers appointed by the Welsh Government under the provisions of the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015.

10. These are detailed, procedural matters which may be properly left to a protocol between the Home Secretary and the Commissioner, rather than being put on the face of the Bill or set out in regulations. This protocol will afford the Home Secretary and the Commissioner the ability to change the way they work together, as the relationship evolves, with reasonable procedural ease, as it will be quicker and easier to amend the protocol than to amend primary, or secondary, legislation. A draft of the Framework Document is available here.

Justification for the procedure

11. The first framework document (and any future revisions of the document) must be laid before Parliament (and Senedd Cymru), but it is not otherwise

subject to any parliamentary procedure (see clause 10(8) and (9)). This procedure is considered appropriate given that the document will be a jointly agreed statement between the Secretary of State and the Commissioner about the way they plan to work together. The document will build on the governance arrangements and functions set out on the face of the Bill and the Welsh Government would have been consulted as set out above. This approach is consistent with the provisions in Schedule 2 to the Crime and Courts Act 2013 in respect of the NCA.

Clause 14(4): Power to amend clause 14

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Negative resolution*

Context and purpose

12. The Domestic Abuse Commissioner's role will be to encourage good practice in: the prevention of domestic abuse; the prevention, detection, investigation and prosecution of offences involving domestic abuse; the identification of perpetrators of domestic abuse, victims of domestic abuse and children affected by domestic abuse; and the provision of protection and support to people affected by domestic abuse.

13. The Commissioner will provide public leadership on domestic abuse, standing up for victims and survivors and their children. They will map and monitor the provision of domestic abuse services across England and Wales, and publish the results. In doing this, they will highlight areas of best practice, point out service provision which falls short of what is expected and make recommendations to public bodies to improve their service provision, thereby driving improvements to the response to domestic abuse across England and Wales.

14. Clause 14 places a duty on specified public authorities to cooperate with the Commissioner at the Commissioner's request. Such public authorities are further required, under clause 15, to respond to any report, published by the Commissioner under clause 7, containing recommendations in relation to them. The relevant public authorities are listed in subsection (3) of clause 14. Clause 14(4) includes a power to amend clause 14 so as to add to this list of relevant public authorities, remove a public authority previously added to the list by regulations and vary any description of a specified public authority. The power to amend the clause as a whole, rather than just subsection (3), would in particular enable regulations to amend subsection (7) so as to add a definition of a new authority inserted in to the list of relevant public authorities. It will not be possible to use the regulation-making power to remove a public authority listed in clause 14(3) as enacted.

Justification for the delegated power

15. Clause 14(3) specifies on the face of the Bill those public authorities which are initially to be subject to the duty to co-operate with the Commissioner. The list includes policing, criminal justice, health and social care bodies and local authorities which are considered to be the principal public bodies involved in tackling domestic abuse and providing services to the victims. Having established this list of public authorities in primary legislation and recognising that this list is central to the scope and effect of clause 14, the Government accepts that the removal of any public bodies from this core list should similarly require primary legislation. It is possible, however, that over time the Commissioner or the Home Secretary will identify other public authorities to which the duty should attach. Having established the principle of the duty in primary legislation, the Government considered that secondary legislation is an appropriate mechanism to add new public authorities to the list (and, if necessary, remove any authority so added) so that the duty to co-operate can be extended as quickly as practicable once the case for this has been established.

16. The regulation-making power also enables regulations to vary the description of a public authority listed in subsection (3). The Government's expectation is that where a specified public authority was renamed, it would normally be for the legislation renaming the body to make the necessary consequential amendment to subsection (3) and/or (7), but this may not always be the case and it may be that it is necessary to change the description of a public authority through the exercise of this power.

17. Section 43 of the Modern Slavery Act 2015 ("the 2015 Act") contains an analogous power to amend the list of public authorities subject to the duty to co-operate with the Independent Anti-Slavery Commissioner. However, it is important to note that the scope of the power in clause 14 is narrower than the power in section 43 of the 2015 Act as, in this instance, there is no power to remove a public authority from the existing list in clause 14(3), as enacted.

Justification for the procedure

18. By virtue of clause 69(5), the regulation-making power is subject to the negative procedure. Having established on the face of the Bill the principle of a duty to co-operate and also set out in clause 14 the core list of public authorities that are subject to the duty, the Government considers that the negative procedure affords an appropriate level of parliamentary scrutiny given the constraints on the regulation-making power, notably the fact that it cannot be used to remove a body listed in the clause on enactment. It is also relevant here that under clause 14(5) the Home Secretary must consult the Commissioner before making any regulations under clause 14(4) and, in practice, the Home Office would also consult any public authority which it

is proposed to add to the list in subsection (3). In applying the negative procedure, the Government has taken into consideration the recommendation of the Delegated Powers and Regulatory Reform Committee in its report on the Modern Slavery Bill (10th Report of session 2014/15), having regard to the difference between the two powers referred to in paragraph 17 above.

Clause 25(2)(c): Power to specify additional persons who may apply for a domestic abuse protection order

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Negative resolution*

Context and purpose

19. Part 3 of the Bill provides for new civil orders to protect victims of domestic abuse - the Domestic Abuse Protection Notice ("DAPN") and the Domestic Abuse Protection Order ("DAPO"). The DAPN is a short-term measure, given to an alleged perpetrator by a police officer not below the rank of inspector, designed to give immediate protection to a victim of domestic abuse while a court-made DAPO affords longer term protection. A court making a DAPO may impose any requirements that the court considers necessary to protect the person for whose protection the order is made from domestic abuse.

20. A DAPO may be obtained through a variety of routes. First, a DAPO may be granted by a court on application by certain categories of person (clause 25). Second, where a DAPN has been given to an alleged perpetrator, there is a duty on the relevant chief officer of police to apply to a magistrates' court for a DAPO (clauses 25(3) and 26). Third, a DAPO may be made by a family court, criminal court or (in specified proceedings – see below) county court of its' own volition during any ongoing proceedings (which do not have to be domestic abuse-related) (clause 28).

21. In the case of a DAPO made on application, clause 25(2) provides that an application may be made by: (a) the person for whose protection the order is sought (namely the victim); (b) the appropriate chief officer of police; (c) a person specified in regulations made by the Secretary of State; or (d) any other person with the leave of the court. The purpose of the delegated power in clause 25(2)(c) is to specify those additional persons who are permitted to make a DAPO application without needing to seek leave of the court.

Justification for the power

22. Applications for existing protective orders (for example Domestic Violence Protection Orders (which will be repealed by the Bill), restraining orders and

non-molestation orders) can be made by different persons. The Government's consultation, *Transforming the response to Domestic Abuse*, asked consultees who they felt should be able to apply for a DAPO and why.

23. Respondents to the consultation said that a wide range of people should be able to apply for a DAPO, with 60% choosing the victim, 62% choosing the police, 54% choosing relevant third parties and 44% choosing certain other persons with permission of the victim and/or court. However, respondents raised concerns about allowing persons associated with the victim, such as family members or friends, to apply because this route may be open to abuse by those who wish to interfere in relationships about which they do not approve.

24. Reflecting these views, the Bill enable victims, the police and other persons (with the leave of the court) to apply for a DAPO, but leaves it to regulations to specify other relevant third persons who may apply as of right. Such relevant third persons could include local authorities, probation service providers, specialist domestic abuse advisers and specialist non-statutory support services (for example, refuge support staff). Given the wide range of potential suitable third parties, it is considered appropriate to leave the specification of such persons or bodies to secondary legislation so that further consultation may take place with the persons or bodies concerned prior to such designation and to enable additional persons and bodies to be added (or removed) over time in the light of experience and evidence of need. An analogous power is contained in section 100(4) of the Criminal Justice and Immigration Act 2008 which enables the Secretary of State, by order, to add to the persons or bodies that may apply for a violent offender order.

Justification for the procedure

25. By virtue of clause 69(5), regulations made under clause 25(2)(c) are subject to the negative procedure. The starting point that a variety of persons may apply to a court for a DAPO (albeit, for persons other than the victim, those specified in regulations or the police, this must be with the leave of the court) is clearly established on the face of the Bill. The negative procedure is considered to provide an appropriate level of parliamentary scrutiny for regulations made under this power which will simply specify further detail about which third parties may apply for an order, without requiring leave of the court. The order-making power in section 100(4) of the Criminal Justice and Immigration Act 2008 is similarly subject to the negative procedure (see section 147(3) of that Act).

Clause 28(8): Power to specify civil proceedings where a domestic abuse protection order may be made

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Negative resolution*

Context and purpose

26. Clause 28 provides that a DAPO may be made otherwise than on application by: the High Court or the family court in any family proceedings to which the perpetrator and victim of domestic abuse are parties; a magistrates' court or the Crown Court in any criminal proceedings involving the perpetrator as a defendant or appellant; and in the county court in relevant civil proceedings to which the perpetrator and victim of domestic abuse are parties. "Relevant" civil proceedings for these purposes are proceedings of a description prescribed by the Secretary of State in regulations made using the delegated power in clause 28(8).

Justification for the power

27. There are a wide range of civil proceedings which may be heard by the county court. Enabling a DAPO to be made in all civil proceedings in the county court would catch any proceedings involving a victim and the alleged perpetrator of domestic abuse, irrespective of subject matter and in circumstances in which it would be unusual, or possibly inappropriate, for a court to act on its own volition to make a DAPO. It is therefore considered appropriate to restrict the type of civil proceedings in which the county court could make a DAPO of its own volition to only those types of cases in which the power is most likely to be relevant and beneficial. This regulation-making power enables the Secretary of State to specify the appropriate civil proceedings in which the power may be exercised. The Government intends to specify only those types of proceedings where it is considered more likely that domestic abuse between the parties might be alleged or revealed in evidence. The power would enable other categories of civil proceedings to be specified over time in the light of further evidence and/or need, recognising the changing nature of abuse and how it may be perpetuated.

Justification for the procedure

28. By virtue of clause 69(5), regulations made under clause 28(8) are subject to the negative procedure. Clause 28(7) establishes the principle that a county court may make a DAPO in certain civil proceedings to which the perpetrator and victim of domestic abuse are parties. The judiciary, the Domestic Abuse Commissioner and other relevant third parties (such as local authorities and domestic abuse charities) will likely be consulted before such regulations were made, and as such we anticipate exercise of this

power will be uncontroversial. Given this, the Government considers that the negative procedure affords an appropriate level of parliamentary scrutiny.

Clause 34(7): Power to specify description of “responsible person”

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*None*

Context and purpose

29. A court making a DAPO may impose any requirements that it considers necessary to protect the person for whose protection the order is made from domestic abuse, or the risk of abuse. Amongst the requirements that may be attached to a DAPO is an electronic monitoring requirement. An electronic monitoring requirement may be imposed to support the monitoring of an individual’s compliance with other requirements of the order (for example, the operation of an exclusion zone around the victim’s home). Electronic monitoring is undertaken using an electronic tag usually fitted to a subject’s ankle.

30. The tag worn by the subject transmits data to a monitoring centre where it is processed and stored. The monitoring centre, operated by a “responsible person”, reviews this data to see whether an individual being electronically monitored is complying with the conditions of the DAPO. Where a subject has failed to comply, the responsible person provides information to the relevant authority, in this case the police, responsible for the enforcement of the order.

31. Clause 34 sets out further provision about electronic monitoring requirements. Subsection (6) provides that a DAPO which includes an electronic monitoring requirement must specify the person who is responsible for the monitoring (“the responsible person”). Subsection (7) provides that the responsible person must be of a description specified in regulations made by the Secretary of State. Similar enabling powers are contained in, for example, section 3AC(2) of the Bail Act 1976 and section 215(3) of the Criminal Justice Act 2003. The relevant statutory instrument made under those powers is the Criminal Justice (Electronic Monitoring) (Responsible Person) Order 2017 (SI 2017/235).

Justification for the power

32. The regulations will effectively specify which service provider or providers are contracted for the time being to provide electronic monitoring services for the purposes of Part 3 of the Bill. The selection of one or more suitable contractors is properly an administrative procedure. In addition, such

contractors will change over time and may need to be changed at short notice. For these reasons, the designation of the responsible person is considered an appropriate matter for secondary legislation.

Justification for the procedure

33. Regulations made under clause 34(7) are not subject to any parliamentary procedure (see clause 69(5)(b)). The primary purpose of these regulations is simply to put into the public domain the name of one or more persons contracted to provide electronic monitoring services for the purposes of Part 3; as indicated above, the selection of the contractor(s) is properly an administrative matter for the executive. Given this, no form of parliamentary scrutiny is considered necessary. This mirrors the approach with the analogous delegated powers in section 3AC(2) of the Bail Act 1976 and section 215(3) of the Criminal Justice Act 2003.

Clause 38(7): Power to add to the list of notification requirements

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Affirmative resolution*

Context and purpose

34. Clause 38 requires a person subject to a DAPO to supply certain information to the police and keep such information up to date. Failure to do so without reasonable excuse, or knowingly supplying false information, is an offence (clause 40). The relevant information is the person's name (if the person uses one or more other names, each of those names) and home address. Such information will assist the police in monitoring the person's compliance with the provisions of the DAPO and assessing the risk they may pose to the victim. Clause 38(7) enables the Secretary of State, by regulations, to specify further notification requirements which a court may impose when making or varying a DAPO. Such regulations may also specify how any such additional requirement(s) is to be complied with (albeit, in practice, regulations are expected to apply the provision in clause 39(1) which specifies how the subject of a DAPO is required to notify details of their name and address).

Justification for the power

35. The domestic abuse consultation sought views on what personal details should be provided under the notification requirements. Of those that answered, 76% of respondents agreed that courts should be able to require individuals subject to a DAPO to notify personal details to the police. Many respondents thought this would help the police to protect victims, but there

were also concerns about proportionality and the resources that would be needed to support this proposal.

36. Respondents were most keen on individuals providing their name and home address (as clause 38 provides) but also supported the idea of providing details about new relationships, their household and any child arrangement orders. Some respondents provided other suggestions, including workplace details, details of any firearms licence held and details of new applications for dependent or spousal visas.

37. There are notification regimes in Part 2 of the Sexual Offences Act 2003 in respect of sex offenders and Part 4 of the Counter-Terrorism Act 2008 (as amended by the Counter-Terrorism and Border Security Act 2019) in respect of terrorism offenders. Both these regimes require a wider range of information to be provided by those subject to the notification requirements. In each case, the more expansive list of requirements, in part, reflects the fact that they are imposed on persons who have been convicted of an offence. This is not necessarily the case with the subject of a DAPO, consequently limiting the standard notification requirements to the person's name and address is considered appropriate. However, the Government indicated in response to the domestic abuse consultation that "we will also enable the court to impose additional notification requirements on a case-by-case basis….[and] will work with police and courts to make sure additional notifications are effective and will test this new approach through a pilot". Leaving the suite of case specific notification requirements to be prescribed in regulations will enable the list to be revised from time to time as may become necessary in the light of new evidence gathered through the pilots, subsequent practical experience of operating these new orders and changing patterns of abuse.

38. There are comparable powers in section 83(5)(h) of the Sexual Offences Act 2003 and section 47(2)(h) of the Counter-Terrorism Act 2008, although these take the form of a power to add to the standard list of notification requirements that apply to all registered sex offenders and registered terrorist offenders respectively.

Justification for the procedure

39. By virtue of clause 69(6), regulations made under clause 38(7) are subject to the affirmative procedure. The affirmative procedure is considered appropriate given that such regulations would enable the courts to impose additional notification requirements on persons subject to a DAPO, which would not have previously been considered by Parliament and which might be applied to individuals who have not been convicted of any offence. Moreover, a failure to comply with any additional notification requirement would constitute a criminal offence. The analogous powers under the Sexual Offences Act 2003 and the Counter-Terrorism Act 2008 are also subject to the affirmative procedure.

Clause 39(4)(b): Power to direct the form of acknowledgement of a notification under clause 38

Power conferred on:	*Secretary of State*
Power exercisable by:	*Direction*
Parliamentary procedure:	*None*

Context and purpose

40. Clause 38 requires a person in respect of whom a court makes a DAPO, within three days of the order being made, to notify the police of their name or names, and home address. There are similar requirements where the person uses a name which has not previously been notified or changes address.

41. Clause 39 sets out the process for notification including an acknowledgment that notification has taken place. Clause 39(4)(a) provides for the acknowledgment of the notification to be in writing and clause 39(4)(b) provides for the acknowledgement to be "in the form directed by the Secretary of State".

42. Similar provisions appear in section 87 of the Sexual Offences Act 2003 in relation to the notification requirements under Part 2 of that Act, in section 50 of the Counter-Terrorism Act 2008 in relation to the notification requirements under Part 4 of that Act, and in section 10 of the Stalking Protection Act 2019 in relation to the notification requirements under section 9 of that Act.

Justification for the delegated power

43. The notification requirement, including the information that must be provided by a person subject to a DAPO, is provided for on the face of the Bill, as is the requirement to acknowledge a notification in writing. The acknowledgement provides protection to the person notifying and it is appropriate for the notification to be in a standard format, recording specified information. The precise form of the written acknowledgment is an administrative matter and, as such, may sensibly be left to be determined by a direction of the Secretary of State.

Justification for the procedure

44. Given the purely administrative nature of such directions, which will not affect the notification requirement, it is not considered necessary to make them subject to any parliamentary procedure; this is consistent with the equivalent provisions in the Sexual Offences Act 2003, Counter-Terrorism Act 2008 and Stalking Protection Act 2019.

Clause 47: Duty to issue guidance about the exercise by relevant persons of their functions under Part 3

Power conferred on:	*Secretary of State*
Power exercisable by:	*Statutory guidance*
Parliamentary procedure:	*None*

Context and purpose

45. Part 3 of the Bill confers a number of powers and duties on police officers, including in respect of the giving of DAPNs and the making of an application for a DAPO. Functions in relation to applications for DAPOs may also be given to other persons specified in regulations made under clause 25(2)(c). Clause 47 places a duty on the Secretary of State to issue guidance to the police and other such relevant persons on the exercise of these and other functions under this Part. Police officers and other relevant persons are required to have regard to (rather than follow) any guidance when exercising functions to which the guidance relates.

Justification for the power

46. The purpose of guidance is to aid policy implementation by supplementing the legal framework provided for in Part 3 of the Bill. Amongst other things, the statutory guidance will provide clear information about how the various pathways for applications work and provide practical advice to guide professionals when making applications. There is a vast range of statutory guidance issued each year and it is important that guidance can be updated rapidly to keep pace with events and operational good practice.

47. The requirement for the guidance to be published in such manner as the Secretary of State sees fit will ensure that it remains accessible to those who need to refer to it.

Justification for the procedure

48. Such guidance is not subject to any parliamentary procedure on the grounds that it will be prepared in consultation with the Domestic Abuse Commissioner and practitioners, it will not conflict with the statutory framework in Part 3 of the Bill and chief officers and other relevant persons will not be under a statutory duty to follow the guidance. This approach is consistent with similar guidance, for example, that provided for in sections 103J(1) and 122J(1) of the Sexual Offences Act 2003 in respect of sexual harm prevention orders and sexual risk orders (available here) and section 30 of the Offensive Weapons Act 2019 in respect of knife crime prevention orders.

Clause 48: Duty to issue code of practice relating to data from electronic monitoring

Power conferred on:	*Secretary of State*
Power exercisable by:	*Statutory code of practice*
Parliamentary procedure:	*None*

Context and purpose

49. Amongst the requirements which a court may attach to a DAPO is an electronic monitoring requirement (see clause 32(6)). Clause 48 requires the Secretary of State to issue a code of practice on the processing of data gathered in the course of an electronic monitoring requirement of a DAPO.

50. The processing of such data will be subject to the requirements in the General Data Protection Regulation and the Data Protection Act 2018. The code of practice issued under clause 48 is intended to set out the appropriate tests and safeguards for the processing of such data, in order to assist with compliance with the data protection legislation. For example, the Government envisages that the code will set out the length of time for which data may be retained and the circumstances in which it may be permissible to share data with the police to assist with crime detection. It is intended that the code will cover the storage, retention and sharing of personal data gathered under a requirement that is imposed for the purpose of monitoring compliance with another requirement.

51. Similar provision for a code of practice in respect of the processing of data from electronic monitoring is included in section 215A of the Criminal Justice Act 2003 (as inserted by the Crime and Courts Act 2013). The code is available here.

Justification for the power

52. The Government considers that a code of practice is the most appropriate vehicle to set out expectations and broad responsibilities in relation to the processing of data gathered under the electronic monitoring requirement. There is a vast range of statutory guidance issued each year and it is important that guidance can be readily updated to keep pace with events and operational good practice.

Justification for the procedure

53. Given the likely content and nature of the code, and in particular the fact that it will not define or create new legal responsibilities and that the processing of data must be in accordance with the requirements of data protection legislation, the Government does not consider it is necessary for

the code to be subject to any parliamentary procedure. This approach is consistent with the analogous code provided for in section 215A of the Criminal Justice Act 2003.

Clause 53(2): Power to specify description of "relevant accommodation"

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and purpose

54. Clause 53 places a duty on tier one local authorities in England (that is, county councils, unitary district councils, the Greater London Authority and the Council of the Isles of Scilly) in respect of the delivery of support to victims and their children in safe accommodation.

55. The duty on such local authorities as set out in subsections (1) and (3) of clause 53 is to: -

- assess need for domestic abuse support for victims of domestic abuse or their children who reside in "relevant accommodation";
- prepare and publish a strategy for the provision of the support;
- monitor and evaluate the effectiveness of the strategy; and
- give effect to the strategy.

56. Subsection (2) of clause 53 defines various terms for the purposes of subsection (1), namely "domestic abuse support" and "relevant accommodation". "Domestic abuse support" is defined as support, in relation to domestic abuse, provided to victims and their children residing in relevant accommodation (for example, counselling services, and advice and assistance such as in respect to securing access to GP services and welfare benefits). "Relevant accommodation" is defined as accommodation of a description specified in regulations made by the Secretary of State (in practice, the Secretary of State for Housing, Communities and Local Government).

57. The Government intends to provide for a broad definition of relevant accommodation in recognition of the diversity of housing in which victims and their children may live, from refuges to dispersed accommodation.

58. Pages 13 and 14 of the Government's response to the domestic abuse services consultation sets out the proposed list of relevant accommodation as including: refuge accommodation; specialist safe accommodation; dispersed accommodation; sanctuary schemes; and move-on or second stage accommodation.

Justification for taking the power

59. Having established the principal duty in legislation to provide domestic abuse support to victims or their children who reside in relevant accommodation, the Government considers that secondary legislation is the appropriate mechanism to describe what constitutes relevant accommodation for these purposes. This will allow for the wide range of potential domestic abuse safe accommodation and will enable additional categories of accommodation to be added or existing categories removed as provision evolves over time. Defining relevant accommodation in secondary legislation will also afford greater latitude to describe the different types of accommodation listed in paragraph 56 above and revise such descriptions where necessary to ensure that they continue to reflect the commonly accepted understanding of each type of accommodation.

Justification for the procedure

60. By virtue of clause 69(5), regulations made under clause 53(2) will be subject to the negative procedure. The Government considers that the negative procedure affords an appropriate level of parliamentary scrutiny, given that the overall scope of the duty on local authorities will be set out in primary legislation and the regulations will be specifying what will essentially be a technical list of safe accommodation-types for the purpose of the operation of the duty. It is also relevant that the Secretary of State must consult the Domestic Abuse Commissioner, local authorities, and such other persons as considered appropriate before making the regulations.

Clause 53(8): Power to make regulations about preparation and publication of strategies

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and Purpose

61. As set out in paragraph 55 above, clause 53 requires tier one local authorities in England to prepare and publish a strategy for the provision of domestic abuse support to victims and their children who reside in relevant accommodation in their area. Clause 53(8) confers a power on the Secretary of State to make regulations about the preparation and publication of such strategies and subsection (9) sets out a non-exhaustive list of the matters that may be provided for in such regulations.

62. The Government believes that local authorities are best placed to assess local needs and develop strategies based on this need. However, while many local authorities already have existing strategies in place, many of which are published, the Government recognises that this is not a consistent picture across England as many do not have strategies in place.

63. The Government recognises that there is a strong correlation between local authorities with a domestic abuse strategy and those providing domestic abuse services, particularly specialist refuge provision.

64. In developing these strategies, local authorities must ensure that the decisions are based on a robust assessment of needs, including for victims and their children from within and outside of the local area. Similarly, in monitoring, evaluating and reviewing the effectiveness of the strategies local authorities will need to take account of any changes in the need for services that may have occurred since the original strategy was developed. Periodic reviews will ensure that decisions about the commissioning of accommodation-based services continue to be based on a robust assessment of needs, including of victims and their children from within and outside of the local area. Such approaches should ensure continued adequate provision of support within a range of relevant accommodation.

65. In assessing need and developing and reviewing strategies local authorities should consider the requirements of all victims, including those with relevant protected characteristics under the Equality Act 2010.

66. Before publishing the first or a revised strategy, local authorities are required to consult with the Local Partnership Board (appointed under clause 54), any tier two local authorities and such other persons as the relevant local authority considers appropriate.

Justification for taking the power

67. Having established the principal duty in legislation requiring tier one local authorities to prepare, publish and keep under review a strategy for the provision of domestic abuse support to victims and their children within relevant accommodation in their area, the Government considers that secondary legislation is the appropriate mechanism for specifying detailed requirements in relation to the formulation, publication and review of such strategies. It is envisaged that such regulations will specify, amongst other things, the date by which the first strategy must be published, the frequency of periodic reviews, the procedure to be followed in preparing strategies, matters to which regard must be had in formulating strategies, and the method of publication of strategies.

68. Such regulations will allow for a consistent approach to strategies published across England. These are subordinate matters relating to the formulation, content and review of strategies which are appropriate for secondary legislation. Specifying such matters in regulations will enable them to be more readily revised over time, for example, to reflect accepted good practice. Section 6 of the Crime and Disorder Act 1998 contains an analogous power for the Secretary of State to make regulations about the formulation and implementation of crime and disorder reduction strategies.

Justification for the procedure

69. By virtue of clause 69(5), regulations made under clause 53(8) are subject to the negative procedure. The Government considers that the negative procedure affords an appropriate level of parliamentary scrutiny given that the duty on tier one local authorities to prepare, publish and review strategies for the provision of domestic abuse support to victims and their children within relevant accommodation in their area will be set out on the face of the Bill and that these regulations will set out secondary matters as described in paragraph 67 above. It is also relevant that the Secretary of State must consult the Domestic Abuse Commissioner, relevant local authorities, and other appropriate persons before making such regulations. The regulation-making power in section 6 of the Crime and Disorder Act 1998 is similarly subject to the negative procedure.

Clause 55(2): Power to make regulations about form and content of annual reports

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and Purpose

70. Clause 55(1) places a duty on tier one local authorities to submit to the Secretary of State an annual report on the exercise of their functions under Part 4. This annual reporting requirement will help the Government to monitor how the new duties on local authorities are working, understand where the challenges are and how the funding is being used, and help identify and disseminate good practice.

71. Clause 55(2) enables the Secretary of State to make regulations about the form and content of the annual reports.

Justification for taking the power

72. A standardised annual reporting framework will assist local authorities in reporting back to the Government on the delivery and outcomes of the new duties, as well as better enabling comparisons to be made across local authority areas. It is envisaged that a range of themes will be reported on, including evidence of: adequate commissioning of accommodation-based support; decisions being informed by needs assessments; the impact of decisions; and adequate provision for all victims and their children. The Government considers that these and other matters to be reported on may properly be left to be specified in regulations so that they can be informed through discussion with the Domestic Abuse Commissioner, local authorities and others and adjusted over time to reflect any changes as the new duties bed in. Section 3(2)(h) of the Crime and Disorder Act 1998 makes analogous provision for regulations specifying reporting requirements for crime and disorder reduction strategies.

Justification for the procedure

73. By virtue of clause 69(5), regulations made under clause 55(2) are subject to the negative procedure. The Government considers that the negative procedure affords an appropriate level of parliamentary scrutiny given that the duty on tier one local authorities to publish annual reports on the exercise of their functions under Part 4 will be set out on the face of the Bill and that these regulations will set out secondary matters in respect of the form and content of such reports. The regulation-making power in section 6 of the Crime and Disorder Act 1998 is similarly subject to the negative procedure.

Clause 56(1): Duty to issue guidance relating to the exercise by local authorities of their functions under Part 4

Power conferred on: *Secretary of State*

Power exercisable by: *Statutory guidance*

Parliamentary procedure: *None*

Context and Purpose

74. As set out in the paragraphs 54 and 55 above, clause 53 confers a duty on local authorities in respect of the provision of support to victims of domestic abuse and their children in safe accommodation.

75. The Government recognises there is a balance to strike between providing local authorities with flexibility to meet particular local needs and to build on well-established approaches with the need for a consistent approach across England.

76. Clause 56 places a duty on the Secretary of State to issue guidance relating to the exercise by local authorities in England of functions under Part 4. All local authorities in England must have regard to the guidance when exercising their functions

77. In preparing (or revising) the guidance the Secretary of State must consult with the Domestic Abuse Commissioner, local authorities and other bodies considered to be appropriate by the Secretary of State such as interested domestic abuse stakeholders.

Justification for taking the power

78. The purpose of any guidance under clause 56 is to support local authorities in respect of the delivery of support to victims of domestic abuse and their children in safe accommodation. The guidance is intended to supplement the legal framework in Part 4 and provide practical advice for local authorities on the discharge of their functions.

79. There is a vast range of statutory guidance, such as this, issued to local authorities and it is important that guidance can be updated quickly to keep pace with operational good practice. The Secretary of State must publish the guidance and any revisions to the guidance.

Justification for the procedure

80. Any guidance issued under clause 56 is not subject to any parliamentary procedure on the grounds that it provides practical advice to local authorities in respect to the delivery of support to victims and their children in safe accommodation. The guidance will be worked up in consultation with local authorities, the Domestic Abuse Commissioner and such other persons as considered appropriate, such as interested domestic abuse stakeholders.

81. Moreover, whilst a local authority exercising its functions under Part 4 will be required to have regard to the guidance when exercising those functions, the guidance will not be binding. The approach in clause 56 is consistent with other legislation providing for statutory guidance.

Clause 59: New section 31R(5) of the Matrimonial and Family Proceedings Act 1984 - Prohibition of cross-examination in person in family proceedings in England and Wales: Power to specify meaning of "specified offence"

Power conferred on:	*Lord Chancellor*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Negative resolution*

Context and purpose

82. Clause 59 inserts new sections 31Q to 31Z into the Matrimonial and Family Proceedings Act 1984 ("MFPA 1984"). New section 31R prohibits cross-examination in person by a party to family proceedings where that person has been convicted of, given a caution for, or is charged with, a "specified offence", where the witness to be cross-examined is the victim, or alleged victim, of that offence. In turn, the victim or alleged victim may not cross-examine the perpetrator or alleged perpetrator. New section 31R(5) defines a "specified offence" to mean an offence specified, or of a description specified, in regulations made by the Lord Chancellor.

83. The purpose of this regulation-making power is to enable the Lord Chancellor to establish a list of "specified offences" for the purposes of new section 31R.

Justification for the power

84. It is intended that the offences specified in regulations made under the power in new section 31R(5) of the MFPA 1984 should be a comprehensive list of all relevant domestic violence and child abuse offences (including sexual or violent offences) where it is considered that direct cross-examination of a victim (or alleged victim) by a perpetrator (or alleged perpetrator) in person, or vice versa, would be unacceptable.

85. The Government proposes to broadly mirror the domestic violence and child abuse offences which are set out in a non-statutory list published by the Lord Chancellor under section 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and referred to in Schedules 1 and 2 to the Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098), as amended. The lists are available at https://www.gov.uk/government/publications/domestic-violence-and-child-abuse-offences. Those lists include offences under the law of England and Wales, Scotland and Northern Ireland. The intention is that the position should be the same in regulations made under new section 31R of the MFPA 1984. In addition, it is intended to make provision in relation to any service disciplinary offences involving violence or abuse by one person against another.

86. The Government considers that, in order to keep the details of the specified offences comprehensive and up to date, it is appropriate to set them out in regulations rather than in primary legislation, which would be harder to amend and keep current.

Justification for the procedure

87. Regulations under new section 31R(5) will be subject to the negative procedure by virtue of new section 31Z(2) of the MFPA 1984. The Government considers that this level of scrutiny is appropriate given that the regulations will simply list, or describe, existing offences which are relevant for the purposes of the new section. If new relevant offences are enacted, then the details will be readily amendable, such that they will be as up to date and comprehensive as possible.

Clause 59: New section 31S(4) of the Matrimonial and Family Proceedings Act 1984 - Prohibition of cross-examination in person in family proceedings in England and Wales: Power to specify meaning of "protective injunction"

Power conferred on: *Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and purpose

88. New section 31S of the MFPA 1984 prohibits cross-examination in person by a party to family proceedings where that person is someone against whom an on-notice protective injunction is in force, where the witness to be cross-examined is the person protected by the injunction. In turn, the person protected by the injunction may not cross-examine the person who is subject to the injunction. New section 31S(4) defines a "protective injunction" to mean an order, injunction or interdict specified, or of a description specified, in regulations made by the Lord Chancellor.

89. The purpose of this regulation-making power is to enable the Lord Chancellor to establish a list of "protective injunctions" for the purposes of new section 31S.

Justification for taking the power

90. It is intended that the types of protective injunctions specified in regulations under the power in new section 31S(4) of the MFPA 1984 should be a comprehensive list of all relevant injunctions or similar where it is considered that cross-examination of a person protected by the injunction by the person subject to the injunction, or vice versa, would be unacceptable.

91. It is intended to mirror the definition of the term "protective injunction" set out in paragraph 22 of Schedule 1 to the Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098), as amended (augmented by the new orders provided for in Part 3 of the Bill – the Domestic Abuse Protection Notice and the Domestic Abuse Protection Order). That definition includes interdicts and orders issued under the law of Scotland or Northern Ireland.

92. As with the specified offences under new section 31R(5) of the MFPA 1984, the Government considers that, in order to keep the details of protective injunctions comprehensive and up to date, it is appropriate to set them out in regulations rather than in primary legislation, which would be harder to amend and keep current.

Justification for the procedure

93. Regulations under new section 31S(4) will be subject to the negative procedure by virtue of new section 31Z(2) of the MFPA 1984. The legal aid regulations which contain the definition of "protective injunction" to be adopted in regulations under new section 31S(4) are also subject to the negative procedure by virtue of section 41(5) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Government considers that this level of scrutiny is appropriate given that the regulations will simply detail types of existing injunctions which are relevant for the purposes of the new section. If omissions are identified in the regulations, or if new types of injunction are enacted, then the regulations will be readily amendable, such that they will be as up to date and comprehensive as possible.

Clause 59: New section 31T(3) of the Matrimonial and Family Proceedings Act 1984 - Prohibition of cross-examination in person in family proceedings in England and Wales: Power to specify meaning of "specified evidence"

Power conferred on: *Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and purpose

94. New section 31T of the MFPA 1984 prohibits cross-examination in person by a party to family proceedings where there is "specified evidence" that the party has perpetrated domestic abuse (as defined in clause 1 of the Bill) against a witness in the proceedings (or vice versa). New section 31T(3) defines "specified evidence" to mean evidence specified, or of a description specified, in regulations made by the Lord Chancellor. Such regulations 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 new section 31T.

95. The purpose of this regulation-making power is to enable the Lord Chancellor to establish a list of "specified evidence" of domestic abuse for the purposes of new section 31T.

Justification for taking the power

96. New section 31T of the MFPA 1984 was not included in the Domestic Abuse Bill as originally introduced in the 2017-19 session. At that time, what is now new section 31U of the MFPA 1984 provided that in any family proceedings where one of the statutory prohibitions under new section 31R or 31S does not operate to prevent a party from cross-examining a witness in person, the court has the discretion in specified circumstances to give a direction prohibiting such cross-examination if certain conditions are met.

97. In commenting on these provisions, the Joint Committee on the Draft Domestic Abuse Bill concluded as follows: "*We are concerned at the potential for inconsistency in application because too many victims of domestic abuse will be protected only at the discretion of the court. We recommend that the mandatory ban is extended so that it applies where there are other forms of evidence of domestic abuse, as in the legal aid regime threshold."* In responding to the Joint Committee's report in July 2019, the then Government undertook to consider this recommendation further. The Government has now accepted this recommendation and new section 31T gives effect to it.

98. As in the legal aid regime on which the recommendation is based, it is intended that the types of evidence will be specified in regulations under the

power in new section 31T(3) of the MFPA 1984 rather than set out in the Bill in order that the details can be kept current and in line where appropriate with the legal aid criteria which can be amended by statutory instrument. It is intended broadly to replicate the comprehensive list of relevant evidence of domestic abuse found in the legal aid regime (other than evidence already specified under new sections 31R and 31S, in order to avoid duplication).

99. As stated above, the Government's intention is to broadly replicate the list of evidence that is currently specified for the purposes of accessing civil legal aid (set out in Schedule 1 to the Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098), as amended). New section 31T(4) is included to ensure that regulations made under new section 31T(3) could make provision analogous to paragraph 21 of Schedule 1 to the 2012 Regulations, namely to include in the list of evidence, evidence which demonstrates that a party to the proceedings has perpetrated domestic abuse against a witness (or vice versa) which took the form of economic abuse (as defined in clause 1(4) of the Bill).

100. As with the specified offences under new section 31R(5) and the specified protective injunctions under new section 31S(4) of the MFPA 1984, the Government considers that, in order to keep the details of specified evidence comprehensive, up to date and consistent where appropriate with the legal aid regime, it is appropriate to set them out in regulations, rather than in primary legislation, which would be harder to amend and keep current.

Justification for the procedure

101. Regulations under new section 31T(3) will be subject to the negative procedure by virtue of new section 31Z(2) of the MFPA 1984. The legal aid regulations which contain the list of evidence to be broadly replicated in regulations under new section 31T(3) are also subject to the negative procedure by virtue of section 41(5) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The Government considers that this level of scrutiny is appropriate given that the regulations will simply detail types of existing evidence of domestic abuse which is relevant for the purposes of the new section with which the court and practitioners are already familiar. If omissions are identified in the regulations, or if new types of evidence are identified, then the regulations will be readily amendable, such that they will be as up to date and comprehensive as possible.

Clause 59: New section 31X(1) of the Matrimonial and Family Proceedings Act 1984 - Prohibition of cross-examination in person in family proceedings in England and Wales: Power to make provision about costs of court-appointed qualified legal representative

Power conferred on: *Lord Chancellor*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution*

Context and purpose

102. As indicated in paragraph 106 below, new section 31W(6) of the MFPA 1984 requires the court to appoint a legal representative to undertake cross-examination of a witness in specified circumstances. New section 31X(1) of the MFPA 1984 enables the Lord Chancellor, by regulations, to make provision for the payment out of central funds of sums to cover the properly incurred fees, costs and expenses of a legal representative appointed under new section 31W(6) of the MFPA 1984.

Justification for taking the power

103. The intention is that the regulations under section 31X of the MFPA 1984 should address issues such as how costs will be paid, how claims for costs should be made, and how decisions in relation to payments may be reconsidered or challenged.

104. It is considered that this level of procedural detail is most appropriately included in secondary legislation, rather than primary. Further, setting out this detail in secondary legislation will make it more readily amendable should this prove necessary once the new provisions are in practical use. Another example of such detail being the subject of a delegated power is Part 3 of the Costs in Criminal Cases (General) Regulations 1986 (SI 1986/1335), as applied with modifications by Part 3A of those Regulations.

Justification for the procedure

105. Regulations under new section 31X(1) will be subject to the negative procedure by virtue of new section 31Z(2) of the MFPA 1984. The Government considers that this level of scrutiny is appropriate given that the intention is that the regulations will be largely setting out matters of practice and procedure. The regulations that provide for funding of legal representatives appointed under the Youth Justice and Criminal Evidence Act 1999 (“YJCEA”), on which these provisions are modelled, are similarly subject to the negative procedure (see section 40 of the YJCEA and section 29 of the Prosecution of Offences Act 1985).

Clause 59: New section 31Y(1) of the Matrimonial and Family Proceedings Act 1984 - Prohibition of cross-examination in person in family proceedings in England and Wales: Power to issue guidance about role of qualified legal representative

Power conferred on: *Lord Chancellor*

Power exercisable by: *Statutory guidance*

Parliamentary procedure: *None*

Context and Purpose

106. Where a party to family proceedings is prohibited from cross-examining a witness in person by virtue of the provisions in new sections 31R to 31U of the MFPA 1984, new section 31W makes provision in relation to alternatives to cross-examination in person. The court is required to consider whether there is a satisfactory alternative means for the witness to be cross-examined, or for obtaining the evidence that the witness might have given under cross-examination. If the court concludes that there is no satisfactory alternative means that can be used, the court will ask the party who has been prohibited from conducting the cross-examination to arrange, within a specified time, a qualified legal representative to cross-examine the witness, and to notify the court of the arrangements. If, after the specified time, the party has either notified the court that there is no qualified legal representative to act for them for that purpose, or the court has not received any notification and it appears to the court that no legal representative will act for the party for the purpose of cross-examining the witness, then the court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a court-appointed qualified legal representative (new section 31W(5)). If the court decides that it is, then it must appoint a qualified legal representative to undertake the cross-examination of the witness in the interests of the party (new section 31W(6)). The legal representative appointed by the court is not responsible to the party (new section 31W(7)).

107. New section 31Y(1) enables the Lord Chancellor to issue guidance for legal representatives appointed under new section 31W(6), including guidance about the effect of section 31W(7). A qualified legal representative is required to have regard to any such guidance.

Justification for taking the power

108. Subsections (5) to (7) of new section 31W of the MFPA 1984 are clear about the functions of a court-appointed qualified legal representative.

109. The Government considers that it would be helpful to provide guidance as to these parameters of such functions so that the qualified legal representative, the court and court users will have a better understanding of the role that will be played by the qualified legal representative. The

intention is that guidance issued under new section 31Y will set out further practical detail about the scope of this new statutory role. There is a range of statutory guidance, such as this, issued each year and it is important that guidance can be updated quickly to keep pace with good practice regarding the operation of the role of qualified legal representatives.

Justification for the procedure

110. Guidance issued under new section 31Y will not be subject to any parliamentary procedure on the grounds that the functions of a court-appointed qualified legal representative will be set out in primary legislation (in new section 31W(5) to (7)) and that any guidance would simply provide supporting practical advice on the intended scope of the role of such a representative consistent with the statutory framework. Moreover, whilst a legal representative will be required to have regard to the guidance when exercising their functions, the guidance will not be binding.

Clause 64: Duty to issue guidance about the disclosure of information by police forces

Power conferred on:	*Secretary of State*
Power exercisable by:	*Statutory guidance*
Parliamentary procedure:	*None*

Context and purpose

111. The Domestic Violence Disclosure Scheme ("the scheme"), often referred to as "Clare's Law", was implemented across all police forces in England and Wales in March 2014.

112. The scheme has two elements: the "right to ask" and the "right to know". Under the scheme an individual or a relevant third party can ask police to check whether a current or ex-partner has a violent past or a history of abuse. This is the "right to ask". If records show that an individual may be at risk of domestic abuse from a partner or ex-partner, the police will consider disclosing the information.

113. The "right to know" enables the police to make a disclosure if they receive indirect information regarding the current or ex-partner that may impact the safety of the individual, such as information arising from a criminal investigation, through statutory or third sector agency involvement, or from another source of police intelligence.

114. In each case, a disclosure can be made lawfully by the police under the scheme if the disclosure is made in accordance with the police's common law powers to disclose information where it is necessary to prevent crime and if the disclosure also complies with data protection legislation (Part 3 of the Data Protection Act 2018), the Rehabilitation of Offenders Act 1974 and

the Human Rights Act 1998. It must be reasonable and proportionate for the police to make the disclosure based on a credible risk of violence or other harm.

115. Non-statutory guidance for the police on the operation of the scheme was first published by the Home Office in July 2012 and, following an assessment report of the pilot scheme in November 2013, was updated in December 2016. The updated guidance took into account the findings of an assessment by the Home Office of the first year's operation of the scheme.

116. Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services' domestic abuse thematic reports, published in 2015 and 2017, concluded that "opportunities were being missed [through the scheme] to provide better support and protection for victims". Both reports identified inconsistencies surrounding the use of the scheme by police forces and noted the low volume of disclosures. The 2017 report concluded that "it is important that both members of the public and officers are aware of the scheme's purpose and the application process". The Government aims to drive greater use and consistent application of the scheme by putting the guidance underpinning the scheme on a statutory footing and placing a duty on the police to have regard to the guidance (clause 64(2)), as provided for in clause 64 of the Bill. The Home Secretary is under a duty to consult the Domestic Abuse Commissioner, the National Police Chiefs' Council and such other persons as he or she considers appropriate before issuing or revising the guidance.

Justification for the power

117. The purpose of the guidance is to support the delivery of the scheme and assist front line officers and those who work in the area of public protection with the practical application of the scheme.

118. The scheme did not introduce any new powers for the police to disclose personal data; the same is true of clause 64. The scheme is based on the police's common law powers to disclose information where it is necessary to prevent crime, and in accordance with data protection and human rights legislation, as explained above at paragraph 114. The scheme and the accompanying guidance provide structure and processes for the exercise of the powers. It does not, of itself, provide the power to disclose or to prevent disclosures being made in situations which fall outside the scheme because they are outside of the police's common law powers to disclose information. Given this, it is appropriate for such practical advice to be included in guidance which can readily be revised from time to time, as necessary, to reflect evolving good practice and relevant case law.

119. Topics which may be covered in the statutory guidance include (but are not limited to):

- Recommended minimum levels of knowledge and experience required by practitioners to discharge their functions under the scheme

effectively;

- Suggested step-by-step processes and timescales for the two disclosure routes under the scheme (the "right to ask" and the "right to know"), including example scenarios for each route;
- Minimum standards of information to be obtained from the applicant;
- Minimum standards of intelligence checks to be completed;
- Guidance on effective engagement with a multi-agency forum such as a Multi-Agency Risk Assessment Conference to inform decision-making;
- Guidance on robust risk assessment and safety planning in order to safeguard the individual or individuals potentially at risk of domestic abuse;
- Suggested types of information which may be disclosed under the scheme, such as details of allegations, charges, prosecutions and convictions for relevant offences;
- Guidance on what constitutes a "reasonable and proportionate" disclosure in line with case law, relevant human rights and data protection legislation; and
- Suggested forms of wording for communicating outcomes at each stage of the scheme process.

<u>Justification for the procedure</u>

120. Any guidance issued under clause 64 would not be subject to any parliamentary procedure on the grounds that it would provide practical advice on the effective operation of the scheme and would be worked up in consultation with the Domestic Abuse Commissioner, the police and any other persons the Home Secretary considered appropriate. As indicated above, the guidance will not of itself create any new powers to disclose personal information. Moreover, whilst chief officers of police must have regard to the guidance, the guidance will not be binding.

Clause 66(1): Power to issue guidance about domestic abuse, etc

Power conferred on:	*Secretary of State*
Power exercisable by:	*Statutory guidance*
Parliamentary procedure:	*None*

<u>Context and purpose</u>

121. As set out in paragraphs 2 and 3 above, the Bill includes a number of measures to tackle domestic abuse, including by better protecting and supporting victims. Clause 1 of the Bill provides for a statutory definition of domestic abuse for the purposes of the Bill, although we expect that it will

also have wider application to inform the response to domestic abuse by statutory and third sector agencies. The definition of domestic abuse makes clear that such abuse is not confined to physical violence. It includes concepts, such as "controlling or coercive behaviour" and "economic abuse", which may not be readily understood by practitioners and others without further explanation.

122. To complement this and other provisions, clause 66 confers power on the Secretary of State to issue guidance about the effect of any of the provisions made by or under the Bill applicable to England and Wales and about other matters relating to domestic abuse. The Secretary of State must issue guidance about the effect of clauses 1 and 2 (the definition of domestic abuse), including by illustrating the different forms of abuse (for example, forced marriage and coercive control relating to a victim's immigration status) and the adverse effect of domestic abuse on children. Although the statutory definition of domestic abuse for the purposes of the Bill is not gendered, guidance must also take account, if relevant to the subject matter, of the fact that the majority of the victims of domestic abuse are female. Such statutory guidance would, amongst other things, help promote understanding amongst public authorities of domestic abuse and the powers available to them to protect and support victims.

123. In preparing the guidance, the Secretary of State would be under a duty to consult the Domestic Abuse Commissioner, the Welsh Ministers in so far as the guidance relates to a body exercising devolved Welsh functions, and such other persons as he or she considers appropriate (for example, the police and other practitioners). Persons exercising public functions to whom the guidance relates will be under a duty to have regard to the guidance when exercising such functions.

124. A similar such power is contained in section 5C of the Female Genital Mutilation Act 2003 (as inserted by the Serious Crime Act 2015).

Justification for the delegated power

125. The Bill itself provides for a statutory definition of domestic abuse and makes other substantive provision to enable criminal, civil and family justice agencies and others to protect and support victims. The purpose of any guidance under clause 66 is to support relevant public authorities in giving effect to the provisions in the Bill and responding to domestic abuse more generally. There is a vast range of statutory guidance, such as this, issued each year and it is important that guidance can be updated quickly to keep pace with operational good practice.

Justification for the procedure

126. Any guidance issued under clause 66 will not be subject to any parliamentary procedure on the grounds that it would provide practical advice on the application of the definition of domestic abuse and other provisions in the Bill and would be worked up in consultation with all

interested stakeholders and practitioners. The guidance will not conflict with, or alter the scope of, the definition in clause 1. Moreover, whilst a person exercising public functions will be required to have regard to the guidance when exercising those functions, the guidance will not be binding. The approach taken in clause 66 is consistent with other legislative provisions providing for statutory guidance, including section 5C of the Female Genital Mutilation Act 2003 and section 77 of the Serious Crime Act 2015 (which provides for guidance about the investigation of the offence of controlling or coercive behaviour in an intimate or family relationship).

Clause 67(1): Power to make consequential amendments

Power conferred on:	*Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument*
Parliamentary procedure:	*Negative resolution (if it does not amend primary legislation), otherwise affirmative resolution*

Context and purpose

127. Clause 67(1) confers a power on the Secretary of State to make consequential provision for the purposes of the Bill. Such provision may include repealing, revoking or otherwise amending primary and secondary legislation.

Justification for taking the power

128. The powers conferred by this clause are wide, but they are limited by the fact that any amendments made under the regulation-making power must be genuinely consequential on provisions made by or under the Bill. But there are various precedents for such provisions, including section 23(2) of the Counter-Terrorism and Border Security Act 2019. Clauses 18 and 49 to 51 already include some changes to other enactments as a consequence of the provisions in the Bill, but it is possible that not all of the necessary consequential amendments have been identified in the Bill's preparation. The Government considers that it would therefore be prudent for the Bill to contain a power to deal with these in secondary legislation.

Justification for the procedure

129. If regulations made under this power do not amend or repeal primary legislation, they will be subject to the negative resolution procedure (by virtue of clause 69(5)). If regulations made under this power do amend or repeal provision in primary legislation, they will be subject to the affirmative resolution procedure (by virtue of clause 69(6)(b)) as befitting a Henry VIII power of this type. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

Clause 68(1) and (2): Power to make transitional or saving provision

Power conferred on:	*Secretary of State and the Department of Justice in Northern Ireland*
Power exercisable by:	*Regulations made by statutory instrument / statutory rule*
Parliamentary procedure:	*None*

Context and purpose

130. Clause 68(1) and (2) confer on the Secretary of State and Northern Ireland Department of Justice respectively power to make such transitional or saving provisions as they consider appropriate in connection with the coming into force of the provisions in the Bill. Such regulations may, amongst other things, make necessary adaptations of any provisions in the Bill brought into force in consequence of other provisions not yet having been commenced (clause 68(3)).

Justification for the power

131. This standard power ensures that the Secretary of State and Department of Justice can provide a smooth commencement of new legislation and transition between existing legislation (for example, the existing civil preventative measures provided for in the Crime and Security Act 2010 which are to be superseded by the provisions in Part 3) and the Bill, without creating any undue difficulty or unfairness in making these changes. There are numerous precedents for such a power, for example, section 183(9) of the Policing and Crime Act 2017.

132. Amongst other things, this power would enable transitional measures to be put in place if guidance prepared under clause 66 of the Bill was issued before the Domestic Abuse Commissioner had been appointed (clause 66(6)(a) requires the Commissioner to be consulted about such guidance before it is issued).

Justification for the procedure

133. As indicated above, this power is only intended to ensure a smooth transition between existing law and the coming into force of the provisions of the Bill. Such powers are often included as part of the power to make commencement regulations and, as such, are not subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them. Although drafted as a free-standing power on this occasion, the same principle applies and accordingly the power is not subject to any parliamentary procedure (see clause 69(5)(b)).

Clause 72(3)-(5): Commencement powers

Power conferred on:	*Scottish Ministers, the Department of Justice in Northern Ireland, Secretary of State*
Power exercisable by:	*Regulations made by statutory instrument / Order made by statutory rule*
Parliamentary procedure:	*None*

Context and purpose

134. Clause 72(3) to (5) contain standard power for the Scottish Ministers, the Northern Ireland Department of Justice and the Secretary of State to bring provisions of the Bill into force by commencement regulations. Subsections (6) to (8) augment this standard power to enable certain provisions to be piloted, namely the provisions in Part 3 (which provides for DAPNs and DAPOs) and clause 63 (polygraph testing). The piloting power would enable these provisions to be brought into force in relation to a specified area or areas or for specified purposes (for example, in relation to clause 63, the piloting of polygraph testing could be confined to persons convicted of certain specified domestic abuse-related offences) for a set period and then make transitional or saving provision about when the pilot period ends. In the case of Part 3, section 33 of the Crime and Security Act 2010 made similar provision for piloting the precursor Domestic Violence Protection Notice and Order. Similarly, section 41 of the Offender Management Act 2007 provided for the piloting of polygraph testing regime as it applies to sex offenders.

Justification for the power

135. Leaving provisions in the Bill to be brought into force by regulations will afford the necessary flexibility to commence the provisions of the Bill at the appropriate time, having regard to the need to make any necessary secondary legislation, issue guidance, undertake appropriate training and put the necessary systems and procedures in place, as the case may be.

136. Before implementing the new DAPN and DAPO across the whole of England and Wales it is proposed to pilot their operation. Such pilots will, in particular, enable the Government to test the effectiveness of positive requirements (such as attendance at alcohol and drug treatment programmes) and the electronic monitoring requirement. It is similarly proposed to test the use of polygraph testing with high risk domestic abuse perpetrators to establish whether the benefits that have been seen with polygraph testing of sex offenders translates to the domestic abuse setting.

137. Given the nature of a pilot – namely that it will be time bound and limited to one or more particular areas – it is appropriate to leave to secondary

legislation the determination of the area or areas where the pilot is to be conducted and over what period (in the case of Part 3, for example, both of these matters will be a matter for negotiation with one or more police forces and other stakeholders).

Justification for the procedure

138. As is usual with commencement powers, regulations made under clause 72 are not subject to any parliamentary procedure (see clause 69(5)(b)). Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

139. In accordance with normal practice, the power to make pilot schemes is similarly not subject to any parliamentary procedure. Again, Parliament will already have approved the provisions to be commenced by enacting them, and partial commencement through the making of a pilot scheme affords the opportunity to assess the effectiveness of the provisions prior to national roll-out. This approach is consistent with the analogous provisions (as regards Part 3 of the Bill) in section 33 of the Crime and Security Act 2010 and section 31 of the Offensive Weapons Act 2019 (which provides for the piloting of knife crime prevention orders).

140. It is accepted that, in relation to polygraph testing, this position contrasts to that in section 41(4) of the Offender Management Act 2007 which provided that an order commencing sections 28 and 29 of that Act (which provides for polygraph testing of sex offenders on licence) to be subject to the affirmative procedure. However, given that polygraph testing is now established in the context of managing sex offenders on licence, it is considered that the normal procedural arrangements should apply to any regulations bringing clause 63 into force across England and Wales.

Home Office / Ministry of Justice / Ministry of Housing, Communities and Local Government
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