

DOMESTIC ABUSE BILL

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

The Government has tabled amendments to the Domestic Abuse Bill for Lords Report stage. These amendments include new delegated powers. This supplementary memorandum explains why the new powers have been taken and the justification for the procedure selected.

New clause “*Duty to report on domestic abuse service in England*”(4): Power to extend the period for preparing and publishing a clause 8 report on domestic abuse service in England

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: None

Context and purpose

1. New clause “*Duty to report on domestic abuse service in England*” requires the Domestic Abuse Commissioner to prepare and publish a report under clause 8 of the Bill on community-based domestic abuse services in England within 12 months of the clause coming into force. Subsection (4) of the new clause enables the Secretary of State to make regulations extending the deadline for preparing and publishing the report by up to six months. The Secretary of State may only make such regulations with the consent of the Commissioner and may only exercise the power once (subsection (5)).

Justification for taking the power

2. The 12-month timetable for preparing and publishing the report required by this new clause has been agreed with the Domestic Abuse Commissioner. However, unforeseen events may, in the event, prevent the Commissioner completing the necessary work so that she can publish a report within the timeframe set out in the new clause. This regulation-making power has been included on a purely precautionary basis so that the deadline can be extended should it prove necessary to do so.

Justification for the procedure

3. By virtue of the amendment made to clause 76(5)(b) of the Bill the regulation-making power in subsection (4) of the new clause is not subject to any parliamentary procedure. This is considered appropriate given that the limited nature of the power (any extension of the relevant period for publishing the required report being limited to six months), the fact that it is only exercisable with

the consent of the Commissioner and the fact that it is only exercisable on one occasion.

Amendment to clause 64 (Prohibition of cross-examination in person in civil proceedings) - new section 85EA(5) of the Courts Act 2003: 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

4. The amendment to clause 64 inserts new sections 85EA to 85EC into the Courts Act 2003, to supplement new sections 85E to 85J already provided for in that clause. New section 85EA prohibits cross-examination in person by a party to civil proceedings where that person has been convicted of or given a caution for 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 85F is also amended so that the court has a discretion to prohibit cross examination by a person who has been charged with a specified offence of the alleged victim of that offence or to prohibit the cross examination of the alleged perpetrator by the alleged victim. New section 85EA(5) defines a “specified offence” to mean an offence specified, or of a description specified, in regulations made by the Lord Chancellor.
5. 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 85EA.

Justification for the power

6. It is intended that the offences specified in regulations made under the power in new section 85EA(5) of the Courts Act 2003 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.
7. 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 85EA of the Courts Act 2003. In

addition, it is intended to make provision in relation to any service disciplinary offences involving violence or abuse by one person against another.

8. While it is intended to broadly mirror the equivalent list under the legal aid regime, there is still an assessment to be done as to whether the precise and voluminous detail of the existing list should feature identically in the context of the prohibition of cross-examination in person in civil proceedings, or whether minor adjustments may be desirable or required. In addition, the existing list comprise considerable detail and complexity – often running to many pages of secondary legislation -- which the Government wishes to ensure it has considered properly in the context of the prohibition on cross-examination in person provisions.
9. Furthermore, the Government considers that the length and detail of these lists are of a type conventionally and generally considered appropriate for secondary legislation. Finally, 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

10. Regulations under new section 85EA(5) will be subject to the negative procedure by virtue of section 108 of the Courts Act 2003. 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.

Amendment to clause 64 (Prohibition of cross-examination in person in civil proceedings) - new section 85EB(4) of the Courts Act 2003: 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

11. New section 85EB of the Courts Act 2003 prohibits cross-examination in person by a party to civil 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 85EB(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.

12. 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 85EB.

Justification for taking the power

13. It is intended that the types of protective injunctions specified in regulations under the power in new section 85EB(4) of the Courts Act 2003 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.

14. It is intended to broadly 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.

15. While it is intended to broadly mirror the equivalent list under the legal aid regime, there is still an assessment to be done as to whether the precise and voluminous detail of the existing list should feature identically in the context of the prohibition of cross-examination in person in civil proceedings, or whether minor adjustments may be desirable or required. In addition, the existing list comprise considerable detail and complexity – often running to many pages of secondary legislation -- which the Government wishes to ensure it has considered properly in the context of the prohibition on cross-examination in person provisions.

16. Furthermore, the Government considers that the length and detail of these lists are of a type conventionally and generally considered appropriate for secondary legislation. Finally, as with the specified offences under new section 85EA(5) of the Courts Act 2003, 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

17. Regulations under new section 85EB(4) will be subject to the negative procedure by virtue of section 108 of the Courts Act 2003. The legal aid regulations which contain the definition of “protective injunction” to be adopted in regulations under new section 85EB(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.

Amendment to clause 64 (Prohibition of cross-examination in person in civil proceedings) - new section 85EC(3) of the Courts Act 2003: 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

18. New section 85EC of the Courts Act 2003 prohibits cross-examination in person by a party to civil 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 85EC(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 85EC.

19. 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 85EC.

Justification for taking the power

20. This provision is mirrored in the clauses of the Bill relating to family courts, which were not included in the Domestic Abuse Bill as originally introduced in the 2017-19 session but subsequently were following recommendations made by the Joint Committee on the Draft Domestic Abuse Bill. The Joint Committee was concerned that relying on a judicial discretion for granting such a ban on cross-examination in person could lead to inconsistency in judicial application. The Joint Committee recommended 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 accepted this recommendation and now feels comfortable in extending this provision to civil courts for the same reasons.

21. As in the legal aid regime and the family provisions on which this provision is based, it is intended that the types of evidence will be specified in regulations under the power in new section 85EC(3) of the Courts Act 2003 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 85EA and 85EB, in order to avoid duplication).

22. 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 85EC(4) is included to ensure that regulations made under new section 85EC(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).
23. While it is intended to broadly mirror the equivalent list under the legal aid regime, there is still an assessment to be done as to whether the precise and voluminous detail of the existing list should feature identically in the context of the prohibition of cross-examination in person in civil proceedings, or whether minor adjustments may be desirable or required. In addition, the existing list comprise considerable detail and complexity – often running to many pages of secondary legislation -- which the Government wishes to ensure it has considered properly in the context of the prohibition on cross-examination in person provisions. The Government also intends to carry out engagement with stakeholders in the domestic abuse sector in relation to the list of specified evidence of domestic abuse to ensure it is appropriately broad, up-to-date, and achieves the aims of the Bill.
24. Furthermore, the Government considers that the length and detail of these lists are of a type conventionally and generally considered appropriate for secondary legislation. Finally, as with the specified offences under new section 85EA(5) and the specified protective injunctions under new section 85EB(4) of the Courts Act 2003, 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

25. Regulations under new section 85EC(3) will be subject to the negative procedure by virtue of section 108 of the Courts Act 2003. The legal aid regulations which contain the list of evidence to be broadly replicated in regulations under new section 85EC (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.

Home Office / Ministry of Justice
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