Proposed new pilot Practice Direction to provide for the Practice and Procedure in the Family Court under Part 3 of the Domestic Abuse Act 2021

Resolution's response to the Family Procedure Rule Committee

Resolution's 6,500 members are family lawyers, mediators, collaborative practitioners, arbitrators and other family justice professionals, committed to a non-adversarial approach to family law and the resolution of family disputes. Resolution members abide by a Code of Practice which emphasises a constructive and collaborative approach to family problems and encourages solutions that take into account the needs of the whole family and the best interests of any children in particular.

Resolution members seek to solve problems outside of court, where possible, through solicitor negotiation, mediation, collaborative practice, arbitration, roundtable discussions, private FDRs/ early neutral evaluation and other processes.

Resolution is committed to developing and promoting best standards in the practice of family law amongst both its members and amongst family lawyers in general.

We also campaign for better laws and better support for families and children undergoing family change.

Responses to consultation questions

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

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

Our view is that some parts of the PD could provide more clarity which we pick up in response to later questions.

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

The missing piece of the picture is the position of the person to be protected and the role they play in third party applications, and applications for variation and enforcement. And the extent to which their views will be taken into account on the protection they.

The person to be protected who is not the applicant may not even be a party to the proceedings. If they are not to automatically have party status, which we consider they should have, it should be very clear how they may apply to become a party.

There doesn't seem to be any listing directive for on notice or without notice hearings.

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

In relation to paragraph 3.4(b) what will the 'opinion' of the person to be protected look like? What form should the opinion be in and what will its status be?

Q2: Paragraph 3 – Application for a DAPO on notice

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

Yes, we agree that applications should be supported by a witness statement.

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

Please see our comments under Q1c.

The opinion of the party to be protected will be a vital part of the court's consideration. We are not sure it is clear what happens if an opinion cannot be obtained, the applicant having sought such, or the extent of the efforts which should be appropriately made to obtain the opinion (or what evidence would be required of that).

What if the person to be protected lacks capacity?

We are also concerned about seeking the opinion of 'any relevant occupant', what this means, and whether it will deter applicants. For example, where the person to be protected is living with bullying in laws related to the P is it envisaged that the opinion of those in laws will be sought and on the basis of what level of information? Nothing should be done to put the person to be protected at risk. Even if this is not envisaged, the person who is to be protected may have this understanding.

Q3: Paragraph 5 – Permission to apply for a DAPO

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

The procedure is fairly clear, but we think there should be more onus on third parties and more detail and guidance provided for them on what the application for permission is required to set out. Particularly on what engagement they have had with the person to be protected and why the third party is making the application - why it is preferable for the applicant to apply than the person to be protected or why the person to be protected is not in a position to apply.

We do not think 'as soon as practicable' in paragraph 5.5 is sufficient in relation to applications of an urgent nature.

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

In principle yes, but we would welcome the opportunity to comment on the content of the proposed form.

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

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

Yes. Again, we would welcome the opportunity to comment on the proposed form.

Q5: Paragraph 7 – Parties

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

We consider that where the person to be protected is not the applicant and is a child of 16 or 17, they should have party status, for the same reasons that someone over 18 should be a party.

We also query whether it is right for Cafcass to never have a role in these cases. If this is purely resource driven, it needs to be reconsidered. There will be as small number of 16 and 17 year olds who will greatly benefit from the appointment of a children's guardian and this should be considered on a case by case basis. These are still children in a protective situation.

In relation to a child aged 16 or 17, at present when a child applies for a non-molestation order, the application is dealt with in the High Court. We suggest giving consideration to making this the same for DAPOs as they will likely involve similar issues and complexity. We anticipate that the numbers will be relatively small, and this would provide confidence that the new system for 16 and 17 year olds will be managed carefully.

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

Please see our response to Q5a.

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

a. ***Do you agree with this approach?***

Yes, we welcome the general approach in terms of intention to make the provisions as accessible and clear as possible. We agree that applicants need to be very clear how service is to be effected.

However, we suggest that overall the service provisions need to be clearer.

For example, should it be clearer on the face of the PD that the court will be able to dispense with service or allow service by alternative means? There is reference in different places to 'must serve…personally'. Adding 'or as otherwise directed by the court' might be helpful, or it might be clearer for the court to be required to give directions on how service is to be effected in every case, for example, if service can be effected by email.

There are also concerns about the capacity of court bailiffs to serve orders quickly in accordance with the objectives of the legislation.

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

Where there is reference to service by a (legal) representative, we would ask that 'or agent instructed on their behalf' be added to provide clarity.

It should always be clear what should be served where service on any other person is directed by the court.

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

Mortgagees only require service of the application and proposed order, not the witness statement. They do not need to know the same amount as the "relevant" person.

We also consider that unless an occupant is made a party, they should only be served with the application/ draft order in the same way as mortgagees, as they only need information as far as it affects occupation. They will not require sight of a witness statement which may contain sensitive personal information and/or put the person to be protected at further risk.

Q7: Paragraph 11 – Hearings

a. ***Do you agree with our suggested approach?***

Our only observation is whether this achieves the desired consistency across courts if those hearings heard by magistrates in the family court are not also generally heard in private.

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

a. ***Do you have any comments on these provisions?***

We welcome the intention but unfortunately simply don't see the programme infrastructure, with consistency and quality across the jurisdiction, and funding being in place or realistically how implementing the positive requirement will work in practice.

We would like to see a requirement that perpetrator programmes are accredited by Respect to ensure the victim's protection - that their views to be sought by the programme provider and updates given to them.

Resolution members acting for victims, perpetrators, or children themselves, see children cases where DAPPs are essential, having a significant impact on whether or not child arrangements for contact can progress. We have been unable to obtain any information from the MoJ about the inability of DAPP providers to accept family court referrals, and also self-referrals in some circumstances, since last year -what will happen next and what to do in the meantime.

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

We are not aware that there is any provision in the primary legislation facilitating the court or the person to be protected to understand the impact of the positive requirement i.e. whether a programme has made a difference/reduced risk including in relation to potential child arrangements.

There needs to be a timeframe for reporting back to the court and ensuring that the person to be protected is aware and updated of any progress made and compliance or non-compliance with conditions. We wonder if the pilot could address this need for timely follow up.

Q9: Paragraph 15 – Electronic monitoring requirements

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

Again, we have similar observations to those in response to Q8 in terms of follow up and the information provided to the person to be protected.

It will be important for there to be consistency across courts.

Q10: Paragraphs 20 and 21 – Notification to the police

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

On the ground there are current issues with the accuracy and storage of police records and access to them. The reality is that the police are often shown orders and statements of service on individuals' mobile phones. We are concerned that in practice, even with the intended short to medium term solution in place, there will be issues around access by all police officers to the relevant data/email address for that police force, and even awareness of any system in place. The court and person to be protected will think the police are aware of the DAPO which might not be the case.

If this is the case, or for some reason notification is not made to the relevant email address or not made its way to the relevant database, we assume that the police will still enforce orders on any breach, and not only enforce or arrest where they have seen the order on a database. And in any event, sometimes orders are breached extremely quickly.

We suggest that on the face of orders it should be made clear that if the police are satisfied that an order is in place and that the P is aware of it, having been served, they are able to enforce the order.

There are wider issues which arise around lack of a victim consent requirement to notification of the police.

Q11: Paragraph 22 – Variation or discharge of a DAPO

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

Again, it is not clear what role the person to be protected will play. They should be a party to variation or discharge proceedings.

It seems strange that where the court is considering such of its own initiative that the relevant chief officer of police can choose to be heard under paragraph 22.8, but the person to be protected does not have the opportunity to be heard.

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

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

In our members' experience, there need to be really clear instructions to the police on the enforcement order.

We would like to see separate specific enforcement forms for these applications. The current contempt forms are confusing.

For further information please contact:
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