

**EXPLANATORY MEMORANDUM TO  
THE MAGISTRATES' COURTS (DOMESTIC VIOLENCE PROTECTION ORDER  
PROCEEDINGS) RULES 2011**

**2011 No. 1434 (L.11)**

1. This explanatory memorandum has been prepared by the Ministry of Justice in consultation with the Home Office, and is laid before the House of Lords by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

**2. Purpose of the instrument**

2.1 These Rules make provision in respect of proceedings in the magistrates' court for applications for Domestic Violence Protection Orders (DVPO) under the Crime and Security Act 2010. Applications for DVPOs are made by complaint to the magistrates' court. Accordingly, these rules prescribe the procedure to be followed when an application for a DVPO is made.

2.2 In order to ensure that the procedures under both the Crime and Security Act 2010 and these rules in this instrument work as intended, the rules also disapply section 2(1) of the Civil Evidence Act 1995<sup>1</sup>, which requires parties proposing to adduce hearsay evidence in civil proceedings to give notice of the proposal, and, by way of an amendment to the existing rules, excludes the Magistrates' Courts (Hearsay Evidence in Civil Proceedings) Rules 1999<sup>2</sup>, which make further provision concerning hearsay evidence, including the contents of any hearsay notice, the procedure to call witnesses for cross-examination on hearsay evidence, credibility and the use of previous inconsistent statements and the service of documents.

**3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 Section 2 (Notice of proposal to adduce hearsay evidence) of the Civil Evidence Act 1995, provides that

*“(1) A party proposing to adduce hearsay evidence in civil proceedings shall, subject to the following provisions of this section, give to the other party or parties to the proceedings—*

*(a) such notice (if any) of that fact, and*

*(b) on request, such particulars of or relating to the evidence,*

*as is reasonable and practicable in the circumstances for the purpose of enabling him or them to deal with any matters arising from its being hearsay.*

*(2) Provision may be made by rules of court—*

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<sup>1</sup> 1995 c.38

<sup>2</sup> S.I. 1999/681

*(a) specifying classes of proceedings or evidence in relation to which subsection (1) does not apply, and*

*(b) as to the manner in which (including the time within which) the duties imposed by that subsection are to be complied with in the cases where it does apply.”*

3.2 In accordance with section 2(2)(a), above, rule 4 of this instrument, provides that section 2(1) of the Act does not apply to proceedings in the magistrates’ court in respect of applications for DVPOs. In addition, rule 5 amends the Magistrates’ Court (Hearsay Evidence in Civil Proceedings) Rules 1999 (the 1999 Rules) to exclude those Rules.

#### **4. Legislative Context**

4.1 Sections 24 to 32 of the Crime and Security Act 2010 introduced a new procedure to protect victims from repeated incidents of domestic violence.

4.2 Section 24 of the Act enables a senior police officer to issue a perpetrator of domestic violence with a Domestic Violence Protection Notice (DVPN), which prohibits that person from further molesting the victim and, where they co-habit, may also require the perpetrator to leave their shared accommodation. Thereafter, section 27 of the Act provides that, within 48 hours of the issue of the DVPN, an application by way of complaint may be made to the magistrates’ court for a DVPO. Section 28 of the Act makes provision as regards the conditions for, and the contents of, the DVPO, which, as well as further prohibiting the perpetrator from molesting the victim, may also make provision concerning further access to shared accommodation.

#### **5. Territorial Extent and Application**

5.1 This instrument applies to England and Wales

#### **6. European Convention on Human Rights**

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

#### **7. Policy background**

- *What is being done and why*

7.1 The Crime and Security Act 2010 introduced new procedures to protect victims from repeated incidents of domestic violence by providing immediate protection to a victim in the aftermath of a domestic violence incident and to ensure that such protection is secured quickly to prevent further acts of domestic violence or threats of violence.

7.2 Domestic violence accounts for 14% of all violent incidents. It has more repeat victims than any other crime: repeat victimisation accounts for 66% of all incidents of domestic violence and 21% of victims have been victimised three or more times<sup>3</sup>. Every year 750,000 incidents of domestic violence are reported to the police, resulting in 200,000 arrests.

7.3 Domestic violence is rarely a one-off incident, and should instead be seen as a pattern of abusive and controlling behaviour through which the abuser seeks power over their victim. Moreover, there is a high attrition rate in domestic violence cases where reported incidents of domestic violence do not progress to charge due to the victim's unwillingness to give a statement – due to coercion and/or fear – or retracting their statement for similar reasons.

7.4 There is evidence from other countries (who have already adopted measures similar to those under provided by the Crime and Security Act 2010) that emergency orders can have a positive impact on the safety of victims in cases of domestic violence. The approach relies on the availability of support for victims to ensure that the victim is given genuine help and guidance about their options and the longer-term support and protection that is available to them.

7.5 There is a high level of public interest in this policy and it attracted much media interest in July/August 2010 when it was announced that the pilots under the Act were to be deferred.

7.6 The Crime and Security Act 2010 addresses these issues by providing new powers to enable the police to issue a Domestic Violence Protection Notice (DVPN) and the Magistrates Court to issue a Domestic Violence Protection Order (DVPO) upon an application by the police.

7.7 Under section 24 of the Act, a member of a police force of the rank of superintendent or above may issue a DVPN, if they have reasonable grounds for believing that the perpetrator has been violent towards, or has threatened violence towards, an associated person and it is necessary to protect that person from violence or threat of violence by the perpetrator. The notice is an emergency non-molestation notice and in some circumstances will act as an eviction notice. It is effective from the time it is handed to the perpetrator.

7.8 Under section 27 of the Act, within 48 hours of the DVPN being served on the perpetrator, an application to a magistrates' court for a DVPO has to be made by the police and heard by the court. The application is made by way of complaint and, consequently, the application for a DVPO is a civil, rather than criminal procedure. The victim does not have to attend the hearing of the application, but, under section 27(10) of the Act, may be required to do so if they have previously given oral or written evidence in the course of the hearing.

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<sup>3</sup> Walker A., Flatley, J., Kershaw, C., Moon, D. (2009) *Crime in England and Wales 2008/09*. Home Office Statistical Bulletin 11/09. London: Home Office; based on the face-to-face interviews.

7.9 If made, then under section 28 of the Act, the DVPO, which may be in force for 14 to 28 days, must contain provision explicitly prohibiting the perpetrator from molesting the victim for the duration of the order and may also make provision concerning access to the shared accommodation.

7.10 As explained below, this instrument will enable the procedures under the Crime and Security Act and, in particular, those relating to the DVPO application to operate in the way in which they were intended.

### Procedure

7.11 Section 27(2) of the Crime and Security Act 2010 provides that an application for a DVPO must be made by complaint. Section 51 of the Magistrates' Courts Act 1980<sup>4</sup>, deals with the procedure for making a complaint. Generally, upon an application to make a complaint, a justice or a justices' clerk will consider the complaint and make a decision as whether or not to issue a summons requiring the subject of the complaint to attend court.

7.12 However, Section 27 of the Crime and Security Act 2010 Act does not refer to a summons being issued, section 27(5) of the Act only requiring the court to give the perpetrator a notice of the hearing. The Act, then, envisaged the DVPO application procedure being commenced by a notice of the hearing being given to the perpetrator, notwithstanding that the issue of a summons would be the correct approach. Concern was expressed about the possible confusion that might arise regarding the need for a summons to commence the process. Accordingly, it was concluded that the most appropriate course of action was to specify that the notice under section 27(5) is deemed to be a summons. Rule 6 of this instrument makes provision for this. In addition, because the application must be made by complaint the rule further provides that the applicant shall be deemed to be a complainant and the respondent to be a defendant. The approach that has been adopted is similar to that in Rule 11(2) of the Magistrates' Courts (Detention and Forfeiture of Cash) Rules 2002.<sup>5</sup>

### Hearsay Evidence

7.13 The policy intention behind the legislation is to enable the police to pursue an application for a DVPO even in circumstances where the victim does not wish to be involved in any legal proceedings, since victims are often reluctant to invoke proceedings against a partner, particularly if they are required to give evidence. Therefore, in many applications, the police will neither call the victim to give evidence or rely in evidence upon any statement made by the victim, but instead will rely upon other hearsay evidence and, by way of example, the evidence of police officers who may have previously attended upon the victim or the perpetrator during the course or immediately after an incident of domestic violence.

7.14 However, the rules which apply to the use of hearsay evidence in magistrates' court civil proceedings are not compatible with the procedure envisaged by the Crime and Security Act 2010 and, therefore, potentially undermine the policy intention to

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<sup>4</sup> 1980 c.43.

<sup>5</sup> S.I. 2002/2998.

both provide immediate protection to a victim in the aftermath of a domestic violence incident and to ensure that such protection is secured quickly to prevent further acts or threats of violence and protect the victim from having to attend court and the resultant risk of being cross-examined by the perpetrator. In the circumstances it was concluded that the most appropriate approach would be to specifically disapply the rules in the context of DVPO applications.

7.15 The Magistrates' Court (Hearsay Evidence in Civil Proceedings) Rules 1999 (the 1999 Rules) include the following provisions, which are excluded by the rule 5 of this instrument:

- Rule 3 of the 1999 Rules, requires a party who intends to give hearsay evidence at a hearing to give at least 21 days notice before the date fixed for the hearing, by serving a hearsay notice on every party and filing a copy in the court. This 21 day period is not compatible with the 48 hour period within which DVPO proceedings are required to be heard under section 27 of the Crime and Security Act 2010. Consideration was given to rule 3(2) of the 1999 Rules, which enables the court or the justice's clerk to make a direction substituting a different period of time for the service of a hearsay notice, on the application of a party to the proceedings. However, it was concluded that such routine use of rule 3(2) would not be appropriate, first because it would be inconsistent with the intention behind the 1999 Rules and, secondly, because the notice periods could well be so short as to be either ineffectual or impossible to comply with.
- Rule 4 of the 1999 Rules makes provision to enable a party to call a witness for cross-examination on their hearsay evidence. However, as stated above, in many applications for a DVPO, the police will neither call the victim to give evidence or rely in evidence upon any statement made by the victim. Moreover, rule 4 currently only takes effect when a hearsay notice is served under rule 3, above, and imposes a seven day notice period which, again, is incompatible with the 48 hour period within which DVPO proceedings are required to be heard. In any event, if a victim (or, for that matter, any other witness) does give evidence or their statement is submitted in support of the application, the combined effect of section 27(8) and (10) of the Crime and Security Act 2010 is such that the court may adjourn the hearing of the application and summons the witness to attend.
- Rule 5 of the 1999 Rules provides that the recipient of hearsay evidence served under rule 3, above, must give seven days notice to the party tendering the evidence if the recipient intends to give evidence of attacking the credibility of the witness or allege that the witness has previously made a statement inconsistent with it. In this instance, not only is the notice period again incompatible with the 48 hour period, but, as currently drafted, rule 5 can only take effect if a hearsay notice is served under rule 3, above. The disapplication of this rule does not prevent a party from giving evidence which attacks the credibility of a witness (or the victim), or from giving evidence of previous inconsistent statements, both which are preserved in sections 5 and 6 of the Civil Evidence Act 1995, only the requirement to give notice is disappplied.

7.16 In light of the need to exclude these rules, it was considered illogical to retain rule 6 (which concerns the service of documents) and rule 7 (which makes a consequential amendment to the Schedule to the Justices Clerks Rules 1970<sup>6</sup>, which has since been revoked).

7.17 Notwithstanding the exclusion of the 1999 Rules, fairness is preserved, overall, because of the provisions of the Civil Evidence Act 1995 and the effect of section 27(8) of the Crime and Security Act 2010, which will enable the court to adjourn the hearing of an application if it considers that a party requires further time in which to consider any hearsay evidence which has been served.

7.18 Section 33 of the Act allows the Secretary of State to commence all or part of the powers for the purposes of a pilot. Sections 24 to 30 of the CSA 2010 will be commenced in June to pilot for at least one year the new powers in specific parts of three police force areas – Greater Manchester, West Mercia and Wiltshire.

- ***Consolidation***

7.19 This is a stand-alone instrument. There are no plans for consolidation.

## **8. Consultation outcome**

8.1 This instrument has been considered by the Magistrates' Court Rule Committee. Informal consultation was undertaken with a representative from the Justices' Clerks Society. Public consultation was not required in respect of this instrument.

## **9. Guidance**

9.1 ACPO and the Home Office will initially publish detailed (non-statutory) guidance for the three pilot areas on the use of the Domestic Violence Protection Notices and Orders. It is intended that statutory guidance will be issued in October 2011. The guidance will refer to this instrument.

## **10. Impact**

10.1 The impact on business, charities or voluntary bodies is negligible.

10.2 The impact on the public sector is negligible.

10.3 An Impact Assessment has not been prepared for this instrument.

## **11. Regulating small business**

11.1 The legislation does not apply to small business.

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<sup>6</sup> S.I. 1970/231.

## **12. Monitoring & review**

12.1 All aspects of the pilot scheme will be evaluated after one year to establish whether the process was effective, the impact on domestic violence and the cost effectiveness of the new powers. The pilots will be monitored on a monthly basis by the pilot forces, ACPO National Co-ordinator and the Home Office working group.

## **13. Contact**

Samantha Darby/Chris Ashley at the Home Office Tel: 0207 035 3273 or email: [Samantha.Darby@homeoffice.gsi.gov.uk](mailto:Samantha.Darby@homeoffice.gsi.gov.uk) can answer any queries regarding the instrument.