



Department of
Justice

www.justice-ni.gov.uk

**Protecting victims of domestic
abuse from being cross-examined
by perpetrators in person in family
proceedings**

**A consultation on options for
legislation**

31 July 2019

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Section 1 – About this consultation

This consultation seeks views on options for legislation to protect victims of domestic abuse from being cross-examined in person in family proceedings by those who have committed the abuse.

The priorities of the Department of Justice (“the Department”), as outlined in its Corporate Plan for 2019-22, include supporting communities to be safe and resilient, which in turn includes the objective, set out in the current business plan, of protecting individuals from the harm caused by domestic violence and abuse. This consultation is one of a number of actions the Department has committed to in furtherance of that objective.

We would particularly welcome the views of victims of domestic abuse who have been involved in family proceedings, especially victims who have been cross-examined by their abuser in person. We would also welcome the views of people who have represented themselves in family proceedings, who may have personally carried out cross-examination of another party or witness. However, views are invited from all court users, people working within the family justice system, community and voluntary sector organisations and anyone else with an interest in the family justice system.

There are a range of legislative measures that could potentially be introduced to support victims of domestic abuse and other vulnerable witnesses giving evidence in family proceedings. However, the introduction of any statutory scheme of special measures for vulnerable witnesses would touch upon the remit of other departments with responsibilities in relation to family justice, as well as the Department and is outside the scope of the consultation. This consultation is concerned only with the issue of protecting victims of domestic abuse from being cross-examined by perpetrators¹ personally. The Gillen Review of Family Justice², which recommended the introduction of legislation to prevent a victim of domestic abuse being directly cross-examined by the perpetrator, together with recent developments in other

¹ For the purposes of this paper, the word “perpetrator” relates to both alleged and convicted perpetrators

² Further information on the Gillen Review of Family Justice is in Section 2

jurisdictions, particularly the introduction of the Domestic Abuse Bill³ in Parliament, have placed a focus on this issue.

The consultation provides an opportunity to inform the development of proposals for legislation. However, primary legislation would be required to implement any proposals. The Domestic Abuse Bill, introduced in Parliament on 16 July 2019, includes provisions to prevent perpetrators of domestic abuse from personally cross-examining victims in the family courts in England and Wales. It also includes some measures in respect of Northern Ireland, in particular the introduction of a new domestic abuse offence. Following the outcome of this consultation, the Department will consider, together with the UK Government, whether it would be appropriate for any provision to prevent cross-examination by perpetrators of domestic abuse in person in family proceedings in Northern Ireland to be included in the Bill. However, it may not be possible to proceed to legislate until the Executive and the Assembly are restored.

³ <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0422/19422.pdf>

Section 2 – Current position

Introduction

There is currently no statutory definition of domestic abuse in Northern Ireland but the ‘Stopping Domestic and Sexual Violence and Abuse Strategy’ published jointly by the Department of Justice and the Department of Health defines it as follows:

“Threatening, controlling coercive behaviour, violence or abuse (psychological, virtual, physical, verbal, sexual, financial or emotional) inflicted on anyone (irrespective of age, ethnicity, religion, gender, gender identity, sexual orientation or any form of disability) by a current or former intimate partner or family member.”

Behaviours associated with domestic abuse will generally come within the scope of a criminal offence, particularly where violence or a threat of violence is involved. Domestic abuse is not, however, limited to physical violence or the threat of it, as reflected in the definition above and in the proposed new domestic abuse offence for Northern Ireland, which is provided for in the Domestic Abuse Bill. This would make it an offence to engage in a course of abusive behaviour (on at least two occasions) against a partner, former partner or close family member. Abusive behaviour for the purposes of the new offence would cover patterns of behaviour which is abusive because it is controlling or coercive, or amounts to psychological, emotional or financial abuse, as well as behaviour which is physically violent, threatening or intimidating. Also, for the purposes of the proposed new offence, the abusive behaviour may not be direct and could be carried out with or through a third party; the behaviour may be either intentional or reckless as to its effect; and harm would not have to be caused, rather an offence will be committed where a reasonable person would consider the behaviour likely to cause harm.

Domestic abuse can arise as an issue in family law cases in a number of ways. A person may be applying to the court for an order, such as a non-molestation order, to protect them from abusive behaviour by a partner, former partner or other family member. Alternatively, domestic abuse may be one of a number of factors that the court has to consider in deciding a case, for example, where this is raised in the context of a private law application concerning arrangements for a child after parents have separated. In some cases, the abusive behaviour may already have been the

subject of criminal proceedings, perhaps resulting in a conviction. However, family proceedings may be the first time that allegations of domestic abuse are being considered by a court.

Where a party to family proceedings is a personal litigant, this creates the potential for a victim of domestic abuse to be cross-examined in person by their abuser. A person may be representing themselves for a variety of reasons, for example, for financial reasons because they are not eligible for legal aid and are unable to afford legal representation. However, it may be a personal choice and this creates the risk that some perpetrators of domestic abuse may actually choose to represent themselves to have the opportunity to cross-examine their victim as a further form of abuse and control.

Courts hearing family proceedings are already dealing with matters that are very personal, emotional and sensitive. For anyone involved in a family case, it is likely to be a daunting and stressful experience. However, where a party has been subject to domestic abuse, they may be particularly vulnerable and the experience of going to court and possibly having to give evidence and be cross-examined may be all the more intimidating and distressing.

There is no statistical data available on the number of family law cases in Northern Ireland involving admitted or alleged domestic abuse, where a personal litigant has cross-examined the (alleged) victim. Anecdotal evidence suggests that, while there is not a large volume of such cases in this jurisdiction (compared, for example, to England and Wales), it does arise from time to time and may be an issue in 5-10% of family law cases. Moreover, even if the overall number of cases where a victim of domestic abuse is cross-examined by the perpetrator in person is relatively small, this does not lessen the impact on an individual victim.

Northern Ireland

Family Proceedings

At present, courts in Northern Ireland hearing family proceedings have no specific legislative powers to prevent a perpetrator of abuse from cross-examining their victim in person. Instead, the courts have to rely on general case management powers, for example, to prevent inappropriate or irrelevant questions, to request the questions in advance and, in some instances, by questions being put to the witness through the judge. However, there is no specific judicial guidance and ultimately how cross-examination of a vulnerable witness by a personal litigant is managed is a matter for an individual judge hearing a case who is, of course, also independent of the parties. The courts have no power, statutory or other, to appoint a legal representative to carry out the cross-examination on behalf of the personal litigant. This may mean that, in some cases, there is a limit to what a judge hearing family proceedings can do to protect a victim of domestic abuse.

Criminal Proceedings

The current lack of legislative provision for family proceedings contrasts with the position in criminal proceedings, where there is specific legislative provision, in the Criminal Evidence (Northern Ireland) Order 1999⁴, prohibiting an unrepresented defendant from cross-examining in person the alleged victim of a sexual offence. Provision is made in the Domestic Abuse Bill to amend the 1999 Order to extend the prohibition to include victims of the proposed new domestic abuse offence. There is also express provision which prevents children who are alleged victims or witnesses from being cross-examined in person by an unrepresented defendant in proceedings involving a wide range of offences.

In cases where the statutory prohibition on cross-examination in person by an unrepresented defendant does not apply, the court can, on an application by the prosecution, or of its own motion, make a direction preventing an unrepresented defendant from cross-examining a witness in person. The court can make such a

⁴ <https://www.legislation.gov.uk/nisi/1999/2789/contents>

direction if it considers this would improve the quality of evidence given by the witness and that it would not be contrary to the interests of justice.

Where a defendant is prevented from cross-examining a witness in person, the court must invite them to arrange for a legal representative to carry out the cross-examination on their behalf. Alternatively, the court can appoint a legal representative to conduct the cross-examination, if it considers this is necessary in the interests of justice. A legal representative appointed by the court is paid for by the Department.

Gillen Review of Family Justice

A fundamental Review of Family Justice in Northern Ireland was commissioned by the Lord Chief Justice in 2015 and led by Lord Justice Gillen. The final report⁵ of the Review was published in 2017 and specifically considered the issue of protection of witnesses from cross-examination by personal litigants. Whilst noting that the incidence may not be as great in Northern Ireland as in England and Wales, the Review found it was nevertheless a problem that had surfaced in discussions with the Women's Aid Federation and particularly the judiciary. The Review considered:

“To allow a perpetrator of domestic abuse to cross-examine their victim in this manner is not only simply another tool used by a perpetrator to extend their control and abuse of vulnerable women but a clear disregard for the consequences and impact of abuse.

There is no distinction in policy terms between the criminal and family process in this regard. Logic strongly suggests that the same protection should be made available to women in the family jurisdiction as exists in the criminal jurisdiction. Why are we obliged to tolerate in family courts what would be forbidden in Crown Courts?”

The Review concluded that it is “absolutely essential” that steps are taken to address this and recommended the introduction of legislation similar to the Criminal Evidence (Northern Ireland) Order 1999 for the protection of witnesses from cross-examination by personal litigants.

⁵ <https://judiciaryni.uk/publications/review-groups-report-family-justice>

Other jurisdictions

The availability of legislative provision to prevent a victim of domestic abuse from being cross-examined personally by the perpetrator in family courts in other jurisdictions is outlined below.

England & Wales

In England and Wales, changes to legal aid have increased the proportion of personal litigants in family courts in that jurisdiction. While court procedural rules⁶ and a supporting Practice Direction⁷ provide some guidance to the Family Court in England and Wales on dealing with private law applications where domestic violence or abuse has occurred or is alleged, it does not currently have the same express legislative powers to prevent cross-examination in person and to appoint a legal representative to carry out the cross-examination which the criminal courts have (which are similar to the powers the criminal courts have in Northern Ireland, as outlined above). The UK Government has, however, committed to introducing such legislation. Provision was initially included in the Prisons and Courts Bill which was introduced in Parliament in early 2017, although the Bill then fell due to the General Election called in May of that year. More recently, the joint Home Office and Ministry of Justice consultation “Transforming the Response to Domestic Abuse” reiterated this commitment and measures have been included in the Domestic Abuse Bill.

The provision included in the Bill is as follows:

- A party to family proceedings who has been convicted of, or given a caution for, or is charged with certain offences (to be prescribed in secondary legislation) is prohibited from cross-examining in person, a witness who is the victim, or alleged victim, of that offence. Similarly, the (alleged) victim may not cross-examine the person convicted, cautioned or charged.
- A party to family proceedings, against whom an on-notice protective injunction (again the relevant orders will be specified in secondary legislation) is in force,

⁶ <https://www.justice.gov.uk/courts/procedure-rules/family>

⁷ https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12j#28a

is prohibited from cross-examining a witness who is protected by the injunction and vice versa.

- In any family proceedings where one of the above prohibitions above does not apply, the court has discretion to give a direction prohibiting a party to the proceedings from cross-examining a witness in person, where it appears to the court that it would diminish the quality of the witness's evidence or cause significant distress to the witness.
- Where a party is prohibited from cross-examining a witness in person, the court will have to consider whether there are satisfactory alternatives to such cross-examination. If there are none, the court must invite the party to arrange for a legal representative to act for them (for the purposes of cross-examining the witness) and, if they do not do so, the court must consider whether it is necessary, in the interests of justice, to appoint a qualified legal representative to cross-examine the witness. The costs of such a representative will be met from central funds.

It is to be noted that the Joint Committee of the House of Lords and the House of Commons, which examined the Bill in draft prior to its introduction, whilst welcoming the proposal to prevent perpetrators of domestic abuse from cross-examining victims in person in family courts, expressed concern at the potential for inconsistency in application because it considered too many victims would be protected only at the discretion of the court. The Committee, therefore, recommended that the automatic prohibition be extended so that it would apply where there are other forms of evidence of domestic abuse⁸. In its response⁹ to the report, the UK Government has indicated that it will consider the Committee's recommendation over the summer, including whether any amendments are needed to the Bill.

⁸ <https://publications.parliament.uk/pa/jt201719/jtselect/jtddab/2075/2075.pdf>

⁹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817556/CCS0619467038-001_Domestic_Abuse_Bill_Print_WEB_Accessible.pdf

Scotland

In Scotland, there is currently no legislation which prevents a victim of domestic abuse who is involved in family proceedings from being cross-examined in person by the perpetrator. However, the Scottish Government's Programme for Government for 2017-18 included a commitment to consult on banning cross-examination of victims of domestic abuse by their alleged abusers in child contact cases before the civil courts. This was subsequently taken forward as part of their recent consultation on the review of Part 1 of the Children (Scotland) Act 1995. The consultation proposed that an option would be to ban a party from cross-examining a victim of domestic abuse if:

- the person has a criminal conviction relating to domestic abuse; or
- the person is the subject of a civil protection order against domestic abuse; or
- the court directs that the person should not be allowed to carry out personal cross-examination based on some evidence of domestic abuse.

An analysis of responses to the consultation was published in May 2019. The Scottish Government is now considering what legislative reforms will be taken forward. However, the Government has already announced that it will bring forward a Family Law Bill, one of the main aims of which will be to further protect victims of domestic abuse.

Republic of Ireland

In Ireland, new legislation in relation to domestic violence (the Domestic Violence Act 2018) recently came into force. The legislation includes provisions to protect victims of domestic violence from being personally cross-examined by the perpetrator, although this only applies in proceedings for a domestic violence protective order.

Children giving evidence in an application for a domestic violence order cannot be cross-examined in person by either the applicant or the respondent, unless the court considers that this is required in the interests of justice. In relation to adults giving evidence in applications for domestic violence orders, the court has power to prevent

a party to the proceedings cross-examining the witness in person, unless the court considers this is required in the interests of justice.

Where a party is prevented from carrying out cross-examination personally, the court will invite them to arrange for a legal representative to act on their behalf for the purpose of cross-examining the witness. Otherwise the court will consider whether it is necessary, in the interests of justice, for the witness to be cross-examined by a legal representative appointed by the court for that purpose. In these circumstances, the legal representative is funded by legal aid.

Summary

Whilst the legislation, or potential legislative provision, varies somewhat between jurisdictions, some common features can be identified:

- an absolute statutory prohibition on a party to the proceedings cross-examining a witness in person, in specified circumstances;
- a discretion for the court to prevent a party cross-examining a witness in person provided certain conditions are met; and
- a power for the court to appoint a publicly funded legal representative to carry out cross-examination on behalf of a party prevented from doing so in person.

Section 3 - The case for introducing legislation

As noted in section one, the Gillen Review of Family Justice and recent legislative and policy developments in other jurisdictions have placed a focus on the protection of victims of domestic abuse from direct cross-examination by their abusers in family proceedings in Northern Ireland.

The Department considers there are a number of reasons why the introduction of legislation to prevent a victim of domestic abuse from being cross-examined in person by the perpetrator in family proceedings may be desirable:

- to ensure the family justice system in Northern Ireland recognises the seriousness of domestic abuse and the impact on victims;
- to ensure the family justice system is not exploited by perpetrators of domestic abuse as a means to continue abuse and control;
- to enable victims of domestic abuse to be supported to give the best quality of evidence, taking into account that the evidence given will often have an impact on outcomes for children and vulnerable adults who are in need of protection; and
- to afford victims of domestic abuse giving evidence in family proceedings the same protection as is available to victims of sexual and other offences giving evidence in criminal proceedings.

The introduction of such legislation would also contribute to the delivery of Outcome 7 of the draft Programme for Government (We have a safe community where we respect the law and each other) as well as Departmental priorities: to support safe and resilient communities including protecting individuals from the harm caused by domestic violence; to address harm and vulnerability through developing policies and legislation to protect the most vulnerable in our society; to deliver an effective justice system; and to secure confidence in the justice system.

Section 4 – Options for legislation

Having regard to the legislative provision applicable in criminal proceedings in Northern Ireland, the recommendations of the Gillen Review of Family Justice and legislation and proposals for legislation in other jurisdictions, we have identified options for legislation in Northern Ireland on which we would invite views. Either one or both of these options could be taken forward.

Option 1 – A statutory prohibition on a party to family proceedings cross-examining another party or witness in person in certain circumstances

The circumstances in which such an absolute prohibition might apply are as follows:

(i) Where a party to the proceedings has a conviction for a criminal offence against another party or witness

In broad terms, such a prohibition might be applied where the criminal offence has been committed by the party to the proceedings against the person to be cross-examined. Specific criminal offences in respect of which a conviction would engage such a prohibition could be prescribed either in the primary legislation or secondary legislation made under it. Offences that could be specified might include sexual offences, violent offences and offences against children.

There is a question as to whether such a prohibition should go further and also apply to a party who has not been convicted but has been given a caution for, or charged with, a criminal offence against the person to be cross-examined. Arguably such provision is required to ensure victims are properly protected and have similar protection as is available to victims in the criminal courts where the statutory prohibition is applied to an accused. The rights of the party prevented from carrying out cross-examination in person are considered further below.

(ii) Where a party to the proceedings has a civil order made against them for the protection of another party or witness

The types of orders which would engage such a prohibition could be specified either in the primary legislation or secondary legislation made under it but, by way of example, might include a non-molestation order or a protection from harassment order, provided the party who is subject to the order was given notice of the application and had the opportunity to contest it.

QUESTION 1

1(a) Do you agree that there should be a statutory prohibition on a party to family proceedings cross-examining another party or a witness in person in the following circumstances:

- (i) Where the party has been convicted of a specified criminal offence against the person to be cross-examined?
- (ii) Where the party has been given a caution for a specified criminal offence against the person to be cross-examined?
- (iii) Where the party has been charged with a specified criminal offence against the person to be cross-examined?
- (iv) Where the party has an “on-notice” civil court order in force against them made for the protection of the person to be cross-examined?

1(b) Are there any other circumstances in which an absolute prohibition on cross-examination in person should apply?

Please explain the reasons for your answers.

Option 2 – To give a court hearing family proceedings a discretionary power to prevent a party cross-examining another party or witness in person

In many cases, family proceedings will be the first occasion on which there has been any engagement with the justice system and there will be no previous criminal conviction, etc., or civil protection order so a statutory prohibition, as outlined above, would not apply. However, giving the courts a discretionary power to prevent cross-examination in person (potentially in addition to applying an absolute prohibition) could cover these circumstances and give further protection to victims of domestic abuse. It would, however, also remove the right of an individual who has not been convicted of any criminal offence, or had a civil order made against them, to conduct their own case in its entirety.

The scope of such a discretionary power would likely be along the lines of the power that is available to courts in criminal proceedings under the Criminal Evidence (Northern Ireland) Order 1999, that is, it could be exercised in the circumstances where it would affect the quality of a witness's evidence if they were directly cross-examined by a party to the proceedings and the court considers that it would not be contrary to the interests of justice to prevent this.

QUESTION 2

- a) Do you agree that courts hearing family proceedings should be given a discretionary power to prevent a party conducting cross-examination of another party or witness in person? Please explain your reason(s), especially if you disagree.
- b) Do you have any views on the circumstances in which such a discretionary power could be exercised? Please explain your reason(s).

Section 5 - ECHR rights

The need to protect victims of domestic abuse needs to be balanced with the need to ensure fairness in the proceedings, including each party having the opportunity to properly challenge the case against them.

If legislation was to be taken forward to prevent a party to family proceedings from conducting cross-examination in person in certain circumstances, the Department considers that it would be necessary to also include provision similar to that available in criminal courts, for a legal representative to carry out the cross-examination instead, either arranged by the party, or appointed by the court. As in criminal proceedings, the fees and costs of a legal representative appointed by the court would be met by the Department.

Private family law disputes may fall within the scope of Article 6 (the right to a fair trial) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR), although whether Article 6 and/or Article 8 is engaged in an individual case will depend on the particular characteristics of the case and the nature of the decision.

Under the options for legislation noted above, an absolute prohibition would likely only apply in certain, particularly serious, circumstances set out in legislation and exercise of the court's discretion would be subject to prescribed conditions. There would also be provision for alternatives to cross-examination in person, including the facility for the court to appoint a publicly funded legal representative to conduct the cross-examination. The Department, therefore, considers that a party's Article 6 rights would not be breached as a result of being prevented from carrying out cross-examination in person. In addition, a party to the proceedings who is to be cross-examined would be enabled to give better quality of evidence, better protecting their Article 6 rights. This will also assist the court hearing the proceedings in reaching its decision, which will ensure the Article 8 rights of all involved are protected.

We will take account of views expressed through this consultation on the human rights implications in developing any proposals for legislation and carry out a further assessment as required.

QUESTION 3

Do you agree that making provision for a legal representative to carry out cross-examination on behalf of a party prevented from doing so in person, including provision for the court to appoint a publicly funded legal representative, is sufficient to protect the ECHR rights of that party?

Section 6 – Financial and equality impacts

Financial impact

The options for legislation discussed in this consultation would have a cost impact for the Department in respect of funding legal representatives to conduct cross-examination on behalf of perpetrators of domestic abuse. It is anticipated that the cost would not be significant. However, the Department will consider this further in developing any future proposals for legislation.

Equality impact

The options for legislation discussed in this consultation have been screened for equality impact having regard to the Department's duties as a public authority under section 75 of the Northern Ireland Act 1998. Such measures, if implemented, would apply equally to all victims and perpetrators of domestic abuse, irrespective of whether they belong to a section 75 category.

However, statistical information indicates that women are more likely than men to be victims of domestic abuse. It is, therefore, anticipated that any new legislative provision to protect victims of domestic abuse from being cross-examined by the perpetrator would benefit a higher proportion of women than men. Whilst children affected by domestic violence would also be expected to benefit, as it is rare for children to give evidence as a witness of fact in family proceedings, the benefit for them is likely to be achieved indirectly, through better outcomes as a result of adult witnesses being supported to give the best quality of evidence.

Conversely, men are more likely than women to be perpetrators of domestic abuse so a higher proportion of men than women are likely to be prevented from carrying out cross-examination in person if legislation is taken forward. This would be mitigated by the court being able to appoint a legal representative to carry out the cross-examination instead and accordingly, it is anticipated that any impact would be minimal and is unlikely to be negative.

Overall, we do not anticipate any adverse equality related impacts on any section 75 category so, at this stage, consider that an Equality Impact Assessment is not required. We will, however, take account of views expressed through this consultation in developing any proposals for legislation and revisit the screening if required.

QUESTION 4

Do you have any comments to make on the draft Equality Screening form?

Section 7 - Next steps

We will consider all contributions within the scope of this consultation and take them into account in the development of any proposals for legislation. A summary of responses will be made available on our website. As noted in section 1, implementation of any proposals would require primary legislation.

Section 8 – Consultation information

Responding to the consultation

The best way to respond to this consultation is online via Citizen Space on the NIDirect website at <https://consultations.nidirect.gov.uk/doj-corporate-secretariat/cross-examination-in-family-courts>.

However, you can also send the consultation questionnaire provided separately by email to AToJ.Consultation@justice-ni.x.gsi.gov.uk or by post to the address below.

The consultation will be open for eight weeks. The closing date for receipt of responses is **5pm on Tuesday 24 September 2019**. Please note that it is unlikely that responses to the consultation will be accepted after this date.

Alternative formats and further information

Hard copies of this consultation document and copies in other formats, such as Braille, large print, etc., can be made available on request. If it would help you to have to this document in a different format or in a language other than English, please let us know and we will do our best to assist you.

If you require any further information on this consultation, please contact us at:

By phone: (028) 9016 9540

By email: AToJ.Consultation@justice-ni.x.gsi.gov.uk

In writing: Family Justice & Courts Branch, Department of Justice, Massey House, Stormont Estate, Belfast, BT4 3SX

Privacy notice

We intend to publish a summary of responses on our website on completion of the consultation process. Any contact details, which will identify a respondent as a private individual, will be removed prior to publication.

All information will be handled in accordance with the General Data Protection Regulation 2018. Respondents should also be aware that the Department's obligations under the Freedom of Information Act 2000 may require that any responses, not subject to specific exemptions under that Act, be disclosed to other parties on request.

Complaints

If you have any concerns about the way that this consultation process has been handled, please contact us at:

By email: standardsunit@justice-ni.x.gsi.gov.uk

In writing: Standards Unit, Department of Justice, Knockview Buildings, Stormont Estate, Belfast, BT4 3SL