

NSPCC in Northern Ireland response to the Department of Justice consultation on the prohibition of cross-examination in family proceedings

Introduction

The NSPCC in Northern Ireland welcomes the opportunity to respond to this consultation. Victims of domestic abuse who are intimidated into silence by direct cross-examination by their perpetrator are denied the right to a fair trial and their children's protection is subsequently diminished. Legislative measures that will prevent abusers of domestic abuse from personally cross-examining their victims in the family courts is a welcome measure and warmly supported.

The family courts should be a place of safety, where the protection of children and adult survivors are put first, and their fears listened to and respected. These measures strongly reflect the importance of children's best interest in the process. Ensuring victims are able to give their best evidence at court is critical to successful outcomes for them, and the safety of children who are in need of protection. In addition, this ban rightly affords victims of domestic abuse in family proceedings the same protection as is available to victims of sexual and other offences in criminal proceedings.¹

The Review of Family Justice in Northern Ireland led by Lord Justice Gillen, published in 2017, concluded that it was 'absolutely essential' that steps were taken to protect victims of domestic abuse from cross-examination by abusers.² Recent developments in other jurisdictions, particularly the introduction of the Domestic Abuse Bill in Parliament, and the review of Part 1 of the Children (Scotland) Act 1995 has placed a welcome focus on legislative reform here. The rationale is clear.

Consultation questions:

Option 1. 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?

Yes, we agree with all of the above.

To ensure that the victim is fully protected and in the interests of justice the NSPCC firmly believe that an automatic ban should be mandatory in these circumstances.

¹ The Criminal Evidence (Northern Ireland) Order 1999

² [Review of Civil and Family Justice in Northern Ireland: Report on Family Justice](#) (Office of the Lord Chief Justice, September 2017)

This broad scope has been included in the Domestic Abuse Bill, as introduced in Parliament for England and Wales. Specifically, the Bill includes, “a blanket ban on cross-examination in person where one party has been convicted of, given a caution for, or charged with certain offences against the other party. The provisions will also introduce a blanket ban on cross examination in person where one party has an on-notice protective injunction in place against the other party.”³

Many victims may not pursue their abuse through criminal courts for many different reasons, particularly where children are involved in the relationship, or where there is financial abuse. Where victims do pursue their abuser through criminal courts, only a small percentage of cases result in a criminal conviction.⁴ Therefore a more holistic approach (including option 1i – 1iv) is needed.

Family court proceedings cannot be an opportunity to continue the pattern of abuse. Option 1, in its entirety will ensure that the family justice system cannot be exploited by perpetrators as a means to further or perpetuate abuse. A blanket ban will also provide much-needed reassurance to the victim that they will not be cross-examined by their abuser. From the outset, the victim can be confident and feel able to advocate properly for the safety of their children. Otherwise they and their children are potentially denied access to justice and protection.

Finally, in England and Wales changes to legal aid have increased the proportion of personal litigants in family courts. There is no statistical data available on the number of family court proceedings involving admitted or alleged domestic abuse, where a personal litigant has cross-examined the alleged victim, however relatively low estimates of 5-10% are cited in the consultation document. This means that an absolute prohibition in all circumstances outlined in Option 1 may not realistically have a significant impact on the volume of applications for personal litigation, or subsequent major financial impact on the Department.

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

Yes, an absolute prohibition should apply in cases where there are allegations of domestic abuse, child abuse, sexual abuse, stalking or harassment.

We believe this should not only be about cross-examination but also about examination-in-chief, for example, where an allegedly abusive party calls a child of the relationship to give evidence in their favour.

In addition, the power dynamic in abusive and coercive relationships can often mean that the person being cross-examined may never have been targeted directly, but instead targeted indirectly through abuse against those close to them. We therefore recommend that these protections are extended further to include circumstances where the party has committed the offences outlined against the children or relatives of the person to be cross-examined.

³ [Cross-Examination in the Family Court Fact Sheet](#) Domestic Abuse Bill 2019 (Home Office, June 2019)

⁴ [No Excuse: A Thematic Inspection of the Handling of Domestic Violence and Abuse Cases by the Criminal Justice System in Northern Ireland](#) (CJINI, June 2019) 7

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

Yes we agree. A judicial safeguard to exercise a discretionary power in cases that fall outside of the threshold for an automatic ban is crucial. Our primary concern is the potential for inconsistency in the courts application of the discretion. Similarly, in consultation, the Law Society in England and Wales also identified this problem, noting "there may be scope for a difference in practice between judges as to whether cross-examination is prohibited or not."⁵ Accordingly, in order that the court can make directions as appropriate for those in need of protection, it requires "adequate training and education for the judiciary, in order to avoid relying on gendered or stereotyped interpretations of the party's behaviour in determining whether cross-examination will indeed cause stress."⁶ Statutory guidance will be produced that will clearly set out how the power should be exercised in practice in England and Wales, and it is important that similar guidance is implemented by the judiciary in Northern Ireland.

We understand that the scope of this provision is intended to be similar to the powers available in criminal proceedings under the Criminal Evidence (Northern Ireland) Order 1999, that is, it could be exercised in the circumstances where it would be likely to cause 'significant distress' and affect the quality of a witness's evidence if they were directly cross-examined by a party to the proceedings. The nature of controlling and coercive relationships are such that there will be subtle behaviours that may seem innocuous, but are powerful enough to silence a victim. Judges may find it difficult to detect that behaviour and fully determine whether 'significant distress' conditions are met. The Department of Justice must consider how this can be managed in a sensitive and appropriate way that minimises the risk of harm or ongoing trauma for the abused witness.

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?

Yes. Funding legal representatives to conduct cross examination on behalf of alleged perpetrators of domestic abuse is important to ensure their right to a fair trial. We note from the consultation document that the cost impact is not likely to be significant.

Implementation of proposals

Clearly primary legislation is required to implement these measures, and it will not be possible to legislate locally until the resumption of the Executive and the Assembly. We ask the Department of Justice to use the quickest legislative means possible. To work with the UK government to implement these provisions in the Domestic Abuse Bill and take the opportunity to provide equal protection for victims of Northern Ireland without delay.

If you would like to discuss this response in further detail please contact Orla O'Hagan at Orla.OHagan@nspcc.org.uk.

⁵ Written evidence submitted to the Joint Committee on the Draft Domestic Abuse Bill by the Law Society of England and Wales. ([DAB0482](#))

⁶ Ibid.