



Domestic Abuse Bill

House of Commons

Second Reading Briefing

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1. JUSTICE is an all-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.
2. JUSTICE welcomes the long-awaited Domestic Abuse Bill (the Bill). The Bill presents a critical opportunity to address the barriers faced by victims of domestic abuse, including those faced when attempting to access the justice system. Facilitating proper and effective participation of victims in legal proceedings is of fundamental importance in a society which upholds the rule of law. Getting it right will not only ensure fairer, more accessible and more effective legal processes for victims themselves, it will also provide the court with the evidence it needs to make better decisions.
3. JUSTICE has the following two concerns with the Bill:
 - **alleged domestic abuse victims should automatically be eligible for special measures across all courts and tribunals, not solely in the criminal courts; and**
 - **cross-examination in person should be automatically prohibited whenever there are allegations of domestic abuse between the person giving evidence and the person who would otherwise conduct the cross-examination.**

Special measures (Clause 58)

4. Clause 58 would ensure any person alleging domestic abuse *in the criminal courts* will be automatically eligible for special measures. These can include separate entrances and waiting rooms, giving evidence remotely by video and audio links, screens and intermediaries. JUSTICE wholeheartedly supports this step in protecting vulnerable and intimidated witnesses. Indeed, JUSTICE's 2019 report, *Understanding Courts*, recommended that "reasonable adjustments to enable lay users to provide their best evidence should be available in all courts and tribunals where the needs of a fair trial demand it", and recommended how that can be facilitated.¹

¹ JUSTICE, *Understanding Courts* (2019) paras 4.8 – 4.18, available at: <https://justice.org.uk/wp-content/uploads/2019/01/Understanding-Courts.pdf>.

5. Unfortunately, however, **the Bill is silent with regards to special measures in courts other than the criminal courts.** JUSTICE considers this to be an omission which could cause concerning disparity between the treatment of witnesses and the quality of evidence being obtained in different jurisdictions.
6. The most glaring need for automatic eligibility is in the Family Court.²

Lack of access to special measures in the Family Court

7. Whilst there are currently rules enabling the Family Court to order special measures, these provisions³ have not led to effective protection of vulnerable or intimidated witnesses in practice.
8. Evidence of the lack of access to special measures has been mounting in the past few years. The All Party Parliamentary Group on Domestic Violence and Abuse highlighted this in 2016, hearing evidence of refused requests for separate waiting rooms and abuse on the way to and from court.⁴ They also considered the Women's Aid survey of domestic abuse survivors, in which 55% of women respondents who had been to the family courts had no access to any special measures, whilst 39% were verbally or physically abused by their former partner in court.⁵
9. This chimes with evidence from the judiciary. Research with family judges has shown that special measures can be "merely hypothetical provisions" for some judges due to lack of resource, with others reporting substandard or inconsistently available facilities.⁶ Giving automatic eligibility a statutory footing is an essential step to ensuring victims are safeguarded in the Family Court as well as the criminal courts.
10. From the perspective of the court user, requesting special measures is not a simple task. Beyond the obvious disadvantage faced by court users who do not know to ask

² The Family Court Quarterly Statistics (October to December 2019) show the number of applications for Domestic Violence remedy orders at an all-time high, with no sign of abatement. See Table 1, available at <https://www.gov.uk/government/statistics/family-court-statistics-quarterly-october-to-december-2019>. See also a joint Cafcass and Women's Aid study which found c.60% of private children law applications for child arrangements orders featured domestic abuse. *Allegations of domestic abuse in child contact cases* (2017) available at <https://www.cafcass.gov.uk/2017/07/25/cafcass-womens-aid-collaborate-domestic-abuse-research/>.

³ Family Procedure Rules Part 3A and Practice Directions 3AA and 12J.

⁴ All Party Parliamentary Group on Domestic Violence and Abuse, *Domestic Abuse, Child Contact and the Family Courts*, (2016) pp. 15-17, available at: <https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2015/11/APPG-Inquiry-report-domestic-abuse-child-contact-and-the-family-courts.pdf>

⁵ Women's Aid survey of survivors of domestic abuse (2015) cited within the APPG report at p.16.

⁶ Natalie Elizabeth Corbett and Amy Summerfield, "Alleged perpetrators of abuse as litigants in person in private family law: The cross-examination of vulnerable and intimidated witnesses" (Ministry of Justice Analytical Series, 2017) p.24. Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/592873/alleged-perpetrators-of-abuse-as-litigants-in-person.PDF.

because they have no legal representation, a victim can be influenced by fear and concern that their request would not be received well,⁷ or that requests for screens or separate entrances may be deemed a request for an unfair advantage.⁸ Automatic eligibility removes this burden.

11. Automatic eligibility also reduces judicial variation in approach. Judicial views on special measures in the Family Court vary widely: for some family judges they are “normal measures” that should be available to anyone who feels they need them, however, other judges see them as a tactical tool equating to “preferential treatment” which disadvantage the alleged perpetrator.⁹ This variance occurs at all levels of the judiciary, unfortunately including leadership positions.¹⁰
12. Automatic eligibility for special measures does not force a confident person to hide behind a screen; it is a presumption which can be disapplied. However, automatic eligibility would provide much needed predictability for alleged victims. Without this, the quality of evidence may be damaged, or engagement in proceedings may be discouraged entirely.¹¹

JUSTICE proposal for special measures

13. Legal processes should not daunt, dissuade and deter victims from giving their best evidence. As such, JUSTICE recommends, in line with the Joint Committee on the Draft Domestic Abuse Bill recommendation,¹² that **alleged domestic abuse victims should automatically be eligible for special measures across all courts and tribunals, not solely criminal.**

⁷ Birchall, J. and Choudhry, S. (2018) “What about my right not to be abused?” Domestic abuse, human rights and the family courts, Bristol: Women’s Aid, p.28, available at: <https://www.womensaid.org.uk/research-and-publications/domestic-abuse-human-rights-and-the-family-courts/>.

⁸ *Ibid*. See also the evidence of a focus group participant: “I know that if I asked for a screen or separate entrances, it would go against me. And that means it would go against the outcome I’m trying to get for my child, so I wouldn’t do it. You just have to deal with the trauma that it brings, you just have to deal with it all”, p.28.

⁹ Corbett and Summerfield (footnote 6 above), p.25.

¹⁰ See the recent case of *JH v MF* [2020] EWHC 86 (Fam) in which the first instance judge (a Designated Family Judge, a leadership position) refused an application for screens for the alleged victim of serious domestic abuse. Instead of screens, the judge determined that the alleged victim should give evidence from the front row of the court room. Then – to preserve the “feng shui” of the court room – ordered the alleged perpetrator also to give evidence from that row, allowing him to confer with his McKenzie Friend during evidence. On appeal this was held to have given the alleged perpetrator a significant advantage. The actions of the judge were heavily criticised on appeal, and the appeal was allowed. Judgment available at: <https://www.bailii.org/ew/cases/EWHC/Fam/2020/86.html>.

¹¹ In one example, a family judge recalls a case in which over three hearings a video link was used for the first, a curtain for the second, and for the third neither were available so the witness refused to attend court due to fear, Corbett and Summerfield (footnote 6 above), p.24.

¹² Joint Committee on the Draft Domestic Abuse Bill, First Report of Session 2017–19, HL Paper 378 HC 2075, para 153, available at: <https://publications.parliament.uk/pa/lt/201719/jtselect/jtddab/2075/207502.htm>.

Prohibition of Cross-examination (Clause 59)

14. JUSTICE whole-heartedly supports the prohibition of cross-examination between alleged victims and alleged perpetrators of domestic abuse. It is “inherently and profoundly unfair”¹³ and will “sometimes amount, and on occasions quite deliberately, to a continuation of the abuse, as the court has to stand by, effectively powerless, while the abuse continues in court and, indeed, as part of the court process”.¹⁴ The absence of any power to prohibit this in the Family Court has long been lamented by the judiciary¹⁵ and Parliament¹⁶ as well as other organisations. In contrast, provisions preventing this in the criminal courts have been available for years.¹⁷ With unrepresented litigants becoming increasingly prevalent in the Family Court¹⁸ it is urgently necessary that the Family Court is given the right tools to catch up.

15. However, the Bill adopts a two-tier approach: it protects some victims outright and for others, who do not fit the criteria but who allege domestic abuse, it provides for the prohibition to be applied at the court’s discretion.

16. Clause 59 only protects outright those victims:

- a) who can produce “specified evidence” of their abuse (as yet undefined and subject to regulations to follow); or
- b) whose abusers have already been charged, convicted, cautioned, or against whom an on-notice injunction has been ordered.

17. Minister Edward Argar explained to the Draft Bill Committee that “given the wide definition of domestic abuse being introduced in this Bill, we felt that a blanket, automatic prohibition against cross-examination in person where domestic abuse is alleged could risk extending the provision further than where it is necessary.”¹⁹

¹³ Hayden J, *Re A (a minor) (fact finding; unrepresented party)* [2017] EWHC 1195 (Fam), at [60].

¹⁴ President of the Family Division, Sir James Munby ‘Because it is the right thing to do’ (24 July 2018), available at: <https://www.judiciary.uk/wp-content/uploads/2018/07/pfd-speech-fjypb.pdf>.

¹⁵ See Statement from President of the Family Division, Sir James Munby: Cross-examination of vulnerable people, December 2016, available at: <https://www.judiciary.gov.uk/announcements/president-of-the-family-division-sir-james-munby-crossexamination-of-vulnerable-witnesses-in-the-family-court/>.

¹⁶ APPG 2016 report (footnote 4 above), p.14.

¹⁷ Achieved through s.36 Youth Justice and Criminal Evidence Act 1999, discussed further at p.9 of this briefing.

¹⁸ Private children law cases are not only at their highest since mid-2013, but they also are being contested by more unrepresented parties than ever before. As of December 2019, neither the respondent nor the applicant had representation in 40% of private children cases, with cases in which both were represented falling to 18%. See Family Court Quarterly Statistics, footnote 2 above. With current estimates of the proportion of private children law cases which involve domestic abuse being at 60% (see also footnote 2, Cafcass and Women’s Aid report) the sheer prevalence of the problem is concerning, and the need of a solution, urgent.

¹⁹ Joint Committee on the Draft Domestic Abuse Bill (footnote 12 above), para 170.

18. JUSTICE is concerned that this approach undermines the seriousness with which the Bill purports to take *all* forms of domestic abuse. We furthermore consider the following issues to support the case for an automatic prohibition of cross-examination in person whenever abuse is alleged.

Predictability for unrepresented litigants

19. Giving or testing evidence in court is daunting for any unrepresented person. Knowing whether that will be conducted in person will be of central importance to them. It is logical that if victims face the possibility of having to be directly cross-examined by their perpetrators, some will be dissuaded from seeking the protection of the Family Court.²⁰ This cannot be the intent of Parliament, especially when the welfare of children is in issue.

Potential for inconsistency of judicial approach

20. The proposed section 31U of the Matrimonial Causes Act 1984, within clause 59, introduces a judicial discretion. This will be available for those who do not qualify for automatic prohibition. This will inevitably lead to variance in how this discretion is applied by judges and magistrates throughout court centres in England and Wales. Indeed the current regime in which judges can facilitate direct cross-examination of a vulnerable witness has resulted in some judges feeling less confident than others, depending on judges' seniority and experience.²¹ Whilst judicial discretion is certainly an asset in other areas of the justice system, here JUSTICE submits it is an unhelpful inconsistency, against which Parliament can and should legislate.

Pre-emptive adjudication of disputed facts at case management stage

21. The lack of predictability for litigants is compounded by there being no indication of how, procedurally, a judge or magistrate may exercise their discretionary power to prohibit cross-examination. If prohibition under section 31U is disputed, to what extent will the court hear evidence or representations *before* the fact-finding hearing at which live evidence of domestic abuse is heard and tested?

22. The President of the Family Division, Sir Andrew McFarlane, has previously commented on the "thin line in some cases, between case management...and premature adjudication"²² which family judges already must tread. The discretion in

²⁰ See example of disengagement from the Family Court at footnote 11 above.

²¹ Corbett and Summerfield (footnote 6 above), p.8.

²² *Re Q (Children)* [2014] EWCA Civ 918, para 54.

section 31U risks such premature adjudication. The result is a process in which the impartiality of the court may be undermined.

23. Instead, both the judiciary and the parties would benefit from a blanket prohibition, since it will not require the veracity of abuse allegations to be scrutinised prior to the fact-finding.

“Specified Evidence”

24. The proposed new section 31T Matrimonial Causes Act 1984 provides that adducing “specified evidence” of domestic abuse will also trigger automatic prohibition. This is difficult for Parliament to scrutinise without precise guidance on what would constitute such evidence. The explanatory notes to Clause 59 say this will “broadly replicate” the Legal Aid Agency evidential criteria²³ but exactly how “broadly” is unclear.

25. While the Draft Domestic Abuse Bill Committee recommended an evidential bar,²⁴ the proposed section 31T is insufficiently precise. There are also practical barriers to this working in practice, which merit reconsideration of the alternatives.

26. Firstly, Ministry of Justice research has shown the difficulties for domestic abuse victims in acquiring evidence of their abuse. Organisations, and health professionals in particular, can be unwilling to write letters; data protection issues arise when attempting to access evidence from the police; language or other vulnerabilities create barriers; and victims who do not disclose abuse to an organisation that can supply evidence end up significantly disadvantaged.²⁵

27. Secondly, the Bill has been drafted to include a caveat at section 31T(4), which states the specified evidence 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 this section.*” It is JUSTICE’s understanding that the Government has included this caveat for economic abuse. However, it is not clear why economic abuse may be singled out, since all forms of domestic abuse can be difficult to evidence, as the above paragraph shows. As set out above with regard to section 31U, a condition that *other* evidence may satisfy the court under this caveat requires the court at the case management stage to decide whether domestic abuse has occurred, when the existence of such domestic abuse may be an issue for the

²³ Set out in the Civil Legal Aid (Procedure) Regulations 2012, regulation 33.

²⁴ Joint Committee on the Draft Domestic Abuse Bill (footnote 12 above), para 173.

²⁵ Farai Syposz, *Research investigating the domestic violence evidential requirements for legal aid in private family disputes* (Ministry of Justice, 2017) pp. 2-3.

fact-finding hearing. The court should not be asked to find for or against one party based on their evidence of domestic abuse – by saying whether it is satisfied or not by the specified evidence – *before* the court conducts a fact-finding on those very issues.

28. Thirdly, the specified evidence provision will result in anyone who cannot evidence their domestic abuse to the Legal Aid Agency having their disadvantage redoubled; not only will the litigant have no lawyer, but they will not automatically qualify to be protected from in-person cross-examination. They are the very litigants Parliament should be legislating to protect – those who find themselves making allegations of domestic abuse for the very first time, in a daunting court environment with no lawyer.

JUSTICE proposal for cross-examination

29. The policy intention behind the cross-examination prohibition is “that the protection afforded by the cross-examination provisions in the Bill will be accessible to every victim or witness who needs it”.²⁶ JUSTICE struggles to see how this can be achieved by only guaranteeing such protection to those who have already secured a charge, caution, conviction or on-notice injunction or who have “specified evidence” to hand.
30. JUSTICE considers that it is wholly inappropriate to allow the alleged perpetrator to cross-examine an alleged victim at all or leave an alleged victim with no other way of challenging the evidence than to cross-examine their alleged abuser. We consider it is far better to risk a few individuals who wrongly allege domestic abuse being cross-examined by a legal representative, than to risk one *bone fide* victim being cross-examined in person by their abuser. If Parliament wants to ensure the latter never happens, the only way is to provide an automatic prohibition based on allegations.
31. Courts should not be, but still unfortunately are for the most part, intimidating places. Those affected by domestic abuse should be able to access justice in a way which ensures best evidence, predictability of procedure and minimal distress.
32. As such, JUSTICE recommends that **cross-examination in person should be automatically prohibited whenever there are allegations of domestic abuse between the person giving evidence and the person who would otherwise conduct the cross-examination. This should not only be the case in the Family Court, but in any court or tribunal.**

²⁶ Government response to the Joint Committee on the Draft Domestic Violence Bill, para 106, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/817556/CCSO619467038-001_Domestic_Abuse_Bill_Print_WEb_Accessible.pdf.

Automatic protection in the criminal courts

33. JUSTICE accepts we are recommending that the prohibition of cross-examination also be automatic in the criminal courts, whilst the proposed section 31U is based upon the discretionary provisions in use in the criminal courts.²⁷ Of course, in practice, criminal proceedings are very different. Firstly, most defendants in criminal proceedings involving imprisonable offences receive legal aid, thus unrepresented cross-examination is not a prolific problem. Secondly, the victim will never be an unrepresented party as they are a witness of the Crown. Therefore, CPS prosecutors know to make an application to prohibit cross-examination by the defendant and can provide clarity and predictability. Thirdly, the CPS prosecutor will cross-examine the defendant on their defence rather than the complainant doing so.
34. Nevertheless, the Bill's provisions, even as drafted, would place protection of alleged abuse victims on a stronger footing in the Family Court than in the criminal courts.
35. Clause 58 extends automatic eligibility for special measures in the criminal courts to complainants of domestic abuse. JUSTICE considers therefore that it is in the spirit of the Bill that automatic prohibition of cross-examination in the criminal courts also be extended to complainants of domestic abuse.²⁸
36. JUSTICE considers that our recommendations would ensure parity between all victims in all courts by enabling automatic protection from cross-examination by a perpetrator of domestic abuse. Furthermore, far from diminishing the rights of alleged perpetrators in this scenario, legal representation will safeguard their right to a fair trial.

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24th April 2020

²⁷ Section 36 Youth Justice and Criminal Evidence Act 1999.

²⁸ Sections 34 and 35 Youth Justice and Criminal Evidence Act 1999, alongside complainants of sexual offences and child witnesses.