

DOMESTIC ABUSE BILL

EUROPEAN CONVENTION ON HUMAN RIGHTS

SUPPLEMENTARY MEMORANDUM BY THE MINISTRY OF JUSTICE

Introduction

1. This memorandum supplements a memorandum dated March 2020 prepared by the Home Office, Ministry of Justice and the Ministry of Housing, Communities and Local Government which addressed issues arising under the European Convention on Human Rights (“ECHR”)¹ in relation to the Domestic Abuse Bill. This supplementary memorandum addresses ECHR issues that arise in relation to certain Government amendments to the Bill tabled for Commons Report stage.

Special measures in family proceedings: victims of domestic abuse (new clause “Special measures in family proceedings: victims of domestic abuse”)

2. The provision of special measures in family proceedings is governed by Part 3A of the Family Procedure Rules 2010 (“FPR”), supported by Practice Direction 3AA. Rules 3A.4 currently places the court under a duty to consider whether a party’s participation in the proceedings (other than by way of giving evidence) is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make one or more participation directions (“special measures”) to assist the party. Rule 3A.5 confers a similar duty in respect of the quality of evidence given by a party or witness. There is therefore a two-stage test in relation to special measures: (a) eligibility and (b) necessity.
3. New clause *Special measures in family proceedings: victims of domestic abuse* (2) provides that rules of court must provide that, where a party or witness is a victim of domestic abuse carried out by another party and/or a relative of another party, then the court is to assume that the quality of evidence and/or that person’s ability to participate in the proceedings will be so diminished by reason of that person’s vulnerability. The practical effect of the new clause is that the court must presume that victims of domestic abuse are eligible for special measures. Subsection (4) of the new clause provides that rules of court may provide for an exception to this general rule, to allow victims who do not wish to be deemed eligible for special measures to notify the court.
4. As eligibility for victims of domestic abuse will be assumed, the court will instead proceed straight to the second part of the test – determining whether it is *necessary* to make one or more participation directions.
5. As with the practical effect of clause 59 (Special measures directions in cases involving domestic abuse), the Bill amends the law concerning eligibility for special measures but does not provide automatic access or guarantee the provision of special measures in any given case. In those circumstances, new clause *Special*

¹ The rights in the ECHR as set out in Schedule 1 to the Human Rights Act 1998

measures in family proceedings: victims of domestic abuse does not, of itself, directly engage Article 6 and/or Article 8 ECHR. Whether those Articles are engaged will depend on whether the court determines, as is the case currently, that the use of special measures is necessary in an individual case to assist the party or witness and gives a direction to that effect.

6. For the avoidance of doubt, and assuming that the civil limb of Article 6(1) (right to a fair hearing) is engaged, the Government considers that the existing law contained in Part 3A of the FPR, together with this clause, is sufficient to protect the Article 6 rights of both parties. In particular, the court will ensure a procedurally fair hearing by:
 - a. Before directing the use of special measures, considering any views expressed by the party about participating in the proceedings or, where the party will also act as a witness, about giving evidence (Rules 3A.4(2) and 3A.5(2));
 - b. Setting out its reasons on the court order for making, varying or revoking a special measures direction or deciding not to make, vary or revoke a direction (Rule 3A.9(2))².
7. Article 8 rights of the parties (whether or not they are the subject of a special measures direction) are generally best protected by the court coming to the ‘right’ decision, reached following a procedurally fair hearing. This is best achieved if all witnesses are able to give the best quality evidence, and if parties are able to participate effectively in the proceedings. The Government therefore considers that new clause *Special measures in family proceedings: victims of domestic abuse* (indirectly) helps to protect the Article 6 and 8 rights of all involved.

Special measures in civil proceedings: victims of specified offences (new clause “*Special measures in civil proceedings: victims of specified offences*”)

8. Under Part 1 of the Civil Procedure Rules (CPR), the Court has an overriding objective to deal with civil proceedings in England and Wales “justly and at proportionate cost”. Under CPR 32.1 the court has a broad power to control the way evidence is given in civil proceedings and it may use this power, in furtherance of the overriding objective, to make directions to assist vulnerable parties or witnesses to give evidence or participate in proceedings. The Government considers that the existing powers of the court are sufficient to protect the Article 6 and Article 8 rights of all parties. The Civil Justice Council described this power as “potentially much wider than the protection afforded in the criminal courts by section 41”³. However, to aid transparency and ensure that the court gives proper consideration to its powers in all cases, new clause *Special measures in civil*

² The Government intends to preserve as much of existing Part 3A and Practice Direction 3AA as is possible, including the Rules referred to above and the list of special measures which are available in the proceedings (see Rule 3A.8).

³ Civil Justice Council Report: Vulnerable Witnesses and Parties within Civil Proceedings: Current Position and Recommendations for Change, para 105.

proceedings: victims of specified offences provides that Court Rules must make more specific provision to enable the court to make a special measures direction in relation to victims of offences to be specified in regulations made by the Lord Chancellor and to require the court to consider whether the quality of their evidence or their participation in the proceedings is likely to be diminished by reason of their vulnerability. As this clause is a duty to make rules, it does not, of itself, engage rights under Article 6 or 8 ECHR. However, as in relation to new clause *Special measures in family proceedings: victims of domestic abuse* regarding family proceedings, the purpose of the duty imposed by new clause *Special measures in civil proceedings: victims of specified offences* is to indirectly protect the Article 6 and 8 rights of all involved.

Prohibition of cross-examination in person in civil proceedings (new clause “*Prohibition of cross-examination in person in civil proceedings*”)

9. The ECHR analysis of new clause *Prohibition of cross-examination in person in civil proceedings* mirrors that for the existing clause 60 of the Bill which prohibits cross-examination in person in family proceedings, accordingly paragraph 10 to 33 below is an updated version of the analysis contained in the Government’s March 2020 memorandum.
10. Clause 60 inserts new Part 4B (comprising new sections 31Q to 31Z) into the Matrimonial and Family Proceedings Act 1984 (“MFPA 1984”) to make provision about the cross-examination of vulnerable witnesses in family proceedings in England and Wales and new clause *Prohibition of cross-examination in person in civil proceedings* inserts new part 7A (comprising new sections 75E to 75J) into the Courts Act 2003 to make provision about the cross-examination of vulnerable witnesses in civil proceedings in England and Wales.
11. New section 31R of the MFPA 1984 provides that no party to family proceedings who has been convicted of or given a caution for, or is charged with, a specified offence may cross-examine in person a witness who is the victim, or alleged victim, of that offence. Relevant offences will be specified in secondary legislation. In turn, the (alleged) victim may not cross-examine the person convicted, cautioned or charged. The provision will not apply where a person has a conviction or caution that is spent for the purposes of the Rehabilitation of Offenders Act 1974 (“ROA 1974”), unless evidence of that conviction or caution is admissible or may be required in the proceedings by virtue of section 7(2), (3) or (4) of the ROA 1974.
12. New section 31S of the MFPA 1984 provides that no party to the proceedings against whom an on-notice protective injunction is in force may cross-examine in person a witness protected by the injunction, or vice versa.
13. Where there is specified evidence that a person who is a witness has been the victim of domestic abuse (as defined in clause 1 of the Bill) carried out by a party to the proceedings (or vice versa), new section 31T prevents that party from cross-examining the witness in person. The evidence that will trigger the bar will be specified in secondary legislation. The Government’s intention is to broadly replicate the list of evidence of domestic violence that is currently specified for the

purposes of accessing civil legal aid (set out in Schedule 1 to the Civil Legal Aid (Procedure) Regulations 2012 (SI 2012/3098), as amended).

14. New section 31U provides that in any family proceedings where one of the statutory prohibitions under new section 31R to 31T does not operate to prevent a party from cross-examining a witness, the court has the discretion in specified circumstances to give a direction prohibiting a party to the proceedings from cross-examining a particular witness in person if certain conditions are met. New section 75F of the Courts Act 2003 provides that, in any civil proceedings, the court has the discretion in specified circumstances to give a direction prohibiting a party to the proceedings from cross-examining a particular witness in person if certain conditions are met.
15. Where a person is prohibited from cross-examining another in person, new section 31W of the MFPA 1984 (in relation to family proceedings) and new section 85H of the Courts Act 2003 (in relation to civil proceedings) make provision for the court to consider whether there are satisfactory alternatives to cross-examination in person. If the court considers there are none, then it must invite the person affected to arrange for a qualified legal representative to act for him or her for the purpose of cross-examining the witness and require them to notify the court by the end of a specified period whether a qualified legal representative is to act for them for that purpose. If the person does not do so, then the court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a qualified legal representative, and if so, the court must appoint a qualified legal representative for that purpose. The Lord Chancellor will issue guidance about the role the court-appointed representative is to play in family proceedings (new section 31Y of the MFPA 1984) and in civil proceedings (new section 85J of the Courts Act 2003). The costs of such a representative will be met from central funds. This will be provided for in secondary legislation made under new section 31X of the MFPA 1984 and new section 85I of the Courts Act 2003.

Article 6

16. Private law family disputes may fall within the scope of Article 6 (the right to a fair trial) (*Keenan v Ireland*⁴) along with civil disputes; the right of access to and custody of one's child (which arises both in public family law proceedings as well as private law proceedings⁵) has been held to constitute a 'civil right' for the purposes of Article 6 (*R v United Kingdom*⁶), although more distant relatives such as grandparents will not necessarily be able to establish equivalent 'civil rights' (*W v United Kingdom*⁷).
17. The Government has assumed that *in principle* it is possible that Article 6 is engaged throughout the process by which family or civil law rights or obligations are ultimately determined. Whether *in fact* Article 6 is engaged at any particular stage of the process depends on the particular case and the decision in question. Consideration has been given to the position of both the party who would undertake cross-examination and the witness who would be cross-examined (who may also be a party).

⁴ (1994) 18 EHRR 342

⁵ *P, C and S v UK* (2002) (Application no. [56547/00](#))

⁶ (1987) 10 EHRR 74 §82 and 83

⁷ (1987) 10 EHRR 29 §72 to 79

18. Currently, there is no express legislative provision which prevents a party from cross-examining in person a witness, although the court may provide alternatives to cross-examination using its general case management powers. However, there is no power to order the appointment of a publicly funded legal representative to undertake cross-examination on behalf of a party. It is evident from legislation and case law (*Re K and H (Private Law: Public Funding*⁸, *Re W*⁹) that the current position does not amount to a breach of Article 6 rights because the court can use other case management options as alternatives to cross-examination in person, such as the judge or a justices' clerk asking questions of the witness instead. However, the Court of Appeal in *Re K and H* indicated that there may be some circumstances in which the alternative measures might not be adequate to prevent a breach of Article 6 rights of the person prevented from conducting cross-examination in person. The Court invited the Government to consider legislation to enable courts to appoint and fund legal representatives in certain circumstances.
19. The effect of the legislative amendments introduced in clause 60 is to impose a bar on a party cross-examining in person a witness in specified circumstances; and, in clause 60 and new clause *Prohibition of cross-examination in person in civil proceedings*, to give a discretion to the court to prohibit cross-examination in person where certain conditions apply. The Government does not consider that this is incompatible with the Article 6 rights of the party who would otherwise undertake the cross-examination for the reasons set out below.
20. A bar on a party cross-examining in person will apply in family proceedings where a person has been convicted of or given a caution for, or is charged with, a "specified offence" (to be defined in regulations). The party will not be able to cross-examine in person the (alleged) victim of that offence. Nor will the victim be able to cross-examine the person who (allegedly) committed the offence. This bar will apply where a conviction or caution is unspent for the purposes of the ROA 1974, or where it is spent but evidence of that conviction or caution is admissible in the proceedings by virtue of existing provisions in that Act. A bar will also apply where there is in force against the party an on-notice protective injunction protecting the witness (or vice versa) or where there is specified evidence of domestic abuse between the party and a witness to whom they are personally connected and intend to cross-examine (and vice versa). The types of injunctions will be specified in regulations, as will the evidence.
21. The circumstances in which the bars apply are considered to be sufficiently serious that their existence warrants an absolute bar (rather than a discretion for the court).
22. The evidence which the Government intends to specify in regulations made under section 31T has already been scrutinised and accepted by Parliament¹⁰ as satisfactory documentary evidence that domestic violence¹¹ has occurred. The

⁸ [2015] EWCA Civ 543

⁹ (2010) UKSC 12

¹⁰ The Civil Legal Aid (Procedure) Regulations 2012, made under s.12 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and subsequent amendments were subject to annulment in pursuance of a resolution of either House of Parliament (s. 41(5) of that Act).

¹¹ The definition of 'domestic violence' in paragraph 12 of Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 forms part of the new statutory definition of 'domestic abuse' provided in section 1 of this Bill.

threshold at which the absolute bar will apply is therefore consistent with existing law and policy and its application should be foreseeable to those subject to it: an unrepresented party to proceedings will only be automatically prohibited from cross-examining a witness where there is clear evidence, as specified in the regulations and consistently with other similar legislation, that domestic abuse has occurred between them.

23. The court will only exercise its discretion to prohibit cross-examination in person in civil or family proceedings in certain circumstances – either to improve the quality of a witness’s evidence on cross-examination, or where it is satisfied that cross-examination in person would cause significant distress to the witness, and that such distress would be more significant than if the witness were cross-examined other than by the party in person. Additionally, the discretionary prohibition can only be applied where it would not be contrary to the interests of justice.
24. Where a party is barred from cross-examining in person, or where the court exercises its discretion to prohibit cross-examination in person, the court will have to actively consider whether there are satisfactory alternatives to such cross-examination. If there are none, then the court must invite the party affected to arrange for a qualified legal representative to undertake the cross-examination. If the party does not do so, the court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a qualified legal representative appointed by the court and, if so, must appoint such a legal representative to cross-examine the witness in the interests of the party. The ‘interests of justice’ test will involve the court weighing whether the party’s Article 6 and/or 8 rights will be breached if they cannot cross-examine the witness and if any other methods are used (such as the judge or a justices’ clerk putting questions to the witness).
25. The Lord Chancellor will issue statutory guidance about the scope and nature of the role of the court-appointed qualified legal representative. It is intended that the guidance will elaborate what a representative may or may not be required or expected to do in the proceedings depending partly on the circumstances of the case. This guidance will assist the representatives, the parties and the court in knowing the scope of the role to be played and, to the extent that it provides guidance on what need not be done which might ordinarily be carried out by a legal representative who is responsible to a party (which a qualified legal representative is not under new section 31W(7) of the MFPA 1984 or new section 85H(7) of the Courts Act 2003), the Lord Chancellor will be required to consider the prohibited party’s rights under Articles 6 and 8 ECHR when preparing the guidance.
26. The fees and costs of the court-appointed legal representative will be paid for from central funds. Taken as a whole, these provisions should ensure that the person’s Article 6 rights are not prejudiced because he or she cannot undertake the cross-examination in person.
27. The rights of other parties (including the witness who is to be cross-examined if they are also a party) will also be better protected as the quality of evidence and conduct of the hearing will be improved as a result.

28. The Government does not consider these provisions amount to a limitation on Article 6 rights; rather they are ensuring a fair hearing for all parties.

Article 8

29. Article 8 may be engaged in so far as these proposals may interfere with the right to respect for private or family life. Whether private or family life exists in a given case or not will depend on the nature of the relationship between the individuals involved in a matter, not upon their legal status: it is a question of fact, depending on the real existence of close personal ties (K v UK¹²).

30. Where private or family life exists, there may be positive obligations inherent in an effective respect for that private or family life; and effective respect for family life may require the provision of civil law remedies (Rasmussen v Denmark¹³). However, the State has a wide margin of appreciation as to the need for, and content of, any measures taken to ensure respect (Abdulaziz, Cabakes and Balkandali v UK¹⁴).

31. The Government considers that, to the extent that it is necessary, the court's existing powers to make orders in relation to the protection of private or family life already protect Article 8 rights. For example, the Children Act 1989 gives the court powers which could be exercised to ensure a child has contact with his/her father where that is in the best interests of the child¹⁵.

32. Where protection can be sought from the courts, Article 8 may oblige a State to make this means of protection effectively accessible, where appropriate, to anyone who may wish to have recourse to it (R (Gudanaviciene and Others) v Director or Legal Casework and Another¹⁶). However, again the State has a wide margin of appreciation as to the need for, and content of, any measures taken to ensure respect for private and family life (Abdulaziz, Cabakes and Balkandali v UK¹⁷).

33. The Article 8 rights of the party who would undertake any cross-examination, and of other parties (whether they are to be cross-examined or not), are best protected by the court coming to the 'right' decision. This is best achieved if all witnesses are able to give the best quality evidence. The Government therefore considers that these clauses ensure that the Article 8 rights of all involved in the case are protected.

The so-called "rough sex" defence (new clause "*Consent to serious harm for sexual gratification not a defence*")

34. New clause *Consent to serious harm for sexual gratification not a defence* is intended to clarify the law, particularly in relation to the so called "rough sex" defence, to make clear that a victim cannot consent to the infliction of serious harm for the purposes of obtaining sexual gratification and, by extension, nor would

¹² (1986) App. No. 11468/85.

¹³ (1984) 7 EHRR 371.

¹⁴ (1985) 7 EHRR 471.

¹⁵ See sections 1 and 8 Children Act 1989.

¹⁶ (2014) EWCA Civ 1622 §70 as cited in Re K & H (Private Law: Public Funding) § 50

¹⁷ (1985) 7 EHRR 471.

consent apply where such sexual activity resulted in the victim's death. It represents a codification of the general proposition of law in this area set out in the case of *R v Brown* [1993] 2 WLR 556, namely, that where an assault occasioning actually bodily harm, or worse, takes place, then public policy requires that society be protected by criminal sanctions notwithstanding the victim consented to the acts inflicted on them.

Article 8

35. In the case of *Laskey and Others v the United Kingdom* (application no: 21627/93; 21628/93; and 21974/93,) which arose from the case of *R v Brown*, the Court noted that the injuries that were or could be caused by the applicants' sado-masochistic activities were of a significant nature and degree, and that the conduct in question was, on any view, of an extreme character. The Court found therefore that the State authorities had acted within their margin of appreciation in order to protect its citizens from real risk of serious physical harm or injury. The notion of necessity implied that the interference correspond to a pressing social need and, in particular, that it was proportionate to the legitimate aim pursued; and furthermore, that in determining whether an interference was "necessary in a democratic society", the Court would take into account that a margin of appreciation was left to the national authorities. The scope of that margin of appreciation was not identical in each case but varied according to the context. Relevant factors included the nature of the Convention right in issue, its importance for the individual, and the nature of the activities concerned. The Court considered that one of the roles which the State was unquestionably entitled to undertake was to seek to regulate, through the operation of the criminal law, activities which involved the infliction of physical harm. This was so whether the activities in question occurred in the course of sexual conduct or otherwise, and the determination of the level of harm that should be tolerated by the law in situations where the victim consented was in the first instance a matter for the State concerned since what was at stake related, on the one hand, to public health considerations and to the general deterrent effect of the criminal law, and, on the other, to the personal autonomy of the individual.
36. Accordingly, the Court found that there was no breach of Article 8 rights because the State was entitled to consider that the prosecution and conviction of individuals was necessary in a democratic society to deter certain forms of behaviour on public health grounds, where the level of physical harm inflicted exceeded that which should be tolerated where the victim consents i.e. the conduct in question could not be considered to be of a trifling or transient nature.
37. Further, so far as personal autonomy of the individual was concerned, the law recognised that this particular principle should be maintained in the context of adult non-violent sexual relationships. Accordingly, the new clause recognises a lawful exception (expressed in the cases of *R v Dica* [2004] 3 ALL ER 593 and *R v Konzani* [2005] EWCA Crim 706), whereby a victim is able to consent to the risk of the transmission of a sexually transmitted infection in the course of sexual activity, where they know or believe that a person has a sexually transmitted disease. For the victim's consent to afford the defendant a defence there would have to be informed consent on behalf of the victim, in relation to which the defendant would need to hold an honest belief.

Article 14

38. It is possible that Article 14, read with Article 8, could be engaged if this new clause, without adequate justification, treats people differently to others in an analogous position on the grounds of a relevant status; or has a disproportionately prejudicial effect on a particular group.
39. However, we do not consider that being a member of the BDSM community can constitute a status for the purposes of Article 14; nor do we consider that this new clause has a disproportionately prejudicial effect on any particular group. In any event, any different in treatment would be justified on public health grounds as set out in relation to Article 8 above.

Ministry of Justice
30 June 2020