

Prisons and Courts Bill

Equalities Statement: Prohibition of cross-examination in person in specified circumstances in family proceedings:

Policy change summary

1. The Government proposes the introduction of legislation to make provision in relation to the prohibition of cross-examination in person in specified circumstances in family proceedings, and to give courts powers to appoint legal representatives to undertake cross-examination in specified circumstances. The provisions will:
 - I. introduce a blanket ban on cross-examination in person in certain specified circumstances;
 - II. give the court a discretion to prohibit such cross-examination in other specified circumstances;
 - III. require the court to consider alternatives to cross-examination where a prohibition on cross-examination in person applies;
 - IV. give the court a power in specified circumstances to appoint a legal representative to ask questions on behalf of a party who is prohibited from cross-examining the person; and,
 - V. make provision for the funding of such legal representatives.

The proposals in this area are modelled on existing provision in the criminal courts (sections 34 to 38 YJCEA 1999) but with certain provisions being adapted to suit family proceedings.

Equality duties

2. The Public Sector Equality Duty comprises three limbs, set out in section 149(1) of the Equality Act 2010, whereby a public authority must, in the exercise of its functions, have due regard to the need to:
 - I. eliminate discrimination (both direct and indirect), harassment, victimisation and any other conduct that is prohibited by the Act;
 - II. advance equality of opportunity between persons sharing a relevant protected characteristic and persons who do not. This includes removing or minimising disadvantages suffered by people due to their protected characteristic, taking steps to meet the needs of people who share a particular protected characteristic, and encouraging participation in public life; and,
 - III. foster good relations between persons sharing a relevant protected characteristic and persons who do not. This includes tackling prejudice and promoting understanding.
3. The relevant protected characteristics are race, sex, disability, sexual orientation, religion or belief, age, gender reassignment, pregnancy and maternity. The protected characteristics of marriage and civil partnership is also relevant to the first limb of the duty.

Equality considerations

Direct discrimination

4. The proposals are not directly discriminatory within the meaning of the Equality Act as they apply equally to all court users: we do not consider that the proposals would result in people being treated less favourably because of a protected characteristic.

Indirect discrimination

5. These provisions will prevent, or give courts powers to prohibit, cross-examination in person in family proceedings- for example, when the would-be cross-examiner has been convicted of committing a sexual offence against the witness; where the quality of evidence given may be diminished as a result of the cross-examination being undertaken in person; or where the cross-examination in person may cause significant distress to the witness. It follows that a range of vulnerable people involved in family proceedings could be impacted by the provisions. Vulnerability is difficult to define, therefore this document will consider all private law court users in family proceedings as a group by protected characteristic, as we expect that most people affected by these proposals will be users of the private law system. The private family law system deals with couples legally ending a marriage or civil partnership and the division of their assets, as well as disputes between family members, often between separated parents about the upbringing of children.
6. We anticipate that the majority of court users impacted by these provisions will be victims of domestic abuse and their abusers, given the way that it is expected that the prohibitions on cross-examination will operate in practice. This document will mainly focus on the equalities impact on those two groups - however, we recognise that other witnesses in family proceedings will be impacted too.
7. We do not believe that the proposals will result in any indirect discrimination, whereby people with protected characteristics are particularly disadvantaged. However, we are aware that there are certain groups (see below) who are overrepresented as victims and perpetrators of domestic abuse and therefore are more likely to be impacted by this provision. There are also certain groups who are overrepresented in family proceedings who will also therefore be impacted by this provision more than others.
8. We have also considered the barriers that certain people with protected characteristics may have to reporting abuse. There are various ways in which the court might be made aware of the abuse, such as where the court is made aware via Cafcass safeguarding checks that the cross-examiner has an unspent conviction for a specific crime. Where the court proceedings relate to an application for a protective injunction, the abuse will have been reported to the court as part of that application. However, we have given consideration to the risk that some groups may be less likely to report abuse than others.
9. We recognise that variance in reporting of domestic abuse amongst different groups is an issue. Even if it were established that in some cases the variance in reporting or effects of judicial discretion constituted a particular disadvantage, the proposed Bill

provisions would be justified as a proportionate means of achieving the legitimate aim of preventing victims of domestic abuse from being cross-examined by their abusers. Ultimately, the policy will also ensure the quality of evidence given in courts, regardless of protected characteristic.

10. Our considerations are laid out by protected characteristic below.

Summary

11. We are satisfied that the proposal overall represents a positive change for the groups below and is a necessary and proportionate means of achieving the policy aims.

Sex

12. Cafcass private law data shows that women were overrepresented as private law client respondents (72%) compared to the general population of England (51%); whilst men are overrepresented as private law applicants (69%) compared to the general population, (49%).¹ It is worth noting that this data is from 2011/12.
13. Evidence shows that women are more likely to be victims of domestic abuse than men, and therefore we anticipate that women will disproportionately be protected by these measures. Women are more than twice as likely to have experienced domestic abuse in the past year as men, with The Crime Survey for England and Wales (CSEW) estimating that 8.2% of UK women (1.3 million women) and 4.0% of UK men (600,000 men) reported experiencing any type of domestic abuse in the last year.²
14. In addition, Refuge report that the ways in which women experience domestic violence is different: the intensity and severity of violence used by men is more extreme and more likely to include physical violence, threats and harassment. Female victims of domestic violence experience more serious psychological consequences than male victims and are much more likely to feel afraid of their partners. Women are four times as likely to experience potentially lethal violence and five times as likely to report that they feared for their lives.³
15. Men are more likely to be perpetrators of domestic abuse than women. Data from the Crown Prosecution Service's Case Management System 2015-6 showed that in domestic abuse prosecutions, of those defendants where gender was recorded, 92.1% were male defendants and 7.9% female; of those victims where gender was recorded 83.3% were female and 16.7% were male.⁴
16. Perpetrators may feel disadvantaged by the provisions as they may see them as preventing them from carrying out cross-examination in person. On the other hand, the provisions could be seen as unfairly advantaging perpetrators of domestic abuse by providing them with a publicly funded, court ordered legal representative for the purposes of undertaking cross-examination of the victim. Any advantage to perpetrators as a result of having a court funded legal representative we believe to be justifiable as a means of protecting vulnerable people from being cross-examined by a perpetrator, when appropriate. This perceived advantage also extends to the victim who will not

¹ Private law cases source: CAF/CASS database, General population estimates source: 2009 Population Estimates by Ethnic Group, Office for National Statistics

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<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/yearendingmarch2015/chapter4intimatepersonalviolenceandpartnerabuse>

³ <http://www.refuge.org.uk/files/Statistics-domestic-violence-and-gender.pdf>

⁴ http://www.cps.gov.uk/publications/docs/cps_vawg_report_2016.pdf

have to carry out cross-examination in person of their abuser and may be provided with a court funded legal representative for these purposes.

17. Stigma and fear of feeling emasculated can make men less likely to report domestic abuse than women. Court staff should be aware of this fact and ensure they take allegations as seriously as with women, offering appropriate advice and support. The Office for National Statistics data (2014/15), shows that male victims (39%) are over three times as likely as women (12%) to not tell anyone about the partner abuse they are suffering from. Only 10% of male victims will tell the police (26% women), only 23% will tell a person in an official position (43% women) and only 19% (23% women) will tell a health professional.⁵
18. In summary, women are more likely to be victims of domestic abuse and are therefore likely to benefit from the prohibition on cross-examination in person by the perpetrator. Both men and women will benefit from the appointment of a publicly funded, court ordered legal representative to conduct cross-examination on their behalf. Agencies should be aware of under-reporting of domestic abuse by both men and women.

Race

19. Cafcass private law data for England shows that of those that provided information on ethnicity, 16% of applicants and 15% of respondents were recorded as being from a Black, Asian and Minority Ethnic (BAME) background. This compares to 12% of the general population aged 18 and over.⁶
20. People from certain ethnic groups, and in particular women from mixed/multiple ethnic groups and men from Black/African/Caribbean/Black British, are more likely to be victims of domestic abuse. Crime survey figures from 2015 show the percentage of men and women aged 16-59 who had been victims of domestic abuse in the preceding year by ethnic group:
 - I. 4.2% of White men and 8.6% of White women;
 - II. 1.9% of men and 14.3% of women from Mixed/Multiple ethnic groups;
 - III. 2% of men and 2.8% women from Asian/British Asian ethnic groups;
 - IV. 6.1% of men and 7.8% of women from Black/African/Caribbean/Black British ethnic groups;
 - V. 0% of men and 6.4% of women from Other ethnic groups.⁷
21. In BAME communities, there are a variety of reasons including language and literacy barriers, cultural barriers, isolation and a lack of awareness of the crime which may make victims of domestic abuse less likely to report the abuse. These may include:
 - I. multiple abusers: parents, siblings, in-laws, other wives, and partners – sometimes the perpetrators collude;
 - II. language and cultural barriers to accessing help;

⁵ ONS BCS Focus on Violent Crime and Sexual Offences 2014/15 Appendix Table 4.28

⁶ Private law cases source: CAFCASS database

⁷ ONS BCS Focus on Violent Crime and Sexual Offences 2014/15 Appendix Table 4.10

- III. forced marriages⁸;
- IV. suffering abuse from more than one perpetrator in the extended family;
- V. fear of breach of confidentiality, particularly in case the family find out; and
- VI. threats of being sent abroad.⁹

22. Consideration should therefore be made within the courts to these potential language and cultural barriers to ensure that members of ethnic and racial minority groups have ample support and opportunity to report abuse.

23. Overall we believe the benefit to ethnic and racial minority groups resulting from these changes will outweigh the risk of underreporting of domestic abuse, as long as the courts are aware of additional challenges which victims of domestic abuse from certain BAME backgrounds may face and make reasonable adjustments.

Religion

24. Cafcass private law data shows that court users from non-religious backgrounds were over-represented, with 30% of applicants and 28% of respondents compared with 22% of the general population. 6% of applicants and respondents were Muslim compared with 5% of the general population. Christians were under-represented, with 42% of applicants and 44% of respondents compared with 69% of the general population.¹⁰

25. There is limited data on religion and belief in regards to the victims or those at risk of domestic abuse however issues concerning faith within the BAME communities are similar in many ways relating to the stigma attached to reporting the abuse and speaking out about it.

26. In sum, although we anticipate that most people affected by these proposals will be non-religious, we are also aware that certain minority religious communities may face additional challenges within the context of domestic abuse, for which agencies should be prepared.

Sexual Orientation

27. There is a lack of data available about the sexual orientation of private law applicants and respondents in family proceedings. There is also limited research on domestic abuse within LGB&T relationships.

28. Stonewall report that: 'one in four lesbian and bi women have experienced domestic abuse in a relationship. Two thirds of those say the perpetrator was a woman, a third a man. Almost half (49%) of all gay and bi men have experienced at least one incident of domestic abuse from a family member or partner since the age of 16'.¹¹

29. There is limited research on how many transgender people experience domestic abuse in the UK, and we are dependent upon evidence from small group samples. However, these figures suggest it is a significant issue. A report by the "The Scottish Transgender

⁸ Forced marriage and female genital mutilation are now crimes in England and Wales and there are protection orders available for victims.

⁹ http://www.eachcounselling.org.uk/downloads/DV_toolkit.pdf

¹⁰ Private law cases source: CAF/CASS database

¹¹ <http://www.stonewall.org.uk/help-advice/criminal-law/domestic-violence>

Alliance indicates that 80% of transgender people had experienced emotional, sexual, or physical abuse from a partner or ex-partner.¹²

30. Evidence suggests that LGB&T communities face complex barriers to seeking support for domestic abuse, including from fear of homo/bi/transphobic victimisation from professionals, to worries about being 'out-ed', to an inability to find specialist support.¹³
31. In summary, while there is little data on witnesses in family proceedings from LGB&T relationships, we understand that these groups face additional challenges to reporting and dealing with domestic abuse, which may impact on how they can benefit from this provision.

Age

32. Private law applicants and respondents aged 30-39 years are the most common age group, making up 40% of the total. They are over-represented compared to this group in the general population of England aged 18 and over where they make up 17%. In Wales, the most common age group for parties is 25-34; 40% of the total.¹⁴
33. Latest estimates from respondents interviewed in the Crime Survey for England and Wales during who reported being a victims of domestic violence, the year ending March 2015 showed that, among both men and women, the prevalence of intimate violence was highest amongst younger age groups, and decreased with age.
34. Overall, we do not anticipate that this provision is likely to disadvantage certain age groups, but the policy is likely to impact on younger people in greater numbers.

Discrimination arising from disability and duty to make reasonable adjustments

35. For private law clients where information on disability was available, 8% of applicants and 6% of respondents were recorded as having a disability compared to 22% of the general population aged 16 and over in England.¹⁵
36. We believe that the policy is positive where it impacts on disabled victims, but it remains important to make reasonable adjustments for disabled victims to ensure appropriate support is given.
37. People with disabilities who experience domestic abuse may face broader risk factors than other domestic abuse victims. Vulnerability resulting from a disability may make a disabled person less able to recognise, report or escape domestic abuse. Disabled people experience higher rates of domestic abuse and they also experience more barriers to accessing support, such as health and social care services and domestic abuse services. Agencies should be aware of this and provide sufficient opportunities for disclosure and support.¹⁶

¹² <http://www.scottishtrans.org/>

¹³ Harvey, S. et al (2014) 'Barriers faced by lesbian, gay, bisexual and transgender people in accessing domestic abuse, stalking and harassment, and sexual violence services'. Welsh Government <http://wales.gov.uk/statistics-and-research/barriers-faced-lesbian-gay-bisexual-transgender-people-accessing-domestic-abuse-sexual-violence-services/?lang=en>

¹⁴ See reference 1

¹⁵ See reference 1

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480942/Disability_and_domestic_abuse_topic_o_verview_FINAL.pdf

38. Specific adjustments should already be in place within courts to support people with disabilities, however in addition to this there should be consideration of the additional challenges which disabled people face within abusive relationships and how that may allow them to benefit from these provisions.

Harassment and victimisation

39. We do not consider there to be a risk of harassment or victimisation as a result of these proposals. In fact, we feel that these measures will act to reduce the harassment and victimisation of victims of domestic abuse by their abusers in family proceedings.
40. We are aware of the ongoing risk of harassment and victimisation of victims of domestic abuse continues to take place outside of the court proceedings themselves, for example when the alleged abuser and alleged victim have to wait in the same room before the hearing. The department is investing in the court estate to improve protections for the vulnerable in court buildings and in the courtroom itself to protect victims of domestic abuse within family proceedings.

Advancing equality of opportunity

41. Consideration has been given to how these proposals impact on the duty to have due regard to the need to advance equality of opportunity by meeting the needs of victims who share a protected characteristic, where those needs are different from the need of those who do not share that protected characteristic. We believe that the amendments are largely positive for victims of domestic abuse, whether they share a protected characteristic or not.

Fostering good relations

42. Consideration has been given to how the cross-examination proposals impact on the duty to advance the fostering of good relations between people who have a PC and those who do not. For the protected characteristic of sex this policy has the potential to reduce conflict between women who share a protected characteristic and men who do not as cross-examination in person of the witness by the perpetrator in court will be avoided. We do not think there are any particular implications for the other protected characteristics from this proposal in terms of fostering good relations.

Mitigation

43. A range of work is in train which will improve the way in which courts are equipped to deal with vulnerable witnesses. The President of the Family Division has recently proposed changes to Practice Direction 12J, which sets out what courts should do in any proceedings relating to children where there is reason to believe there is domestic abuse. Draft new rules of court and a practice direction are also being prepared which will highlight to judges additional tools they already have at their disposal to protect vulnerable witnesses (such as protective screens and video link). The department is developing better training on domestic abuse for operational staff throughout the family justice system
44. We have also been reviewing the arrangements for making legal aid available to victims of domestic abuse in private family cases. Since increasing the time limit on evidence from two to five years in April of last year and allowing evidence of financial abuse, we have been working closely with stakeholder groups, including Women's

Aid, to develop our understanding of the issues that victims of domestic violence face when applying for legal aid.

45. In addition, it is anticipated that this policy will be supported by judicial guidance which will provide guidelines for the judiciary on how to exercise the discretion with relation to this policy.
46. We will continue to monitor the policy after implementation and take action if any equality issues arise.

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