

Title: Prisons and Courts Bill: Court appointed legal representatives in family proceedings IA No: MoJ003/2017 Lead department or agency: Ministry of Justice (MoJ) Other departments or agencies: HM Courts and Tribunals Service	Impact Assessment (IA)				
	Date: 22/02/2017				
	Stage: Final				
	Source of intervention: Domestic				
	Type of measure: Primary legislation				
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Summary: Intervention and Options					RPC Opinion: Not Applicable

Cost of Preferred (or more likely) Option

Total Net Present Value	Business Net Present Value	Net cost to business per year	In scope of One-In, Two-Out?	Measure qualifies as
-£37m	N/A	N/A	Not in Scope	N/A

What is the problem under consideration? Why is government intervention necessary?

At present perpetrators of domestic abuse (alleged or otherwise) can cross-examine their victims in person in family proceedings. Unlike in criminal proceedings, courts hearing family proceedings do not have a specific power to prevent an alleged perpetrator from cross-examining their alleged victim in person, nor do courts have the power to order that a legal representative be appointed (and funded) to ask questions on behalf of a party who is prohibited from cross-examining a witness. Government intervention is therefore necessary to give the court this power and to make provision for the funding of such legal representatives.

What are the policy objectives and the intended effects?

The objectives and intended effects of the proposals are to improve the treatment of the vulnerable in family proceedings and the quality of the evidence they give. More specifically this measure seeks to: introduce a blanket ban on cross-examination in person (by either alleged perpetrators or victims) in certain specified circumstances; give the court a discretion to prohibit cross-examination in person in other cases if satisfied that certain conditions are met; require the court to consider alternatives to cross-examination where a prohibition on cross-examination in person applies; give the court the power to order the appointment of a legal representative to ask questions on behalf of the party who is prohibited from cross-examining the person where necessary; and make provision for the funding of such a representative.

What policy options have been considered, including any alternatives to regulation?

The following options have been considered:
 Option 0 – Do nothing.
 Option 1 – To make provision for the prohibition of cross-examination in person in specified circumstances in family proceedings, and to give courts the power to appoint legal representatives to undertake cross-examination in specified circumstances.
 Option 1 is the preferred option as it meets the policy objectives.

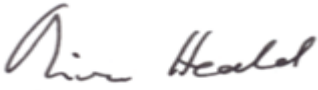
Will the policy be reviewed?

We will monitor the additional expenditure resulting from these measures. We will also assess the practical execution of the policy to determine the extent to which it achieves the stated policy objectives.

Does implementation go beyond minimum EU requirements?						
Are any of these organisations in scope? If Micros not exempted set out reason in Evidence Base.		Micro N/A	< 20 N/A	Small N/A	Medium N/A	Large N/A
What is the CO ₂ equivalent change in greenhouse gas emissions? (Million tonnes CO ₂ equivalent)				Traded: N/A	Non-traded: N/A	

I have read the Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits and impact of the policy, and (b) the benefits justify the costs.

Signed by the responsible Minister:



Date: 22/02/2017

Summary: Analysis & Evidence

Policy Option 1

Description: To prohibit 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.

FULL ECONOMIC ASSESSMENT

Price Base Year 2014-15	PV Base Year 2016-17	Time Period Years 10 years	Net Benefit (Present Value (PV)) (£m)		
			Low: £0m	High: £0m	Best Estimate: -£37m

COSTS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant)	Total Cost (Present Value)
Low	N/A		N/A	N/A
High	N/A		N/A	NA
Best Estimate	N/A		£6m	£37m

Description and scale of key monetised costs by 'main affected groups'

- The cost to the Ministry of Justice of funding legal representatives to cross-examine vulnerable witnesses in family proceedings is estimated to be up to approximately £6m per annum in steady state.

Other key non-monetised costs by 'main affected groups'

- An effective mechanism would need to be set up to source and appoint legal representatives. We have not yet established the cost of administering this, or the costs of any necessary system changes.

BENEFITS (£m)	Total Transition (Constant Price)	Years	Average Annual (excl. Transition) (Constant)	Total Benefit (Present Value)
Low	N/A		N/A	N/A
High	N/A		N/A	N/A
Best Estimate	N/A		£6m	N/A

Description and scale of key monetised benefits by 'main affected groups'

- This policy would create a new revenue stream for providers of legal representation. The total benefit to providers is estimated to be up to approximately £6m per annum. We anticipate a legal representative would be appointed in between 9,000-10,000 family proceedings annually.

Other key non-monetised benefits by 'main affected groups'

- For the purposes of this IA, we assume the wider benefits are at least equivalent to the costs. We expect that vulnerable witnesses would benefit from this policy as they would avoid the distress of being cross-examined in person by, or of having themselves to cross-examine, their alleged abusers; the provisions should also ensure the quality of evidence provided through cross-examination.

Key assumptions/sensitivities/risks

Discount rate 3.5%

In arriving at a cost estimate, we have assumed that:

- the base volumes for domestic violence family law matters and private family matters with a domestic violence component remain constant;
- the proportion of unrepresented respondents remains constant;
- the proportion of domestic violence family law proceedings which are handled ex-parte remains constant;
- the qualitative evidence which informs the proportion of cases in which a legal representative may be required for the purposes of cross-examination takes place is representative and remains constant;
- current final hearing legal aid fees paid to legal representatives in the relevant family proceedings are used as a proxy for the fees which will be paid to appointed legal representatives;
- as this is a new power handed to the court, we cannot be certain how often the court will choose to appoint a legal representative;
- the mechanism by which legal representatives are sourced and appointed and who will lead on the operational aspect has yet to be determined. This may impact on the cost of the policy although we cannot cost it at this time;
- the proposal may impact the speed of cases and required use of court resources, but we cannot quantify this potential impact.

BUSINESS ASSESSMENT (Option 1)

Direct impact on business (Equivalent Annual) £m:			In scope of OITO?	Measure qualifies as
Costs: n/a	Benefits: n/a	Net: n/a	Costs: n/a	Benefits: n/a

Evidence Base

A. Background

Vulnerable Witnesses in Family Proceedings

1. The Ministry of Justice is determined to improve support and protections for vulnerable witnesses in the family justice system. The department is investing in the court estate to improve protections for the vulnerable in court buildings and in the courtroom itself, developing better training on domestic abuse for operational staff throughout the family justice system, and working closely with senior judges to improve the availability of special measures in family courts.
2. There is one particular omission in family law that the Ministry of Justice wishes to address through provisions in the Prisons and Courts Bill. Unlike the criminal courts, family courts do not have a specific power to prevent perpetrators of abuse (alleged or otherwise) from cross-examining their victims in person. Such cross-examination can cause victims significant distress and can amount to a continuation of the abuse. The distress caused to victims in such circumstances may also compromise the quality of the evidence they are able to give and leave them feeling that they and their children have been denied access to justice.
3. Family courts currently have a range of powers to make sure difficult courtroom situations are handled sensitively for vulnerable witnesses. There is not, however, a specific prohibition on cross-examination in person, nor is there a power to order that a legal representative be appointed (and funded) to put questions on behalf of a person prohibited from cross-examining in person. Primary legislation is required to change this situation.
4. The proposed provisions will allow courts to put an end to the face-to-face cross-examination of vulnerable witnesses in the family courts, so that people who need to be heard are not afraid of speaking out.

B. Policy Rationale and Objectives

5. The conventional economic rationale for Government intervention is based on efficiency or equity arguments. Government intervenes if there is a perceived failure in the way a market operates (“market failures”) or if it would like to correct existing institutional distortions (“government failures”). Government also intervenes for equity (“fairness”) reasons.
6. The rationale for this proposal is equity: the current situation in family proceedings in which alleged perpetrators of abuse are able to conduct cross-examination in person of their alleged victims is generally viewed as inappropriate and may, in addition, compromise the quality of the evidence that witnesses are able to give, so preventing them from obtaining full access to justice. Further to this, there may be other situations in which cross-examination in person may cause the witness significant distress.
7. Therefore the main policy objective is to prohibit the practice of cross-examination in person of an (alleged) victim by their (alleged) abuser (and vice versa). The policy would also give family judges a discretion to prohibit cross-examination in person when it appears that such cross-examination will impact negatively on the quality of evidence or when the cross-examination may cause the witness significant distress and it is not possible to obtain the evidence that would be given in cross-examination by other means. This will be achieved by giving courts the power to appoint a publicly-funded legal representative to conduct the cross-examination if necessary.
8. More generally, this measure forms part of a wider package of proposals which all have the overarching objective of improving the treatment of the vulnerable in family proceedings. This measure, along with the other planned protections for the vulnerable, will contribute to improving access to justice by ensuring the quality of evidence before the court.

C. Affected Stakeholder Groups, Organisations and Sectors

9. The proposals assessed in this Impact Assessment (IA) will directly affect the following groups:
- witnesses in family proceedings
 - judges hearing family proceedings;
 - court advocacy service providers;
 - the Ministry of Justice (MoJ) and its agencies

D. Description of Options Considered

10. To meet the above policy objectives, the following two options are considered in this IA:

- **Option 0: Baseline. No changes are made to the primary legislation concerning the cross-examination of vulnerable witnesses in family proceedings.**
- **Option 1: To make provision for the prohibition of cross-examination in person in specified circumstances in family proceedings, and to give courts the power to appoint legal representatives to undertake cross-examination in specified circumstances.**

Option 0: Baseline

11. Option 0 would mean a continuation of the current situation, in which perpetrators of abuse (alleged or otherwise) are able to cross-examine their (alleged) victims in person. While avoiding additional departmental expenditure, this would not meet the policy objectives and would inevitably result in continued criticism from key stakeholders and groups including the President of the Family Division, other members of the judiciary, parliamentarians and Women's Aid.

Option 1: To make provision for the prohibition of cross-examination in person in specified circumstances in family proceedings, and to give courts the power to appoint legal representatives to undertake cross-examination in specified circumstances.

12. Under this option legislation would be enacted such that in any family proceedings, there would be a statutory prohibition on cross-examination in the following circumstances:
- a. Where a party to the family proceedings has an unspent conviction for, or is charged with, a specified offence, that party is prohibited from cross-examining in person a witness who is the victim, or alleged victim, of that offence, and vice versa.
 - b. Where an on-notice protective injunction¹ is in force against a person, that person may not cross-examine in person a witness who is protected by the injunction, and vice versa.
13. The "specified offences" referred to above would be listed in regulations made by the Lord Chancellor— and can be broadly categorised as violence offences, sexual offences and child abuse offences. The "protective injunctions" would also be listed in regulations and would include non-molestation orders, occupation orders, forced marriage protection orders and female genital mutilation protection orders.

¹ An on-notice protective injunction is a protective injunction where the court is satisfied that the person against whom it is in force has had an opportunity to apply to have it set aside, or if it was made at a hearing at which both the person who applied for the protective injunction and the person against whom it was made had notice.

14. In any family proceedings where the statutory prohibition referred to above does not apply, the court would have the discretion to give a direction prohibiting a person from cross-examining a particular witness (or witnesses). The discretion would be exercisable where it appears to the court that the quality of evidence is likely to be diminished if the cross-examination is conducted by a party in person and would be improved if the court were to give a direction to prevent that cross-examination in person from taking place or when significant distress would be caused to the witness through the cross-examination in person taking place. The court could only exercise this discretion where it is satisfied that it would not be contrary to the interests of justice to do so.
15. Where a person is prohibited from cross-examining another in person, the court must firstly consider whether there is an alternative means of cross-examining the person or of obtaining the evidence (such as using pre-recorded cross-examination from criminal proceedings, or the judge putting questions to the witness directly). If it is not possible by any other means, and it is found to be in the interests of justice, then the court would be able to invite the party to appoint a legal representative. If the party does not do so, then the court has the power to appoint a legal representative, chosen by the court, to cross-examine the witness in the interests of the party. Payment for a court appointed legal representative would come from public funds.

E. Cost and Benefit Analysis

16. This Impact Assessment (IA) identifies impacts on individuals, groups and businesses in England and Wales, with the aim of understanding what the overall impact to society might be from implementing the options considered. The costs and benefits of the policy proposal are compared to the baseline, which in this case is the same as Option 0, the 'do nothing' option. The costs and benefits associated with the baseline option are necessarily zero as is its Net Present Value (NPV).
17. IAs place a strong emphasis on valuing the costs and benefits in monetary terms (including estimating the value of goods and services that are not traded). However, there are important aspects that cannot sensibly be monetised which might include how the proposals impact differently on particular groups of society or changes in equity and fairness.
18. The estimates in this IA have been rounded: any additional costs below £5 million have been rounded to the nearest £100,000 and those above £5 million to the nearest £1 million. Consequently, totals may not agree due to rounding. Note that we have generally presented as a range, as uncertainty over the cost estimates remains due to the modelling approach (see section F) and our modelling assumptions. The base case to which the option is compared is the current situation, where the policy does not exist and there is no legal aid expenditure.

Option 1: To make provision for the prohibition of cross-examination in person in specified circumstances in family proceedings, and to give courts the power to appoint legal representatives to undertake cross-examination in specified circumstances.

Costs of Option 1

Monetised Costs

MoJ

19. By enabling the court to appoint publicly-funded legal representatives in these proceedings, we estimate that the steady-state cost to the MoJ would be up to approximately £6 million per annum. This is based on an estimate of potential volumes, using family court statistics and qualitative research on the likelihood of judges seeking to use court-appointed representation. The unit cost is the current final hearing legal aid fee paid to legal representatives in the relevant family proceedings – these are used as a proxy to provide an estimated policy cost.

Non-Monetised Costs

20. It is presently expected that the costs of reissuing guidance and informing stakeholders of its introduction would be negligible to the MoJ.
21. In order to ensure that there are enough legal representatives available to carry out cross-examinations, the MoJ would need to establish a mechanism for sourcing and appointing legal representatives in an effective and timely manner. We would also need to determine who will lead on operating this mechanism. As a result, we cannot currently quantify the cost of setting up this mechanism as any additional costs for changes to departmental systems will depend on the final mechanism selected.

Benefits of Option 1

Monetised Benefits

Court Advocacy Service Providers

22. Option 1 would see a new revenue stream created for providers of legal representation. The total financial benefit to providers is estimated to be up to approximately £6 million per annum, which is equal to the estimated cost of the policy to the MoJ.

Non-Monetised Benefits

Witnesses in family proceedings

23. The main benefit of Option 1 is that the court would have (in specified circumstances) the option to appoint a qualified legal representative to cross-examine vulnerable witnesses. This is likely to be less distressing for witnesses, and should ensure the quality of evidence. Modelling indicates that around 9,000-10,000 family proceedings per annum could benefit from an appointed legal representative.
24. For the purposes of this IA, we assume that the wider benefits are at least equivalent to the costs.

F. Assumptions, Risks and Uncertainties

Assumptions

25. Our analysis takes data on the volume of family proceedings which are categorised as either a domestic violence family law matter or a private law matter with a domestic violence component, and applies a series of evidenced assumptions to determine the likely volume of cases where a publicly-funded legal representative may be appointed to cross-examine a vulnerable witness. This volume is multiplied by legal aid final hearing fees currently paid to legal representatives in the relevant family proceedings as a proxy, to estimate the policy cost. The future fees are yet to be determined.
26. Our modelling aims to provide the most accurate estimate of policy impacts possible. However, we have imperfect knowledge of both the current system and how anything might change under the proposed new system, so we make simplifications and assumptions where necessary. Some of the high-level assumptions include:
- the volumes of domestic violence family law matters and private law matters with a domestic violence component would remain broadly constant. However, they have increased in recent years, and it is possible that this may continue;
 - the proportion of unrepresented respondents in private law matters is representative and that this proportion will remain constant;

- 50 per cent of domestic violence family law matters are handled ex-parte². This is consistent with the proportion of non-molestation and occupation orders dealt with ex-parte. We assume the remaining 50 per cent not dealt with ex-parte is the proportion of cases that may need an appointed legal representative;
- an estimated 50 per cent of cases with vulnerable witnesses will require a legal representative for the purposes of cross-examination. This assumption is based on a research study led by MoJ Analytical Services³. Findings from 21 in-depth interviews with the family judiciary indicated that judges were aware of – and used – a variety of practices to manage cases with the cross-examination of vulnerable witnesses. The judicial interviewees suggested that whilst in some cases a legal representative would be required for cross-examination, this assessment was dependent on the nature of the individual case and litigant, and applying their discretion in terms of the most appropriate way to manage a hearing was key;
- the cost per case is assumed to be equivalent to legal aid paid in the family advocacy scheme and domestic violence hearings. As future fees are yet to be determined, we use legal aid fees paid for final hearings as an indicative figure;
- the implementation date is October 2017.
- The net present calculation uses HMT's GDP deflators for December 2016.

Risks and Uncertainties

27. There is always uncertainty in the modelling of policy costs. The modelling is more sensitive to some of the assumptions made than others.
28. The principal uncertainty arises from the estimated volume of cases in which a publicly-funded legal representative would be appointed in family proceedings. The qualitative evidence that has informed our assumptions (21 judicial interviews) was based on the views and experiences of the court without this provision. As this is a new power, we cannot be certain how often the court will appoint a legal representative, and how behaviour may change. To show the sensitivity, if judges in 25% of cases choose to appoint a publicly-funded legal representative (rather than 50%) the cost could be up to around £3m.
29. Uncertainty over how and when legal representatives would be paid means that it is difficult to assess when the full cost of the policy to the Ministry of Justice would be realised.
30. Having legal representatives cross-examining vulnerable witnesses may impact the speed of cases and the required usage of court resources. We cannot quantify the impact that altered case lengths may have on the court system – however, potential effects on HMCTS should be noted.

G. Wider Impacts

31. The separately published Equalities Statement sets out our assessment of who might be affected by the preferred option, under the Public Sector Equality Duty.

H. Monitoring and Evaluation

32. We have estimated a cost to the Ministry of Justice and highlighted potential impacts on HMCTS. We will monitor the volume of legal representatives appointed as well as how the court is handling the appointment of legal representatives. We will also monitor the implementation of, and costs arising from, this policy.

² An ex-parte legal proceeding is one which is brought about by one party without the other party being notified, and so without the participation or presence of the other party.

³ Corbett, N.E. and Summerfield, A. (2017) Alleged perpetrators of abuse as litigants in person in private family law: The cross-examination of vulnerable and intimidated witnesses. London: Ministry of Justice.

33. Although we do not expect any disproportionate impact on protected groups, we will assess this to ensure that is the case. We will monitor data where it is collected.

This publication was archived in June 2017.