



Written Evidence to the Joint Committee on Human Rights on the draft Domestic Violence and Abuse Bill from Rights of Women

About Rights of Women

Rights of Women specialises in supporting women who are experiencing or are at risk of experiencing, gender-based violence, including domestic and sexual violence. We support disadvantaged and vulnerable women including Black, Minority Ethnic, Refugee and asylum-seeking women (BMER women), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women. By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women's understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families' lives.

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Executive summary

- We are concerned the drafting of the prohibition on cross-examination in the family courts of victims by the alleged perpetrator is insufficient and will lead to some women victims still being cross-examined by the other party, resulting in a continuation of the abuse and a breach of the woman's Article 6 right to a fair trial.
- The current drafting creates a distinction between an absolute prohibition on cross-examination and a discretion on the part of the judge to prohibit cross-examination if certain tests are met, called the "significant distress" and "quality" conditions. The absolute prohibition applies when the perpetrator has been convicted of, given a caution for, or is charged with a specified offence, or there is a protective injunction in force protecting the victim.
- We believe many victims will not meet the absolute prohibition requirements due to the well-known issues of low reporting to the police and lack of police action in cases.
- We believe judicial attitudes to domestic abuse and cross-examination will result in the discretionary tests failing to adequately protect victims of domestic abuse.

- We recommend it is redrafted in keeping with the ethos of the Youth Justice and Criminal Evidence Act 1999 (YJCEA) where it is the nature of the behaviour alleged that determines whether the absolute prohibition applies or a discretion arises.
- We recommend the prohibition on cross-examination in person is extended to the civil courts to protect victims no matter what court they appear in.

Cross-examination in the family courts

1. We wish to raise a number of concerns we have about the drafting of the prohibition on cross-examination in the family courts. We welcome the Government's intention to prohibit cross-examination in person in certain cases. It is long overdue having been legislated against in the criminal jurisdiction in 1999 under the Youth Justice and Criminal Evidence Act 1999 (YJCEA).
2. However, we do not believe that the current proposals provide adequate protection for victims of domestic abuse and will result in the continuation of a group of people being denied access to justice and a fair trial.
3. The cross-examination of victims by the perpetrator of abuse is well recognised as a way in which perpetrators can continue their abuse. In *A (A minor) (fact finding, unrepresented party)* [2017] EWHC 1195 (Fam), the victim of domestic abuse in the case was cross-examined directly by the perpetrator, although via videolink. Mr Justice Hayden, hearing the case, stated that *"It is a stain on the reputation of our Family Justice system that a Judge can still not prevent a victim being cross examined by an alleged perpetrator. This may not have been the worst or most extreme example but it serves only to underscore that the process is inherently and profoundly unfair. I would go further it is, in itself, abusive."*
4. Amendments to the Family Procedure Rules for vulnerable persons (Part 3A), which came into force in November 2017, aimed to alleviate some of the harm caused by direct cross-examination but have not been sufficient to prevent it from happening. Research has shown that around a quarter of victims of domestic abuse in child contact proceedings are still being cross-examined directly by the perpetrator¹.
5. We believe this is continuing because of judicial attitudes to domestic abuse. Research conducted in 2017 by the Ministry of Justice² found that:

¹ 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.

² N. E. Corbett and A. Summerfield (2017) 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

- i) There are wide-ranging views across the judiciary of the appropriate approach to cross-examination in person with *“some judges expressing a desire to allow direct cross-examination of the vulnerable witness by the litigant in person wherever possible. This was partly due to a perceived ‘right’ of the litigant in person to cross-examine if they wish, and partly due to a reluctance from the judiciary to fulfil that role themselves.”*
- ii) Judicial guidance and training on cross-examination in person was mixed with the main form of advice and guidance being informal advice from judicial colleagues.
6. Leaving the question of cross-examination in person to the discretion of the judge will lead to the practice continuing in areas where judges continue to have the attitudes seen above. Furthermore, if the main source of advice and guidance is from judicial colleagues, this will exacerbate the postcode lottery already present within the family justice system where judges practicing in different parts of the country will have different attitudes and approaches to the question.
7. It must be highlighted that the Article 6 right to a fair trial is not a right to cross-examine a witness in person, even in the criminal courts and, in the civil courts, no party has a right to cross-examine witnesses. Victims of domestic abuse who are intimidated into silence by direct cross-examination by the perpetrator are being denied the right to a fair trial.
8. The draft bill creates a distinction between an absolute prohibition on cross-examination and a discretion on the part of the judge to prohibit cross-examination if certain tests are met, called the “significant distress” and “quality” conditions. The absolute prohibition applies when the perpetrator has been convicted of, given a caution for, or is charged with a specified offence, or there is a protective injunction in force protecting the victim.
9. In YJCEA, a defendant charged with a particular offence is automatically prohibited from cross-examining a witness or the complainant. This is because it is accepted that victims of certain offences, for example sexual offences or physical assaults, should be offered protection in order to achieve a fair trial. We have seen no justification from the Ministry of Justice as to why a different approach is being taken in the family court.
10. We believe that the majority of the women that face family law proceedings against the perpetrator of domestic abuse will fall into the discretionary category because the perpetrator will not have been convicted, cautioned, charged or have a protective injunction against them. For example, a report by SafeLives of 811 women in refuge services between 2015-18 showed only 68 women (8%) had a police report made either before or after they entered the refuge and arrests were made in only 44 (65%) of these cases.³

³ p18, [‘Insights refuge England and Wales dataset 2015-18: Adult refuge services’](#) Safelives (2018)

11. Many women do not wish to report domestic abuse to the police and it remains difficult to obtain a non-molestation order, especially in cases of controlling and coercive behaviour, stalking and harassment. However, these are also the cases where judges will find it harder to pick up on behaviour that, in the context of an abusive relationship, is extremely distressing to the victim. The nature of controlling and coercive relationships are such that there will be small behaviours and signals which to an outsider may seem innocuous but are powerful enough to silence the victim. We do not believe that it will be possible for judges to conduct the time consuming enquiry necessary in these cases to properly determine whether the “significant distress” or “quality” conditions are met.
12. We are alert to the significant pressures on the family judiciary and believe that judges, mindful of the additional time that may be required to find and appoint an advocate for the parties, may be less inclined to use the discretion if the allegations are, what they consider to be, “low level”.
13. As a result, we believe that the draft domestic abuse bill will not prevent the direct cross-examination of victims of domestic abuse and for some women, they will continue to be denied the right to a fair trial.
14. We would prefer the nature of the prohibition to follow the approach in YJCEA, where specific alleged behaviour raises the automatic prohibition, rather than action taken by external bodies in relation to that behaviour (convictions, charge, etc). We suggest the draft domestic abuse bill be amended so that if allegations of domestic abuse, child abuse, sexual abuse, stalking or harassment are raised in a case, then there will be an automatic prohibition on the cross-examination in person of any witness.
15. We believe that the proposal to have a discretionary prohibition on cross-examination in person should remain and that the “quality condition” and “significant distress condition” are sensible tests to have to meet. This will ensure that a fair trial is available to any parties that, for whatever reason, may be unable to cross-examine the other party in person.
16. We would add one final concern we have which is that the current prohibition is limited to family proceedings. Women who have experienced domestic abuse, especially specific forms of abuse such as economic abuse, may find themselves facing civil proceedings or having to bring civil proceedings against the perpetrator and these women will continue to lack protection from this abuse under the current proposals.

Rights of Women
15 February 2019