

Domestic Abuse Bill 2020: Cross-examination in family proceedings

What are we going to do?

Prohibit perpetrators and alleged perpetrators of abuse from cross-examining their victims in person in the family court proceedings (and vice versa) in England and Wales.

We are also giving the family court the power to prohibit cross-examination in person in certain other circumstances.

Finally, we are giving the family court the power to appoint a public-funded advocate to carry out the cross-examination where necessary. Guidance will be issued about the scope and nature of that role.

Key Quote

“Few things are likely to retraumatise victims more than being subject to direct cross-examination by their abuser in legal proceedings. Such an experience will inevitably cause immense stress and would of itself be a continuation of the abuse.”

Justice Secretary, Robert Buckland, Commons second reading of the Bill, October 2019

How are we going to do it?

These provisions will introduce an automatic ban on cross-examination in person where one party has been convicted of, given a caution for, or charged with certain offences against the witness (or vice versa). The provisions will also introduce an automatic ban on cross examination in person where an on-notice protective injunction is in place between the party and witness.

We believe that, in addition to victims of domestic abuse, the provisions will provide protection to a wider range of vulnerable people and victims of other types of abuse. We will specify in regulations which offences will trigger the automatic prohibition and expect these to include offences related to domestic abuse or violence, child abuse and sexual abuse.

The automatic ban will also apply where there is other evidence of domestic abuse perpetrated by a party to the proceedings towards a witness (or vice versa). This evidence will also be specified in regulations, and we intend to broadly replicate the evidence criteria used in the legal aid regime.

The provisions will further give the court a power to prohibit cross-examination in person where it would be likely to either diminish the quality of the witness's evidence or cause significant distress to the witness or party.

Finally, the Bill also gives the court the power in specified circumstances to appoint a legal representative to conduct cross-examination on behalf of a party who is prohibited from cross-examining the witness in person. The court-appointed legal representative will be paid from central funds and guidance will be issued about the scope and nature of their role in the proceedings.

Background

Courts hearing family proceedings do not have an express power to prevent a perpetrator or alleged perpetrator of abuse from cross-examining their alleged victim in person, nor do they have the power to order that an advocate be appointed (and funded) to carry out the cross-examination on behalf of the alleged perpetrator.

The fact that it is possible at present for perpetrators (alleged or otherwise) to cross-examine their victims in person in family proceedings has attracted criticism and it is widely accepted that such cross-examination can cause the victim significant distress.

Alternatives to cross-examination in person, such as the judge or a justices' clerk asking questions of the witness instead, already exist. However, there are some circumstances in which these measures would be inadequate and so the Bill provides the courts with specific powers to ensure the fairness of proceedings.

We recognise that family court proceedings in particular can be incredibly difficult for victims, and over the past year we have taken several steps to improve the court process for vulnerable people in the family justice system. This includes introducing in England and Wales new court rules in Part 3A of the Family Procedure Rules 2010 and accompanying Practice Direction 3AA, which are aimed at improving in-court protections for victims of domestic abuse.

We also introduced a revised Practice Direction 12J which makes clear that the court should have full regard for the harm caused by domestic abuse when making decisions about child arrangements, and a new training programme for all court staff on the needs of vulnerable court users.

However, we are determined to further improve the support and protections available for vulnerable witnesses in the family justice system. In June 2020, an MoJ appointed panel of experts published its final report on victims' experiences of private law children's proceedings. The report makes a number of recommendations in relation to both the processes and the outcomes for parties and children involved in such proceedings, based on the evidence submitted, including submissions from over 1,200 organisations and individuals.

Alongside the report, the government published an Implementation Plan, outlining its commitment to overhaul the system. This included immediate changes and commitments to address long-standing issues in the system. That is why we added clause 61 to the Bill, which provides victims of domestic abuse with automatic eligibility for special measures in the family courts.

Clauses 62 and 64 of the Bill also make provision for special measures and prohibiting cross-examination in person in the civil courts respectively. Please refer to the separate fact sheets for further information on clauses 61, 62, and 64.

Do the provisions only apply to victims of domestic abuse?

No. While we anticipate that many victims of domestic abuse will benefit from these provisions, the legislation is not limited to just domestic abuse and will protect a wider range of vulnerable witnesses in the family court.

What about victims who don't have a caution, conviction, charge, or injunction against their abuser?

Our intention is that the provisions should protect every victim of abuse who is a party to family proceedings.

We recognise that many victims either are not able to or choose not to pursue their abuser through the justice system.

The automatic prohibition will therefore also apply where there is other evidence of domestic abuse, such as that relevant for the purposes of accessing civil legal aid in England and Wales.

In addition, this is why the provisions also give the court the power to prohibit cross-examination in person in other circumstances, including where the witness or party would be caused significant distress, or the quality of their evidence would be diminished.

Does this mean cross-examination in the family court is banned?

Cross-examination will not be banned in the family court. Where cross-examination in person is prohibited, the provisions require the court to consider satisfactory alternatives and where there are none, give the court the power to appoint an advocate for the sole purpose of cross-examining the witness on behalf of the party.

Will public funding for a representative be made available in every case where the prohibition applies or is ordered?

The court will appoint a qualified legal representative it decides that it is necessary in the interests of justice to do so.

The provisions require the court to first consider if there are any satisfactory alternative means for the witness to be cross-examined or to obtain the evidence that they might have given in cross-examination.

If there is are no satisfactory alternatives, the court must invite the party to appoint a legal representative to cross-examine the witness. If the party does not do so, the court can appoint a legal representative to carry out the cross-examination, paid for from central funds.

The court-appointed legal representative would not be acting for the party as their lawyer and will only be responsible for cross-examining the witness.