
Prohibition of Cross-Examination in Family Proceedings

Consultation Response

Introduction

1. The Bar Council is the regulatory and representative body of the Bar of Northern Ireland. Members of the Bar specialise in the provision of expert independent legal advice and courtroom advocacy. Access to training, experience, continual professional development, research technology and modern facilities within the Bar Library enhance the expertise of individual barristers and ensure the highest quality of service to clients and the court. The Bar Council is continually expanding the range of services offered to the community through negotiation, tribunal advocacy and alternative dispute resolution.
2. The Bar welcomes the opportunity to comment on the Department of Justice's consultation on protecting victims of domestic abuse from being cross-examined by the perpetrator in person in the family courts. Representing the views of counsel working in every tier of the family courts, the Family Bar Association serves to ensure an independent and quality source of specialist legal advocacy in this area. The Bar recognises that cases being dealt with in the family courts often deal with complex, emotive and sensitive issues and members of the FBA have direct experience of representing parties to family proceedings who have been cross-examined by personal litigants, creating the potential for a victim of domestic abuse to be cross-examined by their abuser, which can have a significant and lasting impact on this individual. These views have helped to inform the Bar's consultation response which is structured to provide a summary of some issues requiring further examination, particularly in relation to financial and economic abuse, before focusing on the specific consultation questions.

Summary

3. The Bar is concerned that there is no clear definition of the family court included in the consultation paper. It is evident that this extends to courts considering applications for protective orders and courts considering plans for children following a separation. However, there is no explicit mention of the Ancillary Relief Court which is the court that determines financial disputes following the breakdown of a marriage. This is not to suggest that these courts will be excluded from any legislative change but is simply meant to highlight the need for policy makers to ensure that the impact of litigation misconduct and financial abuse in financial proceedings is considered given that it is often a continuation of coercive and controlling behaviour.

Prohibition of Cross-Examination in Family Proceedings

Consultation Response

4. We note that the consultation paper provides no statistical evidence on cases in the family courts involving admitted or alleged domestic abuse in which a personal litigant has cross-examined an alleged victim. Anecdotal evidence from members suggests that there has been a marked increase in the number of personal litigants in our family courts. There is a growing concern amongst family lawyers that some litigants have chosen to act as personal litigants because they have realised that they can exploit their Article 6 rights within the court system and continue to act in a controlling and manipulative manner against their former partner whilst representing themselves. These litigants fail to comply with acceptable standards of behaviour which damages the family justice system and often has a significant impact on the other parties to the proceedings.
5. The Bar also notes the recognition in the consultation paper that there is currently no statutory definition of domestic abuse in Northern Ireland but that the 'Stopping Domestic and Sexual Violence and Abuse Strategy' published jointly by the Department of Justice and the Department of Health in 2016 defined Domestic Abuse as "threatening, controlling coercive behaviour, violence or abuse (psychological, virtual, physical, verbal, sexual, financial or emotional) inflicted on anyone (irrespective of age, ethnicity, religion, gender, gender identity, sexual orientation or any form of disability) by a current or former intimate partner or family member".
6. The Bar considers that this may be an area which requires further consideration by the Department as part of any future work. The draft Domestic Abuse Bill in England provides a statutory definition of domestic abuse in Chapter 1. Section 1(3) outlines that behaviour is "abusive" if it consists of any of the following: (a) physical or sexual abuse; (b) violent or threatening behaviour; (c) controlling or coercive behaviour; (d) economic abuse; (e) psychological, emotional or other abuse. Section 1(4) goes on to define "economic abuse" as "any behaviour that has a substantial adverse effect on B's ability to (a) acquire, use or maintain money or other property, or (b) obtain goods or services".
7. The 'Transforming the Response to Domestic Abuse' consultation paper issued by the Home Office and Ministry of Justice in 2018 in relation to England and Wales extended the definition of domestic abuse to include the concept of 'economic abuse' rather than simply financial abuse. This highlighted that whilst "the current non-statutory government definition of domestic abuse already recognises financial abuse, we are aware that this can be restrictive in circumstances where victims may be denied access to basic resources such as food, clothing and transportation. In addition, victims may be forced into taking out loans or entering into other financial contracts by the perpetrator. We therefore want to

Prohibition of Cross-Examination in Family Proceedings

Consultation Response

take a more expansive approach to account for all these forms of abuse". The Bar would welcome such an approach also being taken in Northern Ireland given that this broader concept of economic abuse is very relevant to the family courts. This is explored in further detail in our response to question 4.

8. Furthermore, there is some concern amongst practitioners that the legislative options outlined in the consultation paper will not be implemented until the Executive and Assembly are restored. We note the references throughout the consultation paper to the Domestic Abuse Bill in England and Wales. We would welcome the Department considering, together with the UK Government, whether it would be appropriate for any provision to prevent cross-examination by perpetrators of domestic abuse in person in family proceedings in Northern Ireland being included within the Bill. We note the decision by the Supreme Court in *R (on behalf of Miller) v The Prime Minister* and *Cherry and others v Advocate General for Scotland* on 24 September that the prorogation of Parliament was unlawful, void and of no effect meaning that the legislative journey of the Domestic Abuse Bill should now be able to continue in the House of Commons.

Q1(a). Do you agree that there should be a statutory prohibition on a party to family proceedings cross-examining another party or a witness in the proceedings in person in the following circumstances:

(i) Where the party has been convicted of a specified criminal offence against the person to be cross-examined?

9. Yes. The Bar notes that at present the courts in Northern Ireland hearing family proceedings have no specific legislative powers to prevent a perpetrator of abuse from cross-examining a victim in person. Instead, the courts rely on general case management powers, for example, to prevent inappropriate or irrelevant questions or, in some instances, by questions being put to the witness through the judge which can cause confusion for the victim about the role of the judge. Practitioners indicate that there is no specific judicial guidance and the way in which the cross-examination of a vulnerable witness by a personal litigant is managed is a matter for the judge hearing the case to decide. This is all being managed by the judiciary and legal professionals who are trying to address this issue with the limited facilities available in the family courts.
10. This lack of legislative provision for family proceedings contrasts starkly with the position in criminal proceedings, where there is specific legislative provision under the Criminal Evidence (Northern Ireland) Order 1999 which prohibits an unrepresented defendant from cross-examining in person the alleged victim of a

Prohibition of Cross-Examination in Family Proceedings

Consultation Response

sexual offence. In cases where the statutory prohibition on cross-examination in person by an unrepresented defendant does not apply, the court can, on an application by the prosecution or of its own motion, make a direction preventing an unrepresented defendant from cross-examining a witness in person. Article 26 of the 1999 Order allows for the appointment of a legal representative to conduct the cross-examination, if it considers this is necessary in the interests of justice. The Bar also concurs with the recommendation of Lord Justice Gillen's Review of Family Justice published in 2017 which called for the introduction of legislation similar to the Criminal Evidence (Northern Ireland) Order 1999 for the protection of witnesses from cross-examination by personal litigants.

11. Members also indicate that there is no statutory scheme of special measures for vulnerable witnesses to support them in giving evidence in the family courts unlike in the criminal courts. Judges and legal practitioners are already trying to address this as much as possible by improvising with the facilities already available in the family courts. Whilst the proposals in this paper around the prohibition of cross-examination are welcome, it is unfortunate that it does not include proposals for special measures in the family courts.

Q1(a). Do you agree that there should be a statutory prohibition on a party to family proceedings cross-examining another party or a witness in the proceedings in person in the following circumstances:

(ii) Where the party has been given a caution for a specified criminal offence against the person to be cross-examined?

12. Yes. The Bar agrees that in family proceedings, no party to the proceedings who has been given a caution for a specified offence should be able to cross-examine in person a witness who is the victim, or alleged victim, of that offence. We would also expect provision to be made to ensure that no party to the proceedings who is the victim, or alleged victim, of a specified offence may cross-examine in person a witness who has been given a caution for that offence. We would expect the meaning of "caution" to be fully defined in any legislation.

Q1(a). Do you agree that there should be a statutory prohibition on a party to family proceedings cross-examining another party or a witness in the proceedings in person in the following circumstances:

(iii) Where the party has been charged with a specified criminal offence against the person to be cross-examined?

Prohibition of Cross-Examination in Family Proceedings

Consultation Response

13. Yes. The Bar agrees that in family proceedings, no party to the proceedings who has been charged with a specified criminal offence should be able to cross-examine in person a witness who is the victim, or alleged victim, of that offence. We would also expect provision to be made to ensure that no party to the proceedings who is the victim, or alleged victim, of a specified offence may cross-examine in person a witness who has been charged with that offence. It will also be important to ensure that the specific criminal offences in respect of which a conviction would engage such a prohibition are comprehensively prescribed either in the primary legislation or secondary legislation made under it to include sexual offences, violent offences and children abuse offences.

Q1(a). Do you agree that there should be a statutory prohibition on a party to family proceedings cross-examining another party or a witness in the proceedings in person in the following circumstances:

(iv) Where the party has an “on-notice” civil court order in force against them made for the protection of the person to be cross-examined?

14. Yes. The Bar agrees that the person who is protected by the civil court order should not be cross-examined by the person against whom the injunction is in force, and the person against whom the civil court order is in force should not be cross-examined by the person protected by it. The circumstances pertaining to an “on notice” civil court order would need to be defined in any legislation to ensure that the party who is subject to an any order is given notice of the application and has the opportunity to request a hearing to allow the court to vary or remove the order. In addition, we would expect that the relevant civil court orders would be defined either in the primary legislation or secondary legislation, including a non-molestation order made under the Family Homes and Domestic Violence (Northern Ireland) Order 1998 or an order made under The Protection from Harassment (Northern Ireland) Order 1997.

15. Practitioners also indicate that there are circumstances where a witness may have an ex-parte order in force which could also justify protection from cross-examination. This may be worthy of consideration as otherwise a situation could arise where it is the “on notice” hearing (and thus no decision has been made about an “on notice” order) where the evidence is being given.

Q1(b). Are there any other circumstances in which an absolute prohibition on cross-examination in person should apply?

Prohibition of Cross-Examination in Family Proceedings

Consultation Response

16. No further comments on this.

Q2(a). Do you agree that courts hearing family proceedings should be given a discretionary power to prevent a party conducting cross-examination of another party or witness in person? Please explain your reason(s), especially if you disagree.
(b) Do you have any views on the circumstances in which such a discretionary power could be exercised? Please explain your reason(s).

17. Yes. The Bar takes the view that there should be circumstances where the court has the discretion to prohibit cross-examination in person by being able to give a direction to that effect. The discretion could be exercised if someone involved in the proceedings applies for this to happen or if the court raises the issue. The Bar agrees that any legislation should make similar provision to Section 24(2) of the Criminal Evidence (Northern Ireland) Order 1999 which permits the court to make a direction prohibiting the cross-examination of a witness in person if it appears that the quality of the evidence given by the witness would likely be diminished by being cross-examined and would be likely to be improved if a direction were given by the court. This should also include a clause that it will not be contrary to the interests of justice to direct that cross-examination by a party in person is prohibited.

18. In determining whether this evidence quality condition is met, it might also be helpful to set out a range of factors which the court should consider such as any finding of fact that has been made about the party's or the witness's behaviour and the relationship between the party and the witness. However, this should not be exhaustive and the court should be able to have regard to other matters that it considers relevant when considering whether the quality condition is met.

19. The Bar also notes that the draft Domestic Abuse Bill in England and Wales contains a "significant distress" provision which also allows the court to exercise this discretionary power if the cross-examination in person would be likely to cause significant distress to the witness or the party and the distress caused is likely to be greater than if they were cross-examined other than by the party in person. The Bar considers that this provision might be worth considering for any legislation developed in Northern Ireland.

20. Furthermore, it might also be worth allowing civil court orders which have previously been in force to be included within the court's discretionary power. For example, this could include a complaint of historical rape which was never

Prohibition of Cross-Examination in Family Proceedings

Consultation Response

subject to a criminal complaint or it could be some years after a non-molestation order which may have lapsed. We would reiterate that the court's discretion should be a wide one to allow the individual circumstances to be considered in a fact sensitive way.

3. Do you agree that making provision for a legal representative to carry out cross-examination on behalf of a party prevented from doing so in person, including provision for the court to appoint a publicly funded legal representative, is sufficient to protect the ECHR rights of that party?

21. Yes. As the paper notes in section 5, the options for legislation such as an absolute prohibition would likely only apply in certain, particularly serious, circumstances set out in legislation and exercise of the court's discretion would be subject to prescribed conditions. The provision for alternatives to cross-examination in person, including the facility for the court to appoint a publicly funded legal representative to conduct the cross-examination, would also provide another important protection within the family court system.
22. We take the view that the relevant party simply being warned that personal cross-examination is not permitted and then being left to source their own representation if they choose to do so would not provide an adequate counterbalancing safeguard to the loss of the right to cross-examine, as a lay person may not always appreciate the disadvantage involved or have the means to engage legal representation. Such an approach alone would be unlikely to be compliant with the relevant person's Article 6 right to a fair hearing, nor Article 8 rights to respect for family life and therefore provision for the court to appoint a publicly funded legal representative will be essential.
23. There are also connected matters which would also need to be considered in relation to the appointment by the court of a representative. It will be necessary for there to be careful case management procedures in place so that any issue in relation to this is identified at a relatively early stage in order to avoid excessive delays. It is worth noting that it might be difficult for a legal representative to be instructed solely to conduct the cross-examination in isolation and therefore they may need to be involved throughout the case, depending on the particular circumstances.
24. The Bar has also reviewed section 31V of the Domestic Abuse Bill in England and Wales which provides for alternatives to cross-examination in person. This states at 31(V)(5) that the court must consider whether it is necessary "in the interests

Prohibition of Cross-Examination in Family Proceedings

Consultation Response

of justice for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party”. Section 31(V)(6) highlights that “if the court decides that it is, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the party”. 31W then goes on to deal with the costs of legal representatives appointed under section 31(V) and states at (1) that “The Lord Chancellor may by regulations make provision for the payment out of central funds of sums in respect of 5(a) fees or costs properly incurred by a qualified legal representative appointed under section 31V and (b) expenses properly incurred in providing such a person with evidence or other material in connection with the appointment”.

25. The Bar considers that a similar legislative model could be workable in Northern Ireland. As outlined earlier in our response in relation to the specific proposals, similar provisions for the appointment of a publicly funded legal representative would also be needed to ensure that any self-representing victim in the family courts is not placed in a position to have to personally cross-examine their abuser too.

Q4. Do you have any comments to make on the draft Equality Screening form?

26. The Bar notes that section six states that the options for legislation would have a cost impact for the Department in respect of funding legal representatives to conduct cross-examination on behalf of perpetrators of domestic abuse. Whilst this is not expected to be “significant” according to the paper, the Bar would welcome the opportunity to engage with the Department on this as part of the development of any future proposals for legislation. Based on comments made elsewhere in our response, we would also envisage that this cost implication would need to extend to publicly funded legal representation for any self-representing victim in the family courts too so they are not placed in a position of having to personally cross-examine their abuser. We note no reference is made to this in the Department’s consultation paper.

27. More broadly in terms of access to publicly funded legal services, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 in England and Wales created difficulties for vulnerable parties involved in domestic violence cases after virtually all private family law issues were removed from the scope of legal aid. The Bar would highlight the importance of private family law remaining within scope in this jurisdiction, alongside financial eligibility scales, to ensure access to

Prohibition of Cross-Examination in Family Proceedings

Consultation Response

justice and allow those who need advice and representation to receive it, particularly in relation to those bringing and defending non-molestation orders in the family courts.

28. In addition, as outlined above there is some concern amongst practitioners that the impact of litigation misconduct and economic abuse in financial proceedings is not fully considered in this paper given that it can often represent a continuation of coercive and controlling behaviour and often has a particular impact on women. Practitioners indicate that a perpetrator of abuse in this context will typically be more financially dominant than their spouse and may, for example, refuse to pay spousal maintenance, effectively pushing the more financially vulnerable spouse into accepting a lesser amount than they are entitled to, provide incomplete disclosure of any assets or fail to attend court causing delay. There are some legal protections against this, for example a spouse can obtain an injunction to freeze the assets where there is a risk of them being dissipated and the court can award a larger share of assets and order costs against the perpetrator to penalise financial misconduct.
29. It would also be useful to consider which party is initiating the legal proceedings in the family courts, particularly in relation to ancillary relief; the 'Transforming the Response to Domestic Abuse' consultation paper issued by the Home Office and Ministry of Justice in 2018 in relation to England and Wales appeared to suggest that some men deliberately bring legal proceedings post-separation yet the experience of practitioners in the area of ancillary relief suggests that is often women who are forced to initiate legal proceedings due to the continued economic abuse that they suffer post-separation. For example, bills not being paid and/or the bank threatening to repossess the matrimonial home. The Bar is not aware of any research to support this point as it is based on comments from practitioners but we would welcome any further information that the Department might be able to provide.
30. This also raises questions around how the courts in Northern Ireland tackle abuse by a financially dominant spouse and whether it may be an unwitting facilitator of abuse by the perpetrator against the victim. For example, in practice the court can be unwilling to provide timely maintenance hearings and can refuse to order the perpetrator to pay the legal costs of maintenance proceedings, making the application prohibitive for the financially vulnerable spouse who often endures ongoing financial hardship. Consequently, there can be little disincentive for a perpetrator not to use the court system as a means to continue to assert financial control over a spouse.

Prohibition of Cross-Examination in Family Proceedings

Consultation Response

31. It is also worth noting the English Court of Appeal decision in the case of *Imerman* [2010] EWCA Civ 908 which has been followed by our courts and relates to the disclosure of financial documentation on separation. It acknowledged that whilst there was a need to ensure that a husband did not avoid his liability by concealing his assets on divorce, communications which are concerned with an individual's private life, including his personal finances and personal business dealings are confidential and are specifically covered by Article 8 of the Convention, which confers the right to respect for privacy and expressly mentions correspondence.
32. In *Imerman*, the Court decided that neither the wife nor another person on her behalf were entitled to breach the husband's rights to protect the confidentiality of his documents and information. Since the *Imerman* decision, when the financially dominant spouse eventually provides some disclosure and their spouse discloses documents that he/she has more assets, the Court's attention is turned to the litigation misconduct rather than the failure to disclose assets. The court's powers are limited when dealing with this problem and it often appears that behaviour which is economic abuse is being treated as litigation misconduct rather than also being seen as a continuation of domestic abuse.
33. In summary, this is an area which deserves some recognition in this consultation paper. Whilst there are both protections and failings within the legal system for victims of financial abuse in this jurisdiction, the potential for abuse requires further scrutiny by policy makers and the courts to ensure that the legal system does not act as a forum for continued domestic abuse and control.