Civil Justice Council consultation on vulnerable witnesses and parties within civil proceedings

Response of the Equality and Human Rights Commission

Consultation details

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Scope of the Commission’s response

The Equality and Human Rights Commission (the Commission) has statutory duties and powers under the Equality Act 2010 to promote understanding of, and encourage good practice in relation to, human rights law and equality law.

One of the Commission’s key aims under our Strategic Plan 2019 – 2022 is to reduce barriers to justice for women and girls who have survived violence; our work in this area has included work seeking to improve the access to justice provisions in the Domestic Abuse Bill. In light of this and in light of the Civil Justice Council’s stated aim that responses to this consultation should inform the Domestic Abuse Bill,¹ we have limited the scope of our response to considerations relevant to improving the participation of survivors of domestic abuse and sexual violence in cases before the civil courts. However, the question of the measures required in civil proceedings to protect vulnerable witnesses and enhance their participation in proceedings also engages a number of other areas relevant to the Commission’s work, including the rights of:

- Disabled witnesses, who are protected from discrimination under the Equality Act 2010 (subject to the judicial exemption), as well as under Articles 6 and 14 European Convention on Human Rights (ECHR) and the United Nations Convention on the Rights of Persons with Disabilities.

- Survivors of human trafficking, for whom there are specific provisions relating to the protection of witnesses in the Council of Europe Convention on Action Against Trafficking in Human Beings.

- Survivors of race, sexual orientation, or religion-based violence, who are protected from discrimination under the Equality Act 2010 as well as under international treaties.²

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¹ Civil Justice Council, Consultation paper on vulnerable witnesses and parties within civil proceedings, August 2019, paragraph 15.
² Such treaties include: the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Elimination of All Forms of Racial Discrimination.
Survivors of domestic abuse and sexual violence may participate in cases in the civil courts in a variety of circumstances including, but not necessarily limited to: seeking a protective injunction, such as an harassment injunction; seeking damages for sexual violence, domestic abuse or child abuse; or defamation proceedings in relation to those making accusations.\(^3\)

The Commission considers that there should be adequate and consistent protections and procedural safeguards available to survivors of domestic abuse and sexual violence across all criminal, family and civil proceedings. This was also the view of the Joint Committee on the draft Domestic Abuse Bill, which, as the Council noted in its report, recommended “a single consistent approach…across all criminal and civil jurisdictions.”\(^4\) The Joint Committee on Human Rights has similarly asked the government, in relation to measures in the Domestic Abuse Bill concerning criminal and family courts, to “clarify whether it has given consideration to extending these protections to the civil courts, in order to protect the victims no matter where they are involved in litigation.”\(^5\)

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3 The Times, 14 February 2019, ‘Courts ‘are silencing abused women’.
5 Letter of Joint Committee on Human Rights to Victoria Atkins MP and Edward Argar MP, 10 April 2019.
The Commission also considers that adequate procedural protections and safeguards for survivors of domestic abuse and sexual violence across all court jurisdictions are required in order for the UK to comply with its international human rights law obligations, as set out in Article 6 ECHR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) (which the government has stated its intention to ratify).

**Question 1**

Are there issues in relation to vulnerable parties/witnesses in the civil courts that have not been covered/adequately covered within this preliminary report? If so please give relevant details.

The Commission considers that issues around the participation of survivors of domestic abuse and sexual violence in the civil courts have not received adequate coverage in the preliminary report. The Council states that, “unlike the approach under section 17(4) Youth Justice and Criminal Evidence Act 1999 (or as proposed in the Domestic Abuse Bill), the Council does not believe that a party or witness should axiomatically be deemed vulnerable, or receive automatic special measures, simply because of the subject matter or nature of the action.”\(^6\) The Commission disagrees. Failure to set out in the CPR and/or in legislation a presumption that in relevant circumstances witnesses who are or are likely to be vulnerable as a result of domestic abuse or sexual violence should be eligible for special measures (including a prohibition on cross-examination in person),\(^7\) leaves this question to be decided on a case by case basis at the court’s discretion. Reliance on judicial discretion alone can cause particular problems in cases where domestic abuse or sexual violence is an issue. A recent MOJ study in relation to the family courts, which included interviews with judges, found highly inconsistent application of judicial discretion both with respect to cross-examination in person

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\(^6\) Civil Justice Council, Consultation paper on vulnerable witnesses and parties within civil proceedings, August 2019, paragraph 140.

\(^7\) The presumption in favour of special measures could of course be rebutted if an individual did not wish for special measures.
of a vulnerable witness by an alleged abuser, and with respect to special measures. In relation to cross-examination in person the study states:

“Some judges expressed a desire to allow direct cross-examination of the vulnerable witness by the litigant in person wherever possible. [...] Other judges took an opposing stance, believing that court was a generally stressful experience for the parties, without the additional stressors of cross-examination.”

In relation to special measures, the study stated:

“The judicial view on these special measures varied, and one judge referred to them as ‘normal measures’, on the basis that they should be available to anyone who felt they needed them. Conversely, other judges were more hesitant and saw their use as a tactical tool within the case.”

Whilst this study considered only the family courts, there is no reason to believe that judicial attitudes in the civil courts (where individual judges may be less likely to have experience of cases involving sexual violence or domestic abuse) would be any more consistent.

Reliance on judicial discretion can also put the onus on a survivor to ‘prove’ their vulnerability or fear and distress, which risks poor decisions due to stereotypes as to what constitutes a ‘typical’ survivor of domestic abuse or sexual violence – for example, the myth that all survivors will be visibly distressed when giving evidence. Although progress has been made in recent years towards dismantling these stereotypes, such stereotypes have been shown to still be routinely used in rape and sexual assault criminal trials. There is no reason to suppose they are any less prevalent in relevant civil cases, such as damages

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9 Ibid, pp. 15-16.
10 Ibid, p.25.
claims for injury caused by rape or sexual violence. This can be addressed to a certain extent, but not fully, by judicial training.

Further, bringing court proceedings against a survivor can be used as a tool of abuse in and of itself. This is most common in the family courts but can also be an issue in the civil courts. For example, there are recent reports of defamation cases being used to prevent those making accusations from speaking out in public against alleged abusers. Reliance on training alone to ensure judicial awareness of this is unlikely to be sufficient, for the reasons set out above.

**International human rights framework**

The international human rights framework makes clear that survivors of domestic abuse and sexual violence have a right to protective measures and procedural safeguards across all kinds of judicial proceedings, including civil proceedings, to enable their full participation in such proceedings.

The right to a fair trial under Article 6 ECHR includes participation in civil proceedings. In *Dombo Beheer BV v the Netherlands* (1993) 18 EHRR 213 the Court set out that:

> “as regards litigation involving opposing private interests, "equality of arms" implies that each party must be afforded a reasonable opportunity to present his case - including his evidence - under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”

In the view of the Commission, allowing cross-examination in person of a survivor by an abuser, or failure to provide special measures, both of which may impair a survivor’s ability to present their case effectively due to fear or distress, may breach the principle of equality of arms, as protected by Article 6.

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13 The Times, 14 February 2019, *Courts 'are silencing abused women'*.  
14 *Dombo Beheer BV v the Netherlands* (1993) 18 EHRR 213, paragraph 33.
Further, the European Court of Human Rights has consistently held that survivors of gender-based violence are entitled to the protection of the prohibition from discrimination under Article 14 ECHR. In the Commission’s view, a failure to afford survivors of gender-based violence a fair and reasonable opportunity to present their case may therefore breach Article 14 ECHR together with Article 6.

In relation to CEDAW, to which the UK is a party, General Recommendation 33 states that states must “Ensure that the physical environment…of judicial and quasi-judicial institutions and other services are welcoming, secure and accessible to all women” (15 (e)) and must “Protect women complainants, witnesses, defendants and prisoners against threats, harassment and other harm before, during and after legal proceedings” (18 (g)).

In General Recommendation 35, in relation to myths and stereotypes around gender-based violence, the CEDAW Committee makes clear that “The application of preconceived and stereotyped notions of what constitutes gender-based violence against women, what women’s responses to such violence should be and the standard of proof required to substantiate its occurrence can affect women’s right to the enjoyment of equality before the law, fair trial and the right to an effective remedy established in articles 2 and 15 of the Convention” (26(c)).

Article 56 of the Istanbul Convention requires states to “take the necessary legislative or other measures to protect the rights and interests of victims…at all stages of investigations and judicial proceedings…”. The Convention specifies a number of measures which are particularly relevant with respect to prohibition of cross-examination in person and provision of special measures. States must (inter alia):

- provide for victims’ protection from intimidation, retaliation and repeat victimisation (Article 56 1(a));

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15 See e.g. European Court of Human Rights, Opuz v Turkey (2010) 50 EHRR 28.
16 CEDAW, General Recommendation No. 33 on women’s access to justice, 23 July 2015, CEDAW/C/GC/33.
17 CEDAW, General Recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 14 July 2016, CEDAW/C/GC/35.
• provide victims with appropriate support services so that their rights and interests are duly presented and taken into account (Article 56 1(e));

• ensure that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible (Article 56 1(g));

• enable victims to testify in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available (Article 56 1(i)).

Question 2

Do you agree with the proposed recommendations set out at section 7? If not why not?

Recommendation 1

We agree with the Council’s recommendation at paragraph 138 that “consideration should now be given by the Civil Procedure Rule Committee to rule changes either by amendment to the overriding objective and/or the inclusion of a rule and/or PD to provide equivalent structured consideration to that achieved by rule 3A (and Practice Direction 3AA) of the Family Procedure Rules (FPR).” We welcome the outlined rule change at Recommendation 1 but we think that the changes should go further. We consider rule 3A (and Practice Direction 3AA of the FPR) a good starting model for focussing the court’s attention on the issue of vulnerability, in particular the recognition in FPR 3A 7(d) (read with Practice Direction 3AA) that concerns arising in relation to domestic abuse must be taken into account when deciding to make participation directions with respect to vulnerability. This should be made clear in any new CPR, and sexual violence should also be included as an

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18 FPR 3A and PD 3AA covers: “Vulnerable persons: participation in proceedings and giving evidence” and obliges the court to consider whether a party’s participation in proceedings or the quality of evidence given by a party or witness, is likely to be diminished by reason of vulnerability and, if so, whether it is necessary to make participation directions, before setting out a range of factors to which the court must have regard.
additional factor to take into account. We consider that the Council should provide a full draft of the proposed new rule and invite public consultation on its contents.

However, we do not consider that changes to the CPR alone are sufficient to address the issues we have outlined above. We agree with Recommendations 2-7 but, likewise, do not consider the changes in these Recommendations alone sufficient to address the issues outlined above. We therefore consider that there should be provision for: (i) an automatic prohibition of cross-examination in person of a survivor by an alleged perpetrator in all cases where domestic abuse or sexual violence is raised or where the party who is to examine the survivor has been found or has admitted (whether in civil, family or criminal proceedings) to have perpetrated domestic abuse or sexual abuse (with provision made for the appointment of a legal representative to conduct the cross-examination and the payment out of central funds to cover such representation); and (ii) a presumption of eligibility for special measures for survivors of domestic abuse or sexual violence. We set out further details under Question 3 below.

**Recommendation 3**

We welcome the recommendation for enhanced training for civil judges in relation to issues of vulnerability and recommend that there is specific training to counter misconceptions and myths around domestic abuse and sexual violence and other forms of gender-based violence (as outlined above). We do not consider judicial training alone sufficient to address the issues outlined in this response.

**Question 3**

Do you believe that there should be further or alternative recommendations? If so please set out relevant details.

**Cross-examination in person**

In relation to cross-examination in person, the Domestic Abuse Bill’s current provisions introduce in the family courts an automatic prohibition of cross-
examination in person of a victim by a perpetrator in domestic abuse cases, but only where that perpetrator has been convicted, cautioned or charged with a “specified offence” (to be defined in secondary legislation) or where there is a with-notice protective injunction in place.\(^{19}\) In other cases, prohibition of cross-examination will be left to the discretion of the judge.

Cross-examination in person in cases where domestic abuse is an issue is well-recognised as being re-traumatising for survivors\(^{20}\) and a means by which perpetrators can continue their abuse.\(^{21}\) The same is true for survivors of sexual violence, as recognised by the provisions in Sections 34 -35 of the Youth Justice and Criminal Evidence Act 1999, which bar defendants from cross-examining in person complainants of sexual offences.

In recognition of this, the Commission considers that the cross-examination in person of a survivor by an alleged perpetrator should be prohibited across all criminal, family and civil jurisdictions in all cases where domestic abuse or sexual violence is raised or where the party who is to examine the survivor has been found or has admitted (whether in civil, family or criminal proceedings) to have perpetrated domestic abuse or sexual abuse (with provision made for the appointment of a legal representative to conduct the cross-examination and the payment out of central funds to cover such representation).

**Special measures**

Special measures can include separate waiting rooms, separate entrance and exit times for the parties, screens and video-links; these serve to protect the survivor and go some way to reducing the re-traumatising effect of the court process. The Domestic Abuse Bill creates a presumption that survivors of domestic abuse are eligible for special measures in the criminal court, but does not extend this presumption to the family or civil courts. In the family courts, despite FPR 3A and

\(^{19}\) Section 75, *Domestic Abuse Bill*.


\(^{21}\) Rights of Women, Written Evidence to the Joint Committee on Human Rights on the draft Domestic Violence and Abuse Bill, 15 February 2019, para 3.
Practice Direction 3AA, it is widely reported that special measures are not being provided often enough, and, when they are provided, they are often inadequate. Recent Women’s Aid research reported that 61% of domestic abuse survivors had not had any form of special measures in the family court.\textsuperscript{22} Of the 35% who had accessed some type of special measure, the measures were only in place in some of the hearings they attended, rather than all.\textsuperscript{23} The Women’s Aid research also reveals inconsistent judicial attitudes where requests for special measures are made.\textsuperscript{24} As highlighted above, this suggests that reliance on judicial discretion alone in the civil courts, even with the guidance of a new civil procedure rule similar to FPR 3A and PD 3AA, would be insufficient.

The Commission therefore considers there should be a presumption of eligibility for special measures for survivors of domestic abuse and sexual violence across the criminal, family and civil courts.

\textsuperscript{22} Women’s Aid, “What about my right not to be abused? Domestic abuse, human rights and the family courts”, 2018.
\textsuperscript{23} Ibid.
\textsuperscript{24} Ibid, p.28.