Ms Melissa Case & Ms Nicola Hewer

Director of Family and Criminal

Justice Policy,

Ministry of Justice

102 Petty France,

London SW1H 9AJ

Date: 21 August 2019

Dear Ms Case and Ms Hewer

**Call for evidence: Assessing risk of harm to children and parents in private law children cases**

I am writing to you in your capacity as Chair of the family justice panel steering the [call for evidence](https://consult.justice.gov.uk/digital-communications/assessing-harm-private-family-law-proceedings/consultation/) on assessing risk of harm to children and parents in private law children cases.

We note that the questions in the call for evidence are aimed at individuals with direct personal experience of these matters and organisations and professionals who work within the family justice system. As such, the Equality and Human Rights Commission (the Commission) will not be submitting a formal response.

However, the Commission is closely following the passage of the Domestic Abuse Bill (the Bill), in the context of our work to advise Government and Parliamentarians on the equality and human rights implications of laws and proposed laws. We are writing to highlight two areas we have identified in the Bill where we consider amendments are required to adequately protect domestic abuse survivors[[1]](#footnote-1) in the family courts, namely: broadening the prohibition on cross-examination in person to all cases where domestic abuse is alleged; and extending the presumption of special measures for survivors of domestic abuse to the family and civil courts.

**1. Human rights obligations**

The government has positive obligations under Article 3 of Schedule 1 of the Human Rights Act 1998[[2]](#footnote-2) (prohibition on torture or inhuman or degrading treatment) to prevent continued exposure to domestic abuse (where it reaches the Article 3 severity threshold), where the government has knowledge that a victim is vulnerable to it. This duty to protect can apply to domestic abuse that is continued through cross-examination in person and may apply beyond cases where there is a conviction, charge, caution or an injunction against the perpetrator.[[3]](#footnote-3)

Article 8 (right to respect for private and family life) also requires the government to take steps to protect the physical and psychological integrity of victims from abusers. Further, cross-examination in person of a domestic abuse victim by an alleged perpetrator could amount to a breach of the victim’s Article 6 right to a fair trial, as can a failure to put in place special measures to enable a victim to participate effectively in the proceedings.

Under Article 56 of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention), which the government intends to ratify by means of the Bill, the government is obliged 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 [Istanbul Convention](https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e) specifies a number of measures which are particularly relevant with respect to prohibition of cross-examination in person and provision of special measures. The government must (*inter alia)*:

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

**2. Prohibition of cross-examination in person**

The 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.[[4]](#footnote-4) 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[[5]](#footnote-5) and a means by which perpetrators can continue their abuse.[[6]](#footnote-6) It remains a significant problem for domestic abuse survivors in the family courts, with a recent survey by Women’s Aid finding that 24% of respondents had been cross-examined by a perpetrator.[[7]](#footnote-7)

The provisions in the Domestic Abuse Bill are insufficient to protect survivors from this continued abuse. Specialist organisations believe that the majority of women facing family law proceedings against perpetrators of domestic abuse will fall into the discretionary category, due to the high levels of domestic abuse which goes unreported to police. A report by SafeLives showed only 8% of women had a police report made either before or after they entered a refuge and arrests were made in only 65% of these cases.[[8]](#footnote-8)

Relying on the court’s discretion in this context leads to inconsistency in application, as highlighted by Ministry of Justice research conducted in 2017, which found a wide range of differing views among the judiciary as to the correct approach to take to cross-examination in person in family law cases.[[9]](#footnote-9) Such inconsistency of application causes confusion and uncertainty for survivors, and will leave too many survivors unprotected.

*Commission recommendation*

We recommend that the automatic prohibition of cross-examination in person of a victim by a perpetrator be extended to all cases where domestic abuse is alleged. Although it is outside the scope of this consultation, we note here our recommendation that this automatic prohibition also be extended to the civil courts, to ensure protection is extended no matter where victims have to face their perpetrators in litigation.[[10]](#footnote-10)

**3. Provision of special measures in the family courts**

The Bill creates a presumption that victims of domestic abuse are eligible for special measures in the criminal court, but does not extend this presumption to the family court. 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 Bill is silent as regards the provision of special measures outside the criminal courts.

Part 3A of the Family Procedure Rules, together with Practice Direction 3AA (introduced in 2017), gives the court discretion to order special measures where a party’s participation in proceedings and the quality of their evidence is likely to be diminished by reason of vulnerability.

However, it is widely reported that special measures in the family court 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.[[11]](#footnote-11) 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.[[12]](#footnote-12) The research also reveals inconsistent judicial attitudes where requests for special measures are made.[[13]](#footnote-13) Prominent members of the judiciary have long been calling for protections for victims of domestic abuse in the family courts to be aligned with those in the criminal courts[[14]](#footnote-14) and yet witnesses to the Joint Committee on the draft Domestic Abuse Bill in May this year gave evidence that special measures in the family courts were still “not satisfactory or on a par with those facilities available in the criminal courts.”[[15]](#footnote-15)

*Commission recommendation*

The presumption of eligibility for special measures for victims of domestic abuse must be extended to the family courts (and the civil courts). This would remove the potential for inconsistencies arising from differing judicial attitudes to domestic abuse and/or lack of resources. The provision of special measures in the family courts (and civil courts) should be prioritised under the current court reform programme.

**4. Collection of data**

Insufficient data is currently collected on the treatment of cases where domestic abuse is raised in the family courts.

In order to improve policy and practice in this area, and to improve safeguarding for survivors and their children, data on judicial decision-making in the family court where domestic abuse is raised and on case outcomes (such as harm to children and/or parents as a result court orders) (disaggregated according to protected characteristic under the Equality Act 2010) should be collected and made publicly available.[[16]](#footnote-16) Data that might usefully be collected in the context of the issues raised in our letter would include (*inter alia*):

* data on the implementation of Practice Direction 12J (as recommended by Cobb J in his review of Practice Direction 12J);[[17]](#footnote-17)
* the number of cases which involve cross-examination in person of a survivor (or alleged survivor) of domestic abuse;
* the number of cases for which special measures are requested and granted and the types of measures which are requested and granted;
* the number of cases where domestic abuse is raised and the survivor (or alleged survivor) is a litigant in person.

We will publish a copy of this letter on our website.

Yours sincerely

Alasdair Macdonald's signature

**Alasdair Macdonald**

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1. We use the term ‘survivor’ where possible but use the term ‘victim’ where referring to or discussing the Domestic Abuse Bill and/or the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) since this is the term used in those documents. [↑](#footnote-ref-1)
2. Schedule 1 of the Human Rights Act 1998 sets out the articles from the European Convention on Human Rights incorporated into domestic law by the Act. [↑](#footnote-ref-2)
3. As noted by the JCHR, [Letter to Victoria Atkins MP, Parliamentary Under Secretary of State Home Office and Edward Argar MP, Parliamentary Under Secretary of State MOJ](https://www.parliament.uk/documents/joint-committees/human-rights/correspondence/2017-19/Correspondence-from-JCHR-Chair-Draft-domestic-abuse-bill-100419.pdf), 10 April 2019. [↑](#footnote-ref-3)
4. Section 75, [Domestic Abuse Bill.](https://publications.parliament.uk/pa/bills/cbill/2017-2019/0422/19422.pdf) [↑](#footnote-ref-4)
5. [All-Party Parliamentary Group on Domestic Violence, Domestic Abuse, Child Contact and the Family Courts, 2016](https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2015/11/APPG-Inquiry-report-domestic-abuse-child-contact-and-the-family-courts.pdf), p 4; and [House of Commons Home Affairs Committee, Domestic Abuse: Government Response to the Committee’s Ninth Report of Session 2017–19, 7 May 2019, HC 2172 of session 2017–19](https://publications.parliament.uk/pa/cm201719/cmselect/cmhaff/2172/217202.htm), p 7. [↑](#footnote-ref-5)
6. 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. [↑](#footnote-ref-6)
7. Women’s Aid, “[What about my right not to be abused? Domestic abuse, human rights and the family courts](https://www.womensaid.org.uk/research-and-publications/domestic-abuse-human-rights-and-the-family-courts/)”, 2018. [↑](#footnote-ref-7)
8. ‘Insights refuge England and Wales dataset 2015-18: Adult refuge services’ Safelives (2018), p.18, as quoted in Rights of Women, Written Evidence to the Joint Committee on Human Rights on the draft Domestic Violence and Abuse Bill, 15 February 2019, para 10. [↑](#footnote-ref-8)
9. N. E. Corbett and A. Summerfield, [Alleged perpetrators of abuse as litigants in person in private family](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/592873/alleged-perpetrators-of-abuse-as-litigants-in-person.PDF)

   [law: The cross-examination of vulnerable and intimidated witnesses](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/592873/alleged-perpetrators-of-abuse-as-litigants-in-person.PDF), Ministry of Justice Analytical Series, 2017, Section 4.1 [↑](#footnote-ref-9)
10. The JCHR also raised this point in its letter of 10 April 2019. See above note 3. [↑](#footnote-ref-10)
11. Women’s Aid, “[What about my right not to be abused? Domestic abuse, human rights and the family courts](https://www.womensaid.org.uk/research-and-publications/domestic-abuse-human-rights-and-the-family-courts/)”, 2018. [↑](#footnote-ref-11)
12. Ibid. [↑](#footnote-ref-12)
13. Ibid, p.28. [↑](#footnote-ref-13)
14. See for example, [Cobb J, Review of Practice Direction 12J FPR 2010, Child Arrangement and Contact Orders: Domestic Violence and Harm, Report to the President of the Family Division, November 2018](https://www.judiciary.uk/wp-content/uploads/2017/01/PD12J-child-arrangement-domestic-violence-and-harm-report-and-revision.pdf) (in particular paragraphs 15-18). [↑](#footnote-ref-14)
15. Joint Committee on the draft Domestic Abuse Bill, [First Report of Session 2017–19](https://publications.parliament.uk/pa/jt201719/jtselect/jtddab/2075/2075.pdf), HL Paper 378, HC 2075, 14 June 2019, para 140. [↑](#footnote-ref-15)
16. Collection of data in this context was also suggested in a letter to then Justice Ministers Rt Hon David Gauke MP and Paul Maynard MP by a group of human rights and family law lawyers, see: [Family Law Week](https://www.familylawweek.co.uk/site.aspx?i=ed201043), 29 May 2019. [↑](#footnote-ref-16)
17. Cobb J, [Review of Practice Direction 12J FPR 2010, Child Arrangement and Contact Orders: Domestic Violence and Harm, Report to the President of the Family Division](https://www.judiciary.uk/wp-content/uploads/2017/01/PD12J-child-arrangement-domestic-violence-and-harm-report-and-revision.pdf), November 2018, para 28. [↑](#footnote-ref-17)