
Domestic Abuse and Family Proceedings Bill

Committee Stage – Written Submission

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 provide a response to the Justice Committee's call for written evidence on the Domestic Abuse and Family Proceedings Bill. By way of background, the Bar responded to the Department of Justice consultation on the creation of a domestic abuse offence in April 2016 and the consultation on protecting victims of domestic abuse from being cross-examined by the perpetrator in person in family courts in September 2019.
3. The Bar recognises that domestic abuse causes significant harm and distress to families and individuals across Northern Ireland. The law currently provides for a wide range of offences which can be and are prosecuted in circumstances of domestic violence and abuse and it is hoped that this new legislation will further assist in tackling this difficult issue by capturing patterns of coercive and controlling behaviour in intimate relationships. However, there is a concern amongst practitioners that some proposals place too great an emphasis on criminal convictions. Domestic abuse is complex; those affected may only speak out about the behaviour they have been subjected to when they are separating and may have never involved the PSNI or any statutory agencies. They can be reluctant to criminalise abusive ex-partners particularly where there are children involved in the relationship. The issue of perpetrators using the family justice processes to further abuse victims also goes beyond simply cross-examination as there are other ancillary issues such as repeat applications for a review of contact arrangements, withholding of maintenance, disposing of assets and other forms of coercive control involving economic abuse which elongate the process.
4. In addition, the Bar believes that a public education campaign will be vital to highlight and educate as to the terms of the Bill and, in particular, the criminalisation of certain behaviours for the first time. This should include education in our schools on healthy relationships with the signs of coercive control forming an important part of this. Education must also sit alongside

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training of criminal and family justice professionals including police, prosecutors, barristers, solicitors, social workers and the judiciary which will be necessary if an effective criminal justice response is to follow the reporting of an offence. Education and training will also be important in circumstances in the family courts where an allegation is made but has not been reported to the PSNI.

5. The briefing note set out below has been prepared to assist the members of the Justice Committee in their consideration of the Bill. It also reflects the views of the Criminal Bar Association and Family Bar Association which serve to ensure an independent and quality source of specialist legal advocacy in both our criminal and family courts. Practitioners working in these areas have considerable exposure to the topic under consideration and have provided their views with an objectivity, insight and intent of informing policy making for the long term good. This briefing note is structured according to the specific clauses contained within the Bill which the Bar takes a view on.

Part One, Chapter One: Domestic Abuse: Offence and Aggravation

Clause One

6. The Bar notes that this section of the Bill aims to give effect to the intention to improve the operation of the justice system by creating an offence that recognises the experience of victims, the repetitive nature of abusive behaviour and the potential cumulative effect of domestic abuse. In terms of clause 1(1), we note that this makes it an offence for a person to engage in a course of behaviour, defined in clause 4(4) as behaviour on at least two occasions, which is abusive of another person with whom they are at the time of the course of behaviour personally connected. We note the further conditions stipulated in clause 1(2)(a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm and in 1(2)(b)(i) that A intends the course of behaviour to cause B to suffer physical or psychological harm, or (ii) is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.
7. The Bar recognises that the proposed reasonable person test may be to the benefit of the prosecution in not requiring to show that B was in fact adversely impacted by the behaviour. However, reliance on an objective test is problematic for a number of reasons. For example, the proposed test requires the reasonable person to assess the likely impact on B. It invites the fact finder to decide how the reasonable person might consider B, as an individual, is likely to be impacted. That in itself may necessitate that some evidence be provided about the impact on B

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or about B as an individual. It is possible that there will rarely be objective and independent proof of any complaint of psychological harm in these situations, unless records of a diagnosed condition can be provided, and therefore there is a risk that the test may ultimately need to rely on B's evidence to actually secure a conviction in practical terms.

8. Furthermore, the reference at clause 1(3) that psychological harm includes 'fear, alarm and distress' with no requirement to demonstrate the actual impact on the victim is a low bar and potentially gives considerable discretion to the PPS in making decisions around the which complaints should be prosecuted. We would highlight that this, when coupled with the broad list of family members in clause 5, will potentially allow a considerable range of behaviours in intimate and family relationships to fall under the ambit of this Bill.
9. Despite this, the Bar recognises that there is a fine balance which must be struck between ensuring the safe prosecution of alleged perpetrators of domestic abuse and at the same time ensuring that the victims of domestic abuse do not endure further trauma as part of a criminal trial by having to prove to the court that the behaviour has caused them psychological harm. We appreciate that the rationale behind the Bill is a genuine attempt to improve the operation of the system and recognise the very difficult experiences of victims.

Clause Two

10. Clause 2 of the draft offence defines abusive behaviour. The definition includes behaviour that is violent or threatening behaviour (which can be directed at B, at a child of B or at someone else under 2(2)(c)) that has as its purpose one of the effects listed at clause 2(3) or that a reasonable person would consider likely to have one or more of the effects. The effects listed at 2(3) are very broad and are behaviours that have been routinely detailed in academic literature as typical of abusive behaviour yet such behaviours that are well documented as being typical of abusive behaviours may not be viewed as such by the reasonable person. Important work has been done by a range of organisations to combat many of the myths and misconceptions which inform attitudes and understanding of domestic abuse. However, this issue still persists and therefore there may be some value in the Committee considering whether the offence should require evidence of harm to B in order to prevent any myths or misconceptions allowing a perpetrator to escape conviction.

11. The Bar expressed concern in response to the DOJ consultation in April 2016 that the criminalisation of behaviours, such as those listed in clause 2(3) of the Bill, must be contextualised if the legislation is to achieve its aim. As previously noted,

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to achieve this it is necessary to distinguish coercive control from other undesirable incidents of behaviour which shouldn't necessarily be subject to the criminal law. The Bar appreciates that to incorporate such a distinction into legislation is complex and that this has been attempted in this Bill by the reference to "a course of behaviour" which is abusive in clause 4(4) defined as being on at least two occasions. Whilst this definition avoids criminalisation of single isolated incidents, the Bar is of the view that it does not capture or reflect the distinction between coercive control and other behaviours which should not necessarily be subject to potential criminal sanctions.

12. For example, the legislation as drafted would potentially capture within it the behaviour of one partner who suspects the other partner of having an affair and monitors that individual's phone or social media which could result in a prosecution. In addition, given the range of personal relationships that the Bill applies to under the use of 'members of the same family' in clause 5, the Bill could also potentially apply to a wide range of scenarios involving family disagreements. For example, this Bill could apply if an individual had a gambling addiction and a family member intervened to restrict their 'freedom of action' to try and stop this individual from spending money with the aim of protecting them. Therefore the Bar is of the view that a defence of reasonableness must be available in respect of the offence of abusive behaviour, albeit the Bill offers a limited definition of reasonableness at clause 12 with two examples provided in the accompanying explanatory memorandum.
13. We would reiterate that there needs to be continuing education as to the complex type of behaviour that manifests coercive control. In relation to our example above at paragraph 12, one partner who monitors the other's phone may indeed be the individual who is actually having an affair but is applying their standards to their partner. This monitoring of calls may be just one element forming part of other behaviours which constitute coercive control. Effective public education will be key in addressing these difficult scenarios as we move away from the idea that a criminal offence arises from one action as opposed to the cumulative effect of various different actions.
14. It is important to recognise that at the time of intervention by the justice system, the victim may no longer see that the controlling behaviour they are being subjected to as abusive due to the cumulative nature of it. This has been a problem encountered by many in the criminal and family justice system for years when even after a prosecution the parties reconcile with no change of behaviour.

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Clause Three

15. See our comments above in relation to clauses 1 and 2 on the test for the impact of the behaviour on B. We note that 3(1) states that the domestic abuse offence can be committed whether or not A's behaviour actually causes B to suffer harm of the sort referred to in section 1(2) and 3(2) which states that A's behaviour can be abusive of B by virtue of section 2(2)(c) whether or not A's behaviour actually has one or more of the relevant effects set out in section 2(3). It seems possible that the absence of a requirement to show harm to B could arise in cases where B is not the instigator of the complaint, where B is not in fact harmed and where B does not themselves consider the conduct abusive. The effects listed earlier at 2(3) may also arise in a non-abusive context. For example, this includes making B 'dependent on' A and could potentially include financial dependency. This could apply where one partner ceases paid employment to provide child care and, if combined with A then seeking to control the spending of B on clothes, that may fulfil "effects" (a) and (c), as drafted. Where B does not consider this abusive, employing an objective test may cause difficulty.

16. We note the stipulation at 3(3) that 'nothing in this chapter prevents evidence from being led in proceedings for the domestic abuse offence about - (a) harm actually suffered by B as a result of A's behaviour, (b) effects which A's behaviour actually had on B'. As stated above, it is important that such evidence remains relevant in the case and the Committee may wish to consider whether the offence should in fact require evidence of harm to B.

Clause Four

17. The adoption of either intention or recklessness as the mental element of an offence is common in criminal law. There is no reason why it should not be employed in respect of an offence of domestic abuse. However, there is a risk that the problems identified above in respect of the *actus reus*, where the stated 'effects' of behaviour are very widely defined and may encompass behaviours that one would not expect to be criminalised, combined with both intention and recklessness as the *mens rea*, would not provide the legal certainty that is sought.

18. The Bar notes that liability can arise from an omission under clause 4(2)(b). It is possible to envisage situations where a failure, for example, to provide money to a dependent partner thus perhaps controlling their access to sufficient food, can easily be recognised as abusive behaviour causing harm. It is harder to envisage a situation where criminal liability should properly be attributed for a failure to communicate something. We note that the explanatory memorandum elaborates on this to mention examples such as a failure to pass on times and dates of appointments or social occasions, a failure to feed a family pet or a failure to

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speak to or communicate with an individual. However, we would still be concerned that this definition is insufficiently clear, accessible and foreseeable. The risk of uncertainty is exacerbated when the *mens rea* for committing the offence by omission includes recklessness. We would reiterate that the defence of reasonableness must be available in respect of these situations given how broadly it has been defined.

Clause Five

19. The Bar notes that clause five brings a very wide range of personal connections within the scope of the Bill which goes beyond partners or ex-partners. Indeed it appears that much of the Bill is based almost entirely on the Scottish model under the Domestic Abuse (Scotland) Act 2018 except for this clause which instead adopts section 76 of the Serious Crime Act 2015 in England and Wales and the associated list of relatives contained within section 63(1) of the Family Law Act 1996. In effect this draft Bill takes what constitutes abusive behaviour under the Scottish legislation and the low level of psychological harm required for an offence restricted only to partners and ex-partners and merges it with the wide ambit of the English legislation for a whole range of family members.

20. The Bar can understand the rationale behind the inclusion of this on the basis of a desire to ultimately offer protection to a wide range of family members alongside the recognition that family dynamics are often diverse. However, in terms of the practical operation of this clause there is a risk that a very broad spectrum of scenarios involving family disagreements could be unintentionally criminalised given that the Bill is not restricted to partners and ex-partners. We would query whether the criminal law is the most appropriate way in which to deal with these extended family relationships and if this could be better addressed in other ways, such as through public education. The Committee might wish to consider whether the offence should instead be defined more tightly to include partners, ex-partners and being aggravated where offending involves children (as per clauses 8 and 9).

Clauses Six and Seven

21. The Bar has no particular comment to make on these.

Clause Eight

22. The Bar agrees that the offence should be aggravated by reason of the accused's partner or connected person being under 18 at the time of any of the behaviour that constituted the domestic abuse offence.

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23. In terms of clause 8(3), the Bar considers that it is sufficient for the court to state on conviction that the offence was aggravated, record the conviction in a way that shows that the offence was aggravated and take the aggravation into account in determining the appropriate sentence under 8(3)(a), (b) and (c). We take the view that the requirement under 8(3)(d) for the court to indicate how the offence affected the sentence is not necessary as it could disturb the judiciary's carefully weighted assessment as to the starting point of a sentence in cases involving domestic abuse as an aggravating factor.

Clause Nine

24. The Bar agrees that the offence should be aggravated where it involves a child as provided for in this clause. We note that clause(2)(b) provides that the aggravation applies where a child sees, hears or is present during a single incident of the course of behaviour which can include a verbal abuse incident or a physical assault. We would query whether in practical terms the drafting of this clause at present could result in a child being required to give evidence as to their awareness of the accused's behaviour or any adverse impact caused by it.

25. We note the similarities between this draft Bill and the Domestic Abuse (Scotland) Act 2018 and query the Department's rationale for not including in Clause 9, section 5(4) and (5) of this Act, in particular Section 5(5) which reads: "For it to be proved that the offence is so aggravated, there does not need to be evidence that a child – (a) has ever had any – (i) awareness of A's behaviour, or (ii) understanding of the nature of A's behaviour".

26. In terms of clause 9(4), the Bar considers that it is sufficient for the court to state on conviction that the offence was aggravated, record the conviction in a way that shows that the offence was aggravated and take the aggravation into account in determining the appropriate sentence under 9(4)(a), (b) and (c). We take the view that the requirement under 9(4)(d) for the court to indicate how the offence affected the sentence is not necessary as it could disturb the judiciary's carefully weighted assessment as to the starting point of a sentence in cases involving domestic abuse as an aggravating factor.

Clauses Ten and Eleven

27. The Bar has no particular comment to make on these.

Clause Twelve

28. The Bar takes the view that a defence of reasonableness should be available in respect of the offence of abusive behaviour, particularly given the broad nature of the potential scenarios which could be caught under the Bill. The wording of

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clause 12 is acceptable and it remains for the prosecution to prove beyond reasonable doubt that the offence has been committed. However, we would have questions around the application of this defence as the explanatory memorandum accompanying the Bill only gives two examples, including where the accused acted to prevent a partner recovering from drug/alcohol addiction from associating with certain persons or frequenting certain places or where the accused restricted a relative's freedom of movement for their own safety due to the effects of suffering from dementia. These two examples both appear to be sensible applications of this defence and it is worth noting that 12(2)(a) requires that the accused adduces evidence to raise this as an issue which may necessitate the provision of expert medical reports in certain circumstances. There are also likely to be more possible examples in which the behaviour could be considered reasonable in the circumstances and we would welcome further guidance on this.

Clause Thirteen

29. The Bar has no particular comment to make on this.

Clause Fourteen

30. The Bar takes the view that provision in clause 14(b) that the maximum penalty for a case tried on indictment of 14 years' imprisonment or a fine or both is particularly high. The Serious Crime Act 2015 specifies a term not exceeding five years. In cases involving serious abuse, it seems highly likely that conduct will be capable of being prosecuted as a discrete offence of violence or a sexual offence under existing legislation. Many of these carry very significant sentences and it is there that the gravity will be reflected. Whilst we appreciate that the nature of the penalties is intended to reflect the cumulative nature of the offence over time, it is difficult to envisage a course of behaviour amounting to abuse which would not include violent or sexual offences and yet might warrant a 14 year prison sentence. It is also hard to envisage the PPS deciding not to prosecute an allegation of rape or serious violence as a discrete offence. However, we note that Part Two of the Bill goes on to provide that any such offence could be aggravated because it also involves domestic abuse.

31. The Bar would query why the Department did not consider including a provision to enable the court to consider making a restraining order when the court considers it appropriate akin to Section 5 and Section 5A of the Protection from Harassment Act 1997.

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Clause Fifteen

32. The Bar considers that it is sufficient for the court to state on conviction that the offence was aggravated, record the conviction in a way that shows that the offence was aggravated and take the aggravation into account in determining the appropriate sentence under 15(4)(a), (b) and (c). However, we take the view that the requirement under 15(4)(d) to indicate precisely how the offence affected the sentence is not necessary as it could disturb the judiciary's carefully weighted assessment as to the starting point of a sentence in any case involving domestic abuse as an aggravating factor. It will also remain important for the sentencing judge to be able to have the flexibility and discretion to depart from any guidelines based on the circumstances of an individual case and where there are justifiable reasons for doing so.

Clause Sixteen

33. Clause 16 sets out the conditions required for the domestic abuse aggravator to apply which appears to borrow from many of the earlier clauses in the Bill. See the Bar's comments elsewhere on the reasonable person test, the definition of psychological harm and recklessness which are also relevant to this section of the Bill. In addition, we note that 16(3) again gives a very broad scope to this clause by providing that the offence itself does not have to have been committed against the accused's partner/connected person as it can be committed against a third party with the purpose of abusing their partner or a connected person. We note the example provided in the explanatory memorandum that the aggravation could be in effect where an accused commits criminal damage against the friend of their partner, or a connected person, with the intent of causing psychological harm to their partner or a connected person. However, beyond this we are generally unclear as to the specific scenarios which it is envisaged would fall within this and would suggest that the Committee requests further clarity on the necessity of 16(3) being included within the Bill.
34. More broadly, for the purposes of Chapter 2 and indeed the earlier sections of the Bill the Bar considers that it might be helpful for the legislation to include a clear definition of domestic abuse. The Bar understands that the 'Stopping Domestic and Sexual Violence and Abuse Strategy' published jointly by the Department of Justice and the Department of Health in 2016 provides a non-statutory definition of 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".

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35. The Bar considers that this is an area which the Committee may wish to consider further as it would give further certainty and clarity to the circumstances in which this legislation can be appropriately used. The draft Domestic Abuse Bill currently being considered at Westminster provides a statutory definition of domestic abuse at section 1(3) which is helpful as it 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.

Clause Seventeen

36. The Bar has no particular comment to make on this.

Clause Eighteen

37. See the Bar's earlier comments on clause 5 in relation to the meaning of personal connections.

Clauses Nineteen and Twenty

38. The Bar has no particular comment to make on these.

Chapter Three: Amendments and Guidance

Clause Twenty-One

39. The Bar agrees with the reforms set out in this chapter which are intended to reduce the possibility of an accused person using the justice system to further exert control and influence over their partner. The Bar has no issue with Article 29(1) of the Magistrates' Courts (Northern Ireland) Order 1981 being amended to prohibit those accused of the domestic abuse offence before a Magistrates' Court from the right to elect for trial by jury at Crown Court as per clause 21.

Clause Twenty-Two

40. The Bar takes the view that the special measures directions set out in clause 22 will provide an important safeguard for witnesses required to give evidence in court and should be enacted by way of amendments to Part 2 of the Criminal Evidence (Northern Ireland) Order 1999.

Clause Twenty-Three

41. The Bar agrees that clause 23 should provide for The Criminal Evidence (Northern Ireland) Order 1999 to be amended to prevent an individual charged with an

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offence involving domestic abuse from cross-examining in person a witness who is the complainant in any criminal proceedings.

Clause Twenty-Four

42. The Bar has no particular comment to make on this.

Clause Twenty-Five

43. The Bar takes the view that it will be necessary for the Department of Justice to publish guidance on the law and procedure relating to domestic abuse under clause 25. Further guidance and training will be important for a wide range of criminal justice professionals in order to ensure an effective justice system response following the reporting of an offence.

Part Two: Family Proceedings: Cross Examination

Clause Twenty-Six

44. The Bar recognises that cases being dealt with in the family courts often deal with complex, emotive and sensitive issues and members of the Family Bar Association 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.

45. By way of background, the Committee will be aware that the Legal Aid, Sentencing and Punishment of Offenders Act 2012 removed private family law proceedings from public funding in England and Wales with the exception of non-molestation and exclusion orders. However, the evidence that was required by applicants to obtain legal aid in order to bring or defend an application for a non-molestation/occupation order was too onerous and indeed the House of Commons Justice Select Committee [expressed its concern](#) in 2015 about the evidence requirement leaving many individuals vulnerable and unable to gain legal representation. In England and Wales the introduction of the LASPO changes coincided with a marked increase in litigants in person who had no choice but to defend themselves yet some others used this as a reason to continue exercising control over their victims.

46. Locally the Bar highlighted in our responses to the Access to Justice 1 and 2 reports in 2011 and 2015 that many incidents of domestic abuse are first disclosed in the civil courts i.e. applications for protection, children proceedings or separation and divorce proceedings rather than in the criminal justice system.

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We also made clear that by withdrawing funding for legal representation in private family law cases there would be delay and an increase in the number of litigants in person in our court system.

47. The Bar welcomed the decision taken by the Department of Justice in Northern Ireland not to follow England and Wales and there continues to be funding for legal representation for applicants and respondents in private family law cases including non-molestation/occupation applications. However, it is means tested and not all applicants or respondents qualify whilst others choose to act as litigants in person regardless of funding. This has led to very difficult experiences in the family courts for victims of domestic abuse and badly presented cases by some litigants in person.
48. The Bar welcomes the intention behind this part of the draft bill which is to stop the practice of persons cross-examining victims of domestic abuse and using the court system to perpetuate further abuse. However, we note that the Department has adopted the criteria for barring cross-examination in cases with domestic abuse from the Westminster Bill which specifically used England's legal aid criteria for when there will be an automatic bar to cross-examination by a litigant in person and when it is a matter of discretion for the trial judge.
49. Our draft Bill prohibits cross-examination in person of complainants in proceedings involving domestic abuse in the criminal court when the person is charged with the offence as per clause 23 but the same automatic bar is not afforded to the family court. The criteria used in the family court is the same evidence required for legal aid in England and Wales which is very restrictive. The Bar believes that this defeats the purpose that the legislation sets out to achieve by not appreciating that many acts of domestic abuse, violence and coercive control are not reported to the PSNI and are not prosecuted through the criminal courts for many reasons.
50. In the family court when children are involved, there is the principle of no delay and therefore many family cases proceed to hearing before the outcome of criminal proceedings therefore the victim in both proceedings automatically gets protection from cross-examination in person in the criminal court but has to make an application to the family judge to exercise their discretion in the family court if no criminal proceedings have taken place. The Bar fails to see the rationale for the difference in treatment between the courts when the purpose of this part of the Bill is to protect Article 6 rights to a fair hearing of both complainant and defendant as well as ensuring the victim is not subjected to further abuse.

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51. The Bar believes there should be an automatic bar once an allegation of domestic abuse has been made in all family proceedings. Detailed below are a range of further comments based specifically on each of the new Articles to be inserted into the Family Law (Northern Ireland) Order 1993.
52. **Article 11A:** The Bar welcomes the clarification provided in relation to the meaning of family proceedings. We raised in response to last year's consultation exercise the need for the Ancillary Relief Court to be included within this as the court that determines financial disputes following the breakdown of a marriage given the need to ensure the impact of litigation misconduct and financial abuse in financial proceedings is considered as it can be a continuation of coercive and controlling behaviour.
53. **Article 11B:** The Bar welcomes this new provision which provides that, in family proceedings, no party to the proceedings who has been convicted of, or given a caution for, or is charged with, a specified offence may cross-examine in person the alleged victim of that offence. It also includes provision that the alleged victim may not cross-examine in person the alleged perpetrator. It is worth noting that our members have been raising concerns around this issue for a number of years given the difficulties it has created for the judiciary, witnesses and legal professionals who have tried to address it to date through the limited facilities available in the family courts and general case management powers. The content of Articles 11(B)(5), (6) and (7) which define a number of terms appears acceptable. We refer to our earlier comments on the limited use of this bar in the family courts.
54. **Article 11C:** The Bar is unclear as to what an 'on-notice protective injunction' means and if it means an inter partes non-molestation order or county court injunction then this should be clarified. We agree that Article 11C will be an important provision given that it will ensure that, in family proceedings, no party to the proceedings against whom an 'on-notice protective injunction' is in force may cross-examine in person a witness who is protected by the injunction. It is also important that it provides that a party who is protected by such an injunction may not cross-examine in person a witness against whom the injunction is in force. We note that Article 11C(4) and (5) provide that a 'protective injunction' will be one specified in regulations made by the Department of Justice. We would welcome the Committee giving consideration to the bar to cross-examination in person being extended to those who have obtained an ex-parte non-molestation order and are about to contest the inter partes application.

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55. **Article 11D:** The Bar notes that 11D provides that, in family proceedings, where specified evidence is adduced that a party to the proceedings has been abusive towards a witness to whom that party is personally connected, that party may not cross-examine the witness in person and vice versa. As per Articles 11D(3) and (4) it will be necessary for the Department to describe this ‘specified evidence’ in further detail in regulations.
56. **Article 11E:** The Bar agrees that it is important that in addition to the absolute prohibition on cross-examination in person under new Articles 11B–11D, the court be given a wide discretion to prohibit cross-examination in person by giving a direction to that effect under 11E. The use of this if either a ‘quality condition’ or ‘significant distress condition’ is met will be workable provided that it would not be contrary to the interests of justice for the court to give the direction. However, it necessary to be conscious that this does create a hurdle for the applicant to overcome in terms of persuading a judge that the victim will be significantly distressed and this is even before the case begins.
57. Article 11E(5) is particularly useful in giving the court this wide discretion as it sets out factors that the court must consider when deciding whether or not the ‘quality condition’ or ‘significant distress condition’ is met, covering views expressed by the witness or the party, the nature of the questions likely to be asked, any finding of fact that has been made about the party’s or witness’s behaviour, how the party or witness is acting and any relationship between the witness and the party. It is also important that the list is not exhaustive. As referenced elsewhere, our family barristers indicate that it is not uncommon for a first disclosure of coercive and controlling behaviour, in some cases, to be made by a victim to a legal professional as part of family proceedings. In addition, it is also worth noting that there may be scope for a difference in practice between judges as to whether cross-examination is prohibited or not. This may require training and education for the judiciary and others in the legal sector in determining whether cross-examination will indeed cause distress.
58. **Article 11F:** The Bar has no particular comment to make on this Article which covers how long a direction may last and the circumstances in which a court may revoke a direction.
59. **Article 11G:** The Bar welcomes Article 11G which gives the court the ability to consider whether it is necessary in the interests 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, if there is no other satisfactory alternative. However, would highlight that the Bill does not fully recognise the marked

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increase in the number of personal litigants in the family courts and the impact that of this. There has been a growing concern amongst family barristers for some time 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. We would query whether 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.

60. By way of comparison, the criminal court benefits from state funded representation for the prosecution in cases through the Public Prosecution Service. In criminal prosecutions, a great deal of material will typically have been gathered into the trial bundle as a result of the various legal requirements for criminal trials but also the front-loading of work conducted by the police actively investigating alleged criminal offences. The same is rarely the case with family proceedings. In a family case, if the applicant is not represented, it is unlikely that all the relevant evidence (e.g. previous police records) will have been identified and filed in the proceedings. This may mean that the legal representative might find a case that is not properly prepared or ready to be heard. Therefore there may be a need to raise issues of disclosure or obtaining information to ensure a fair and compliant process.
61. More broadly, in the interests of justice the Committee may also wish to consider not only cross-examination which forms part of this Bill but also examination-in-chief, for example, where an allegedly abusive party calls the child of the relationship to give evidence in their favour.
62. **Article 11H:** The Bar welcomes Article 11H which provides that the Department of Justice must pay the fees, costs and expenses properly incurred by a qualified legal representative. It would be helpful to review the DOJ regulations containing the sums or rates payable once this is available.
63. **Article 11I:** The Bar considers that it will be essential that the DOJ issues more detailed guidance for legal representatives appointed under Article 11G in connection with the role that they should play in family proceedings as per Article 11I.

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64. Furthermore, the Committee may also wish to consider the issue of a statutory scheme of special measures for vulnerable witnesses to support them in giving evidence in the family courts which does not presently exist 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 content of the draft Bill around the prohibition of cross-examination is welcome, it is unfortunate that it does not include proposals for special measures in the family courts. This is a matter which the Bar raised in response to the consultation exercise in September 2019 but it has not been addressed to date.