



Department of  
**Justice**

[www.justice-ni.gov.uk](http://www.justice-ni.gov.uk)

**Protecting victims of domestic  
abuse from being cross-examined  
by perpetrators in person in family  
proceedings – a consultation on  
options for legislation**

**Summary of consultation responses  
and next steps**

**February 2020**

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## Section 1 – Introduction

1.1. This paper provides a summary of responses received by the Department of Justice (“the Department”) to a public consultation on options for legislation to protect victims of domestic abuse from being cross-examined by perpetrators in person in family proceedings.<sup>1</sup>

1.2. The consultation was launched on 31 July 2019. The paper was published on the Department’s website, as well as on Citizen Space on the NIDirect website. The consultation officially closed on 24 September 2019, although four organisations requested and were given further time to respond. Twenty responses were received, six of which were from individuals. A list of the organisations that responded is at **Annex A**.

1.3. The Department is grateful to all respondents for their interest in this consultation.

1.4. The responses were collated and carefully considered. Some respondents expressed views relating to wider policy issues in relation to family justice, in particular in relation to the lack of legislative provision for special measures in family proceedings, or issues that were not directly related to the issue of protecting victims of domestic abuse from being cross-examined by perpetrators personally. These views have not been included in this paper but will be raised separately with the relevant organisation.

1.5. This paper summarises the responses and outlines the next steps.

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<sup>1</sup> For the purposes of this paper, the word “perpetrator” relates to both alleged and convicted perpetrators.

## Section 2 – Summary of consultation responses

**Question 1(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 person in the following circumstances:**

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

Q1(a)(i)	Sixteen agreed One disagreed Three did not specifically answer
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2.1. Of those who specifically answered this question, all respondents except one agreed that there should be an absolute prohibition on any person involved in proceedings who has a conviction for a specified offence cross-examining, in person, the victim of that offence. One respondent also suggested that a victim who is representing him or herself should not be required to personally cross-examine the perpetrator.

2.2. Several respondents noted that the nature of domestic abuse relies on unequal power structures between the perpetrator and victim, and that, when a victim leaves an abuser, they effectively break this power and control. They were concerned that the family courts can be an effective way for the perpetrator to reassert power and control over a victim. Most respondents considered that the proposed prohibition would protect victims by denying the perpetrator an opportunity to re-exert power over the victim and further abuse them, as well as causing them unnecessary stress and anxiety. They were also of the view that the courts should not facilitate a scenario in which a perpetrator is enabled to further intimidate a victim within the court setting, which would impair access to justice. Respondents thought that the protection would improve the confidence of vulnerable and intimidated victims to engage with the family justice system. A couple of respondents noted comments made on the Domestic Abuse Bill by Philip Scott, Chair of Resolution's Domestic Abuse Committee that family courts make decisions that often have life-long consequences for any children involved; victims should therefore be enabled to

give their best possible evidence so that there is a safe, lasting and satisfactory outcome for these children. Another respondent also considered it important to ensure that the best quality evidence is available to the court so that it can make its decision timeously.

2.3. One respondent emphasised that the lack of legislative provision to prevent cross-examination in person in family proceedings contrasts starkly with the protection available in criminal proceedings. They were of the opinion that this situation, which sometimes leads judges to use general case management powers to question victims directly, is confusing. The same respondent noted that prohibiting cross-examination where there was a relevant conviction would be in keeping with the recommendations of the Gillen Review, as well as following the lead of proposed legislative changes in neighbouring jurisdictions. Another respondent suggested that legislating for the prohibition would contribute towards demonstrating compliance with Article 56(1)(g) (Measures of protection) of the Istanbul Convention.<sup>2</sup>

2.4. Another point made by a respondent was on the need 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 and that these should include sexual offences, violent offences and child-abuse offences.

2.5. Only one individual considered that there should not be a statutory prohibition in any circumstances. He was of the view that one parent (usually the mother) is given protected status by the family justice system from lying and perjury, and can hide behind domestic abuse. He concluded that frequently the other parent (usually male) is subjected to many years of abuse but is then listed or found to be the perpetrator.

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<sup>2</sup> Council of Europe Convention on preventing and combating violence against women and domestic violence.  
Available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008482e>.  
Article 56 refers to protections in criminal proceedings.

**Question 1(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 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?**

Q1(a)(ii)	Fifteen agreed Two disagreed Three did not specifically answer
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2.6. Of those who specifically answered this question, all except two agreed that there should be an absolute prohibition on any person involved in proceedings who has been cautioned for a specified offence cross-examining, in person, the victim of that offence. Many of these respondents reiterated the comments they had made in response to the first question noted above.

2.7. A couple of respondents emphasised that because domestic abuse is still a hidden crime, with no independent witnesses to specific incidents, getting a conviction can be difficult. Other respondents noted that a caution implied that a threshold of evidence had been met and that police were concerned about behaviour; also that the acceptance of a caution is an admission of guilt. One respondent suggested that “caution” should be defined in legislation.

2.8. One respondent noted that many victims may not pursue their abuser through criminal courts for many reasons, particularly where children are involved in the relationship or where there is financial abuse, and therefore, a holistic approach to prohibition ought to apply, which should encompass relevant cautions, charges and on-notice protection orders, as well as convictions.

2.9. Only two respondents disagreed: the individual who thought there should be no absolute prohibition and another respondent who was of the view that, where a person has not been convicted of an offence, it should be for the court to take the decision on whether there should be direct cross-examination or not. The same respondent considered that the judge is well placed in such circumstances to ensure

that the family justice system is not exploited by perpetrators of domestic violence and to balance the rights of all involved.

**Question 1(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 person in the following circumstances:**

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

Q1(a)(iii)	Fifteen agreed One raised concerns but did not specifically disagree Two disagreed Two did not specifically answer
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2.10. Of those who specifically answered this question, all except two agreed that there should be an absolute prohibition on any person involved in proceedings who is charged with a specified offence cross-examining in person the victim of that offence. Again those who gave reasons generally reiterated the points they had made in relation to the first question as noted above.

2.11. One respondent expressed the view that the alleged perpetrator's human rights may have to be considered in the context of the high level of drop-out rates among victims in domestic abuse cases.

2.12. A few respondents noted that there are numerous reasons why a person may be charged with an offence but not convicted and that getting a conviction can be difficult as domestic abuse is often a hidden crime with no independent witnesses. They felt that the impact of being cross-examined by the alleged perpetrator would be no less significant in situations where they have been charged with a domestic abuse related offence but not subsequently convicted. It is, however, to be noted that in order to protect the Article 6 rights of a party, the prohibition under this proposal would apply only in relation to charges that were current and not where charges had previously been brought but subsequently dropped or resulted in acquittal.

2.13. Only two respondents disagreed: the respondent who thought that there should be no absolute prohibition and the same respondent who thought that a caution for a relevant offence should not result in an automatic prohibition. This respondent considered that, where a perpetrator is charged with an offence, the allegation of abuse has not been tested in a criminal court and no findings made, so rather than applying an absolute prohibition, it should be left to the discretion of the judge.

**Question 1(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 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?**

Q1(a)(iv)	Sixteen agreed One disagreed Three did not specifically answer
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2.14. Of those who specifically answered this question, all except one respondent agreed that an absolute prohibition on cross-examination in person should apply where an on-notice protective injunction is in force against a party.

2.15. One respondent noted that many victims of domestic abuse seek protection from the civil courts in the form of non-molestation or occupation orders. They felt that, where an order has been issued, this is in place for the victim’s safety, often indicating a history of domestic abuse within the relationship. They therefore considered that any cross-examination in person could result in further abuse of the victim and increase the trauma to them. They also considered, as did another respondent, that since many orders prevent the perpetrator from contacting or coming within a certain distance of the victim, permitting cross-examination in person in family courts undermines the integrity of the conditions set out in the order.



2.16. One respondent stated that 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 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, they considered it important that the relevant civil court orders are 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. The same respondent pointed out that a situation could arise where it is the “on notice” hearing (and, therefore, no decision has been made about an “on notice” order) at which the evidence is being given. They thought that there may be circumstances where a witness may have an ex-parte order in force that could justify protection from cross-examination.

2.17. The only respondent who disagreed was the same individual who considered that there should not be a statutory prohibition in any circumstances for the reasons already noted.

**Question 1(b) - Are there any other circumstances in which an absolute prohibition on cross-examination in person should apply?**

Q1(b)	<p>Ten made suggestions</p> <p>Two disagreed that the scope of the prohibition should be widened</p> <p>Eight did not answer/had made no comments to make</p>
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2.18. A couple of respondents emphasised that domestic abuse is under-reported and that the family courts are often the first time that victims of domestic abuse engage with the justice system. One respondent said it was their preference that there should be a statutory prohibition on cross-examination by personal litigants where there is any indication that there has been a history of domestic abuse, although not formally documented and considered that the protection and safety of the party to be cross-examined should be the paramount concern of the court in such circumstances.

2.19. Another respondent made the point that the power dynamic in abusive and coercive relationships can often be such that the person being cross-examined may never have been targeted directly but rather indirectly, through abuse against those close to them.

2.20. Following on from the comments noted above, a number of suggestions were made in relation to other circumstances in which an absolute prohibition on cross-examination should apply:

- the party has committed a specified offence against the children or relatives of the person to be cross-examined (this was suggested by several respondents);
- the party has been convicted of a relevant offence in respect of another victim;
- there are allegations of domestic abuse, child abuse, sexual violence, coercive control, stalking or harassment;
- there is any indication in whatever form of a history of domestic abuse;
- police have been called out to a domestic abuse incident;
- a police officer attests that there is evidence of domestic abuse;
- a DASH [Domestic Abuse, Stalking and Honour Based Violence] risk checklist has been completed [by the police] and the abused party has been assessed to be high risk;
- a case has been referred to MARAC [Multi Agency Risk Assessment Conference];
- an application has been submitted to the Northern Ireland Domestic Violence and Abuse Disclosure Scheme;
- domestic abuse has been disclosed to court staff;
- the court proactively asks the party to be cross-examined if the litigant in person has been abusive;
- a statutory agency or a voluntary support organisation attests that domestic abuse has been disclosed to them or they have provided support to a victim of domestic abuse;
- staff in a child contact centre indicate that they have concerns about domestic abuse;
- there is a report of domestic abuse in medical records.

2.21. One respondent was expressly opposed to the scope of the statutory prohibition applying more widely and believed that it should instead be left for the court to decide whether cross-examination in person should be allowed. One individual also stated that the scope of the prohibition should not be extended (indeed that there should not be a prohibition in the first place).

**Question 2(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?**

Q2(a)	<p>Sixteen agreed</p> <p>One considered that there should only be an automatic prohibition</p> <p>Three did not specifically answer</p>
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2.22. The majority of respondents were of the view that the court should have a discretionary power and one described it as “crucial”. Many respondents noted that a significant number of partners who perpetrate domestic abuse and are party to family proceedings, will not have a conviction against them as victims are often reluctant to report incidents or to seek injunctions. One respondent considered that it is the duty of the court to provide protection from cross-examination for victims who have never reported abuse to the police and therefore in relation to whom the criteria for automatic prohibition discussed would not be met.

2.23. Although their preference was for an absolute prohibition in all circumstances, one respondent was supportive of a discretionary power where the automatic prohibition, as outlined in option 1 in the consultation paper, did not apply.

2.24. Another respondent was of the view that providing a discretionary power would send out a positive message that the legislature, government and wider society are serious about protecting victims of domestic abuse from further abuse or control and would represent a positive step-change, particularly when understood in the context of the wider movement for change to domestic abuse legislation. A discretionary power would further encourage engagement with the justice system

and would enable more victims to give accurate, good quality evidence and advocate effectively for their child's best interests and safety.

2.25. One respondent recommended that the provisions in respect of the discretionary power should be in line with similar provisions for England and Wales in the Domestic Abuse Bill. It also considered that civil court orders that had previously been in force should be included within the court's discretionary power, for example, a lapsed non-molestation order. It concluded that the court's discretion should be a wide one to allow the individual circumstances to be considered in a fact-sensitive way.

2.26. One respondent noted that the nature of controlling and coercive relationships is such that there will be subtle behaviours that may seem innocuous but are powerful enough to silence a victim. They thought that judges may, therefore, find it difficult to detect such behaviour and fully determine whether 'significant distress' conditions are met. In view of this, it was suggested that the Department should consider how this can be managed in a sensitive and appropriate way that minimises the risk of harm or ongoing trauma for the abused witness.

2.27. Many respondents were concerned that the discretionary power would be applied inconsistently by the courts. It was suggested that there should be guidance (some suggested that this should be statutory) for judges on the discretionary power, as well as training and awareness-raising on domestic abuse and coercive control. One suggested that the use of the power should be reviewed regularly to ensure fairness and a level of consistency in its application.

2.28. One individual considered that there should only be an automatic prohibition.

**Question 2(b) - Do you have any views on the circumstances in which such a discretionary power could be exercised?**

Q2(b)	Nine made suggestions One considered that there should only be an automatic prohibition Ten did not specifically answer/had no additional comments to make
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2.29. Respondents made the following suggestions in relation to the circumstances in which a discretionary power could be exercised, as follows:

- where a credible disclosure of domestic abuse is made;
- where there are allegations of domestic abuse, sexual violence and/or coercive control;
- where domestic abuse has been disclosed to a statutory agency, voluntary support organisation or a legal representative;
- when domestic abuse is cited in the case currently before the court;
- where the police are currently investigating an incident but charges have not yet been made;
- when harassment or verbal molestation occurs during the conduct of the cross-examination in person;
- when the perpetrator intends to cross-examine a member of the victim's wider family as a witness, especially a child or young person;
- to apply broadly to protect victims and enable access to justice.

2.30. One respondent considered that the exercise of the discretionary power should always be in keeping with the human rights of all parties and the rules of the court.

2.31. Another respondent recommended that provisions affording greater flexibility for courts to prevent cross-examination of victims directly by perpetrators should rest on an affirmative determination by the court that the interests of justice so require rather than the negative formulation proposed in the consultation paper.

2.32. In line with responses to the previous question, one respondent suggested that there should be a practice direction or guidance for the judiciary to ensure consistency in the implementation of the discretionary power and to ensure that judges are appropriately supported.

**Question 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?**

Q3	Twelve agreed Two disagreed Six did not specifically answer
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2.33. Of those who specifically answered the question, all considered that making provision for a legal representative to carry out the cross-examination on behalf of the party prevented from doing so in person was essential to protect the ECHR rights of that party and would ensure fairness for all parties. It was noted that the courts already have powers in criminal proceedings to appoint a legal representative where cross-examination in person is prevented and it was therefore considered that providing for similar provisions in family proceedings would not breach Articles 6 and 8 rights.

2.34. One respondent advised that there may also be connected matters that would also need to be considered in relation to the appointment by the court of a legal representative. For example, it may be necessary for there to be careful case management procedures in place so that the need to appoint a legal representative is identified at an early stage in order to avoid excessive delays. They added that it may be difficult for a legal representative to be instructed solely to conduct the cross-examination in isolation and they may need to be involved throughout the case, depending on the particular circumstances. The same respondent was of the view that the provisions in the Domestic Abuse Bill in respect of a legal representative would be a workable model for Northern Ireland.

2.35. One individual considered that a legal representative should be appointed to conduct the examination-in-chief, as well as the cross-examination. Another individual considered that the ECHR rights of the victim would be better protected if the questions were agreed with the judge before the cross-examination commenced.

**Question 4 - Do you have any comments to make on the draft Equality Screening form?**

Q4	Three made comments on the Equality Screening form Seventeen did not specifically answer/had no comments to make
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2.36. One respondent stated that they were satisfied with the equality considerations and conclusions laid out in the consultation document, while another noted they had no concerns, believing that the options for legislation should be regarded as a gender-neutral issue. Whilst expressing some concerns about the language used in the equality screening form, another respondent welcomed the screening out.

## **Section 3 – Next steps**

3.1. The majority of respondents indicated their strong support for a statutory prohibition on cross-examination in person in family proceedings in certain circumstances. Whilst a few respondents expressed reservations about the scope of the absolute prohibition set out in option 1, most agreed with the circumstances in which it was suggested that an absolute prohibition might be applied and many thought the scope should be wider. The majority of respondents also strongly agreed that a court hearing family proceedings should have a discretionary power to prevent cross-examination in person where an absolute prohibition does not apply. It was also considered that the ECHR rights of a party prohibited from carrying out cross-examination in person would be protected by making provision for the court to appoint a publicly funded legal representative.

3.2. As well as noting the overall support for the measures set out in the consultation paper, we have also reflected on the views of those respondents who considered that the scope of the absolute prohibition should be extended beyond the circumstances specifically outlined in the paper. Taking into account these views, we consider there is merit in creating a power to extend the scope of the absolute prohibition by way of secondary legislation. Of course, in any case where the circumstances do not come within the scope of the absolute prohibition, an application could be made to the court to use the proposed discretionary power to prohibit cross-examination in person.

3.3. Although not specifically raised in the responses to the consultation, the Department is of the view that there would be merit in ensuring courts, the legal profession and parties have a clear understanding about the role of a legal representative appointed by the court and there would accordingly be merit in creating a power for the Department to publish guidance on this.

3.4. Therefore, having carefully considered all of the consultation responses, we have concluded that the following legislative measures should be introduced for all family proceedings:

- a statutory prohibition on a party cross-examining another party or a witness in person in the following circumstances (or vice versa):



- where the party has been convicted of a specified criminal offence against the person to be cross-examined;
- where the party has been given a caution for a specified criminal offence against the person to be cross-examined;
- where the party is charged with a specified criminal offence against the person to be cross-examined; and
- where the party has an “on-notice” injunction in force against them, made for the protection of the person to be cross-examined;
- a power for the Department to specify in regulations additional evidence of domestic abuse in respect of which a statutory prohibition would apply;
- a discretionary power for the court to prevent a party conducting cross-examination of another party or witness in person where it would affect the quality of the witness’ evidence or cause significant distress;
- a power for the court to appoint a legal representative, who will be paid for by the Department, to carry out cross-examination on behalf of a party prohibited from doing so in person;
- a power for the Department to make regulations about the payment of fees and costs of a legal representative appointed by the court; and
- a power for the Department to issue guidance about the role of a legal representative appointed by the court.

3.5. With regard to some of the points made by respondents to the consultation, the Department confirms that key terms would be defined in the legislation, e.g. family proceedings, conviction and caution; and that relevant offences and injunctions invoking the automatic prohibition would be specified in secondary legislation.

3.6. The Department will share comments about guidance, training and awareness-raising for the judiciary with the Judicial Studies Board.

3.7. In the consultation paper, we had indicated that, subject to the outcome of the consultation, we would consider, together with the UK Government, using the Domestic Abuse Bill, then before Parliament, to make legislative provision on this matter. The Bill, however, subsequently fell upon the dissolution of Parliament for the

general election. The subsequent restoration of the Northern Ireland Executive now means that the legislation can be taken forward as part of a domestic abuse Bill to be introduced to the Northern Ireland Assembly.

3.8. If you require any further information on the response to the consultation, please contact us as follows:

By email: [AToJ.Consultation@justice-ni.x.gsi.gov.uk](mailto:AToJ.Consultation@justice-ni.x.gsi.gov.uk)

In writing: Family Courts & Tribunals Branch, Department of Justice, Massey House, Stormont Estate, Belfast, BT4 3SX.

**List of organisations that responded to the consultation**

Attorney General for Northern Ireland

The Bar of Northern Ireland

Barnardo's Northern Ireland

Belfast Area Domestic & Sexual Violence Partnership

Belfast Health & Social Care Trust

Commissioner for Older People for Northern Ireland

Green Party Northern Ireland

Law Society of Northern Ireland

NSPCC Northern Ireland

Office of the Lord Chief Justice

Sinn Féin

Southern Health & Social Care Trust

Victim Support NI

Women's Aid Federation Northern Ireland