**Briefing: Domestic Abuse Bill 2019 to 2021**

**House of Lords Committee Stage**

27 January 2021

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Executive Summary

The Equality and Human Rights Commission has been given powers by Parliament to advise Government on the equality and human rights implications of laws and proposed laws and to publish information or provide advice, including to Parliament, on any matter related to equality, diversity and human rights.

The Domestic Abuse Bill is intended to be a “once-in-a-generation opportunity to transform the response”[[1]](#footnote-1) to this crime, which disproportionately impacts women and girls. The Commission welcomes the opportunity the Bill presents to ensure better support and protection for survivors of domestic abuse in England and Wales. The need to improve routes to support and safety for domestic abuse survivors has been brought into sharp focus during the coronavirus pandemic, with increases in reported cases of domestic abuse across the UK.[[2]](#footnote-2)

We consider that changes to the Bill are required for it to be the transformative legislation the Government intends it to be. This briefing sets out our recommendations to ensure the legislation meets this ambition, improves support and protection for all survivors, and supports compliance with the Government’s commitments under the Convention on Preventing and Combatting Violence against Women and Domestic Violence (the Istanbul Convention) and with the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

We recommend changes to the Bill and support corresponding amendments in five priority areas, to ensure:

1. Sufficient specialist support services, provided in the community as well as in refuges, and available to all without discrimination.
2. Equal protection and support for migrant survivors.
3. Improved protections for survivors in the courts and consistency across all court jurisdictions.
4. Improved protections for disabled survivors subject to coercive control.
5. Guidance issued under the Bill takes into account the cross-government violence against women and girls (VAWG) strategy.

This second briefing addresses point 3 only. A first briefing on points 1, 2, 4 and 5 is available [here](https://www.equalityhumanrights.com/sites/default/files/parliamentary-briefing-domestic-abuse-bill-lords-committee-25-january-2021.docx).

Recommendation: Improved protections for survivors in the courts

### 1. Support amendments 109, 111, 112 and 113 to Clause 62 (special measures in civil proceedings)

These amendments, tabled by Lord Marks of Henley-on-Thames, ensure that survivors are automatically eligible for special measures in the civil courts (as the Bill currently provides for in the family courts).

**Why are these amendments needed?**

Currently, the Bill provides for automatic eligibility of special measures in the family courts for victims of domestic abuse without the need for determination of the victim’s vulnerability (Section 61). This is a very important and welcome improvement for survivors introduced by the Government following the Commons stages. Section 62 (also introduced by Government amendment) provides a discretion for special measures in the civil courts, but does not ensure automatic eligibility. We welcome this extension of the availability of special measures in the civil courts but it does not go far enough. The current Section 62 provides that a court may make a special measures direction where the survivor is the “victim, or alleged victim, of a specified offence,” meaning that only survivors whose alleged perpetrator has been convicted, cautioned or charged with an offence, will benefit, and then only subject to judicial discretion.

This is problematic both in relation to the evidential bar and to judicial discretion. First, most survivors (79% according to Office for National Statistics estimates)[[3]](#footnote-3) do not report their abuse to the police. Secondly, judicial discretion in relation to special measures has proved highly inconsistent in the family courts (as evidenced by Ministry of Justice[[4]](#footnote-4) and Women’s Aid[[5]](#footnote-5) research) and there is no reason to think that judicial discretion will be more consistently exercised in the civil courts. We therefore recommend automatic eligibility for special measures for survivors in the civil courts, as in the family courts, ensuring consistency of protection across all jurisdictions, as recommended by the Draft Bill Committee.[[6]](#footnote-6)

### 2. Support amendments 124, 125 and 126 to Clause 64 (civil proceedings: prohibition of cross-examination in person)

These amendments, tabled by Lord Marks of Henley-on-Thames, provide for the same prohibition of direct cross-examination in civil proceedings as that which is available in family proceedings.

**Why are these amendments needed?**

Cross-examination in person in cases where domestic abuse is an issue is well-recognised as being re-traumatising for survivors[[7]](#footnote-7) and a means by which perpetrators can continue their abuse.[[8]](#footnote-8)

Currently, for family proceedings, section 63 of the Bill provides for automatic prohibition of cross-examination in person where there is a caution, conviction, charge, injunction or specified evidence provided (according to the Bill’s explanatory notes, this is to be along similar lines to that required for legal aid, e.g. letter from refuge or doctor). For civil proceedings, currently section 64 will enable a court in civil proceedings to give a direction prohibiting a party to the proceedings from cross-examining a witness in person, where either the quality of the witness’s evidence would otherwise be diminished, or such cross-examination would be likely to cause significant distress to the witness or party (and it would not be contrary to the interests of justice to give the direction). This departs from and is significantly less than the protections offered to domestic abuse survivors in the family courts.

As set out above, we consider that there should be consistency of provision across family and civil courts, as recommended by the Draft Bill Committee.[[9]](#footnote-9) Amendments 124 and 126 would ensure that domestic abuse survivors in the civil courts benefit from an automatic prohibition of cross-examination in person as in the family courts, where they can provide “specified evidence” (or there is a caution, conviction, injunction or charge in place). These amendments to strengthen protections for domestic abuse survivors would not affect the availability of the discretionary provision currently provided in the Bill to prohibit cross examination in other cases that are heard in the civil courts where the judge considers the quality of the witness’s evidence would be diminished, or significant distress would be caused.[[10]](#footnote-10)

These amendments would represent a significant improvement for survivors in the civil courts, where they may find themselves subject to cross-examination by an alleged perpetrator in a variety of civil cases, including, for example, libel cases[[11]](#footnote-11) or small claims courts where there has been economic abuse and the couple were unmarried.

### 3. “Specified evidence”

As described above, Section 63 of the Bill (prohibition of cross-examination in person in family proceedings) applies the prohibition on cross-examination in person to survivors who can provide “specified evidence”. The explanatory notes to the Bill currently state that “specified evidence” will be defined in regulations made by the Lord Chancellor. The explanatory notes further explain that Government intends for the specified evidence to broadly replicate the list of evidence that is currently specified for the purposes of accessing civil legal aid – which includes “a copy of a finding of fact made in legal proceedings in the UK, a letter or report from a health professional, a letter from any person who is a member of a local safeguarding forum or a letter from an independent domestic violence advisor.”[[12]](#footnote-12)

We recommend that the definition of “specified evidence” in regulations made under this Act must go further and should include either a statutory declaration or a witness statement (which includes a signed statement of truth) from a survivor, and we hope that the Minister might commit to this during the Lords stages of the Bill. This should apply both to current section 63, and to section 64 as amended by amendments 124, 125 and 126. Reliance on the forms of “specified evidence” listed in the explanatory note to the Bill (and those in the civil legal aid regulations)[[13]](#footnote-13) can be problematic, as many survivors face difficulties in evidencing their abuse. This is shown by recent Ministry of Justice research.[[14]](#footnote-14) The difficulties include language barriers, unwillingness of organisations (and health professionals in particular) to write supporting letters, and the fact that a survivor may not yet have disclosed or reported their abuse to a relevant organisation.[[15]](#footnote-15)

**Further information**

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. Find out more about our work on the [Equality and Human Rights Commission website](http://www.equalityhumanrights.com)**.**

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1. HM Government (January 2019), [Transforming the Response to Domestic Abuse Consultation Response and Draft Bill](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf). [↑](#footnote-ref-1)
2. BBC (25 November 2020), [Coronavirus: Domestic abuse offences increased during pandemic](https://www.bbc.co.uk/news/uk-55073229); BBC (23 July 2020), [Coronavirus: Domestic abuse helpline sees lockdown surge](https://www.bbc.co.uk/news/uk-53498675). [↑](#footnote-ref-2)
3. ONS, [Crime Survey for England and Wales, March 2016: Domestic abuse, sexual assault and stalking](https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focusonviolentcrimeandsexualoffences/yearendingmarch2016/domesticabusesexualassaultandstalking). [↑](#footnote-ref-3)
4. N. E. Corbett and A. Summerfield (2017), [Alleged perpetrators of abuse as litigants in person in private family 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, Section 4.2. [↑](#footnote-ref-4)
5. Ibid, p.28. [↑](#footnote-ref-5)
6. House of Lords, House of Commons, [Joint Committee on the draft Domestic Abuse Bill](https://publications.parliament.uk/pa/jt201719/jtselect/jtddab/2075/2075.pdf), First Report of Session 2017–19, para 153. [↑](#footnote-ref-6)
7. [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-7)
8. 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-8)
9. House of Lords, House of Commons, [Joint Committee on the draft Domestic Abuse Bill](https://publications.parliament.uk/pa/jt201719/jtselect/jtddab/2075/2075.pdf), First Report of Session 2017–19, para 153. [↑](#footnote-ref-9)
10. The Government has explained that the existing discretionary prohibition in civil proceedings implements advice from the Civil Justice Council (CJC), stating that “the CJC recommended that the prohibition of cross-examination by a self-represented party should be extended to cover the civil courts but it should not be an automatic prohibition and that the court should retain a discretion to determine whether to permit cross-examination, given the breadth of types of proceedings that come before the Civil Courts” (see: Home Office (August 2020), [Policy Paper: Cross examination in civil proceedings](https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/cross-examination-in-civil-proceedings)). These amendments address the CJC’s concern that there should be discretion in a wider range of cases, while also ensuring an automatic prohibition on cross-examination in person where there is evidence of domestic abuse. [↑](#footnote-ref-10)
11. Eg. The Times, 14 February 2019, ‘[Courts ‘are silencing abused women](https://www.thetimes.co.uk/article/courts-are-silencing-abused-women-95hrdjqnq?ni-statuscode=acsaz-307)’. [↑](#footnote-ref-11)
12. HM Government (2020), [Explanatory notes to the Domestic Abuse Bill](https://publications.parliament.uk/pa/bills/lbill/58-01/124/5801124en.pdf). [↑](#footnote-ref-12)
13. Civil Legal Aid (Procedure) Regulations 2012. [↑](#footnote-ref-13)
14. Ministry of Justice (2017), Farai Syposz, [Research investigating the domestic violence evidential requirements for legal aid in private family disputes](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/719408/domestic-violence-legal-aid-research-report.pdf)*,* pp. 2-3. [↑](#footnote-ref-14)
15. Ibid. [↑](#footnote-ref-15)