



Rights of Women's response to the consultation on amendments to Family Procedure Rules – Vulnerable Witnesses and Children

Rights of Women is a national, registered charity. Rights of Women aims to increase women's understanding of their legal rights and improve their access to justice by providing them with legal advice and assistance on topics including domestic violence, immigration and victims of sexual assault. We produce legal guides including *From Report to Court: a handbook for adult survivors of sexual violence* (latest edition 2014) funded by the Home Office. You can find out more about Rights of Women on our website: www.rightsofwomen.org.uk

Survivors of domestic violence and the Family Court

Rights of Women is concerned that the Family Court process as a whole from mediation, court proceedings, and what happens after court proceedings, are not safe for survivors of domestic violence. Special measures is just a small part of the issues faced by women affected by violence, but is a hugely important part to get right as it will enable more women to actively and safely take part in proceedings.

There is an urgent need to provide women in the Family Court with the protection of special measures. Rights of Women receives a large number calls from women survivors of domestic and sexual violence on our legal advice lines. Many of our callers are distraught at the prospect of facing their abuser in court. They tell us that they are "terrified" and they fear they will not be believed. The concept of being cross-examined by their abuser is often overwhelming.

Our research report: [*Picking up the pieces: domestic violence and child contact*](#) looks at women's journeys before, during, and after contact proceedings (now referred to as child arrangement proceedings). We refer you in particular to section 5 of the report, which explores the negative impact on a fair outcome in court as a result of:

- being cross-examined by the abuser
- lack of women's safety at court: 74% of women had concerns about their safety in court. They reported lack of facilities to separate them from the perpetrator in the court building enabled him to continue abuse and harassment.
- the difficulties in raising domestic violence in court, and being heard
- lack of fact finding hearings to consider allegations of domestic violence

- lack of legal advice and good representation
- uneven judicial awareness of domestic violence
- lack of information on the court process.

94% of the women and professionals who responded to our survey agreed that some perpetrators of domestic violence use contact proceedings (now child arrangements proceedings) to exert power and control over the victim. Women often describe to us their fears that they will not be believed, that they will not be safe and that their children will not be safe before, during and after court proceedings.

Family Court proceedings require survivors to be present and involved in court proceedings much more actively than they are in the criminal courts (where they are witnesses and need only give evidence at one hearing). In the Family Court women are not just concerned about giving evidence, but about attending court and taking part in proceedings as a whole. However, the protection available to them in the Family Court compared to the criminal courts is far less. One of our recommendations in *Picking up the pieces* was the introduction of “[s]pecial facilities that mirror those available in criminal proceedings must be introduced in civil proceedings to prevent victim-survivors of domestic violence from having to face perpetrators in court”.

Lack of legal advice and representation in the Family Court for survivors of domestic violence is a further barrier to women being able to participate in proceedings. Our research on the [impact of LASPO](#) demonstrates the deterrent effect of the absence of legal advice and representation with 47% of women who had experienced domestic violence doing nothing about their situation as a result of not being eligible for legal aid. A legal system which enables these women to access the Family Court and participate in proceedings and achieve a fair outcome is key to addressing and preventing violence against women and girls, and improving the lives of children and families.

Responses to Q1 – Q.6

Q1.

Our answer to (a), (b) and (c) is yes. Women who call our advice lines often tell us that they feel the views of their children are not heard or taken seriously by the courts, particularly in relation to child arrangements. Another concern often expressed by women is the lack of time Cafcass officers spend with children to listen to the children’s views. Currently, the most common way to obtain the child’s wishes and feelings is through the parents and the Cafcass officer. Several women who took part in [Picking up the pieces: domestic violence and child contact](#) were concerned that officers spent a minimal amount of time with them and the children and did not accurately report the violence to the court.

In light of the above, we welcome the amendments to the Family Procedure Rules which emphasise the importance of the child's views and imposes a duty to consider ways in which the child can participate in proceedings, including communicating with the judge directly.

Q2

- (a) We welcome any changes that ensure the voices and needs of children are properly heard and explored by the Family Court.
- (b) We consider that the provision as drafted is unclear. Is this rule requiring the court to consider making an alternative direction that meets the overriding objective if the court does not make a direction under paragraph (2)? Or, is this rule requiring the court to make an alternative direction meeting the overriding objective if the court does not state on the order that the party's interest and position can be properly secured without any direction under paragraph (2)?

Secondly, we do not consider it enough to simply "state" that the party's or witnesses' interest and position can properly be secured without any direction under paragraph (2) being made. We consider that the court should provide *reasons* as to why the court is not making a direction under paragraph (2) and how or why the party's interest and position is being properly secured without such assistance.

For example, rule 3A.4(3) should be amended to read: *If the court does not make a direction under paragraph (2) the court order must state why the party's interest and position can properly be secured without any direction under paragraph (2) being made.*

Finally, we consider that to give effect to the court's duty under rule 1.2, the overriding objective should be referred to in the list of factors the court should have regard to in 3A.6. It is important, for example, for the court to bear in mind its duty to ensure the parties are on an equal footing when considering to give the directions mentioned in rules 3A.4(2).

Q3

- (a) Yes, we agree with the use of the term "is likely to be diminished".
- (b) No, we do not consider that the proposed rule provides sufficient clarity about the specific circumstances in which it should be applied. The proposed rules imply that diminishment can only occur by reason of age or incapacity; it does not include fear or distress. It should be made clear that the diminishment can take place by reason of age, incapacity or fear and distress.

As mentioned in the background to the consultation, special measures are more systematically available in the criminal courts and we agree with the comments of Sir James Munby in the 12th 'View from the President's Chambers' in which he set out the aims of the Children and Vulnerable Witnesses Working Group: "*We must be cautious not to reinvent the wheel. A vast amount of thought has gone into crafting the arrangements now in place in the criminal courts...We need to consider how this excellent work can be adapted for use in the Family Division and the Family Court*".

Sections 16 to 33 of the Youth Justice and Criminal Evidence Act 1999 (the 1999 Act) address special measures and eligibility for special measures in the criminal courts. The 1999 Act makes it possible, and in some cases mandatory, to provide special measures for vulnerable and intimidated witnesses. Section 17 of the Act provides for special measures "if the court is satisfied that the quality of evidence given by the witness is likely to be diminished by reason of fear or distress on the part of the witness in connection with testifying in the proceedings".

The rules in part 3A broadly reflect the rules in the criminal court in relation to vulnerable witnesses, but there does not seem to be any mention of *intimidated* parties or witnesses and there is no mention of *fear or distress* in the list of factors the court must have regard to when deciding whether to make a direction in 3A.6. This, we consider, is a serious omission as the current provisions imply that the measures apply to adults with physical or mental disabilities and children only. We consider that including the term "intimidated" in the title of Part 3A and including "fear and distress" in the rules will bring the provisions closer to the criminal justice system and ensure that survivors of domestic violence are placed closer to an equal footing with the other party.

Q4

Our response to (a), (b) and (c) is no. These extra provisions are not in the rules and legislation for the criminal courts and there is no evidence to indicate that the measures are being used inappropriately in the criminal courts.

- (a) The judge dealing with the case will have detailed knowledge of the circumstances of the case and the parties and is best placed to decide whether special measures are required. We assume that judges will receive training on special measures when the rules are introduced. Obtaining agreement from a more senior judge will waste time and resources, and is unnecessary.
- (b) An additional test for intermediaries may deter judges from directing the measure when there is a genuine need.
- (c) If the court is of the view that the measure is required, then in the interests of justice the measure should be provided. If the measure is not available in that court, or on a particular day in the diary, then arrangements would need to be

made for the hearing to make place at a different court or on a different day. Naturally there needs to be communication with staff at HMCTS to check whether the measure is available, but this does not need to be done *before* the direction is made. This indicates that if the measure is not available the measure will not be provided, which will place that child, party or witness at a disadvantage. The list in 3A.6 includes the availability and costs of the measure as a consideration for the court and we consider this to be a sufficient. Making availability a pre-requisite to the measure being provided may lead to unfair decisions.

We welcome rule 3A.7.(2) which states: “*If the family court gives a direction for a measure which is not available where the court is sitting it must direct that the court will sit at the nearest or most convenient location where the family court sits and the measure is available*”. However, we would suggest that the rule be amended to remove reference to “*where the family court sits*”. This is because the nearest and most convenient court which has the measure available may be a court where the Family Court does not normally sit. Perhaps consideration should also be given as to whether hearings should be able to take place in criminal courts if no other venue is available, as criminal courts should have most special measures available.

We consider that it would be helpful for the Committee or the Working Group to conduct a review of the measures available in all of the courts in England and Wales and that this information be made available to judges and the public. This will identify the current provision, which courts need to make provision available, and it will help judges identify alternative venues. Rights of Women submitted a Freedom of Information request for this information in 2014, however our request was rejected.

We suggest that the courts work with staff from specialist Violence Against Women and Girls (VAWG) organisations in their area to identify which measures would be helpful to vulnerable and intimidated witnesses for each court. This would include, for example, arrangements for separate entrances and exits, staggering arrival and departure times, identification of appropriate intermediaries, as well as the other measures listed in 3A.7.

Q5

We consider that employment may be a relevant factor. For example, a member of staff employed by a refuge or domestic violence support organisation may require special measures when giving evidence in front of an alleged perpetrator, in order to protect the member of staff’s identity and / or safety.

We also consider that the following should be added to the list under 3A.6:

- the overriding objective; and
- whether the child, party, or witness has or may have been subjected to sexual or domestic violence by any other party to the proceedings or members of the family or associates of that other party

Q6

Intermediaries in cases of sexual violence

3A.7 provides a list of measures that may be available, and this includes a party or witness being questioned in the court “with the assistance of an intermediary”. We are of the view that this should be amended to “with the assistance of or through an intermediary”. This would then enable the court to provide an intermediary to cross-examine intimidated parties or witnesses when cross-examination by the other party or by the judge on behalf of the other party is inappropriate.

In *Q v Q; Re B (A Child); Re C (A Child)* [2014] EWFC 31, Sir James Munby President of the Family Division commented that “...*in cases where the issues are as grave and forensically challenging as in Re B and Re C, questioning by the judge may not be appropriate or, indeed, sufficient to ensure compliance with Articles 6 and 8.*” This is the ideal opportunity to ensure measures are available in such situations.

The function of the intermediary should be set out to reflect s29(2) of the 1999 Act.

The 1999 Act prohibits any person accused of a sexual offence from cross-examining the complainant. We consider that a similar provision should be introduced for the Family Court. Currently, a woman or child subjected to a sexual offence may find that she is protected in the criminal court, but cross-examined by the same perpetrator in the Family Court. This can have a severely detrimental affect on the health and well-being of the party or witness, and on the outcome of the case.

Amendments to other parts of the rules

The pre-ambule to the consultation mentions some of the Rules that the Committee intends to amend as a consequence of the new Part 3A. In addition to those mentioned, we consider that Part 3A should be considered at the outset of all cases involving sexual or domestic violence and that, in particular, Part 3A should be referred to in Part 9 and Part 10 of the rules. It should also be referred to in Practice Directions 12J and 12B.

Practical issues

We consider it important for parties and witnesses to be made aware of the availability of special measures from the outset, and for them to have an opportunity to request special measures. This could, for example, be done by amending court forms and guidance (such as forms C100, C1A, C7, FL401, and guide CB1). Alternatively, the Committee could consider whether a new “special measures request” form would be helpful, which could include guidance on who might need special measures, the circumstances in which special measures can be provided and the types of measures available.

Finally, we suggest that standard orders such as the CAP02 and CAP02 Lite be amended to include boxes recording the judge’s decisions on special measures.

Other measures

We note reference to “any matters set out in Practice Direction xxx” in 3A.6. As part of this Practice Direction we suggest reference be made to practical measures such as separate waiting rooms, separate entrances and exits, and staggering arrival and departure times. These measures should also be included on the forms mention in “Practical issues” above.

Training for judges

We assume that when the rules are introduced magistrates and judges will be provided training on the provision of special measures. As part of this training, we urge you to consider training by VAWG specialists on domestic violence and, in particular, coercive control. It is the coercive control element of domestic violence that women find so debilitating and this can have a severe impact on their ability to take part in proceedings. It is important that judges understand the dynamics and impact of coercive control so that they can make safe decisions both in relation to special measures and safety for women and children.

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