Rights of Women Response to Consultation on Vulnerable Witnesses and Parties in Civil Proceedings

About Rights of Women

Rights of Women (RoW) specialises in supporting women who are experiencing or are at risk of experiencing, gender-based violence, including domestic and sexual violence. We support disadvantaged and vulnerable women including Black, Minority Ethnic, Refugee and asylum-seeking women (BMER women), women involved in the criminal justice system (as victims and/or offenders) and socially excluded women. By offering a range of services including specialist telephone legal advice lines, legal information and training for professionals we aim to increase women’s understanding of their legal rights and improve their access to justice enabling them to live free from violence and make informed, safe, choices about their own and their families’ lives. Rights of Women is a registered charity 1147913 and Company Limited by Guarantee.

Rights of Women’s consultation response

Before answering the specific questions asked in the consultation we would point out that as a women’s legal organisation we will confine our responses to law and legal policy issues within our skills and experience.

Consultation Questions

1. Are there issues in relation to vulnerable parties /witnesses in the civil courts which have not been covered/adequately covered within this preliminary report? If so please give relevant details.

Special measures and the Domestic Abuse Bill

The Domestic Abuse Bill currently progressing through Parliament will ensure that survivors of domestic and sexual abuse are automatically eligible for special measures in the criminal courts. Rights of Women recommends that these provisions be extended to include family courts and civil courts and we suggest that this is something that the Council could explore. Our experience is that special measures are already routinely considered during proceedings in the criminal courts, but not in the family and civil courts. It is unclear whether this is due to lack of resources, insufficient procedures or a greater level of reluctance amongst family and civil judges to grant special measures. Legislation which renders survivors automatically eligible for special measures across all three jurisdictions should help ensure consistency and safety for survivors.
**IDVAs and ISVAs**

One potential area of support for survivors of domestic abuse and sexual abuse which has not been explored is funding for Independent Domestic Violence Advisors (IDVAs) and Independent Sexual Violence Advisors (ISVAs) to support survivors in civil courts. IDVAs and ISVAs have specialist knowledge on the needs of survivors and already support survivors through the criminal justice system. The support they offer could, for example, include helping them request special measures, showing court rooms before hearings, explaining what she can expect at court hearings, and attending court hearings as a McKenzie Friend if she is unrepresented.

2. Do you agree with the proposed recommendations set out at section 7? If not why not?

1. *Rule changes:* We support this recommendation in principle, however, we would want to see the draft rule before we form a firm view. In particular, we would want the definition of vulnerable persons or persons eligible for support to include survivors of all forms of violence against women and girls (VAWG).

2. *Directions Questionnaires and online access:* We agree with this proposed recommendation and suggest the questionnaire could also include an option for parties to request special measures.

3. *Training for civil judges:* We agree with this recommendation. The training should involve training by or in consultation with specialist organisations in the areas of VAWG and child abuse.

4. *Intermediaries:* We agree with this recommendation and suggest that specialist organisations in the areas of VAWG and child abuse be consulted when producing the guidance.

5. *Court protocols and guidance:* We agree with this recommendation. The protocols and guidance should be made available to the public in an easy-read format.

6. *Staff training:* We agree with this recommendation.

3. Do you believe that there should be further or alternative recommendations? If so please set out relevant details

**Direct cross-examination**

Rights of Women is of the firm view that there should be a recommendation to prohibit direct cross-examination of witnesses:

(a) in any civil proceedings in which the witness has alleged that the party who is to examine her has subjected her to domestic abuse, sexual abuse, child abuse, stalking or harassment and these allegations are contested but have not yet been determined; and
(b) in civil proceedings in any circumstances in which the party has been found or has admitted (whether in civil, family or criminal proceedings) to have perpetrated domestic abuse, sexual abuse, child abuse, stalking or harassment against the witness.

It is disappointing that the Council has chosen not to include such a recommendation. The reasons provided by the Council are:

- the limited number of cases in which a ban could properly axiomatically apply

We do not understand how the Council has reached this conclusion. If a case involves a perpetrator of abuse directly questioning a survivor then it is self-evident that this is unjust and likely to diminish the evidence of the survivor, and a ban should apply. The Council has failed to explain why a ban would be axiomatic in such circumstances in the criminal and family courts (once the Domestic Abuse legislation has commenced) but not in the civil courts.

If the Council is suggesting that the number of cases that would require the ban is likely to be small, then this is not a reason for the protection not to exist. It is important for the protection to be available for those who need it, and the fact that there will be few cases when this is required means that it is unlikely to have a significant impact on the Ministry of Justice’s budget.

If the Council is suggesting that it would be difficult to define the case categories for which the ban should apply, we suggest that the focus should not be on case categories but rather the relationship between the parties i.e. a person who has or is alleged to have perpetrated domestic abuse, sexual abuse, child abuse, stalking or harassment towards the party/witness should not be allowed to directly cross-examine her.

- the likelihood of prior proceedings (family or criminal)

Again, we fail to understand the logic behind this reasoning. The fact that there have been prior proceedings in the family or criminal courts does not make the witness any less vulnerable when she is in the civil courts. Survivors should not be cross-examined by their abusers regardless of there having been prior proceedings.

- existing powers under CPR 32.1(3)(g) and CPR 3.1A

These powers allow the courts to limit cross-examination and allow judges to put, or cause to be put, questions to the witness which may appear to the court to be proper. The Family Courts have similar powers currently under the Family Procedure Rules. However, these are discretionary powers and judges who lack detailed knowledge about the impact of VAWG and the impact this can have on survivors are less likely to sufficiently limit cross-examination. A clear ban which automatically applies would provide clarity for survivors who fear taking part in legal proceedings due to the prospect of direct cross-examination, and avoid any potential harm caused to survivors by being directly cross-examined.

In cases where the court does decide that a prohibition should apply using its powers under the CPR 3.1A, there may be no appropriate advocate to conduct the questioning and the judge may have to put the questions on behalf of the perpetrator (or on behalf of the survivor if she cannot cross-examine her perpetrator). It is far from ideal for a judge to be conducting the questioning in an adversarial legal system. Funding should be made available for a representative to conduct questioning when no other appropriate person is available.

- the ability to adopt the procedure set out in PS v BP [2018] EWHC 1987 (Fam) and LXA & BXL-v-Wilcox and Wilcox [2018] EWHC 2256 (QB)152
These cases do not add very much to the powers available under CPR 32.1(3)(g) and CPR3.1A or do anything to alleviate our concerns in relation to inconsistent decision making, lack of clarity, and lack of appropriate advocates to conduct questioning.

- at the moment there is no suggestion that funding for a representative would be available in the civil courts (and statutory provision would be required)

This is the only reason provided by the Council which we agree is a barrier to a ban on direct cross-examination. There is absolutely no reason why the Domestic Abuse Bill should not include civil proceedings as part of the legislation on banning direct cross-examination.

Rights of Women gave evidence to the Joint Committee on the Draft Domestic Abuse Bill and written evidence to the Joint Committee of Human Rights\(^1\) on why the prohibition on direct cross-examination should be extended to the civil courts. Our recommendation is supported by other services which support survivors of VAWG\(^2\). As far as we are aware, our recommendation is still being considered. We suggest the Council urgently reconsider its position on whether a prohibition should be introduced in the civil courts.

**Data collection**

There is a dearth of data on the number of cases in the civil courts which involve one party who is the survivor of VAWG and the other is the perpetrator of VAWG, the number of survivors and perpetrators who are litigants in person, the number of cases where special measures are put in place, the number of cases when the survivor is cross-examined by the perpetrator of abuse, and the experiences of survivors in civil courts. We believe there should be a recommendation for HMCTS to collect such data, which will help identify gaps and assess the potential impact of changes and new measures to the civil justice system.

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