



Bar Council response to the *Transforming the Response to Domestic Abuse* consultation paper

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Home Office and Ministry of Justice's consultation paper entitled "Transforming the Response to Domestic Abuse".¹
2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.
4. We have not answered every question in the consultation, but have responded only to those questions where we consider that we have something of value to add.

Consultation questions

Question 1 - Do you agree with the proposed approach to the statutory definition?
Yes, we agree. The inclusion within the definition of controlling behaviour through economic control is welcomed and should be seen across the economic spectrum and not just in terms of obviously economically vulnerable individuals. The concept of coercion should properly reflect the disempowerment of the victim and that an

¹ HM Government, "[Transforming the Response to Domestic Abuse](#)" (2018)

objective of coercive behaviour is to alter the victim's perspective of the situation and to make them behave in ways that they otherwise would not. We agree that the definition of abuse should not be exhaustively defined.

Question 2 - Will the new definition change what your organisation does?

Question 3 - How can we ensure that the definition is embedded in frontline practice?

Question 4 - What impact do you think the changes to the age limit in the 2012 domestic abuse definition have had?

Question 5 - We are proposing to maintain the current age limit of 16 years in the statutory definition - do you agree with this approach?

Yes, we agree. The overriding public concern is to protect children and, as the consultation identifies, children can be the victims of domestic abuse perpetrated by other children. The approach of maintaining the current age limit of 16 years draws a sensible line albeit that it will involve some complexity in distinguishing between domestic abuse and child abuse. The Law Reform Committee (LRC) of the Bar Council would encourage careful consideration of Child Sexual Exploitation (CSE) between adolescents (as distinct from CSE by an adult) and recognises the importance placed on educating children and young adults about the importance of safe and respectful relationships as set out in 1B. Moreover, the LRC recognises that safeguarding provisions apply within the education and social services sector to protect those under 16 who live in an abusive environment.

Question 6 - In addition to the changes being made to how relationship education will be taught in schools, what else can be done to help children & young people learn about positive relationships and educate them about abuse?

Question 7 - What agencies or groups do you think the UK Government should focus its efforts on in order to improve the identification of domestic abuse? Please tick the top 3 from the list.

Question 8 - In addition to improving training programmes and introducing guidance, what more can the government do to improve statutory agencies' understanding of domestic abuse?

Question 9 - What further support can we provide to the public (employers, friends, family, community figures) so that they can identify abuse and refer victims to help effectively?

Question 10 - We are in the process of identifying priority areas for central Government funding on domestic abuse. Which of the following areas do you think the Government should prioritise?

Question 11 - What more can the Government do to encourage and support effective multi-agency working, in order to provide victims with full support and protection?

Question 12 - What more can the Government do to better support victims who face multiple barriers to accessing support?

Question 13 - How can we work better with female offenders and vulnerable women at risk of offending to identify their domestic abuse earlier?

Question 14 - How can we make greater use of women-specific services to deliver interventions in safe, women only environments?

Question 15 - In addition to reviewing who may be eligible for the Destitute Domestic Violence Concession, what other considerations could the Government take in respect of protecting domestic abuse victims with no recourse to public funds?

Consideration should be given to giving access to Legal Aid to obtain legal advice and to make applications to the Family Court for injunctive relief and protection.

Question 16 - Do you agree that the proposed Domestic Abuse Protection Notice issued by the police should operate in broadly the same way as the existing notice (except that it would also be able to be issued in cases of abuse which do not involve violence of the threat of violence)?

Yes.

Question 17 - Which of the following individuals/organisation should be able to apply for a DAPO?

All individuals/organisations listed and the CPS.

Question 18 - Which persons or bodies should be specified by regulation as "relevant third parties" who can apply for a DAPO on a victim's behalf? Select all that apply.

All persons listed.

Question 19 - We propose that there should be multiple routes via which an application for a DAPO can be made; including: a magistrates court by the police following the issue of a DAPN or at any other time, as a standalone application by, for example, the victim or a person or organisation on the victim's behalf to a family

court, by a party during the course of any family, civil or criminal proceedings. Do you agree?

Yes. Whilst, we agree in principle with the creation of DAPOs, the consultation does not expressly set out what legal and evidential test must be met before a DAPO can be made. One test might be that a court should be satisfied on the balance of probabilities that there is a serious risk of further abuse and that the order is necessary to prevent further abuse. The consultation is also silent as to any rights of the alleged perpetrator. We assume these matters will be addressed in future consultations and would welcome the opportunity to respond.

Question 20 - Do you agree that family, civil and criminal courts should be able to make a DAPO of their own volition during the course of any proceedings?

Yes.

Question 21 - Do you agree that courts should be able to impose positive requirements as well as prohibitions as part of the conditions attached to the proposed order?

Yes.

Question 22 - Do you agree that courts should be able to require individuals subject to a DAPO to notify personal details to the police?

Yes.

Question 23 - If so what personal details should the courts be able to require individual to provide to the police? Select all that apply.

Question 24 - Do you agree that the breach of the proposed order should be a criminal offence?

Yes.

Question 25 - If you do agree that the breach of the proposed order should be a criminal offence, should it be possible for breach to alternatively be punished as a contempt of court?

Yes.

Question 26 - Do you agree that courts should be given an express power to impose electronic monitoring as a condition of a DAPO?

No. The conditions imposed as part of the DAPO must be proportionate and we have concerns about an individual who is not formally accused of committing a criminal offence being ordered to be electronically monitored. The electronic tagging of an individual to monitor their whereabouts is an obvious invasion of privacy which needs to be justified. Moreover, the current proposals would allow for a DAPO of

unlimited duration with a condition attached for electronic monitoring. This could not be regarded as proportionate.

Question 27 - Which particular statutory safeguards relating to the use of electronic monitoring with DAPO should be put in place?

Safeguards such as the right for the alleged perpetrator to make representations, the right to legal representation, the right to apply to vary the order and a right of appeal will need to be incorporated into the system. We note the suggestion of a higher threshold being applied before imposing an electronic monitoring condition but the consultation is silent as to the appropriate threshold.

Question 28 - How much easier do you think it will be for domestic abuse victims to register to vote anonymously, once the changes summarised above happen?

Question 29 - What further support could survivors receive to prove their safety would be at risk if their name and address appeared on the electoral register - please put forward one suggestion.

Question 30 - Do you have any further comments or suggestions on how to make it easier for Domestic abuse survivors to anonymously register to vote?

Question 31 - Aside from anonymous registration how else can we keep victims' addresses safe?

Question 32 - Before reading this consultation, were you aware of the Domestic Violence Disclosure Scheme (Clare's Law)

Yes.

Question 33 - Do you agree with the guidance underpinning the DVDS should be put into law? Please select one.

Yes, we agree.

Question 34 - How do you think we can best promote awareness of the DVDS amongst the public?

Question 35 - What practical barriers do domestic abuse victims face in escaping or removing from economic abuse and how could these be overcome?

Question 36 - What more can we do to tackle domestic abuse which is perpetrated online, or through control of technology?

Question 37 - How can we continue to encourage and support improvements in the policing response to domestic abuse across all forces and improve outcomes for victims?

Question 38 - Do you think creating a legislative assumption that all domestic victims are to be treated as eligible for assistance on the grounds of fear and distress (if the victim wants such assistance) will support more victims to give evidence?

Yes. We are not convinced that there is an evidential basis for reform because applications for special measures for complainants of domestic violence are rarely refused. A legislative assumption that special measures will be granted to complainants alleging domestic violence will provide greater certainty as to how they will provide their evidence. We see no difficulty for the defendant who will still have an opportunity to object.

Question 39 - Is there more the Government could do to explain the range and remit of existing measures for victims to help support them in the criminal justice process? Please select one.

Question 40 - Do you know of instances in criminal proceedings when an application to prevent cross-examination of a victim by an unrepresented defendant has been denied in a domestic abuse case? Where possible please provide evidence or details of the experience to support your answer?

No. Members of the LRC are not aware of such a situation and have informally sought the views of professional colleagues in chambers and via social media. The view of those practising is that refusal is very unlikely, owing to the appointment of advocates to cross-examine complainants at the first hearing in the magistrates' court and judicial awareness of the needs of complainants. We are aware of one example when the prosecution made an application to prevent cross-examination of the complainant in an attempted murder case which was refused by the trial judge at Wood Green Crown Court *R v Holloway* [2016] EWCA Crim 2175. This was not an allegation of domestic violence.

Question 41 - Do you think extending the prohibition on cross-examination in criminal proceedings would support more domestic violence victims to give evidence?

Yes. The increasing numbers of unrepresented defendants have made it more likely that victims of domestic abuse will face cross-examination by their abusers. Inefficient processes may also lead to adjournments when the court is not aware that a defendant is unrepresented. We are aware of occasions when the lack of representation is not communicated to the court or, if communicated, is not actioned by court staff. The consequence is that a vulnerable complainant attends court on the day of trial to give evidence, the defendant attends in person and there is no one to carry out the cross-examination. The trial therefore has to be adjourned, with the increased likelihood that

the complainant will disengage with the proceedings and not attend court on a second occasion. Resources need to be provided to deal with the administrative burden that orders such as s.38 orders place on court staff. We do agree that extending the prohibition on cross-examination in criminal proceedings would support more domestic violence complainants to give evidence.

Question 42 - Do you have suggestions for how we can better support prosecutions through to conclusion, including the better support for witnesses who currently disengage with the process. Where possible please provide evidence or details of the experience to support your answer.

Yes. Certainty as to special measures and a prohibition on an accused from questioning the complainant. Court listing in the criminal courts still relies upon "warned lists" and "floating trials". Warned lists mean that a Crown Court trial could be listed any day over a two-week period; the parties are informed the afternoon before the listing. This is unsatisfactory for all parties and one assumes daunting for complainants who will have the anxiety of potentially giving evidence throughout the warned list period. Fixed hearing dates for domestic violence cases will reassure victims and enable them to prepare properly by being able to organise time off work, childcare and prepare for the task of giving evidence. Floating trials are when a trial is listed in the hope that a courtroom becomes available. It inevitably involves all parties waiting for prolonged periods; in our experience this makes the process of giving evidence more daunting and makes it more likely that a complainant will disengage. Moreover, the risk of the complainant and defendant coming into contact is too much for the witness liaison to manage. Late disclosure to the defence can also be unsettling for a complainant. If disclosure is late, it is far less likely that the disclosure process has been explained to a complainant, who may only be told at court that personal messages have been disclosed to their alleged abuser; this may be distressing and lead to disengagement. Late disclosure and the late service of evidence may also lead to adjournments and disengagement by the complainant.

Question 43 - What more can police, witness care units and the CPS do to support victims through the justice process from point of report onwards?

Question 44 - Are there other aspects of the criminal court treatment of vulnerable people which the family court could learn from?

Yes. The Family Court can learn from the criminal courts and has already done so. The Family Court regularly uses the vulnerable witness facilities at Combined Court Centres and provision for video links at Family Courts situated separately are markedly less available. The Family Law Bar Association (FLBA) has set up a working group to put together an advocacy training course for family practitioners, working with the Inns of Court College of Advocacy (ICCA) to adapt its *Advocacy and the Vulnerable* training scheme (currently being rolled out to criminal advocates with oversight by the Bar Council) to best fit family law and procedure. Parents taking part

in public law (care) proceedings very often fit in the category of “vulnerable” set out in PD22A; the challenge for advocates to enable them to participate to their best ability extends to Case Management Hearings, Issues Resolution Hearings and throughout the proceedings and not just when they are giving evidence. The Family Court can learn from the criminal courts in making sure that when a vulnerable witness is to give evidence they commence their evidence at the time planned and without having to wait for case management decisions that can wait until after the evidence has been given. The Family Court can also learn from the criminal court by making available separate entrances and separate or designated waiting spaces so that victims can be sure they will not “bump” into the perpetrator whilst waiting for the hearing to commence. We further suggest that the equivalent of s.38 of the YJCEA 1999 be introduced in the Family Court to give the judge power to prohibit cross-examination of the complainant by a litigant in person and appoint an advocate to conduct the cross-examination on their behalf.

Question 45 - Do you think there is further action the Government could take to strengthen the effectiveness of the controlling or coercive behaviour offences?

No.

Question 46 - Do you think the current approach of using sentencing guidelines, as per guidelines issued in February 2018 is effective in ensuring sentences imposed reflect the seriousness of domestic abuse when it involves children?

Question 47 - Is a statutory aggravating factor needed in order for the court to reflect the seriousness of offences involving domestic abuse and children in sentencing?

Question 48 - Please share any other views on how to ensure domestic abuse and its impact on children are taken into account in sentencing?

Question 49 - Do you think that taking extraterritorial jurisdiction over these offences is sufficient to satisfy the requirements of the Convention?

Yes. We have not identified any other offences. The Government has already signed the Istanbul Convention and is committed to its implementation. The consequence of that decision will provide that offences committed abroad which do not involve domestic violence could be prosecuted within this jurisdiction. Extending the extraterritorial jurisdiction will not only apply to offences connected to domestic violence but would apply to any of the listed offences being committed (e.g. a bar fight between two adults on holiday in Spain could be prosecuted in an English Crown Court). Whilst not a matter of law reform we can envisage difficulties in investigating and gathering evidence abroad. Mutual legal assistance, in particular the co-operation of EU partners, helps to identify and gather evidence for criminal proceedings from abroad. Investigative tools such as the European Investigation Order empower a member state to require that another member state obtains evidence on its behalf.

However, the process of obtaining evidence from abroad remains more challenging than if the evidence existed domestically. We would also anticipate the CPS issuing guidance for charging decisions in respect of offences committed abroad.

Question 50 - If not, what additional offences do you think we should take extraterritorial jurisdiction over and why?

N/A

Question 51 - Do you agree that relying on the civil law remedy in the Protection from Harassment Act 1997 is sufficient to satisfy the sexual harassment requirements of the Convention?

Yes.

Question 52 - If not, what do you think is necessary to satisfy those requirements?

N/A

Question 53- Do you agree we should explore (with the Crown Prosecution Service) further controlled and monitored use of conditional cautions with rehabilitation programmes than is currently permitted for lower-level, normally first time domestic abuse incidents? Please select one.

If yes, please explain your answer suggesting what procedures should be in place to ensure a conditional caution would only be given in appropriate cases with appropriate conditions attached. If no, please explain your answer.

Question 54 - Do you have any additional evidence on current conditional caution practice which we should consider in relation to this issue?

Question 55 - What changes to current policies or procedures would help police and other agencies to better manage serial and repeat abusers in particular those who are not subject to a sentence of the court. This can include how best to: risk assess an abuse and plan for risk reduction (ii) engage an abuser in order to encourage compliance with control measures.

Question 56 - What more could be done to work with perpetrators in prisons, particularly offenders who receive a sentence of less than 12 months and do not have sufficient time to complete a domestic abuse programme in custody? We are interested to hear of particular examples of practice which have been successful.

Question 57 - What more could be done to work with perpetrators in the community (convicted or non-convicted) to change their behaviour? We are interested to hear of particular examples of practice which have been successful.

Question 58 - Please select which of the following you believe should be priorities for improving data collection.

Question 59 - Do you agree with the proposed model for a Domestic Abuse Commissioner outlined above?

Question 60 - Of the proposed powers and resources which do you consider to be the most important for a domestic abuse commissioner?

Question 61 - Question for public bodies only: What would be the practical implications of complying with the proposed Domestic Abuse Commissioner's powers?

Question 62 - One proposal is that the Domestic Abuse Commissioner could routinely collate, quality assure and share lessons learnt from DHRs. What more could be done to increase awareness of the learning from DHRs?

Question 63 - How can areas best hold their own local agencies to account in terms of monitoring delivery against DHR action plans?

Question 64 - How can the government better share and promote effective practice on domestic abuse across all public services both in regard to commissioning and delivery of services?

Question 65 - What role should local areas play in sharing good practice?

**Bar Council²
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