

# WOMEN'S AID

## Submission

# Mediation Bill 2017

Updated July 2017



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## 1. Introduction

**Women's Aid welcomes the publishing of the Mediation Bill 2017.**

Women's Aid is a leading national organisation that has been working in Ireland to stop domestic violence against women and children since 1974. In this time, the organisation has built up a huge body of experience and expertise on the issue, enabling us to best support women and share this knowledge with other agencies responding to women experiencing domestic violence. Our services and expertise are outlined below.

### **National Freephone Helpline**

Our National Freephone Helpline (1800 341 900) operates 24 hours a day, seven days a week, and provides support and information to callers experiencing abuse from intimate partners. It is the only free, national, domestic violence Helpline with specialised trained staff and volunteers, accredited by The Helplines Association and with a Telephone Interpretation Service facility covering 170 languages for callers needing interpreting services. In 2015 the Women's Aid National Freephone Helpline responded to 15,952 calls.

### **One to one support visits and Court Accompaniment**

We also provide face to face support visits and Court Accompaniment in the greater Dublin area. Court Accompaniment is a specific service providing support to the particular needs of women seeking legal redress in the Courts regarding violence by a current or former husband or partner. In 2016 Women's Aid provided 748 support visits and 240 court accompaniments.

### **Dolphin House Family Law Support and Referral Service**

Women's Aid also operates the Dolphin House Family Law Support and Referral Service, in partnership with the Dublin 12 Domestic Violence Service and Inchicore Outreach Centre. This is a free and confidential drop in service for women who are experiencing abuse in a relationship, located in the Dublin District Family Law Court.

### **Training and Development**

Women's Aid is a centre of excellence in training to statutory, voluntary and community organisations as they develop and maintain organizational responses to women and their children experiencing domestic violence. Training participants include health and social care professionals, staff from community groups throughout Ireland and Women's Aid National Freephone Helpline volunteers.



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## Policy and Communications work

The sum of the above contacts with women experiencing domestic violence and their supporters enable us to have a good picture of the issues that need addressing to improve systemic responses and we use that information in our policy and communication work. We provide relevant information and recommendations to government and other relevant agencies on the nature and prevalence of domestic violence, the barriers faced by women experiencing domestic violence and the gaps in existing legislation/systems.

## 2. Statistical context

A recent **European Union survey (FRA)**<sup>1</sup> on violence against women has found that in Ireland:

- 14% of women have experienced physical violence by a partner (current or ex).
- 6% of women have experienced sexual violence by a partner (current or ex).
- 31% of women have experienced psychological violence by a partner (current or ex).

This same survey found that in Europe, 73% of women who have experienced physical or sexual violence by a current or a previous partner, indicate that their children have become aware of the violence<sup>2</sup>.

### Women's Aid statistics<sup>3</sup>

In 2016:

- there were 19,115 contacts with Women's Aid, in which 16,946 disclosures of domestic violence against women were made (including emotional, physical, financial and sexual abuse)
- Our Court Accompaniment service went to court 240 times with 133 women, and provided support to women in applications for orders under the Domestic Violence Act, child related court applications (such as custody, access, maintenance) and separation/divorce applications
- the Dolphin House Support and Referral Service supported 387 women in 411 face to face drop in sessions throughout the year
- there were 3,823 disclosures of child abuse to Women's Aid direct services.
- 49% of the information, referral and advocacy work by the Helpline and One to One service in 2016 was in support of women accessing and negotiating the legal system for protection. This includes information and support on legal options, how to access expert legal advice and representation and contacting the Gardaí.

<sup>1</sup> FRA gender-based violence against women survey dataset available at <http://fra.europa.eu/DVS/DVT/vaw.php>

<sup>2</sup> European Union Agency for Fundamental Rights (FRA), 2014, Violence against women: an EU-wide survey Main results, page 134. No country specific data available.

<sup>3</sup> Women's Aid Impact Report 2016.



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## 3. Mediation in the Context of Domestic Violence and Post Separation Abuse.

Women's Aid recognises the potential of mediation to positively resolve family disputes in cases **where there is no domestic violence**. However, where domestic violence is present, mediation is not appropriate. It could put women at risk during the process of mediation. It could lead to unsafe and unfair outcomes for women and their children. This is due to the power imbalance between the parties and the fear and intimidation experienced by women subjected to domestic violence.

Research has shown that, in many cases, domestic violence does not end with separation. On the contrary, separation is frequently a time of heightened risk for women experiencing domestic violence. Physical and sexual violence often escalate at this point and separation is one of the key risk factors that must be taken into consideration in domestic violence risk assessment tools<sup>4</sup>.

The FRA report found that of the women who separated from a violent partner 91% experienced violence during the relationship and 33% experienced violence **during the break up**. For 16% violence started or continued **after separation**<sup>5</sup>.

Our experience providing frontline services confirms this. In 2016 one quarter (26%) of the women we worked with were being abused by an ex-husband or ex-partner<sup>6</sup>.

For women leaving abusive relationships, separating and going through the Family Law Court to settle matters such as divorce, custody, access and maintenance, is a particularly fraught time.

Mediation is **predicated on the parties having an equal relationship** and being able and willing to cooperate with each other. It is unrealistic to think that a perpetrator of violence would cooperate with his victim in an honest and open way, or that this process would be able to reverse what may have been years of dominance and control.

Participation in mediation can put women in danger of further abuse and harassment through contact with the abuser on arrival, during negotiations and on departure. For example, women accessing our helpline and

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4 See for example the risk assessment tools SPECSS+, DASH.

5 European Union Agency for Fundamental Rights (FRA), 2014, Violence against women: an EU-wide survey Main results, Table 2.11. No country specific data available.

6 Women's Aid Impact Report 2016.



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support services report that mediation in Family Law is easily abused by their partner/husbands and some have even been abused during the mediation sessions without the mediator intervening.

A woman who used Women's Aid Support Services spoke to the Irish Times about her experience of mediation with her abusive ex-husband:

**After the separation, they were both in court to deal with custody of and access to their children. Her ex-husband began arguing, while she sobbed and when the judge intervened, her ex-husband said he wanted to attend mediation. The judge agreed. Abigail didn't feel she could object, so she went along. Her ex-husband turned up an hour and a half late. When mediation started, he began "shouting and roaring", cursing and saying the children did not want her. Every time Abigail tried to speak he would stand up and shout over her. The mediator eventually ended the session and said they could reschedule when he had calmed down. The mediator went out and spoke to the receptionist, while Abigail's ex-husband waited by the lift for 10 or 15 minutes. The mediator took her out another door and brought her to a Women's Aid office nearby for support.**

**Asked what she would like judges to know when they are dealing with cases with a history of domestic abuse, she said if either party asks for mediation, judges should speak to them separately. "It's very hard to speak up when there is a person across the room that you're in fear of," she says. "You can't speak your personal truth when you are in fear, nobody can. You are not getting an authentic result in mediation if one party is in fear."<sup>7</sup>**

A recent report on shared parenting in Ireland by **One Family**<sup>8</sup> includes the following experience exemplifying what can go wrong:

**"It was of no use whatsoever. I felt very vulnerable during the sessions. Mediator was male, which I didn't have a problem with but he allowed my ex-husband to verbally abuse me during the sessions. Not a positive experience at all. After 10 very difficult sessions, mediation concluded with nothing agreed." – Mother of 2**

<sup>7</sup> "When I came back everything belonging to me was burnt" The Irish Times, p. 3, 10<sup>th</sup> July 2017. Available <https://www.irishtimes.com/news/crime-and-law/when-i-came-back-everything-belonging-to-me-was-burnt-1.3148614> (accessed 10.7.17)

<sup>8</sup> One Family, Ireland's first national Shared Parenting Survey Results and Recommendations Report



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Women who have experienced domestic violence may feel intimidated and fearful during negotiations with the ex-partners, regardless of the presence of mediators, which would impact on their capacity to negotiate confidently a safe and fair outcome for themselves and their children. It is our experience that women may agree to disadvantageous arrangements or may not be able to freely articulate their fear and concerns in the presence of the abuser.

Research proves that abusive men use custody and access to continue controlling and abusing their ex-partner and often the children as well<sup>9</sup>.

It is therefore vital for the woman as well as the children's safety that a victim of domestic violence is not put into the situation where she is intimidated by her partner into agreeing to unsafe or unfair arrangements.

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<sup>9</sup> See for example Women's Aid, *Child Custody and Access in the context of Domestic Violence: Women's Experiences and the Response of the Legal System*, 2003. Bancroft and Silverman, 'The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics', 2002, Sage Publication. Holt "A Case of Laying Down the Law: Post-Separation Child Contact and Domestic Abuse" *Irish Journal of Family Law* Vol. 14 No.4 Winter 2011



**WOMEN'S AID**

Making Women and Children Safe

**WOMEN'S AID**

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## 4. Main Concerns and Recommendations relating to the Mediation Bill 2017

### 4.1 Summary of Recommendations

**Recommendation 1:** That a provision is inserted in Section 3 to add Family Law Cases where domestic violence is alleged to the list of proceedings to which the Bill does not apply.

**Recommendation 2:** That a provision is included in Section 8 to include that prior to commencing mediation, the mediator make enquires separately with the parties as to whether there has been domestic violence in the relationship to assess if the case is suitable for mediation.

**Recommendation 3:** Solicitors and Barristers should be trained in recognising domestic violence and in referring appropriately.

**Recommendation 4:** Mediators should be trained in recognising domestic violence and in referring appropriately.

### 4.2 Exemption for Family Law Cases in the Context of Domestic Violence

While in the Bill mediation remains a voluntary process, there is a strong emphasis on promoting mediation as a viable and possibly better alternative to litigation in civil law, including in Family law. For example, according to the website of the Department of Justice and Equality, the Bill will<sup>10</sup>:

- introduce an obligation on solicitors and barristers to advise parties to disputes to consider utilising mediation as a means of resolving them and, where court proceedings are launched, requires parties to proceedings to confirm to the court that they have been so advised and have considered using mediation as a means of resolving the dispute.
- in family law cases, parties will be required to attend an information session on mediation.
- provide that a court may, on its own initiative or on the initiative of the parties, and following the commencement of proceedings, invite the parties to consider mediation as a means of resolving the dispute.
- provide for the suspension of court proceedings in such cases to facilitate the mediation process.

As discussed above, **mediation is generally not appropriate in Family Law cases where there is domestic violence.**

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10 <http://www.justice.ie/en/JELR/Pages/MediationBill2017>



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Women's Aid has the following concerns in relation to the above stated objectives of the Bill in cases where domestic violence is present:

- It would be inappropriate and unhelpful for a solicitor or barrister to advise an abused woman who is seeking a separation/ divorce or going to court in relation to custody, access or maintenance to consider mediation (Section 14 and 15).
- Abusers may apply to the court to consider mediation (under Section 16) in order to prolong or delay court proceedings and force their partner to engage with them. Abusers may use the mediation sessions to continue intimidating and abusing their partners.
- Women may feel they have to engage in mediation if invited by the Court (Section 16) and may then find it difficult to negotiate safe and fair agreements face to face with their abuser. They may feel compelled into accepting dangerous or unfair terms for fear of being seen as uncooperative.
- There are also possible financial consequences for not participating in mediation. Section 21 provides that, in awarding costs in civil proceedings covered by this Bill, the Court may take into consideration any unreasonable refusal or failure of a party to the proceedings to consider using mediation or to attend mediation.

Women's Aid appreciates that according to **Section 3. (1) (h)** this Bill shall not apply to proceedings under the Domestic Violence Acts.

However, many women separating from an abusive partner may be involved in **other Family Law proceedings such as separation, divorce, child custody and access or maintenance** and there does not seem to be a process for screening such cases out.

In its 2010 Report on Alternative Dispute Resolution the **Law Reform Commission** acknowledged that Family law disputes not suitable for mediation included not only those under the Domestic Violence Act, **but also those where the safety of one of the parties (and or their children) is at risk**. Therefore they recommended to exempt both situations from mandatory information sessions on mediation:

“The Commission recommends that a party in family law proceedings shall not be required to attend an information session where: (a) where the proceedings involve an application for a safety order, a barring order or a protection order under the Domestic Violence Act 1996; or (b) where a party



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satisfies the court that his or her personal safety, or the safety of his or her children is or are at risk<sup>11</sup>.”

Women's Aid believes that a similar approach would better protect parties separating from an abusive partner from unintended negative consequences of mediation and that therefore the list of proceedings to which the Bill does not apply should be expanded to include Family Law cases where domestic violence is alleged.

We note that in the Dáil amendments based on this recommendation were not accepted, the reason given being that mediation remains voluntary and that similar obligations on solicitors to advise mediation in family law already exist in other relevant Acts. This misses the point that it may be very difficult for a woman to refuse mediation when it is so strongly encouraged by the legal system, even if it is not safe. However under this Bill there are other much more concerning provisions under S16 and S21, which may be very detrimental to victims of domestic violence engaged in Family Law proceedings.

These provisions would allow a perpetrator of domestic violence to apply for the Court to invite parties to mediation (S16. (1) (a). During mediation, proceeding may be adjourned (Section 16 (2)), giving more time to a perpetrator to put pressure on the woman to agree to unsafe arrangements.

Moreover under S21, refusal to consider or attend mediation can be considered when awarding costs. So a victim of domestic violence may be "invited" to mediation by her abuser, who may use this tactic to protract proceedings, may feel coerced to agree to mediation even if it is not safe for her or in her best interest and she may well fear that if she does not engage she will have to pay costs.

**Recommendation 1:** That a provision is inserted in Section 3 to add Family Law Cases where domestic violence is alleged to the list of proceedings to which the Bill does not apply.

## 4.2 Screening

Given the prevalence of domestic violence, it is essential that **systematic screening** is put into place to identify Family Law cases where mediation would not be appropriate, or if the parties are genuinely willing to participate in mediation notwithstanding domestic violence, for whom special measures needs to be implemented.

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11 Law Reform Commission, (2010), Alternative Dispute Resolution: Mediation and Conciliation, page 122



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Many victims do not readily report domestic violence. The FRA report for example found that in Ireland only 21% of women contacted a legal service/solicitor as a result of the most serious incident of physical or sexual violence by a partner<sup>12</sup>. Therefore a proactive approach to screening is required:

- on the part of solicitors/barristers before suggesting mediation and
- on the part of mediators themselves before starting mediation.

Women's Aid notes that the role of the mediator is outlined in Section 8. A provision could be added in this section to require that a mediator screens parties **separately** for domestic violence **before** commencing mediation.

We do not think that this would be intrusive or inappropriate, on the contrary it may encourage victims of domestic violence to identify any concerns they may have in relation to mediation. Screening out domestic violence is already best practice in mediation, this would ensure all mediators adhere to this principle.

**Recommendation 2:** That a provision is included in Section 8 to include that prior to commencing mediation, the mediator make enquires separately with the parties as to whether there has been domestic abuse in the relationship to assess if the case is suitable for mediation.

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12 FRA gender-based violence against women survey dataset available at <http://fra.europa.eu/DVS/DVT/vaw.php>



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## 4.3 Training for Legal Professionals

Under Section 14 and 15 respectively, solicitors and barristers are required to advise clients to consider mediation and to provide information on mediation and its benefits prior to instituting proceedings. They also have to provide a statutory declaration to the effect that the above requirement has been met with.

As this would be highly inappropriate where there is domestic violence, it is necessary that solicitors and barristers are trained to screen for domestic violence and are resourced to refer any victim of domestic violence to specialist services.

As in Recommendation 1, these requirements should in any case not apply in cases of domestic violence.

**Recommendation 3:** Solicitors and Barristers should be trained in recognising domestic violence and in appropriate referrals.

## 4.4 Training for Mediators

As discussed above, mediators should screen parties to identify domestic violence prior to commencing mediation. Moreover, under Section 17. (a) when the court has invited the parties to consider mediation but mediation did not take place the mediator is required to report on the reason why it did not happen. Under Section 17. (b) a mediator is also required to report to court on the outcomes of a mediation, including on:

- (iv) if no mediation settlement has been reached, a statement as to whether, in the mediator's opinion, the parties engaged fully in the mediation.

It is imperative that the mediator is able to recognise when abuse and/or fear have prevented proper engagement in mediation or a settlement form being reached. **There should be no negative inference on Family Law proceedings if a victim of domestic abuse is unable or unwilling to participate fully in mediation.** It is therefore vital that mediators are knowledgeable about domestic violence and are able to identify it, to respond appropriately and to refer to support services as needed.

**Recommendation 4:** Mediators should be trained in recognising domestic violence and in referring appropriately.

Ends

