

WOMEN'S AID

Recommendations for the review of the Domestic Violence legislation

November 2012

Background

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 Work

National Freephone Helpline

Our National Freephone Helpline (1800 341 900) operates from 10am to 10pm, every day of the year (except Christmas day), 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.

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.

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.

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



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prevalence of domestic violence, the barriers faced by women experiencing domestic violence and the gaps in existing legislation/systems.

Women's Aid has welcomed the current Government commitment to introduce consolidated and reformed domestic violence legislation, and has prepared this document to avail of the opportunity to explore improvements in a number of relevant areas.

Women's Aid would like to acknowledge the generous pro bono work carried out by legal professionals under the Public Interest Law Alliance (PILA) pro bono scheme, who researched a number of legal issues on which Women's Aid needed more information to prepare this paper: Lynne McDonagh B.L., Aoife Mooney B.L., Katie Dawson B.L, Michael Kinsley B.L., Elizabeth Mitrow, Solicitor.

At times this paper quotes directly from their research reports, however the conclusions and recommendations Women's Aid arrived at and which follow, may or may not coincide with theirs.

Summary of recommendations

Women's Aid recommends:

- 1) That the Domestic Violence Act 1996 is amended to further extend eligibility for Safety Orders to all parties who are or have been in an intimate relationship, regardless of cohabitation. Furthermore, the definition of such applicant should specify that such intimate relationship need not be sexual in nature.
- 2) That a provision is included in the Domestic Violence Act to allow for Garda to apply for emergency orders to an on-call judge. Whereby, on request from a Garda attending a domestic violence incident, a Garda of appropriate rank can authorise the calling of an on-call judge to apply for an Emergency Barring Order. The return date would be the next sitting day in the nearest available Court.
- 3) To explore whether it would be possible to remove the property test for cohabitants applying for a Barring Order, at least in cases where it conflicts with the best interest of the child/ren of the family, and to explore whether the safety and welfare of the child should override property rights.
- 4) If the property test is retained:
 - 4.1) To remove the duration of cohabitation test so that a person would be eligible to apply for a Barring Order if they were cohabiting, regardless of any particular period of cohabitation.
 - 4.2) If that is not possible for all cases, the duration of cohabitation requirement should at least be removed for cases where the applicant is the sole owner of the property.
- 5) That guidelines are developed in relation to criteria and considerations for granting Orders under the Domestic Violence Act.



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Such guidelines should clearly name as forms of abuse covered by the Act: physical abuse, sexual abuse, financial abuse and emotional abuse of the applicant and/or of any child of the relationship.

Stalking should be included in the guidelines as a ground for applying for a Safety Order.

- 6) A rebuttable presumption should be introduced, by which Custody and unsupervised Access with a child should not be granted to a parent who is a perpetrator of domestic violence unless the Court is wholly satisfied that the child would be safe from abuse while in the custody of or unsupervised access with such parent, including safe from emotional abuse caused by exposure to domestic violence.
- 7) A mechanism to provide the Family Law Court with child welfare and safety assessments should be re-instated.
- 8) A mechanism to allow children to have their voices heard in Family Law proceedings should be introduced, especially in cases of domestic violence.
- 9) When granting any Barring Order, (including Emergency and Interim) the Court should consider the safety and well-being of any children of the relationship and take interim measures for their protection while Custody and Access proceedings are pending.
- 10) That a specific offence of stalking should be introduced in Irish law, including a comprehensive but not exhaustive definition, similar to that of Scotland or Victoria.
- 11) That such a provision should allow for the Court to make a Non-Harassment/Restraining Order to protect the victim from future harassment or stalking on conviction for a stalking offence and even if the defendant is not convicted of an offence of harassment or stalking, but the Court believes the facts warrant the making of such an order for the protection of the victim.
- 12) Stalking should be explicitly recognised as a ground for applying for a Safety Order.

Eligibility for Safety Orders

The issue: partners in dating relationships (not cohabiting and without a child in common) are not eligible to apply for Safety Orders.

Recommendation:

1) Women's Aid recommends that the Domestic Violence Act 1996 is amended to further extend eligibility for Safety Orders to all parties who are or have been in an intimate relationship, regardless of cohabitation. Furthermore, the definition of such applicant should specify that such intimate relationship need not be sexual in nature.



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Rationale:

In August 2011, much welcomed amendments to the Domestic Violence Act 1996 were enacted via the Civil Law (Miscellaneous Provisions) Act 2011, which extended eligibility for orders under the Act to categories previously excluded.

In particular the above Act removed the minimum required period of cohabitation before a cohabiting partner could apply for a Safety Order and gave equal access to the protections of the Domestic Violence Act to opposite-sex and same-sex couples.

Very importantly the Act also extended eligibility for Safety Orders to parents of a child in common, regardless of any current or previous cohabitation.

Women's Aid welcomed these improvements, and understands that in the following months there was a noticeable increase in applications under the Domestic Violence Act in Dolphin House, which could confirm that the amendments were needed and had an immediate and noticeable impact.

Partners in dating relationships (with no cohabitation and no child in common) are still not eligible for protection under the Domestic Violence Act.

However, domestic violence also occurs in young/dating relationships:

- In a national survey on domestic abuse, almost 60% of people who had experienced severe abuse in intimate relationships experienced the abuse for the first time under the age of 25, and 24% before the age of 19¹.
- 186 women have been murdered in the Republic of Ireland since 1996. 39 (21%) of these women were aged between 18 and 25 years of age. This is the second largest age group represented in the Women's Aid female homicide statistics. Of the 39 women aged 18-25, 30 cases have been resolved. Of the resolved cases, 16 women (53%) were killed by someone they were, or had been, in an intimate relationship with. Of these 16 women, ten were NOT living with their murderers.²
- International research on dating violence shows that women aged between 16 and 19 are at the highest risk of sexual assault (7.9 per cent), stalking (8.5 per cent) and domestic abuse (12.7 per cent). Women aged between 20 and 24 are only slightly less at risk, stalking (7.5 per cent) and domestic abuse (11.1 per cent)³.
- Recent UK research also concludes that "adult domestic violence often starts at a much younger age than previously recognised"⁴ and that it affects young women disproportionately.

Women's Aid believes that protection from domestic violence should not be contingent on cohabitation. Therefore Safety Orders should be available to all parties who are or have been in an intimate relationship. This is supported by the United Nations Handbook for Legislation on Violence Against Women, which states that domestic violence legislation should apply to "individuals who are or have been in an intimate relationship, including marital, non-marital, same sex and non-

¹ Watson and Parsons, Domestic Abuse of Women and Men in Ireland, National Crime Council, 2005, page 64

² Women's Aid Female Homicide Media Watch Statistics 1996 – 30th September 2012

³ Domestic Violence: the facts, the issues, the future - Speech by the Director of Public Prosecutions, Keir Starmer QC, 12/04/2011. http://www.cps.gov.uk/news/articles/domestic_violence_-_the_facts_the_issues_the_future/

⁴ Christine Barter, Melanie McCarry, David Berridge and Kathy Evans, Partner exploitation and violence in teenage intimate relationships, NSPCC, 2009



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cohabiting relationships; individuals with family relationships to one another; and members of the same household.”⁵

While partners in abusive dating relationships have recourse to the criminal legal system, there are a number of negatives in respect to this course of action, including that prosecution matters are taken out of their hands and that the burden of proof is raised from the “balance of probabilities” to “beyond reasonable doubt”. Moreover the criminal justice system deals with punishing past events, rather than preventing future threats and victimisation.

By comparison with cohabiting or married victims, dating victims have no fast and accessible recourse to the Civil Courts in order to get protection from future abuse.

Legal research carried out for Women’s Aid on this issue looking at a number of other jurisdictions, concludes that it is possible and not problematic to frame protective legislation which includes non-cohabiting partners. This is generally achieved by extending the category of those who are eligible to apply under domestic violence legislation to those who “are or have been in an intimate personal relationship” with the perpetrator.

In certain jurisdictions, such as New South Wales and New Zealand, it is clearly specified that an intimate or personal relationship need not be sexual in nature.

For example, in New South Wales, domestic violence is covered by the Crimes (Domestic and Personal Violence) 2007 and those who may apply for relief includes those have or have had an “intimate personal relationship with the other person, whether or not the intimate relationship involves or has involved a relationship of a sexual nature”. Women’s Aid supports such definition.

Emergency Barring Orders

The issue: Lack of immediate protection when the Courts are not sitting.

Recommendation:

2) Women’s Aid recommends that a provision is included in the Domestic Violence Act to allow for Garda to apply for emergency orders to an on-call judge. Whereby, on request from a Garda attending a domestic violence incident, a Garda of appropriate rank, can authorise the calling of an on-call judge to apply for an Emergency Barring Order. The return date would be the next sitting day in the nearest available Court.

⁵ Department of Economic and Social Affairs Division for the Advancement of Women, Handbook for Legislation on Violence against Women, Advanced version, United Nations, New York, 2009, page 26.



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Rationale:

A gap that Women's Aid has noted in existing legislation is the lack of emergency orders, to afford immediate protection to a victim of domestic violence when the Courts are not sitting.

For example, if a domestic violence incident occurs on a Friday evening, there is no recourse to the Courts until at least the following Monday. It may be unsafe for a woman and her children to remain in the home with the perpetrator and with no protection.

While the Gardai can arrest in certain cases, station bail is usually given within a few hours. In other cases, the Gardai may be unable to arrest, due to lack of evidence or the nature of the offence. The perpetrator of violence who is neither arrested, charged, nor otherwise on bail is free to return to the scene of the abuse, therefore there is no immediate protection.

In these cases, women and their children, who may with reason be fearful of the perpetrator, have only the option of leaving their home to seek shelter elsewhere, with family, friends or in refuges.

Family and friends may or may not be willing or able to accommodate them, or this may not be a safe option, as the perpetrator will know where family and friends are. Refuges are often full, with Safe Ireland data showing that in 2010 women and children were not able to be accommodated in refuges on over 3,236 occasions, because the refuge was full or there was no refuge in the area.

Moreover, some women do not wish to avail of refuges, for a variety of valid reasons, including location, not disrupting the children, not wishing to leave their home.

There is a clear need for orders to be available outside of traditional Courts hours, so that victims of domestic violence do not find themselves without protection for extended periods of time.

Women's Aid has commissioned research through PILA, which shows that many other jurisdictions have solved this problem through the use of emergency orders. In some jurisdictions, these orders are issued directly by Police (for example in Austria, Germany and as a pilot in certain parts of the UK). In others jurisdictions, they are made through a Police application to the Court (or authorised officer) via telephone, fax or email. An example of the latter would be the Provisional Orders in New South Wales (Part 7 of the Crimes (Domestic and Personal Violence) Act 2007). Crucially these orders can be made out of hours through an on-call system for magistrates, therefore ensuring 24/7 protection.

A similar on-call system already exists in Ireland for criminal law.

Women's Aid proposes that a similar system for Emergency Barring Orders is implemented in Ireland, whereby upon attending a domestic violence incident, and where there is an immediate risk to the victim and/or the children, the attending Garda can be authorised by another Garda of appropriate rank to contact an on-call judge and apply for an Emergency Barring Order with immediate effect. This would only last until the next sitting day in the nearest Court.

Such a system would ensure that access to Barring Orders is available 24/7.

It is worth noting that the Council of Europe Convention on preventing and combating violence against women and domestic violence includes provisions to bar the perpetrator of domestic violence from the home in situations of immediate danger (Article 52).



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Barring Order eligibility

The issue: restricted eligibility for Barring Orders for unmarried cohabitants.

Recommendations:

3) To explore whether it would be possible to remove the property test for cohabitants applying for a Barring Order, at least in cases where it conflicts with the best interest of the child/ren of the family, and to explore whether the safety and welfare of the child should override property rights.

4) If the property test is retained:

4.1) To remove the duration of cohabitation test so that a person would be eligible to apply for a Barring Order if they were cohabiting, regardless of any particular period of cohabitation.

4.2) If that is not possible for all cases, the duration of cohabitation requirement should at least be removed for cases where the applicant is the sole owner of the property.

Rationale:

Currently a cohabitant wishing to apply for a Barring Order needs to meet 2 requirements:

- 1) A duration of cohabitation requirement, by which the applicant must have lived with the respondent in an intimate and committed relationship for a period of at least six months in aggregate during the period of nine months immediately prior to the application for the Barring Order, and
- 2) A property test requirement, by which the applicant must have an equal or greater legal or beneficial interest in the property in question.

This clearly creates problems for those parties who have been living together for a shorter time or who have a lesser interest in the property.

It should be noted that the presence of children in the violent relationship has no bearing on the legal determination under the current statutory position with respect to the ownership aspect of the test to be applied. The legislation clearly states that the Court “shall not make a Barring Order” where the applicant has less of a legal or beneficial interest in the property in question.

This is regrettable, as in certain cases in the absence of a Barring Order, women and children have no choice but to leave the home for their safety and seek protection with family, friends or in a refuge. This may be a very disruptive move. It may mean that children have to leave favourite possessions, friends and supports behind, that they may have to change schools, normal activities and routines. Women and children that are forced to leave their home may find that it takes a long time for them to secure a new accommodation and that they are in emergency/transient accommodation for a long period. In certain extreme cases women and children may even find themselves homeless and living on the streets.

Ideally property rights should not interfere with the safety of the injured party and with the safety and/or welfare of any children involved.



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Legal research carried out for Women's Aid found a number of other jurisdictions where it is possible to exclude a violent party from the home, regardless of ownership or leasehold rights. In these jurisdictions, generally legislation does not differentiate between those who can apply for the equivalent of a Safety Order and those who can apply for the equivalent of a Barring Order. Once a person is deemed to fulfill the requirements in order to access domestic violence protection, they can be awarded any or all of the protections offered under the relevant legislation depending on the specific circumstances of the situation. Generally in these pieces of legislation, it is expressly stated that any legal or beneficial interest that either party may have in the property in question will not be affected by any order made under the specific legislation.

While this approach is ideal, Women's Aid is aware that constitutional constraints in Ireland may prevent such an approach here. However, it would be beneficial to explore whether it would be possible to remove the property test, at least in cases where it conflicts with the best interest of the child/ren of the family, or whether the safety and welfare of the child should override property rights. In this case it should be made explicit, that any legal or beneficial interest that either party may have in the property in question will not be affected by any order made under the Domestic Violence Act.

If the property test is retained, there are a number of measures that could be taken regardless, to improve eligibility for Barring Orders:

- a. Women's Aid recommends that the duration of cohabitation test is removed and that a person would be eligible to apply for a Barring Order if they were cohabiting, regardless of any particular period of cohabitation. This is a sensible approach as there is already a requirement in the legislation that the applicant must have a greater or equal interest in the property in order to apply for a Barring Order. A residency requirement on top of this is unnecessary.
- b. If that is not possible for all cases, the duration of cohabitation requirement should at least be removed for cases where the applicant is the sole owner of the property, as there can be no justification for insisting that a person allow an abuser to live in their house for any period of time before being eligible to seek a Barring Order from the Courts.

Guidelines

Issue: there are no guidelines in relation to criteria and considerations for granting orders under the Domestic Violence Act, 1996, leading to inconsistent application of the legislation.

Recommendation:

5) That guidelines are developed in relation to criteria and considerations for granting orders under the Domestic Violence Act.

Such guidelines should clearly name as forms of abuse covered by the Act: physical abuse, sexual abuse, financial abuse and emotional abuse of the applicant and/or of any child of the relationship.

Stalking should also be included in the guidelines as a ground for applying for a Safety Order.



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Rationale:

The Act does not set out criteria regarding the standard or type of proof necessary to determine the basis for the granting of an order, nor what the Court should consider in this regard.

This has led to considerable variation among and even within Courts regarding the grounds on which Courts will grant orders under the Domestic Violence Act. A Law Society survey found considerable variation among judges regarding the evidence they considered sufficient in order to obtain an order under the Domestic Violence Act⁶. The National Crime Council has also noted considerable regional variation in the outcomes for applications under the Act and has recommended research into the issue.⁷

Women's Aid has noted that it can be extremely difficult for women to obtain an order when they are experiencing emotional abuse, despite the fear the abuser is making them feel and even when this has stark consequences on the health and wellbeing of the woman and of her children.

Children related matters

Issue: when parents separate in the context of domestic violence, Access and Custody Orders are often made that disregard the impact of domestic violence on children and the risk of continuing abuse to both children and their mothers. This is compounded by a lack of expert child welfare and safety assessment to support the Courts when making determinations regarding Custody and Access. The voice of the child is also absent from such proceedings.

Recommendations:

6) A rebuttable presumption should be introduced, by which Custody and unsupervised Access with a child should not be granted to a parent who is a perpetrator of domestic violence unless the Court is wholly satisfied that the child would be safe from abuse while in the custody of or unsupervised access with such parent, including safe from emotional abuse caused by exposure to domestic violence.

7) A mechanism to provide the Family Law Court with child welfare and safety assessments should be re-instated.

8) A mechanism to allow children to have their voice heard in Family Law proceedings should be introduced, especially in cases of domestic violence.

9) When granting any Barring Order (including Emergency and Interim), the Court should consider the safety and well-being of any children of the relationship and take interim measures for their protection while Custody and Access proceedings are pending.

⁶ The Law Society Law Reform Committee (1999), *Domestic Violence: A Case for Reform* The Law Society Law Reform Committee (1999), *Domestic Violence: A Case for Reform*

⁷ Watson and Parsons, *Domestic Abuse of Women and Men in Ireland*, National Crime Council, 2005



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Rationale:

The link between child abuse and domestic violence has been clearly established with domestic violence being the most common context in which child abuse takes place. It has also been found that the more severe the domestic violence, the more severe the abuse of children in the same context⁸.

International research demonstrates both the co-occurrence of child abuse with domestic violence and the impact of domestic violence on the developmental needs and safety of children⁹. Moreover, exposure to domestic violence is recognised as a form of emotional abuse, with detrimental effects to children's well-being, as recognised in Children First: National Guidance for the Protection and Welfare of Children.

Domestic violence does not necessarily end with separation and in fact at times it can be escalated by separation. It is our experience that often the abuse of the mother and the children continues after separation, with Custody and Access arrangements made that disregard the impact of domestic violence on children and the risk of continuing direct abuse and/or exposure¹⁰.

After separation, children may be directly abused or neglected by the perpetrator during the time spent with them. Children are also emotionally abused when forced to witness the abuse of their mother and by the undermining of the relationship and bond with their mother, which is critical to their healing¹¹.

Recent Irish research into post-separation child contact confirms the findings of international literature on this topic. This research found that:

- there is a lack of understanding within the Family Law system that domestic abuse can and often does continue after separation
- the history of domestic abuse is often not identified when contact orders (Custody and Access) are being decided on
- even when domestic violence is identified, it is not considered relevant to the contact orders, leading to arrangements that the mothers and children participating in the research deemed inappropriate and unsafe¹²

The research concludes by asserting "the need to recognise and embrace the relevance of domestic violence in child contact cases" and challenges the view that "post-separation contact with domestically abusive men upholds children's rights and is in their best interest"¹³.

⁸ M. Hester et al., Making an Impact - Children and Domestic Violence: A Reader: 2nd edition, Jessica Kingsley Publishers, 2007

⁹ See for example Hogan, F. and O'Reilly M. (2007) Listening to children: Children's stories of domestic violence. Office of the Minister for Children/Department of Health and Children. Dublin

S. Holt et al, "The impact of exposure to domestic violence on children and young people: A review of the literature", Child Abuse and Neglect 32 (2008) 797-810).

The Australian Domestic & Family Violence Clearinghouse and The University of New South Wales for the Benevolent Society, The Impact of Domestic Violence on Children: A Literature Review, 2011

¹⁰ Women's Aid, Child Custody and Access in the context of Domestic Violence: Women's Experiences and the Response of the Legal System", 2003.

¹¹ See in particular Bancroft and Silverman, The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics, 2002, Sage Publications

¹² 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



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Women's Aid concurs with these conclusions and believes that exposure to domestic violence must be taken into account when determinations are being made regarding Custody, Access and Guardianship.

Women's Aid has commissioned legal research to see how this is approached in other jurisdictions.

Two approaches were identified, one based on a rebuttable presumption of not granting unsupervised contact (including both custody and access) to perpetrators of domestic violence, the second of including domestic violence as a factor that the Courts must consider when making decisions on access and custody matters.

For example, in New Zealand, if the Court is satisfied that a party to proceedings concerning the parenting and/or guardianship of a child (under 16 years) is a "violent party" and/or has perpetrated physical or sexual abuse on the other party to the proceedings (usually the child's mother) or on a child of the relationship or of the family (which includes step-children), the Court must not give that violent party day-to-day care of the child or unsupervised contact with the child **unless** the Court is fully satisfied that the children will be safe in the day-to-day care of or having unsupervised contact with that (violent) party¹⁴.

If in such a proceeding the Court is not satisfied that an allegation of qualifying violence is proved, but nevertheless is satisfied from the evidence that there is a real risk to the safety of the child posed by the child having contact with the relevant party, the Court may make any order it deems fit in order to ensure the safety of the child vis-a-vis the party.

The New Zealand Legislation also includes provisions to protect the non-abusive parent from abuse during access and change over¹⁵.

Similarly in the United States a Model Code on Domestic and Family Violence (1994) has been prepared by the National Council of Juvenile and Family Court Judges. The Model Code has been widely implemented in State laws in the U.S. and includes a "rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence"(Section 401).

This approach is the preferred one for Women's Aid, as it acknowledges the risks that a violent party poses to children, both in terms of direct child abuse, and in terms of the emotional abuse suffered by children when exposed to the abuse of their primary carer. It would also fit with the current developments in both policy and legislation in relation to child protection, which increase reporting requirements of and response to child abuse. It would not make sense for a mother to have to report offences against the child to the Gardai or HSE and then to have the Family Law Court granting unsupervised access to the same child.

¹³ Ibidem page 94

¹⁴ Section 60(3) of the New Zealand Care of Children Act 2004, as amended by the Care of Children Amendment Act, 2011

¹⁵ See Section 51 of the Care of Children Act 2004



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Expert reports

Another issue that has been identified is the lack of expert child welfare and safety assessment to support the Courts when making determinations regarding Custody and Access. This function used to be performed by the Probation and Welfare Service but has been discontinued.

Women's Aid believes that this has created a serious gap in the Family Law Court system, where potentially life-changing decisions are made without the benefit of vital information.

Women's Aid recommends that a system to provide the Family Law Court with child welfare and safety assessments should be re-instated and welcomes the Minister's commitment in this regard.

The voice of the child in Custody and Access proceedings

The voice of the child is currently missing in Ireland in proceedings such as Custody, Access and Guardianship.

Recent Irish research looking at the decision making process in child contact, specifically in cases where there is domestic violence, found that there is an "absence of a child-centered process that prioritises ascertaining the child's view and wishes"¹⁶.

The research found that only a minority of children were consulted in the decision regarding contact with their father and that "the overwhelming experience of those minority children was that their views were neither listened to nor taken seriously"¹⁷.

Women's Aid believes it is imperative that children are given an opportunity to have their voices heard in relation to these proceedings, according to the age and maturity of the child. This could happen through the appointment of a Guardian ad litem (GAL) who can represent the views and wishes of the child in legal matters. The provision of GAL is provided for in Section 28 of the Guardianship of Infants Act 1964 but this section has never been commenced. Strengthening the voice of the child in the Family Law Court would ensure greater protection of children's rights as set out in the UN Convention on the Rights of the Child and the European Convention of Human Rights.

While Women's Aid understands the resource implications of this, we believe it should as a minimum be implemented where domestic violence is a factor of the parents' relationship and/or where there is child abuse.

Barring Orders and Children's Safety and Welfare

When a Court grants a Barring Order, it means that it has found, on the balance of probabilities, that there is a significant risk to the welfare and safety of the applicant.

In the experience of Women's Aid, when Barring Orders are granted to protect a woman from her abusive partner, there is often no assessment process looking at the safety and well-being of children of the relationship. For example in many cases the perpetrator may be barred from the house but still have unsupervised access to the children and use that access to continue abusing the children.

¹⁶ Holt, S. Domestic Abuse and Child Contact: Positioning Children in the Decision-making process, Child Care in Practice, Vol.17, No.4, October 2011, pp 327-346

¹⁷ Ibidem page 341



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As discussed above, domestic violence and child abuse often co-occur and exposing a child to domestic violence is in itself a form of emotional abuse.

It is therefore essential that, when granting a Barring Order, the Court gives full consideration to any risk the perpetrator of violence may pose to any child of the relationship.

Legal proceedings in relation to Custody and Access may take a long time, and during this period while the woman is protected by the Barring Order, the children may still be subjected to on-going abuse.

Therefore Women's Aid recommends that when granting a Barring Order the safety and wellbeing of any children should always be considered and, when appropriate, interim measures should be put in place to protect them from further abuse (including emotional abuse) while Custody and Access proceedings are finalised.

Stalking

Issue: the need to update stalking legislation and provide for restraining orders for victims.

Recommendations:

10) That a specific offence of stalking should be introduced in Irish law, including a comprehensive but not exhaustive definition, similar to that of Scotland or Victoria.

11) That such a provision should allow for the Court to make a Non-Harassment/Restraining Order to protect the victim from future harassment or stalking on conviction for a stalking offence and even if the defendant is not convicted of an offence of harassment or stalking, but the Court believe the facts warrant the making of such an order for the protection of the victim.

12) Stalking should be explicitly recognised as a ground for applying for a Safety Order.

Rationale:

Women experiencing domestic violence are often controlled, followed, harassed and stalked by their abusers both during the relationship and after separation.

Stalking often escalates after separation and it is linked to the abuser wanting to continue to control the victim. It can be very distressing for women who are subjected to it and it is an indicator of increased risk for the women targeted. In fact, stalking is included in many domestic violence risk assessment tools as a high risk factor.¹⁸

In recent years Women's Aid has highlighted how new technologies are being used to monitor and control women in abusive relationships. This includes women being harassed continuously by phone, text messages, and through social networks; women's access to the internet being either curtailed or monitored; personal details or lies being spread about them through social network;

¹⁸ See for example SPECSS+, DASH



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abusers taking control of the woman's email, social accounts or identity and impersonating her online¹⁹.

Currently, harassment is dealt with under Section 10 of the Non-Fatal Offences Against the Person Act 1997, however the definition of harassment in this Act is complex and hard to prove.

In the experience of Women's Aid, Section 10 of the Non-Fatal Offences Against the Person Act 1997 is rarely used to protect women who are stalked by their partners. The current legislation also does not explicitly refer to a number of new technologies that are used to stalk and harass women.

It is important that stalking legislation should recognise that behaviours that may appear innocent or trivial when viewed in isolation may amount to harassment when viewed in context and that stalkers can target not just the victim but also someone close to the victim as a means of creating fear and apprehension in the victim. In the context of domestic violence, this often means targeting children, new partners, family and friends, or colleagues of the victim.

Women's Aid has commissioned legal research into how stalking and harassment is dealt with in other jurisdictions. This has found particularly interesting definitions in the legislation of Scotland²⁰ and Victoria²¹ (See Appendix 1).

Both have comprehensive definitions of stalking which crucially include the use of new technologies, and also allow for prosecution to take place in circumstances where the accused person engaged in a course of conduct against a person other than the victim themselves, provided that it was likely to cause the victim to suffer fear or alarm. This is very important for victims of domestic violence, where often the perpetrator targets family and friends as a means to get to them.

Restraining/non-harassment orders

Other jurisdictions have also provided for restraining or non-harassment orders that work similarly to an order under the Domestic Violence Act. Considering that not all victims of domestic violence are covered under the Domestic Violence Act, and in particular that dating relationships are so far excluded, restraining orders are extremely important.

In Scotland, England, and Wales these orders can be issued by the Court on conviction for an offence of harassment or stalking.

In other jurisdictions, for example Queensland, the Court can impose a restraining order on a person accused of stalking even without conviction. The Queensland Criminal Code Act 1899 states:

- (1) This section applies on the hearing before a Court of a charge against a person of unlawful stalking.
- (2) Whether the person is found guilty or not guilty or the prosecution ends in another way, if the presiding judge or magistrate considers it desirable, the judge or magistrate may

¹⁹ See also Hand, Tammy; Chung, Donna; Peters, Margaret The use of information and communication technologies to coerce and control in domestic violence and following separation, Australian Domestic and Family Violence Clearinghouse, (2009)

²⁰ Section 39 of the Criminal Justice and Licensing (Scotland) Act 2010

²¹ Section 21A of the Crimes Act 1958 (Victoria)



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constitute the Court to consider whether a restraining order should be made against the person.²²

This is important as not all cases of stalking may result in successful prosecution for a variety of reasons. However, the victim needs to be protected from future stalking or harassment even if the criminal case falls apart.

Both the above approaches are in the Criminal Courts. In order to maximise protection from stalkers that are or have been intimate partners, Women's Aid recommends that, in addition to introducing a criminal offence of stalking as discussed above, stalking should also be recognised as a ground to apply for a Safety Order. This would provide protection through the Civil Courts for those cases where a Criminal Court approach is not feasible or appropriate.

²² Section 359F, Chapter 33 Criminal Code Act 1899 Queensland



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Appendix 1

In Scotland, Section 39 of the Criminal Justice and Licensing (Scotland) Act 2010, sets out the offences of

- Engaging in a course of conduct which causes the victim to suffer fear or alarm and the defendant engaged in the course of conduct with the intention of causing the victim to suffer fear or alarm
- Engaging in a course of conduct which causes the victim to suffer fear or alarm and the defendant engaged in the course of conduct knows, or ought to have known that engaging in the course of conduct would be likely to cause the victim to suffer fear or alarm

“Conduct” is defined as

- a) Following,
 - b) contacting, or attempting to contact,
 - c) publishing any statement or other material relating or purporting to relate to the victim
 - d) publishing any statement or other material purporting to originate from the victim or another individual
 - e) monitoring the victim’s use of the internet, email or other electronic communication
 - f) entering any premises
 - g) loitering in any public or private place
 - h) interfering with the victims property
 - i) giving anything to the victim, leaving anything to be found, given to, or brought to the attention of victim or another person
 - j) watching or spying on the victim (or another person)
 - k) acting in any other way that a reasonable person would expect the victim to suffer fear or alarm
- ‘Course or conduct’ is defined as involving conduct on at least two occasions



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Victoria's legislation (Crimes Act 1958 - SECT 21A) defines stalking as follows:

Victoria Crimes Act 1958 - SECT 21A

Stalking

21A. Stalking

(1) A person must not stalk another person.

Penalty: Level 5 imprisonment (10 years maximum).

(2) A person (the offender) stalks another person (the victim) if the offender engages in a course of conduct which includes any of the following-

- (a) following the victim or any other person;
- (b) contacting the victim or any other person by post, telephone, fax, text message, e-mail or other electronic communication or by any other means whatsoever;
- (ba) publishing on the Internet or by an e-mail or other electronic communication to any person a statement or other material-
 - (i) relating to the victim or any other person; or
 - (ii) purporting to relate to, or to originate from, the victim or any other person;
- (bb) causing an unauthorised computer function (within the meaning of Subdivision (6) of Division 3) in a computer owned or used by the victim or any other person;
- (bc) tracing the victim's or any other person's use of the Internet or of e-mail or other electronic communications;
- (c) entering or loitering outside or near the victim's or any other person's place of residence or of business or any other place frequented by the victim or the other person;
- (d) interfering with property in the victim's or any other person's possession (whether or not the offender has an interest in the property);
 - (da) making threats to the victim;
 - (db) using abusive or offensive words to or in the presence of the victim;
 - (dc) performing abusive or offensive acts in the presence of the victim;
 - (dd) directing abusive or offensive acts towards the victim;
- (e) giving offensive material to the victim or any other person or leaving it where it will be found by, given to or brought to the attention of; the victim or the other person;



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(f) keeping the victim or any other person under surveillance;

(g) acting in any other way that could reasonably be expected-

(i) to cause physical or mental harm to the victim, including self-harm; or

(ii) to arouse apprehension or fear in the victim for his or her own safety or that of any other person- with the intention of causing physical or mental harm to the victim, including self-harm, or of arousing apprehension or fear in the victim for his or her own safety or that of any other person.

(3) For the purposes of this section an offender also has the intention to cause physical or mental harm to the victim, including self-harm, or to arouse apprehension or fear in the victim for his or her own safety or that of any other person if-

(a) the offender knows that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear; or

(b) the offender in all the particular circumstances ought to have understood that engaging in a course of conduct of that kind would be likely to cause such harm or arouse such apprehension or fear and it actually did have that result.

