

LAW SOCIETY SUBMISSION



RECOMMENDATIONS FOR AMENDMENTS TO THE DOMESTIC VIOLENCE BILL 2017

DEPARTMENT OF JUSTICE & EQUALITY
JOINT OIREACTHAS COMMITTEE ON JUSTICE & EQUALITY

MAY 2017

ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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1. Summary and Key Recommendations

- 1.1. The Law Society welcomes the measures to be introduced in the Bill and recognises that the enactment and implementation of this legislation will bring Ireland a step closer to ratification of the Council of Europe's *Convention on preventing and combating violence against women and domestic violence* (2011; Istanbul Convention).
- 1.2. The Society's Family and Child Law Committee have considered the Bill and make the following submissions to assist Oireachtas members in their consideration of what is a grave and hugely important piece of legislation:
 - A definition of domestic violence be included at section 2 of the Bill to include all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit, including online stalking and harassment.
 - Extend the courts' power to grant safety and protection orders to those in dating and intimate relationships who are not cohabiting, regardless of age.
 - In line with other jurisdictions, the Bill should include criteria as to factors to be taken into account by a court hearing an application for any type of Domestic Violence Order.
 - Provide for a member of the Garda Síochána to apply for an order where there is an immediate risk of harm if an applicant cannot access the court in a safe and timely way.
 - Section 8(16)(2) of the Bill should be amended to allow for applicants to make alternative arrangements for safety, outside the existing statutory timelines.
 - Ensure that all barring, interim barring and emergency orders are served on the respondent by a member of the Garda Síochána.
 - The Bill should permit arrangements for service of safety and protection orders by a member of the Garda Síochána.
 - UN recommendations in respect of dispensing with legal aid contributions for domestic violence cases must be accommodated within the Bill.

2. Definition of domestic violence

Section 2

- 2.1. While the entire Bill is concerned with domestic violence, there is no definition of domestic violence in it. Such a definition is required to ensure that domestic violence, as defined in the Istanbul Convention (Article 3) is recognised in law and practice and that the definition goes beyond physical violence to mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit.
- 2.2. The UN *Committee for the Elimination of all forms of Discrimination against Women* recommended that Ireland introduce a specific definition of domestic violence and other emerging forms of gender-based violence, such as online stalking and harassment¹.
- 2.3. The Minister of Justice and Equality observed at Second Stage of the Bill, that legal issues prevent the inclusion of a definition of domestic violence. The Society would welcome an indication of the issues, so that an accommodation within a carefully considered definition can be found.

Recommendation:

A definition of domestic violence be included at Section 2 to include all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit, including online stalking and harassment.

3. Extend the class of applicants for safety & protection orders, irrespective of age.

Sections 5 & 9

- 3.1. The extension of safety orders to cover electronic communication is welcome. So too is the commitment to introduce amendments at Committee stage to extend access to safety orders to those in intimate and committed relationships but who are not cohabiting.²
- 3.2. The Law Society submits that this would also be an opportunity to provide protection for those who are in dating relationships, including young people under 18 years of age who are at risk of violence or abuse and who seek to apply in their own right.

Recommendation:

Extend the courts power to grant safety and protection orders to those in dating and intimate relationships who are not cohabiting, irrespective of their age.

¹ Recommendation 27 Concluding Observations UN Committee for the Elimination of Discrimination against Women; <https://goo.gl/kWINHp>

² Tánaiste, Minister for Justice & Equality; Seanad Éireann; 1 March 2017.

4. Provide statutory guidance on reasons for granting an order – Sections 5, 6, 7, 8 & 9

4.1. As long ago as 1999, the Law Society advocated in its paper 'Domestic Violence; a case for reform', for the introduction of either detailed statutory guidance or a list of criteria to be considered by the courts in determining whether to grant protective orders.³ The Society stated then:

'There is considerable divergence among District Court judges in the exercise of their discretion The provision of detailed statutory criteria to guide judicial discretion is an approach adopted elsewhere in Family Law. The Judicial Separation and Family Law Reform Act, 1989, the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996 each set down clear and detailed criteria for consideration by the courts in the exercise of discretion under the legislation.'⁴

4.2. The report quoted a practitioner who concluded that this guidance

'makes it far easier for the practitioner to advise the client on the issues to be considered by the court when deciding whether or not to grant a particular relief'.

4.3. More recent studies have also highlighted the lack of consistency in courts.⁵

4.4. Accordingly, the legislation should list criteria or factors to be taken into account in deciding whether to grant protective orders. Such guidance should not inhibit the power of the court to grant orders in other grave circumstances.

4.5. Building on the experience of other jurisdictions where such criteria are included, the Bill might include the following criteria:

- Any history of violence by the respondent against the applicant or any dependent;
- Any act, pattern or repetition of violence by the respondent against the applicant or dependent;
- Any pattern of coercive and controlling behaviour directed at the applicant by the Respondent;
- Any factors that would escalate the risk of violence including, but not limited to, substance abuse, access to weapons, high levels of stress and anxiety, unstable health;
- a deterioration in the relationship between the applicant and respondent including any recent or pending separation;
- The applicant's perception of the risk to their own safety and security;
- Any circumstance which might increase the applicant's or a dependent's vulnerability to violence from the respondent including, but not limited to, pregnancy, health, age, family circumstance or economic dependence;

³ Domestic Violence: a case for reform (1999) Available at: https://www.lawsociety.ie/Documents/Law_reports/domviolence.pdf

⁴ At p.19-20

⁵ In Search of Justice: Women and the Irish Legal System, INASC (2016). Available at: <http://www.safeireland.ie>

- Any other matter which appears to the Court to be relevant to the safety and welfare of the applicant and/or dependents.

4.6. Where the application is for an interim barring order under s.7 or an emergency barring order under s.8, further guidance must be inserted in s.7(1)(a) and s. 8(3) as to the meaning of ‘reasonable grounds for believing that there is an immediate risk of significant harm to the applicant or the dependent person’ by including the following factors⁶ to which the court should have regard:

- The risk of serious harm caused directly or indirectly by any kind of violence by the respondent against the applicant or any dependent if an order is not made immediately;
- The housing or other accommodation needs and the resources of the applicant and any dependents;
- The DVA order history of the respondent in relation to the applicant or any other person;
- Any pending criminal charges or any criminal convictions for violence against any person including the applicant or any dependents;
- Any violence by the respondent against the applicant and/or any dependent which is recent, repeated and/or severe, including any attempts at lethal violence against either the applicant or any dependent.

Recommendation:

That the legislation furnish legislative guidance by way of criteria as to factors to be taken into account by a court hearing an application for any type of Domestic Violence Order.

5. A more flexible process for obtaining an emergency or interim barring order
Section 8

- 5.1. The Law Society is concerned that the process for obtaining an interim or emergency barring order, is insufficiently flexible to accomplish the purpose of the section or to comply with Article 52 of the Istanbul Convention.⁷
- 5.2. The Bill seeks to provide protection through these orders for those who are at immediate risk of danger. The process for obtaining such an order (requiring a sworn affidavit or information and attendance at court) may delay and even deny access to the remedy by a person at immediate risk of harm.

⁶ Factors also proposed in submissions of Safe Ireland and National Women’s Council of Ireland

⁷ Article 52: “Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk”

- 5.3. Amongst the difficulties posed by the current process, may be the time of day or night at which the risk occurs, the distance of the applicant from a courthouse, or the process of completing a sworn affidavit. In those circumstances, a faster, more flexible remedy would be to permit a member of the Gardaí to make the initial application on behalf of the person in danger until such time as the applicant had the opportunity to access the court personally.
- 5.4. Section 8(16) of the Bill provides that an emergency barring order can only be made for a period of 8 working days and then not again for a period of at least one month from the last day of the previous order. There will be circumstances in which this will not be sufficient to allow an applicant to make alternative arrangements for safety.
- 5.5. In order to ensure that the safety of the applicant and any dependents is prioritised, section 8(16)(2) as drafted could be re-worded to read:

A further emergency barring order may be made on notice to the respondent against the respondent within the one month period referred to in paragraph (a) where the court is satisfied that the applicant remains in a situation of immediate danger and that as a result, there are exceptional circumstances which justify the making of a further order.

Recommendations

Provide for a Garda to apply for an order where there is an immediate risk of harm if an applicant cannot access the court in a safe and timely way

The Law Society recommends that Section 8(16)(2) of the Bill should be redrafted to allow for applicants to make alternative arrangements for safety, outside the existing statutory timelines.

6. Notification & Service of Domestic Violence Orders

Section 15

- 6.1. As recommended also by National Women's Council of Ireland, the serving of barring orders, interim barring orders and emergency barring orders to the respondent should always be the responsibility of the Garda Síochána.
- 6.2. Further, in respect of safety or protection orders, the views of the applicant should be sought when deciding whether the order should be served by a Garda or by the applicant. Section 15 of the Bill should specify this.

Recommendation:

Section Ensure that all barring, interim barring and emergency orders are served on the respondent by a member of the Garda Síochána.

The Bill should permit arrangements for service of safety and protection orders by a member of the Garda Síochána..

7. Dispensing with legal aid contributions in domestic violence cases

- 7.1. The Law Society notes the answer of the Tánaiste to a parliamentary question from Mr. Jonathan O'Brien TD.⁸ on the contribution payable by those seeking civil legal aid in domestic violence cases. She noted that the Legal Aid Board is to consider in due course making proposals in relation to revising the financial eligibility criteria for civil legal aid. The obligation of applicants to make an 'up-front' payment of €130 or to depend on the discretion of the Legal Aid Board to waive or reduce that contribution may act as a deterrent to an applicant seeking protection.
- 7.2. The UN *Committee for the elimination of discrimination against women* has recommended the abolition of contributions in these cases.⁹

Recommendation:

UN recommendations in respect of dispensing with legal aid contributions for domestic violence cases must be accommodated within the Bill.

8. Conclusions

- 8.1. The views and recommendations contained within this submission have been compiled the Society's Family and Child Law Committee. The Committee is comprised of senior and expert practitioners in the field of family law, and including domestic violence law.
- 8.2. The Society is willing to expand on the recommendations above and to provide additional commentary on the Bill.

⁸ Parliamentary Question, 16 February 2017: <http://www.justice.ie/en/JELR/Pages/PQ-16-02-2017-51>

⁹ Recommendation 28, 29

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