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## Recommendations for Legislative Amendments: Domestic Violence Bill 2017

May 2017\*

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### About the National Women's Council of Ireland

Founded in 1973, the National Women's Council of Ireland (NWCI) is the leading national women's membership organisation. We represent and derive our mandate from our membership, which includes over 180 groups and organisations from a diversity of backgrounds, sectors and locations across Ireland. We also have a growing number of individual members who support the campaign for women's equality in Ireland. Our mission is to lead and to be a catalyst for change in the achievement of equality for women. Our vision is of an Ireland and of a world where women can achieve their full potential and there is full equality between women and men.

NWCI is the chair of the National NGO Observatory on Violence against Women and convenor of the Women's Human Rights Alliance. At a European level, NWCI is represented on the Executive Committee of the European Women's Lobby. NWCI's expertise in informing the development of government policy and legislation has been widely recognised. We currently sit by invitation on the National Steering Committee on Violence Against Women and the Women, Peace and Security Monitoring Group and the Department of Foreign Affairs NGO Standing Committee on Human Rights.

### NWCI Observations on the Domestic Violence Bill 2017

Ending violence against women is critical to achieving equality for women and ensuring women are safe and free to participate fully in society.

NWCI welcomes the new measures to be introduced in the Domestic Violence Bill, and the fact that Ireland is moving towards ratification of the Istanbul Convention. NWCI welcome in particular the enhanced protection of and support for victims when they are going to court, the removal of the barrier of property ownership when applying for interim barring orders and the recognition of the new reality of online abuse.

We also welcome and strongly **support the Tánaiste's stated intention to bring forward amendments to the Bill at Committee Stage to extend access to safety and protection orders to those in intimate and committed relationships, who are not cohabiting.** In that

respect we would stress that this proposal should extend to minors who are in abusive situations where the abuser is also under 18.<sup>1</sup>

We recognise that this Bill is primarily focused on reforming the civil law with regard to domestic violence. We do not wish to delay the progress of this Bill by recommending that it should be amended to include a number of recommendations that concern criminal matters, as we accept that they may require detailed analysis. However we would like to take this opportunity to draw attention to the fact that in order to fully implement the prosecution pillar of the Istanbul Convention future consideration should be given to establishing **a specific domestic abuse offence** separate from the general offence of public assault under which it is currently prosecuted.

It is the considered opinion of NWCI that the current criminal law does not reflect the true experience of victims of long-term domestic abuse, including coercive control. A specific domestic abuse offence would improve the ability of people to access justice through effective prosecution of domestic abuse. A specific offence would also recognise the particularly harmful and complex nature of domestic violence, assist in the effective policing of domestic violence incidents and send out a clear message of zero tolerance towards violence in the home. NWCI recommends that the process of drafting a separate bill that specifically addresses criminal and prosecution needs should be initiated after the passing of this Bill in order to effectively address domestic violence in a holistic manner. This would concur with the 2014 recommendations of the Oireachtas Committee on Justice, Defence and Equality,<sup>2</sup> and would also reflect the 2017 recommendation (27c) of the UN Committee under the Convention for the Elimination of all forms of Discrimination Against Women (CEDAW) which called on the State to “criminalise domestic violence”.<sup>3</sup>

### **NWCI respectfully recommend that the Bill be amended to include:**

Domestic violence law influences and reflects society’s expectations about behaviour that is considered unacceptable and how the state and communities should respond. The law also provides victims with legal tools to stop perpetrators being violent, and gives the Gardaí and the Courts the powers and responsibilities to take action to ensure the tools are effective. In that respect the following are amendments to the current Bill that NWCI and our members wish to see adopted in order to strengthen the Bill and provide further protection for victims, predominantly women.

- 1. A definition of domestic violence that captures not only acts of physical (including sexual) violence, but also acts of psychological and economic abuse, including stalking and other forms of harassment, and acts which are undertaken in order to exercise “coercive control” over their victim.**
- 2. Detailed statutory guidance or a list of criteria to be considered by the courts in determining whether to grant protective orders.**

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<sup>1</sup> A 2008 survey of Bliss readers in the UK found that 1 in 5 girls have been physically hurt by someone they were dating. For sixteen year old girls, this goes up to 1 in 4. [Expect Respect Campaign, Women’s Aid Federation, December 2008]

<sup>2</sup> Joint Committee on Justice, Defence and Equality *Report on hearings in relation to Domestic and Sexual Violence*, October 2014, 31/JDAE/018.

<sup>3</sup> Committee on the Elimination of Discrimination against Women Concluding observations on the combined sixth and seventh periodic reports of Ireland, CEDAW/C/IRL/CO/6-7, (adopted on 3rd March 2017).

3. On request from a Garda attending a domestic violence incident, a Garda of appropriate rank, can authorise communicating with an on-call judge to apply for an out of hours barring order.
4. An undertaking cannot be substituted for a protective order in circumstances where the 'evidential standard' for the issuing of a court order has been discharged.
5. When granting a barring order the safety and well-being of any children should always be considered and, when appropriate, interim measures should be put in place to protect them from further abuse. In addition experts should be available to the Court to assess the risk the perpetrator poses to children and the impact on them of direct and/or indirect abuse.
6. In cases where a Court is satisfied to grant a barring, interim barring order, safety order or protection order, it should be open to a Judge, of their own volition, or on the application of any party to the proceedings to vary any existing access order to require same access to be supervised.
7. The development of a national network of contact centres with support incorporating a domestic abuse risk assessment framework and, as appropriate, safety planning, in order to contribute to meeting the safety and psychological needs of women and children experiencing domestic violence.
8. A perpetrator/respondent is prohibited from personally cross examining an applicant during court proceedings; and they cannot delay a court hearing without reasonable cause.
9. End the requirement for victims of domestic violence to make financial contributions for civil legal aid when seeking court protection under domestic violence legislation to ensure access to justice to all women without sufficient means. There should not be a restriction on the number of legal aid certificates which may be granted within a given period, if one or more of them relates to domestic violence proceedings.

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## **Explanatory Notes and Proposed Legislative Language**

### **1. Statutory Definition of Domestic Violence**

The aim of the Domestic Violence Bill should be to reduce and prevent violence in domestic relationships by recognising that domestic violence in all its forms is unacceptable behaviour, and by making sure there's effective legal protection for victims of domestic violence. The courts and the Gardaí must be guided by this aim whenever they're exercising a power under the Domestic Violence Bill. The Bill refers to "domestic violence" 36 times without attempting to define it, thereby implying that what is meant by domestic violence is clear and obvious. However, reports and statistics to date do not reflect that position and therefore it is essential that this Bill provides real guidance to those that will be applying the Bill once it is enacted. This position reflects the 2017 recommendation (27c) of Committee on the UN Convention for the

Elimination of all Forms of Discrimination against Women which called on the Irish Government to introduce a specific definition of domestic violence into our laws.<sup>4</sup> It also reflects the 2014 conclusions of the Joint Committee on Justice, Defence and Equality which determined: that “domestic offences, given their seriousness, must be clearly defined”.<sup>5</sup>

When determining what this definition should look like we must first refer to the Istanbul Convention. It defines domestic violence as “*all acts of **physical, sexual, psychological or economic violence** that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim*” (Article 3). The Convention also states that violence against women includes **threats** of the acts listed above, as well as **coercion or arbitrary deprivation of liberty**. NWCI recommends consideration be paid to formulating a clear statutory definition of “domestic violence” that reflects modern understanding and so it should capture not only acts of physical (including sexual) violence, but also acts of psychological and economic abuse, including stalking and other forms of harassment, and acts which are undertaken in order to exercise “coercive control” over their victim. Furthermore, it should recognise that violence within the home is not limited to intimate relationships and can extend to all members of the household.

This is not unprecedented in Irish law as the Children and Family Relationships Act 2015 (which amends the Guardianship of Infants Act 1964<sup>6</sup>) in determining what is in the best interests of a child specifies that the court shall have regard to all of the factors or circumstances that it regards as relevant to the child concerned and his or her family – including “household violence”.<sup>7</sup> Inserting a definition into legislation is a feature of other common law jurisdictions. In particular, New Zealand has had a definition of domestic violence since 1995 which has been amended several times since enactment as social norms and expectations continue to change and new evidence about how to stop violence occurring continues to emerge. The definition recognises that a distinguishing characteristic of intimate partner violence and child abuse is that the violence can be a pattern of harmful behaviours occurring over time that can result in the victim’s life being controlled by the perpetrator.

In light of our commitment to ratify the Istanbul Convention, and our commitment to comply with CEDAW, and in respect of our own Children and Family Relationships Act 2015 recognising household violence, as well as this Bill’s understanding that ‘welfare’ should reflect the

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<sup>4</sup> *Committee on the Elimination of Discrimination against Women Concluding observations on the combined sixth and seventh periodic reports of Ireland*, CEDAW/C/IRL/CO/6-7, (adopted on 3rd March 2017).

<sup>5</sup> Joint Committee on Justice, Defence and Equality Report on hearings in relation to Domestic and Sexual Violence, October 2014, pg 5. “The Committee heard how in most cases the abuses are premeditated and repeated, and not once off arguments or incidents. The Committee heard how many abuses are carried out with the intention of degrading and humiliating the victim in the one place he or she should feel secure, the home. Furthermore, in most cases the abuse is sustained and continuous, forming an identifiable pattern evidenced by the physical and/or emotional state of the victim.”

<sup>6</sup> The Act requires the child’s best interests to be the paramount consideration in decisions on guardianship, custody and access and set out a wide range of factors for the court’s consideration when determining a child’s best interests taking account of the child’s physical, psychological and emotional needs. The Act considers the capacity of the person seeking guardianship, custody or access to care for and meet the child’s needs. In particular the court is able to consider any history of household violence which was considered by the Minister for Justice and Equality, Frances Fitzgerald TD in a speech on 24 March 2015 to be “very important because of the potential impact on the child’s safety and wellbeing and on that of other members of the household”. See: <http://www.justice.ie/en/JELR/Pages/SP15000079>

<sup>7</sup> Deputy Frances Fitzgerald in the Oireachtas debates explained that “household violence” was used to encompass “more accurately the potential risks of violence that may have an impact on the child’s welfare”. (Thursday, 5 March 2015) The Act defines to “include behaviour by a parent or guardian or a household member causing or attempting to cause **physical harm** to the child or another child, parent or household member, and includes **sexual abuse** or causing a child or a parent or other household member to **fear for his or her safety** or that of another household member”. Specifically, the Act asks the court to consider “any harm which the child has suffered or is at risk of suffering, including harm as a result of household violence, and the protection of the child’s **safety and psychological well-being**”.

applicant's physical and psychological welfare, **NWCI recommend adopting a definition of domestic violence that captures not only acts of physical (including sexual) violence, but also acts of psychological and economic abuse, including stalking and other forms of harassment, and acts which are undertaken in order to exercise "coercive control" over their victim.**

On page 7 line three, to insert a definition of domestic violence

"Domestic violence

(1) 'Domestic violence' means any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse, (even if all or any of those incidents, when viewed in isolation, may appear to be minor or trivial), inflicted against an applicant or a dependent person by the respondent and includes **all acts of physical, sexual, psychological or economic violence.**

(2) For purposes of subsection (1):-

'Coercive behaviour' is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten the applicant or a dependent person by the respondent.<sup>8</sup>

'Controlling behaviour' is a range of acts designed to make an applicant subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.<sup>9</sup>

'Psychological' means violence inflicted against an applicant or a dependent person by the respondent and includes, but is not limited to, all, or any of the following: -

(a) threatening (including threatening suicide) to use violence against, molesting or putting in fear;<sup>10</sup>

(b) harassing by persistently following, watching, pestering, besetting or *communicating\**;<sup>11</sup>

(c) damaging property;

(d) ill-treatment of one or both of the following: (i) household pets: (ii) other animals whose welfare affects significantly, or is likely to affect significantly, an applicant or a dependent person's well-being;

(e) causing or allowing a dependent person to see or hear the physical, sexual, or psychological abuse of an applicant; or puts a dependent person, or allows a

<sup>8</sup> UK Domestic Abuse Guidelines for Prosecutors.

<sup>9</sup> UK Domestic Abuse Guidelines for Prosecutors.

<sup>10</sup> Wording that reflects section 5(2)(a) of the Bill.

<sup>11</sup> Wording that reflects section 10(1) of the Non-Fatal Offences Against the Person Act 1997. Women experiencing domestic violence are often controlled, followed, harassed and stalked by their abusers both during the relationship and after separation.

dependent person to be put, at real risk of seeing or hearing that abuse occurring. However, an applicant who suffers abuse as per subsection (1) is not regarded as having (a) caused or allowed a dependent person to see or hear that abuse; or (b) put a dependent person, or allowed a dependent person to be put, at risk of seeing or hearing that abuse.

'economic' violence includes but is not limited to unreasonably denying or limiting access to financial resources, or preventing or restricting employment opportunities or access to education.

\*Regarding the definition of “communicating” it would be useful to draw upon the Law Reform Commission’s Report on Harmful Communications and Digital Safety which contained the Harmful Communications and Digital Safety Bill 2016.<sup>12</sup> The 2016 Bill defined “communication” to apply to all forms of communication, whether offline or online, analogue or digital, implementing the recommendation in paragraph 2.53 of the Report. The definition includes communication by speech, by letter, by camera, by telephone (including SMS text message), by smart phone, by any digital or online communication (including the internet, a search engine, a social media platform, a social media site or the World Wide Web), or by any other telecommunications system. Defining communication in this way would assist the protection of applicants.

Each relevant subsection<sup>13</sup> of the Bill should also specify that communications **with third parties** about the applicant, particularly by electronic means, will catch the behaviour more commonly known as “revenge porn” and other indirect communications made in order to harass the applicant. NWCI further recommends that each relevant subsection referring to **communication by electronic means** should also include an exception to allow for necessary communication in respect of matters related to children in common, (facilitate access arrangements, notifying emergencies), as directed for by the judge.<sup>14</sup>

**2. Statutory Guidance**

The Bill does not outline criteria governing the standard or type of proof necessary for a court to determine the basis for granting a protective order. All the court has to be is ‘of the opinion that there are reasonable grounds for believing that the safety or welfare of the applicant or any dependent person so requires’ (sections 5(2), 6(2)(a) and 9(1)), or ‘is of the opinion that there are reasonable grounds for believing that there is an immediate risk of significant harm’ (sections 7(1)(a) and 8(3)). Neither does the Bill clarify the situation where it would be more appropriate for the court to grant a barring order rather than a safety order where either option is open to the court. This essentially transposes the standard of the Domestic Violence Act 1996.

As far back as 1999, the Law Reform Committee of the Law Society of Ireland published the results of a survey which showed that in the absence of guidance the law was being applied differently between District Court areas.<sup>15</sup> This conclusion was reaffirmed in a 2016 study.<sup>16</sup> It

<sup>12</sup> Law Reform Commission *Final Report on Harmful Communications and Digital Safety* (2016).  
<sup>13</sup> Sections 5(2)(c), 6(3)(c), 7(2)(c), 8(4)(c) and 9(1)(c)  
<sup>14</sup> The Harassment and Related Offences Bill 2017 also follows recommendations made by the Law Reform Commission in its report on Harmful Communications and Digital Strategy  
<sup>15</sup> Domestic violence: The case for reform, A report by the Law Society’s Law Reform Committee May 1999.  
<sup>16</sup> SAFE Ireland. (2016) *In Search of Justice: Women and the Irish Legal System*. Athlone: SAFE Ireland.

does not make sense to continue with this approach into the new Bill. One of the major consequences of a lack of standardisation is that legal professionals cannot accurately predict outcomes for women; this in turn deters women from reporting and pursuing legal cases, undoubtedly contributing to the low levels of reporting and high levels of withdrawals of complaints. The provision of detailed statutory criteria to guide judicial discretion is an approach adopted elsewhere, for example, the Judicial Separation and Family Law Reform Act 1989. Moreover the Bill itself at section 5(1)(b) lists four factors that the court has to have regard to when it is deciding whether or not a person is residing with another person in a relationship.

**NWCI recommends 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, and in that respect NWCI endorses the list of factors compiled by *Safe Ireland* in their submission regarding this Bill.<sup>17</sup>**

On page 8 line one, to insert a new section, (termed section A for the purposes of this paper):

- (1) For the purposes of sections 5, 6, 7, 8, B<sup>18</sup> and 9 in deciding there are reasonable grounds for believing that the safety or welfare of an applicant or a dependent person so requires, the court shall have regard to—
- a) any history of violence by the respondent against the applicant or any dependent;
  - b) whether any violence by the respondent against the applicant or any dependent is repetitive or escalating;
  - c) the current status of the relationship between the applicant and the respondent, including any recent separation or intention to separate given the elevated risk of serious and/or lethal violence that is triggered by this action;
  - d) any circumstance of the respondent that may increase the risk of violence by the respondent against the applicant or any dependent, including substance abuse, employment or financial problems, mental health problems associated with a risk of violence, access to weapons, or a history of serious violence including lethal violence, against the applicant and/or others;
  - e) the applicant's perception of risks to his or her own safety and security;
  - f) any circumstance that may increase the applicant's vulnerability or any dependent's vulnerability to violence from the respondent, including pregnancy, age, family circumstances, health or economic dependence;
  - g) the accommodation needs of the applicant and any dependent(s);
  - h) any evidence of deterioration in the physical, psychological or emotional welfare of the applicant or any dependent which in the opinion of the court, was caused directly by the behaviour of the respondent;

<sup>17</sup> Available at: [http://www.safeireland.ie/safeireland-docs/INASC\\_SAFEIreland\\_report.pdf](http://www.safeireland.ie/safeireland-docs/INASC_SAFEIreland_report.pdf)  
Safe Ireland, *BRIEFING NOTE Amendments Recommended to: Domestic Violence Bill 2017*, March 2017. Furthermore, such factors can also be seen in

<sup>18</sup> See recommendation number 3, *Out of Hours Barring Orders*, which calls for the insertion of a new section B.

- i) whether it is appropriate in the circumstances to make any order under Section 14;<sup>19</sup> and
  - j) any other matter which appears to the Court to be relevant to the safety and welfare of the applicant and any dependents.<sup>20</sup>
- (2) For the purposes of sections 7(1)(a) and 8(3) in deciding there are reasonable grounds for believing that there is *an immediate risk of significant harm* to the applicant or a dependent person, the court shall also have particular regard to—
- a) risk of serious harm caused directly or indirectly by any kind of violence by the respondent against the applicant or any dependent if the order is not made immediately;
  - b) protection order history of the respondent with regard to the applicant, and/or others, as far as known;
  - c) any criminal proceedings for violence against the respondent, in respect of the applicant and/or others, pending or concluded, as far as known; and
  - d) any violence by the respondent against the applicant and/or any dependent, which is recent, repeated, and/or severe, including attempts at lethal violence against either the applicant or any dependent.
- (3) Whatever order is made or not made on the application, the reasons for making it or not making it and for making it subject to conditions, if any, should all be recorded by the Court and a copy of these reasons should be made available to each party with the minimum of delay.

### **3. Out of Hours Barring Orders**

The Bill provides for the making of interim barring orders and emergency barring orders where there are reasonable grounds to believe that there is an “*immediate risk of significant harm*”. However neither section of the Bill makes reference to what should occur in circumstances where an order is required outside of traditional court hours. There is a clear need for these orders to be available 24/7, so that victims of domestic violence do not find themselves without protection for extended periods of time, particularly if an emergency sitting of the local court cannot be arranged. The Bill should facilitate a situation where on request from a Garda attending a domestic violence incident, a Garda of appropriate rank, can authorise contacting an on-call judge to apply for an out of hours barring order.

Including a provision to make the grant of such an order subject to an undertaking from the applicant to serve all necessary documents on the respondent by the next sitting day or by the end of some other agreed period – would go some way to undermine any argument from respondents’ representatives that the grant of an ex parte order by telephone or other electronic means on an emergency basis, would be too much of an attack on a respondent’s rights, and it would give the applicant some breathing space in which to prepare the documents required to

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<sup>19</sup> The necessity for this is discussed at point 5.

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be served. The proposed wording should be drafted wide enough to allow for an order to be granted on an emergency on-call basis by other electronic means as well as by phone (eg Skype, where possible). For the avoidance of doubt this should be an **ex parte** procedure.

Furthermore, any Garda attending a domestic violence incident should be under an obligation **either** to provide information to the victim on domestic violence specialist services available in their local area, **or with the victim's consent**, to refer the victim to these services.

**NWCI recommends inserting a new section to facilitate a situation where on request from a Garda attending a domestic violence incident, a Garda of appropriate rank, can authorise communication with an on-call judge to apply for an out of hours barring order.**

On page 17, line 9, insert a new section, (termed section B for the purposes of this paper),

“On request from a Garda attending a domestic violence incident, a Garda of appropriate rank, can authorize communicating with an on-call judge to apply for an out of hours barring order.”

#### **4. Undertakings**

An undertaking is a sworn promise given by a perpetrator to a Judge in lieu of a protection order. As an undertaking is not a court order it comes without the protection of a court order. In practical terms this means that where the perpetrator breaches the undertaken, the Gardaí have no power of arrest, and therefore can offer no real protection to victims of domestic violence. The Bill should be amended to ensure that where a woman is seeking a domestic violence court order, and she has met the standard of the court to obtain such an order, then a judge cannot instead choose for the application to be determined by an undertaking.

We would also stress the dangers of **cross-undertakings**. They are often aggressively sought by the respondent's legal representatives to prevent the issue of a court order which is needed if the safety and welfare of the applicant and any dependents are to be protected in reality, as there is no real substitute for the power of arrest which attaches to protective orders. Though there is no finding of fact against an applicant who gives a cross-undertaking, nevertheless giving an undertaking not to engage in behaviour implies that there is at least a risk that it would otherwise be engaged in. For this reason also, they should be avoided.

**NWCI recommends inserting a new section to ensure that an undertaking cannot be substituted for a protective order in circumstances where the 'evidential standard' for the issuing of a court order has been discharged.**

On page 18, line 24 a new section to insert, (termed section C for the purposes of this paper):

“Where the court, on application to it, is of the opinion that there are reasonable grounds for believing that the safety or welfare of an applicant or a dependent person so requires the making of a relevant order, the court cannot substitute an undertaking for a court order.”

#### **5. Domestic Violence and children**

Research has repeatedly shown that women are at elevated risk of abuse after they have left the relationship.<sup>21</sup> This situation is compounded by access arrangements which give the abuser a reason to contact and see their former partner thereby facilitating an opportunity for further assault, harassment, intimidation and abuse. In 2015 it was disclosed to Women's Aid that in 82 contacts children were being abused during access and on 124 occasions mothers disclosed that they themselves had been directly abused during access visits.<sup>22</sup> Furthermore, one of the key learnings to emerge from the Child Contact Centre pilot project was that parents with safety/barring orders are sometimes required to break them in order to facilitate court-ordered contact between their child and the other parent.<sup>23</sup>

This is particularly troublesome in the context of barring orders which are only granted when a court has determined that the respondent poses a **significant risk** to the welfare and safety of the applicant. Research and the experience of organizations working at the coalface shows that where a woman is being abused by her partner there is a high probability that the safety and welfare of children of the family is also jeopardised, and therefore this risk to the children should also be considered, assessed and mitigated. Unfortunately, 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, and access is often granted.

**NWCI recommends including in the Bill a provision by which, when granting a barring order the safety and well-being of any children should always be considered and, when appropriate, interim measures should be put in place to protect them from further abuse. In addition experts should be available to the Court to assess the risk the perpetrator poses to children and the impact on them of direct and/or indirect abuse.**

**NWCI recommends in cases where a Court is satisfied to grant an order, it should be open to a Judge, of their own volition (motion), or on the application of any party to the proceedings to vary any existing access orders to require same access to be supervised.**

This is not only in the children's best interests but it could also take some pressure off the courts and Legal Aid by dealing with this issue at the same time as the barring order. As things stand, often after the woman is granted a Barring Order, her partner puts in access /custody applications, so they have to return to court. To support this, there is a need for expert reports assessing child's safety and welfare being available to the courts. This should include assessing the emotional impact of being exposed to the abuse of their primary carer, which is recognised as a form of child abuse. The need for free/affordable expert reports has also been recently reiterated in the One Family Report on Shared parenting.<sup>24</sup>

However, when supervised access is ordered, there is no particular way in which this access is facilitated. Currently women are attempting to fill this gap by facilitating change overs at Garda Stations or with the assistance of social workers. NWCI would welcome the development of a

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<sup>21</sup> See Chapter 4 of *Child Custody and Access in the Context of Domestic Violence, Women's Experiences and the Response of the Legal System* (Women's Aid 2003). 23% of women who contacted Women's Aid in 2015 disclosed that they were abused by an ex-spouse or partner. The types of abuse disclosed after the relationship has ended included: physical and sexual assaults, stalking, including being followed, harassed by phone calls, text messages or social networks, publicly humiliating the woman, and damage to her new partner, home and property. [Women's Aid Impact Report 2015]. See also work published by Dr Stephanie Holt in the journal *Child Abuse Review* which documented that continued Domestic Abuse was Facilitated by Post-Separation Contact (2015).

<sup>22</sup> For a greater examination of this area see *Child Custody and Access in the Context of Domestic Violence, Women's Experiences and the Response of the Legal System* (Women's Aid 2003).

<sup>23</sup> One Family Child Contact Centre Key Learnings, pg 8.

<sup>24</sup> One Family, *Ireland's first national Shared Parenting Survey Results and Recommendations Report*.

national network of contact centres as a possible means of creating a safe space. However any such centres would have to be provided with staff trained on the dynamics of domestic violence and with the capacity to provide both physical safety and psychological support for children. Furthermore, considering the high prevalence of domestic violence as a key cause/ contributing factor to family breakdown, and ongoing dynamic risks presented to victims, primarily women and children, we think it's imperative that the development of a national network of contact centres should also incorporate a domestic violence risk assessment framework and, as appropriate, safety planning.<sup>25</sup>

**NWCI recommends including in the Bill a provision which will establish a National Network of Contact Centres which incorporate a domestic violence risk assessment framework and, as appropriate, safety planning, in order to contribute to meeting the safety and psychological needs of women and children experiencing domestic violence.**

On page 18, after section C, to insert a new section, (termed section D for the purposes of this paper):

“D(1) When granting a barring order, the court shall, in determining the provision of access to the dependent child, have regard to any harm which the dependent child has suffered or is at risk of suffering, including harm as a result of domestic violence, and the protection of the dependent child’s safety and psychological well-being;

(2) For the purposes of subsection (1), the court shall have regard to domestic violence that has occurred or is likely to occur in the household of the dependent child, or a household in which the child has been or is likely to be present, including the impact or likely impact of such violence on:

- (a) the safety of the child and other members of the household concerned;
- (b) the child’s personal well-being, including the child’s psychological and emotional well-being;
- (c) the victim of such violence;
- (d) the capacity of the perpetrator of the violence to properly care for the child and the risk, or likely risk, that the perpetrator poses to the child.

(3) In proceedings to which this section applies, the court may, by order, give such directions as it thinks proper for the purpose of procuring from an expert a report in writing on any question affecting the welfare of the child.

(4) An order under subsection (3) may be made by the court of its own motion or on application to it in that behalf by a party to the proceedings and, in deciding whether to make an order,

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In the UK, the Co-ordinated Action Against Domestic Abuse (Caada) pioneered the use of the Dash (Domestic Abuse, Stalking and Harassment and Honour Based Violence) risk checklist, which all police forces and many other agencies now use to see how much danger a victim is in. The idea is to start from risk. If you understand the level of risk that victims face, those at high risk of serious injury or murder can get the fastest help. Cosc, the Gardai and Trinity are working on developing a risk assessment tool that would perform the same function as the CAADA DASH in the UK. The development of the risk assessment framework is under the second national strategy on Domestic, Sexual and Gender-based Violence. Furthermore An Garda Síochána will develop and implement a Risk Assessment Matrix for all victims of domestic violence and sexual crime.

the court shall have regard to any views expressed to it in relation to the matter by or on behalf of a party to the proceedings concerned or any other person to whom they relate.”<sup>26</sup>

- (5) Establish a National Network of Contact Centres which incorporate a domestic violence risk assessment framework and, as appropriate, safety planning, in order to contribute to meeting the safety and psychological needs of women and children experiencing domestic violence.

## **6. Court Proceedings**

Fear of the judicial process itself is a significant deterrent to victims, let alone the opportunities perpetrators have to abuse the process to punish or intimidate their victims. On the day of the full hearing both parties can attend in court. All evidence must be presented to the court orally. This means that witnesses have to attend and give evidence in the witness box. They must be prepared to be cross-examined by the respondent or his/her legal representative who may dispute the evidence. Therefore as the applicant is also a witness they can be cross-examined by the respondent. As well as being a traumatic experience for a survivor of domestic violence, this can also mean that women feel that they are unable to advocate properly for the safety of their children, meaning that they and their children are denied access to justice. The treatment of domestic violence victims in court needs to be addressed in this Bill in order to ensure that a respondent is prohibited from directly interrogating their ex-partner during court proceedings.

**NWCI recommends inserting a new section that prohibits a perpetrator from personally cross examining an applicant during court proceedings.**

On page 21, line 21, insert a new subsection 14(3), (termed subsection 14(3) for the purpose of this paper):

“A respondent shall be prohibited from cross examining the applicant during relevant court proceedings.”

A further tactic that has been employed in court proceeding is for the respondent to appear without legal representation and then refuse to progress the matter until they have such representation. Judges often adjourn the matter based on this request only for the respondent to appear at the next court date without legal representation, and the cycle repeats. This is done to intimidate a victim into dropping the court proceedings. Respondents should not be able to repeatedly delay a court hearing in this manner. The Court should be able to make such directions as it considers necessary in the interests of justice to ensure that the full hearing of the application is concluded with all due expedition.

**NWCI recommends that a respondent is prohibited from delaying domestic violence hearings without reasonable cause.**

On page 25, line 38, insert new section E, (termed section E for the purposes of this paper):

“A respondent is prohibited from delaying court proceedings under this Act without reasonable cause”.

<sup>26</sup>

A large amount of the language of this section is transcribed from section 63 of the Children and Family Relationships Act 2015, which inserted Part V ‘Best interests of the Child’ into the Guardianship of Infants Act 1964.

## 7. Civil legal Aid

Access to legal protections, in the form of safety, protection and barring orders, are often dependent on civil legal aid from the State. Despite the popular belief that all legal aid is free, people affected by domestic violence who qualify for civil legal aid services are required to pay a minimum financial contribution of €130.<sup>27</sup> This is not a once off payment as victims of domestic violence may need to make recurring applications for legal aid and a financial contribution is required for each.<sup>28</sup> Moreover, some women are not eligible for legal aid because of assets held in joint names over which they have no control. High demand for services has led to long waiting lists and waiting times, with some women waiting months for a solicitor.<sup>29</sup>

A system of waiver does exist which permits the Legal Aid Board to waive an applicant's legal fees where failure to do so would cause "undue hardship", and such waivers have been applied to cases involving victims of domestic violence. However difficulties exist as to the operation of the waiver system, such as a lack of public awareness, waiting times, and no automatic entitlement. In recognition of these difficulties the CEDAW Committee recommended that the State "end the requirement for victims of domestic violence to make financial contributions for civil legal aid when seeking court protection under domestic violence legislation to ensure access to justice to all women without sufficient means".<sup>30</sup>

Following a recent Dail question it was revealed that the cost of waiving the fee would be €138,000 (figure in 2016) where the sole application before the court is for an order under the Domestic Violence Act, and €228,000 (figure in 2016) where that is among multiple matters before the court. Minister Fitzgerald also confirmed that she expects the Legal Aid Board to bring a proposal to her on this issue "in the near future".<sup>31</sup>

**NWCI recommends that the State end the requirement for victims of domestic violence to make financial contributions for civil legal aid when seeking court protection under domestic violence legislation to ensure access to justice to all women without sufficient means. There should not be a restriction on the number of legal aid certificates which may be granted within a given period, if one or more of them relates to domestic violence proceedings.**

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<sup>27</sup> Prior to 2013 the minimum contribution was €50, the increase therefor accounts for a rise of 160%.

<sup>28</sup> SAFE Ireland (2014) *Safety in a Time of Crisis: Priorities for Protecting Women and Children impacted by Domestic Violence*, Athlone: SAFE Ireland, p.13.

<sup>29</sup> Safe Ireland (2015) *The Lawlessness of the Home*. Athlone: SAFE Ireland. P. 63 However, an increase of over €1.6m was announced in the budget for 2016, which it is hoped will assist in reducing waiting times. See FLAC: Submission under the UN Convention on the Elimination of all forms of Discrimination against Women (16 December 2016).

<sup>30</sup> *Committee on the Elimination of Discrimination against Women Concluding observations on the combined sixth and seventh periodic reports of Ireland, CEDAW/C/IRL/CO/6-7*, (adopted on 3rd March 2017) at para. 29.

<sup>31</sup> Jonathan O'Brien (Sinn Fein) - asked the Minister for Justice and Equality the cost of not requiring a financial contribution from victims and survivors of domestic violence seeking legal aid. [Dail question 18410/17] <https://www.kildarestreet.com/wrans/?id=2017-04-12a.112>



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