

Women's Aid Submission to the Family Courts Bill

December 2022



Women's  Aid

Introduction

Women's Aid is a leading national organisation that has been working in Ireland to stop domestic violence¹ 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. More information is available at www.womensaid.ie.

Women's Aid welcomes the publishing of the Family Courts Bill, and more generally, the government's commitment to reform the Family Courts. However, we are concerned that the experiences and needs of domestic violence victims/survivors, including children, are not sufficiently considered and addressed in this process.

Women's Experiences with the Family Law Court

Women's Aid has held serious concerns about family law outcomes and processes for many years.

Women accessing our support services regularly tell us that custody and access arrangements are made which **are not safe for children and their mothers and which enable the abuse to continue post separation**. The women report that proceedings are biased against them and that many professionals, including judges and child report experts, do not understand the issues faced by women separating from an abuser nor the impact of domestic abuse, including coercive control, on children.

In theory, access to their parents should be the right of the child. In practice it is exercised as the right of the parents, and in this context specifically: the right of the abusive father. There is a pro-contact assumption that often trumps considerations regarding the risk to the children and their mothers, as well as sometimes the stated wishes of children not to be forced to go on access.

¹ While recognising that the legal term in Ireland is 'domestic violence' we acknowledge that many victims/survivors identify more with the term 'domestic abuse' or 'intimate partner violence'. Women's Aid uses these terms interchangeably in this submission to refer to the same set of abusive behaviours perpetrated by current or former intimate partners (including emotional, physical, sexual and economic abuse and coercive control).

As a result, custody and access orders can be dangerous and/or detrimental to the safety and the well-being of children and their mothers. 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 during changeover and by the undermining of the relationship and bond with their mother, which is critical to their healing. Additionally, proceedings in the Family Law Court are protracted and costly, the premises are inadequate and there is a lack of support for women engaging with the Family Law Court during and after proceedings.

The establishment of a dedicated Family Court presents an excellent opportunity to ensure that domestic violence is taken into account in family law and that victims are protected, in terms of both safe outcomes and safe processes. However, what is so far missing in the overall reform project is the understanding that domestic violence victims are a key vulnerable group accessing the Family Courts and **that they access the court not only in relation to domestic violence orders but also, just as importantly, in relation to other matters such as custody, access and maintenance.**

In this respect, we note that Article 31 of the Istanbul Convention request that

1 Parties shall take the necessary legislative or other measures to ensure that, in the determination of custody and visitation rights of children, incidents of violence covered by the scope of this Convention are taken into account.

2 Parties shall take the necessary legislative or other measures to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children.

The Platform of United Nations and regional independent mechanisms on violence against women and women's rights similar calls for intimate partner violence to be an **essential factor** in the determination of custody and reiterate that "perpetrators or alleged perpetrators' rights or claims during and after judicial proceedings, **including with respect to property, privacy, child custody, access, contact and visitation,** should be determined in the light of women's and

children's human rights to life and physical, sexual and psychological integrity, and guided by the principle of the best interests of the child" as per CEDAW General Recommendation No. 35 (2017) on gender-based violence against women, updating general recommendation No. 19.² (emphasis added)

We do not find this reflected in the recently released **Family Justice Strategy** in general, nor specifically in this Bill. Neither includes a visible and cross-cutting recognition of domestic abuse as it impacts on the above Family Law proceedings. In neither are there clear provisions or actions to support families attending the Family Courts where there are allegation of DV, such as screening³, risk management and fast tracking of these cases, and no establishment of vital contact centres for children.

Specific Concerns about the Family Courts Bill

Women's Aid strongly supports the establishment of a dedicated Family Court, which will make the court more efficient and user-friendly, and we acknowledge the many positives in this Bill, for example, separate location or times for family law cases, relaxation of the in-camera rule to allow for research and non-identifying reporting and possibility of being accompanied in court.

However, as we already submitted at the General Scheme stage⁴, we remain concerned that domestic abuse is not sufficiently considered nor addressed. This Bill provides very limited consideration of domestic abuse, which is mentioned only in relation to the orders available under the Domestic Violence Act, 2018. However, women who have experienced domestic abuse also access the court for a variety of other proceedings including separation, divorce, custody access and maintenance, and the Bill does not address these circumstances.

2 The Platform of United Nations and regional independent mechanisms on violence against women and women's rights [2019] 'Intimate Partner Violence against Women is an Essential Factor in the Determination of Child Custody, Say Women's Rights Experts'

https://previous.ohchr.org/Documents/Issues/Women/SR/StatementVAW_Custody.pdf, Accessed 19/06/22

3 Except in relation to mediation, where the Family Justice strategy envisage tools for identifying DV prior to mediation (Action 4.5), but such tools do not seem to have other functions

4 Women's Aid submission to the Family Court Bill General Scheme, February 2021

<https://www.womensaid.ie/about/policy/publications/submission-to-the-court-bill-general-scheme-2021>

Women's Aid believe that the Bill can be improved by explicitly mentioning domestic violence, including coercive control, in the guiding principles, mediation and training sections. It is essential that safety from domestic abuse for both child and non-abusing parent should be included in the guiding principles, that there is a clear exemption from ADR/mediation for **all** proceedings where there are allegations of domestic abuse (and not only for orders under the Domestic Violence Act 2018) and that training clearly includes domestic abuse and coercive control.

Guiding Principles

- The invisibility of and lack of focus on domestic violence, and particularly coercive control, in the Bill is reflected in the lack of a guiding principle on **safety** in S 8(2). It is of grave concern to Women's Aid that in these guiding principles, no reference is made to the safety and welfare of parties that may be in the Family Law Court in relation to separation, divorce, child custody and access or maintenance in the context of an abusive relationship (in line with Article 31 of the Istanbul Convention) or indeed in relation to an application under the Domestic Violence Act 2018.
- The safety principle should refer both to safe **outcomes** (for example, the risk posed by the abuser is considered so that interim or final orders do not put the victim or a child at risk of continuing abuse) and safe **processes** (for example, the abuser is not able to use the proceedings as a form of abuse, there are safe waiting spaces in court, separate entrances etc.).
- The guiding principles lack any reference to the need of prioritising the **safety and emotional well-being of children** from experiencing domestic violence, including coercive control, as well as a recognition of exposure to domestic violence as a form of emotional child abuse by the perpetrator⁵.

⁵ See for example 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).

While of course the best interest of the child is named as the primary consideration, in our experience, when the courts determine the best interest of the child, domestic abuse and its impact on the child are often minimised and therefore the child's physical and emotional safety is trumped by the promotion of contact at any cost⁶.

- The Family Law Court should be accessible and its proceedings clear and comprehensible to all users, including those with a disability, minorities, users for whom English is not their first language or those experience additional barriers or disadvantages. While we acknowledge work underway by the Courts Service to practically promote this accessibility, this should be formally reflected in the guiding principles.

Recommendations

1. Insert as a guiding principle in S 8(2) the promotion of the safety and welfare of victims of domestic abuse accessing the courts for any family law proceedings (including separation, divorce, custody, access and maintenance, as well as for orders under the Domestic Violence Act 2018).
2. Insert as a paramount guiding principle in S 8(2) the protection of children involved in Custody and Access proceedings from any form of domestic abuse.
3. Insert as a guiding principle in S 8(2) a recognition that being exposed to domestic abuse against a family member is a form of emotional child abuse that the court should protect children from by supporting the non-abusive parent.
4. Insert as a guiding principle in S 8(2) that proceedings should be accessible to all users, including those with disabilities and those experiencing additional barriers or disadvantages.

⁶ S. Holt, "A Case of Laying Down the Law: Post-Separation Child Contact and Domestic Abuse" (2011) 14(4) I.J.F.L. 87–97.

Alternative Dispute Resolution/Mediation

Women's Aid recognises that mediation and other Alternative Dispute Resolution (ADR) methods can provide effective and positive options to parties in family law disputes where there is no domestic abuse. When there is domestic abuse, including coercive control, Women's Aid strongly believes that mediation is not appropriate, as it could put women at risk during the process of mediation and it could lead to unsafe and unfair outcomes for themselves and their children.

Mediation is predicated on the parties having an equal relationship and being able and willing to cooperate with each other, which is not the case in an abusive relationship. On the contrary, our experience is that women may not be able to freely articulate their fears and concerns in the presence of the abuser and end up agreeing to disadvantageous and dangerous arrangements.

For many women leaving an abusive controlling relationship, separation is a particularly fraught time, with increased risk of intimidation and violence by the abuser. Participation in mediation can put women in danger of further abuse and harassment through contact with the abuser on arrival, during the mediation session and on departure. In recognition of these risks, Article 48 of the Istanbul Convention prohibits the mandatory use of mediation or other ADR methods in criminal or civil cases, including family law, where there is domestic violence or other forms of violence against women covered by the Convention.

In our experience, it may however be very difficult for women who are separating from an abuser to refuse mediation if they cannot "prove" the abuse by producing an order under the Domestic Violence Act 2018. Many women do not report domestic violence to the Gardaí or apply for a domestic violence order prior to separation. **Their strategy to escape the abuse is the act of separation itself.** If they refuse mediation in the absence of such "evidence", this is held against them as they are deemed uncooperative or difficult. Women may therefore feel obliged to participate in mediation when it is not safe for them and the dynamics of coercive and controlling behavior can continue to play out in such settings.

Mediation is predicated on parties being willing to cooperate and able to do so safely. As such, it should remain genuinely voluntary for all parties and no adverse inference should be drawn by

parties refusing mediation, even if they are not able to provide “hard evidence” of domestic abuse.

While the Family Courts Bill does not go as far as to make mediation mandatory, Women's Aid is concerned that the strong emphasis on mediation and ADR without a recognition of their limitations and the lack of clarity on whether there would be consequences if somebody refuses it, may compel victims of domestic abuse to participate in it regardless of the risk to their safety, as we have already observed happening in current practice.

Specifically:

- Mediation is included in S 8(2)(b) and in S 8(4)(a) as a guiding principle of the Family Law Court, without any clear statement recognising its unsuitability for cases of domestic abuse. In both sections, the promotion of ADR including mediation are tempered by the phrase “unless resolution by such means would not be appropriate due to the nature of the proceedings;”

This phrase is welcome, but it is not sufficiently specific and clear, and given our experience with women feeling coerced into mediation, we believe that domestic abuse should be mentioned as one of the situations where ADR and mediation are not appropriate. This would make it clear to all court users as well.

- Applications to the Family Court will have to state whether or not mediation under the Mediation Act 2017 has been attempted⁷. There are exceptions to the above for certain proceedings such as the Domestic Violence Act 2018⁸. This exemption does not cover equally important proceedings for women separating from an abuser, such as divorce, separation, custody, access and maintenance.

7 S 8C(1)(b) of the Act of 1961 as amended by S (10) of this Bill, S 24(1)(b), S 39(1)(b) respectively for the Family High, Circuit and District court.

8 S 8C(2) of the Act of 1961 as amended by S (10) of this Bill, S 24(2), S 39(2) respectively for the Family High, Circuit and District court.

- At any stage of proceedings a judge can suspend proceedings to allow the parties to resolve some of all of the issues by mediation/ADR⁹. This can be by the judge's own motion or by request of one of the parties. Again there is no exception or safeguard for victims of domestic violence who may find themselves coerced into mediation by their abuser. Moreover, it is not clear if this suspension applies to proceedings under the Domestic Violence Act 2018 as well. Women's Aid believes that it certainly should not.

Recommendations

1. In S 8(2)(b) and in S 8(4)(a) specify that ADR and mediation are not appropriate where there is domestic abuse (with or without protective orders being in place), so that parties in Family Law Court proceedings will not be penalised in any way for refusing to participate in mediation.
2. In S 8C(2) of the Act of 1961 as amended by S (10) of this Bill, S 24(2), and S 39(2) ensure that exceptions to mediation requirements already provided for proceedings under Domestic Violence Act 2018 should equally apply to custody, access and maintenance, separation and divorce proceedings where domestic abuse is alleged.
3. In S 8C(3) of the Act of 1961 as amended by S(10) of this Bill, S 24(3) and S 39(3), dealing with suspending proceedings to attempt mediation, include adequate safeguards for victims of domestic violence accessing the Family Law Courts in relation to separation, divorce, custody, access or maintenance, as well as in relation to orders under the Domestic Violence Act 2018, so that victims of domestic abuse are not compelled to participate in mediation. When a party declines mediation/ADR because of domestic abuse, their statement to this effect should suffice.

⁹ S 8C(3) of the Act of 1961 as amended by S (10) of this Bill, S 24(3), S 39(3) respectively for the Family High, Circuit and District court.

Training

Women's Aid appreciates that judges appointed to the Family Court would have relevant experience, training or temperament and would have to take part in education or training as required by the Principal Judge of each court in consultation with the President of the court in question and in consultation with the Chief Justice¹⁰.

In our day-to-day experience supporting women accessing the Family Court for applications for domestic violence orders or for custody, access and maintenance orders we have noted great inconsistency in judges and other Family Court professionals understanding of domestic violence, including coercive control. We therefore strongly suggest that the judicial training referred to in the Bill would include training on the dynamics and impacts of domestic violence including coercive control. This training should include a focus on its impact on children and its impact on the ability of victims to confidently participate in legal proceedings.

Moreover, the Bill is silent in relation to training being provided to professionals in the court other than judges. It is equally important that other professionals such as lawyers, mediators, court staff, S32 reporters and any other child experts are specially trained on domestic violence, including coercive control.

Recommendations

1. That the judicial training referred to in S 59 should include training on domestic abuse, including coercive control, how children experience domestic abuse and its impact on the ability of victims to confidently participate in legal proceedings. This training should be mandatory and a requisite for appointment to the Family Law Court.
2. That training on recognising domestic violence, including coercive control, is also provided to all other professionals operating in the Family Law Court.

Family Law Rules Committee

10 S 59

S 51 provides for the establishment of a Family Law Rules Committee or sub-committees to ensure that the rules of court in relation to family law proceedings are coherent and applied with consistency across all levels of the family courts.

Women's Aid believes that there should be a formal mechanism for the Family Law Rules Committee to engage with Court users and domestic violence specialist services, via membership on the Committee or alternative arrangements.

Domestic violence is highly prevalent and impacts greatly on all aspects of family law. Many of the most intractable, prolonged and costly family law cases are cases where there is domestic violence and child abuse, due to the abuse of process that domestic violence perpetrators often engage in. It is therefore essential that the court is informed about domestic violence and hears from the users and specialist services to counter the marginalisation of domestic violence as a side issue in family law and provide safe and supportive measures to families escaping abuse.

Recommendation

A mechanism for the Family Law Rules Committee to engage with court users and domestic violence specialist services is included under S 51.

Conclusion

We would like to thank the committee, and all legislators, for your attention to and consideration of our submission and we would welcome any opportunity to discuss the contents with you directly.

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