

## A rescue craft

*The Domestic Abuse Bill provides a golden opportunity to better protect the vulnerable from abuse perpetrators, says **Julia Townend***



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“**A**buse isn’t only about those noticeable, physical signs. Sometimes there are no bruises”.

These were the chilling words of Rosie Duffield MP in her speech to the House of Commons on 2 October 2019, as the Domestic Abuse Bill underwent its second reading with a view to reforming domestic abuse law.

Then on 6 November, parliament was dissolved in advance of the general election of 12 December, leaving supporters of the bill fearful that this crucial law reform may be relegated to Hansard and history.

On 19 December 2019, good news came in the form of the Queen’s Speech which confirmed that the long-delayed bill would make its way back into the legislative timetable.

### STATUTORY DEFINITION

Momentum has been building for a clear, broad statutory definition of domestic abuse, which recognises its more nuanced forms. There have been steps in the right direction.

In the criminal justice sphere, in March 2015 a new offence of controlling or coercive behaviour in intimate or familial relationships was introduced (section 76 of the Serious Crime Act 2015).

In the family jurisdiction, in October 2017 Sir James Munby, the former president of the Family Division, issued a revised practice direction for child arrangements proceedings which referred to a broader category of ‘domestic abuse’ instead of ‘domestic violence’ (paragraph 3 of Practice Direction 12J to the Family Procedure Rules 2010).

The Domestic Abuse Bill proposes to introduce a statutory definition of domestic abuse. This defines it as abusive behaviour (including physical or sexual abuse, violent or threatening behaviour, controlling or coercive behaviour, economic abuse or psychological, emotional or other abuse, whether or not a single incident or a course of conduct) between two people aged 16 or over who are “personally connected”.

“Personally connected” includes those who are or have been married, civil partners, engaged, in a civil partnership agreement, in an intimate personal relationship, relatives or there is a child in relation to whom they each have a parental relationship.

Practitioners should be familiar with any new statutory definition, not only for the purposes of its direct application within any particular practice area, but also for the identification of a client’s vulnerabilities and the more general impact those may have.

### FURTHER PROTECTIONS

The bill as presented contains 86 clauses within five proposed parts including provision for a new civil order – the domestic abuse protection order (to replace the domestic violence protection order introduced nationally in 2014).

In the first instance, a domestic abuse protection notice would be given. Currently, to secure such protection there needs to be violence or threatened violence. With the proposed broader requirement of ‘abuse’, it is hoped the police and the courts will no longer face difficulties in deciding whether certain types of behaviour are sufficiently violent.

The new protective measures would supplement existing remedies such as bail conditions and restraining orders in the criminal justice system; and non-molestation orders, occupation orders and undertakings in the family courts.

It is proposed that Clare’s Law is elevated to statute – namely, the right of an individual to ask the police if someone with whom they are in a relationship has a record of violent or abusive behaviour; and the right of the police to proactively share such information with an individual to protect a potential victim.

The bill also provides for the grant of secure tenancies in cases of domestic abuse, stipulations in relation to offences against the person committed outside the UK, and particular terms pertaining to the already established role of the Domestic Abuse Commissioner.

### CROSS-EXAMINATION

From the perspective of family law practitioners, the most significant proposed reform is the prohibition of cross-examination of victims of abuse in person by perpetrators in family proceedings (and vice versa).

Where a perpetrator of domestic abuse self-represents in the family court, this dilemma is often encountered. Direct interaction through questioning can be traumatic for the victim and constitute a continuance of the abuse. In

the case of *PS v BP* [2018] EWHC 1987 (Fam), Mr Justice Hayden called for parliamentary intervention in relation to this omnipresent issue.

In his judgment, he identified guidance for such cases given that there is no presumption that the accused may not cross-examine an alleged victim. Among other things, he identified a need for “ground rules” hearings; the possibility of the child being represented by a lawyer who could conduct cross-examination; and the possibility of questions being written down and submitted to the judge to question the witness.

These were referred to as a “forensic life belt until a rescue craft arrives”. The approach has been incongruous with the practice in the criminal courts, where section 36 of the Youth Justice and Criminal Evidence Act 1999 prohibits the accused from cross-examining particular witnesses.

The bill may offer the rescue craft. The reform would prevent a perpetrator of abuse who has been cautioned or convicted for an offence, or been made subject to an on-notice protective injunction, from directly cross-examining the accuser or directly being questioned. Beyond this, the family courts would have a general discretionary power to prevent cross-examination where the statutory ‘quality’ or ‘significant distress’ conditions are met; and it would not be contrary to the interests of justice to impose such a prohibition.

If questioning is disallowed, the court must consider if there are satisfactory alternative means for obtaining the evidence. If not, the court would be required to invite the litigant in person to arrange for a lawyer to act on their behalf for cross-examination. If this is declined but the court considers cross-examination necessary in the interests of justice, the court must meet the costs of a lawyer out of central funds.

Practitioners should be familiar with the final terms of the bill as incorporated into law so that holistic advice may be given to clients. It may be that extensive protections are available outside of the practice area in which one is advising.

#### **FURTHER ARMOURY**

Legislation is but one piece of the armoury required to ensure domestic abuse laws are up to date and effective. It is clear a multi-agency approach to tackling domestic abuse is essential as well as changes to current policy.

Various charities and other organisations have been vocal about what they perceive to be wrong with the bill in its current form. Some have suggested that the age limit in the statutory definition of domestic abuse should



be removed, while others have defended it on the basis that abuse of younger individuals constitutes child abuse.

Age UK is calling, among other things, for the legislation to protect people from abuse by those in trusted positions including those who provide unpaid care (such as friends and neighbours). They recognise the important roles that health professionals can play in identifying domestic abuse and providing support for older survivors.

Others, such as the End Violence Against Women Coalition, argue that the proposed legislation does not go far enough in terms of provision of resources for victims of abuse. For example, the lack of refuge places, difficulties with housing benefits and barriers to private rental options mean those fleeing abuse are often required to stay with their perpetrators, or face homelessness. Many groups are concerned that migrant victims will be no better protected under the proposed laws than at present.

#### **GOLDEN OPPORTUNITY**

In the year ending March 2018, an estimated two million adults aged 16 to 59 experienced domestic abuse according to the Crime Survey for England and Wales. Theresa May, in her first speech to the House of Commons after resigning as prime minister, hailed the draft statute as a “once-in-a-generation opportunity”.

It will be interesting to see what the new parliamentary term brings. This bill offers a golden opportunity to supplement current law – and ensure desperately needed proper protections for the vulnerable. ☺



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