

Once in a generation?



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Is the Domestic Abuse Bill the rescue craft sought by the family justice system?

"Often we see the same images and stereotypes on TV: housing estates, working-class families, drunk men coming home from the pub, women surrounded by children, and a sequence of shouting, followed by immediate physical violence or assault. But soap opera scenes tend to focus only on one or two aspects of a much bigger and more complex picture. Domestic violence has many faces, and the faces of those who survive it are varied too... Abuse is not just about noticeable physical signs. Sometimes there are no bruises." These were the powerful words of Rosie Duffield MP as the Domestic Abuse Bill underwent its second reading in the House of Commons on 2 October 2019.

They will come as no surprise to family lawyers, many of whom witness the plight of vulnerable litigants, from all walks of life, with depressing regularity. Many practitioners know horror stories about how the workings of the family justice system have facilitated abuse and so the reform to domestic abuse legislation remains eagerly awaited.

A long and winding road

It has not been a smooth pathway for the Domestic Abuse Bill. Its initial introduction led to first and second readings in the House of Commons on 16 July 2019 and 2 October 2019 respectively. The progress of the Bill was delayed by Brexit and the September 2019 unlawful prorogation of Parliament. As the Bill navigated the House of Commons committee stage, on 6 November 2019 Parliament was dissolved in advance of the general election of 12 December 2019.

On 19 December 2019 the Queen's Speech confirmed that the Domestic Abuse Bill would return to the legislative timetable. The first reading in the House of Commons during the new Parliamentary session occurred on 1 March 2020. The momentum with which the Bill may now progress has been thrown into further question by the Covid-19 epidemic. Unfortunately, the early suggestions from charities are that the social distancing and isolation ramifications of the coronavirus create a higher risk of domestic abuse occurring.

Defining domestic abuse

The Bill proposes to introduce the first statutory definition of domestic abuse in England & Wales, recognising its more nuanced forms. There had been some steps in the right direction in the criminal and family jurisdictions. (On 3 March 2015 a new offence of controlling or coercive behaviour in intimate or familial relationships was introduced by s76 of the Serious Crime Act 2015; on 2 October 2017 Sir James Munby 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). Domestic abuse comprises abusive behaviour (including physical or sexual abuse, violent or threatening behaviour, controlling or coercive behaviour, economic abuse, or psychological, emotional or other abuse – whether a single incident or a course of conduct – between two people aged 16 or over who are "personally connected". The meaning of "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.

A rescue craft for cross-examination

For family law practitioners, the most significant proposed reform within the Domestic Abuse Bill is the prohibition of cross-examination in person in family proceedings. Under the current law, where a party self-represents in the family court, a dilemma is often encountered whereby procedure may lead to a domestic abuse victim being questioned directly by the alleged perpetrator, and vice versa. Not only can this be traumatic – it may constitute a continuance of the domestic abuse.

There have been judicial calls for reform since 2006 (see *H v L & R* [2006] EWHC 3099 (Fam)). Having previously described the situation as a "stain on the reputation of



our family justice system" (in *Re A (A minor) (Fact finding; Unrepresented party)* [2017] EWHC 1195 (Fam)), Mr Justice Hayden called for Parliamentary intervention in *PS v BP* [2018] EWHC 1987 (Fam), identifying, amongst other things, 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 protections available in the criminal courts – for example, s36 of the Youth Justice and Criminal Evidence Act 1999 prohibits the accused from cross-examining particular witnesses.

The Domestic Abuse Bill may offer that rescue craft. The reform would prevent a perpetrator of abuse who has been cautioned, convicted or charged with a specified offence, or who has been made subject to an on-notice protective injunction, from directly cross-examining the accuser or directly being questioned by them. 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 to arrange for a lawyer to act on their behalf for cross-examination. If 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.

Further highlights of the Domestic Abuse Bill

The proposed reforms would also include the following:

- 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". The proposed broader requirement is "abuse", thus avoiding the difficulties faced by police and courts in deciding whether certain types of behaviour are sufficiently violent to meet the threshold. The new protective measures would supplement existing remedies, including bail conditions and restraining orders in the criminal justice system and non-molestation orders, occupation orders and undertakings in the family courts.
- Placement on a statutory footing of the guidance supporting the Domestic Violence Disclosure Scheme, rolled out across England & Wales in 2014. This scheme, also known as Clare's Law, authorises police to disclose to individuals the details of their partner's abusive past, where lawful, proportionate and necessary.

knowledge about obtaining help or a risk of detention and deportation, which may constitute a breach of Article 4(3) of the Istanbul Convention. Evidence presented to the Joint Committee on the Draft Domestic Abuse Bill suggested that immigration authorities had taken enforcement action against victims at a time when they required protection and support. It may be that clear Home Office policy is required to determine the correct approach, and a firewall could be introduced to separate reporting of crime and access to support services from immigration control, as suggested by the Step Up Migrant Women campaign.

- Duties on local authorities to provide support to victims of domestic abuse and their children in refuges and other safe accommodation.
- A statutory presumption that alleged victims of domestic abuse are eligible for special measures in the criminal courts.
- Controversially, that domestic abuse offenders are subjected to polygraph testing as a condition of their licence following their release from custody.

Does the proposed legislation go far enough?

The definition of domestic abuse in the Bill omits express reference to various specific but established forms of abuse (including female genital mutilation, forced marriage, honour-based crimes, modern slavery and exploitation and coercive control related to immigration status). Age UK has called for those in trusted positions (friends, neighbours and others providing unpaid care) to be included within the definition of "personally connected", as such abuse often affects the elderly.

The proposed legislation does not recognise that certain criminal offending is a direct consequence of domestic abuse. Often the abuse suffered by such offenders is significantly worse than the crimes which they are accused of committing and their previous experiences are often disregarded. The Prison Reform Trust and the Criminal Bar Association have proposed the creation of a statutory defence for those whose offending is driven by their experience of domestic abuse.

There is concern that the currently drafted prohibition of cross-examination in person in family proceedings does not go far enough and may be applied inconsistently. Many victims will not receive mandatory protection (as a result of a conviction, caution, charge or injunction) and will be reliant on the discretionary ground. Solutions to this could include extending the mandatory ban to apply where there is a court finding of fact or other documentary evidence of abuse (as in the legal aid regime threshold – see the first report of session 2017-19 of the Joint Committee on the Draft Domestic Abuse Bill, 11 June 2019, paragraph 173). Publication of clear national guidance as to what circumstances satisfy the discretionary ground to ensure uniform application may assist. Resolution, in supplementary written evidence, suggested that a more effective way to address the issue may be the extension of legal aid for representation of both victims and perpetrators. It has also been suggested (in written evidence submitted by the Law Society) that the prohibition on the cross-examination of witnesses by the perpetrator should be extended to third parties, such as a child of the relationship.

Reform is still required in relation to protecting migrant women. Those with an insecure immigration status may face the stark choice of remaining in an abusive relationship or escaping but becoming destitute due to a lack of

A once-in-a-generation opportunity

The latest figures from the Crime Survey for England and Wales show that in the year ending March 2018 an estimated two million adults aged 16 to 59 experienced domestic abuse. 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". Clearly a multi-agency commitment to addressing domestic abuse is essential to support statutory reform and it is hoped that the Domestic Bill will remain at the forefront of the legislative agenda.

