



**ombudsman**  
do leanaí  
for children

**Advice of the Ombudsman for Children's Office  
on the Domestic Violence Bill 2017**

**June 2017**



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## **Recommendations of the Ombudsman for Children's Office on the Domestic Violence Bill 2017**

### **Court Orders**

- The safety and well-being of all children experiencing or exposed to domestic violence must be more formally assessed and considered by the court in making orders under this legislation. As recommended by Women's Aid and the National Women's Council of Ireland, immediate interim measures must be taken, where necessary, to protect children and 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.

### **Respect for the Views of the Child**

- Section 23 should expressly recognise that it is the right of all children who are capable of forming views to express those views in proceedings involving or affecting them, with their views being given due weight in accordance with their age and maturity.
- The Minister for Justice and Equality should prepare and publish the draft regulations relating to child views experts as a matter of urgency to inform debate on the legislation and allow greater precision in the analysis of its impact.
- The Department of Justice and Equality should work with the Department of Children and Youth Affairs to secure the establishment and proper resourcing of an independent statutory body, with a clear remit to manage and deliver an independent representative service in all judicial proceedings affecting children.

### **Special Protection Measures**

- The Department of Justice and Equality should take all necessary steps to ensure that special protection measures for child victims and witnesses are widely available and used.
- Consideration should be given to making provision under Section 22 of the Bill for all child victims and witnesses to have a right to be accompanied, as appropriate, in court by a support person of their choice. Information on, and contact details for, available support services should also be provided to the child victims under Section 24, in a manner which is adapted to their age and maturity and in a language which is understandable, as well as gender and culture sensitive.
- The best interests of the child/children involved in or affected by proceedings under Section 33 should be the primary consideration in the court's determination of whether to restrict coverage of the case.

## 1. Introduction

The former Minister for Justice and Equality, Frances Fitzgerald, published the Domestic Violence Bill 2017 ('the Bill') on 3 February 2017. The stated aims of the proposed legislation include: to improve the protections available to victims of domestic violence; and to bring Ireland a step closer to ratifying the Council of Europe Convention on preventing and combating violence against women and domestic violence, more commonly known as the Istanbul Convention.

This advice has been prepared pursuant to Section 7(4) of the Ombudsman for Children Act 2002 (as amended), which provides that the Ombudsman for Children may give advice on any matter relating to the rights and welfare of children, including proposals for legislation that affect children.

The Ombudsman for Children's Office ('OCO') welcomes the publication of the Bill and its purpose to consolidate and reform the law on domestic violence to provide better protection for victims. In particular, we welcome inclusion of the following:

- Section 35, which provides for the creation of a new criminal offence of forced marriage and Section 39 which amends the Family Law Act 1995 to remove the exemption for underage marriage. This latter provision implements the 2016 recommendation by the UN Committee on the Rights of the Child for the State party to expeditiously amend the 1995 Act to remove all exceptions that allow marriage under the age of 18 years.<sup>1</sup>
- The new provisions under Part 2 introducing special protection measures aimed at making the court process less difficult for all victims of domestic violence and providing them with support.

In accordance with the Ombudsman for Children's statutory mandate, this advice focuses on children experiencing or exposed to domestic violence. Taking into account the recommendations made by other stakeholders, particularly with regard to:

- the inclusion of a specific definition of domestic violence in the legislation,<sup>2</sup>
- the extension of access to safety and protection orders to those in intimate and committed relationships, who are not cohabiting,<sup>3</sup>
- the introduction of a system to allow members of An Garda Síochána to apply for Out of Hours Barring Orders to an on-call judge,<sup>4</sup>

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<sup>1</sup> Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Ireland* (2016) UN Doc. CRC/C/IRL/CO/3-4 at paras 25-26.

<sup>2</sup> Barnardos, *Explicit Domestic Violence Offence must be in new Domestic Violence Law* (Press Release, 03 May 2017) available at <https://www.barnardos.ie/media-centre/news/latest-news/explicit-domestic-violence-offence-must-be-in-new-domestic-violence-law.html>; National Women's Council of Ireland, *Recommendations for Legislative Amendments: Domestic Violence Bill 2017* (2017) available at [http://www.nwci.ie/images/uploads/NWCI\\_Submission\\_Domestic\\_Violence\\_Bill\\_2017.pdf](http://www.nwci.ie/images/uploads/NWCI_Submission_Domestic_Violence_Bill_2017.pdf).

<sup>3</sup> Women's Aid, *Domestic Violence Bill 2017 Submission* (2017) available at [https://www.womensaid.ie/download/pdf/submission\\_on\\_the\\_domestic\\_violence\\_bill\\_2017.pdf](https://www.womensaid.ie/download/pdf/submission_on_the_domestic_violence_bill_2017.pdf).

- the introduction of detailed statutory guidance to be considered by the courts in determining whether to grant orders under the legislation,<sup>5</sup> and
- the establishment of a dedicated family court and child court welfare service, and a full roll out of child contact centres across the country to facilitate court ordered supervised access visits,<sup>6</sup>

this advice specifically addresses amendments that we believe are merited in the following three areas: court orders; respect for the views of the child; and special protection measures.

The purpose of this advice is to highlight how the legislative framework could be improved to strengthen the recognition, protection and fulfilment of children’s rights. In preparing this advice, the Ombudsman for Children’s Office (OCO) has been guided by the international and domestic children’s rights framework, in particular Article 42A of the Constitution, the UN Convention on the Rights of the Child (UNCRC), the guidance provided by the UN Committee on the Rights of the Child, and the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice.

## 2. Children’s Rights Framework

Following Ireland’s ratification of the UNCRC in 1992, the State is required to undertake “all appropriate legislative, administrative and other measures” for the implementation of children’s rights,<sup>7</sup> including:

- children’s right to be protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (Article 19),
- children’s right to have their best interests treated as a primary consideration in all activities undertaken by public and private institutions, including courts of law (Article 3), and

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<sup>4</sup> Barnardos, *With small changes, Domestic Violence Bill could improve protections for children experiencing domestic abuse* (Press release, 01 March 2017) available at <https://www.barnardos.ie/media-centre/news/latest-news/with-small-changes-domestic-violence-bill-could-improve-protections-for-children-experiencing-domestic-abuse.html>; Women’s Aid, *Domestic Violence Bill 2017 Submission* (2017) available at [https://www.womensaid.ie/download/pdf/submission\\_on\\_the\\_domestic\\_violence\\_bill\\_2017.pdf](https://www.womensaid.ie/download/pdf/submission_on_the_domestic_violence_bill_2017.pdf).

<sup>5</sup> SAFE Ireland, *Briefing for Members of the Oireachtas, Legislative Amendments Recommended to: Domestic Violence Bill 2017* (2017) available at <http://www.safeireland.ie/wp-content/uploads/SAFE-Ireland-Domestic-Violence-Bill-2017-Recommendations-for-Legislative-Amendments-April-2017-.pdf> and National Women’s Council of Ireland, *Recommendations for Legislative Amendments: Domestic Violence Bill 2017* (2017) available at [http://www.nwci.ie/images/uploads/NWCI\\_Submission\\_Domestic\\_Violence\\_Bill\\_2017.pdf](http://www.nwci.ie/images/uploads/NWCI_Submission_Domestic_Violence_Bill_2017.pdf).

<sup>6</sup> Barnardos, *Explicit Domestic Violence Offence must be in new Domestic Violence Law* (Press Release, 03 May 2017) available at <https://www.barnardos.ie/media-centre/news/latest-news/explicit-domestic-violence-offence-must-be-in-new-domestic-violence-law.html>; National Women’s Council of Ireland, *Recommendations for Legislative Amendments: Domestic Violence Bill 2017* (2017) available at [http://www.nwci.ie/images/uploads/NWCI\\_Submission\\_Domestic\\_Violence\\_Bill\\_2017.pdf](http://www.nwci.ie/images/uploads/NWCI_Submission_Domestic_Violence_Bill_2017.pdf).

<sup>7</sup> See Article 4, UNCRC.

- children’s right to express their views freely in all matters affecting them and to have due weight given to their views, in accordance with their age and maturity (Article 12).

The UN Committee on the Rights of the Child has emphasised that, in order to fully implement Article 19, child victims of all forms of violence must be treated in a child-friendly and sensitive manner throughout the justice process, taking into account their personal situation, needs, age, gender, disability and level of maturity and fully respecting their physical, mental and moral integrity.<sup>8</sup> All decision-makers must also be able to demonstrate how the best interests of each child involved in or affected by judicial proceedings have been examined and assessed and what weight has been ascribed to their best interests in the decision.<sup>9</sup>

Furthermore, although expressing views is a choice for each child and not an obligation, the Committee has clarified that the rights afforded to children under Article 12 should not be subject to any age limits or other arbitrary restrictions, either in law or in practice.<sup>10</sup> The full implementation of children’s right to express views and be heard in judicial proceedings requires recognition of, and respect for, both verbal and non-verbal forms of communication, through which very young children can demonstrate understanding, choices and preferences.<sup>11</sup>

The UN Committee on the Rights of the Child has also recommended that “whenever possible, the child must be given the opportunity to be directly heard in any proceedings”.<sup>12</sup> However, when hearing a child indirectly through an independent representative, it is essential that this professional has sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children. They should also receive ongoing and systematic training, including training on children’s rights and skills-based training on communicating with children at their level of understanding.<sup>13</sup>

With regard to domestic law, Articles 42A.4.1<sup>o</sup> and 42A.4.2<sup>o</sup> of the Irish Constitution provide that, in the resolution of child care proceedings brought by the State and proceedings concerning adoption, guardianship, custody and access, the best interests of the child must be the paramount consideration, and the views of the child shall be ascertained and given

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<sup>8</sup> Committee on the Rights of the Child, *General Comment No. 13: The right of the child to freedom from all forms of violence* (2011) UN Doc. CRC/C/GC/13 at p. 21.

<sup>9</sup> Committee on the Rights of the Child, *General comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) UN Doc. CRC/C/GC/14 at p. 7.

<sup>10</sup> Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard* (2009) UN Doc. CRC/C/GC/12 at pp. 8-9.

<sup>11</sup> Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard* (2009) UN Doc. CRC/C/GC/2009/12 at pp. 8-9.

<sup>12</sup> Committee on the Rights of the Child, *General Comment No 12: The Child’s Right to be Heard* (2009) UN Doc. CRC/C/GC/12 at pp. 9-10.

<sup>13</sup> Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers’ Deputies) at p. 27 and Committee on the Rights of the Child, *General Comment No 12: The Child’s Right to be Heard* (2009) UN Doc. CRC/C/GC/12 at pp. 9-10.

due weight having regard to the age and maturity of the child. Although the express rights afforded to children under these provisions are limited to specific judicial settings, we are of the view that it is reasonable to interpret this provision more broadly in light of Articles 3 and 12 of the UNCRC, which provide children with the right to have their best interests treated as a primary consideration and the right to express their views and be heard in all judicial and administrative decisions affecting them.<sup>14</sup>

### 3. Court orders

#### Recommendation:

- The safety and well-being of all children experiencing or exposed to domestic violence must be more formally assessed and considered by the court in making orders under this legislation. As recommended by Women's Aid and the National Women's Council of Ireland, immediate interim measures must be taken, where necessary, to protect children and 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.

Section 5 provides the court with the power to make a safety order to prohibit violent and threatening behaviour, if it is of the opinion that there are reasonable grounds for believing that the safety or welfare of a child so requires. Under Sections 6, 7 and 8 respectively, the court can make a barring order, interim barring order or emergency barring order when it is of the opinion that there are reasonable grounds for believing that it is necessary to protect the safety or welfare of a child or that there is an immediate risk of significant harm to a child.

In the experience of organisations working in this area, when barring orders are granted to protect a woman from her abusive partner, in practice there is often no assessment process looking at the safety and well-being of children of the relationship.<sup>15</sup> According to Women's Aid, "in many cases the perpetrator may be barred from the house, but still have unsupervised access to the children and use that access to continue abusing the children directly and/or through having them witnessing continuing abuse of their mother."<sup>16</sup> Findings from the One Family Child Contact Centre Pilot Project demonstrate that parents

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<sup>14</sup> The Irish courts have held that laws passed after the ratification of Ireland's international law commitments fall to be interpreted in light of those commitments. See *Dos Santos v. Minister for Justice* [2013] IEHC 237 and B. Barrington, "Child Care Law" in Children's Rights Alliance and Law Centre for Children and Young People, *Making Rights Real for Children: A Children's Rights Audit of Irish Law* (Dublin: 2015) at p. 189.

<sup>15</sup> Women's Aid, *Domestic Violence Bill 2017 Submission* (2017) available at [https://www.womensaid.ie/download/pdf/submission\\_on\\_the\\_domestic\\_violence\\_bill\\_2017.pdf](https://www.womensaid.ie/download/pdf/submission_on_the_domestic_violence_bill_2017.pdf), pp. 10-11 and National Women's Council of Ireland, *Recommendations for Legislative Amendments: Domestic Violence Bill 2017* (2017) available at [http://www.nwci.ie/images/uploads/NWCI\\_Submission\\_Domestic\\_Violence\\_Bill\\_2017.pdf](http://www.nwci.ie/images/uploads/NWCI_Submission_Domestic_Violence_Bill_2017.pdf), p. 10.

<sup>16</sup> Women's Aid, *Domestic Violence Bill 2017 Submission* (2017) available at [https://www.womensaid.ie/download/pdf/submission\\_on\\_the\\_domestic\\_violence\\_bill\\_2017.pdf](https://www.womensaid.ie/download/pdf/submission_on_the_domestic_violence_bill_2017.pdf), pp. 10-11.



with safety/barring orders may be required to break them in order to facilitate court-ordered contact between their child and the other parent.<sup>17</sup>

It is vital that a child-centred approach is consistently adopted by the court to ensure that the safety and well-being of all children involved in or affected by proceedings under this legislation is fully protected. In this regard, it is worth noting that the Council of Europe's guidelines on child-friendly justice recommend that "domestic law should facilitate where appropriate the possibility of access to court for children who have sufficient understanding of their rights and of the use of remedies to protect these rights, based on adequately given legal advice".<sup>18</sup> Although we appreciate the very serious nature of domestic violence cases, and the need to protect children from harm, we are of the view that these factors need to be balanced with the evolving capacities of children and their right to access justice. Accordingly, we would welcome consideration being given to the matter of providing children with the right to make a direct application for an order under this legislation, in accordance with their age and evolving capacities.

#### **4. Respect for the views of the child**

##### **Recommendations:**

- Section 23 should expressly recognise that it is the right of all children who are capable of forming views to express those views in proceedings involving or affecting them, with their views being given due weight in accordance with their age and maturity.
- The Minister for Justice and Equality should prepare and publish the draft regulations relating to child views experts as a matter of urgency to inform debate on the legislation and allow greater precision in the analysis of its impact.
- The Department of Justice and Equality should work with the Department of Children and Youth Affairs to support the establishment and proper resourcing of an independent statutory body, with a clear remit to manage and deliver an independent representative service in all judicial proceedings affecting children.

The OCO welcomes the commitment under Section 23 of the Domestic Violence Bill 2017 to make the court process more child-centred and to facilitate expression by a child of his or her views in proceedings under the legislation. However, we believe that this Bill could go further in securing children's right to express their views and be heard in such an important context.

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<sup>17</sup> One Family, *Child Contact Centre: Key Learning* available at [https://onefamily.ie/wp-content/uploads/One-Family\\_Child-Contact-Centre\\_Key-Learnings.pdf](https://onefamily.ie/wp-content/uploads/One-Family_Child-Contact-Centre_Key-Learnings.pdf), p. 5.

<sup>18</sup> Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies) at p. 26.

Firstly, Section 23 provides that when certain orders are being sought on a child's behalf, the court "may", having regard to the age and maturity of that child, ascertain the views of the child as part of its decision-making process, or appoint an expert to ascertain and convey the child's views where it considers that appointment to be necessary. This affords the courts significant discretion and could therefore lead to inconsistencies as regards the extent to which the views of children are heard in domestic violence cases, either directly or through independent experts. This provision is also of concern because it appears to be based on an understanding of child views experts as being primarily a service to the courts when they consider it necessary, as opposed to being a service for children to give effect to their rights.

In our view, it is of significant importance that the Bill should expressly recognise that, when court orders covered by this provision are being sought on behalf of a child or affect a child, the child must have the opportunity to express his/her views and be heard by the decision-maker, either directly or indirectly, as a matter of right. This would bring the legislative framework more clearly into line with domestic and international law, and ensure that all children have the same rights irrespective of the judicial proceedings they are involved in or affected by.

Section 23(6) of the Bill states that regulations made by the Minister, in consultation with the Minister for Children and Youth Affairs under Section 32 of the Guardianship of Infants Act 1964, will apply to an expert appointed under this provision. To date, no specific timeframe for the publication of these regulations has been provided. We are concerned that it is difficult to assess how this provision will operate in practice without clarity about:

- the qualifications and eligibility required to become a child views expert,
- the training of child views experts,
- the monitoring and establishment of a register of child views experts, and
- the fee structure applicable to child views experts and the payment of fees.

More generally, we are concerned that Government Departments appear to be adopting a piecemeal and incoherent approach to incorporating Article 12 of the UNCRC at a legislative level. More specifically, the Department of Children and Youth Affairs and the Department of Justice and Equality have adopted different approaches to implementing children's right to express views and be heard in judicial proceedings, with provision being made for the appointment of guardians *ad litem* in child care proceedings and child views experts in private family law and domestic violence proceedings. The precise differences between these professional groups need to be clarified in order to avoid confusion as to whether a guardian *ad litem* or a child views expert should be appointed, particularly when the court hears proceedings under this legislation in tandem with or around the time of proceedings on public law matters (Section 14).

In our view, there is a need to establish a coherent, credible and effective mechanism to promote the rights of all children under Article 12 of the UNCRC in judicial proceedings. In this regard, in our recent submission on the General Scheme of the Child Care (Amendment) Bill 2017, we called for the establishment of an independent statutory body that could operate under multiple legislative frameworks – including the Children and Family Relationships Act 2015, the Child Care (Amendment) Bill 2017 and the Domestic Violence Bill 2017, once enacted – to provide children with access to independent representatives in all judicial proceedings affecting them. We strongly encourage the the Department of Justice and Equality to work closely with the Department of Children and Youth Affairs to secure the establishment of such a body.

## **5. Special protection measures**

### **Recommendations:**

- The Department of Justice and Equality should take all necessary steps to ensure that special protection measures for child victims and witnesses are widely available and used.
- Consideration should be given to making provision under Section 22 of the Bill for all child victims and witnesses to have a right to be accompanied, as appropriate, in court by a support person of their choice. Information on, and contact details for, available support services should also be provided to the child victims under Section 24, in a manner which is adapted to their age and maturity and in a language which is understandable, as well as gender and culture sensitive.
- The best interests of the child/children involved in or affected by proceedings under Section 33 should be the primary consideration in the court’s determination of whether to restrict coverage of the case.

The OCO welcomes the new provisions under Part 2 of the Bill, which introduce special protection measures aimed at making the court process less difficult for all victims of domestic violence and providing them with support. However, we believe that some amendments are necessary to ensure the full protection of children’s rights.

Section 21 of the Bill allows for evidence to be given through live television link by children, unless the court sees good reason to the contrary. It also provides that where live television link facilities are not available in a particular court, the court may order the transfer of the proceedings to a court district where these facilities are available.

To date, special protection measures for victims and witnesses, such as live television links and intermediaries, are rarely used in Ireland. Furthermore, it has been documented that the introduction of the necessary technology in all courts has been restricted by financial

constraints, meaning that the availability of these support measures varies widely from district to district.<sup>19</sup>

Therefore, while this provision is to be welcomed, it is vital that live television link facilities, as well as trained intermediaries, are widely available and used in practice to provide child victims and witnesses with access to special protection measures in all districts and to avoid delays being caused by the transfer of proceedings.

Under Section 22 of the Bill, a victim of domestic violence may, in addition to being accompanied by his or her legal representative, be accompanied in court by an individual (including a support worker) of his or her choice unless an order is made by the court to the contrary. Section 24 provides that the Courts Service shall provide each applicant for an order under the legislation with information on, and contact details for, support services for victims of domestic violence.

Children consistently report finding court settings intimidating and frightening, often because they associate them with criminality and usually describe them as inappropriate for children.<sup>20</sup> Therefore, it is of significant importance that these support measures are available to all child victims and witnesses involved in proceedings under the legislation.

Section 33 provides that where proceedings are brought following a breach of an order under the legislation, it is an offence to publish or broadcast information and images which would lead to the identification of the applicant, the person charged or a dependant of either of them. However, the court, having considered the impact on a dependant or other relevant person, can consent to their identification. The court can also direct the publication of information that would lead to the identification of the parties to the proceedings when the interests of justice so require.

We suggest that there should be an express requirement that the best interests of the child/children involved in or affected by the proceedings must be the primary consideration in the decisions made by the court under this provision.

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<sup>19</sup> S. Phelan, "Access to justice and decision-making" in Children's Rights Alliance and Law Centre for Children and Young People, *Making Rights Real for Children: A Children's Rights Audit of Irish Law* (Dublin: 2015) at p. 37. See also, The Journal, *At the moment, court is a very frightening place for a child" - young victims in Ireland's legal system* (24 May 2016) at <http://www.thejournal.ie/child-court-protection-2784424-May2016/> and J. Kline & E. Flynn, *Access to Justice for Children with Cognitive Disabilities: Ireland Country Report* (Galway: Centre for Disability Law and Policy, 2015) at p. 50.

<sup>20</sup> Fundamental Rights Agency, *Child-friendly justice, Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States* (Luxembourg: Publications Office of the European Union, 2017) at p. 33.