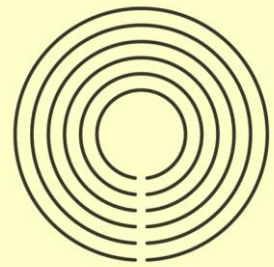


Law Reform Ireland

Issues Paper on Domestic Violence



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The Law Reform Commission is launching this series of Issues Papers which aims to provide readers with summaries or outlines of projects on which the Commission is embarking or on which work is already underway, and to give readers an opportunity to express views on specific questions. The Issues Papers will be circulated to members of the legal professions and to others who are likely to have a particular interest in, or specialist knowledge of, the relevant topic. They will also be published on the Commission's website (www.lawreform.ie) so as to be available to all members of the public. The Commission's primary objective in taking this initiative is to obtain views, suggestions and comments about reform projects that are still at the early stages of development.

Opinions expressed in these Issues Papers merely represent current thinking within the Commission on the various items mentioned. They should not be taken as representing positions that have been taken by the Commission. Where the Commission has taken a position on a particular item, this will be apparent from the text.

Comments and suggestions are warmly welcomed from all interested parties and all responses will be treated in the strictest confidence. These should be sent to the Law Reform Commission:

*via email to dvconsultation@lawreform.ie with the subject line **Domestic Violence***

or

via post to IPC House, 35-39 Shelbourne Road, Dublin 4, marked for the attention of Colm Kitson BCL LLM B.L.

We would like to receive replies no later than close of business 25th July 2013 if possible.

BACKGROUND

This paper forms part of the Commission's *Third Programme of Law Reform*, which includes a project to review the law on domestic violence.¹ Since the Third Programme was formulated the Department of Justice and Equality began a general review of the law on domestic violence. In discussions with the Department in 2012, the Commission agreed that it could complement and assist the Department's general review by examining two areas on which the question of reform had been raised.²

The first issue which the Commission has agreed to examine is whether it should be possible to refuse bail for preventative reasons where a person has been charged with the offence of breach of a domestic violence order under section 17 of the *Domestic Violence Act 1996*. It has been suggested to the Commission that because bail cannot be refused for preventative reasons under the *Bail Act 1997*, victims of domestic violence may be put at

¹ *Report on Third Programme of Law Reform 2008-2014* (LRC 86-2007), Project 24.

² Similarly, the Commission's *Report on Charitable Trusts* (LRC 80-2006) contributed to the Government's general review of charity law, which culminated in the *Charities Act 2009*.

risk of future domestic violence committed whilst the defendant is on bail. A solution to this perceived problem that has been suggested would be to convert breach of a domestic violence order into a “serious offence” for the purposes of the Constitution and the *Bail Act 1997* by providing that it would be punishable by up to 5 years imprisonment and listed in the Schedule to the 1997 Act. An alternative view is that making the breach of a domestic violence order a serious offence fails to take account of the general objective of the *Domestic Violence Act 1996*, which is to ensure that victims of domestic violence have effective access to preventive civil orders and that this could be put at risk if breach of a domestic violence order, a preventative civil order, were to be made a “serious offence” punishable by up to 5 years imprisonment.

The Commission is seeking the views of interested parties in relation to the following issues raised by this question. These views will be considered by the Commission in producing its Discussion Paper.

INTRODUCTION

Prior to 1997 the circumstances in which it was constitutionally permissible to refuse bail were governed by the decision of the Supreme Court in *People (Attorney General) v O’Callaghan*.³ The Supreme Court accepted that bail could be refused in circumstances where it was likely that the accused would attempt to evade justice, for example by absconding, interfering with witnesses or jurors or destroying evidence. The Supreme Court emphasised that bail could not be refused because of the likelihood that the accused would commit offences whilst on bail.

In 1996 a Constitutional Referendum was passed which inserted what is now Article 40.4.6° into the Constitution and which provides:

“Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.”

This amendment thus reversed that element of the decision in the *O’Callaghan* case which had held that bail could not be refused for the preventative detention reason that the accused might commit offences on bail. The *Bail Act 1997* was enacted in the wake of this constitutional amendment. Section 2 of the 1997 Act provides:

“2.—(1) Where an application for bail is made by a person charged with a serious offence, a court may refuse the application if the court is satisfied that such refusal is reasonably considered necessary to prevent the commission of a serious offence by that person.

(2) In exercising its jurisdiction under *subsection (1)*, a court shall take into account and may, where necessary, receive evidence or submissions concerning—

- (a) the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction,
- (b) the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction,
- (c) the nature and strength of the evidence in support of the charge,
- (d) any conviction of the accused person for an offence committed while he or she was on bail,
- (e) any previous convictions of the accused person including any conviction the subject of an appeal (which has neither been determined nor withdrawn) to a court,
- (f) any other offence in respect of which the accused person is charged and is awaiting trial,

³ *People (Attorney General) v O’Callaghan* [1966] IR 501.

and, where it has taken account of one or more of the foregoing, it may also take into account the fact that the accused person is addicted to a controlled drug within the meaning of the Misuse of Drugs Act, 1977.

(3) In determining whether the refusal of an application for bail is reasonably considered necessary to prevent the commission of a serious offence by a person, it shall not be necessary for a court to be satisfied that the commission of a specific offence by that person is apprehended.”

Thus, as provided for in Article 40.4.6°, two conditions must be fulfilled before bail can be refused for preventative reasons under the *Bail Act 1997*. Firstly the accused must be charged with a “serious offence”. Secondly the refusal of bail must be “reasonably considered necessary” to prevent the commission of another “serious offence”. This means that the refusal of bail must be necessary to prevent the commission of another “serious offence”, and a decision on the existence of such a necessity must be reasonably made.

The term “serious offence” is defined by section 1 of the *Bail Act 1997* as “an offence specified in the Schedule [of the 1997 Act] for which a person of full capacity and not previously convicted may be punished by a term of imprisonment for a term of 5 years or by a more severe penalty”. The Constitution itself does not define the term “serious offence” but it is notable that the threshold of 5 years imprisonment specified in the *Bail Act 1997* is a well established indicator of the gravity of offences; it is the level at which investigative detention and arrest without warrant are permissible.⁴

Breach of a domestic violence order is an offence under section 17 of the *Domestic Violence Act 1996* which provides:

“17.—(1) A respondent who—

- (a) contravenes a safety order, a barring order, an interim barring order or a protection order, or
- (b) while a barring order or interim barring order is in force refuses to permit the applicant or any dependent person to enter in and remain in the place to which the order relates or does any act for the purpose of preventing the applicant or such dependent person from so doing,

shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding £1,500 or, at the discretion of the court, to imprisonment for a term not exceeding 12 months, or to both.

(2) *Subsection (1)* is without prejudice to the law as to contempt of court or any other liability, whether civil or criminal, that may be incurred by the respondent concerned.”

Thus this offence is not a “serious offence” for the purposes of Article 40.4.6° of the Constitution or the *Bail Act 1997*. It has been suggested to the Commission that it is problematic that a person charged with breaching a domestic violence order cannot be denied bail on the basis that they might commit further offences. It has been further suggested that making breach of a domestic violence order a “serious offence” would remedy this problem and improve the protection that is given to victims of domestic violence.

Were breach of a domestic violence order made into a “serious offence” by providing that it could be punished by 5 years imprisonment, or a greater penalty, it would also have to be triable on indictment because Article 38.2 of the Constitution provides that only minor offences can be tried summarily and an offence that carries a punishment of up to 5 years imprisonment is not a “minor offence”.

It would be unsatisfactory if breach of a domestic violence order could only be tried on indictment because many breaches of domestic violence orders are trivial and are therefore likely to be only “minor offences” which should

⁴ Section 4 of the *Criminal Justice Act 1984* and section 2 of the *Criminal Law Act 1997*.

be tried summarily.⁵ To address this, the 1996 Act could be amended to provide that breach of a domestic violence order would be a hybrid offence triable either on indictment or summarily. Where breach of a domestic violence order was tried on indictment, it could be provided that on conviction the defendant could be liable to be sentenced to 5 years imprisonment, and where it was being tried summarily it could be provided that on conviction the defendant could be liable to be sentenced to a maximum of 12 months imprisonment. This reform would mean that breach of a domestic violence order could become a “serious offence” for the purposes of the Constitution and the *Bail Act 1997*, but could also be triable summarily when the breach is of a less serious or trivial nature.

Issue 1: the balance between effective protection and the rights of respondents

1.01 The aim of the *Domestic Violence Act 1996* is to provide the victims of domestic violence with an effective remedy against future acts of domestic violence through civil orders. It is important that an appropriate balance be struck between protecting persons from domestic violence and ensuring that the rights of respondents are properly observed.

1.02 For domestic violence orders to be an effective remedy the victims of domestic violence must be able to obtain an order when appropriate. In 2011, out of 2,763 barring orders initially filed 1,043 (37.7%) were granted by the District Court and out of 3,755 safety orders initially filed 1,513 (40.3%) were granted. At first sight this low percentage of orders granted might suggest that the application process is unduly onerous for applicants but it appears that in the majority of cases the initial filing is withdrawn or struck out before the case comes to a hearing.⁶ The provisions in the *Domestic Violence Act 1996* which indicate that it is broadly effective in protecting applicants include the following. Firstly applicants do not need to show that they have been the victim of physical violence or that an order is required to prevent future physical violence; emotional abuse is sufficient as long it threatens the applicant’s psychological welfare.⁷ Secondly applicants can also obtain interim protection in the form of interim barring orders and protection orders which can be granted on an ex parte basis. This means that applicants can obtain protection from domestic violence in the period between the initial application for a domestic violence order and the final decision. Thirdly the overwhelming majority of breaches of domestic violence orders lead to criminal prosecutions. In 2011 out of 1,082 recorded breaches, 936 (86.5%) led to criminal prosecutions.

1.03 The rights of the respondent are also taken into account in the 1996 Act. First, the respondent’s conduct must reach a minimum level of severity before an order is granted, thus an order cannot be granted merely because of the irretrievable breakdown of the relationship.⁸ Second, the period for which ex parte orders

⁵ The Commission notes that making breach of a domestic violence a “serious offence” might raise a constitutional question, which is not under consideration here, as to the meaning of the term “serious offence” in Article 40.4.6° and when a particular offence complies with this criterion.

⁶ Shannon *Family Law Practitioner* (Round Hall) comments, para F - 023, that in 2000 49.2% of orders were withdrawn or struck out while only 4.1 of applicants were refused relief by the court.

⁷ Nonetheless it has also been observed that the lack of guidance as to when an order should be granted has led to discrepancies in how the 1996 Act is applied in practice (see Law Society of Ireland, Law Reform Committee *Domestic Violence: The Case for Reform* (May 1999)). This has meant that some victims of domestic violence have found it difficult to obtain protection from emotional, as opposed to physical, violence (see Women’s Aid *Recommendations for the review of the Domestic Violence legislation* (November 2012)).

⁸ *O’B v O’B* [1984] IR 182.

are valid is limited,⁹ although there are outstanding concerns about the length of time that interim orders remain in force when they are not granted on an ex parte basis.¹⁰

1.04 If breach of a domestic violence order were made a “serious offence” it is possible that this balance that is currently struck by the *Domestic Violence Act 1996* would be put at risk. The procedure for obtaining an order would probably have to become more onerous, inhibiting the ability of applicants to obtain the protection that is currently afforded. In *O’B v O’B* the Supreme Court imposed additional requirements on the application for a domestic violence order (under the pre-1996 Act legislation in this area), such as the requirement that the conduct attain a minimum level of severity.¹¹ The Court placed particular emphasis on the criminal law consequences for a respondent of breaching an order O’Higgins CJ noting that, as the respondent could be imprisoned for 6 months if he or she contravenes its terms “[t]hese consequences indicate that the making of such an order requires serious misconduct on the part of the offending spouse.”¹²

1.05 It has been observed that the decision in *O’B v O’B* was interpreted by other courts in a manner that struck the wrong balance between protecting victims and ensuring the due process rights of respondents.¹³ For example Shannon comments that some judges interpreted the *O’B v O’B* decision as requiring a pattern of violence even though he notes that “mental cruelty perpetrated by one spouse against the other” clearly invokes the jurisdiction of the court.¹⁴ The 1996 Act to some extent limited the effect of the *O’B v O’B* decision by clarifying that a domestic violence order can be granted even where there is not a physical risk to the applicant. If the criminal punishment for breach of an order were increased to 5 years imprisonment it is likely that this threshold would have to be reconsidered in light of the analysis in *O’B v O’B*. If the threshold for granting protection was raised because of this, the 1996 Act might be less effective at providing protection for applicants.

1.06 The validity of interim orders issued under the 1996 Act might also be open to question if breach of a domestic violence order were a criminal offence punishable by up to 5 years imprisonment. Interim and ex parte orders are a substantial interference with the respondent’s rights because interim orders are granted without a full review of the evidence and ex parte orders are granted without hearing evidence from the respondent. To ensure that the respondent’s rights are not disproportionately abridged, the Supreme Court held in *DK v Crowley* that the period that ex parte interim barring orders can remain in force must be limited and this is now set at 8 days.¹⁵ While the Courts have allowed for a greater abridgment of the respondent’s rights in relation to protection orders, so that 15 days has been held to be an acceptable period for which an ex parte protection order may remain in force,¹⁶ this took account of the current limited criminal law consequences for breaching an order.¹⁷ It might not be the case that the interim and ex parte procedure would continue to be regarded as a proportionate abridgment of the respondent’s rights if breach of an order carried a possible sentence of 5 years imprisonment.

⁹ *DK v Crowley* [2002] 2 IR 744. This decision led to the enactment of the *Domestic Violence (Amendment) Act 2002* which limits the period that ex parte interim barring orders can remain in force to 8 days.

¹⁰ Law Society of Ireland, Law Reform Committee *Domestic Violence: The Case for Reform* (May 1999); Horgan & Martin *Domestic Violence and Abuse in 2008 – What Has Been Done to Tackle the Problem?* (2008) 11(3) IJFL 66.

¹¹ *O’B v O’B* [1984] IR 182.

¹² *O’B v O’B* [1984] IR 182 at 189.

¹³ See Ward “*Barring Orders: A Need For Change*” (1988) 6 ILT 90.

¹⁴ Shannon *Family Law Practitioner* (Round Hall) at para F - 010.

¹⁵ *DK v Crowley* [2002] 2 IR 744. This decision led to the enactment of the *Domestic Violence (Amendment) Act 2002* which limits the period that ex parte interim barring orders can remain in force to 8 days.

¹⁶ *L(MJ) v Ireland* [2008] IEHC 241 at para 13.

¹⁷ *Goold v Collins* [2004] IESC 38 and *L(MJ) v Ireland* [2008] IEHC 241.

1.07 It is also important to bear in mind the adverse consequences for the respondent that may result from domestic violence orders. Where a domestic violence order is granted and the respondent breaches its terms, he or she is liable to being prosecuted for and found guilty of a criminal offence. It has been suggested to the Commission that domestic violence orders are especially capable of being abused because of the close personal circumstances through which they arise and the fact that there are often no witnesses to the conduct which the respondent is alleged to have committed. The risk to the respondent is greater in the case of ex parte orders which are granted solely on the applicant's evidence. The danger of disproportionate adverse consequences for the respondent would clearly be even greater if breach of a domestic violence order could be punished by a maximum of 5 years imprisonment. Moreover, because of the pro-arrest policy of the Garda Síochána, if the holder of a domestic violence order complains to the Gardaí about a breach the respondent will generally be arrested. The pro-arrest policy is viewed as an important protection for the victims of domestic violence, but if breach of a domestic violence order were punishable by 5 years imprisonment it would allow the Gardaí to detain a person for investigative reasons under the *Criminal Justice Act 1984*, rather than simply to secure their attendance in Court. This could also result in disproportionate adverse consequences for a respondent who is accused of breaching an order. It has been observed that domestic violence orders, particularly interim barring orders, create a risk of injustice especially where an order amounts to an effective custody order.¹⁸

1.08 Therefore it is possible that there would be significant disadvantages to both the applicant and the respondent if breach of a domestic violence order were made into a "serious offence".

Q.1: Do you agree that making breach of a domestic violence as a "serious offence" could:

A. Undermine the current civil law protections offered by the Domestic Violence Act 1996 by leading to a more onerous application process?

B. Strike an inappropriate balance between the need to provide protection from future acts of domestic violence and upholding the rights of the respondent?

Issue 2: whether making breach of a domestic violence order a serious offence is necessary

2.01 It is probable that where a breach of a domestic violence order would merit a sentence of 5 years imprisonment the conduct that amounts to the breach would also amount to a "serious" offence that could be prosecuted separately, for example assault causing harm under section 3 of the *Non-Fatal Offences Against the Person Act 1997* (which carries a maximum sentence on conviction on indictment of 5 years imprisonment) or harassment under section 10 of the *Non-Fatal Offences Against the Person Act 1997* (which carries a maximum sentence on conviction on indictment of 7 years imprisonment), both of which are scheduled offences under the *Bail Act 1997*. Conversely where there was not an underlying "serious offence" it would appear disproportionate to provide that breach of a domestic violence order could be tried on indictment and punished by up to 5 years imprisonment. Thus assault under section 2 of the *Non-Fatal Offences Against the Person Act 1997*, which cannot give rise to a prosecution on indictment and can only be tried summarily, carries a maximum sentence of 6 months imprisonment. It would be inconsistent if a breach of a domestic violence order by conduct that would otherwise amount only to an assault could be tried on indictment and punished by up to 5 years imprisonment.

2.02 It would therefore appear that where breach of a domestic violence order is sufficiently serious to warrant being tried on indictment and punished by up to 5 years imprisonment the breach will disclose an underlying "serious offence". Where this is the case bail might be refused for preventative reasons in appropriate cases under the *Bail Act 1997* for the underlying offence.

¹⁸ Horgan & Martin *Domestic Violence and Abuse in 2008 – What Has Been Done to Tackle the Problem?* (2008) 11(3) IJFL 66.

2.03 Therefore it is arguable that if breach of a domestic violence order be made into a “serious offence” this would result in undesirable duplication of offences and be an unnecessary reform.

Q.2: Do you agree that allowing breach of a domestic violence order to be tried on indictment and punished by 5 years imprisonment or a more severe penalty would be an unnecessary reform because such a breach would constitute an existing “serious offence” and such reform would result in undesirable duplication of offences?

Issue 3: the effect in bail applications of making breach of a domestic violence order a “serious offence”

3.01 It has been suggested to the Commission that, because breach of a domestic violence order is not a “serious offence” that allows for the form of preventative detention permissible under the *Bail Act 1997*, victims of domestic violence may be put at risk of future domestic violence while a person accused of breaching such an order is awaiting trial on bail. It has been suggested that making breach of a domestic violence order a “serious offence” would remedy this problem.

3.02 The *Bail Act 1997* lists six factors that a Court must take into account when deciding if bail should be refused for the preventative reasons permitted by Article 40.4.6° of the Constitution. The first factor is “the nature and degree of seriousness of the offence with which the accused person is charged and the sentence likely to be imposed on conviction”. The second is “the nature and degree of seriousness of the offence apprehended and the sentence likely to be imposed on conviction.” It has been noted that this means that a court may properly grant a person bail even though refusal of bail may be “reasonably considered necessary” to prevent the defendant committing further serious offences if the facts disclose that a custodial sentence is unlikely to be imposed for the serious offence with which the defendant has been charged or in respect of another serious offence that it is thought the defendant might commit.¹⁹

3.03 It has been suggested to the Commission that where a person is charged with breach of a domestic violence order he or she might be refused bail where there is a likelihood that the person will evade justice by intimidating witnesses if released. Where there has been a breach of a domestic violence order the holder of the order will generally be a witness. Thus if there is a risk of continued domestic violence bail might be denied in appropriate circumstances on the ground that it is likely that the accused would intimidate the witness. Indeed if the accused has a history of serious violence against the holder of the domestic violence order this might be an important consideration when deciding if there is a likelihood of intimidating witnesses.

3.04 It might therefore be the case that making breach of a domestic violence order a “serious offence” would not necessarily affect the outcome of bail proceedings. Even if breach of a domestic violence order were to be made a “serious offence”, bail should only be refused for the preventative reasons permitted by the *Bail Act 1997* where the nature and degree of the breach are serious and a custodial sentence is likely if the defendant is convicted. This is only likely to be the case where breach of the domestic violence order is accompanied by an underlying “serious offence”, for example, assault causing harm which is already one of the offences contained in the Schedule to the 1997 Act. Similarly, bail could only be refused for preventative reasons if the apprehended offence was another “serious offence” and was also sufficiently serious to make a custodial sentence likely if the offence was carried out and the accused convicted.

Q.3: Do you agree that making breach of a domestic violence order a “serious offence” would not necessarily result in accused persons being refused bail in circumstances where they could not currently be refused bail?

¹⁹ Walsh *Criminal Procedure* (Thomson Roundhall 2002) at 527.