

Domestic Violence (Amendment) Bill, 2002 [*Seanad*]: Second Stage.

Minister of State at the Department of Justice, Equality and Law Reform (Mr. O'Dea): I move: "That the Bill be now read a Second Time."

The purpose of this Bill is to remedy a defect in the Domestic Violence Act, 1996, which resulted in the Supreme Court on 9 October declaring section 4(3) of the Act unconstitutional. In doing this, the Bill restores to our courts the power to make interim barring orders *ex parte*.

Section 4(1) of the Domestic Violence Act, 1996, provides that the Circuit or District Court may, on the making of an application for a barring order, or between the making of such application and its determination, make an interim barring order if it is of the opinion that there are reasonable grounds for believing that there is an immediate risk of significant harm to the applicant or any dependent person if the order is not made immediately, and the granting of a protection order would not be sufficient to protect the applicant or any dependent person.

Section 4(3) of the Act provides that where the court, in exceptional circumstances, considers it necessary or expedient in the interests of justice, an interim barring order may be made *ex parte* or notwithstanding the fact that the originating document or other notice of the application required to be duly served on the respondent to the application has not been so served. The words "*ex parte*" signify that the order has been made in the absence of, and without notice to, the other party. Section 4(4) provides that an interim barring order shall cease to have effect on the determination by the court of the application for the barring order.

On 9 October last, the Supreme Court, in a case which arose out of the granting of an *ex parte* interim barring order which was in effect for almost three months, held that the provisions of section 4 as they relate to *ex parte* interim barring orders, in failing to prescribe a fixed period of relatively short duration during which such an order would continue in force, deprived the respondents to such applications of the protection of the principle of *audi alteram partem* - that the other side should be heard - in a manner and to an extent which is disproportionate, unreasonable and unnecessary. The court declared section 4(3) unconstitutional and said that it had not been demonstrated that the remedy of an interim order granted on an *ex parte* basis would be in some sense seriously weakened if the interim order thus obtained were to be of limited duration only, thus requiring the applicant, at the earliest practicable opportunity, to satisfy the court in the presence of the opposing party that the order was properly granted and should now be continued in force.

It is important to note that the Supreme Court said that it was beyond dispute that the Legislature was entitled to abridge the rights of individual citizens, such as a person's right to be heard in proceedings taken against them, to deal with the social evil of domestic violence. However, the manner in which the abridgement of the right is effected has to be proportionate. As is clearly indicated by the Supreme Court, when such an order is made, there must be an early return date on which the applicant must show in proceedings, of which the respondent has notice, that the continuation of the interim order is justified in accordance with the statutory criteria.

The Supreme Court's decision did not surprise me. When the Domestic Violence Bill was being debated in the House in July 1995, I expressed concerns about how it dealt with *ex parte* interim barring orders. I said at the time that we must look carefully at the restrictions on the general application of the power being given to the courts as it is a serious matter for someone to be removed from his or her family home without having the right to speak in his or her defence. This is exactly the point emphasised by the Supreme Court in its recent judgment.

On the provisions of the Bill, section 1 is the substantive provision which substitutes a new subsection (3) for the existing section 4(3). Paragraph (a) of the proposed subsection has three features worthy of comment. These are: first, the provision that an interim order may be made *ex parte*; second, the replacement of the phrase "in exceptional cases" in section 4(3) with a reference to "the circumstances of the particular case"; and, third, the stipulation that an interim order may be made *ex parte* "where the court considers this necessary or expedient in the interests of justice".

Section 4(3), in its present form and prior to the Supreme Court decision, permitted the making of an interim barring order *ex parte* or notwithstanding the fact that the originating document or other notice of the application required to be served on the respondent to the barring order application had not been so served. This was a reference not to notice of the application for the interim order but to notice of the application for the full barring order. I have been informed that, in the vast majority of cases, interim barring orders were issued where notice of the barring order application had yet to be served on the respondent. Even where this notice had been served, it would be rare for the respondent to be aware that, in addition to a full barring order, an interim barring order was also being sought against him or her.

The approach taken in the Bill is to dispense with reference to notice of the barring order application and provide simply that where, having regard to the circumstances of the particular case, the court considers it necessary or expedient in the interests of justice, an interim barring order can be granted *ex parte*; that is, in the absence of and without notice to the respondent. Where the court decides it is neither necessary nor expedient in the interests of justice to make the order *ex parte*, it can require notice to be served on the respondent of the application for the interim order. Paragraph (b) of section 1 makes a largely similar amendment to section 5(4) of the Act dealing with protection orders. I will refer to that matter later.

The second point about the proposed new subsection (3)(a) relates to the phrase, "having regard to the circumstances of the particular case." The Supreme Court noted that section 4(3), as it stands, provides for the making of interim barring orders *ex parte* in "exceptional cases", but contains no indication of the criteria by which the court is to decide whether a case is exceptional. The merit of the new wording is that it invites the court to assess the circumstances of the case before it. In that respect, it focuses on the individual case before the judge and does not require any determination that the case is exceptional, which would imply comparison with other cases.

As regards the phrase "necessary or expedient to do so in the interests of justice", Deputies will note that this criterion is already in section 4(3). It also resembles section 17(3) of the Child Care Act, 1991, which was referred to with approval by the Supreme Court in the case to which I referred and which permits an interim care order in respect of a child to be made without notice to a parent where, having regard to the interests of justice or the welfare of the child, the judge so directs.

On the proposed paragraphs (b) and (c) of the new subsection (3), applications for interim barring orders, prior to the finding of unconstitutionality, were generally made on sworn information. However, they were often supported by oral evidence given by the applicant to the judge. I understand that while the sworn information was frequently made available to the respondent, practice differed from one judge to another and sometimes the information was not made available. The oral evidence, however, was not recorded in a note or otherwise nor was it communicated to the respondent.

This issue has been highlighted in a report of the Law Society law reform committee entitled, *Domestic Violence: The Case For Reform*, published in May 1999. This report proposed that court rules be amended to require that *ex parte* applications for a protection order or an interim barring order be made on affidavit and that the respondent automatically be provided with a note of all the evidence given at the hearing.

The effect of paragraphs (b) and (c) is that the application for an interim barring order must be made either on an affidavit or on sworn information and, where an interim order is made *ex parte*, a note of any evidence given must be made and served, together with the order and affidavit or sworn information, on the respondent as soon as practicable. In this way, the respondent will have full information on what has been alleged against him or her and the basis of which he or she has been barred from the family home.

Paragraph (c) provides that the note of the oral evidence shall be prepared by the judge, the applicant or the applicant's solicitor and approved by the judge or as otherwise directed by the judge. In the case of applicants for an *ex parte* interim barring order in the District Court, which represents the majority of cases, it would be unusual for such persons to be

accompanied by a solicitor and they may not be fully in a position to make an adequate note of their evidence.

To ensure such cases are catered for, the judge may make the note or he or she may direct that it be done in some other way, for example, by obtaining the services of a stenographer.

Paragraph (d) of the proposed new subsection (3) addresses the main point in the Supreme Court's judgment. The court held that the provisions of section 4, as they relate to *ex parte* interim barring orders, in failing to prescribe a fixed period of relatively short duration during which such an order would continue in force, deprived the respondents to such applications of the protection of the principle of *audi alteram partem* in a manner and to an extent which is disproportionate, unreasonable and unnecessary. Paragraph (d) provides that the *ex parte* order shall have effect for not more than eight working days unless, on application by the applicant for the barring order and on notice to the respondent, the order is confirmed within that period by order of the court.

The report of the Courts Service for 2001 indicates that, while the average length of time from the date of issue of the summons to the date of hearing of barring and safety order applications was 12 weeks, barring order applications where an interim barring order had been made were dealt with within two to three weeks. So the District Court had been giving priority already to cases in which an interim order had been made and judges were generally conscious of the need to set early return dates where they had made such orders.

Proposed paragraph (e) provides that the *ex parte* interim barring order shall contain a statement of the effect of paragraph (d), i.e. the duration of the order and the possibility of its being confirmed as provided for in the paragraph. A working day, for the purpose of paragraph (d), is defined in paragraph (f) as a day other than a Saturday, Sunday, or a public holiday within the meaning of the Organisation of Working Time Act, 1997.

If the interim order is confirmed, it will continue in effect until the application for the barring order itself is determined, as provided for in section 5(4) of the 1996 Act.

Paragraph (b) of section 1 of the Bill provides that a new subsection (4) is to be substituted for section 5(4) of the 1996 Act. This provides that a protection order may be made *ex parte*. Section 5(4), as it stands, provides that a protection order may be made "notwithstanding the fact that the originating document or other notice of the application required to be duly served on the respondent to the application for a safety order or a barring order has not been so served". As I have already explained in relation to section 4(3), this is a reference to the notice of the application for the final order - in this case a barring order or a safety order - not to any application for the interim relief. The proposed amendment to section 5(4) changes this by simply providing that a protection order may be made *ex parte*, that is in the absence of and without notice to the respondent.

Section 2 contains a standard provision for the Short Title and collective citation.

This Bill represents the first significant amendment to the Domestic Violence Act, 1996, an Act which itself radically amended our previous law on the subject. That Act came into operation in March 1996 and it provided expanded remedies to victims of domestic violence. Based on the experience of its operation, there have been a number of recommendations for change to what are perceived to be deficiencies in the Act. In particular, there have been reports from Women's Aid and the Law Society's law reform committee - I have already referred to the latter report. There is also a commentary on the Law Society's report by AMEN, an organisation that speaks in defence of men who have been respondents in domestic violence cases.

I will now outline some of the proposals, which have come from various sources. Eligibility criteria for orders under the Domestic Violence Act, 1996 should be extended to include a person with a child in common. The residence requirement for eligibility for a barring order in the case of unmarried cohabitants should be reduced from its present level which is six months out of the previous nine. The residence requirement should be removed for cohabitants seeking a safety order and for cohabitants with sole ownership or tenancy rights in

the home seeking a barring order. Provisions should be introduced permitting parents or elderly relations to apply for protective orders against abusive relations or persons other than an adult child. Such provisions should include safety or barring orders against such relations or persons residing in the home and safety orders against those residing elsewhere.

There should be a category of associated persons who would be entitled to apply for a safety order and a non-exhaustive list of such persons should be provided. Also, associated persons with sole ownership or tenancy rights in the home should be entitled to apply for a barring order. There should be either detailed statutory guidance or a list of criteria to be considered by the courts in determining whether to grant protection orders.

The Minister, Deputy McDowell, intends to have these various recommendations further examined in consultation with interested parties and, to the extent that reform seems warranted, his intention would be to introduce the necessary amendments as part of a family law reform Bill which he would aim to bring forward in about a year's time.

This Bill represents a proportionate response to the situation where an interim barring order has to be obtained urgently to save a vulnerable person who is faced with an immediate risk of significant harm to himself or herself, or a dependent. I commend the Bill to the House.

Mr. Deasy: I will be brief. This Bill should be passed today so that it can be enacted before Christmas for obvious reasons. The Bill restores the power to the courts to make *ex parte* interim barring orders. The legislation allows for an interim barring order that is granted *ex parte* to lapse not more than eight days from the day it is made unless it is continued by a court, which has given the respondent an opportunity to be heard. Where such an order is made, a note of evidence must be given to the person barred.

With others, my colleague, Senator Terry, made the point that there were many groups in the country involved in this debate in the past two or three weeks. Many of them felt there should have been a wider debate on domestic violence and the issues that surround barring orders. It is a sad indictment of the way society is going that it is necessary to pass this Bill before Christmas. There should be a wider debate and we should invite AMEN and Women's Aid to participate. We have talked about this for a long time, but the topic has not been debated adequately with women's and men's groups.

One statistic stands out for me. Four out of every ten Irish women, who have had a sexual relationship, have experienced domestic violence. That is pretty startling and gives an indication of how widespread this issue is. Like the Minister, I am not surprised at the decision of the Supreme Court. I do not think many people were surprised. However, it has put the victims of domestic violence at renewed risk. At the moment, the courts can only provide a safety order or a protection order, which is not enough. At present a man or woman can wait for months before a violent partner can be barred, which necessitates this legislation.

At one point it was said of domestic violence that it was a monologue, meaning that it was focused on violence against women. Now it has become a dialogue and is a debate that centres on not just women, but also men. John Waters should be given credit for that. Almost single-handedly he has raised the debate nationally over violence that is perpetrated against men in this country. I am sure not many people know that one third of sexual assaults in this country are perpetrated against men.

There are some issues not covered in this legislation that need to be addressed quickly. One of those is the lack of help for victims of violent partners. A study in the UK discovered that only one in 20 victims actually report the crime committed against them. I imagine it is similar in this country. In many cases people do not understand or believe they cannot afford to deal with the legal system. They feel intimidated by the system and that has to change. In many cases that is why these crimes are not reported.

On a general theme, one of the biggest issues facing the country is the break up of the traditional family unit. This is having a deep effect on our society in terms of crime and in many other respects. The Minister and I are both from urban areas, although Waterford is the smaller of the two. When one visits a secondary school in Limerick or Waterford, it becomes

very noticeable that many of the children are from one parent families. While many lone parents are doing a tremendous job bringing up their children, unfortunately, a large number of one parent families lack a role model. I have been told by social workers that some such families are terribly dysfunctional for this reason.

It is incumbent on us to begin to allocate resources to domestic violence issues, which we have, to date, failed to do. We need to evaluate the break up of the family unit here. Although some pilot programmes on domestic violence have been done very successfully, they are badly under funded. In many cases the schemes have helped participants and prevented the break up of families. The Government needs to address the problem of family breakdown and its serious consequences.

I lived in Washington DC for seven years. I remember taking a trip with one of the local homicide captains in the middle of the summer. It was at the height of the 1990-93 period when the city was known as "Murder, USA" because it had the highest number of murders *per capita* in the country. The captain told me we had a very good chance of coming upon a homicide. At about 3 a.m., we did. Afterwards, I asked him what was going on in the city, to which he pointedly replied that most of the kids in question, mainly juveniles aged between 14 years and 25 years, had never known their fathers and, similarly, the generation of men before them had never known their fathers. The family unit had broken down. Although we have not reached that stage yet, domestic violence here is not given sufficient priority and funds are not being allocated to existing pilot programmes, which should be expanded.

We need to try to keep families together at all costs. Domestic violence programmes and schemes have been successful, but have lacked funding. We cannot accept domestic violence as an inevitable, but unfortunate facet of life. Our tendency to do this is allowing tremendous damage to be done to society. Intervention and prevention programmes would ameliorate the problem. We should also provide more money for refuges, many of which are so short of funds they must turn away significant numbers of people, which one estimate I have seen put at 66% of those seeking assistance. This issue needs to be addressed.

I support the Bill. It is an indictment of society that we are taking it just days before Christmas, a period which we acknowledge gives rise to widespread domestic violence as people get together.

Mr. Costello: I welcome the Minister and the legislation, which my party will support. It was inevitable, as the Minister indicated, that a case would be taken before the courts because of the manner in which *ex parte* applications were being made and the delays in hearing cases in full. It comes back to the question of resources. If there had been full hearings of *ex parte* applications, it is very unlikely a constitutional case would have been taken as the matter would have been dealt with expeditiously and there would have been a full hearing. As such, it is improbable the respondent would have been so dissatisfied as to take a case to court.

We should also remember that the Supreme Court did not find against *ex parte* orders *per se*, but against the mechanisms used. The Bill is in tune with the constitutional findings in that it makes provision for *ex parte* findings where a sufficiently important and serious emergency arises. The problem, therefore, was with the manner in which applications were being handled, the lack of resources available to the courts and the rather lackadaisical approach by which information or notes were not made available to the respondent, who was not informed in all cases. One also had the problem of full cases dragging on.

I hope we will get a commitment to provide resources in support of the legislation. I am appalled by the last sentence in the explanatory memorandum which states that no necessary financial implications are envisaged, despite the acknowledgement that the legislation will give rise to additional court hearings. One cannot introduce legislation on such a basis. The resources available are insufficient to expedite the cases which come before the courts, either on an *ex parte* or permanent basis. To introduce further legislation and claim it will have no financial implications is ludicrous. I am concerned we will again find ourselves without the necessary resources and the legislation will, as a result, fall into disrepute.

I am also unhappy that we are debating the legislation at this late date. I understand it could have been taken on 9 October, which would have allowed us to consider the context in which it has been framed. There is no sense in rushing legislation through the House. I am concerned we do not have a repeat of the passage of the previous legislation which passed without First Stage, Second Stage, Committee Stage or Final Stage debates. This was, I understand, the first time this happened in the House. This debate is not much better in that we have little more than an hour to debate all Stages and there will not be an opportunity to put the proposals in their proper, broad societal context or consider amendments, either by subtraction or addition. It is wrong to use the imminent end of the session as a pretext for taking a guillotine approach.

As the title of the Bill states, the background to the legislation is very serious and has grave implications for society. Domestic violence is widespread. We, as public representatives, are probably more aware than most because we are in constant contact with people who have been abused, physically and emotionally, in the home and elsewhere. Domestic violence is often a hidden crime. The Garda Commissioner, who appeared before a committee yesterday, said he was a great believer in CCTV on the streets and that he has examined some of the footage from city centre locations and was appalled at the degree of violence one citizen can perpetrate on another in a public place. What may be done in the family home or in an intimate situation may be very sour indeed. During celebrations or festive seasons such as Christmas there seems to be a substantial increase in domestic violence. That leads us to the degree of alcohol consumed in this country and the limited steps we have taken to deal with it even though we speak about it regularly.

There is no doubt that we need to deal with this substantial problem which often spills over into the courts as emergency action is required. Before I look at the legislation I wish to refer to statistics on the nature and extent of violence against women which I am sure have been supplied to all Members by Women's Aid. I would have thought the Minister of State would have put such statistics on the record as a background to the legislation. In 2000, Women's Aid - one organisation - supported 10,000 women in need of support. In 1999, three refuges accommodated 609 women and 1,451 children but we must remember there are 32 refuges in the country.

In 1999, gardaí were called out more than 10,000 times to incidents of domestic violence of which 92% were against women. In 2001, 4,470 barring orders were applied for, while 2,067 were granted. In the same year, 2,903 safety orders were applied for, while 1,232 were granted. Some 8,243 calls were made to the Dublin Rape Crisis Centre between July 1999 and June 2000. Four out of ten women involved in a sexual relationship with a man have experienced violence. The Rotunda Maternity Hospital found that in a sample of 400 pregnant women, 12.5% had experienced abuse while pregnant. That is a fairly horrific picture of violence in the home presented by one organisation. There are other organisations, including those representing men who have been subjected to violence, which could give us statistics that would add considerably to what I have stated.

This amending legislation is appropriate in that it remedies a defect in the Domestic Violence Act, 1996, whereby it was deemed unconstitutional to grant barring orders as they operated under that legislation. What is the Minister of State's interpretation of the eight working days? Is it eight working days as set out in section 1(f) which states "days other than Saturdays, Sundays or public holidays"? How does it operate if the courts are in recess? Does it mean the working days of the courts or of the ordinary citizen?

Section 1(c) states "If an interim barring order is made *ex parte* - (i) a note of evidence given by the applicant shall be prepared forthwith-". Does that also apply to an application for a barring order? The taking of a note of evidence should be automatic once the applicant is brought before the court. It would be proper to have the facilities in place and to have best practice. A proper note of evidence should be taken in all cases, irrespective of the success or otherwise of the barring order.

The victims of violence must be paramount and this legislation at least ensures temporary relief for them. However, what will be done in the long term? What support and relief will be provided by the State? The State has been lackadaisical in providing support mechanisms

and relief to victims of violence, whether generally or, more particularly, in the home. It has been left almost exclusively to voluntary organisations to fund raise and make applications to the State for grants, funds and premises. The State has not taken the initiative in this matter. Although the situation in respect of domestic violence has been deteriorating, as the statistics show, the State's responsibility has not increased in a meaningful fashion and resources have not been provided and structures and mechanisms have not been put in place.

The Minister of State said the Minister, Deputy McDowell, intends to look at some of the broader issues and to introduce an amendment as part of a family law Bill. I fear future commitments. It is like the Minister closing down Shanganagh Castle, the only open prison for juveniles, and promising to build a replacement some time in the future.