

[2002] C.O.L.R VIII

An Overview of the Strengths and Weaknesses of the Domestic Violence Act, 1996.

By Edel O'Herlihy

Introduction

The introduction of the Domestic Violence Act, 1996 heralded a long awaited acknowledgement by the Irish legislature of the pressing social gravity of the problem of domestic violence. In doing so, it closed a chequered legislative chapter spanning over two decades where the piecemeal approaches of the Family Law (Maintenance of Spouses and Children) Act, 1976 and the Family Law (Protection of Spouses and Children) Act, 1981 can be described as offering to battered spouses little other than “a miserable mouse of protection”. The Act addresses many of the problems and lacunae mooted as lacking in earlier legislative attempts and thereby received a positive and enthusiastic welcome by Women’s Aid Groups and the legal profession itself. For the first time the Act provides a civil remedy for cohabitees, parents of adult non-dependant children, homosexual couples, adult siblings and others falling under a novel category of persons “residing with each other in a non-contractual relationship”. In widening the category of persons entitled to protective orders, it is clearly a socially conscious and pragmatic piece of legislation responsive to the changing nature of adult relationships and the exigencies of the growing social dynamic that is domestic violence. As a whole, therefore, it merits positive applause in relation to the social aim of increasing the menu of protective orders available to those often silent victims of domestic violence. It provides, as Rosemary Horgan so euphemistically coins “a short sharp shock” for the violent perpetrator and in doing so radiates a stern message that domestic violence is no longer a “behind closed doors” familial phenomena.

A Pandora’s box of anomalies?

While redressing fatal oversights of previous legislation, the Act, like its predecessors, falls into the trap of many the wary legislature. It grapples inadequately with the rotten core, preferring instead to tackle superficial decay by addressing a short-term cure, thereby skirting around the issue of long-term eradication. In addition, many of the welcome ideological provisions of the Act relating to cohabitees, homosexual couples etc. do not make such positive advances as would first appear. Such sections are littered with restrictive criteria, which circumscribe rights created by the preconditions of cohabitation periods and property requirements.

It is proposed, therefore, in forwarding proposals for reform to examine both the strengths and weaknesses of protective orders in the Act, detailing the categories of applicant eligible and restrictions on recovery. Secondly, the standard of proof required (“safety and welfare”) shall be discussed, examining judicial pronouncements in case law and the seminal decision of O’B v O’B. Thirdly, the powers of arrest and forcible entry extended to the Gardai by the Act and proposals for mandatory victim participation shall be canvassed. Finally, proposals of the National Steering Committee on Violence against Women, recommendations contained in the Safety and Sanctions publication by Women’s Aid and the findings of a national survey of practitioners commissioned by the Law Reform Committee of the Law Society shall be summarised.

Protective Orders: Sufficiency and Reform

“[Domestic Violence remedies are] often of little more value than sticking plaster is to a broken leg”

The Act offers the victim of domestic violence four stalwart remedies: barring order, interim barring order, safety order and protection order. A study undertaken by Dobash and Dobash and cited with approval by the Task Force demonstrates that 90-95% of victims availing of protective civil remedies are women. Reality dictates, therefore, that discussion of remedies available is centred on relief for battered women in the home.

The Barring Order

The barring order was first introduced by section 22 of the Family Law (Maintenance of Spouses and Children) Act, 1976. Section 3(8) of the 1996 Act now provides that, where made by the District Court, a barring order shall be for 3 years or such shorter period as the Court deems appropriate. This extension is greatly welcomed and is strengthened by the stern approach in general taken by the Act in criminalising the perpetrator when this exclusionary order is breached. This order is place-fixated in that it directs the perpetrator:

“if residing at a place where the applicant or...dependant person resides, to leave such place” (s.3(2)(a)(i))

The protective scope of the barring order covers 4 categories of applicant, which shall be examined presently.

Spouse

Under section 3(1)(a) of the Act a spouse may apply for a barring order. A conspicuous anomaly unearthed by this section, however, is that those applicants whose marriages have been annulled are unprotected. This indeed is a major downfall of the Act and leads to the blatant inequity that persons living as husband and wife for 20 years, whose marriage is subsequently annulled, are considered undeserving of protection despite the fact that their original intent to marry was identical to persons who may only be married for 6 months. A wife being assaulted or otherwise victimised therefore, where she fails to satisfy other criteria, such as the cohabitation requirements of section 3(1)(b), must revert to the remedy of a civil injunction. This would indeed perpetrate an intolerable injustice on such victims and it may be submitted takes constitutional protection of the family and married life to the extreme. The Minister for Equality and Law Reform Mr. Taylor addressed these concerns at Report and Final Stages stating:

“[The matter] is not straightforward and I am of the view that separate legislation covering nullity in this and other respects would be the more appropriate and safest way forward.”

Six years later the matter remains unaddressed and unresolved, a failing attributable more to the legislature than of the Act itself.

(ii) Cohabitees

The extension of the Act to this sizeable group is a highly commendable pragmatic step. It acknowledges the high and increasing incidence of cohabitation as opposed to marriage despite the introduction of divorce in 1996. However, while an ideological strength, the restrictive eligibility criterion serve to detract from the sections very operability and reflects a legislature yet wary of embracing complete social reality.

Firstly, the cohabitees must have been residing as “husband and wife”. A considerable weakness of this section is the absence of any statutory guidance criteria. Perhaps this nebulous concept defies definition. One would perceive that this requirement automatically precludes homosexual couples from this, the most powerful and far-reaching of remedies offered by the Act, yet this is not expressly stated. Alan Shatter argues:

“...there is nothing contained in [the section] to prevent a partner in a homosexual or lesbian relationship arguing that he or she resides with another as husband and wife. Whether such argument would be accepted by a court remains to be seen.”

The question must be asked: are the words “husband and wife” to be assigned to their male and female sexes respectively or can the traditional roles of provider and nurturer be taken into consideration? It is arguable that these traditional roles have been so jettisoned by modern society that no one facet can now be attached to either sex. So amorphous is this concept that a golden or teleological interpretation would, in essence, involve an ingenious exercise of judicial lawmaking. For the moment at least, it is submitted, the door is barred to homosexual couples obtaining this more forceful relief.

The next vital restriction relates to the much-criticised quantitative cohabitation period of 6 out of 9 months immediately prior to the application. It has been argued that 9 months is an unnecessarily restrictive narrow window producing the unconscionable scenario that a cohabitant in the fifth month and third week of living with a partner may be arbitrarily denied relief. What public policy or constitutional implications merit such a narrow time frame being imposed, save only that it is a severe remedy? When questioned thus at Committee Stage the Minister responded:

“I am advised that a stricter provision is necessary in the case of a barring order... because we run the risk of constitutional challenge by giving the court power to order a cohabitant from his or her home. To minimise the success of any such challenge the provision needs to be operated under strict conditions consistent with the need to protect persons from violence...” (emphasis added)

The Attorney General clearly advised a cautious approach rather than run the risk that the worthy aim of the reform be undermined by a constitutional challenge. It would appear, therefore, that an omnipresent constitutional sword of Damocles hangs over cohabitant relief delimiting its effectiveness by necessitating cautious restraint. The Task Force recommended that this provision be reviewed but also added the qualifier that any review must be “subject to any constitutional considerations.” It may be proposed that to considerably strengthen this section the judiciary be afforded certain discretion when considering applications marginally falling short of the 6 month period.

Perhaps more unjust and meritorious of the voluminous criticism it received is the property requirement in section 3(4)(a). This requires that the applicant have a legal or beneficial interest “equal or greater” than that of the respondent. This section on first appraisal would appear to place the constitutionally protected property right above the battered victim’s right to bodily integrity. It is arguable that this, above all, is the

weakest link in the entire legislative schema. This received stout criticism at Committee Stage:

“It is virtually valueless to attempt to introduce such legislation while introducing a restriction that will effectively exclude 99% of cohabitants...the kernel of this Bill [which] extends the right to apply for a barring order to cohabitants will exist only on paper. It is a cosmetic exercise which will achieve nothing in practice.”

The Minister responded by again stressing the advice received from the Attorney General. It may be argued that this section serves only to re-victimise the applicant, denying her relief and thus perpetuating the vicious circle of economic dependence. When a victim instructs a solicitor she is, in essence, sent back from whence she came, simply because she lacks an equal interest in the communal property. This indeed is an ironic factor because very often a domineering violent partner will seek to control his victim by depriving her of any economic dependence in the first place. It is submitted that while constitutional considerations must be taken into account, it must not be such as to produce the present anomaly, which expects two different degrees of fortitude from a woman simply on the ground of having gone through a marriage ceremony.

Procedural Retreat from the high ground?

The proverbial sting in the tail of section 3(4)(a) is somewhat diluted by section 3(4)(b). This provides an exception to the hearsay rule by allowing an applicant to “state a belief” that she has a legal or beneficial interest not less than that of the respondent. Byrne and Binchy provide an excellent analysis of this provision, which would seem to detract from the above criticism of section 3(4)(a):

“The provision does not quantify the weight of the evidence or prescribe that it generates any presumption, not even one of fact. Nevertheless, one suspects that in practice this provision is designed to achieve an accommodation with the constitutional concerns which will in many cases have the effect of enabling the court to comply formally with the need to address these concerns without doing so in any meaningful or substantive way.” (emphasis added)

O’ Riordan voices similar concerns in relation to the limited jurisdiction of the District Court in property disputes. It is suggested that any reprieve from the stringent test of section 3(4)(a) even in the short term is to be welcomed.

Finally, section 3(11) is an admirable strength of the Act reflecting concerns of women’s aid groups who feared that judicial reluctance to employ the most stringent

option of forcible ejection from the home would lead to a flood of safety orders being granted as a “softer option”.

(iii) Parents of any non-dependant child

This, like the above category of cohabiters, is clearly an advantageous extension of relief to parents residing with an adult child. It is regrettable, however, that a potential opportunity was missed in containing relief to non-dependants, in that violence by psychologically immature dependants is an all too common scenario. Should not the legislature have seen fit to provide the remedy of a barring order, at the very least, a safety order should have been made available.

The Safety Order

Described essentially as “a long term protection order” this novel provision has come under significant if not microscopic inspection. This remedy, despite failings in the drafting of the section, is clearly recognisable of the emotional psyche of a battered woman, in that, while she may want the violent behaviour to stop she may wish the relationship to continue. This stand-alone order in section 2(2) does not have the same stigma as an exclusionary barring order. When granted it directs the respondent not to use or to threaten to use violence, molest or put the applicant in fear and if not residing at the place where the applicant resides not to watch or beset that place.

It may be demonstrated that yet again a worthy aim of the Act is undermined by poor drafting in failing to nail down a precise definition of “watching and besetting” or “molesting”. The most positive feature of this safety order is the enlargement of the categories of person entitled to recover, namely:

- (i) spouse
- (ii) cohabiters (6 months in aggregate over a period of 12 months)
- (iii) parent of a non-dependant adult person
- (iv) persons residing in a non-contractual relationship

It is this latter catch-all or umbrella category which is the crux of debate on section 2. It extends the protective arm of the Act to such persons as homosexual couples, parents residing with sons and daughters-in-laws, adult siblings, lodgers, and those who do not satisfy the cohabitation requirements in category (ii). The legislature provided the first comprehensive list of guidelines in the Act in relation to this novel section. The absence of a residence requirement could be said to positively redress the apparent discrimination against homosexual couples in applying for a barring order by the insertion of the “husband and wife” standard. Byrne and Binchy commend the ideological statement of protecting homosexual couples but state that any direct reference to such persons deems such a statement to be “out of the corner of the mouth”. This “catch-all” category, therefore, can be seen as a major innovation and serves to strengthen the Act’s response to a wide variety of social relationships.

The insertion of a cohabitation period yet again in relation to cohabitees has been heavily criticised by the Law Reform Committee of the Law Society. It considers that, given that the nature of the order is essentially directed against specified forms of misconduct, then no property rights are affected which would require limitation by way of a cohabitation period. They submit that this creates the anomaly that homosexual couples are treated more favourably than heterosexual cohabiting couples.

A procedural cloud of obfuscation surrounds the question as to whether cohabitees failing under category (ii) would also fall under the catch-all category. The Minister during the progress of the Act through the Oireachtas clearly addressed this possibility. It is questionable, therefore, why any cohabitation period would exist at all? This is clearly a poorly drafted section of the Act in need of legislative intervention or authoritative judicial clarification.

Interim Barring Order

The court may grant an interim barring order under section 4 where there exists “an immediate risk of significant harm” to the applicant if the order is not made and the granting of a protection order would not be sufficient. This is a welcome addition to the menu of protective orders provided by the Act. The strength of this section is that it remedies lacunae in the 1976 and 1981 Act by a substantial interlocutory relief rather than, as could be said for the use of the protection order in 1981, providing a stop-gap measure to plug the interim period between application and determination of the substantive order.

A particular gem in section 4 lies in the provision that “in exceptional circumstances” under section 4(3) an ex parte application may be made where the court considers it necessary or expedient “in the interests of justice”. This remedy is of particular fortitude to the battered woman in recognising the immediacy of her situation. The Law Reform Committee paid particular attention to the due process implications of

this section. It considered it essential that an early return date be set for the hearing to determine the full barring application in order to prevent injustice to the respondent.

(iv) Protection Order

This remedy was first available under the 1981 Act and was then a welcome addition, repairing a fatal oversight of the 1976 Act which failed to provide interim relief. Its importance may be diminished somewhat by the introduction of the interim barring order but it remains a vital safety net to catch those falling through the process due to ineligibility for want of property interest and habitation periods. Its lower standard of proof is the saving grace for most applicants who fail to satisfy the stern “immediate and significant harm test” for an interim barring order. The protection order mirrors the relief of a safety order and in essence is the lowest common denominator of relief protecting those in the interim who may qualify for a safety or barring order. It is a creditable strength of the Act, therefore, that some minimum amount of protection at least be provided pending the full hearing.

The Standard of Proof: “Safety and Welfare” and the landmark decision

of O’B v O’B

The acid test for granting orders under sections 2, 3 and 5 of the Act relates to “reasonable grounds for believing that the safety or welfare of the applicant or any dependant person” requires the making of such an order. Neither the 1976, 1981 nor 1996 Act proffer definitions of the term “safety”, however O’ Higgins CJ in O’B v O’B stated:

“The use of the word “safety” probably postulated a necessity to protect from actual or threatened physical violence emanating from the other spouse.”

Reference to “welfare” however is more problematic in that it postulates a myriad of factors, emotional and psychological, on a sliding scale of gravity varying from positive acts of grave misconduct to apathetic disaffection and neglect. The Act provides a definition of welfare in section 1, which differs from previous legislation in taking account for the first time of the “psychological” welfare of the applicant. This clearly reflects the legislative aim that, in giving a more precise definition, judicial uncertainty may be avoided. The Minister stated:

“...the Supreme Court [in O’B] made it clear that violence in the home can take several forms, is not confined to physical abuse and can include emotional and mental cruelty. Nevertheless the perception remains with some groups that mental cruelty is not a ground for a barring order. The definition of the

word “welfare” is intended to allay the concerns which those groups have on the matter.”

It is argued, therefore, that one of the positive strengths of the Act addresses the shadow of uncertainty cast by the O’B case. There, the Chief Justice proposed a definition of welfare relating to “neglect or fear or nervous injury brought about by the other spouse”. He clearly tied the concept of welfare to the conduct of the offending spouse and stated:

“..the making of such an order requires serious misconduct on the part of the offending spouse-something wilful and avoidable which causes, or is likely to cause, hurt or harm, not as a single occurrence but as something which is continuing and repetitive in its nature.”

This reliance on the fact of misconduct rather than the degree of risk to the applicant was heavily criticised by Duncan and led to the fear that only in the most serious cases of mental cruelty, not resulting from mere irreconcilable differences on irretrievable marriage breakdown, could an applicant recover. Such criticism was shared by Ward and he cited a substantial drop in the rate of barring orders granted following the O’B decision e.g. success rate for barring applications in the Dublin Metropolitan District alone fell from 46.1% in 1983 to 22.7% in 1984.

Considering the tendency, therefore, in the aftermath of the O’B decision for District Court Clerks to advise applicants and solicitors that non-physical conduct as a sole ground for seeking an application would be insufficient, the new definition in the Act of welfare is a major strength. It sends a positive message to applicants that physical violence is no longer necessitated. Shatter argues that the broader definition of welfare given by Griffin J in his dissenting judgment in O’B is more in line with the philosophy of the Act, namely:

“the word welfare ordinarily refers to health and well being and in respect of a spouse would include both physical and emotional welfare; in the case of a child, it would in addition include moral and religious welfare.”

Garda Powers of Arrest: A golden opportunity lost for mandated victim participation?

Section 18 of the Act empowers the Gardai to make an arrest without a warrant and, where necessary, enter a premises by force to affect such arrest. This provision is indeed a great strength of the Act and now circumvents procedural requirements in relation to trespass by a Garda on private property when affecting an arrest by implementing a pro-arrest policy. Fergal Davis analyses the two models of mandated victim participation, namely the “Soft Approach” and the “Hard Approach” and leans towards the latter “no-drop” policy. He reasons that by not introducing mandated victim participation, we are in fact undermining our own assault legislation and, in the words of John Murphy:

“the legislature conspire[d], wittingly or otherwise, to create and nurture the image of domestic violence

as a sub-species of offence-one that is less reprehensible than other forms of violence...”

Davis stresses that the ultimate beneficiaries of such a program are the children of violent and dysfunctional families. It may be argued, however, that by depriving the victim of autonomy in decision making and extracting her from the decision process, she becomes a mere tool in the prosecution enterprise.

It is submitted, therefore, that the current pro-arrest policy of the Act is sufficient, to the extent that it gives the Gardai the powers needed to affect the arrest but still respects the victim’s autonomy. The Garda policy statement issued in 1994, updated in March 1997, urges that domestic violence should be treated as any other crime. The Act has succeeded in striking a delicate balance in adopting a pro-arrest policy as opposed to the strictures of mandatory victim participation. Any weakness thereafter lies in Garda policing. A positive enhancement of the Act, it is proposed, would implement some form of mandatory mediation as adopted in “soft” approaches in the US.

Summary Reform Proposals

Both the Task Force in 1997 and the National Steering Committee in 1999 highlighted the failure of the 1996 Act to cover situations where a couple have a child in common but do not live together.

The Law Reform Committee of the Law Society proposed the insertion of a category of “associated persons” which would entitle persons pending a nullity decree and cohabittees with a child in common to apply for a safety order. Similarly, this category would include persons with sole ownership or tenancy rights in the home and allow them to apply for a barring order.

The Task Force recommended that appropriate mechanisms be put in place to enable the operation of the Act to be closely monitored.

The current position in relation to persons whose marriage has been annulled is completely unsatisfactory and should be addressed by legislation

The Law Reform Committee recommended that statutory guidance be given as to what appropriate circumstances will warrant the granting of a barring order and vice versa.

The Law Reform Committee also recommended that the cohabitation requirement in relation to cohabittees seeking a barring order be removed.

Conclusion

The Domestic Violence Act, 1996 was a welcome and positive statement of reform by the legislature. In the past, legal responses to domestic violence have been described as blunt and abrupt in nature and susceptible to the phenomena of “ad hocism” which pervades family law. Lord Scarman’s oft-quoted trenchant description of civil law remedies as “a hotchpot of enactments of limited scope” could be said to have epitomised the piecemeal approach to domestic violence before the Act. In consolidating the law, therefore, it provided a solid foundation of rights for the victims of domestic violence. In expanding the category of persons entitled to protective orders, it produced a socially-conscious and pragmatic piece of legislation capable of withstanding the exigencies of a modern and changing society. Many of the weaknesses of the Act stem from drafting oversights or the constitutional restraints which have been discussed. While the Act in its present form is capable of causing injustice to certain categories of persons not covered, arguably further legislative intervention may easily remedy such failings given that the core principles of the Act are fundamentally sound.

Hereafter referred to as “the Act”.

The Act does not define domestic violence. Analysis in this paper shall proceed on the definition proffered by the Report of the Task Force on Violence Against Women, April 1997, p.27:

“Domestic violence refers to the use of physical or emotional force or threat of physical force, including sexual violence, in close adult relationships. This includes

violence perpetrated by a spouse, partner, son, daughter or any other person who has a close blood relationship with the victim.”

The English Civil law on domestic violence was so described in the case of Sir George Davis v Johnson [1979] AC 264, quoted here from Helen L. Conway: “Domestic Violence: Eradication or Escape?”, (1994) NLJ 144.

Calls for reform and consolidation in the area of domestic violence in the late eighties and early nineties came from such groups as Women’s Aid in their Report “Making the Links”, Dublin 1995, Coolock Community Law Centre “Domestic Violence: The Response of the Legal System”, Dublin 1995, the Second Commission on the Status of Women Report, Jan 1993, Report of the Joint Oireachtas Committee on Marriage Breakdown, 27 th March 1985.

Section 2(1)(a)(iv).

R. Horgan, “Domestic Violence: A Case for Reform?”, [1998] 1 IJFL 3.

As Conway notes “attention is drawn away from the societal nature of the problem and societal responses”.(above n.3) The Act does throw out a tenuous lifeline by extending powers of intervention in section 6 to Health Boards and providing in section 7 for the procurement of a report on the welfare of any child concerned under the Childcare Act, 1991 and a social report under section 47 of the Family Law Act, 1995.

[1984] IR 182.

First Report, March 1999. Hereafter “the Task Force”.

1999, Research study conducted by Patricia Kelleher and Monica O’Connor, discussed by Denise Charlton, [1999] 3 IJFL 10.

Discussed in detail by Owen McIntyre, Law Reform Executive “Domestic Violence: The Case for Reform”, [2000] 1 IJFL 10.

M. Freeman, “Violence Against Women”, (1980) 7 British Journal of Law and Society, p.169, at p.241. Quoted here from John Murphy, “Making Private Violence Public”, [1999] 50 NILQ 186.

Dobash and Dobash, “Women, Violence And Social Change”, Sage Publications, 1992. See further Dobash and Dobash, “Rethinking Violence against Women”, Sage Publications, 1999.

These disturbingly high findings are supported by recent Irish statistics. The National Steering Committee (above n.9) cite data collated by the National Network of Women’s Refuges and Support Services. In 1998 15,276 distress calls were made by women to helplines, as opposed to 11,400 in 1997 and 9,177 in 1996. During 1998 Women’s Aid Helpline alone received 8,475 calls. A staggering 73% of these calls related to domestic violence. Furthermore, a study of 463 women visiting the Adapt Refuge in Limerick published in their Report “Seeking A refuge from violence: The

Adapt Experience”, Mid-Western Health Board, April 1992 highlighted that the largest age group reporting violence at 23.1% of callers was 25-29 year olds. It is submitted that male battery is as yet an underreported phenomenon and the stigma attached demonstrates that statistics are distorted by those men who choose not to report.

In 1976 a barring order could be granted for 3 months, this was extended in 1981 to 1 year. Before 1976 a woman had to apply for the lengthy and expensive remedy of a civil injunction in the High Court. This remedy was heavily criticised by Browne and Connolly, Coolock Community Law Centre (above n.4) p.48 as “largely ineffective....too costly and time consuming.”

Another strength of this section, and indeed the Act, is reference at all times to “dependant person” as opposed to “child(ren)” from previous legislation. This recognises the myriad and complexity of human relationships that now comprise the family unit. It acknowledges that adult dependants are also worthy of protection.

The Act postulates some form of positive misconduct, however as shall later be discussed, mental trauma, neglect and emotional abuse may suffice. Considering the Supreme Court landmark judgment in O’B v O’B and the, as yet, uncharted waters of the Act, one awaits Supreme Court clarification.

Section 3(1)(b) refers to non-spouses, as obviously some procedural flaw now deems her to be. Presumably this would occur in a new marriage. Section 3(12) relates to constructive desertion, therefore, it would appear that lacking the cohabitation period by reason only of the spouse’s violence/misconduct would not preclude recovery in such a scenario under s. 3(1)(b). i.e. a woman married for a long period whose marriage has been annulled but remains resident with the respondent may recover under section 3(1)(b). A woman recently married, but whose marriage is void e.g. where under 18 years and no exemption granted (s.31 FLA 1995) and who has not resided with respondent for at least 6 months is stoically denied relief.

Report and Final Stages, 459 Dail Debates, Cols 589, 590.

In the Adapt study (above n. 14) 27% of women experiencing violence were unmarried. 4.7% of these were unmarried mothers cohabiting and 0.8% related to single persons in a relationship and cohabiting. It is suggested that this figure is much larger today. It may be noted at this point that as early as 1976 in the English Domestic Violence and Matrimonial Proceedings Act, 1976 cohabitantes had a statutory relief to a short-term ouster order.

Alan Shatter, Shatter’s Family Law, Fourth Edition, Butterworths, 1997, p.863.

Shatter expertly delineates this sheer looseness by framing a barrage of potential questions that may, in the continuing absence of statutory guidelines, present themselves before a court. His most pressing concern is how does one gauge when exactly one commences to reside as “husband and wife”; does this require sexual intercourse? He questions:

“What of flatmates living together who subsequently have a romantic relationship? . . . For example if a man and woman live together in one household for 12 months, are they to be regarded as “husband and wife” from the date when they commenced sleeping together or from the date they first engaged in sexual intercourse together?” (p.849)

Is pooling resources to discharge household outgoings considered to be sufficient? Such questions posed by Shatter highlight the sheer ambiguity of this concept and demonstrate that it is one in need of urgent definition.

The Task Force noted this almost “exclusive membership” and stated:

“This could be viewed as violating guarantees of equality before the law and equal protection of the law if lesbian/gay couples are treated differently.” (p.52)

Some solace can be gleaned from the fact that this is an aggregate period over 9 months and that “constructive desertion” will be taken into account under section 3(12). Therefore, where one partner lacks the specified 6 month aggregate by reason only of the escalation of violence necessitating that he/she leave, that partner will be considered to have a continued unbroken residence.

Select Committee on Legislation and Security, Wed 1 st Nov 1995, Col. 419.

Above n. 9, p.60.

Select Committee on Legislation and Security, Tues 7 Nov, Cols. 456, 457. Deputy O’ Dea.

No such restrictive property requirement is required under section 3(4)(a) for spousal applications. R. Horgan

succinctly epitomises current dissatisfaction with section 3(1)(b) :

“As the time frame and ownership requirements act as sentinels to the “gateways” to the relief for the cohabitant, clear instructions are required in respect of both issues.”, above n.6, p.12

Byrne and Binchy, Annual Review of Irish Law 1996, p. 360.

Ragnal O’ Riordan, BL “New Domestic Violence Law Enacted”, 1996 Bar Review 28. O’ Riordan feared that serious implications could ensue where matters may be treated as “res judicata” once the District Court order is made. The Minister cited convenience as the driving force behind this section. He stated that production of the title deeds could constitute a timely nuisance, particularly where they may be deposited on mortgage in a Building Society.

This was seen as a major flaw in the failed Family Law (Protection of Spouses and Children)(Amendment) Bill, 1987. In the aftermath of O’B v O’B it was feared that the judiciary would abuse the remedy of protection order therein as a soft option

scapegoat. See further Peter Ward, BL, [1988] 6 ILT 90: "Barring Orders: A need for change".

Explanatory Memorandum to the Bill as initiated, para. 4(d).

This is portrayed by M. Shepard and E. Pension in "Co-ordinating Community Responses to Domestic Violence-Lessons from Duluth and Beyond", Sage Publications 1999, p.129:

"Psychological abuse isolates victims of violence, erodes their self-esteem and tends to make them more susceptible to external control. The climate of intimidation, with the always present threat of violence, pressures many women to become less assertive and to hold back in many ways with their partners as a means of self protection."

A definition in relation to the corresponding criminal offence is provided in section 9(2) of the Non Fatal Offences Against the Person Act, 1997.

The English equivalent of the 1996 Act is the Family Law Act, 1996 which provides two broad reliefs: (i) an occupation order (ii) a non-molestation order. Similarly, "molest" has not been defined in that Act but a general definition has been derived from case law. In *Vaughan v Vaughan* [1973] 3 All ER 449 it was stated that in colloquial terms it refers to "pestering". In *C v C* [1997] *The Independent*, 27 th Nov 1997 it was held that "molestation" implied some quite deliberate conduct aimed at a high degree of harassment such as to justify the intervention of the court. See further Black, Bridge and Bond, *A practical approach to family law*, Fifth Edition, Blackstone Press Limited 1998.

Statutory guidance is lacking in relation to any criteria which would satisfy a barring order as opposed to a safety order where both are pleaded.

Annual Review of Irish Law 1996, p. 362.

Above n. 11, p. 11.

Note the Ministers unequivocal statement at Col. 422, Select Committee, 1 Nov. 1995.

Indeed the Task Force recommended that at hearing stage, facilities be put in place such as separate and secure waiting room facilities for the use of family and the victim to ensure that the victim is not forced to sit near the accused. It also recommends that the court should use its discretion in facilitating the victim to give evidence from behind a screen. p. 60.

Like an interim barring order it satisfies the recommendation of the Task Force where it states:

"...in situations of high risk provision must always be made for immediate remedies to guarantee the safety of the victim." (p.61)

[1984] ILRM 1.

Ibid. p.3

Committee Stage, 1 Nov 1995, Col. 408.

Above n. 42, p.5. This reference to repetitive and wilful misconduct was criticised by W. Duncan, "He stepped in and he stepped out again", (1982) DULJ 155. He states that "it does not follow that the word "conduct" should be read as "misconduct", still less "serious misconduct"...the wording of the [1981] Act, by its specific reference to safety and welfare and by its omission of any reference to misconduct would suggest that the legislature intended this to be the central consideration." Duncan's criticism centres, therefore, on the over-reliance by O' Higgins CJ on misconduct as opposed to consideration of the degree to which the health, safety and welfare of the complainant spouse is at risk.

Ibid.

Above n.31.

Above n. 42, p.8. Shatter p.866. This may ultimately lead to such cases as *C v C*, Unrep. 16 Dec 1982 being decided differently in the light of the Act. Similarly, cases such as *McA v McA* [1981] 1 ILRM 61 where mental cruelty was found to be sufficient may re-emerge. O'Riordan accordingly warns: "lawyers may fear a deluge of metal torture cases." The point has not yet been tried and a judgment of the Supreme Court is required to clarify this point.

As adopted in Brooklyn, New York. Here victims who reported abuse were required to undergo educative counselling before they were allowed to drop the charges.

This no-drop policy was implemented in Duluth, Minnesota. Police will prosecute if there is any corroborative evidence at all. Here on pain of prosecution for contempt of court victims were required to testify against their abuser.

Fergal Davis, "Mandated Victim Participation: a Criminal Law response to the problem of Domestic Violence", [1999] 3 ILT 39

John Murphy, "Making Private Violence Public", [1999] 50 NILQ 186.

Violent behaviour is a learned form of conduct. A study commissioned by the National Child Abuse Centre in Denver in the eighties revealed that 66% of children who had witnessed parental violence had a "marked incapacity to enjoy life", 63% manifested some type of psychiatric symptom and 38% presented learning difficulties. This research was quoted from "Helping Troubled Families, A Social Work Perspective", George Thorman, Aldine Publishing Co., 1982, p.133.

The Task Force recommended that similar units to that established in 1993 in the Dublin Metropolitan District be set up. It strongly supported the Act's pro-arrest policy, rejecting proposals of mandatory victim participation. It proposed in addition, however, that a pro-arrest policy must be part of an integrated criminal justice response involving policy, prosecution and sentencing

See further “Mediation USA: Facing up to Domestic Violence”, Nigel Fricker QC, (1997) Family Law 125. “But he’d never lay a finger on the children-Domestic Violence and Mediation”, C. Richards, (1997) Family Law 125.

The apparent rationale of the Minister for excluding this category of persons was that the kernel of the Act related to parties resident together. Presumably, at present such persons recover under the Non Fatal Offences legislation of 1997.

Analogous to the English Family Law Act, 1996.

Richards v Richards, [1984] FLR 11.