

CONTACT, DOMESTIC VIOLENCE AND RISK ASSESSMENT

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INTRODUCTION

I am Ranjit Kaur, director of Rights of Women, and this morning Anji Mouelhi and I will be speaking about the issue of contact in the context of domestic violence. I will cover the basic issues and lessons from the international experience, while Anji (who is Rights of Women's Legal Officer) will then speak about the domestic situation. We will both then be happy to take questions.

Rights of Women has been involved with the issue of contact and domestic violence since our inception in 1975. We are a not for profit organisation dedicated to informing, educating and empowering women concerning the law and their legal rights. We offer free confidential legal advice for women, training on women's rights, and guidance for women and policy makers through publications and research.

THE KEY ISSUES

A parent said:

After he was released from prison for stabbing me, he saw my daughter at the probation office under supervision. After a while they persuaded me to let him have her on his own. Things went OK for a long while but when she was eleven, she became very depressed and unhappy and tried to get out of seeing him. It turned out he had started hitting her on contact visits.

Another parent reported:

On every occasion he came to the house he would force his way in. He continued to abuse me physically and verbally in front of the kids. I had to call the police to remove him after contact visits, and on several occasions he raped me. I still belonged to him, or so he thought. The thought of him coming to collect the children from the house terrifies me. At the moment his parents collect and bring back the children, but from May the court has ordered that he can come to the house. Once again I will be unsafe and at risk from this person.

All those are the words of survivors of domestic violence, as expressed in a recent online consultation initiated by the all-party parliamentary group on domestic violence, which were read out to the House of Commons during

debates on child contact¹. The courts frequently award contact to fathers who have been violent within the family.

Two women every week are killed in the UK by partners or ex-partners². The Solicitor-General, Harriet Harman, announced in October that provisions against domestic violence would appear in the forthcoming Criminal Justice Bill. These provisions would enable the authorities to prosecute men who repeatedly commit domestic violence, regardless of whether the woman decides to press charges. That the government is taking this issue seriously is to be commended, although we are concerned that women may be forced to give evidence against their will. However, the failings in the current regime of contact need to be addressed urgently as part of any joined up strategy on domestic violence, as the system as it stands fails to protect either women or their children from violence.

Since the implementation of the Children Act 1989 in October 1991, concerns have been expressed by women's groups, legal practitioners, advice workers, academics and refuges about the practice of contact. Where contact was ordered between a child and a violent father, evidence emerged of risks that:

- Women would suffer continued violence and abuse
- Children would directly witness or hear violence and abuse
- Children would be affected directly by trying to intervene in violent and abusive behaviour by fathers towards mothers or by being manipulated by fathers into facilitating this behaviour
- Children would be affected indirectly by the psychological and practical effects of continued violence towards and abuse of their mothers³.

Presumption of Contact

Courts in the UK make a presumption of contact with the father⁴. Domestic violence does not constitute a bar to contact, and the courts frequently award contact to fathers who have been violent. If a mother refuses to obey a contact order in order to protect herself and her children from a violent ex-partner, she may be labelled 'implacably hostile'. This implies vindictive behaviour, and continued refusal may result in her being sent to prison.

A major study of the contact regimes in England and Denmark in 1996 recommended that there should be a presumption of no contact where it is proven that there has been domestic violence⁵. This would entail reform along the New Zealand model, which we will return to in more detail shortly.

¹ Hansard 7 Jun 2000 : Column 108WH

² Home Office statistics on homicide

³ Rights of Women, *Contact between Children and Violent Fathers: in whose Best Interests?* 1997

⁴ Bailey-Harris, Barron, and Pearce, *From Utility to Rights? The Presumption of Contact in Practice*, *International Journal of Law, Policy and the Family* 13, (1999) 111-131; also Smart and Neale, *Arguments Against Virtue: Must Contact be Enforced?* May [1997] *Fam Law* 332

⁵ Hester and Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark*, Policy Press 1996

The Advisory Board on Family Law Children Act Sub-Committee in its major 2002 report to the Lord Chancellor's Department advises against adopting such a model but recommended that there should be Good Practice Guidelines to be used at every level of the court, with the question of legislation to be revisited after evaluation of the impact of guidelines⁶. We would strongly endorse the need for new legislation on the New Zealand model, the need for which is illustrated by the unacceptable risks posed to women and their children by the current system.

Risk to women

One in four women experiences domestic violence, which often continues after the relationship is over⁷. A study undertaken in 1996 of 79 mothers who had been abused by partners in England and Denmark found that 74 of the women had been assaulted by ex-partners when participating in contact visits, and that half of the 53 women from England said that their children had suffered physical or sexual abuse from the ex-partners, but contact continued in all cases bar six, with poor provisions made to ensure the children's safety.

Risk to Children

A great deal of research identifies a link between violence to a mother and child abuse⁸. Contact can be used as a means to continue abuse, or to exercise control over the mother. Social services on Merseyside indicate that domestic violence is a feature in approximately 40-50% of cases that are brought to the attention of child protection case conferences⁹. Child abuse and woman abuse occur together in 40-60% of cases¹⁰. In 30-40% of families where the man is being violent to his partner, the children are also being physically or sexually abused¹¹.

In their survey of contact proceedings, Judges have a 'tendency to treat past conduct as irrelevant to the determination of a contact application, and this includes violence directed by the father towards the mother' (Bailey-Harris et al, p. 123)¹². The same study found that where a father had been violent, supervised contact was usually recommended, with the possibility of increased contact if this was felt to have gone well. The 1995 overview of research studies on child protection commissioned by the Department of Health identified domestic violence as an issue in many families who were likely to maltreat their children¹³. The same report highlighted that 'domestic

⁶ Advisory Board on Family Law Children Act Sub-Committee, *Report to the Lord Chancellor on the Question of Parental Contact in Cases where there is Domestic Violence*, HMSO, 2002

⁷ Greater London Assembly, *London Domestic Violence Strategy*, November 2001

⁸ see for example Hester and Radford, *Domestic Violence and Child Contact Arrangements in England and Denmark*, Policy Press 1996

⁹ Sefton Social Services Dept – year end 31 March 1999.

¹⁰ Hughes et al, 1989.

¹¹ Strauss, Gelles and Steinmetz, 1980.

¹² Bailey-Harris, Barron, and Pearce, *From Utility to Rights? The Presumption of Contact in Practice*, *International Journal of Law, Policy and the Family* 13, (1999) 111-131

¹³ Department of Health, *The Children Act Now: Messages from Research*, p. 29

violence was present in nearly half of the cases in the safeguarding children study but was rarely mentioned in child protection plans¹⁴.

A major analysis of research projects found that 40-60% of cases of domestic violence against the mother, the same male perpetrator abused the children (Hughes et al 1989 cited in Women's Aid p. 3)¹⁵. The report of Drs Sturge and Glaser commissioned for use in an important Court of Appeal case on this issue highlighted the dangerous effects of witnessing domestic violence¹⁶. Their comprehensive research showed that children still suffered emotional trauma even when they were not directly involved in the violence. Their recommendation was 'not only that there should be no automatic assumption that contact to a previously or currently violent parent was in the child's interests, if anything the assumption should be in the opposite direction and he should prove why he can offer something of benefit to the child and the child's situation'¹⁷. They found that:

Domestic violence involves a very serious and significant failure in parenting – failure to protect the child's carer and failure to protect the child emotionally (and in some cases physically – which meets any definition of child abuse)¹⁸.

The Children Act Sub Committee of the Advisory Board on Family Law called for the Lord Chancellor's Department to commission major long term research into the effects on children of witnessing domestic violence¹⁹ (p. 9). Further, we strongly dispute the assertion of groups such as Families Need Fathers that there should be a presumption of contact regardless and that 'residence and contact orders should be used in exceptional circumstances only eg. when proven risk to child – residence [should be with] one parent, supervised contact to the other'²⁰.

Our recommendations

Rights of Women believes that the catastrophic failures in the contact system must be addressed. We believe that the government should act immediately to ensure the safety of women and children at risk of further violence. We want:

- The Children Act should be amended to give a rebuttable presumption of no contact where there has been domestic violence
- Further amendments to family legislation including

¹⁴ Department of Health, *The Children Act Now: Messages from Research*, ??year, p. 45

¹⁵ Need to get full ref – not listed on doc

¹⁶ Sturge and Glaser, *Contact and Domestic Violence – the Experts' Court Report*, [2000] Fam Law 615

¹⁷ Cited in Re L; Re V; Re M; Re H [2000] 2 FLR 339

¹⁸ see note 11, p. 623

¹⁹ Advisory Board on Family Law Children Act Sub-Committee, *A report to the Lord Chancellor on the Question of Parental Contact in Cases where there is Domestic Violence*, 2000

²⁰ Families Need Fathers, *Response to Making Contact Work*, section 1

- changes to the Children Act to consider the value and quality of contact for children;
 - changes to the Children Act welfare checklist and s. 31 to include in the definition of psychological harm violence to a family member with the effects on children of such violence to be considered;
 - a procedural amendment to provide for dismissal of Children Act cases at the outset when made by seriously violent or abusive applicants.
- Department of Health to urgently analyse review of child homicide cases involving domestic violence in order to draw up more effective risk assessment procedures.
 - Protocol to be introduced to prevent abusers using Seek and Find Orders to locate their ex-partner
 - Compulsory, nation-wide training for Court Welfare Officers, mediators, solicitors, barristers and judges on children and domestic violence
 - Increased access to Legal Aid for domestic violence cases [check current status with Anji]

To make the government's new stance on domestic violence not only tenable but safe, changes must be made to the contact system. To encourage women to break the silence and then enforce potentially lethal contact meetings is irresponsible in the extreme.

LESSONS FROM THE INTERNATIONAL EXPERIENCE

Introduction

The UK may be able to benefit from the experience of other countries in dealing with the issue of child contact and domestic violence. Improved protection against domestic violence impacts directly on child contact issues²¹. What follows is not a comprehensive survey of international practice (this would take several books!) but a brief mention of some of the more innovative approaches the UK might learn from.

Austria

Austrian police may now remove an offender from home for 10 days if they believe domestic violence has taken place and is likely to recur. A court can then extend this order at the woman's request, and both parties can separately attend support projects after the action. This law allows the police to act immediately to protect women.

Other European states

²¹ Kelly, Specific Domestic Violence Legislation: Examples and Advantages, January 2001, www.domesticviolencedata.org/3_notice/forum/liz_legn.htm

Other European legislation specifies that criminal assault on an intimate partner should affect sentencing – Belgium, Spain and France all enacted such legislation in the 1990s. Sweden has a new law recognising the ongoing nature of domestic violence, which criminalises the ‘gross violation of a woman’s integrity’, which may be made alongside charges for assaults²². In Northern Ireland, where someone who is subject to a non-molestation order applies for contact, the court must consider whether the child has or is at risk of suffering harm through witnessing domestic violence.

The Americas

In some Latin American states and US states specific criminal offences of domestic violence have been created. The US Violence Against Women Act includes within the statute specified resources. The US also has a Model code with a rebuttable presumption that it will be in the child’s best interests to live with the non-abusing parent, and contact may only be awarded where the safety of the child and non-abusing parent can be guaranteed²³.

New Zealand

The New Zealand system is considered to be particularly strong with respect to child contact as it features a rebuttable presumption that there should not be contact unless the court can be sure that the mother and child will be safe. The law has a risk assessment checklist that must be considered by the court before contact is awarded. All children are represented in family proceedings. There is no power to imprison a mother who refuses to comply with a contact order or similar agreement. Children have a right to oppose access – the older and more mature a child is the more weight will be given to her wishes.

Most respondents favouring legislative change in the UK on this issue as canvassed by the Advisory Board on Family Law Children Act Sub-Committee favoured reform on the New Zealand model. New Zealand’s Guardianship Act features a mandatory risk assessment checklist, and Dr Radford finds that a similar provision in the UK ‘would enable the courts to systematically assess the impact of the domestic violence upon the child and the risks of contact in cases where there may not be a previous court order or injunction’²⁴. The Domestic Violence Act of 1995 provides that when there is a Protection Order in place, the respondent may not contact any child of the applicant’s family, unless contact is permitted under any order or written agreement. A major research project into the efficacy of the combined effects of the new Act and the Guardianship Act found that:

²² *ibid.*

²³ Cited in Women’s Aid briefing, September 2001, www.womensaid.org.uk/policy/briefings/child%20contact%20dv.htm

²⁴ Report per note 15, p. 25

The provisions for access to children in the domestic violence legislation have led to a growing use of access arrangements which are safer for both children and custodial parents²⁵.

Australia

The Australian equivalent of our welfare checklist instructs the court to consider the need to protect the child from physical or psychological harm caused, or that may be caused, by any family violence involving a child or a member of her family²⁶. We believe that similar provisions should be added to our welfare checklist to increase the protection from abuse available to children, and by extension, their mothers.

Human Rights

The UK's obligations under international law are relevant where women suffer domestic violence. Such obligations may be found in the International Convention on Civil and Political Rights, Articles 2 and 26, and the Convention on the Elimination of All Forms of Discrimination Against Women²⁷. In the European Convention on Human Rights, Articles 3 and 8 place the state under a positive obligation to protect women from domestic violence. These articles provide a prohibition on inhuman and degrading treatment and also protect physical integrity and family life²⁸. This is therefore arguable under the Human Rights Act 1998. When the state fails to protect women from domestic violence it fails in its international human rights obligations. A contact regime which systematically exposes women, and children, to domestic violence cannot be fully compliant with such norms.

CONCLUSION

In conclusion, I would like to reiterate that if we are to see an effective, human rights compliant state response to domestic violence, we must see urgent and substantial reforms made to the contact system as it stands.

²⁵ Ministry of Justice (New Zealand), *The Domestic Violence Legislation and Child Access in New Zealand*, 1999

²⁶ Family Law Act 1975 (Australia) ss. 68F and 68K

²⁷ for details see Finlay, Bailey-Harris, Otlowski, *Family Law in Australia*, Fifth Edition, 1997, p. 542

²⁸ Starmer, *European Human Rights Law*, LAG, 1997, ss. 19.50-19.52