

PART 06

- Barriers to Justice

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The research contexts for each of the jurisdictions in Part 2 set out a number of challenges to justice that have been raised in the literature. Some of those challenges have been demonstrated from the research findings in the preceding chapters and relate to deeply embedded cultural behaviours within the family justice system which are particularly problematic for victims of domestic abuse. Our research also revealed that a number of systemic challenges which have

significantly impacted upon the ability of the family justice system in each of the jurisdictions to respond effectively to victims of domestic abuse.

Co-operation between institutions

Although there was some evidence of a good degree of cooperation in principle between the different stakeholders within the family justice system and between social services and criminal justice mechanisms, significant difficulties remain. Stakeholders reported a lack of coordination which resulted in family courts not being kept up to date with relevant criminal proceedings that were simultaneously being undertaken.³⁸⁷ Delays in getting the information relating to criminal law procedures were cited and particularly to court appointed experts, tasked with reporting to the family court (UKFG4D). In England & Wales, the police were cited as particularly problematic in this regard, despite the procedures being in place to share information. A number of stakeholders reported that information was often not sent in time which delayed the proceedings; the police regularly took up to ten weeks to respond, if at all: ³⁸⁸ 'I think there's very strict and kind of rigid systems in place, which I understand. ..I don't know, sometimes, if you don't ask for exactly the right sort of thing, in the right way, at the right time, you wouldn't necessarily get that information' (UKIO8). On a similar note, UKIO9 said:

'the police won't just send us information because we request it. It has to be done formally, through the court.'

In France, Spain and Italy there was a notable issue with communication between the family, child protection and criminal system, no doubt due to a lack of national oversight and protocols in place to facilitate it. Survivors related how, the family courts operated in isolation of other proceedings despite being informed that they had occurred or were ongoing. It was common for family courts to make no attempts to obtain this information and proceed with the case without taking this information into account.³⁸⁹ This perception was also shared by professional stakeholders (ITIJ5, ITIL1, ITIL6 and ITIO2), which according to ITIO2, might be because 'the criminal trial is long', and thus it may not be finished in time for the civil case to consider the criminal evidence or sentence. However, there was also evidence of some collaboration, albeit it very much depended upon local practice.³⁹⁰ 'There is a lack of coordination, that is, a lack of coordination between the courts and

the other bodies involved [...] in the end it depends on goodwill, not because we have someone or a system that allows us to coordinate everything, ideally I would be able to access these reports directly, not having to keep reminding them over and over again' (SPIJ1).

³⁸⁷ BIJ1, BIJ3, BIJ8, BIL12, BIL2 and BIO6, BIJ9, BIO6, BIO6.

³⁸⁸ UKIJ3, UKIJ6, UKIJ7, UKIJ8, UKIL1, UKIL5, UKIO3, UKIO5 and UKIO8, UKIJ7

³⁸⁹ FRFG1A, FRFG2A and FRFG3C, FRIL2, ITFG1B, ITFG2D, ITFG2B, SPFG1E, SPFG1A, SPFG3C.

³⁹⁰ ITIO3, SPIJ1, SPIL11 SPIO3, SPIO6 and SPIO7.

Workload was a major issue that affected the ability of professionals working within the family justice system, particularly those employed by the State. Understaffing was raised as a particular concern (BIL1, BIO1, BIO2, BIO6): 'Yes, a lot could and should be done, and it could all function better. Unfortunately, it seems that we're all burdened too much by it. We're saturated; what can I tell you? We need more supervision; there are few workers, much work, many applications, and scarce resources'(BIO6).

In England & Wales, there was widespread recognition from a range of professional stakeholders about the strain that Cafcass was under which then led to delays: 'the problem we've got at the moment is Cafcass are overstretched. I would say that, but instead of getting reports in, say, you know, 10 weeks, it might be sort of 14 weeks' (UKIJ2). Judges were also overloaded with the number of cases they had to manage and did not feel

they had enough time to deal with them properly: 'I think, you know, I know this isn't what you're looking at in terms of, things, but, you know, in any given day, I could have 5 private law cases, effectively back-to-back, 3 in the morning, 2 in the afternoon. You just, sometimes while you just haven't been able to get into a case sufficiently well enough to do justice to it' (UKIJ3). This was exacerbated by the increase in litigants in person in England & Wales, caused by the removal of legal aid for family law cases: 'You know, that's the biggest challenge I would say, is litigants-in-person. And a suggestion that that saves money. I just don't believe that saves money. All it means, is the court hearings take longer, and there are more court hearings' (UKIJ8).

In Spain, judges discussed their high work volume and feeling 'saturated (SPIL3)'. Those who did not work in the specialist violence courts felt it was worse for them as they had to cover a variety of areas. However, judges who

worked in the specialist courts were not immune to high workloads either (SPIJ1, SPIJ3, SPIJ5, SPIJ6). These stakeholders shared how this impacted upon their capacity to perform and the speed in which they were expected to deal with the cases: 'The problem of justice in Spain is the saturation of work, we have a brutal workload. So, of course, I understand that in judicial districts where you have one and they are mixed, i.e. they deal with first instance, they deal with instruction, they deal with violence, where at the same time that you have a boat with 25 immigrants, a drug operation, you have a family trial where there is violence against women. No, they cannot have the dedication that I can have' (SPIJ1). These working conditions clearly had a knock-on effect on lawyers who felt that they were not given a sufficient amount of time during the proceedings to represent their clients effectively³⁹¹ 'They don't give us the time to talk to the victims properly'(SPIL1).

Length of the process

Stakeholders across all jurisdictions in all countries complained about the length of time that procedures took. Survivors in Bosnia & Herzegovina talked about processes lasting over four years to reach a sentence (BFG1B, BFG1A, BFG3H), BFG1F mentioned eight years, while BFG2G talked about ten years of wait. This was corroborated by professional stakeholders.³⁹² In Italy, survivors gave examples of cases taking more than seven years to complete (ITFG1D and ITFG2B) and in Spain taking up to 14 years (SPFG1A) and 11 years for SPFG1D. Most survivors in Italy and Spain complained about waiting for lengthy periods for their

cases to complete which prolonged the stress for themselves and their children. In France both survivors³⁹³ and professional stakeholders (FRIJ1, FRIL2, FRIL4, FRIO2), brought up the length of proceedings, with one case taking over eight years to end (FRFG1D).

A good deal of these delays were exacerbated by the length of time it took for court appointed experts to produce their reports, an issue which was raised in four out of five of the jurisdictions. In England & Wales, where family law proceedings involving children are subject to the 'no delay principle' there were a large

number of survivors who experienced considerable delays in the conclusion of their cases due to delays in receiving Cafcass reports (UKFG2C, UKFG3A UKFG4D) and corroborated by a large number of professional stakeholders³⁹⁴ who reported that they were taking about 18 weeks (UKIO7) and 26 weeks (UKIJ8). In France, expert reports were reported as taking over a year to be completed (FRIL3, FRIL9, FRIJ1) whereas in Spain the backlog of cases for psychosocial teams varied according to each jurisdiction, from two months to a year (SPIO1) or generally a 10 month wait SPIJ6.

³⁹¹ SPIL3, SPIL5, SPIL7, SPIL10, SPIO1, SPIL1.

³⁹² BIJ1, BIJ2 BIJ3, BIJ9, BIL1, BIL2, BIL3, BIL9, BIO2, BIO6.

³⁹³ FRFG1E, FRFG1F, FRFG1A, FRFG1D, FRFG2A, FRFG3A, FRFG3C, FRFG3D.

³⁹⁴ UKIJ2, UKIJ3, UKIJ5UKIJ6, UKIJ7, UKIJ9 UKIL2, UKIL5, UKIL8, UKIL7 UKIO2, UKIO3 UKIO4, UKIO5, UKIO6, UKIO9.

The Limited Availability of Legal Aid

Despite the fact that all the jurisdictions in the project have established a system for victims of domestic abuse to receive legal aid on either a free or means tested basis the vast majority of survivors reported that they had no access to legal aid. This was either because it was hard to access or the salary requirements were too low; in Italy, for example the threshold for legal aid is less than 11,000 euros a year. As a result, most survivors had to pay for legal assistance which, given the length of time proceedings took became prohibitively expensive. UKFG2A spent £63,000, whereas UKFG2C spent over £100,000. In France, it was even higher, FRFG1A spent more than 300,000 euros, whereas FRFG1D spent 340,000 euros. In Spain, survivors spent from 18,000 euros (SPFG3H) to 50,000 euros (SPFG3C), to 80,000 euros (SPFG3A). The economic impact was significant: 'I've always had to pay lawyers, I've spent. I'm in debt, I have loans with all the banks. In other words, I owe everything'(SPFG3B). Dealing with costs of this magnitude exacerbated what was already an economically precarious position post separation and left them struggling to cover their and their children's basic needs. It also affected their ability to pay for the costs of maintaining contact with their

children, FRFG3A had to cover travel expenses to keep in contact with the children or complying with preexisting commitment; FRFG3B had to pay rent in Paris and the mortgage of the house where her ex-partner lives. Many relied on family to help them with the costs such as ITFG2C and SPFG1B. A significant added cost came from Instructing experts which was often necessary, to counter the poor quality of reports from the court appointed experts: 'the average cost of a technical consultancy is about 4/5 thousand euros so at least 2,500 euros per person, plus you have to pay your consultant. The range of expenses for a consultant varies from 2,000 up to 8/10 thousand euros' (ITIL2). ITIJ1 also did the maths: 'in Italy, I don't know if you know, there's an annual income of 11,000 euro, that is, under 11,000 euro, one can have legal aid, and even with a simple job, if you earn 12,000 euro, one cannot afford to pay tens of thousands of euro for the trial'.

It is clear from the responses above that, the main barrier to justice was the costs of either getting legal advice and/or paying for expert reports, with many relying on family or taking on loans. Survivors who could not afford to pay for extra expert evidence, were not eligible for legal aid or could not afford

a good lawyer, were simply denied a level playing field during court proceedings as SPIO7 commented, 'good lawyers are expensive.' This was a particular issue in England and Wales where, there are large numbers of parties who are representing themselves. This had a number of serious consequences for victims who did not understand the rules of evidence or know how to navigate the process sufficiently to demonstrate that the abuse took place. One example given was a failure to introduce evidence for a fact-finding hearing that was easy to obtain such as mobile phone messages, something UKIJ10 referred to 'as bleeding obvious.' The same judge related how self-representing parties put an additional burden upon judges that they were not able to fulfil 'you're becoming a participant in and most judges don't have a trial background.. we are asked to cross examine and we aren't trained for this.' The answer, in this particular judge's area was to appoint a Children's Guardian for the child as that would ensure that a barrister would be appointed who could undertake these tasks instead. However, this was not always possible and depended upon local practice.

Geographical Barriers

Survivors who lived outside of cities and in rural locations were at a significant disadvantage in terms of accessing justice. This was often due to the lack of availability of specialist services for domestic abuse victims and the need to travel long distances to access the justice system or to comply with court orders. BIJ8 commented that there were simply no legal aid services available in smaller towns. ITFG1A

had to travel twenty or thirty kilometres to bring the girls to her ex partners house which was monitored by social services. SPFG1B and SPFG1D both had to regularly travel 30km to maintain contact with their children Spanish stakeholders also pointed out how there are few specialized courts and that they are concentrated in bigger cities. This required survivors to travel in from surrounding locations: 'in

Spain we currently have 106 exclusive courts, but we have 431 judicial districts, which means that exclusive courts are less than 25% of those that there should be'(SPIJ5). SPIO1

also commented on how 'When I started working in this field, as there was nothing, I was the first psychologist here in my city, which is a small city.'

A Lack of Information About the Legal Process

Survivors across all jurisdictions complained about how hard it was for them to understand the legal process and how they did not receive enough explanation of the legal process they are living. In FRFG1E words, the process is 'messy.' UKFG2A complained she had 12 different judges and never understood why, whilst UKFG3B shared that she went through a fact-finding, not aware that she was having one. Professional

stakeholders acknowledge that this was a problem and agreed that survivors have limited knowledge of the law.³⁹⁵ This also extended to a lack of awareness around complaints procedures with many survivors in Italy complaining that they had no idea how to complain about stakeholders' performance. (ITFG1B, ITFG2B, ITFG3A, ITFG3D).

Covid

The research project was undertaken during the Covid 19 outbreak which impacted significantly upon the experiences of survivors and professional stakeholder groups working in the family justice system. All the jurisdictions in the project implemented emergency measures such as the postponement of non-urgent hearings, the introduction of remote hearings by video/zoom or telephone call and social distancing when face to face hearings were resumed. Inevitably the preparedness of courts was dependent upon the existing infrastructure with considerable variations occurring at the local level. Across all jurisdictions, an exception to the suspension of proceedings was made for cases involving the protection of minors. For lawyers and court appointed experts this also meant working remotely (using video or telephone calls) when taking

instructions from clients or speaking to family members, including children. For survivors already separated from the perpetrator it was a mixed experience. Social distancing measures either intensified situations of conflict or gave some respite from having to comply with problematic visitation arrangements.

The legacy of Covid 19 on the justice system remains; the interruption to the normal operation of the courts has had a detrimental impact on the publicly funded and legally aided sectors of the legal profession, worsening barriers for accessing legal representation. In addition there has been a detrimental impact on the flow of cases through the courts and it may take several years before the backlog of criminal, and family returns to pre-pandemic levels. The human cost of the backlog can be measured in part by defendants being

held on remand in prison for longer, litigants and is that victims are waiting even longer for justice, and with a greater likelihood of evidence being lost or forgotten during the lengthier waits for a hearing.³⁹⁶ In short, Covid 19 worsened the existing position in many countries, which as the findings of this research has demonstrated were already struggling to cope with the provision of effective procedural justice.

These issues were reflected in the research findings. First, delays caused by Covid 19 and the subsequent lengthening of the judicial process was reported across all jurisdictions and stakeholder groups: 'cases that had started before two or even the end of 2019, at the beginning of 2020 they are still not resolved. So it was horrendous'(SPIL8). Stakeholders in Bosnia & Herzegovina, France, Italy and

³⁹⁵ BIJ3, BIJ4, BIJ9, BIL11, BIO2, UKIJ2, UKIJ3, UKIJ4, UKIJ6, UKIJ8, ITIO2, SPIL2, SPIL7, SPIO3.

³⁹⁶ See 'The Functioning of the Courts in the Covid 19 Pandemic' OESC Report, 2020 469170.pdf (osce.org) the report of the House of Lords Select Committee on the Constitution HL Paper 257, 2021 257.pdf (parliament.uk)

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Spain also talked about how the courts stopped all work, suspending all or most activities, with the exception of the most serious cases Covid meant losing face-to-face interaction, which was damaging for court assessments. Other stakeholders reflected on how the change in procedures affected the conduct of the cases. A number of participants in England & Wales felt strongly that interactions between the court, assisting institutions and the parties should always be face-to-face (UKIJ1, UKIJ7, UKIL2, UKIO1, UKO16). This was because they felt that something tangible was lost in the switch to online, phone or written communication, particularly in terms of assessing witness evidence (UKIJ1, UKIL2, UKIL5). UKIJ4 commented on phone interventions: 'we all had to learn how to deal with court hearings by video, or by telephone, telephone's never really very good, actually. We can't see each other. We don't know when someone's stopped talking, or whether they've just made a gap. There's no visual cues to assist us.' In Spain, for example, participants complained about how the masks took a lot of the communication away (SPIJ6, SPIL11, SPIL12, SPIO7). As a result, some participants decided to go back to working face to face in court as soon as they were allowed.³⁹⁷ Italy was the only country that moved to written submissions as an option, and this was not positively valued by stakeholders (ITIJ4, ITIL2, ITIL4, ITIL7). In the words of ITIL4: 'Unfortunately we had a lot of dealings in written form not via web. Often the written form was not easy to make the judge understand it.'

Conversely, participants in England & Wales perceived remote interactions as working very well in raising no issues in terms of complying with the requirements of procedural justice.³⁹⁸ In the words of UKIJ4: 'if I focus on video, COVID, was a very steep learning curve about how to deal fairly with cases by video. And I think we, I think we came out the other side. And my view is, that whereas perhaps not as, as good as an in-person hearing, I think

it's, I think video hearings, provided the party has the right equipment. And, has an appropriate place to engage from. I think they are perfectly Article 6 compliant.'

The research findings also demonstrated the impact of Covid 19 on visitation. One particular effect was the reduction in visitation which for some participants felt like the deliberate instrumentalization of the pandemic: ITIL3 commented: 'There were many appeals from fathers who couldn't see their children' and (UKIL7) felt that mothers used covid as an excuse to stop contact. However, this was not limited to fathers, a good number of survivors in Spain experienced a significant reduction and withdrawal of visitation with their children (SPFG1D, SPFG2E, SPFG3H). 'I had two hours every 15 days, and those two hours, because of COVID were lowered to one hour. I was seeing them one hour every 15 days, one year like that, with the excuse of COVID, and one videocall' (SPFG1D). Whereas for SPFG3H her hours were reduced from eight a month in a meeting point to four hours a month. There were also some survivors who lost contact with their children for a while, SPFG1D did not see her children for three months before a new agreement was reached. SPFG1C lost complete contact with her child during the entirety of the lockdown, as the father lived in a different city and SPFG3D did not see her child for more than one year. Indeed the closure of meeting points was raised by a number of participants (SPIJ1, SPIJ3, SPIJ5) which resulted in 'those children didn't see their parents' (SPIL5).

Others felt that Covid 19 meant that proceedings were rushed and concluded without a sufficient consideration of the evidence. In France, FRFG1C shared how in her case the court made a hasty decision to conclude the case during Covid 19 outbreak by deciding to award shared custody and without making the necessary checks concerning the violence that she and the children had

experienced. Whereas in the case of ITFG1B, in Italy, she lost custody of her children because she vaccinated them when the father was against it.

There were also tangible benefits, mainly around an increase in the sense of safety and security felt by survivors who could give evidence from the comfort of their own homes without having to risk interaction with their ex partners (UKFG2A) which was also something professional stakeholders thought was a positive benefit of the new arrangements³⁹⁹ (UKIJ4). 'On the issue of special measures, it was made very much easier, because, of course, no one was in the same room. And, if they both were able to come in by video, you could turn your camera off. It actually made a lot of the of the, of the ability to participate on an equal footing, very much easier.' These arrangements were also acknowledged as creating greater flexibility in the working arrangements of professional stakeholders, who did not have to travel to visit families in person (UKIO3), or to appear in courts all over the country (UKIL7 and ITIL6). This also had the knock-on effect of making things cheaper for clients (UKIL7) 'I don't have to find the courts; I don't have to check if I've got the right parking money. All that stress is taken away, stripped away. The client doesn't have to pay for travel, or travel time. So, their fee is less.' As a result, some professional stakeholders moved their interactions permanently online (FRIO2, FRIO4, ITIJ5, ITIL6, ITIO2) and built on technology that was created for the pandemic in order to improve services for victims of domestic abuse (SPIL5). 'We, with the service for the victims of Tivoli for example have transformed the service online precisely to make it more accessible. Apps were created that allowed contact to be made online, for instance YOUNPOL... that the State Police also created to help reporting through a transmission to the operations centres. MYTUTELA an app useful in cases of persecution that allows the recording of the material received via mobile phone. The systems and strategies have improved' (ITIO2).

³⁹⁷ UKIJ1, UKIJ4, UKIL2, ITIJ4, ITIJ5, ITIJ7.

³⁹⁸ UKIJ2, UKIJ4, UKIJ8, UKIL4, UKIL7, UKIO3, UKIO9

³⁹⁹ UKIJ2, UKIJ3, UKIJ4, UKIJ6, UKIJ8, UKIL4, UKIL5, UKIL7, UKIL8, UKIO2, UKIO4, UKIO5, UKIO6, UKIO7, ITIL6, ITIL8, ITIO1

Summary

Although there was some evidence of a good degree of cooperation in principle between the different stakeholders within the family justice system and between social services and criminal justice mechanisms, significant difficulties remain. Stakeholders reported a lack of coordination which resulted in family courts not being kept up to date with relevant criminal proceedings that were simultaneously being undertaken. In France, Spain and Italy there was a notable issue with communication between the family, child protection and criminal system, no doubt due to a lack of national oversight and protocols in place to facilitate it.

Workload was a major issue that affected the ability of professionals working within the family justice system, particularly those employed by the State. Understaffing was raised as a particular concern in England & Wales; there was widespread recognition from a range of professional stakeholders about the strain that Cafcass was under which then led to delays. Judges across the jurisdictions were also overloaded with the number of cases they had to manage and did not feel they had enough time to deal with them properly. Unsurprisingly therefore, stakeholders across all jurisdictions except England & Wales complained about the length of time that proceedings took to complete; the longest reported case was 18 years. Delays were also caused by the length of time court appointed experts were taking to complete their reports, in England & Wales the longest period was up to 26 weeks, in France over a year and in Spain there was generally a 10 month wait SPIJ6.

Despite the fact that all the jurisdictions in the project have established a system for victims of domestic abuse to receive legal aid on either a free or means tested basis the vast majority of survivors reported that they had no access to legal aid. It is clear that a significant barrier to justice is the costs of either getting legal advice and/or paying for expert reports, with many relying on family or taking on loans. Survivors who could not afford to pay for extra expert evidence, were not eligible for legal aid or could not afford a good lawyer, were simply denied a level playing field during court proceedings.

Survivors who lived outside of cities and in rural locations were at a significant disadvantage in terms of accessing justice. This was often due to the lack of availability of specialist services for domestic abuse victims and the need to travel long distances to access the justice system or to comply with court orders.

The research project was undertaken during the Covid 19 outbreak which impacted significantly upon the experiences of survivors and professional stakeholder groups working in the family justice system. All the jurisdictions in the project implemented emergency measures such as the postponement of non-urgent hearings, the introduction of remote hearings by video/zoom or telephone call and social distancing when face to face hearings were resumed.

For survivors already separated from the perpetrator it was a mixed experience. Social distancing measures either intensified situations of conflict or gave some respite from having to comply with problematic visitation arrangements. The legacy of Covid 19 on the justice system remains; the interruption to the normal operation of the courts has had a detrimental impact on the publicly funded and legally aided sectors of the legal profession, worsening barriers for accessing legal representation. In addition there has been a detrimental impact on the flow of cases through the courts and it may take several years before the backlog of criminal, and family returns to pre-pandemic.