

SUBMISSION TO THE JUSTICE COMMITTEE: DOMESTIC ABUSE AND FAMILY PROCEEDINGS BILL

Introduction

In welcoming the opportunity to assist the Committee in its scrutiny of this important Bill, I am conscious of the effective engagement I had with the Committee in 2018 on the production of human rights guidance on domestic abuse and stalking. The proposed legislative changes generally sit well with human rights compliant practice enjoined in that guidance.

I am conscious that the new offence of domestic abuse is very broadly drafted and, while I am content that the Assembly is competent to make this provision, I am aware that its breadth provides the opportunity for individual decisions which might fall short of what is required by articles 7 and 8 ECHR. It would be a matter for the PSNI, the PPS and ultimately, the Courts as public authorities bound by section 6 of the Human Rights Act 1998 to ensure that their decisions are compatible with these protected rights. Accordingly, if, on the particular facts of a case, it could not have been reasonably foreseen that behaviour could be considered abusive, or if the penalisation, in light of the facts, is disproportionate, then a charge/prosecution/conviction should not occur.

An unintended consequence of the very broad drafting of the offence of domestic abuse is its potential for being exploited by stalkers. As is well known, a standard pattern in stalking is that there will have been a relationship between A and B, often a relationship of short duration. Complaints by A against B to the PSNI about stalking behaviour (frequent presence near A's house, or place of employment, following A etc) may be transformed by the inventive malevolence of B into instances of abusive behaviour by A: "she's trying to get me into trouble."

Competence Issue: extraterritoriality

I have one concern about legislative competence arising from clause 10 in the current draft of the Bill.

In essence, I am concerned that Clause 10 (behaviour occurring outside the UK) purports to penalise acts occurring outside Northern Ireland that are not criminalised in the country in which they take place. By section 6 (2) (a) of the Northern Ireland Act 1998, a provision is outside Assembly's legislative competence if it would form part of the law of a country or territory other than Northern Ireland. Making behaviour criminal in territory where that behaviour is not otherwise criminal seems to me to offend against that limitation.

In providing for penal consequences for behaviour, clause 10 operates to 'form part of the law' of the country in question. In my view, 'forming part of the law' is a broad concept, not restricted to formally or explicitly altering that country's statute book. If clause 10 were in force, a person who is a UK national or ordinarily resident in Northern Ireland doing an act in, for example, France or the Republic of Ireland experiences a legal consequence not there before the coming into force of clause 10. He or she can be prosecuted before a court in Northern Ireland for a course of behaviour that may not be criminal in France or the Republic of Ireland.

Specifically, in the Republic of Ireland, section 39 of the Domestic Violence Act 2018 creates an offence of coercive control which is limited to control of spouses, civil partners or those in intimate relationships, past or present. This Bill proposes that the domestic abuse offence can be committed by one family member abusing another – a brother abusing his sister, for example.

Clause 10, as presently drafted, proposes that a UK national living in Dublin could be prosecuted in Northern Ireland for domestic abuse of his sister who lives with him – all his actions taking place in Dublin – even though, at present, the legislation in the Republic of Ireland does not criminalise that

behaviour (noting that there may be elements of behaviour which might, separately constitute offences).

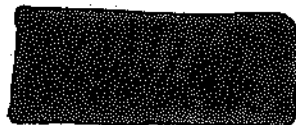
To the extent that the behaviour by the UK national is not criminal in Dublin, the Assembly would be purporting to enact a provision that would 'form part of the law' applying in the Republic of Ireland (even though the clause does not, of course, amend the Domestic Violence Act 2018).

Article 44 of the Istanbul Convention requires the UK to establish jurisdiction over the offences addressed by the Convention when the offence is committed by a UK national or by someone who is habitually resident in the UK.

Article 44(3) provides that for certain offences, the extra territorial jurisdiction must not be 'subordinated to the condition that the acts are criminalised in the territory where they are committed'. These are sexual violence, including rape, forced marriage, female genital mutilation, forced abortion and forced sterilisation. This means that for offences which are not specified, such as the proposed offence of domestic abuse, it is acceptable to only claim extra territorial jurisdiction when an act is already criminalised in that jurisdiction.

Conclusion

This Bill is, generally, to be welcomed. If there are any specific issue which arise for the Committee as a result of this submission or otherwise, I am very happy to engage further.



John F Larkin QC,

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