



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Advice to the Department of Justice:
Domestic Abuse and Family
Proceedings Bill**

June 2020

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Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC):

- 2.8 continues to call on the UK Government to ratify the Istanbul Convention and advises the Department to continue to work with the UK Government on achieving this goal, including ensuring that the resulting Domestic Abuse and Family Proceedings Act is comprehensive and compliant with the Istanbul Convention.**
- 2.13 advises that the Department considers Article 8 of the Istanbul Convention when allocating financial resources to combat domestic abuse. The NIHRC recommends that the Department ensures that the protection and support for victims in Northern Ireland adopt a victim-centered approach and do not create an inequality in provision across jurisdictions.**
- 2.14 advises that without providing provision for a Domestic Abuse Commissioner, the Department needs to find alternative ways of fulfilling obligations contained within the Istanbul Convention concerning data collection and research, awareness-raising, education and training of professionals.**
- 2.18 recommends that the Department commits to reviewing the introduction of Domestic Abuse Protection Notice and Domestic Abuse Protection Orders within an agreed timeframe and that the Department continues to engage with the voluntary and community sector on these matters. The NIHRC further recommends that the Department continues to monitor all additional measures in place in the rest of the UK, for possible implementation in NI through the future Miscellaneous Provisions Bill.**
- 2.21 recommends the Department introduces a specific criminal offence of stalking and ensures effective protection for victims or potential victims of stalking in Northern Ireland without further delay, to ensure compliance with the Istanbul Convention.**

- 2.25 recommends the Department introduces a specific criminal offence of upskirting in Northern Ireland and ensures effective protection of victims or potential victims without further delay, to ensure compliance with the Istanbul Convention.**
- 3.7 advises the Department to ensure that the Bill specifically states that the provisions within apply, regardless of an individual's immigration status.**
- 3.12 recommends the Department consider including reference to gender-based violence in clause 1 as a form of domestic abuse.**
- 3.16 recommends that the Department widens the definition of clause 5 to include for example individuals living together without the need for any form of intimate relationship, live-in carers within a private home and guardians.**
- 3.17 advises that clause 5(3) be extended to unequivocally include family relationships such as an uncle, aunt, niece, nephew or cousin.**
- 3.23 recommends that safeguards are introduced to ensure clauses 8 and 9 are implemented in such a way that the best interests of the child are a primary consideration. This includes only requiring that evidence is obtained directly from the child victim or relevant child when necessary and that it is obtained in a child-friendly manner. It includes the child victim or relevant child only providing evidence directly to the court when it is necessary, that it is set up in an age-appropriate manner and that consideration is given to alternatives such as live links where appropriate. It also includes providing age-appropriate psycho-social counselling to the child victim or relevant child before, during and after the trial.**
- 3.26 welcomes the extra-territorial application of the Bill regarding perpetrators, as set out in clause 10, and advises that this provision is retained, in line with the Istanbul Convention.**

- 3.33** advises the Department to be cautious regarding clause 10 and to ensure that effective safeguards are in place to prevent misuse of this clause by perpetrators, to the detriment of the victim. This requires particular consideration of the potential vulnerabilities of the victim that require special protection, such as women, children and persons with disabilities. It also requires consideration of whether the burden of proof should instead rest with the defence to prove beyond reasonable doubt that the utilising the defence is necessary and proportionate. The NIHRC recommends consulting with sector experts and victims on this specific issue.
- 3.36** advises the Department that it should be satisfied that in providing for this exception that the best interests of the child are a primary consideration and that it contains sufficient safeguards to ensure that this exception cannot be misused in cases of family breakdown and disputes around child contact, where the child may be used as a weapon in such cases.
- 3.44** advises that, in line with Article 6 ECHR and Article 14 UN ICCPR, clause 21 should only be utilised in exceptional circumstances. The NIHRC recommends that clause 21 is amended to reflect this by referencing necessity and proportionality, with the legitimate aim of protecting the victim, as guiding principles for when this clause can be utilised.
- 3.50** welcomes the provision for special measures in clause 22. The NIHRC recommends that the principle of reasonable accommodation is inserted into clause 22 and implemented in consultation with the individual victim, when determining what special measures are appropriate in each case.
- 3.53** continues to call on the Department to progress implementation of the Gillen Report Recommendations. The NIHRC recommends the Department consider facilitating, where necessary, pre-recorded cross-examination outside court settings for vulnerable individuals and include provision for this within clause 26.

- 4.3 recommends that the Department works with the relevant public authorities and civil society organisations to systematically collect and publish data on domestic abuse that is disaggregated by sex, gender, ethnicity, disability and age. It should also record the journey of abuse investigations through the criminal justice system, including number of initial reports, number of referrals to the Public Prosecution Service, how many reach different stages of the court process, how many prosecutions, what is the resulting remedy and how many repeat offences.**
- 4.5 recommends the Department provide emergency funding to organisations supporting domestic abuse victims in accordance with the recent surge in cases, as a result of lockdown and in line with the rest of the UK.**

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (NIHRC), pursuant to section 69(3) of the Northern Ireland Act 1998 the NIHRC shall advise the Executive Committee of the Assembly of legislative and other measures which ought to be taken to protect human rights. Furthermore, under section 69(1) of the Northern Ireland Act 1998, the NIHRC reviews the adequacy and effectiveness of law and practice relating to the protection of human rights in Northern Ireland (NI). In accordance with these functions, the following statutory advice is submitted to the Committee of Justice regarding the Domestic Abuse and Family Proceedings Bill.
- 1.2 The NIHRC bases its advice on the full range of internationally accepted human rights standards, including the European Convention on Human Rights, as incorporated by the Human Rights Act 1998, and the treaty obligations of the Council of Europe (CoE) and United Nations (UN). The relevant regional and international treaties in this context include:
- European Convention on Human Rights (ECHR);¹
 - CoE Convention on Preventing and Combating Violence against Women (Istanbul Convention);²
 - UN Convention on Civil and Political Rights (UN ICCPR);³
 - UN Convention on Elimination of Discrimination against Women (UN CEDAW);⁴
 - UN Convention against Torture (UN CAT);⁵
 - UN Convention on the Rights of the Child (UN CRC);⁶ and
 - UN Convention on the Rights of Persons with Disabilities (UN CRPD).⁷

¹ Ratified by the UK 1951. Further guidance is also taken from the body of case law from the European Court of Human Rights (ECtHR).

² Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention), 11 April 2011.

³ Ratified by the UK 1966.

⁴ Ratified by the UK 1986.

⁵ Ratified by the UK 1988.

⁶ Ratified by the UK 1989.

⁷ Ratified by the UK in 2009.

1.3 In addition to these treaty standards, there exists a body of 'soft law' developed by the human rights bodies of the CoE and UN. These declarations and principles are non-binding, but provide further guidance in respect of specific areas. The relevant standards in this context include:

- UN CAT Committee Concluding Observations 2019;⁸
- UN CEDAW Committee Concluding Observations 2019;⁹
- UN Human Rights Committee General Comment 32;¹⁰ and
- UN Declaration on the Elimination of Violence against Women.¹¹

1.4 The NIHRC welcomes the legislation to bring Northern Ireland in line with the rest of the UK and Ireland in terms of domestic abuse legislation.

1.5 The NIHRC welcomes the opportunity to provide advice on the Domestic Abuse and Family Proceedings Bill.

2.0 General Comments on the Bill

Istanbul Convention

2.1 New figures show that incidences of domestic violence were at an all-time high in Northern Ireland before the start of the Covid-19 lockdown in March and have increased since. The Police Service NI revealed that they have received at least 3,755 calls related to domestic abuse since the lockdown began.¹² Pre-lockdown domestic incidents and crimes were already running at a 15 year high.¹³ In 2018/19, the Police Service NI recorded 18,640 domestic abuse crimes, which equates to 51 such crimes per day. The represented an increase of 2,476 (15.3 percent) from

⁸ CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019.

⁹ CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report', 8 March 2019.

¹⁰ CCPR/C/GC/32, 'UN Human Rights Committee General Comment No 32: Article 14 on the Right to Equality Before the Courts and Tribunals and to a Fair Trial', 23 August 2007, at para 29.

¹¹ UN General Assembly, 'Declaration on the Elimination of Violence against Women', 20 December 1993.

¹² NI Statistics and Research Agency, 'Domestic Abuse Calls Received by Police in Northern Ireland Weekly Management Information on Domestic Abuse Calls Received by Police Service NI since Covid-19 Lockdown Measures were Introduced on 23 March 2020' (NISRA, 2020).

¹³ NI Statistics and Research Agency, 'Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland Update to 31 March 2020' (NISRA, 2020).

2017/18.¹⁴

2.2 Articles 2 and Article 3 ECHR protects the right to life and freedom from torture, cruel, inhuman or degrading treatment and punishment.¹⁵ The European Court of Human Rights (ECtHR) has been clear that these provisions contain positive obligations to ensure these fundamental rights are protected. For example, the case of *Branko Tomasic v Croatia* (2009) was brought by the family of a mother and daughter shot by her husband before he committed suicide. The ECtHR held that there had been a violation of Article 2 ECHR, on account of the Croatian authorities' lack of appropriate steps to prevent the deaths of the child and his mother.¹⁶ The ECtHR noted that:

bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the Court is also careful, when considering positive obligations, not to interpret Article 2 in such a way as to impose an impossible or disproportionate burden on authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.

A positive obligation will arise where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid the risk.¹⁷

2.3 Furthermore, in the case *ES and Others v Slovakia* (2009) the ECtHR held

¹⁴ NI Statistics and Research Agency, 'Domestic Abuse Incidents and Crimes Recorded by the Police in Northern Ireland Update to 31 March 2020' (NISRA, 2020).

¹⁵ See also Article 7, UN International Covenant on Civil and Political Rights 1966; Article 2, UN Convention Against Torture 1984; Article 5, UN Convention on the Elimination of Discrimination against Women 1979.

¹⁶ *Branko Tomašić and Others v Croatia* (2009) ECHR 79.

¹⁷ *Ibid*, at paras 50-52.

that Slovakia had failed to provide the first applicant and her children with the immediate protection required against her husband's violence, in violation of Article 3.¹⁸

- 2.4 The UN Committee against Torture (UN CAT Committee) and UN Committee on the Elimination of Discrimination against Women (UN CEDAW Committee) have highlighted domestic abuse and violence as a persistent issue in the UK, including Northern Ireland.¹⁹ Both UN Committees have also highlighted the disproportionate impact on women and the need for gender sensitive policies to provide protection, prosecution and redress.²⁰
- 2.5 The UN CAT Committee in its 2019 Concluding Observations on the UK raised concerns of sexual and gender-based violence.²¹ The UN CAT Committee stated it is concerned about reports that State party officials are recording increasing numbers of domestic abuse crimes and sexual offences, mainly against women, while also recording low prosecution and conviction rates in these cases.²²
- 2.6 The UN CEDAW Committee in its 2019 Concluding Observations on the UK, noted "with particular concern the inadequacy of laws and policies to protect women in Northern Ireland (from gender-based violence)" and recommended that the UK ratify the Istanbul Convention.²³
- 2.7 The NIHRC welcomes the introduction of the Domestic Abuse and Family Proceedings Bill, as a step in the right direction towards implementing the UN Committees' recommendations and the Istanbul Convention.
- 2.8 **The NIHRC continues to call on the UK Government to ratify the Istanbul Convention and advises the Department to continue to work with the UK Government on achieving this goal, including**

¹⁸ *E S and Others v Slovakia* (2009) ECHR 1282.

¹⁹ CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at para 56; CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 29.

²⁰ *Ibid.*

²¹ *Ibid.*, at para 56.

²² *Ibid.*

²³ CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 29.

ensuring that the resulting Domestic Abuse and Family Proceedings Act is comprehensive and compliant with the Istanbul Convention.

Domestic Abuse Commissioner

- 2.9 A Designate Domestic Abuse Commissioner was introduced in England and Wales in 2019, with a view to putting on a statutory footing through enactment of the Domestic Abuse Bill. The Commissioner's role is to "provide public leadership on domestic abuse and play a key role in overseeing and monitoring the provision of domestic abuse services in England and Wales".²⁴ Within this it has a role in information gathering and joint working with public authorities and civil society.
- 2.10 The existence of such a role is reflective of the obligations in the Istanbul Convention concerning data collection and research (Article 11), awareness-raising (Article 13), education (Article 14), and training of professionals (Article 15). The UN CAT Committee and UN CEDAW Committee raised the need for improvements in these areas in their 2019 concluding observations on the UK, including Northern Ireland.²⁵
- 2.11 The NIHRC recognises the Justice Minister's reservations in introducing a Commissioner in Northern Ireland. The Department has argued the existent of close relationships with relevant statutory and voluntary sector organisations and a single police service which covers the entire jurisdiction as being reasons for such.²⁶ The Minister also highlighted that commissioners generally cost in the region of £1 million, money that could be invested in other services such as new advocacy support service or behavioural change programmes to address abusive behaviour.²⁷
- 2.12 Article 8 of the Istanbul Convention states regarding financial resources that:

²⁴ UK Government, 'Policy Paper: Domestic Abuse Commissioner Factsheet' (UK Gov, 2020)

²⁵ CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI', 7 June 2019, at paras 57(c) and 57(e); CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI', 14 March 2019, at para 30(b).

²⁶ NI Assembly, 'Official Report: Tuesday 28 April 2020 - Second Stage: The Domestic Abuse and Family Proceedings Bill (NIA Bill 03/17-22)' (NI Assembly, 2020).

²⁷ Ibid.

parties shall allocate appropriate financial and human resources for the adequate implementation of integrated policies, measures and programmes to prevent and combat all forms of violence covered by the scope of this Convention, including those carried out by non-governmental organisations and civil society.

- 2.13 **The NIHRC advises that the Department considers Article 8 of the Istanbul Convention when allocating financial resources to combat domestic abuse. The NIHRC recommends that the Department ensures that the protection and support for victims in Northern Ireland adopt a victim-centered approach and do not create an inequality in provision across jurisdictions.**
- 2.14 **The NIHRC advises that without providing provision for a Domestic Abuse Commissioner, the Department needs to find alternative ways of fulfilling obligations contained within the Istanbul Convention concerning data collection and research, awareness-raising, education and training of professionals.**

Domestic Abuse Protection Notices and Orders

- 2.15 Domestic Violence Protection and Protection Orders have been operational in England and Wales since 2014. The proposal is to eventually replace these with the broader reaching Domestic Abuse Protection Notices and Orders in England and Wales. These new Protection Notices and Orders are currently being piloted in England and Wales.
- 2.16 A Protection Notice is an emergency non-molestation and eviction notice, which can be issued to a perpetrator by the police when attending a domestic abuse incident. It is effective from the point of issue, and can be issued without the victim's consent. Within 48 hours of a Protection Notice being served, the police can apply to the Magistrates' Court for a Protection Order. This can prevent the perpetrator from returning to a residence and from having contact with the victim. The time limit for this with Domestic Violence Protection Orders is for up to 28 days, it is intended that the Domestic Abuse Protection Orders be flexible in its duration to ensure long-term protection where it is necessary and

proportionate.²⁸

2.17 The NIHRC recognises that the decision by the Minister to observe the operation and utility of Domestic Abuse Protection Notice and Domestic Abuse Protection Orders in England and Wales, before introducing in Northern Ireland.²⁹ The NIHRC recognises that the Minister committed to introduce these measures in Northern Ireland at a later stage through the introduction of a future Miscellaneous Provisions Bill.³⁰

2.18 The NIHRC recommends that the Department commits to reviewing the introduction of Domestic Abuse Protection Notice and Domestic Abuse Protection Orders within an agreed timeframe and that the Department continues to engage with the voluntary and community sector on these matters. The NIHRC further recommends that the Department continues to monitor all additional measures in place in the rest of the UK, for possible implementation in NI through the future Miscellaneous Provisions Bill.

Stalking

2.19 Clause 13 of the Bill sets out the alternative offences provision such as the Protection from Harassment (Northern Ireland) Order 1997. The Department has confirmed that stalking will be added to that list in due course, as the Minister has committed to introduce stalking legislation separately, later in the year.³¹

2.20 Article 34 of the Istanbul Convention, under the title of stalking, requires Parties to “take the necessary legislative or other measures to ensure that the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety, is criminalised”.

²⁸ Home Office, 'Policy Paper - Domestic Abuse Bill 2020: Overarching Factsheet' (HO, 2020).

²⁹ NI Assembly, 'Official Report: Tuesday 28 April 2020 - Second Stage: The Domestic Abuse and Family Proceedings Bill (NIA Bill 03/17-22)' (NI Assembly, 2020).

³⁰ Ibid.

³¹ Ibid.

- 2.21 **The NIHRC recommends the Department introduces a specific criminal offence of stalking and ensures effective protection for victims or potential victims of stalking in Northern Ireland without further delay, to ensure compliance with the Istanbul Convention.**

Upskirting

- 2.22 Article 40 of the Istanbul Convention requires Parties to:

take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction.

- 2.23 In England and Wales, the Voyeurism (Offences) Act 2019, which criminalises upskirting, came into force on 12 April 2019. Similar legislative provision has been made in Scotland through the Sexual Offences (Scotland) Act 2009.

- 2.24 There are no similar provisions that currently provide for the specific offence of upskirting in Northern Ireland.

- 2.25 **The NIHRC recommends the Department introduces a specific criminal offence of upskirting in Northern Ireland and ensures effective protection of victims or potential victims without further delay, to ensure compliance with the Istanbul Convention.**

3.0 Specific Clauses of the Bill

Clause 1: Domestic abuse offence

- 3.1 Article 3 of the Istanbul Convention defines domestic violence as “all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or

partners, whether or not the perpetrator shares or has shared the same residence with the victim”.

- 3.2 The NIHRC welcomes the introduction of an extensive statutory offence of domestic abuse that includes physical harm, psychological harm, violent behaviour, threatening behaviour and controlling behaviour. The NIHRC welcomes that the offence of controlling behaviour is expansive and includes economic control, in line with the Istanbul Convention.
- 3.3 The NIHRC recognises that the definition of the offence does not deviate from definitions in England, Wales and Scotland and that it addresses the gap that exists concerning coercive control.
- 3.4 Article 59 of the Istanbul Convention requires victims of violence against women and girls to be protected, regardless of their immigration status.
- 3.5 The UN CAT Committee has also made reference to “consider revising police practices that deter migrant women from seeking protection from the authorities in cases where they have been subjected to or are at risk of gender-based violence”.³²
- 3.6 For the Bill to be human rights compliant, the provisions must protect and support all individuals who experience domestic abuse, regardless of their immigration status.
- 3.7 **The NIHRC advises the Department to ensure that the Bill specifically states that the provisions within apply, regardless of an individual’s immigration status.**
- 3.8 The Istanbul Convention provides for the need to ensure specific protection for women against violence. Article 3 of the Istanbul Convention defines violence against women as:

all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or

³² CAT/C/GBR/CO/6, ‘UN CAT Committee Concluding Observations on the Sixth Periodic Report of the UK of Great Britain and NI’, 7 June 2019, at para 57(b).

suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

- 3.9 This definition is supported by Article 1 UN CEDAW, with the UN CEDAW Committee's General Comment No 35 confirming that special measures are required to ensure women are protected from violence.³³
- 3.10 Figures in Northern Ireland are not disaggregated, however, Women's Aid NI report that "about 90% of reported cases are perpetrated by men against women. It is estimated that one in four women will suffer domestic violence at some point".¹⁵
- 3.11 It is important that the statutory offence reflects the gendered impact of domestic violence and abuse, as such recognition will have positive implications for the way resources are allocated to support survivors.
- 3.12 **The NIHRC recommends the Department consider including reference to gender-based violence in clause 1 as a form of domestic abuse.**

Clause 5: Personal connection

- 3.13 Clause 5 sets out the meaning of personal connection between the victim and perpetrator. The NIHRC welcomes reference to a variety of intimate relationships including existing or former husband or wife, civil partners, co-habitees and otherwise intimate personal relationship. The NIHRC further welcomes there being no requirement to live or have lived in the same home. This is in line with Article 3 of the Istanbul Convention, which defines domestic violence as act that "occur... between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim".
- 3.14 Clause 5 refers only to those "living together, or have lived together, as if spouses of each other" or "are, or have been, otherwise in an intimate

³³ CEDAW/C/GC/35, 'UN CEDAW Committee General Comment No 35: Gender-based Violence against Women', 26 July 2017.

personal relationship with each other". Personal connection does not appear to extend to individuals that are living together or had been living together not as spouses or situations where an individual is or has been a live in carer (on a part-time or full-time basis) within a private home. The possibility of domestic violence and abuse cannot be ruled out in such scenarios. Article 3 of the Istanbul Convention also refers to domestic violence including violence "within the... domestic unit".

- 3.15 Clause 5(3) currently defines family connection for the purposes of domestic abuse as between parent, grandparent, child, grandchild, brother and sister. It also extends to half-siblings and stepchildren. However, Article 3 of the Istanbul Convention adopts a broader approach referring to acts of violence that "occur within the family or domestic unit". Obvious omissions of the family relationships that are missing are aunt, uncle, niece, nephew and cousin. There is also not a clear identified relationship that a guardian would fall into within clause 5.
- 3.16 **The NIHRC recommends that the Department widens the definition of clause 5 to include for example individuals living together without the need for any form of intimate relationship, live-in carers within a private home and guardians.**
- 3.17 **The NIHRC advises that clause 5(3) be extended to unequivocally include family relationships such as an uncle, aunt, niece, nephew or cousin.**

Clauses 8 and 9: Aggravating factors

- 3.18 Clause 8 provides for an aggravating factor where the victim is under 18 and clause 9 provides for aggravation where a relevant child has been involved.
- 3.19 Article 19 of the UN CRC requires that "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse".

- 3.20 The Preamble of the Istanbul Convention recognises that children are victims of domestic violence, including as witnesses of violence in the family. Articles 22, 23 and 26 of the Istanbul Convention also call for specialist support for children in such situations. This includes age-appropriate psycho-social counselling and ensuring that all supportive measures are based on the best interests of the child.
- 3.21 The NIHRC welcomes the purposes of clauses 8 and 9, as they are reflective of the specific impact that domestic abuse can have on children and deters the perpetrator from using children for the purposes of abusing the adult victim.
- 3.22 However, safeguards should be in place to protect children in terms of proving that this aggravating factor should be taken into account. These provisions should be implemented in such a way to ensure the best interests of the child involved are a primary consideration, reflecting Article 3(1) of the UN CRC.
- 3.23 **The NIHRC recommends that safeguards are introduced to ensure clauses 8 and 9 are implemented in such a way that the best interests of the child are a primary consideration. This includes only requiring that evidence is obtained directly from the child victim or relevant child when necessary and that it is obtained in a child-friendly manner. It includes the child victim or relevant child only providing evidence directly to the court when it is necessary, that it is set up in an age-appropriate manner and that consideration is given to alternatives such as live links where appropriate. It also includes providing age-appropriate psycho-social counselling to the child victim or relevant child before, during and after the trial.**

Clause 10: Behaviour occurring outside the UK

- 3.24 Clause 10 concerns “behaviour occurring outside of the UK” where offences within the Bill committed abroad by UK citizens can be prosecuted in Northern Ireland.
- 3.25 Article 44(1) of the Istanbul Convention states:

parties shall take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with... [the Istanbul Convention], when the offence is committed:

- a) In their territory; or
- b) On board a ship flying their flag; or
- c) On board an aircraft registered under their laws; or
- d) By one of their nationals; or
- e) By a person who has her or his habitual residence in their territory.

3.26 The NIHRC welcomes the extra-territorial application of the Bill regarding perpetrators, as set out in clause 10, and advises that this provision is retained, in line with the Istanbul Convention.

Clause 12: Defence on the grounds of reasonableness

3.27 Clause 12 of the Bill concerns “defence on the grounds of reasonableness”.

3.28 On the one hand, clause 12 is welcomed as it acknowledges the existence of difficult scenarios where the alleged perpetrator has withheld an individual’s access to bank accounts in a non-abusive way due to the alleged victim’s gambling addiction or due to a degenerative condition that increasingly and (up to a certain point) inconsistently affects the alleged victim’s mental capacity, such as dementia. However, there are concerns that this clause could be misused as a justification for abuse. There is the risk that particularly vulnerable victims that suffer from mental health issues or have disabilities and have inadequate legal support and representation could be disproportionately impacted by the implications of such a defence.

3.29 Article 16(5) UN CRPD requires that “States Parties shall put in place effective legislation and policies, including women-and-child-focused legislation and polices, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

- 3.30 The UN CEDAW Committee, in its 2019 Concluding Observations on the UK, made specific reference to the need to ensure that the UK's "laws and policies effectively protect women with disabilities from all forms of gender-based violence, and in particular violence perpetrated by their caregivers".³⁴
- 3.31 The UN CRPD Committee in its 2017 Concluding Observations on the UK raised concerns "about abuse, ill-treatment, sexual violence and exploitation of women, children, intersex persons and elderly persons with disabilities, and the insufficient measures to prevent all forms of exploitation, violence and abuse against persons with disabilities".³⁵
- 3.32 Clause 12(2)(b) places the burden of proof on the prosecution to "prove beyond reasonable doubt that the course of behaviour is not as described". Yet under clause 12(2)(a) the alleged perpetrator only has to provide evidence that "is enough to raise an issue as to whether the course of behaviour is as described". It may be more appropriate for the defendant to prove beyond reasonable doubt that the course of behaviour is as described.
- 3.33 **The NIHRC advises the Department to be cautious regarding clause 10 and to ensure that effective safeguards are in place to prevent misuse of this clause by perpetrators, to the detriment of the victim. This requires particular consideration of the potential vulnerabilities of the victim that require special protection, such as women, children and persons with disabilities. It also requires consideration of whether the burden of proof should instead rest with the defence to prove beyond reasonable doubt that the utilising the defence is necessary and proportionate. The NIHRC recommends consulting with sector experts and victims on this specific issue.**

Clause 17: Exception regarding the aggravation

³⁴ CEDAW/C/GBR/CO/8, 'UN CEDAW Committee Concluding Observations on the UK Eighth Periodic Report', 8 March 2019, at para 29(b).

³⁵ CRPD/C/GBR/CO/1, 'UN CRPD Committee Concluding Observations on the Initial Report of the UK of Great Britain and NI', 29 August 2017, at para 38.

- 3.34 Clause 17 provides that an offence committed by person "A" cannot be aggravated in relation to another person ("B") by reason of involving domestic abuse if, at the time of the commission of the offence, "B" was under 18 and "A" had responsibility for "B".
- 3.35 Article 3(1) UN CRC requires that the best interests of the child are a primary consideration.
- 3.36 **The NIHRC advises the Department that it should be satisfied that in providing for this exception that the best interests of the child are a primary consideration and that it contains sufficient safeguards to ensure that this exception cannot be misused in cases of family breakdown and disputes around child contact, where the child may be used as a weapon in such cases.**

Clause 21: No right to claim trial by jury

- 3.37 The NIHRC welcomes requirements to take special measures in order to protect the rights of victims.
- 3.38 Article 56 of the Istanbul Convention requires the necessary legislative or other measures are taken to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings. However, as required by the right to a fair trial, these special measures must strike a balance between protecting the victim and maintaining public scrutiny.
- 3.39 Article 6(1) ECHR provides for the right to a fair and public hearing. The ECtHR has observed:

the public character of proceedings protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6, a fair hearing.

- 3.40 However, the right to a public hearing is not absolute. Article 6(1) ECHR and Article 14(1) UN ICCPR both permit the exclusion of the press or the public from all or part of a trial, “where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.
- 3.41 Even where there is a high expectation of publicity, the ECtHR has recognised that it may:
- on occasion be necessary under Article 6 to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice.³⁶
- 3.42 The ECtHR has found a violation of Article 6(1) where the domestic authorities did not provide sufficient reasoning to demonstrate that closure of a court was necessary.³⁷
- 3.43 Article 14 ICCPR requires that a hearing be open to the public “apart from exceptional circumstances”.³⁸
- 3.44 **The NIHRC advises that, in line with Article 6 ECHR and Article 14 UN ICCPR, clause 21 should only be utilised in exceptional circumstances. The NIHRC recommends that clause 21 is amended to reflect this by referencing necessity and proportionality, with the legitimate aim of protecting the victim, as guiding principles for when this clause can be utilised.**

Clause 22: Special measures directions

- 3.45 The NIHRC welcomes provisions that victims will automatically be eligible for consideration of special measures when giving evidence. Clause 22

³⁶ *B and P v United Kingdom* (2001) ECHR 298, at para 37.

³⁷ *Chaushev and Others v Russia* (2016) ECHR 929, at para 24.

³⁸ CCPR/C/GC/32, ‘UN Human Rights Committee General Comment No 32: Right to Equality Before the Courts and Tribunals and To a Fair Trial’, 23 August 2007, at para 29.

makes provision for this by amending the Criminal Evidence (Northern Ireland) Order 1999 to include the offence of domestic abuse.

- 3.46 Article 56(1) of the Istanbul Convention requires the State to take measures to protect the rights and interests of victims in judicial proceedings by “enabling victims to testify, according to the rules provided by their internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available”.
- 3.47 The UN CAT Committee also highlighted that “complaints mechanisms and investigations require specific positive measures which take into account gender aspects in order to ensure that victims of abuses such as sexual violence and abuse, rape, marital rape, domestic violence, female genital mutilation and trafficking are able to come forward and seek and obtain redress”.³⁹
- 3.48 Article 5(3) UN CRPD requires that reasonable accommodation is made to ensure non-discrimination and equality for persons with disabilities. Article 2 UN CRPD defines reasonable accommodation as:
- necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.
- 3.49 The principle of reasonable accommodation has been developed in the context of persons with disabilities, but it offers an approach of best practice across a variety of scenarios, including taking into account the needs of victims of domestic abuse, which often differ depending on the individual involved.
- 3.50 **The NIHRC welcomes the provision for special measures in clause 22. The NIHRC recommends that the principle of reasonable**

³⁹ CAT/C/GC/3, ‘UN Committee against Torture General Comment No 3: Implementation of Article 14’, 13 December 2012, at para 33.

accommodation is inserted into clause 22 and implemented in consultation with the individual victim, when determining what special measures are appropriate in each case.

Clause 26: Prohibition of cross-examination in person

- 3.51 The NIHRC welcomes clause 26, which provides for a number of legislative amendments for the purpose of prohibiting cross-examination in family proceedings. It includes prohibiting cross-examination of any person who has been convicted, charged or cautioned with a specified offence to cross-examine in person a witness who is the alleged victim of that offence. It also includes prohibiting cross-examination of any persons protected by injunctions or where specified evidence is adduced that a person who is a party to the proceedings has engaged in behaviour that was abusive of a witness to whom that party is personally connected.
- 3.52 Some recommendations from the Gillen Review may also be relevant to court proceedings in domestic abuse cases. For example, Recommendation 2 requires the “introduction of early pre-recorded cross-examination, initially of children and vulnerable adults, to be conducted away from the court setting. In time, consideration should be given to extending this to include all complainants in serious sexual offences”.⁴⁰
- 3.53 **The NIHRC continues to call on the Department to progress implementation of the Gillen Report Recommendations. The NIHRC recommends the Department consider facilitating, where necessary, pre-recorded cross-examination outside court settings for vulnerable individuals and include provision for this within clause 26.**

4.0 Additional Non-Legislative Considerations

Disaggregated data

- 4.1 The UN CEDAW Committee in its 2019 concluding observations on the UK

⁴⁰ John Gillen, ‘Gillen Review Report into the Law and Procedures in Serious Sexual Offences in Northern Ireland Recommendations’ (DoJ, 2019).

recommended that the UK Government and NI Executive “systematically collect and publish data, disaggregated by sex, gender, ethnicity, disability and age, throughout the whole of its territory to inform policymaking and assess the impact of measures taken”.⁴¹

- 4.2 The NIHRC welcomes the data published by the Police Service NI on domestic abuse in Northern Ireland. However, the information gathered and how it is disaggregated can be improved.
- 4.3 **The NIHRC recommends that the Department works with the relevant public authorities and civil society organisations to systematically collect and publish data on domestic abuse that is disaggregated by sex, gender, ethnicity, disability and age. It should also record the journey of abuse investigations through the criminal justice system, including number of initial reports, number of referrals to the Public Prosecution Service, how many reach different stages of the court process, how many prosecutions, what is the resulting remedy and how many repeat offences.**

COVID-19 funding

- 4.4 Other governments within the UK have provided extra funding to organisations during the current crisis. The Scottish Government have provided £1.35 million to Scottish Women’s Aid and the UK Government committed an additional £28 million package for domestic violence victims and £3.8 million for community based domestic abuse and modern slavery services in England and Wales.⁴²
- 4.5 **The NIHRC recommends the Department provide emergency funding to organisations supporting domestic abuse victims in accordance with the recent surge in cases, as a result of lockdown and in line with the rest of the UK.**

⁴¹ CEDAW/C/GBR/CO/8, ‘UN CEDAW Committee Concluding Observations on the Eighth Periodic Report of the UK of Great Britain and NI’, 14 March 2019, at para 26(d).

⁴² Amnesty International UK, ‘Press Release: Northern Ireland with domestic violence at all-time high, funding urgently needed for frontline groups’, 18 May 2020.

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