

FROM THE OFFICE OF THE JUSTICE MINISTER



Minister's Office Block B,
Castle Buildings
Stormont Estate
Ballymiscaw
Belfast
BT4 3SG
Tel: 028 90522744
DoJ.MinistersOffice@justice-ni.x.gsi.gov.uk

Christine Darrah
Clerk to the Justice Committee
Northern Ireland Assembly
Parliament Buildings
Ballymiscaw
Stormont
Belfast BT4 3XX

18 May 2020

Dear Christine,

DOMESTIC ABUSE AND FAMILY PROCEEDINGS BILL: FOLLOW-UP TO ISSUES RAISED AT JUSTICE COMMITTEE BRIEFING AND SECOND STAGE DEBATE

Following officials' briefing to the Committee on the Domestic Abuse and Family Proceedings Bill it was agreed to follow up on provision for special leave for victims of domestic abuse and the robustness of the defence provisions. These issues were raised again during the second stage debate, as well as a number of other issues on which further information and clarification is provided below.

Special leave for victims of domestic abuse

Members noted during the oral briefing on 2 April that special leave for victims of domestic abuse was available elsewhere and asked if this could be considered for Northern Ireland. This point was raised again during the second stage debate. This is a matter that would fall within the remit of the Department for the Economy and the Minister has written to Minister Dodds seeking her views on this issue. As noted during the second stage debate the Minister is supportive of this issue being explored further, though continues to be keen that the domestic abuse offence is legislated for as soon as possible rather than delaying the Bill for the purpose of material amendments that could be dealt with in a future legislative vehicle.

Members will wish to note that Departments of Health and Justice published guidance, in November 2018, for employers on developing a workplace policy on domestic and sexual violence and abuse. This was developed in partnership with key stakeholders to provide advice on how employers across the public, private and voluntary sectors can develop increased awareness and more effective responses to domestic and sexual abuse, for the benefit of all staff. The Justice Minister has asked the Economy Minister to consider how her Department could help disseminate this guidance. The guidance can be accessed at:

www.justice-ni.gov.uk/publications/developing-workplace-policy-domestic-and-sexual-violence-and-abuse

Defence provision

During the Committee session on 2 April, a concern was raised that the defence provision was akin to that in England and Wales for their controlling and coercive behaviour offence and that this could result in vulnerable people being abused. At second stage, it was also queried whether the defence of having to “raise an issue” was sufficiently loose as to allow for victim blaming. It was also noted that Members would want to consider the defence in more detail, particularly the meaning of reasonableness.

Members may find it helpful to note that the new domestic abuse offence locally is not directly comparable to the controlling or coercive behavior offence in England and Wales. There, behaviour needs to have a serious effect on the victim, and, the accused needs to know or ought to know that the behaviour would have such an effect. In Northern Ireland, we consider that the offence itself is more robust and harm does not have to be caused for it to apply. This is important given that some people may ‘normalise’ coercive control or physical abuse particularly if it has been ongoing. Unlike the new offence for Northern Ireland, the controlling or coercive behaviour offence in England and Wales does not explicitly include physical abuse. The new offence locally is more akin to the Scottish domestic abuse offence, often hailed as the ‘gold standard’, and indeed goes further than this in some respects.

It is not considered that the defence provision will provide a charter to harm vulnerable people and would not cover deliberately harmful behaviour. It is a limited defence subject to a number of conditions. First, the defendant needs to be able to show that the course of behaviour was reasonable in the particular circumstances. The defence is aimed at situations where, for example, a spouse prevents their partner, who has a gambling addiction, from having access to a bank account, or limits the activities of a person with dementia. The behaviour could be viewed as controlling but its purpose is to prevent the person harming themselves.

The defendant must provide enough evidence to show that the course of behaviour was reasonable. The test to be satisfied in the defence is an objective one. A magistrates' court, or a jury in the Crown Court, would have to consider the defence and decide whether or not the defence has been made out. Would a reasonable person, in possession of the same information, consider the behaviour reasonable in the particular circumstances of the case? The evidential burden rests with the defendant and it is for the prosecution to demonstrate beyond reasonable doubt that the defence is not made out. In addition, if the defendant asserts that their behaviour was reasonable, the court will consider this against the full backdrop of the alleged offending behaviour. Therefore, if there are multiple occasions of alleged abusive behaviour, for example, it will be much harder to assert that any individual behaviour was reasonable in those circumstances.

Where the defence might assert, for example, that any control was part of the normal consensual agreed roles in the relationship, a decision will already have been taken to prosecute in the first place, there will need to be evidence why the behaviour is abusive, why the reasonable person could conclude it was likely to be harmful to the victim and that there was intention or recklessness to cause that harm. This would all form part of any rebuttal of the defence.

Members questioned whether the wording, "raise an issue" would allow for victim blaming. As set out above, it is not considered that this is the case. This wording is

also used in all other regions across Great Britain. Also the conditions set out above would also have to be applied. Having liaised with colleagues we are not aware of any difficulties caused by this in other jurisdictions. However, if Members have examples of this officials would of course be happy to consider this further.

Housing Allocation Scheme and Secure Tenancies

As Members will be aware, the Minister has written to the Minister for Communities, Deirdre Hargey MLA, to ask if the Housing Allocation Scheme, which her Department operates, could be amended to award housing points to victims intimidated as a result of domestic violence and abuse. The Minister also raised the issue relating to the granting of secure tenancies. We await a response from the Minister for Communities and will update the Committee on this in due course.

Further issues raised during Second Stage debate

Personal connection

It was noted that Members would want to consider further what is meant by being personally connected. For the purpose of clarity this covers family members, excluding young child parent relationships, as well as intimate relationships. Two people are personally connected if they:

- are, or have been, married to each other or civil partners;
- live together (or have lived together) as if spouses of each other;
- are, or have been, in an intimate personal relationship; or
- are family members.

An intimate personal relationship would cover relationships between two individuals (including young/teenage and same-sex relationships), although the relationship need not be sexual or necessarily long-term.

A family member will include a person's parent, grandparent, child, grandchild or sibling as well as the parent, grandparent, child, grandchild or sibling of the person that they are in a relationship with. It is considered essential that familial abuse is captured, as domestic abuse is not limited simply to intimate relationships. In addition, there is a need to align with the cross-Departmental seven year strategy which was agreed with key stakeholders and covers familial abuse. Members will also wish to note that around 35% of domestic abuse crimes involve a familial relationship. Familial abuse could capture abuse of older people, for example, when an adult child or grandchild takes on the role of a carer to their parent or grandparent or sibling abuse.

Members will be aware that the offence locally is wider than the offence in Scotland which does not include familial abuse. It also goes wider than the England and Wales offence by including ex-partners who are no longer living together. This is considered essential as we know that abuse continues, and often escalates, after a breakdown of a relationship. It is not considered that living together should be a requirement for abuse to occur.

Scope of abusive behaviour

It was noted during the debate that Members would want to consider the scope of abusive behaviour to ensure it is not too wide, causes ambiguity or is symbolic in nature. We know that perpetrators tailor their behaviour to cause the victim as much upset as possible and it may not be immediately obvious to outsiders or other family members.

The offence created by this Bill must ultimately come back to whether the behaviour is abusive. The detail in the Bill is intended to provide clarification in relation to what this may entail but in no way detracts from the fact that the crux of the offence is whether or not there is abusive behaviour. It is important to also note that there are a number of safeguards in place. A one off incident will not constitute an offence as there needs to be a pattern of behaviour. In addition, a reasonable person would need to consider that the course of behaviour would be likely to cause the person to suffer harm. As already

outlined at the beginning of the letter, there would also be a defence where a person can show that the course of behaviour was reasonable and evidence of this would need to be shown. It is therefore considered that through both the offence and defence there are a range of safeguards and conditions to be met that ensure the offence is robust and also that it cannot unnecessarily be evaded.

What coercive control is and what it is not

Abusive behaviour by an offender will include behaviour that is physically or sexually violent, threatening or has a range of effects on an individual. This includes making the victim feel subordinate, isolated, controlled and where their freedom of action is restricted. Importantly the description of abusive behaviour is not exhaustive and includes both direct behaviour towards the victim as well as their child or another person. The effects of the abusive behaviour may be such that the abuser makes the person feel frightened, humiliated or degraded, isolates them from family and friends or monitors their phone, e-mail or social media use. The abuser might also use mind games to make their victim question their sanity. It is intended that the guidance associated with the offence will provide further information in relation to this and be of assistance to operational organisations and interested parties. This will be developed in conjunction with both statutory and voluntary sector stakeholders.

Parental alienation

A query was raised during the debate as to whether parental alienation should be included in the definition of domestic abuse. The Bill does not provide for a definition of domestic abuse per but clearly sets out what is meant by abusive behaviour. It is considered that parental alienation could be captured by the new domestic abuse offence, depending on the specific circumstances of the case.

Harm not having to be proved/reasonable person test

It was asked during the debate whether harm not having to be proved was necessary given there is a reasonable person test which already provides a safeguard. These safeguards are in fact linked. The offence can be committed even if harm is not

committed, reflecting the resilience of the victim or the fact that for many the abusive behaviour has effectively become normalised. In proving the offence consideration will be given to whether a reasonable person would consider that the behaviour would be likely to result in harm to the person. Setting out in the legislation that actual harm does not have to be caused ensures that no doubt can creep in when the reasonable person is considering the likelihood of harm.

Aggravation where the victim is under 18

A query was raised as to why an aggravation where the victim is under 18 is needed. Members are aware that the domestic abuse offence does not apply where a person has parental responsibility for someone under 18 years of age, given the need not to cut across current child protection provisions. However, it is vital that provision is made to ensure that other relationships involving those under 18 are covered and that consideration can be given to the impact of abusive behaviour in sentencing. The offence itself would apply in relation to intimate relationships where the victim is under 18 or familial relationships where there is no parental responsibility, for example, sibling abuse.

Given the long-lasting and damaging impact of domestic abuse on young people, it is considered that the inclusion of aggravation for the types of scenarios highlighted above is appropriate. It will be for the police and the court to decide whether the child aggravator should apply, depending on the specific circumstances of the case. A public interest test would also be considered by the Public Prosecution Service in terms of bring forward charges.

Alternative available for conviction

It was queried why the alternative available for conviction is needed and why a person would not meet the threshold for the domestic abuse offence.

In some domestic abuse offence cases the court may not be satisfied that the accused committed the offence. This might be because the personal connection could not be

proved. The Bill provides that the person can be convicted of a specified alternative offence, if there is enough evidence to prove that offence. This is intended to make the provisions as robust as possible.

The alternative offences are the offence of harassment and putting people in fear of violence under Articles 4(1) and 6(1) of the Protection from Harassment (Northern Ireland) Order 1997. Stalking offences would also be included in due course.

Individuals could potentially be charged with both the domestic abuse offence and an alternative offence or offences from the outset if considered appropriate and dependant on the particular circumstance of the case.

It was also asked whether the alternative available for conviction provision could be used by barristers to try and get the accused a lesser charge of harassment. It is considered that if the court is satisfied that the accused committed the domestic abuse offence that they will be charged and convicted of this.

Provisions are too detailed

It was suggested that the offence provisions are too detailed and should be simplified. Members will wish to note that, regardless of the detail provided in clause two (which is explanatory and supplementary) that the basis of the offence remains whether or not there is abusive behaviour. More generally the details are considered essential to cover the whole ground on which the offence is based. Less detail, rather than more, would risk loopholes or uncertainties regarding what is or is not abusive. This is especially true where relevant effects are in play.

Robustness of legislation

It was queried whether the legislation is robust and watertight enough to protect victims and not be used as a tool by perpetrators. We consider that it is, on the basis that there are a number of conditions that must apply before the test for the offence is met (a course of abusive behaviour (on two or more occasions and the public interest test for prosecution met); the two individuals are personally connected; a reasonable person

FROM THE OFFICE OF THE JUSTICE MINISTER



would consider the behaviour likely to cause harm and the accused intends to cause the other person to suffer harm or is reckless to this). There are also safeguards associated with the defence as set out earlier.

We would of course welcome any specific concerns, or examples that Members have on why they consider that the offence or defence is not robust enough in order that officials, along with our legal experts, can consider these in detail.

I trust that Members will find this helpful as part of their consideration during Committee stage of the Bill.

Departmental Assembly
Liaison Officer (DALO)