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9 September 2020

Dear Christine,

Domestic Abuse and Family Proceedings Bill

During the oral evidence session on the provisions of the Domestic Abuse and Family Proceedings Bill on 3 September 2020, officials agreed to provide further information, as set out in your subsequent letter of 4 September 2020. Please see below a response to each point.

Clause 3 – *Whether the Westminster model includes this or a similar clause and whether the wording is the same.*

Clause 3 outlines that the effects of the abusive behaviour, (such as dependency, subordination, isolation and control), do not have to have caused harm in order for an offence to occur. Rather, as set out in Clause 1, it is sufficient that a reasonable person would consider that the behaviour would be likely to result in harm. This is intended to cover situations where a victim may not consider that they have been harmed, effectively due to either their resilience or abusive behaviour being 'normalised'. This is in line with the Scottish Domestic Abuse offence. This is considered a critical aspect of the Bill in terms of ensuring that obvious abusive behaviour is criminalised even where the individual may not be considered that harm has been caused or be aware that they have

been subject to domestic abuse. As noted during the Committee session this was the case for the Hart family, who had been subject to controlling and coercive behaviour by their father for years prior to him killing his wife and daughter.

The position in the Bill differs from the offence in England and Wales (section 76 of the Serious Crime Act 2015) which captures controlling and coercive behaviour by an intimate partner or, a family member or a previous intimate partner who lives with the victim. For the offence to occur there, behaviour needs to have a serious effect on the victim, and, the accused needs to know or ought to know (i.e. a reasonable person with the same information would know) that the behaviour would have such an effect. Harm has to be proven. The behaviour of the accused has a serious effect where it causes a person to fear, on at least two occasions, that violence will be used or it causes a person serious alarm or distress which has a substantial adverse effect on their usual day-to-day activities. It is considered that the position in the local Bill, which also reflect that adopted in Scotland, is more comprehensive and will provide greater protection to those that are subject to domestic abuse, which may have been ongoing for some time.

Clause 8 – *An update regarding the implementation of the recommendation in the Gillen Review in relation to contact orders and child arrangements in the context of domestic abuse.*

This recommendation was for the introduction of a judicial Practice Direction in Northern Ireland, similar to one which supports family court procedural rules in England and Wales, and therefore is for the judiciary to consider.

By way of background, the Practice Direction in England and Wales sets out what a court hearing a private law application in relation to a child is required to do in a case in which it is alleged or admitted, or there is other reason to believe, that the child, or a party, has experienced domestic abuse perpetrated by another party, or that there is a risk of such abuse. The Gillen Review noted that this Practice Direction was intended to deal with a difficulty that had arisen in that jurisdiction as a result of their statutory presumption that

the involvement of a parent in a child's life is likely to further the child's welfare. While there is not the same statutory presumption in Northern Ireland, the Gillen Report made the recommendation "out of an abundance of caution".

Clause 9 – *Whether the provision in the Scottish legislation adopts the same approach as this clause in relation to the aggravation applying where "a child sees, hears or is present" and whether there is any difference in the wording of the clause.*

In line with clause 9, section 5 of the Domestic Abuse (Scotland) Act 2018 provides that the domestic abuse offence is so aggravated if a child sees, hears, or is present during an incident of behaviour that A directs at B as part of the course of behaviour.

It is considered that the offence locally, in relation to child aggravation, is wider than the Scottish offence in that there is no requirement for a reasonable person to consider that the behaviour would adversely impact on a child or that the child has to live with the victim or offender. The requirement in the Bill is simply that the child sees, hears or is present. Given this, there is no associated condition, in that a child does not have to be aware of the abusive behaviour.

The Department is also of the view that the Scottish provisions do not extend to abuse that occurs outside the home, that is where a child lives in another household from that in which the violence occurs, rather it is about the extent to which evidence of the impact on the child is needed.

Clause 11 – *Further details of the proposed amendment, confirmation that the Department intends to bring the amendment forward and the draft wording.*

Officials are continuing discussions with colleagues in the Department of Health around the format of an amendment to child protection provisions (contained in health legislation but amendment of which could be brought forward through the Domestic Abuse Bill subject to agreement) to make it explicit that where a child is ill-treated, that this would

also include non-physical abuse. Such provision would make clear that it would be an offence whether the suffering or injury caused to a child was physical or psychological in nature, for example isolation, humiliation or bullying. While the draft provision is not yet available we will advise the Committee on this as soon as possible.

Clause 22 – *An update on the Lord Chief Justice’s response in relation to the proposed amendment, confirmation that the Department intends to bring the amendment forward and the draft wording.*

As the Committee is aware, the Minister wrote to the Lord Chief Justice on 30 July to seek his views on potential amendments to require court rules to make specific provision in relation to special measures in family and civil proceedings for victims of domestic abuse and other offences. Similar provision is now included in the Westminster Domestic Abuse Bill.

The Lord Chief Justice’s response was received by the Department on 2 September. The Chief Justice noted that the proposed amendments are primarily policy matters for the Department and the need for consideration of the funding and operational impact of any future court rules on special measures. As the response did not raise any issues from the judicial perspective in relation to the substance of the provision being considered, the Minister has decided to proceed to bring these amendments forward. The proposed amendments would create a requirement for court rules to make specified provision in relation to special measures in family and civil proceedings (as detailed below) and the operational and other implications would be considered in advance of any court rules being made of foot of such provision.

While the technical detail of the proposed amendments is still being considered, it is intended that they will require the following provision to be made in court rules.

- (1) Provision to enable a court hearing family proceedings to make a special measures direction in relation to a party or witness who is a victim of domestic

abuse carried out by another party or witness in the proceedings; and to require a court to assume that the quality of the victim's evidence or their participation in the proceedings will be diminished, so that the court will be required to consider whether to make a direction for special measures to assist them (subject to an opt-out). This will, in effect, require court rules to provide for victims of domestic abuse to be automatically eligible for consideration for special measures in family proceedings, to bring family courts in line with the provision in the Bill in relation to automatic eligibility of victims of domestic abuse for consideration for special measures in criminal courts.

- (2) Provision to enable a court hearing civil proceedings to make a special measures direction in relation to a party or witness in civil proceedings who is a victim of certain offences (to be specified in secondary legislation), where the court is satisfied that this is likely to diminish the quality of their evidence, or otherwise affect their participation in the proceedings.

The Department also intends to take forward an amendment to the Bill to provide for a court hearing civil proceedings to have a discretionary power to prohibit cross-examination in person. This provision will broadly replicate for civil proceedings the provision in clause 26 of the Bill (in new Article 11E to be inserted in the Family Law (Northern Ireland) Order 1993), giving a court hearing family proceedings a discretionary power to prohibit cross-examination in person if certain conditions are met. The proposed amendment will be limited to a judicial discretion rather than including any automatic ban due to the much broader types of case that come within the scope of civil proceedings. Also mirroring the provision in clause 26 in relation to family proceedings, it is intended that the proposed amendment will give a court hearing civil proceedings the power to appoint a legal representative funded by the Department to carry out the cross-examination instead and that guidance will be issued about the scope and nature of their role in the proceedings.

As compared to family proceedings, it is anticipated there would be relatively few civil cases involving a victim of domestic abuse or other offences where this is likely to impact on the quality of their evidence, etc. However, for completeness, the Department considers that there is merit in taking this opportunity to make provision for civil proceedings also.

The Department also proposes to make a minor amendment to clause 26 to require a court considering whether to exercise its discretionary power to prohibit cross-examination in person to have regard to findings of fact made in civil or criminal proceedings, as well as family proceedings (new Article 11G, paragraph (5)(d) and (e) refers).

The Department will share the draft wording of the proposed amendments with the Committee as soon as possible.

Proposed amendment to amend Article 12A of the Children (NI) Order 1995

In the supplementary table, still to be considered by the Committee, the Department advised of another proposed amendment to the Bill in relation to family proceedings. This would amend Article 12A of the Children (Northern Ireland) Order 1995 in consequence of the new domestic abuse offence and the child aggravator. As the Department of Finance is responsible for the substantive private family law, the proposed amendment has been agreed with the Minister of Finance.

Article 12A of the 1995 Order presently requires a court hearing contact or residence proceedings to consider whether a child has suffered, or is at risk of suffering, harm, through seeing or hearing ill treatment of another person. This applies where the party applying for the order has had a non-molestation order made against them, or the court is considering making one. An inconsistency could arise if a court is specifically required to have regard to harm (or the risk of harm) to a child caused by seeing or hearing domestic abuse where a non-molestation order has been made by a family court but not where a party has been convicted by a criminal court of the new domestic abuse offence



and the child aggravator applied. In view of this, the Department intends to bring forward an amendment to the Bill to amend Article 12A, so that a court considering an application for a contact or residence order will be specifically required to have regard to the conviction of the party applying for the order for the new domestic abuse offence (or another offence), where the child aggravator has been applied. A copy of the draft wording is attached at **Appendix A**.

I hope this response is helpful and I would be grateful if you would bring this to Members' attention.

Yours sincerely,

**Departmental Assembly
Liaison Officer (DALO)**

Proposed amendment to amend Article 12A of the Children (NI) Order 1995

Domestic Abuse and Family Proceedings Bill

Amendments for Consideration Stage

Minister of Justice

Amendment 1

New clause

Before clause 26 insert—

‘Factors relevant to residence and contact orders

A26.—(1) In the Children (Northern Ireland) Order 1995, in Article 12A (residence and contact orders and domestic violence) ~~□~~

(a) in paragraph (1), after “in favour of” insert “~~□~~—

(a) any person, the court shall have regard to any conviction of the person for a domestic abuse offence involving the child,

(b) ”,

(b) after paragraph (1) insert ~~□~~—

“(1A) For the purposes of paragraph (1)(a), a domestic abuse offence involving the child is ~~□~~—

(a) an offence under section 1 of the Domestic Abuse and Family Proceedings Act (Northern Ireland) 2020 if ~~□~~—

(i) the offence is aggravated as provided for in section 9 of that Act, and

(ii) the aggravation of the offence relates to the child, or

(b) an offence of any kind (apart from one under section 1 of that Act) if ~~□~~—

(i) the offence is aggravated as provided for in section 15 of that Act, and

(ii) the child is not the person against whom the offence was committed but the aggravation of the offence relates to the child.”,

(c) in paragraph (2), for “paragraph (1)” substitute “paragraph (1)(b)”,

(d) in paragraph (3), after “Article 3” insert “(and in that paragraph neither sub-paragraph limits the effect of the other sub-paragraph)”.’