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Domestic Abuse and Family Proceedings Bill

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This Bill Paper discusses the provisions of the Domestic Abuse and Family Proceedings Bill.

This paper comprises research material only. Nothing in the paper should be taken as legal interpretation or a substitute thereof.

Key Points

The Domestic Abuse and Family Proceedings Bill was introduced in the Northern Ireland Assembly on 31 March 2020. The Bill provides for:

- A new offence of domestic abuse
- A definition of abusive behaviour, which includes coercive control
- A domestic abuse aggravator for sentencing
- The prohibition of a person charged with domestic abuse to trial by jury
- Special measures for the protection of witnesses in domestic abuse criminal proceedings
- Prevention of cross-examination of witnesses by persons accused of domestic abuse in criminal and family proceedings

The Bill is modelled closely on the Scottish legislation, particularly the Domestic Abuse (Scotland) Act 2018. However, the relationship referred to in relation to domestic abuse in the 2018 Act is a 'partner or ex-partner', whereas there is a broader relationship provided for in the Bill, as 'personally connected'.

In England and Wales and the Republic of Ireland, rather than a specific domestic abuse offence, the approach has been to increase sentencing for domestic abuse in relation to existing offences and to introduce an offence of coercive control.

A Domestic Abuse Bill in the Westminster Parliament includes a number of provisions that are not in the Northern Ireland Bill. These include the following:

- A Domestic Abuse Commissioner
- Domestic Abuse Protection Notices and Orders
- Secure tenancies for victims of domestic abuse

Concerns have also been raised in relation to a defence of 'reasonable behaviour', intended to allow for control in instances of mental health or addiction issues, but may be open to abuse.

Executive Summary

The Domestic Abuse and Family Proceedings Bill was introduced in the Northern Ireland Assembly. The Bill contains the following provisions:

- Domestic abuse offence: Such an offence exists in Scotland, but not in the Republic of Ireland or England and Wales.
- Definition of abusive behaviour: Scotland has such a definition in relation to an offence; in the Republic of Ireland the definition relates to a domestic violence aggravator; the Domestic Abuse Bill at Westminster defines domestic abuse for England and Wales.
- Coercive control included in the definition: The other jurisdictions have coercive control legislation in place.
- Domestic abuse aggravator: Scotland and the Republic have a statutory domestic abuse or violence aggravator.
- Domestic abuse aggravator in relation to a child: Scotland has the same provision; other jurisdictions have aggravators in relation to children, but not specific to domestic abuse.
- Prohibition to the right to trial by jury.
- Prohibition of personal cross-examination of witnesses in criminal and family proceedings: This is the case on Scotland for criminal proceedings and is to be introduced in family proceedings by the Children (Scotland) Bill; the provision for criminal proceedings exists in the Republic of Ireland; for family proceedings only in England and Wales.
- Provision of support measures for witnesses: This is the case in Scotland and the Republic of Ireland and is provided for in the Domestic Abuse Bill at Westminster.
- Extra-territorial jurisdiction: This is the case for the domestic abuse offence in Scotland; the Domestic Abuse Bill provides for such in relation to named offences, there being no domestic abuse offence in England and Wales.

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1 Introduction

The Domestic Abuse and Family Proceedings Bill was introduced in the Northern Ireland Assembly on 31 March 2020¹. The purpose of the Bill is to:

create a course of conduct offence and a sentencing aggravation concerning domestic abuse and make rules as to procedure and giving evidence in criminal cases involving domestic abuse; and prevent cross-examination in person of certain witnesses in particular circumstances in family proceedings in the civil courts

This paper provides background to the Bill and places this in the context of developments in domestic abuse legislation elsewhere. The paper summarises the provisions of the Bill and makes some comparison with other jurisdictions. There then follows some discussion on what is not in the Bill.

¹ Domestic Abuse and Family Proceedings Bill: <http://www.niassembly.gov.uk/assembly-business/legislation/2017-2022-mandate/primary-legislation---bills-2017---2022-mandate/domestic-abuse-bill/>.

2 Background to the Bill

The UK has signed, but not ratified, the Council of Europe Convention on preventing and combating violence against women and domestic violence (known as the Istanbul Convention)². Article 33 of the Convention states:

Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats is criminalised.

Recognising that coercive control is often a precursor to domestic violence³, legislation to criminalise such behaviour has been enacted in the Republic of Ireland,⁴ Scotland⁵ and in relation to the law of England and Wales.⁶

Responsibility for policy relating to domestic and sexual abuse in Northern Ireland lies jointly with the Department of Justice and the Department of Health. Policy direction is derived from the 2016 Stopping Domestic and Sexual Violence and Abuse in Northern Ireland seven-year strategy⁷.

The Strategy has five strands:

1. Driving Change through Co-operation and Leadership
2. Prevention and Early Intervention
3. Delivering Change through Responsive Services
4. Support
5. Protection and Justice

The draft Year 4 Action Plan for the Strategy includes the following legislative commitments⁸:

- Strand 4: Introduce a new Domestic Abuse Offence and statutory aggravator⁹

² Council of Europe Convention on preventing and combating violence against women and domestic violence: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>.

³ See Research and Information Service Research Paper 3/19 *The Criminalisation of Coercive Control*, 28 June 2020: <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2017-2022/2019/justice/0319.pdf>.

⁴ Domestic Violence Act 2018: <http://www.irishstatutebook.ie/eli/2018/act/6/enacted/en/html>.

⁵ Domestic Abuse (Scotland) Act 2018: <http://www.legislation.gov.uk/asp/2018/5/contents/enacted>.

⁶ Serious Crime Act 2015: <http://www.legislation.gov.uk/ukpga/2015/9/contents/enacted>.

⁷ Department of Justice and Department of Health (2016), *Stopping Domestic and Sexual Violence and Abuse in Northern Ireland - A Seven Year Strategy*, March 2016, Belfast: DoJ and DoH: <https://www.justice-ni.gov.uk/publications/stopping-domestic-and-sexual-violence-and-abuse-northern-ireland-seven-year-strategy-march-2016>.

⁸ Department of Justice and Department of Health (2019), *Stopping Domestic and Sexual Violence and Abuse Strategy - Draft Year 4 Action Plan*, Belfast: DoJ and DoH: <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/Year%204%20draft%20Action%20Plan%20Stopping%20Domestic%20and%20Sexual%20Violence%20and%20Abuse%20Strategy.pdf>.

⁹ Priority 20: Continue to develop and deliver initiatives and interventions, based on best practice, to effectively address harmful, violent and abusive behaviour.

- Strand 5: Introduce Domestic Violence Protection Notices and Domestic Violence Protection Orders in Northern Ireland¹⁰

The Department of Justice consulted on a domestic abuse offence and domestic violence disclosure scheme in 2016¹¹. Responses to the consultation were overwhelmingly in favour of an offence, to include coercive and controlling behaviour, and of a disclosure scheme¹². The disclosure scheme was introduced in Northern Ireland in March 2016 without the need for legislation¹³.

During the time the Assembly was not sitting, the UK Government sought to legislate on domestic abuse for Northern Ireland in the Domestic Abuse Bill 2017-19¹⁴. The Bill fell with the dissolution of Parliament in 2019.

The Domestic Abuse Bill 2019-21 was introduced into the House of Commons in March 2020¹⁵ after the restoration of the Northern Ireland Assembly, so does not contain the same provisions for Northern Ireland as the previous Bill¹⁶.

The Domestic Abuse and Family Proceedings Bill was introduced in the Northern Ireland Assembly on 31 March 2020.

¹⁰ Priority 18: Focused protection, support and information will be available for all victims throughout their engagement with the Justice System.

¹¹ Department of Justice Domestic Abuse Offence and Domestic Violence Disclosure Scheme consultation: <https://www.justice-ni.gov.uk/consultations/domestic-abuse-offence-and-domestic-violence-disclosure-scheme>.

¹² Department of Justice (2016), Justice Domestic Abuse Offence and Domestic Violence Disclosure Scheme – A Consultation: Summary of Responses.

¹³ Department of Justice (2018), *Domestic Violence and Abuse Disclosure Scheme Northern Ireland (DVADS NI) Guidance*, March 2018: <https://www.justice-ni.gov.uk/publications/domestic-violence-and-abuse-disclosure-scheme>.

¹⁴ Domestic Abuse Bill 2017-19, Clauses 57-65: <https://services.parliament.uk/bills/2017-19/domesticabuse.html>.

¹⁵ Domestic Abuse Bill 2019-21: <https://services.parliament.uk/Bills/2019-21/domesticabuse.html>.

¹⁶ Clause 61 of the 2019-21 Bill still provides for extra-territorial jurisdiction in relation to certain offences for residents of Northern Ireland.

3 Provisions of the Domestic Abuse and Family Proceedings Bill

The section contains summaries of the provisions of the Bill.

Domestic Abuse Offence

Clause 1 provides for an offence of domestic abuse. This offence requires three conditions to be met:

1. Abusive behaviour towards another person
2. A personal connection between the person being abused and the perpetrator
3. That;
 - a. A reasonable person would consider the behaviour to cause physical or psychological harm; and
 - b. Either the perpetrator intends the behaviour to cause harm, or is reckless as to whether it causes harm.

Clause 2 defines abusive behaviour to include behaviour that is:

- Violent
- Threatening
- Has the intention or effect of:
 - Making the person dependent or subordinate to the perpetrator
 - Isolating the person from friends, family or other sources of social interaction or support
 - Controlling, regulating or monitoring day to day activities
 - Depriving or restricting freedom of action
 - Making the person feel frightened, humiliated, degraded, punished or intimidated

The violence can be sexual or physical and the behaviour described can be aimed at the person, a child of the person or 'someone else'.

Clause 3 provides that the behaviour does not necessarily have the effects set out above to be considered abusive.

Clause 4(2) defines behaviour to include:

- Saying or otherwise communicating as well as doing something
- Intentionally failing to do or communicate something

A 'course of behaviour' is behaviour on at least two occasions.

Clause 4(3) defines 'directed at a person' to include conduct relating to the person's ability to acquire, use or maintain money or property or acquire goods or services, including by use of a third party.

Clause 5 defines a 'personal connection' as two people who:

- Are or have been married to each other
- Are or have been in a civil partnership with each other
- Are or have been living together 'as if spouses' of each other
- Are or have been in an intimate relationship
- Are members of the same family

Clauses 6 and 7 relate to the establishment of a 'personal connection' by notice by a prosecutor in relation to a domestic abuse charge.

Clause 8 and 9 provide for aggravation where a child is involved, where:

- Abusive behaviour is directed at the child; or
- The child is used to facilitate the abuse.

Clause 10 provides that offences committed outside the UK are treated as if they had taken place in Northern Ireland.

Clause 11 provides for an exception to aggravation in relation to a child where the accused has a caring responsibility for the child, as legislation in relation to child abuse is more appropriate in this instance.

Clause 12 provides for exceptions where a course of behaviour may be reasonable, such as where interventions may be necessary in cases of mental illness or addiction.

Clause 13 provides that, should domestic abuse not be proven, that alternatives may be available for conviction, i.e. on other charges.

Clause 14 provides for the maximum penalty for the domestic abuse offence:

- 12 months on summary conviction
- 14 years on indictment

Clauses 15 to 20 provide for aggravation as to domestic abuse.

Criminal Cases and Family Proceedings Involving Domestic Abuse

Clause 21 amends the Magistrates' Courts (Northern Ireland) Order 1981¹⁷ to exclude anyone charged with a summary offence of domestic abuse from a right to a trial by jury.

Clause 22 amends the Criminal Evidence (Northern Ireland) Order 1999¹⁸ to entitle a witness to assistance on grounds of fear or distress about testifying. Special measures provided for in the 1999 Order are:

- Screening the witness from the accused (Article 11)
- Evidence given by live link (Article 12)
- Evidence given in private (Article 13)
- Removal of wigs and gowns by court officials (Article 14)
- Video recorded evidence (Article 15)
- Video recorded cross-examination (Article 16)
- Examination of a witness through an intermediary (Article 17)
- Aids to communication (Article 18)

Clause 23 amends the 1999 Order to prohibit a person charged with a domestic violence offence from cross-examining a victim in person in criminal proceedings.

Clause 24 amends the 1999 Order to reflect the definition of domestic abuse in the Bill.

Clause 25 empowers the Department of Justice to issue guidance in relation to the domestic abuse offence and domestic abuse more generally.

Clause 26 amends the Family Law (Northern Ireland) Order 1993¹⁹ to prohibit a person cautioned, charged or convicted with a domestic violence offence, or in respect of whom there is a relevant injunction, from cross-examining a victim in person in family proceedings.

¹⁷ Magistrates' Courts (Northern Ireland) Order 1981: <http://www.legislation.gov.uk/nisi/1981/1675/contents>.

¹⁸ Criminal Evidence (Northern Ireland) Order 1999: <http://www.legislation.gov.uk/nisi/1999/2789/contents>.

¹⁹ Family Law (Northern Ireland) Order 1993: <http://www.legislation.gov.uk/nisi/1993/1576/contents>.

4 The Provisions of the Domestic Abuse and Family Proceedings Bill Compared

This section compares the provisions of the Bill with provisions elsewhere intended to have the same or similar effect.

Domestic Abuse Offence

Clause 1 provides for the offence of domestic abuse:

The domestic abuse offence

- 1.—(1) A person (“A”) commits an offence if—
- (a) A engages in a course of behaviour that is abusive of another person (“B”),
 - (b) A and B are personally connected to each other at the time, and
 - (c) both of the further conditions are met.
- (2) The further conditions are—
- (a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm, and
 - (b) that A—
 - (i) intends the course of behaviour to cause B to suffer physical or psychological harm, or
 - (ii) is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.
- (3) The references in this section to psychological harm include fear, alarm and distress.
- (4) The offence under this section is to be known as the domestic abuse offence.

This mirrors the provisions of Section 1 of the Domestic Abuse (Scotland) Act 2018, except that in the Scottish legislation the perpetrator has to be a ‘partner or ex-partner’, whereas in the Bill, the relationship is one of ‘personally connected’.

A 'personal connection' is defined in Clause 5 of the Bill as:

Meaning of personal connection

5.—(1) This section has effect for the purposes of this Chapter.

(2) Two people (“A” and “B”) are personally connected to each other if any of these applies—

- (a) they are, or have been, married to each other,
- (b) they are, or have been, civil partners of each other,
- (c) they are living together, or have lived together, as if spouses of each other,
- (d) they are, or have been, otherwise in an intimate personal relationship with each other, or
- (e) they are members of the same family.

(3) They are members of the same family—

- (a) if B is A’s parent, grandparent, child, grandchild, brother or sister, or
- (b) if—
 - (i) one of them is in a relevant relationship with someone else (“C”), and
 - (ii) the other of them is C’s parent, grandparent, child, grandchild, brother or sister.

(4) One person is in a relevant relationship with someone else if—

- (a) they are married to, or are civil partners of, each other, or
- (b) they are living together as if spouses of each other.

(5) In determining family membership—

- (a) a relationship of the half blood or by affinity is to be treated as a relationship of the whole blood, and
- (b) a stepchild of a person is to be treated as the person’s child.

The Domestic Violence Act 2018 in the Republic of Ireland does not provide for an offence of domestic abuse or domestic violence, but Section 39 provides for the offence of ‘coercive control’. This applies in relation to a ‘relevant person’, who is a spouse, civil partner or is in an intimate relationship.

In England and Wales, there is no specific domestic violence offence, criminal prosecution being pursued through general offences. Section 76 of the Serious Crime Act 2015²⁰ provides for the offence of controlling or coercive behaviour in an intimate or family relationship. Clause 1 of the Domestic Abuse Bill in Westminster provides for a definition of ‘domestic abuse’ in relation to a ‘connected person’, defined in Clause 2 as in the Northern Ireland Bill, but with the difference of ‘they are relatives’ instead of ‘members of the same family’ and the addition of two people who:

- Have agreed to marry one another
- Have or have had parental responsibility for the same child

²⁰ Serious Crime Act 2015: <http://www.legislation.gov.uk/ukpga/2015/9/section/76/enacted>.

Abusive Behaviour

Clause 2 provides for the definition of 'abusive behaviour':

What amounts to abusive behaviour

2.—(1) This section contains provision for determining for the purposes of this Chapter when behaviour of a person (“A”) is abusive of another person (“B”).

(2) Behaviour that is abusive of B includes (in particular)—

- (a) behaviour directed at B that is violent,
- (b) behaviour directed at B that is threatening,
- (c) behaviour directed at B, at a child of B or at someone else that—
 - (i) has as its purpose (or among its purposes) one or more of the relevant effects, or
 - (ii) would be considered by a reasonable person to be likely to have one or more of the relevant effects.

(3) The relevant effects are of—

- (a) making B dependent on, or subordinate to, A,
- (b) isolating B from friends, family members or other sources of social interaction or support,
- (c) controlling, regulating or monitoring B’s day-to-day activities,
- (d) depriving B of, or restricting B’s, freedom of action,
- (e) making B feel frightened, humiliated, degraded, punished or intimidated.

(4) In subsection (2)—

- (a) the reference in paragraph (a) to violent behaviour includes both sexual violence and physical violence,
- (b) in paragraph (c), “child” means a person under 18 years of age.

(5) None of the paragraphs of subsection (2) or (as the case may be) (3) is to be taken to limit the meaning of any of the other paragraphs of that subsection.

Clause 3 provides that the behaviour does not have to actually cause harm to be abusive. Clause 4 provides that the behaviour can be communicated or done, conduct towards property or undertaken through a third party.

The definition in the Bill resembles that of Section 2 in the Scottish legislation, except that:

- The Scottish legislation includes behaviour that is ‘intimidating’
- The Scottish legislation does not contain the provision at Clause 2(5) of the Bill.

The Domestic Violence Act 2018 in the Republic of Ireland provides for aggravation where a ‘relevant person’ commits an offence defined in other legislation²¹ (Section 40) and also provides for the offence of coercive control, which is defined as behaviour that is ‘controlling or coercive’, (Section 39(1)(a)).

²¹ Criminal Law (Rape) Amendment Act 1990: <http://www.irishstatutebook.ie/eli/1990/act/32/enacted/en/html>; and Non-Fatal Offences Against the Person Act 1997: <http://www.irishstatutebook.ie/eli/1997/act/26/enacted/en/html>.

The Domestic Abuse Bill at Westminster defines ‘abusive behaviour’ as follows (Clause 1(3)):

- physical or sexual abuse;
- violent or threatening behaviour;
- controlling or coercive behaviour;
- economic abuse;
- psychological, emotional or other abuse.

This can be a course of behaviour or a single incident, whereas the Northern Ireland domestic abuse offence stipulates a course of behaviour that takes place on two or more occasions (Clause 4(4)).

Aggravation

Clauses 8 and 9 provide for aggravation in relation to a child.

Aggravation where victim is under 18

8.—(1) It may be specified as an allegation alongside a charge of the domestic abuse offence against a person (“A”) that the offence is aggravated by reason of the person in relation to whom the offence is alleged to have been committed (“B”) having been under 18 years of age at the time of any of the behaviour constituting the offence.

Aggravation where relevant child is involved

9.—(1) It may be specified as an allegation alongside a charge of the domestic abuse offence against a person (“A”) that the offence is aggravated by reason of involving a relevant child.

(2) For the purposes of subsection (1), the domestic abuse offence is aggravated by reason of involving a relevant child if—

- (a) at any time in the commission of the offence—
 - (i) A directed behaviour at the child, or
 - (ii) A made use of the child in directing behaviour at B, or
- (b) the child saw or heard, or was present during, an incident of behaviour which A directed at B as part of the course of behaviour.

These provisions mirror those of Section 5 of the 2018 Act in Scotland.

The 2018 Act in the Republic of Ireland does not contain provisions for aggravation in relation to a child in a context of domestic abuse.

The legislation in England and Wales does not contain provisions for aggravation in relation to a child in a domestic violence context, although the impact on a child is

included in sentencing guidelines relating to domestic abuse²². There is a specific offence of causing physical harm to a child in a domestic setting provided for by the Domestic Violence, Crime and Victims Act 2004²³.

Clause 15 provides for a general aggravator in relation to domestic abuse.

Aggravation as to domestic abuse

15.—(1) It may be specified as an allegation alongside a charge of an offence against a person (“A”) that the offence is aggravated by reason of involving domestic abuse.

(2) An offence as mentioned in subsection (1) does not include the domestic abuse offence (see section 1).

(3) Subsection (4) applies where— (a) an allegation of aggravation is specified as mentioned in subsection (1), and (b) the aggravation as well as the charge is proved.

(4) The court must—

(a) state on conviction that the offence is aggravated by reason of involving domestic abuse,

(b) record the conviction in a way that shows that the offence is so aggravated,

(c) in determining the appropriate sentence, treat the fact that the offence is so aggravated as a factor that increases the seriousness of the offence, and

(d) in imposing sentence, explain how the fact that the offence is so aggravated affects the sentence imposed.

Clause 16 replicates the conditions in Clause 1 relating to the domestic abuse offence and Clause 18 replicates the provisions for personal connection in Clause 5.

The general aggravation provision in Scotland is in the Abusive Behaviour (Scotland) Act 2016²⁴. The provisions of Section 1 of the 2016 Act are considered when: *libelled in an indictment or specified in a complaint that an offence is aggravated by involving abuse of the partner or ex-partner of the person committing it*. The actions of the court detailed in Section 1(5) of the 2016 Act are then reflected at Clause 15(4)(a) to (d) of the Northern Ireland Bill.

As stated above, the general domestic violence aggravator is provided for by Section 40 of the Domestic Violence Act 2018 and there is no general statutory domestic abuse aggravator for England and Wales, although aspects of an abusive relationship are included in guidelines to be taken into account in sentencing²⁵.

²² ‘Domestic Abuse’, Sentencing Council website, accessed 6 April 2020: <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/domestic-abuse/>.

²³ Section 5, Domestic Violence, Crime and Victims Act 2004: <https://www.legislation.gov.uk/ukpga/2004/28/contents>.

²⁴ Abusive Behaviour (Scotland) Act 2016: <http://www.legislation.gov.uk/asp/2016/22/contents/enacted>.

²⁵ Domestic Abuse’, Sentencing Council website, accessed 6 April 2020: <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/domestic-abuse/>.

Extra-Territorial Jurisdiction

Clause 10 provides that abusive behaviour outside the UK is treated as if it took place in Northern Ireland.

Behaviour occurring outside the UK

10.—(1) If—

- (a) a person’s course of behaviour consists of or includes behaviour occurring in a country outside the United Kingdom,
- (b) the course of behaviour would constitute the domestic abuse offence if it occurred in Northern Ireland, and
- (c) the person is a United Kingdom national or is habitually resident in Northern Ireland,

the person commits the domestic abuse offence as if the course of behaviour occurred in Northern Ireland.

(2) In this section— “country” includes territory, “United Kingdom national” means an individual who is—

- (a) a British citizen, a British overseas territories citizen, a British National (Overseas) or a British Overseas citizen,
- (b) a person who under the British Nationality Act 1981 is a British subject, or
- (c) a British protected person within the meaning of that Act.

Extra-territorial jurisdiction is provided for in relation to the domestic abuse offence in Scotland by Section 3 of the Domestic Abuse (Scotland) Act 2018.

There being no offence of domestic abuse in the Republic of Ireland and England and Wales, there is no specific extra-territorial jurisdiction for domestic abuse in those jurisdictions. However, Clause 60 of the Domestic Abuse Bill at Westminster provides for such in relation to murder, manslaughter, offences relating to bodily harm, poisoning or child destruction and Clause 61 provides for the same for Northern Ireland.

Criminal Proceedings

Clauses 21 to 24 of the Bill amend existing legislation in order to safeguard from further abuse victims and witnesses in criminal proceedings associated with domestic abuse. Article 29 of the Magistrates' Courts (Northern Ireland) Order 1981²⁶ provides for exceptions to the right to trial by jury for certain summary offences. Clause 21 adds the domestic abuse offence to this list to prevent the use of the trial by jury as a means for further abuse or intimidation by a perpetrator.

Article 5 of the Criminal Evidence (Northern Ireland) Order 1999 provides for special measures for witnesses on the grounds of fear or distress about testifying in cases of a

²⁶ Magistrates' Courts (Northern Ireland) Order 1981: <http://www.legislation.gov.uk/nisi/1981/1675/contents>.

sexual offence, slavery or human trafficking offences. Clause 22 adds the domestic abuse offence to this list.

Special protection measures are provided for in other jurisdictions by the following:

- Scotland: Criminal Procedure (Scotland) Act 1995 (Section 271H)
- England and Wales: Youth Justice and Criminal Evidence Act 1999 (Sections 23-30)
- Republic of Ireland: Criminal Justice (Victims of Crime) Act 2017 (Section 19)

The Scottish and Irish legislation includes special measures for domestic abuse cases and the Domestic Abuse Bill at Westminster provides for the same for England and Wales. Table 1 summarises the special measures for each of the jurisdictions.

Table 1: Special Measures in Northern Ireland, Scotland, Republic of Ireland and England and Wales

	Northern Ireland (Art,5 1999 Order)	Scotland (S.271H 1995 Act)	Republic of Ireland (S.19 2017 Act)	England and Wales (S.23-30 1999 Act)
Screening	Yes	Yes	Yes	Yes
Live link	Yes	Yes	Yes	Yes
Evidence in private	Yes	Yes	Yes	Yes
Removal of wigs and gowns	Yes	No	No ²⁷	Yes
Video recorded evidence	Yes	Yes	No	Yes
Video recorded cross-examination	Yes	Yes	No	Yes
Examination through intermediary	Yes	Yes	Yes	Yes

²⁷ But Section 23(3)(b) provides for the removal of wigs and gowns in civil proceedings in a District Court.

Aids to communication	Yes	No	No	Yes
Supporter	No	Yes	No	No
Prior statement	No	Yes	No	No
Direction re questions about private life	No	No	Yes	No

Clause 23 amends the Criminal Evidence (Northern Ireland) Order 1999²⁸ to prohibit cross-examination of a witness in criminal proceedings relating to domestic abuse by anyone charged in connection with the case. This is a measure to prevent the use of cross-examination as a means of further abuse or intimidation.

Prohibition of cross-examination in person

23.—(1) The Criminal Evidence (Northern Ireland) Order 1999 is amended as follows.

(2) After Article 22 insert—

“Complainants in proceedings involving domestic abuse

22A. No person charged with an offence involving domestic abuse (see Article 3A) may in any criminal proceedings cross-examine in person a witness who is the complainant, either—

(a) in connection with that offence, or

(b) in connection with any other offence (of whatever nature) with which that person is charged in the proceedings.”.

Article 23 of the 1999 Order prohibits cross examination of a child witness with anyone charged in connection with certain offences. Clause 23(3) adds domestic violence to this list.

Section 288DC of the Criminal Procedure (Scotland) Act 1995 prohibits the conduct of defence by the accused in domestic abuse cases. In the Republic of Ireland, Section 16 of the Domestic Violence Act 2018 provides for a prohibition of cross-examination by the applicant or respondent. In England and Wales, Rule 23.4 of the Criminal Procedure Rules²⁹ gives the court discretion whether to prohibit cross-examination of a witness by a defendant in person, but there is no outright prohibition in criminal proceedings.

²⁸ Criminal Evidence (Northern Ireland) Order 1999: <http://www.legislation.gov.uk/nisi/1999/2789/contents>.

²⁹ The Criminal Procedure Rules 2015: <http://www.legislation.gov.uk/uksi/2015/1490/contents/made>.

Family Proceedings

Clause 26 amends the Family Law (Northern Ireland) Order 1993³⁰ to prohibit cross-examination of a victim or witness by the accused, as with the provisions relating to criminal law. In this case, the insertion in the Order is more extensive than a simple amendment, as a similar measure does not exist in family law in Northern Ireland.

Clause 4 of the Children (Scotland) Bill³¹ amends the Vulnerable Witnesses (Scotland) Act 2004³² to provide for the prohibition on the personal conduct of a case where a non-harassment order (or similar) is in place or where a person is being or has been prosecuted with a relevant offence, including domestic abuse.

In the Republic of Ireland, Section 16 of the Domestic Violence Act 2018, discussed above in relation to criminal proceedings, refers to prohibition of cross-examination in ‘a court’. In Section 2 of the Act (Interpretation), “*court*” means *the District Court or the Circuit Court*.

Clause 59 of the Domestic Abuse Bill at Westminster makes provision to amend the Matrimonial and Family Proceedings Act 1984³³ to prohibit in family courts cross-examination of an alleged victim of an offence by a person convicted, charged or cautioned in relations to that offence and *vice versa*.

A table showing the provisions of the Bill in comparative context is in the appendix.

³⁰ Family Law (Northern Ireland) Order 1993: <http://www.legislation.gov.uk/nisi/1993/1576/contents>.

³¹ Children (Scotland) Bill: <https://www.parliament.scot/parliamentarybusiness/Bills/112632.aspx>.

³² Vulnerable Witnesses (Scotland) Act 2004: <http://www.legislation.gov.uk/asp/2004/3/contents>.

³³ Matrimonial and Family Proceedings Act 1984: <http://www.legislation.gov.uk/ukpga/1984/42>.

5 Issues and Challenges

Issues have been raised in relation to legislation in Northern Ireland and provision in other regions of the UK³⁴. This section looks at:

- Reasonable behaviour defence
- Domestic Abuse Commissioner
- Domestic Abuse Protection Notices and Orders
- Secure tenancies in cases of domestic abuse

Reasonable Behaviour Defence

Clause 12 provides for a defence on the grounds that behaviour may be reasonable under certain circumstances.

Defence on grounds of reasonableness

12.—(1) In proceedings in respect of a charge against a person (“A”) of the domestic abuse offence, it is a defence for A to show that the course of behaviour was reasonable in the particular circumstances.

(2) That is shown if—

- (a) evidence adduced is enough to raise an issue as to whether the course of behaviour is as described in subsection (1), and
- (b) the prosecution does not prove beyond reasonable doubt that the course of behaviour is not as described in subsection (1).

This reflects the provisions of Section 6 of the Domestic Abuse Act in Scotland. In England and Wales, a defence is provided for on the basis of ‘best interests’ (Section 76(8) of the Serious Crime Act 2015).

- (8) In proceedings for an offence under this section it is a defence for A to show that—
- (a) in engaging in the behaviour in question, A believed that he or she was acting in B’s best interests, and
 - (b) the behaviour was in all the circumstances reasonable.

The Domestic Violence Act 2018 in the Republic of Ireland does not contain such a provision.

³⁴ For example, Women’s Aid Federation Northern Ireland, *Briefing Paper February 2020*.

The Explanatory and Financial Memorandum to the Bill states with reference to Clause 12³⁵:

This clause provides that it is a defence for the accused to show that the course of behaviour was, in the particular circumstances, reasonable. This may apply where, for example, the accused acted to prevent their partner from associating with certain persons or frequenting certain places if they are recovering from alcohol or drug addiction or to restrict their freedom of movement for their own safety due to the effects of suffering from dementia.

Subsection (2) allows for the accused to adduce evidence that is enough to raise an issue as to whether the course of behaviour was reasonable, with the prosecution then needing to disprove this version of events.

Nothing in this clause affects the broader requirement for the prosecution to prove beyond reasonable doubt that the offence has been committed.

In the consultation in relation to the Scottish legislation, the objection was raised that this is open to manipulation, for example, against³⁶:

- Women with disabilities, where the perpetrator is the carer.
- Women with health problems, including those with mental health conditions.
- Women with substance abuse problems

Domestic Abuse Commissioner

Clauses 3 to 17 of the Domestic Abuse Bill at Westminster provide for a Domestic Abuse Commissioner. The functions of the Commissioner are provided for by Clause 6.

³⁵ Domestic Abuse and Family Proceedings Bill Explanatory and Financial Memorandum, p.11:

<http://www.niassembly.gov.uk/assembly-business/legislation/2017-2022-mandate/primary-legislation---bills-2017---2022-mandate/domestic-abuse-bill/efm---as-introduced/>.

³⁶ Lucy Robertson (2016), *Criminal Offence of Domestic Abuse Analysis of Consultation Responses*, Edinburgh: Scottish Government, p.28: <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-analysis/2016/09/criminal-offence-domestic-abuse-analysis-consultation-responses/documents/00505326-pdf/00505326-pdf/govscot%3Adocument/00505326.pdf?forceDownload=true>.

6 General functions of Commissioner

- (1) The Commissioner must encourage good practice in—
- (a) the prevention of domestic abuse;
 - (b) the prevention, detection, investigation and prosecution of offences involving domestic abuse;
 - (c) the identification of— (i) people who carry out domestic abuse; (ii) victims of domestic abuse; (iii) children affected by domestic abuse;
 - (d) the provision of protection and support to people affected by domestic abuse.
- (2) The things that the Commissioner may do in pursuance of the general duty under subsection (1) include—
- (a) assessing, monitoring, and publishing information about, the provision of services to people affected by domestic abuse;
 - (b) making recommendations to any public authority about the exercise of its functions; (c) undertaking or supporting (financially or otherwise) the carrying out of research;
 - (d) providing information, education or training;
 - (e) taking other steps to increase public awareness of domestic abuse;
 - (f) consulting public authorities, voluntary organisations and other persons;
 - (g) co-operating with, or working jointly with, public authorities, voluntary organisations and other persons, whether in England and Wales or outside the United Kingdom.

The Commissioner's remit extends to Wales only in areas that are not devolved functions. Legislation in Wales provides for a National Advisor to the Welsh Government³⁷. The functions of the National Advisor are provided for in Section 21 of the Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015:

21 Functions of the Adviser

- (1) The National Adviser is to exercise the following functions, subject to the direction of the Welsh Ministers—
- (a) to advise the Welsh Ministers about pursuing the purpose of this Act or tackling related matters (see subsection (2));
 - (b) to give other assistance to the Welsh Ministers in their pursuit of the purpose of this Act or tackling related matters;
 - (c) to undertake research relating to pursuing the purpose of this Act, tackling related matters or examining whether abuse of any kind is related directly or indirectly to inequality of any kind between people of a different gender, gender identity or sexual orientation;
 - (d) to advise and give other assistance, with the agreement of the Welsh Ministers, to any person on matters relating to pursuing the purpose of this Act or tackling related matters;
 - (e) produce reports on any matter relating to the purpose of this Act or tackling related matters.

³⁷ Section 20, Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015: <http://www.legislation.gov.uk/anaw/2015/3/contents>.

New Domestic Abuse Protection Notices and Orders

Clauses 19 to 23 of the Domestic Abuse Bill at Westminster provide for Domestic Abuse Protection Notices. The purpose of a Domestic Abuse Protection Notice is to secure the immediate protection of a victim of domestic abuse from future abuse carried out by a suspected perpetrator. The Notice prohibits the perpetrator from abusing the victim and, where they cohabit, may require the perpetrator to leave those premises. It may also prohibit the perpetrator from coming within a specified distance of the premises where the victim lives³⁸.

Clauses 24 to 44 of the Domestic Abuse Bill provide for Domestic Abuse Protection Orders.

24 Meaning of “domestic abuse protection order”

(1) In this Part a “domestic abuse protection order” is an order which, for the purpose of preventing a person (“P”) from being abusive towards a person aged 16 or over to whom P is personally connected—

- (a) prohibits P from doing things described in the order, or
- (b) requires P to do things described in the order.

Application is made to the court automatically by a senior police officer where a Protection Notice is in place, but application can also be made by the individual, by other courts in the course of proceedings or by other persons defined in Regulations.

While there is a range of protections available in England and Wales, including the Domestic Violence Protection Notices and Orders³⁹ on which the provisions in the Bill are modelled, the Bill will provide for protections on a wider basis⁴⁰.

In 2018, the Scottish Government consulted on protective orders for people at risk of domestic abuse⁴¹ and committed in 2019 to introduce legislation to provide for such orders⁴².

In the Republic of Ireland, the Domestic Violence Act 2018 provides for Safety Orders (Section 6), Barring Orders (Section 7), Interim Barring Orders (Section 8), Emergency Barring Orders (Section 9) and Protection Orders (Section 10).

³⁸ Domestic Abuse Bill, Explanatory Notes, p.22.

³⁹ Provided for by Section 24 to 33 of the Crime and Security Act 2010: <http://www.legislation.gov.uk/ukpga/2010/17/contents>.

⁴⁰ Domestic Abuse Bill, Explanatory Notes, p.7.

⁴¹ Scottish Government Consultation on Protective Orders for People at Risk of Domestic Abuse, December 2018: <https://www.gov.scot/publications/consultation-protective-orders-people-risk-domestic-abuse/pages/2/>.

⁴² Consultation on protective orders for people at risk of domestic abuse, Feedback Updated 15 October 2019: <https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/>.

Secure Tenancies in Cases of Domestic Abuse

Clause 65 of the Domestic Abuse Bill at Westminster inserts new provisions into the Housing Act 1985⁴³ to provide for secure tenancies for victims of domestic abuse. This is the case for victims who are either tenants or joint tenants on with flexible tenancies.

81ZA Grant of secure tenancies in cases of domestic abuse

(1) This section applies where a local housing authority grants a secure tenancy of a dwelling-house in England before the day on which paragraph 4 of Schedule 7 to the Housing and Planning Act 2016 (grant of new secure tenancies in England) comes fully into force.

(2) The local housing authority must grant a secure tenancy that is not a flexible tenancy if—

(a) the tenancy is offered to a person who is or was a tenant of some other dwelling-house under a qualifying tenancy (whether as the sole tenant or as a joint tenant), and

(b) the authority is satisfied that—

(i) the person or a member of the person's household is or has been a victim of domestic abuse carried out by another person, and

(ii) the new tenancy is granted for reasons connected with that abuse.

(3) The local housing authority must grant a secure tenancy that is not a flexible tenancy if—

(a) the tenancy is offered to a person who was a joint tenant of the dwelling-house under a qualifying tenancy, and

(b) the authority is satisfied that—

(i) the person or a member of the person's household is or has been a victim of domestic abuse carried out by another person, and

(ii) the new tenancy is granted for reasons connected with that abuse.

Such provisions are not in legislation in Scotland or the Republic of Ireland.

⁴³ Housing Act 1985: <http://www.legislation.gov.uk/ukpga/1985/68/contents>.

Appendix: Clauses of the Domestic Abuse and Family Proceedings Bill Compared

	<i>Northern Ireland Bill</i>	<i>Scotland</i>	<i>Republic of Ireland</i>	<i>England and Wales</i>
Domestic abuse offence	Clause 1	Section 1 2018 Act		
Definition of domestic abuse	Clauses 1-2	Section 1-2 2018 Act	Section 39 2018 Act	Clause 1 DA Bill
Coercive control	Clause 2	Section 2 2018 Act	Section 39 2018 Act	Section 76 2015 Act
Connection	Clause 5	Section 11 2018 Act	Section 39-40 2018 Act	Clause 2 DA Bill
Aggravation in relation to a child	Clauses 8-9	Section 5 2018 Act		
Extra-territorial jurisdiction	Clause 10	Section 3 2018 Act		
Domestic abuse aggravation	Clauses 15-20	Section 1 2016 Act	Section 40 2018 Act	
Prohibition of trial by jury	Clause 21			
Support measures	Clause 22	Section 271H 1995 Act	Section 19 2017 Act	Clause 58 DA Bill
Prohibition of cross-examination (criminal)	Clause 23	Paragraph 2, Schedule to 2018 Act	Section 16 2018 Act	

Prohibition of cross-examination (family)	Clause 26	Clause 4 Children (Scotland) Bill	Section 16 2018 Act	Clause 59 DA Bill
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