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RaISe

Domestic Abuse Legislative Provisions

Please note – nothing in this paper constitutes legal advice or should be used as a substitute for such.

On 31 March 2020, the Justice Minister introduced the Domestic Abuse and Family Proceedings Bill (the DA&FP Bill) to the Assembly. This Briefing Note addresses a number of domestic abuse related legislative developments, identified from other jurisdictions, which are not specifically addressed in the DA&FP Bill. Specifically the developments considered in are: new ‘Domestic Violence Protection Orders’; a statutory basis for domestic violence disclosure schemes; and creation of the role of Domestic Abuse Commissioner.

Key points

The Domestic Abuse and Family Proceedings Bill (the DA&FP Bill) introduced to the Assembly on 31 March 2020 includes: the creation of a new domestic abuse offence; two child aggravators associated with that offence; a statutory aggravation of domestic abuse associated with any other offence; and a number of associated changes to criminal procedures, evidence and sentencing in domestic abuse related cases.

Based on comparative research, the focus of this Briefing Note is on domestic abuse related legislative developments which are not specifically addressed in the DA&FP Bill. These provisions relate to: emergency barring orders; the legal basis for domestic violence disclosure schemes; and the creation of the role of Domestic Abuse Commissioner. The potential role for a domestic abuse offenders register is addressed within the context of disclosure schemes.

It is important to note that the driving force for legal reform in other jurisdictions may result from factors, such as the fragmentation resulting from issues of scale and institutional complexity, that are not present in Northern Ireland.

Whilst this Briefing Note focuses narrowly on legislative provisions, it is also important to underline that, during a previous consultation exercise, consultees clearly argued that any effective response to the problem of domestic abuse must: provide potential victims with the tools to enhance their safety; facilitate their exit from a relationship with a perpetrator; and link effectively with adequately resourced support provision.

1. Introduction

On 31 March 2020, the Justice Minister introduced the Domestic Abuse and Family Proceedings Bill (the DA&FP Bill) to the Assembly. In anticipation of this a bill to address domestic violence, the Justice Committee commissioned comparative research on domestic abuse related legislative developments in other jurisdictions. The aim of the research was to identify legislative provisions which are not specifically addressed in the DA&FP Bill but which relate to its existing provisions. RaISe will, however, also publish a Bill Paper which addresses the provisions contained within the DA&FP Bill and places them in the context of wider emerging approaches to tackling domestic abuse in England and Wales, Scotland, and the Republic of Ireland.

Initial research highlighted the relevance of legislative developments in the UK and the Republic of Ireland, not only because of shared ‘common law’ legal systems across the jurisdictions but also because bespoke domestic abuse legislation had been enacted, or a bill introduced, within the last two years.¹ Furthermore, in relation to Scotland, the policy development and law making processes had been informed by experts with extensive knowledge of domestic abuse law in other jurisdictions. The Scottish legislation which resulted from these processes has been described by Professor Evan Stark as the new ‘gold standard’ for criminalising coercive control and domestic abuse.² With the exception of the relevant legislation in the Republic of Ireland, a statutory definition of domestic abuse is a common feature of the existing or proposed legislation considered. The Domestic Abuse Bill, which was reintroduced to the UK Parliament in March 2020, has been described as an attempt to ‘future proof’ the law in this area. The following three legislative developments provided for within the Bill are considered in this paper.

- New Domestic Violence Protection Orders.
- A statutory basis for domestic violence disclosure schemes.
- Establishment of the office of the Domestic Abuse Commissioner.

In the following sections, each of these developments and their relationship to existing law in Northern Ireland is considered. It is important to note, however, that specific legislative provisions may most appropriately be considered as part

¹ Domestic Violence Act 2018 <http://www.irishstatutebook.ie/eli/2018/act/6/enacted/en/html>

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

Domestic Abuse Bill (HC Bill 96) <https://services.parliament.uk/bills/2019-21/domesticabuse.html>

² Scott, Marsha. (2020) The Making of the New ‘Gold Standard’: The Domestic Abuse (Scotland) Act 2018. In ‘Criminalising Coercive Control: Family Violence and the Criminal Law’ by Marilyn McMahon.

of a legislative whole. Perhaps more importantly, it should be recognised that domestic abuse can only be addressed effectively through both legislative and non-legislative mechanisms and support.³

2. New Domestic Violence Protection Orders

Article 52 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention) establishes the obligation of states parties to ensure protection to victims of domestic violence, among other measures, by ordering the perpetrator to leave, and to stay away from the home of the victim or person at risk, and not to contact the victim or person at risk, on the basis of an emergency barring order (EBO).

The Istanbul Convention does not prescribe who should be approved to make EBOs, the procedure by which to make them or their duration, leaving these key issues to the discretion of each state to decide. Therefore, EBOs can be regulated differently in each the relevant state. Nonetheless, the key elements that need to be included are the power to remove a perpetrator from the home of the victim, and to order them to stay away from the victim.

In England and Wales, a system of EBOs, originally introduced in pilot form in 2011, was extended across the jurisdiction in March 2014. The legal framework for operation of the scheme is contained in sections 24-33 of the Crime and Security Act 2010 (the C&S Act 2010). These provisions permit the police to issue a Domestic Violence Protection Notice (DVPN), and for Domestic Prevention Protection Orders (DVPOs) to be issued by the magistrates' courts on application by the police.⁴ Guidance relating to the scheme explains that:

A DVPN is an emergency non-molestation and eviction notice which can be issued by the police, when attending to a domestic abuse incident, to a perpetrator. Because the DVPN is a police-issued notice, it is effective from the time of issue, thereby giving the victim the immediate support they require in such a situation. Within 48 hours of the DVPN being served on the perpetrator, an application by police to a magistrates' court for a DVPO must be heard.

DVPOs are a civil order that fills a "gap" in providing protection to victims by enabling the police and magistrates' courts to put in place protective measures in the immediate aftermath of a domestic violence incident where there is

³ The RaSe Bill Paper will outline more widely emerging approaches (both statutory and non-statutory) to tackle domestic abuse in England and Wales, Scotland, and the Republic of Ireland.

⁴ Crime and Security Act 2010 <http://www.legislation.gov.uk/ukpga/2010/17/contents>

insufficient evidence to charge a perpetrator and provide protection to a victim via bail conditions.

A DVPO can prevent the perpetrator from returning to a residence and from having contact with the victim for up to 28 days. This allows the victim a degree of breathing space to consider their options with the help of a support agency. Both the DVPN and DVPO contain a condition prohibiting the perpetrator from molesting the victim.⁵

Section 97 of the Justice Act (Northern Ireland) 2015⁶ gives effect to Schedule 7, the content of which mirrors the wording of sections 23 to 33 of the C&S Act 2010. As a result, the legal framework for the use of DVPN/Os in Northern Ireland, closely resembles that in place in England & Wales. The regime in England and Wales, however, is due to change.

The Domestic Abuse Bill⁷ introduced in the House of Commons in March 2020 includes provisions which would repeal sections 23 to 33 of the C&S Act 2010 and put in place a new civil preventative order regime. The Explanatory Note which accompanies the Bill explains that:

Part 3 of the Bill provides for the DAPN, modelled closely on the existing DVPN, and for the DAPO which will have the following key features:

- be available in a variety of courts on application by the police, the victim, persons specified in regulations or any other person with the leave of the court;
- be available to protect a person from domestic abuse, or the risk of domestic abuse, carried out by another person to whom they are personally connected;
- enable the imposition of any requirements (including, prohibitions, restrictions and positive requirements) on the perpetrator that are necessary to protect the victim; and
- breach of a DAPO will be a criminal offence, punishable by up to five years' imprisonment or a fine or both (or as a civil contempt of court, in the alternative).⁸

⁵ Domestic Violence Protection Notices (DVPNs) and Domestic Violence Protection Orders (DVPOs) Guidance Sections 24-33 Crime and Security Act 2010 (December 2016)

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575363/DVPO_guidance_FL_NAL_3.pdf

⁶ Justice Act (Northern Ireland) 2015 <https://www.legislation.gov.uk/nia/2015/9/contents>

⁷ Domestic Abuse Bill (HC Bill 96) <https://services.parliament.uk/bills/2019-21/domesticabuse.html>

⁸ Domestic Abuse Bill – Explanatory Notes <https://publications.parliament.uk/pa/bills/cbill/58-01/0096/en/20096enlp.pdf>

A government factsheet, published at the time of the Bill's introduction, further explains that:

Other protective orders, such as Non-Molestation Orders and Restraining Orders, will remain in place so that they can continue to be used in cases which are not domestic abuse-related, such as cases of stalking or harassment where the perpetrator is not a current or former intimate partner or a family member.

Our policy intention in creating new DAPNs and DAPOs is to bring together the strongest elements of existing protective orders into a single comprehensive, flexible order which will provide more effective and longer-term protection to victims of domestic abuse and their children

It is our intention that DAPOs will become the 'go to' protective order in cases of domestic abuse.⁹

In Scotland, whilst provisions for EBOs were not contained in the Domestic Abuse (Scotland) Act 2018¹⁰, the 'Scottish Government Consultation on Protective Orders for People at Risk of Domestic Abuse' document was published in December 2018. The introduction to the consultation document explained that:

The new protective orders could be used to keep those at risk of domestic abuse safe by giving the police and courts powers to remove suspected perpetrators from their homes.

In contrast with existing civil measures such as interdicts and exclusion orders, the new protective orders we are consulting on would mean the person at risk is not required to make the application to the court themselves for one of these protective orders. This may be key to ensuring the safety of a person at risk where the effect of abuse is such that they are not in a position to initiate civil proceedings to remove the person putting them at risk from their home, because, for example, they are being controlled to such an extent that they could not initiate a court action. It would provide them with time to seek advice on their longer-term housing options and reduce the risk that they have to become homeless to escape the perpetrator.¹¹

In October 2019, following completion of the consultation exercise, the Scottish Government reported that:

⁹ Home Office (March 2020) Policy paper - Domestic Abuse Protection Notices/Orders factsheet <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-protection-notices-orders-factsheet>

¹⁰ Domestic Abuse (Scotland) Act 2018 <https://www.legislation.gov.uk/asp/2018/5/contents/enacted>

¹¹ Scottish Government (2019) 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/>

The great majority of respondents who expressed a view supported providing the police with a power to impose emergency protective orders to remove a suspected perpetrator of domestic abuse from the household of a person at risk of domestic abuse. There was almost unanimous agreement that the courts should have a power to impose a longer-term protective order.¹²

The Scottish Government indicated that responses to the consultation would inform development of legislation and provided a summary of responses on a number of policy matters including: the length of time for which protective orders should run; who should be able to apply to the courts for protective orders; who should be covered by any scheme of protective orders; whether or not protective orders should be used to impose conditions beyond removal from shared housing. To date, the Scottish Government has not introduced the proposed legislation to the Scottish Parliament.

3. A statutory basis for domestic violence disclosure schemes

The Department of Justice (the Department) consultation paper published in 2016 addressed not only the creation of a domestic abuse offence but also the development of a domestic violence disclosure scheme. Regarding the latter, the consultation document explained that the Department was:

seeking views on whether current arrangements can be enhanced by the establishment of a Domestic Violence Disclosure Scheme in Northern Ireland. This scheme, sometimes known as Clare's Law, would be based on processes that would enable new partners of previously violent individuals to find out about their partner's history of violence and abuse. They could then make informed choices about how and whether they take that relationship forward.¹³

Following completion of the consultation exercise, the Department published feedback which, in a summary of views, recorded that:

Conceptually, there was broad support for the introduction of both 'Right to Ask' and 'Right to Know' schemes which fundamentally would formalise the rights of individuals to make timely and informed choices about their relationships. Responses provided in relation to the detail of the schemes usefully highlighted a range of issues which will require further consideration to ensure the legality and operational effectiveness of the proposed schemes.¹⁴

¹² Scottish Government (2019) Consultation on protective orders for people at risk of domestic abuse (Feedback Updated 15 Oct 2019) <https://consult.gov.scot/justice/people-at-risk-of-domestic-abuse/>

¹³ Department of Justice (2016) Domestic Abuse Offence and Domestic Violence Disclosure Scheme <https://www.justice-ni.gov.uk/consultations/domestic-abuse-offence-and-domestic-violence-disclosure-scheme>

¹⁴ As above

In 2018, the Department issued guidance on how a scheme with both ‘a right to ask’ and ‘a right to know’ should operate in Northern Ireland.¹⁵ The scheme, operated by the Police Service of Northern Ireland in conjunction with statutory and voluntary partners, allows a potential victim to receive information on their partner’s history of abusive behaviour in terms of the risk they pose, enabling them to make an informed choice about their relationship.

The latest available data show that in the year following its introduction, over 326 applications had been made to the scheme and 40 people, identified as being at risk, had been advised about their partner’s abusive past.¹⁶

The scheme described above is modelled upon one that was implemented across England and Wales in March 2014. Like that scheme operating in England and Wales, the scheme works in Northern Ireland without a specific statutory basis. In relation to England and Wales, however, the Government aims ‘to drive greater use and consistent application’ of the scheme by using the Domestic Abuse Bill to place the guidance underpinning the scheme on a statutory footing and to place a duty on the police to have regard to the guidance.

The Department, in its report on the 2016 public consultation, noted that a number of respondents had proposed a domestic abuse offenders register, similar to the existing sexual offenders register, as a mechanism for disclosing information. In this context, the document reported that:

It was noted that registers exist in other jurisdictions and we might wish to explore having a register similar to those in certain states in the United States. It was proposed that a database could be publicly accessible and searchable which might be a solution to shortening the process and relieving the pressure on the police. Respondents acknowledged that there may be issues with regard to privacy of the individual concerned, however it was highlighted that a domestic violence register could be held and operated in much the same way as the existing register for sex offenders. It was noted that the latter gives concerned persons the right to ask if a person is on the register, but does not confer on them the right to search the register themselves (Scotland’s Sex Offenders Register was given by way of example).

It was highlighted that with regards to the register there would be a legal requirement for perpetrators of domestic violence to register as part of their conviction and this may require a change in the law.

¹⁵ Department of Justice (2018) Domestic Violence and Abuse Disclosure Scheme Northern Ireland (DVADS NI) Guidance <https://www.justice-ni.gov.uk/sites/default/files/publications/justice/Domestic-violence-and-abuse-disclose-scheme.pdf>

¹⁶ <https://www.justice-ni.gov.uk/news/326-checks-carried-out-last-year-through-domestic-violence-and-abuse-disclosure-scheme>

A focus group identified that “Women (victims) carry a lot of shame, and the perpetrator just slopes off to the next relationship. A register would give the perpetrators their own shame”. It was also said that “It should impact on their lives as much as it’s been impacting ours”.

It was proposed that the register could be managed by a designated body for example the PSNI and or by a multiagency group.¹⁷

Provision for a register is not contained within the DA&FP Bill and no such register exists in other parts of the UK or Ireland. The London Assembly has, however, been active in seeking to have one created. Following publication in August 2017 of a report¹⁸ by Assembly Member Len Duvall, the London Assembly agreed a unanimous motion supporting the introduction of a register.¹⁹ The following year, in its written evidence to the House of Commons, Home Affairs Committee²⁰ the London Assembly stated that:

A Domestic Abusers Register will place the onus firmly on the offender. It would also trigger a vital step change in the way we protect victims and their families, particularly children, by giving police officers immediate access to the information they need to manage risk more effectively.

A similar requirement already exists for sex offenders under part two of the 2003 Sexual Offences Act. The Act requires certain offenders to notify the police of their personal information such as name, address and bank and credit card details and to update the police when these details change in what is commonly known as the ‘sex offenders register’. Establishing a similar process for domestic abusers would put the onus on those that commit, or have committed, domestic abuse related crimes to inform the police of their previous offending history and residence.²¹

The written evidence went on to argue that a domestic abuse register would:

...also create a deterrent for perpetrators, who will not want to be placed on such a register. The social stigma associated with being on a Domestic Abusers’ Register will therefore help to prevent further offences and so reduce victimisation.²²

¹⁷ <https://www.justice-ni.gov.uk/sites/default/files/consultations/justice/domestic-abuse-offence-domestic-violence-disclosure-scheme-summary-of-responses.pdf>

¹⁸ https://www.london.gov.uk/sites/default/files/domestic_abuse_report_final_copy_correction.pdf

¹⁹ <https://www.london.gov.uk/motions/domestic-violence>

²⁰ House of Commons (2018) Home Affairs Committee – Domestic Abuse Inquiry <https://www.parliament.uk/business/committees/committees-a-z/commons-select/home-affairs-committee/inquiries/parliament-2017/domestic-abuse-inquiry-17-19/>

²¹ <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/domestic-abuse/written/89330.html>

²² <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/home-affairs-committee/domestic-abuse/written/89330.html>

The Joint Committee on the Draft Domestic Abuse Bill, which reported in June 2019, endorsed the UK Government's decision to place the guidance to the police on the Domestic Violence Disclosure Scheme on a statutory footing and, noting that it had taken evidence both in favour and against a register of offenders committing repeat domestic abuse offences, proposed that this is an area which the government should keep under review.²³

4. Domestic Abuse Commissioner

The Domestic Abuse Bill contains provisions which will establish the office of the Domestic Abuse Commissioner in law. The policy intent is that the Commissioner will provide public leadership on domestic abuse issues and play a key role in overseeing and monitoring the provision of domestic abuse services in England and Wales. A factsheet explains that:

The Commissioner will be tasked with encouraging good practice in preventing domestic abuse; identifying victims and survivors, and perpetrators of domestic abuse, as well as children affected by domestic abuse; and improving the protection and provision of support to people affected by domestic abuse.

To do this, we expect the Commissioner to map and monitor provision of services, make recommendations to public bodies about their response, carry out research, work jointly with public authorities and voluntary organisations, and raise public awareness of domestic abuse. The Commissioner will consider both specialist domestic abuse services such as refuges or specialist victim services, as well as how mainstream services identify and respond to victims and survivors.

The Commissioner will have the power to publish reports and lay them before Parliament; these reports will hold local commissioners, statutory agencies and national government to account and make recommendations on how they can improve their response.

Specified public bodies will be under a duty to cooperate with the Commissioner, and they and government ministers will be required to respond to each recommendation made to them within 56 days.

To safeguard and secure the Commissioner's independence, we will publish a statutory framework document agreed with the Commissioner, which will set out

²³ House of Lords/House of Commons Joint Committee on the Draft Domestic Abuse Bill Draft (June 2019) First Report of Session 2017–19 Draft Domestic Abuse Bill <https://publications.parliament.uk/pa/jt201719/jtselect/jtdab/2075/2075.pdf>

in greater detail how the Home Secretary will work with the Commissioner and will address, in particular, issues of governance, funding and staffing.²⁴

The report of the Joint Committee on the Draft Domestic Abuse Bill included a number of recommendations relating to the independence and accountability arrangements provided for in the Bill. Amongst other things the report stated that:

As far as the linked issues of independence and accountability are concerned, we have grave concerns about the proposal for the Commissioner's role to be responsible to the Home Office. There is a potential for the Home Office to experience serious conflicts between its work in relation to domestic abuse and its responsibility for immigration control...

We recommend that the Commissioner be responsible to the Cabinet Office, to provide the Commissioner with extra authority in relation to the wide range of Ministers and government departments with which their office will have to engage. We also recommend a clear, direct accountability to Parliament, as an assurance of the Commissioner's independence of government. Furthermore, the draft Bill should be amended to remove the requirement for the Commissioner to submit draft reports and advice to the Secretary of State and to obtain the approval of the Secretary of State for their annual strategic plan. The Commissioner should be given power to appoint staff independently, albeit on civil service terms and conditions.²⁵

In September 2019, the UK Government's Home Secretary announced Nicole Jacobs as the 'designate Domestic Abuse Commissioner'.

In Wales, section 20 of the Violence Against Women, Domestic Abuse and Sexual Violence (VAWDASV) Act 2015²⁶ establishes the post of the National Adviser. Section 21 states that The National Adviser is to exercise the following functions, subject to the direction of the Welsh Ministers:

advise the Welsh Ministers about pursuing the purpose of the VAWDASV Act or tackling related matters (A related matter is defined as abuse which the National Adviser considers to be related directly or indirectly to inequality of any kind between people of a different gender, gender identity or sexual orientation);

give other assistance to the Welsh Ministers in their pursuit of the purpose of the VAWDASV Act or tackling related matters;

undertake research relating to pursuing the purpose of the VAWDASV Act, tackling related matters or examining whether abuse of any kind is related directly

²⁴ Home Office (March 2020) Policy paper - Domestic Abuse Commissioner factsheet <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-commissioner-factsheet>

²⁵ House of Lords/House of Commons Joint Committee on the Draft Domestic Abuse Bill Draft (June 2019) First Report of Session 2017–19 Draft Domestic Abuse Bill <https://publications.parliament.uk/pa/jt201719/jtselect/jttdab/2075/2075.pdf>

²⁶ Violence against Women, Domestic Abuse and Sexual Violence (Wales) Act 2015 <https://gov.wales/sites/default/files/publications/2019-11/national-advisers-annual-plan-2020-21.pdf>

or indirectly to inequality of any kind between people of a different gender, gender identity or sexual orientation;

advise and give other assistance, with the agreement of the Welsh Ministers, to any person on matters relating to pursuing the purpose of the VAWDASV Act or tackling related matters;

produce reports on any matter relating to the purpose of the VAWDASV Act or tackling related matters.

Yasmin Khan and Nazir Afzal, OBE were appointed National Advisers in January 2018 on a job-share basis. In their Annual Plan 2020-21, the Advisers make reference to creation in the Domestic Abuse Bill of the position of the Domestic Abuse Commissioner, and observe that the role has some similarities with that of the National Advisers in Wales. They add, however that ‘Having met with her, she is clear that the powers of the Domestic Abuse Commissioner in the Domestic Abuse Bill are applicable only in relation to reserved matters and non-devolved bodies in Wales. We anticipate that we will form a close working relationship with the Domestic Abuse Commissioner’.²⁷

5. Conclusion

This paper has identified a number of legislative developments in other jurisdictions which, due to their timing, provenance and focus may be relevant to consideration of the DA&FP Bill. As has been stated, however, each development relates to a specific Act or Bill and should be seen in this wider context. It is also important to recognise that for a number of reasons (such as scale, institutional complexity or the nature of existing service delivery) the provisions may be better suited to one jurisdiction rather than another.

It is important also to note that the legislative provisions should not be seen in isolation from the need to provide the support services and other resources needed to ensure the safety of those subject to domestic abuse

²⁷ <https://gov.wales/sites/default/files/publications/2019-11/national-advisers-annual-plan-2020-21.pdf>