



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Domestic Abuse and Family Proceedings Bill:
Mr John Larkin QC, Attorney General for Northern Ireland

18 June 2020

Committee. One cannot read such evidence without pain because of the pain that is disclosed by it, but one of the things that struck me was the evidence from the Women's Aid Federation, with its reference to the number of women in its refuges. If one pauses for a moment to ask whether police action has invariably followed the presence of each woman who has taken up a place of safety in a Women's Aid refuge, although there may be reasons that are particular to the individual why that has not happened, there is a real issue — I say this in no critical spirit about the performance of criminal justice agencies — with respect to the existing body of law. I make that point.

As the Committee knows, I have raised one competence concern in relation to clause 10. Let me say right away that the issue is not whether clause 10, for present purposes, is a good or a bad thing. I know that the Deputy Chair, for example, will have pointed to abuse that takes place on honeymoon in Spain; that is a powerful point. The issue is not the merits or otherwise of being able to do that; the question is a more fundamental one about whether the Assembly can do it. I will give you some background. The competence of the Northern Ireland Parliament established under the Government of Ireland Act 1920 was always limited to Northern Ireland. It could:

"make laws for the peace, order, and good government of ... Northern Ireland".

It had no extraterritorial capacity. There is nothing in section 6 that suggests that the Assembly was intended to be empowered with extraterritorial capacity. The phrase is used:

"form part of the law of a country or territory other than Northern Ireland".

What does that mean? One school of thought and, by implication, it appears to be the school of thought taken up by the Office of the Legislative Counsel (OLC), is that that means going to the bother of, on the face of things, purporting to change the law. You change the French penal code, for example, or you purport to do so. You change the Acts of the Oireachtas in relation to Ireland. That strikes me as unreal, and it seems to me that the proper approach must be, "Are you attempting to change the law, as it currently operates, in that country?" That is exactly what clause 10 does. I have given the example of how the law on this subject area is different in Ireland from what it is here and that we are providing for penalisation. That may be a good thing or a bad, but the question is, "Can we do it?". I do not think that we can. Therefore, the Assembly would act in vain were it to purport to do that.

It is important for that issue to be tested. If my view is not accepted — no doubt, down the line, it will be tested — it would be much better to have it tested at the outset, so that one knows what the position is. The issue is likely to arise and, arguably, has arisen already in another context. This is of fundamental importance. Can the Assembly do this kind of thing? I do not think that it can, but we need to find out.

There is just one other point, and it is a reflection that has been prompted by the work of the Bar Council. At its core, there can be no dispute between right-thinking members of the community about the evil that the Bill seeks to address. However, there are unintended consequences. I have drawn attention to one of them in the submission. Another that occurred to me yesterday runs along these lines. While there is a protection for the acts that parents do with respect to their children under 18, imagine the following scenario: a single parent — a mother — with a daughter in full-time education, in her last year at school; the daughter is 18. The mother is concerned about the daughter being in contact with persons who may be of that age or slightly younger who are, perhaps, supplying drugs. Perhaps they are causing her to get involved in low-level criminality or maybe more than low-level criminality. The mother decides not to pay for the daughter's mobile phone or transport and to deny her the use of the family car to meet these people. OK, what do we know? There is a connection between them. The daughter is distressed by that behaviour, and the mother cannot but be aware of the distress that she causes, albeit for the very best of motives, motives that, I think, all of us would agree with. The, let us say, "evil friend" denounces the mother to the police. True it is that the mother may have the reasonable excuse defence, but she has to make that affirmatively. She has to make it live. Meanwhile, she may have been arrested and prosecuted. It strikes me that the 18 cut-off age is inapt to cover situations where parents will act in good faith.

Imagine, in the same scenario, that one not is dealing a child in the legal sense but someone over 18 with learning difficulties. A parent will want to protect that child and will take actions that one would take with respect to someone much younger, and there is that exposure to risk. It strikes me that there is a risk that the legislation can be gamed, as it stands, by the very people it is designed to protect from.

The Chairperson (Mr Givan): Thank you. We will tease those out now, and I will come back, at the end of the session, to your role over the last 10 years and cover that aspect, so forgive me for not picking up on your introductory remarks at this stage.

Mr Larkin QC: No, no. I am grateful, Chair.

The Chairperson (Mr Givan): On the extraterritorial competence issue, Scotland has been cited, as in "If they're able to do it, why not Northern Ireland?". Is there merit in that argument?

Mr Larkin QC: No. In general terms, with apologies, this maybe leaches into the more general observations. If we have learnt anything from devolution and from RHI, it is that we have to take responsibility for the material that passes before our eyes. It is not enough to say, "A has looked at it. B has looked at it"; we have to look at it too and form our own judgement about it.

It seems to me that we have an advantage in that we have a longer history of devolution, albeit with fits and starts, in this jurisdiction, and, if we look at whether it is intended to give the Scottish Parliament that extraterritorial legislative capacity, we see that it is not. We have the advantage of knowing that it was never intended to give that to the Northern Ireland Parliament, as was, or to the Assembly. If it had been desired to give it that kind of extraterritorial capacity, that would have been clearly set out.

I agree that there is something perhaps faintly unfortunate in the formulation:

"form part of the law of a country or territory",

but that cannot mean — it would be absurd, respectfully, to have it mean — that it must be, on the face of things, an attempt to change the code pénal in France or the Bürgerliches Gesetzbuch in Germany. If you are trying to change the law for practical purposes in France or Germany, that must suffice for the loss of competence.

The Chairperson (Mr Givan): Can the UK Parliament?

Mr Larkin QC: Of course. Parliament can change the laws on traffic in the middle of Paris, if it wishes. It will not be effective, but it can certainly do it. I am grateful for the question, Chair, because it points out that fundamental distinction. Parliament can legislate on anything to achieve any effect: we cannot.

The Chairperson (Mr Givan): So, if an offence is committed outside this jurisdiction, if the UK Parliament were to legislate, it could be taken into account in prosecuting a case in the UK.

Mr Larkin QC: Clause 10 could be enacted without the least difficulty by Parliament.

The Chairperson (Mr Givan): We had that debate around human trafficking. We looked at the Swedish model, and it takes into account offences that take place outside. I would like to be able to do that. That is my personal view.

Mr Larkin QC: You mentioned the human trafficking legislation. Again, if, having taken an earlier view on competence, I got that wrong, so be it. However, I think that that maybe falls just slightly on the right side of the line when you are taking account of something that has happened abroad, and I do not think that there is any issue about that. If, for example, one gives significance to an event that happens abroad and they do not complete the offence in, for example, France, Dublin or Brussels, that is different, and human trafficking goes just, I hope, on the right side of that line.

The Chairperson (Mr Givan): We will need to check what the Assembly passed by way of that, but, because of those arguments at the time, I do not think that we included offences that take place outside Northern Ireland.

Mr Larkin QC: It is giving effect to events. That is an important distinction.

The Chairperson (Mr Givan): What is the mechanism for testing it? You have fed that in to the Department, the Minister has touched on it and other MLAs have raised the issue of competence as well. What is the process? If the Department were to decide to proceed and gives advice to say that its

view is that we are able to do it and that it is within the Assembly's legislative competence, and the Attorney General says that it is not, how do we test that?

Mr Larkin QC: Obviously, one of the powerful things about this Committee is that its view on the content of the criminal law tends to prevail. If the Committee were to take a view, I imagine that the Minister would regard that with very great respect, to put it modestly, and might be persuaded to change her mind. If the Committee or the Minister do not take that view, the issue is that, when the Bill completes its passage, it will, then, be for the attorney of the day to take a view on whether the matter should be referred.

The Chairperson (Mr Givan): By "referred", do you mean to the Supreme Court?

Mr Larkin QC: Yes.

The Chairperson (Mr Givan): OK. I want to pick up on the point that you made in your paper about the Bill being very broadly drafted. I just want to get to the meat of that concern. Is it so broad that it could become symbolic and not effective? Is that the concern?

Mr Larkin QC: Good law is clear law and straightforward law. There is a human rights dimension in that citizens should be reasonably clear on what the demands of the criminal law are on them with respect to any given form of behaviour. Let us bear it in mind that the consequences can be very broad, that no harm need actually be occasioned and that the harm includes distress. I said earlier that I imagine we are all in absolute agreement about the core evil that the Bill is designed to address, but it does not strike me as a proper or useful function of the criminal law to police the quality of relationships or, indeed, old relationships.

I give the example of the stalker who could turn the legislation against the victim of stalking. There are other examples, such as the phenomenon of the drunken phone call. Two drunken phone calls might be distressing, but are they the kind of thing that properly attracts the criminal law and, at least, the paper possibility of trial and indictment leading to 14 years' imprisonment? Again, that point was made by the Bar Council. The kinds of serious offence that tend to lead to a Crown Court trial rather than summary proceedings will, almost inevitably, give rise to other offences — serious assaults, for example, which are already adequately covered by our existing criminal law.

The very foggy penumbra around the core strikes me as potentially giving rise to individual convention breaches around the lack of clarity of the criminal law. The Bill itself, with the exception that I have already adverted to in clause 10, is probably within competence, but individual instances of police prosecutorial action may fall foul of convention requirements.

The Chairperson (Mr Givan): It was not in your paper, but there is an issue around the defence on the grounds of reasonableness in clause 12. Some submissions said that the reasonableness defence should be removed altogether, while others asked for a lot more clarity on it. I stand to be corrected, but I think that the Public Prosecution Service said in its submission that it does not have any issues and believes that it is sufficiently clear. I would welcome your view on clause 12.

Mr Larkin QC: As I recall, the Bar Council expressed concern about the examples that were given in the explanatory memorandum. They were right to draw attention to that, but my view is that they are in no way limiting of the clear words of the Bill. The last time I was here, we discussed "reasonable excuse" in the context of the COVID-19 regulations. Here, it is a kind of reasonable excuse-type defence. Clause 12 fleshes it out but does so in a way that is largely a restatement of existing *[Inaudible.]* It is for the defendant to make the issue evidentially live, and then it is for the prosecution to disprove that reasonable excuse defence beyond reasonable doubt. I think that it is fine. I agree that it is, perhaps, unfortunate that the explanatory memorandum gave two rather high-flown instances. The truth is that there are a lot of things that can amount to a reasonable excuse in the circumstances.

The Chairperson (Mr Givan): The reasonableness test is something that pervades.

Mr Larkin QC: It is frequently found, and, as the Committee knows, there are two usages of reasonableness. One is the "reasonable person" test in relation to abusive behaviour, and then there is the reasonableness defence. I recall reading Mr Allister's critique of this at Second Reading, and it is not particularly user-friendly legislation from the perspective, I imagine, of police or prosecutors. At the

same time, it will give rise to or at least be ripe with the possibility of individual instances of abuse because it is so very wide.

The Chairperson (Mr Givan): Thank you. That is helpful, John. I appreciate that.

Ms Dillon: Thank you very much for your presentation. On the extraterritorial issues, are you saying that, whilst you do not think that it is within the competence to actually deal with an incident that happens abroad, if something were to happen in a bar in Dublin and the abuse continued when they came home to, for example, Newry, that what happened in the bar could be used during the court process as evidence of where it began but continued when they got home? That would be within the competence, but if the incident happened entirely in Dublin and was not reported, you cannot come home and expect that the case will be held in a court in Newry.

Mr Larkin QC: This is a tricky area. Let us take the punch in a pub in Dublin. The Assembly, in my view, could not enact legislation to provide for a special offence of punching someone in a pub in Grafton Street, for example. What the Assembly can do, it seems to me, is acknowledge behaviour and give legal effect to behaviour, but the behaviour that it gives legal effect to cannot be complete in itself. The offence can never be complete by an extraterritorial Act, because that would, it seems to me, give rise to a change in the law in Dublin, which the Assembly cannot do. If it is a combination of event in Dublin X plus event in Newry Z, as long as the event in Dublin does not bring about the legal consequence in its entirety, that seems to me to be OK. That is back to the Human Trafficking Act. I think that that is the side of the line that that falls on, whereas clause 10, it seems to me, provides for the change in the law in the territory or country other than Northern Ireland.

Ms Dillon: That is something that we need to scope out. I was keen on that, but, obviously, if it is not within our competence, it will create a false expectation.

Mr Larkin QC: I see the force of your argument. One has married this person and made assumptions about that individual, but, suddenly, on honeymoon abroad, the mask slips. If I may say so, that struck me as a powerful point. The issue is not, "If we could, should we not do this?"; the issue is, "Can we?".

Ms Dillon: That is fair enough. It is something that we need to scope out.

You have raised issues, and you have concerns about the broad nature of the Bill. A few of our previous witnesses raised concerns about the need for good guidance alongside the legislation. Do you think that guidance would deal with that issue to any extent? Is it still going to be —?

Mr Larkin QC: No. Guidance is often the soft-soap solution. The important thing is to get the legislation right. The famous Islamic conqueror of Alexandria burnt the library, a wonder of the ancient world, and the argument was, "If it is stuff that is simply reflective of what is in the Koran, it is unnecessary. If it is contrary to the Koran, it is pernicious". I often use that example about guidance. If the guidance goes against the legislation, it is wrong and unlawful; if it simply tells us in other words what is in the legislation, it is often unnecessary. The focus should be on getting the legislation right.

Miss Woods: I have a couple of points, and I would like some clarification. On the acknowledgement of behaviour in different jurisdictions and territories, you said that the offence cannot wholly be committed in, for example, Dublin. Would this not be covered by the fact that an offence has to be committed two or more times? Would that not be covered in the example that you gave, in that it was committed in Dublin and then in Newry? That could still be counted.

Mr Larkin QC: No. Let us say that it is the honeymoon example, somewhere in Spain. There is abusive behaviour on two occasions abroad. Clause 10 permits a prosecution here with respect to that. It is not that clause 10 will always be relied on to present a neatly boxed-up and beribboned case for the prosecution but that it can be, and it is to that extent that I have a problem with it on competence grounds.

Miss Woods: I agree with Linda and others that we need to scope this out properly. Will the ratification of the Istanbul convention in the Westminster Domestic Abuse Bill, which has provisions coming next week to the Assembly, not give strength to the issues of competence raised about clause 10?

Mr Larkin QC: No, for two reasons. First, your question probably adverts to the fact that the Istanbul convention requires states' signatory to make extraterritorial provision, but it would not include the domestic abuse events. Secondly, even if it did, there is nothing in the UK's response to the Istanbul convention that confers extra competence on the Assembly.

The Chairperson (Mr Givan): Could there be included in the Domestic Abuse Bill at Westminster a provision to give effect to that, if it was the view of the Committee that it wanted to do this the legal way?

Mr Larkin QC: Yes. There could. Doing it that way is the absolutely legally bombproof way of doing it.

The Chairperson (Mr Givan): OK. It may be fortunate that we have both Bills going through at the same time. That is something for us to examine.

Do any other members want to ask questions about the Bill? Members who are on StarLeaf have a facility where you can "Raise your hand" and I can see that. It might even be a red hand. No, it is a blue hand. I am content with either colour. We need to get a green one.

Ms Dillon: The red hand is for Tyrone also.

Ms S Bradley: I appreciate the Attorney General's presence today. I just want to tease that point out further. What about other potential solutions to add extraterritorial capacity? This is very much framed around the geographical world that we know, which much legislation is, but in a digital world it could be persistent if, for example, there was a persistent online character assassination. Do we need to give thought to the course or location of the perpetrator?

Just while we are on clause 10 and we have the Attorney General here, clause 10(1)(c) says:

"the person is a United Kingdom national or is habitually resident in Northern Ireland."

Does that give rise to some challenge on identity? For example, under the Good Friday Agreement, a UK national can identify as Irish. Is there a reason for the concern that that might need to be tightened up? I would appreciate your thoughts on that.

Mr Larkin QC: There are two issues. A big problem arises from so much criminality, including abuse occurring online and in trying to put cross hairs on that abuse. Therefore, one can entirely sympathise with trying to go beyond the geographical confines of Northern Ireland to address harm that is occurring here. As the Chair indicated, there may be a relatively bombproof solution through parliamentary legislation.

The second issue is interesting. You are right that the two groups are ordinarily resident in Northern Ireland or a UK national, but that would seem to me to be coterminous with people who are ordinarily resident in Northern Ireland, even if they regard themselves — there was a recent case about this, as members will know — as Irish and not British. Someone who regards herself/himself as Irish and not British will be ordinarily resident in Northern Ireland. That would not be a particular problem for competence; the competence issue in clause 10 does not particularly focus on that.

Ms Dillon: I have one point in response to Sinéad's question. There is a habitual residence test, which, when I looked at this, I assumed would be the test that would be applied that does not necessitate you being a UK national or declaring yourself a UK national.

Mr Larkin QC: It would be wider. For example, for EU residence, a wider category of person would be on that. It is interesting, and I must confess that I have not looked at this, but if one assumed that there was no competence issue in extraterritoriality, to go back to clause 10, there might be an issue if one could identify categories of person who would be essentially exempt. Therefore, if A is married to B and B is not protected in this way, there would be issues under the convention in relation to article 8 and article 14 and issues of discrimination. Happily or unhappily, there is a larger issue, from my perspective, about the extraterritoriality of clause 10, so the other issue does not have to be looked at with the immediacy that it perhaps might otherwise require.

The Chairperson (Mr Givan): OK. Thank you.