



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Domestic Abuse and Family Proceedings Bill:
Bar of Northern Ireland

2 July 2020

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)

Ms Linda Dillon (Deputy Chairperson)

Mr Doug Beattie

Ms Sinéad Bradley

Ms Jemma Dolan

Mr Gordon Dunne

Miss Rachel Woods

Witnesses:

Mr David Mulholland

Bar Council of Northern Ireland

Ms Sarah Ramsey QC

Bar Council of Northern Ireland

The Chairperson (Mr Givan): I welcome Ms Sarah Ramsey QC, the chair of the Bar of Northern Ireland, and Mr David Mulholland, its chief executive. They are attending the meeting via StarLeaf to provide oral evidence on the Domestic Abuse and Family Proceedings Bill. A report of the meeting will be published by Hansard in due course. I am not sure who will make the opening remarks.

Ms Sarah Ramsey (Bar Council of Northern Ireland): I am going first. Can you hear me?

The Chairperson (Mr Givan): Yes.

Ms Ramsey: Good morning. Thank you for the opportunity to present virtually to the Committee on the Domestic Abuse and Family Proceedings Bill. I am a QC and chair of the Bar Council. Joining me today is David Mulholland, the chief executive of the Bar Council.

The Bar Council is an elected body of 20 barristers that acts as the representative body for the Bar of Northern Ireland. Our independent practising barristers specialise in the provision of expert legal advice and advocacy, and we serve the public interest by upholding the rule of law and the administration of justice. We welcome the opportunity to address members today and to answer any questions that you may have on the Bill. We can hopefully give you a sense of how it might operate in practice from both a criminal and family law perspective.

The Bar Council's written submission to the Committee highlights the fact that the law currently provides for a wide range of offences that can be and are prosecuted in circumstances of domestic violence and abuse. We support the creation of the new offence, and we hope that it will further assist in tackling the issue by capturing patterns of coercive and controlling behaviour in intimate relationships, as well as by prohibiting cross-examination in person in certain circumstances in family courts.

By way of background, I have been practising as a barrister in the family courts for almost 30 years. During that time, there is no doubt, our society in Northern Ireland has become more diverse and our family dynamics more complex than ever. Family cases often involve emotive and sensitive issues, and I and many of our members have direct experience of representing parties to family proceedings who have been cross-examined by personal litigants, creating a scenario in which victims of domestic abuse can be cross-examined by their abuser. Understandably, that can have a significant and lasting impact on victims.

To begin with, I will speak specifically to the clauses in the Bill on the family courts. Part 2 of the Bill has broadly adopted the criteria for barring cross-examination from the Domestic Abuse Bill that is separately going through the UK Parliament at present, which specifically uses England's restrictive legal aid criteria in family proceedings for when there will be an automatic bar to cross-examination by a personal litigant and when it is a matter of discretion for the judge. Our Bill prohibits cross-examination in person of complainants in proceedings involving domestic abuse in the criminal court when the person is charged with an offence — that is as per clause 23 — but the same automatic bar is not afforded to the family court, as per the clauses in Part 2.

Committee members may be aware that the principle of "no delay" governs cases involving children in the family courts. Many cases therefore proceed to hearing before the outcome of criminal proceedings. What that means is that the victim in both proceedings automatically gets protection from cross-examination in person in the criminal court but has to make an application to the family judge to exercise their discretion in the family court if no criminal proceedings have taken place. The Bar cannot see the rationale for the difference in the treatment between the courts when the purpose of that Part of the Bill is to protect article 6 rights to a fair hearing of both complainant and defendant, as well as to ensure that the victim is not subjected to further abuse, and that further abuse would be via the court system. While the court will have discretion under the Bill to prohibit cross-examination if there is the quality condition or the significant distress condition, we say that there would instead be merit in an automatic prohibition on cross-examination once an allegation of domestic abuse has been made in family proceedings.

It is worth highlighting for members the fact that the Bar Council is committed to quality-assuring our advocacy training standards for practitioners at all stages of their career, particularly in the skills deployed when dealing with children and vulnerable adults. We identified the need to address cross-examination involving vulnerable witnesses in criminal cases some time ago, and that approach was endorsed last year by Sir John Gillen as part of his review of the law and procedures in serious sexual offences. A key focus for us during 2019-2020 has therefore been on the development of our new vulnerable witness training programme for practitioners working across our *[Inaudible]* system, and we have drawn on best practice in other jurisdictions, including England and Wales and Australia.

Another area that the Committee may wish to consider is a statutory scheme of special measures for vulnerable witnesses to support them in giving evidence in the family courts, which, unlike in the criminal courts, do not exist. Judges and legal practitioners are already trying to address that as much as possible by improvising the facilities already available in the family courts.

At this point, it is worth highlighting the point that I and other colleagues observe that the issue of perpetrators using the family justice system to perpetuate abuse is unfortunately not uncommon. It goes beyond cross-examination, as there are often other ancillary issues involved, such as repeat applications for review of child contact arrangements, the withholding of maintenance, incomplete disclosure of assets and the disposal of those alongside other forms of coercive control involving economic abuse, and that serves only to elongate the court process. Lawyers working in our family courts are often confronted with those difficult issues in a range of cases; indeed, sometimes those affected by coercive and controlling behaviour may speak out about what they have been subjected to only when they are in the process of separating and may never have involved the PSNI or other statutory agencies. You also find that they can be reluctant to criminalise abusive ex-partners, particularly when there are children involved in the relationship.

It is therefore important that we recognise that there is significant complexity attached to the issue of domestic abuse that goes beyond our justice system. At the core of our response to the societal harm caused by it must be a public education campaign, which will be vital to highlight and educate on the terms of the Bill, in particular the criminalisation of certain behaviours for the first time. That should include education in our schools on healthy relationships. The signs of coercive control form an important part of that. Education must sit alongside the training of criminal and family justice professionals, including police, prosecutors, barristers, solicitors, social workers and the judiciary. That will be necessary if an effective criminal justice response is to follow the reporting of an offence.

Education and training will also be important in circumstances in the family courts in which an allegation is made but has not been reported to the police.

I will now address the clauses relating to the creation of an offence of domestic abuse. Hopefully, I can give members an insight into the views that our criminal practitioners have on it. The Bar is supportive of a specific domestic abuse offence being created, yet there are challenges inherent in creating such an offence in criminal law. For example, the reference in clause 1(3) to psychological harm including "fear, alarm and distress" with no requirement to demonstrate the impact on the victim is a low bar and potentially gives considerable discretion to the Public Prosecution Service (PPS) in making decisions on which complaints should be prosecuted. That clause, when coupled with the broad list of family members in clause 5, could allow a considerable range of behaviours in intimate and family relationships to fall under the ambit of the Bill.

There is a risk in the practical operation of clause 5 that a broad spectrum of scenarios involving family disagreements could be unintentionally criminalised, given that the Bill is not restricted to partners and ex-partners, as is the case under the Domestic Abuse (Scotland) Act 2018, which the rest of the Bill mirrors. While the rationale behind its inclusion is likely a recognition that family dynamics are diverse, it is debatable whether the criminal law is the most appropriate way to deal with extended family relationships and whether that might be better addressed in other ways, such as through public education.

I expect that members will be interested in our views on the defence of reasonableness, which is contained in clause 12. I understand that other organisations have raised the issue in their submissions and some have called for it to be removed altogether. We are in a unique position, in that we represent alleged perpetrators and alleged victims. While it remains for the prosecution to prove beyond reasonable doubt that the offence has been committed, in the light of the comments that I have already made on the broad nature of clause 5 and the wide-ranging scenarios that could be caught under the Bill, which our written submission goes into in a little more detail, our practitioners take the view that the defence must be available for the offence. The explanatory memorandum gives us two examples of where the defence could be used. One is where

"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",

and the other is where the accused restricted a relative's freedom of movement

"for their own safety due to the effects of suffering from dementia."

Those two examples appear, we say, to be entirely appropriate applications of the defence. The Bar would welcome further guidance on the provision of other examples in which the behaviour could be considered reasonable in the circumstances.

It is also worth highlighting the fact that all our members are subject to the Bar of Northern Ireland's code of conduct. It sets out the standards of professional conduct and practice required. Any member who fails [*Inaudible*] any of their duties or the standards required may be referred to the professional conduct committee for professional misconduct.

In summary, the Bar absolutely recognises that a fine balance must be struck between ensuring the safe prosecution of alleged perpetrators and, at the same time, ensuring that those who have suffered domestic abuse do not endure further trauma as part of a criminal trial. We should not expect, however, that the criminal law alone can provide the solution to a complex societal problem. I reiterate that we cannot overestimate the importance of effective public education in addressing domestic violence and abuse. Too often, by the time of intervention by the justice system, victims may no longer see that the controlling behaviour to which they are being subjected is abusive, owing to the cumulative nature of it. Many in the criminal and family justice system have encountered that problem for years, where, even after a prosecution for physical violence, the parties reconcile, with no change of behaviour. The Bar supports the Bill and hopes that our written submission has been of some assistance to the Committee in scrutinising it in order to help to ensure that our law is as effective as it can be in addressing domestic violence and abuse. We all want to see the legislation brought in quickly, but, in doing so, we want to ensure that it will be fit for purpose. Any of the points that we raise are, therefore, trying from different perspectives to highlight potentially unintended consequences of the Bill, and, hopefully, those points are seen as helpful and not as hurdles. We will be happy to answer any questions that members may have.

The Chairperson (Mr Givan): Thank you for that overview of your submission. The written submission goes into a lot of helpful detail, and that is where your expertise will be invaluable to the Committee. We have talked about the issues, and we all have a huge amount of sympathy, but it is about creating effective legislation that can have a practical impact, and that is what we need to put into practice.

I want to pick up on some of your comments on the broad definition of abuse and harm. I know that one of the concerns that are being raised is about making the definition so broad that you do not get to the kernel of the issues and do not deal with the offence effectively. I would appreciate a comment from you on that. It is connected to your comments about the reasonable defence that, given how broad it is, it then necessitates, in your view, the requirement to have a reasonable defence put forward. Perhaps you could comment in a little more detail on the broad nature of the offence and the reasonable defence arguments.

Ms Ramsey: If you look at our written submission, you will see that we go into a little more detail on that. One of the suggestions that we had made is that there may be an advantage to defining domestic abuse in the Bill. We referred to a public health definition, and, if you look, you will see that that has been picked up in England. John Gillen referred to practice direction 12F, I think, which sets out a definition of domestic abuse.

One of the things that the Bar is happy with is that there has been a move away from the phrase "domestic violence", which suggests a physical act, to the notion of "domestic abuse". That reflects society's views about coercive control and how abuse does not need to be physical. That should be reflected in any definition, because that, really, is the mischief that the Bill tries to address. We have to recognise that they can be very nuanced behaviours; they can be economic and involve withholding money, for example. From the Bar's perspective, we welcome having more legal certainty in a definition, because it is clear that, as society moves away from a notion of what domestic abuse entails, a definition would be helpful.

The Chairperson (Mr Givan): I want to ask you about who might be captured in the new legislation under the scope of the definition of "extended family". In Scotland, as you cited, it relates to current partners and ex-partners. What are the Bar's concerns about the scope of the relationships that are proposed for inclusion?

Ms Ramsey: Again, it is a fine balancing act. One of the particular issues that I come into contact with is the nature of the personal relationships. Sometimes, they are outwith the terms of the current legislation. [*Inaudible*] for example, within the terms of the non-molestation legislation, there are occasions where the relationships are not covered by the legislation. To some extent, there has been a widening of the scope to include other family members and extended family members. That, again, reflects the blended society that we now have. However, one word of caution is that we need to be careful that, in widening the scope, we are not enlarging it to cover a situation where you may have family disputes. That is not a mischief that the Bill was created to cover.

The Chairperson (Mr Givan): I regularly get complaints from people that non-molestation orders are not being enforced and they end up going back to the court and so on. Maybe that goes back to your point that trying to use the criminal law to regulate difficult relationships is not always the best course of action. In all that, I am concerned that we offer a legislative route to prosecute people, but, when it comes to enforcing some of those things, unless the sentence is custodial, it becomes difficult to manage and you end up in a cycle of court appearances and so on. Is that a concern for the Bar?

Ms Ramsey: In short, yes. The Bill is reflective of a societal change, and we have to look at the solutions in a holistic way. That is why, when you read our submission, you will see that there is an emphasis on education and training. If you look at what has been happening in England and Wales, you will know that they appointed a Domestic Abuse Commissioner in September last year. We can only see that as positive, because it highlights the issues and encourages people to recognise the broad scope of domestic abuse and exactly what it entails.

The Chairperson (Mr Givan): OK. I will bring in other members, if they wish to raise issues.

Mr Beattie: Sarah, thank you for that deep dive into the Bill. It was extremely useful, and your expertise is clear. David, it is great to see you again.

Maybe you could jump in on this, as it relates to one of the points that you raised. In this Bill on domestic abuse, do you see contact denial or parental alienation as a form of domestic abuse? Does that stand up? Is there enough in the Bill to see that as a domestic abuse offence? To follow on from that, if we were to see it as an offence, you raise a point in paragraph 31 of your submission that the Bar would:

"consider including a provision to enable the court to consider making a restraining order",

Would that be the safety valve for that contact denial or parental alienation if it was due to an abusive relationship? It is the opposite of that, if you see where I am coming from.

Ms Ramsey: Could you clarify exactly what you are asking me? Is it whether I feel that parental alienation is a form of domestic abuse?

Mr Beattie: Yes, and contact denial. Do you see those as forms of domestic abuse in the wider sense?

Ms Ramsey: They absolutely can be. That is why I am glad that, when one looks at the Bill, one sees that it, effectively, suggests that, if you use children as a pawn in your relationship, it has to be condemned. That has to be reflected in the Bill.

Mr Beattie: Sorry, I will come back to the point that you made in paragraph 31 of your submission, where you ask why there was no consideration of restraining orders. That would cover the opposite effect, where there is contact denial and parental alienation because the other partner is violent. That needs to be in the Bill as a safety valve. Is that what you are saying?

Ms Ramsey: We suggested that it would be helpful. There was no mention of it in the Bill, so we would support that.

Mr Beattie: OK. That is clear. Thank you.

Ms Dillon: Thank you for your presentation and your detailed written presentation. I appreciate those, Sarah.

The first things that I want to ask about are orders and notices. They are obviously not in the Bill, and the Minister has said that she intends to bring those in through the miscellaneous Bill. I have some concerns about that, which I have raised before. I also raised them when we met the Bar. Non-molestation orders are not effective for a number of reasons. First, very often, the victims of domestic violence are working poor and are not entitled to any financial assistance. A non-molestation order is put in place, and the perpetrator takes it back to court very quickly, which means that the costs for the victim accumulate. Without something in place, it restricts what the PSNI can do to act quickly to protect victims. That is one of my concerns. I had hoped that the orders and notices would have gone some way to addressing that, and I was disappointed not to see them in the Bill. I would appreciate a wee bit of your insight into that. Do you want to deal with that first, Sarah?

Ms Ramsey: Yes. Thanks, Linda. Certainly, there are issues. Again, we talk about looking at this in a holistic way. I think that some of the other stakeholders spoke to you about that and about the necessity not just to look at criminal law or family law as a solution but to try to look at it all in the round. You will see that we raised an issue on non-molestation orders, which, I think, you have described as inter partes "injunctions" in the Bill. We suggested that, if there is an ex parte non-molestation order, which is when one party has brought it before the court and the judge has deemed that there is sufficient evidence to grant an ex parte non-molestation order, that should be sufficient grounds to determine that the alleged abuser should not be in a position to cross-examine the alleged victim. Therefore, yes, there are some limitations in the crossover between non-molestation orders and family court proceedings.

Ms Dillon: OK. Thanks. With regard to broader family relationships and the impact that they could have, your view is that the reasonableness defence would go some way to address that.

Ms Ramsey: Yes.

Ms Dillon: Do you feel that the Bill would have gaps if those were not included, or are you content that it would serve its purpose if it was limited to partners and ex-partners?

Ms Ramsey: It is a fine balancing act. The Bill has cleverly reflected how society has changed. I think that we were trying to do was just to alert the Committee to one of the dangers of expanding the group of people who would be included if you went beyond partners and ex-partners. However, one has to reflect society, and those are issues that, perhaps, would not be caught if you merely mentioned partners and ex-partners in the Bill.

Ms Dillon: Clause 8 is about the under-18s and over-18s. We have raised this with other witnesses. If both people are under 18 or the perpetrator has maybe just turned 18 years old and the victim is 17 years old, what room is there? We are looking for your specific knowledge of that, because you deal with it in the courts and may know how it might play out there. I suppose we are trying to get to the bottom of that.

Ms Ramsey: I think that that is why we set out in our response that we feel that there should be a level of discretion and why we feel that clause 12 should be and remain *[Inaudible.]* If you are talking about aggravating factors where the children are under the age of 18, if you look at how we describe that when one talks about sentencing, you see that we say that the judiciary should have a level of discretion in sentencing, notwithstanding that there may be aggravating factors, because there are always specific cases. That has to be taken into consideration, rather than just having a blanket response where children are under the age of 18.

Ms Dillon: I have a final point about the issue that you raised about the family courts and the not-automatic bar. My instinctive view was that there could be an allegation, so might that be abused? Could people make allegations in order to not be cross-examined? I have to say that the explanation that you gave in your presentation has made me rethink that. We possibly need to look at that. As a Committee, we should certainly look at how that will impact. I just want to say that I appreciate your clarification of that.

The education issue has been raised repeatedly by witnesses, as I am sure you are aware. The Committee has taken that on to deal with as part of its mop-up. It is important. The education piece is vital; without it, the legislation will not be as effective as it could and should be. It can be abused and misused, but I believe that education will prevent that from happening. I appreciate your presentation.

Ms Ramsey: Thank you very much.

Ms S Bradley: Can you hear me?

The Chairperson (Mr Givan): Yes. Thank you, Sinéad.

Ms S Bradley: OK. Thank you, Sarah and David, and thanks for your presentation and your written submission; it is quite thorough. Everybody's interest is in making good law, and it is concerning when you consider some of the comments. It seems that we maybe have a wide net, a low bar and are in a catch-all situation, and it is about knowing what parameters to adjust to stay true to the objective of this law.

I particularly want to look at what you said in your submission about clause 15. You touched on it, Sarah, when you referred to the need to state and be specific about the aggravating factors. I have concerns about whether there is a lack of transparency in that and consistency in application. How does that compare, if at all, to similar legislation or sentencing at the moment? Can you give me a bit of an insight to that?

Ms Ramsey: The particular issue in the Bill is that you are dealing with family relationships, and I have to look at it from a family lawyer's perspective. One of the catchphrases that we always use is that each case turns on its own merits. Our view on clause 15 was to leave a level of discretion, especially when you are dealing with relationships and you have issues relating to children. Going forward, children are perhaps going to be aware of criminal prosecutions that have taken place, so leaving some discretion for the judiciary would be helpful in respect of levels of sentencing and in how the family will exist going forward. It is really about looking at it from a more holistic perspective.

Ms S Bradley: Yes, I appreciate that, Sarah, and I suppose that the sensitivities around it are difficult to manage. This is new legislation, so there is no case law that you can refer to or get a measure of a reasonable landing place for sentencing. I suppose that a body of work builds up over time, but, if no regard is given to the rationale for a big part of the sentencing, does that make it difficult?

Ms Ramsey: You would usually have a written judgement, and we would use that as precedence to give people an idea of sentencing guidelines. I do not think that there would be a difficulty in that.

Ms S Bradley: Is there another example, Sarah, of legislation that does not specifically have that written into it and you almost have to read between the lines to find something specific to that case? One of the things in one of the submissions was the absolute absence of information on a lot of domestic abuse issues, because, as you said, a lot of cases never come forward. If they do, it is because the relationship has already entered the separation stage, and even then a lot of things slip through the net. At every opportunity we have, should we try to capture in a really transparent way, as a public education exercise, that the implications of that behaviour are that they result in court?

Ms Ramsey: Sometimes it is not apparent from a criminal record how an offence occurred. As lawyers, we discuss that with clients when we are going through their criminal record. I cannot think of specific legislation. Can you leave that with me, and I will come back if there is anything?

Ms S Bradley: Yes. I just want your thinking on that, Sarah. I appreciate it. Thank you, Chair.

The Chairperson (Mr Givan): Do any other members have points to raise? Rachel has been emailing me: unfortunately, her IT connection is dropping in and out. I know that she would have wanted to ask questions.

Mr Dunne: Sarah, you mentioned that special measures are already in place in family courts. Will you give us some examples? Where do you feel that improvements will be made as a result of bringing in the legislation?

Ms Ramsey: Special measures are already available in criminal courts. We recommend that they be provided in family courts also. On a practical basis, when we, as family lawyers, are aware that there are issues of domestic abuse or domestic violence, we try to take those into consideration. I referred to practice direction 12F in England. An article yesterday set out the additional measures that the courts in England are suggesting. There are practical suggestions, such as having separate waiting rooms for alleged perpetrators and victims. There are special measures on shielding witnesses giving evidence and taking into consideration how they get to and from the courtroom. Such things can only be helpful, because they protect alleged victims and assist them, if necessary, in giving evidence before the court.

Mr Dunne: Is there a risk of the legislation being used to settle or get involved in family disputes? That is a big issue.

Ms Ramsey: That is one of the cautions that we set out. There are some issues in which it is not perhaps applicable for the legislature to become involved. It is one of the dangers that we set out when we talked about widening the scheme. As, I think, one of your colleagues said, there is a low bar there, but clause 12 is really a form of check and balance in that regard. People will look at what is reasonable in all the circumstances. The legislation should perhaps not be used for mere family disputes, but it should be looked to for the mischief that it is trying to solve, which is domestic abuse.

Mr Dunne: Thank you, Sarah.

The Chairperson (Mr Givan): Sarah, thank you very much for the evidence. We did not go into the entire written submission, which is excellent, but I assure you that we, as a Committee, will raise with the Department all the issues that you have raised, even though we did not touch on all of them. A lot of valid points have been made that we will need to consider, because we all want to get the most effective legislation for dealing with the issue. Thank you very much for your submission today.

Ms Ramsey: Thank you.