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23 September 2020

Dear Christine,

Domestic Abuse and Family Proceedings Bill

Thank you for your letter of 19 September 2020, seeking further clarification on aspects of the Domestic Abuse and Family Proceedings Bill. Please see below a response to each point.

Clauses 5 & 18 – The Committee noted that the terms adoptive parent/child, foster parent/child and kinship carer/child relationship would come within the scope of parental responsibility but would like a response to the specific questions the Committee raised in relation to the term ‘affinity’ as outlined in my letter dated 14 September i.e. clarification of where the Department’s understanding of the term ‘affinity’ comes from, whether this is a legal definition, further information on the opinion provided by DSO and, given that stepchildren are specified in the clause, is there any reason why the other relationships should not be specifically set out in the legislation.

The provisions in the Bill around family members/relative, in terms of those that are covered in it and the terminology used, are similar in nature to those contained within the Family Homes and Domestic Violence Act (Northern Ireland) 1998. That legislation was



considered in the context of family member/relative for the Bill and contains similar references to relationships being of the full blood, half blood or by affinity. It also contains references to step relationships.

The use of the term affinity in legislation refers to the relationship that each person in a marriage has to the relations of the other person. Departmental Solicitor's Office advice was not sought on this matter.

The Committee had previously asked for clarification on whether the term 'affinity' would cover adoptive parent/child, foster parent/child and kinship carer/child relationships. An adopted child would legally be considered to be the child of an individual. The relationship between foster parent/child and kinship carer/child is captured in the context of parental responsibility (albeit that the parental exclusion would then typically apply) rather than the term affinity. This is considered appropriate given that these relationships can be short to medium term, and may cover many different individuals over a period of time, while kinship relationships can be difficult to determine in terms of the basis of the relationship. More generally the issue of parental responsibility and affinity are two separate issues.

Clause 9 – The Committee wants to see the text of the proposed amendment being considered in conjunction with the Department of Health before it reaches a position on this clause.

The draft wording of the proposed amendment, which amends the child cruelty offence in Section 20 of the Children and Young Persons Act 1968 is set out below.



New clause

Before clause 21 insert—

‘Definitions for child cruelty offence

Meaning of ill-treatment etc. in offence provision

[20A]. In section 20 (cruelty to persons under 16) of the Children and Young Persons Act (Northern Ireland) 1968—

- (a) in subsection (1), the words from “(including” to “derangement)” are repealed,
- (b) before paragraph (a) of subsection (2) insert—

“(za) a reference to—

- (i) ill-treatment is to ill-treatment whether physical or otherwise;
- (ii) suffering or injury is to suffering or injury whether physical or otherwise;”.

This will ensure that non-physical ill treatment of a child, by someone with parental responsibility for them, is criminalised. It will also ensure that current references to an offence around unnecessary suffering or injury to a child explicitly state that this relates to the suffering or injury being of a physical or otherwise nature, again ensuring that non-physical behaviour is captured. This should enable matters such as isolation, humiliation, buying etc. to be captured. Assuming acceptance of the amendment, including by the Speaker, this would make clear that it is an offence.

Members will wish to note that the child cruelty offence only applies to those under the age of 16. Having liaised with colleagues in the Department of Health, as well as colleagues in PSNI, we are not aware of similar child protection provisions that can be easily adjusted to explicitly deal with non-physical ill treatment of those aged 16 and 17 in the context of a parent-child relationship. On this basis, we would **welcome the Committee’s views**, in order to ensure that non-physical abuse of 16 and 17 year olds in a parent-child relationship is clearly provided for in legislation, on reducing the age



threshold for the parental responsibility exclusion from under age 18 to under age 16 (clauses 11 and 17). In the absence of this there is the possibility that it may not be possible to address the non-physical ill treatment of those aged 16 and 17 in this context.

In this context it should be noted that the standard offence thresholds would apply, insofar as any behaviour would have to be considered to be abusive, be viewed as such by a reasonable person and occur on two or more occasions. Members will wish to note that the parental responsibility exclusion in England and Wales is also 16, which we understand has not given rise to difficulties there. This could be considered appropriate in that it is linked to a range of age-specific permissions e.g. school leaving age, age at which a person can live on their own, ability to work in a licensed premises, getting married or joining the armed forces with parental consent. Furthermore, any decision to charge an individual with the offence would be dependent on the particular circumstances of the case and the reasonable person defence would also apply.

The draft wording of such an amendment is set out below.

Clause 11

Clause 11, page 7, line 15, leave out '18' and insert '16'

Clause 17

Clause 17, page 9, line 21, leave out '18' and insert '16'

Clause 9 – the Committee is also considering a potential amendment to Clause 9 and has agreed to provide the wording of the draft amendment, which is outlined at Appendix A, and request the views of the Department on what it does, whether there are any implications if it was added to the clause, what value it adds to the clause and



whether the Department will consider covering this in the Explanatory and Financial Memorandum to provide greater clarity.

As Members are aware the Department has previously briefed on this matter and advised that the child aggravation locally is wider than the Scottish offence in that there is no requirement for a reasonable person to consider that the behaviour would adversely impact on a child or that the child has to live with either the victim or offender.

The Scottish legislation provides that their offence is aggravated if a child sees, hears or is present **plus** a reasonable person would consider the behaviour to be likely to adversely affect a child. Proving the aggravation is then subject to a condition that, for the offence to be aggravated, there does not need to be evidence that the child has been aware of, understood or been adversely affected by the abuse. Our offence is aggravated on the basis of an objective fact, simply that the child sees, hears or was present (the first limb of the Scottish requirements), turning purely on these facts, unlike the Scottish provision which also requires a second limb of consideration of adverse affects. Our clause does not raise the question of the child's awareness.

The proposed Committee amendment would therefore introduce an unrelated adverse affect provision, which is unnecessary and would add nothing to the clause (since presence of the child in our provisions is a matter purely of fact and does not depend on the supposed impact on the child). This is also out of context compared to the Scottish legislation (the provision in question in Scotland is principally a counterweight to their adverse impact provision for which we have no equivalent). The Department also considers that the amendment could risk giving rise to confusion, by cast doubting on the effectiveness of clause 9. The Department would not support the amendment. Any text in the Explanatory and Financial must reflect what is contained in the Bill.



Clauses 11 and 17 – the Committee wants to see the wording of the proposed amendment to child protection provisions currently being discussed with the Department of Health before it reaches a position on these clauses.

The amendment to child protection provisions is set out again below for ease of reference for Members. Members will also wish to consider the matters set out earlier in this correspondence.

New clause

Before clause 21 insert—

‘Definitions for child cruelty offence

Meaning of ill-treatment etc. in offence provision

[20A]. In section 20 (cruelty to persons under 16) of the Children and Young Persons Act (Northern Ireland) 1968—

- (a) in subsection (1), the words from “(including” to “derangement)” are repealed,
- (b) before paragraph (a) of subsection (2) insert—

“(za) a reference to—

- (i) ill-treatment is to ill-treatment whether physical or otherwise;
- (ii) suffering or injury is to suffering or injury whether physical or otherwise;”.’

Clause 11

Clause 11, page 7, line 15, leave out ‘18’ and insert ‘16’

Clause 17



Clause 17, page 9, line 21, leave out ‘18’ and insert ‘16’

Clause 13 – the Committee would like further information on the burden of proof/evidential base required to meet the test of personal connection

The basis on which the personal connection is met, and the evidence needed, will depend on the individual circumstances of the case. While a new offence is being introduced evidence gathering and the provision of proof per se are not new to police or prosecutors. It is likely that this could take a range of forms. It may include any combination of the below, as well as additional aspects as considered appropriate:

- evidence of a marriage, civil partnership, relationship or family connection;
- history of the relationship;
- records of lifestyle, household and finances;
- records of communication between the individuals, e.g. emails, phone records, text messages, social media, online activity;
- audio or visual recordings of interaction between the individuals;
- photographic evidence;
- information from third parties or other bodies such as housing services, children’s social care departments, education, probation and medical professionals; and
- information from family, friends, co-workers, neighbours, regular service providers, etc.

As part of the processes related to the offence the police will need to establish personal connection, including with interview questioning. PPS will serve a notice of personal connection and while personal connection will be taken to be established it may be challenged by the defence during the court proceedings. In those circumstances PPS must then prove, beyond reasonable doubt, that the parties are connected.

Clause 22 – the Committee wants to see the text of the proposed amendment to provide for court rules before it reaches a position on this clause.



The draft wording of the proposed amendments are set out in **Appendix A** (see proposed new clauses 26A and 26C).

Clause 25 – the Committee welcomes the Minister’s intention to bring forward an amendment to change ‘may’ to ‘must’ in 25(1) as it requested and agreed to provide its preferred wording for the amendment.

Members will wish to note that the Department is proposing an alternative amendment to clause 25 which would amend both subsection (1) and subsection (3), to provide consistency in those provisions. The proposed amendment provides that the Department must issue guidance on Part 1 of the Bill and such other matters as it considers appropriate, keep the guidance under review and revise it if it considers revision necessary in light of the review. This ensures that the change requested for by the Committee is dealt with in both parts of the clause as appropriate. In addition, more generally, Members will wish to note that, given the duty imposed, the **Interpretation Act (Northern Ireland) 1954** automatically requires the guidance to be revised from time to time, as the occasion requires in the absence of this.

The draft wording of the proposed amendments is set out below.

Clause 25

Clause 25, page 13, line 28, leave out ‘may’ and insert ‘must’

Clause 25

Clause 25, page 13, line 30, leave out ‘other matters’ and insert ‘such other matters as it considers appropriate’

Clause 25



Clause 25, page 13, line 34, leave out from ‘may’ to end of line 35 and insert ‘must—

- (a) keep any guidance issued under this section under review, and
- (b) revise any guidance issued under this section if it considers revision to be necessary in light of review.’

Clause 26 – the Committee wants to see the text of the proposed minor amendment to this clause and the proposed amendment to provide for a court hearing civil proceedings to have a discretionary power to prohibit cross-examination in person before it reaches a position on this clause.

The draft wording of the proposed amendments is set out in **Appendix A** (see proposed amendments to clause 26 and proposed new clause 26B).

The proposed amendment to amend Article 12A of the Children (Northern Ireland) order 1995 has already been shared with the Committee but is included again for ease of reference (see new clause A26).

Other minor and technical drafting amendments to be brought forward by the Department

The Committee will wish to note that in further reviewing the Bill Legislative Counsel have advised as to a number of minor and somewhat technical drafting amendments (**there is no policy change**) that the Department would intend to bring forward. Members will wish to note that these are being notified to the Committee at the earliest opportunity, to enable consideration as part of the Committee stage of the Bill.

These include amendments to clause 8 and clause 10 (child aggravator and extra territorial provisions) which are minor drafting amendments to tidy a small aspect of the



wording in each place, particularly to reflect the position that the course of behaviour under the main offence is not the sole element of the domestic abuse offence.

An amendment to clause 13 (which deals with an alternative offence as to the domestic abuse offence) would insert provision, for the avoidance of doubt, as to the effect of the Criminal Law Act 1967, which contains general provisions for alternative verdicts in indictment (Crown Court) proceedings. This is to make sure that there is no risk of implying that the provisions in the 1967 Act are ousted by what is contained in clause 13.

The draft wording of the proposed amendments is set out below.

Clause 8

Clause 8, page 5, line 24, leave out ‘constituting the offence’ and insert ‘by virtue of which the offence is constituted’

Clause 10

Clause 10, page 6, line 38, leave out ‘course of behaviour would constitute the domestic abuse offence’ and insert ‘domestic abuse offence would be constituted by virtue of the course of behaviour’

Clause 13

Clause 13, page 7, line 40, at end insert—

‘(3) This section is without prejudice to section 6(2) of the Criminal Law Act (Northern Ireland) 1967 (alternative verdicts on trial on indictment).’



Members are asked to note that the draft amendments contained in this letter are provided for information, to assist in the Committee's deliberations, but they are not being formally tabled at this stage. There may be some technical or drafting adjustments to the amendments, but no substantive changes in the effect of the amendments is expected, as they are finalised for formal tabling.

Members may also wish to note that some titles and headings in the Bill may need to be updated after Consideration Stage in light of all changes made by amendments to the Bill as a whole at that Stage.

I would be grateful if you would bring this information to Members' attention.

Yours sincerely,

TIM LOGAN

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