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Clerk to the Justice Committee
Room 242
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Dear Christine,

Domestic Abuse and Family Proceedings Bill

Thank you for your letter of 14 September 2020, raising further queries on aspects of the Domestic Abuse and Family Proceedings Bill. Please see below a response to each point.

Clause 1 – *Further clarification of the rationale for adopting a different approach in this Bill to the Scottish legislation which confines the offence to partners and ex-partners and where the definition that is included in the 2016 Domestic Abuse and Sexual Violence and Abuse Strategy, and upon which the officials indicated the decision in relation to this legislation was based, came from and who had input into it.*

While the majority of domestic abuse crimes currently involve a partner or intimate relationship around 35% of domestic abuse crimes involve a family relationship. It is therefore considered important that domestic abuse is not limited simply to intimate relationships but that it also covers close family relationships.

The Stopping Domestic and Sexual Violence and Abuse Strategy is a joint strategy led by the Department of Justice and the Department of Health on behalf of the Northern Ireland Executive. The scope of the Strategy, and the position in terms of the coverage of domestic abuse (to include both intimate and family relationships), was agreed



following consultation with key stakeholders (including statutory and voluntary sector partners) and was also the subject of a full public consultation.

In addition, the content and scope of the Domestic Abuse and Family Proceedings Bill, covering both intimate partner relationships and family members, was agreed by a multi-agency Task and Finish Group which involved a range of our voluntary sector partners including Action on Elder Abuse (now Hourglass), Men's Advisory Project, NSPCC, Nexus and Women's Aid Federation as well as representatives from police, the Probation Board and the Public Prosecution Service. Operationally the scope for domestic abuse for the police currently includes close family, while both police and PPS have indicated that they are content with the definition set out in the Strategy.

On the basis of the above locally close familial relationships already fall within the scope of domestic abuse.

Clauses 5 & 18 – *clarification of where the Department's understanding of the term 'affinity' and its view that it covers adoptive parent/child, foster parent/child and kinship carer/child relationships 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 relationships that fall within the term 'affinity' should not be specifically set out in the legislation.*

In previous correspondence to the Committee officials advised that the terms adoptive parent/child, foster parent/child and kinship carer/child relationship would come within the scope of parental responsibility, rather than be covered by the term 'affinity', albeit that such relationships are dealt with under the parental responsibility provisions.

Clause 9 – *further clarification of why, under the Bill, a child is not considered a victim in their own right, to what extent the proposed amendment being considered in conjunction with the Department of Health will address this and, if there were multiple children in a*



home e.g. 4 children and each one was classed a victim in their own right under this legislation, would one incident result in an offence against the victim and an offence against each child under this clause i.e. 5 separate offences?

The Department gave careful consideration to the scope of the domestic abuse offence in order to ensure that children could be captured within it, in their own right, where they are in a relationship or are a family member (except where parental responsibility applies, in order to prevent criminalisation of this) and that aggravation related to a child could be reflected while preventing criminalisation of parental responsibility.

The Department, in conjunction with the Department of Health, is currently liaising with Counsel on the amendment to current child protection legislation around an offence of ill treatment of a child so that it explicitly states that ill treatment can be physical or otherwise. The purpose of this would be to ensure that non-physical ill treatment of a child, by someone with parental responsibility for them, is criminalised. It would also ensure that current references to an offence around unnecessary suffering or injury to health would also explicitly state that this relates to the suffering or injury being of a physical or psychological nature, again ensuring that non-physical behaviour is captured. We consider that this is a more appropriate means through which to deal with the concerns around the non-physical abuse of a child. The Department will share the wording of the amendment with the Committee as soon as it is available.

Assuming such an amendment is accepted each child (as set out in the scenario provided by the Committee) could potentially be a victim of that offence. However, this will depend on the individual facts and circumstances of the case.

Clause 9 – *the Committee is concerned that, while there is an assumption in this clause that harm has been done with the reference to ‘seeing, hearing or being present during...’; that is not specific or clear enough. Noting the wording of Clause 5 subsection 5 of the Scottish legislation which states that “for it to be proved that the offence is so aggravated*



there does not need to be evidence that a child had ever had any awareness of or understanding of A's behaviour or been adversely affected by A's behaviour" the Committee believes that, to ensure effective enforcement and prosecution, the wording of clause 9 needs to be strengthened to reflect this position much more clearly. The Committee is of the view that this clause requires amended, either by adopting the Scottish wording unless there is any specific reason not to use that wording or wording that provides the same sort of clarity, and requests confirmation from the Department on whether the Minister is content to bring forward an amendment on this basis. If the Minister agrees to bring forward an amendment the Committee wishes to see the wording of the draft amendment as soon as possible. In the meantime, the Committee is seeking its own advice regarding a possible amendment.

It is considered that the offence locally, in relation to child aggravation, 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 (as referred to above) or that the child has to live with either the victim or offender. Given this, there is no associated condition that a child does not have to be aware of the abusive behaviour.

Locally the child aggravator provided for by clause 9 applies if, at any time in the commission of the offence, a relevant child sees, hears or is present during an incident of abuse, they are used to abuse another person or abusive behaviour is directed at them.

The clause does not provide that the child has to have an awareness of, be adversely affected by, or understand the behaviour. The grounds is that the child is involved in one of the ways set out above. As a result it is not considered that an amendment akin to the Scottish legislation is needed. We hope that this provides the necessary reassurance to the Committee.

Clauses 11 & 17 – *the Committee wishes to see the wording of the proposed amendment to child protection provisions currently being discussed with the Department of Health*



before considering these clauses further.

As noted the Department, in conjunction with the Department of Health, is currently liaising with Counsel on the amendment to current child protection legislation. The Department will share the wording of the amendment with the Committee as soon as it is available.

Clause 12 – *the Committee is interested to know if the Department is aware of any examples in other jurisdictions where the “reasonableness defence” has been used inappropriately.*

Officials had previously liaised with their counterparts in other jurisdictions on this, as well as a wide range of other issues. They have advised that they are not aware of difficulties in relation to the reasonable defence provision. Importantly any use of the defence in other jurisdictions would be determined by the particular circumstances of the case and if successful the behaviour would have been considered reasonable by the court. Where unsuccessful it would not have been considered reasonable for the court.

Clause 13 – *further information and detail on why this clause is necessary, how it would work in practice including the provision of a scenario or example illustrating this and what the implications would be if it was removed from the Bill. The Committee is also concerned that the wording of the clause does not clearly reflect the explanation of the purpose of the clause provided by departmental officials and asks the Department to reflect on how the wording of the clause could be changed/enhanced to better reflect its purpose.*

This provision is intended to deal with a scenario where it is considered that there may be what is considered to be abusive behaviour, however, the personal connection (which needs to be proved for the domestic abuse offence) is challenged by the defence and not proven to the court. In these circumstances the behaviour could be deemed to amount to harassment (or stalking in due course), which does not require a personal connection.



We do not consider that this will give rise to a ‘downgrading’ of the offence; the aim would always be to secure a conviction for the new offence. In the absence of the provision it may be that the person is not charged with any alternative offence. While it is considered that this would most likely be the reason for an alternative offence having to be considered we would not wish to be limited to this, in terms of stipulating this in legislation. It may not be the only scenario and there may be other limited circumstances, dependant on the individual circumstances of the case. The Department will amend the Explanatory and Financial Memorandum to include this scenario as an example and will also include this in the guidance which is being produced on the new offence.

Clause 22 – *the Committee will consider the information provided by the Department in its correspondence dated 9 September 2020 in relation to proposed amendments to require court rules to make specific provision in relation to special measures in family and civil proceedings for victims of domestic abuse and other offences at its meeting on 17 September 2020. The Committee will however want to see the wording of the proposed amendments before reaching a position on this clause. The Committee also requests confirmation that it is the Department’s intention to adopt the recommendation of Women’s Aid and the recommendation in the Gillen Review regarding a guarantee of special measures in the Family Court.*

The Department confirms that the proposed amendment in relation to special measures in family proceedings will require court rules to make provision so that victims of domestic abuse are automatically eligible for consideration for special measures in family proceedings. It would be for the court hearing the proceedings to determine whether it is necessary to make a direction for special measures in an individual case.

The proposed amendments are presently being drafted by Legislative Counsel and will be shared with the Committee as soon as possible.

Clause 25 – *the Committee wants 25(1) changed from ‘may’ to either ‘will’ or ‘must’ in*



relation to the provision of guidance by the Department and requests confirmation from the Department regarding whether the Minister is content to bring forward such an amendment, and any other consequential amendments required, on this basis. If the Minister agrees to bring forward an amendment the Committee wishes to see the wording of the draft amendment as soon as possible. In the meantime, the Committee is seeking its own advice regarding a possible amendment.

As noted at the previous Committee session the use of the word “may” is commonly used in legislation when referring to guidance. We can assure Members that the Department will publish guidance, there is no question of this not being published, and we will share it with the Committee beforehand. An initial draft of the guidance has been shared with members of a multi-agency Task and Finish Group which is scheduled to meet next Monday. On further consideration of this issue, prompted by the Committee’s letter, the Minister has agreed to table an amendment to change the word “may” to ‘must’ in clause 25. The Department is accordingly instructing Counsel to draft an amendment and will share the wording of this with the Committee as soon as it is available.

Clause 26 – *the Committee will consider the information provided by the Department in its correspondence dated 9 September 2020 in relation to a proposed amendment to provide for a court hearing civil proceedings to have a discretionary power to prohibit cross-examination in person at its meeting on 17 September 2020 together with the proposed minor amendment to require a court considering whether to exercise its discretionary power to prohibit cross-examination in person to have regard to findings of fact made in civil or criminal proceedings as well as family proceedings. The Committee will however want to see the wording of the proposed amendments before reaching a position on this clause. The Committee also requests confirmation that it is the Department’s intention to adopt the recommendation of Women’s Aid in relation to an automatic prohibition of cross examination in any family proceedings where there are allegations of domestic abuse or where the perpetrator has admitted to domestic abuse and the recommendations in the Gillen Review relevant to court proceedings in domestic*



abuse cases.

In relation to the recommendation of Women's Aid, provision has already been made in the Bill for an automatic prohibition to apply (in addition to the circumstances, where a party has been convicted of, cautioned for, or is charged with a relevant offence, or has had a relevant on-notice injunction made against them) where there is other specified evidence of domestic abuse (see new Article 11D to be inserted in the Family Law (NI) Order 1993). The other types of evidence of domestic abuse will be specified in regulations. It is anticipated that such evidence would need to be sufficiently objective and robust to justify an absolute bar, whilst at the same time protecting as many victims as possible. The Department intends to consult on which other types of evidence should lead to an automatic prohibition before making any regulations under this power. In cases where an automatic prohibition does not apply, a court will have a discretionary power to prohibit cross-examination in person.

The proposed amendment in relation to prohibition of cross-examination in person in civil proceedings and the minor amendment to clause 26 are presently being drafted by Legislative Counsel and will be shared with the Committee as soon as possible.

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

Yours sincerely,

Departmental Assembly Liaison Officer