

Margaret Mitchell MSP
Convener, Justice Committee
c/o Justice Committee Clerks
Room T2.60
The Scottish Parliament
Edinburgh
EH99 1SP

29th August 2017

Dear Convener,

Re: Domestic Abuse (Scotland) Bill

Further to the oral evidence that our organisations provided on 20th June 2017 on the Domestic Abuse (Scotland) Bill and the oral evidence of the Cabinet Secretary for Justice on 27th June 2017 we write to provide some additional information about our call for an offence that recognises the harm that is done to children when there is domestic abuse of their parent (or carer) or in the environment that they live in.

Our organisations warmly welcome the introduction of the Bill and fully support the creation of a specific offence that recognises the psychological and emotional impact of coercive control, but we remain concerned that it does not sufficiently recognise and address the impact of domestic abuse on children.

Impact of Domestic Abuse on children

The Scottish Government has made it absolutely clear that being in an environment where domestic abuse is taking place is damaging to children; that it violates children's rights and that coercive control of a parent or carer impacts on children from the earliest, and most crucial stages of infant development. It affects them even if they are not aware of the abuse and even if the non-abusing parent does their utmost to protect them from it.

A range of evidence documents how domestic abuse, during pregnancy and afterwards, can severely disrupt the relationship between parent and infant, undermine parental connections and attachment and compromise the child's ability to feel safe, secure and loved and the non-abusing parents' ability to provide material and emotional support that can mitigate against children experiencing poor outcomes in later life.

Children and young people experience domestic abuse in many different ways - in our evidence we noted examples such as children whose car seats are withheld so that their parent is not able to take them out; children who are impacted by restrictions on family finances; children being forced to watch while their non-abusing parent is abused. Our position is that all of this must be viewed within the gendered analysis of domestic abuse and that the most appropriate place for this is the Domestic Abuse Bill.

Statutory Aggravator

We welcome the introduction to the bill of a statutory aggravator recognising the impact of domestic abuse on a child, particularly given the impact it will have on, and the transparency it will provide around, sentencing decisions. We hope it will also serve to raise awareness of the impact of domestic abuse on children, both amongst professionals and the wider public. We hope this recognition of children's experiences will influence decisions made in civil courts regarding the safety of contact where there is a history of domestic abuse.

Whilst we believe that the aggravator is an important part of the Bill we feel it could be strengthened. At present it requires a child to see, hear or be present when the abuse takes place. This is out of step with the understanding of domestic abuse contained within the Bill as a whole and means, for example, that where a non-abusing parent seeks to protect their children from knowledge of the abuse, the aggravator may not be available.

Non-harassment orders

We welcome the proposal in the bill for non-harassment orders to be considered in all cases of domestic abuse. However, we believe that the protection of non-harassment orders should be considered for children as well as for adults in cases of domestic abuse.

Separate Offence

We have been clear throughout our written and oral evidence that we do not consider the introduction of the aggravator to be enough to ensure that children are recognised as victims of domestic abuse in their own right. We believe there should be a parallel offence recognising the harm done to a child when domestic abuse is occurring within the household. This call has been supported not only by our organisations but also by Aberlour, NSPCC Scotland, Scottish Women's Aid and ASSIST: organisations with direct experience of working alongside children and families that have been affected by domestic abuse. We feel it is important that the harm done to the parent (or carer) and the resultant harm to the child are not separated and we therefore believe that the separate offence belongs within the current Bill.

In his evidence to the Committee the Cabinet Secretary explicitly stated that he was "*aware of concerns that the existing offence may not adequately deal with psychological abuse of a child.*" The Government's proposed solution is to review Section 12 of the Children and Young Person's (Scotland) Act, 1937 to "*consider whether it requires to be updated to reflect a modern understanding of what amounts to abuse of a child.*" We support this review to improve the way abuse of children is addressed, but do not feel that it is appropriate to address the harm done to children in the very specific context of domestic abuse within that review of section 12. In particular, we are concerned that this would separate the harm done to a child in the context of domestic abuse from the perpetrator's behaviour. Together with the other members of the Equally Safe Children and Young People Stakeholders Reference Group, we outlined our concerns to Scottish Government, prior to the publication of the bill. (We have attached our previous

submission to the Scottish Government for the consideration of the Committee as Appendix A.)

The Scottish Government has a bold ambition, outlined within the Equally Safe strategy, to eradicate violence against women and children. To help achieve this ambition, the new offence needs to be equally bold by explicitly recognising that the coercive control of a parent (or carer) results in harm to their child. We believe it is possible to amend the Bill, as currently drafted, in a way that enables the Police and COPFS to effectively investigate and prosecute domestic abuse as an offence against a child, thereby holding the perpetrator to account for his behaviours as they harm children. We believe civil courts will understand the offence against a child and will be able to recognise this when making contact decisions, which will help to keep children safe. The creation of a separate offence relating to children in the specific context of domestic abuse will ensure that children have the same protection under the Bill that adults have.

We hope that this information is helpful to the Committee. We would be happy to provide additional detail if that would be helpful.

Yours faithfully,

Bruce Adamson, Children and Young People's Commissioner, Scotland

Martin Crewe, Director, Barnardo's Scotland

Mary Glasgow, Acting Chief Executive, Children 1st

Fergus McMillan, Chief Executive, LGBT Youth Scotland

Appendix A

Domestic Abuse and Section 12 of the Children and Young Person's (Scotland) Act 1937

Members of the Equally Safe Children's Reference Group understand that the Scottish Government is planning to consult on recommendations around reform of the Children and Young Person's (Scotland) Act 1937, including a proposal to amend section 12 to include domestic abuse, in some form. We have spent some time considering the potential implications of situating such an offence within section 12 and share a strong, collective concern that this would not be a helpful way forward for a range of reasons including:

- In 2011 the Scottish Government and Parliament's recognition that coercive control of mother and child is distinct from other forms of child abuse led to the introduction of domestic abuse as a specific ground for referral in Children's Hearings. This change resulted from the understanding that using either Section 12 of the Children and Young Person's (Scotland) Act 1937 or lack of parental care as grounds for a hearing could render the impact of domestic abuse on both mother and child invisible. Instead of holding the perpetrator to account for his actions, the mother could be wrongly perceived as failing to protect her child. We are therefore concerned that using, even a reformed, Section 12 of the Children and Young Person's (Scotland) Act will not offer sufficient protections to child and mother and are unsure about how it would operate in practice. Indeed, it could be seen as a retrograde step.
- Section 12 has in the past been used to prosecute victims of domestic abuse, for failure to act or lack of parental care. There is a risk that an amended section 12, could continue to be used this way. Neglect has gendered connotations in our society, which increases this risk.
- There is a risk that dealing with the impact of domestic abuse on children in child protection legislation will perpetuate the focus within the law being solely on the adult victim. Incorporation of an offence against children within the specific domestic abuse legislation should increase the likelihood of offenders being prosecuted for an offence against the child(ren) as well as the adult victim.
- Containing an offence of domestic abuse, however articulated, within child protection legislation, may not sufficiently fulfil the core purpose of educating the public, prosecutors and civil courts alike, that domestic abuse is always a crime against a mother and a child, wherever there is a child or children involved.
- Section 12 does not at present recognise the context of domestic abuse as an offence against a mother (in most cases) and child(ren), unrelated to the issue of the perpetrator's parental rights and responsibilities for a child. Amending section 12 sufficiently, to fully take account of the specific context of domestic abuse would be complex and time-consuming. We believe there may be serious challenges in using a wider definition of emotional abuse within an updated Act, to cover the specific dynamics of a domestic abuse situation, particularly where the perpetrator is not a parent of a child. Amendment of section 12 may therefore not reach the result we wish to achieve, and may inadvertently reduce the protection to children.
- The focus of the draft Domestic Abuse (Scotland) Bill is *necessarily* on the behaviour of the perpetrator. The relationship that the perpetrator has with any child(ren) involved –

and whether they are a parent or have caring responsibilities towards that child – is not of relevance. Rather, it is the behaviour of the perpetrator towards the adult victim and the impact of that behaviour on any child(ren) involved that is of concern, as acknowledged by the inclusion of the statutory aggravator.

- Section 12 of the 1937 Act is aimed at parents and carers of children. Therefore, situating a ‘domestic abuse’ offence within section 12 offences of cruelty to children by those with parental and caring responsibilities, automatically shifts the focus onto the relationship between perpetrator and child, rather than keeping it focussed on the relationship between the perpetrator and the adult victim, and the subsequent impact on the child victim. Whilst the perpetrator of the abuse could be a person who is, in fact, caring for a child, it could be argued in defence that a person does not have charge or care of a child, making it more complex to prosecute. In practice it may be very difficult to prosecute those without Parental Rights and Responsibilities. There is a strong argument that it would not capture for example, a boyfriend, who took no role in caring for the child, but at the same time acted in such a way as to cause emotional harm to that child.
- It is very difficult to see how both the *actus reus* and the *mens rea* requirements of the section 12 offence could be aligned to an offence of domestic abuse against a child. Scottish case law makes it clear that the *mens rea* for section 12 relates to an intention to carry out an action (which a reasonable person would consider neglect, ill-treatment etc), as opposed to an intention in relation to the consequences of the action. Further, the action involved in a section 12 offence must be such that it is likely to cause unnecessary suffering or injury to health (judged objectively, rather than subjectively). It would be extremely complicated, if not impossible, to weave a domestic abuse offence into section 12, as the *mens rea* of the adult domestic abuse offence requires intention or recklessness as to the consequences of behaviour, which is not incorporated in a section 12 offence. In addition, one of the actions that could result in the offence being committed includes the abusive behaviour having very specific purposes (e.g. isolating from friends etc) – this specificity of purpose is rightly not present in a section 12 offence. This highlights the very different nature and purpose of the section 12 offence as opposed to the domestic abuse offence.
- The *actus reus* and *mens rea* requirements of the domestic abuse offence have been very carefully considered in relation to the drafting of the Domestic Abuse (Scotland) Bill. It would seem most sensible to translate this, amended as necessary, into an offence against the child. The complexities and potential unintended consequences of trying to fit this into an updating of section 12 of the 1937 Act could impede both the introduction of both a domestic abuse offence relating to children and the progress the Scottish Government wishes to make on updating the section 12 offence.

For more information about the information in this briefing please contact:

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