



Margaret Mitchell, MSP
Convener, Justice Committee
The Scottish Parliament
Edinburgh
EH99 1SP

1 May 2017

Dear Convener,

Domestic Abuse Bill

I welcome the introduction of this Bill. It addresses a number of shortcomings in existing legislation relating to domestic abuse. Whilst the Bill is not perfect, it represents significant progress in recognising patterns of coercive control and psychological abuse and in moving away from an incident-based understanding of domestic abuse. I believe it will enable this behaviour to be recognised by the criminal law and it will increase the awareness of this form of domestic abuse in the wider justice system and in society.

As Children and Young People's Commissioner Scotland, my role is to promote and safeguard the rights of children and young people across Scotland, with particular reference to the United Nations Convention on the Rights of the Child (UNCRC)¹. Article 19 of the UNCRC requires state parties to take "all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence...". The UN Committee on the Rights of the Child issued its General Comment on Domestic Abuse in 2011. This clarified that Article 19 includes protection from domestic abuse and that states were required to "assist caregivers with challenges relating to domestic violence"². In June 2016, the Committee issued the Concluding Observations of its examination of the United Kingdom's compliance with the UNCRC³. The Committee expressed its concern at the impact domestic abuse had on children and recommended that legislation be revised in order to protect all children from the effects of domestic abuse.

In 2010, a consultation of children and young people undertaken by my office identified the effect domestic abuse had on children as an issue of concern. In 2013, I commissioned research into children's experiences of child contact proceedings where domestic abuse was alleged. This found that there needed to be a better understanding the impact of domestic abuse on children, in both policy and law⁴.

¹ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx>

² http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f13&Lang=en

³ http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGBR%2fCO%2f5&Lang=en

⁴ <https://www.cypcs.org.uk/publications/domestic-abuse>

Over the last two years my office has worked with Scottish Women's Aid on improving the understanding of children's experiences of court ordered contact. This has culminated in a children and young people's participation project, Power Up Power Down. The project engaged with 27 children and young people aged 5-17 years with experience of domestic abuse and disputed contact through the medium of a comic strip. An initial comic strip was designed to represent the current experiences of children and was used as a means of prompting discussion. The children and young people involved in the project then worked together to form a new comic strip, which outlined the more creative and child-friendly ways in which they'd like their views to be sought. The range of recommendations from the children and young people is extensive and I will forward a link to the film once it is completed (after 4th May). My office will be happy to share further information about this project with the Committee, should they wish to know more.

Do you agree with the proposal in the Bill to create a new offence of abuse behaviour towards a person's partner or ex partner covering both physical violence and non-physical abuse?

I am very pleased to see the see a new criminal offence capturing patterns of co-ercive control and psychological abuse between intimate partners or ex-partners introduced into Scottish Law.

Do you believe that the proposed offence is needed to address a gap in the existing law which currently makes it difficult to prosecute some forms of domestic abuse?

I welcome the current Bill as I believe it will improve protections for women and children who are victims of domestic abuse. It recognises the complex nature of coercive control and is an important step in improving the protections for women and children who experience domestic abuse.

The current Bill clarifies the definition of domestic abuse in a way which is significantly broader than that contained in existing criminal law, for example sections 38 and 39 of the Criminal Justice and Licencing (Scotland) Act 2010 which relate to specific incidents. It is worth noting the UN Committee on the Rights of the Child, in their 2016 Concluding Observations, welcomed the introduction of equivalent legislation in England and Wales.

Do you have any views on the definition of the offence, such as the requirement for a course of behaviour, the definition of abuse behaviour, or the defence that the behaviour was reasonable in all the circumstance.

I am satisfied with the offence defined as 'a course of behaviour'. Whilst the intention of this Bill is to address coercive control, existing legislation must be retained to deal with serious criminal offences. Offences such as stalking, sexual and physical assault, including rape, when they occur in intimate partnerships, should still be prosecuted as appropriate and have the domestic abuse aggravator applied where police investigations indicate controlling behaviour has also occurred. The intention of this Bill is to extend protection, not to replace existing legislation relating to these crimes.

The defence of reasonableness is a subjective test and I share the concerns Scottish Women's Aid raised in their response to the government's consultation on the Bill. The examples given by Scottish Women's Aid usefully illustrate how problematic this section of the Bill is and it will require very careful consideration during the passage of the bill⁵.

The offence is restricted to abuse between partners and ex-partners. Do you agree with this approach? For example, during the Scottish Government's consultation on a draft offence, concerns were raised that it did not properly reflect the impact of domestic abuse on children. The Scottish Government has sought to address this concern in the Bill, primarily by providing that the offence will be aggravated where it involves a child. Do you have any views on this aspect of the Bill?

In my response to the Scottish Government's consultation on the proposed offence, in April 2016, I expressed my concern that the impact on children was not reflected in the offence, despite there being clear evidence of the effects patterns of coercive control have on children⁶. Children can be affected indirectly, when a perpetrator denies access to funds, or restricts social activities or denies the victim access to support networks. They can also be directly involved in the abuse, for example where a perpetrator uses them to monitor or spy on their parent. In addition to research undertaken on behalf of this office, a wide range of international and Scottish research recognises the impact domestic abuse, particularly coercive control, has on children.

My office has worked with partners from both the women's and children's sector and Scottish Government officials, to address this and I am pleased to see the introduction of a statutory aggravator that recognises the impact domestic abuse has on children. This will improve awareness of the impact of domestic abuse on children, but I would like to see this aggravator improved and strengthened.

Specifically, I am concerned that the wording of section 4(2)(b) which states that the offence is aggravated if "a child sees or hears, or is present during, an incident of behaviour that A directs at B as part of the course of behaviour". This reflects an incident-focussed understanding of domestic abuse and does not fully recognise the cumulative impact of coercive control on children, remembering that the vast majority of incidents are unreported. It is widely acknowledged and research shows that children living in a household where domestic abuse occurs are inevitable impacted by it. This may happen with them seeing, hearing or being present (which is likely to be defined as "in the room") at any specific incident. Take, for example, where a mother is denied funds to purchase nappies for her baby. The baby will be directly affected by this even if they did not see or hear, or were not in the room, when the funds were denied. Together with our partners, my office has argued for this to be amended to "is present in the household", wording which is used in section 67(2)(b)(q)(ii) of the Children's Hearings (Scotland) Act 2011 (as amended by the

⁵ https://consult.scotland.gov.uk/criminal-law-and-sentencing-team/criminal-offence-domestic-abuse/consultation/view_respondent?uuld=663098245

⁶ <https://www.cypcs.org.uk/ufiles/Criminal-Offence-Domestic-Abuse.pdf>

Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011)⁷. I would suggest such a wording is adopted in this Bill.

Do you have any views on factors which might impact on the reporting, investigation and prosecution of the offence?

My office's research has highlighted a need for improved awareness of domestic abuse and the impact these crimes have on children. This Bill is intended to change the understanding of domestic abuse and will therefore need to be complemented by awareness raising amongst relevant agencies: the judiciary, legal profession and the courts; adult and child protection professionals; and the police. It will also present a very useful opportunity to raise awareness of domestic abuse within society as a whole.

The Bill makes a number of reforms to criminal procedure, evidence and sentencing. For example, it would prohibit the accused in a domestic abuse case from personally conducting the defence. Do you agree with this prohibition?

I welcome the proposals to prevent the accused in a domestic abuse case from personally conducting their defence. This reflects existing practice for sexual offences. Taking into account the particular nature of coercive control, this will serve to prevent victims and their children by being further abuse by the perpetrator via the court process.

The Bill will also require the court in a domestic abuse case to consider making a non-harassment order. What are your views on this approach.

The requirement to consider a Non-Harassment Order (NHO) in all cases where the Domestic Abuse aggravator has been applied is welcomed as an important step to protecting victims of domestic abuse from continued coercive control by the perpetrator.

However, I am concerned that the addition of the aggravator relating to children has not been reflected in the provisions relating to NHOs in the Bill. As a result, I believe it is vital that the impact on children of domestic abuse identified in section 4 of the Bill is reflected in Chapter 3, which amends the existing legislation relating to NHOs. I would suggest that an amendment be made so that, where the child aggravator is applied, the court must consider the inclusion of any children in a NHO, to ensure that children who have experienced domestic abuse receive the same protection as adults. My office's work on child contact highlighted that contact can be ordered even when an NHO exists in relation to the parent they reside to. This can be used by perpetrators of domestic abuse to continue the abuse through the children, in the ways discussed above. The inclusion of any children of the household in an NHO would, I believe, increase protections to children when decisions about are made by civil courts.

Further Comments

While I welcome the inclusion of the aggravator relating to children in the offence, subject to the improvements discussed above, the Bill as it currently stands does not

⁷ <http://www.legislation.gov.uk/asp/2011/15/section/13>

recognise that an offence may have been committed against the child as a result of the coercive control of their primary caregiver. My office has argued for this to be addressed and will continue to do so, either as an amendment to the current Bill or through some other means. It is important that the harm done to children by perpetrators of domestic abuse is fully recognised in law. Existing child abuse and neglect legislation, particularly section 12 of the Children and Young Persons (Scotland) Act 1937, is not able to address the specific nature of domestic abuse and, importantly, it may be very difficult to charge a person who does not have Parental Rights and Responsibilities (for example a step-parent or unmarried father) under section 12. Furthermore, the gendered understanding of caring has in the past resulted in victims of domestic abuse being prosecuted under section 12 for a perceived failure to protect their children from the abuser.

Thank you again for the opportunity to provide evidence on this matter. Should you require any further information in relation to this response, please contact my Policy Officer, Megan Farr, in the first instance (megan.farr@cypcs.org.uk).

Yours sincerely

A handwritten signature in black ink that reads "Tam Baillie". The signature is written in a cursive style with a large initial 'T'.

Tam Baillie
Children and Young People's Commissioner Scotland