Home Office

Ministry of Justice

Baroness Williams of Trafford
Minister of State for Countering Extremism

Lord (David) Wolfson of Tredegar, QC
Parliamentary Under Secretary of State

Sent by email:
Lord Rosser
Rosser@parliament.uk

1 March 2021

Dear Richard,

DOMESTIC ABUSE BILL: GOVERNMENT AMENDMENTS FOR REPORT

We are writing to provide colleagues with details of the Government amendments (copy attached) we have tabled today for Lords Report stage.

In summary, these amendments:

a) place a duty on the Domestic Abuse Commissioner to publish a report within 12 months of commencement on the need for community-based domestic abuse services and on the provision of such services;

b) amend the provisions in Part 4 of the Bill (which place a duty on tier one local authorities in England to provide support to victims of domestic abuse and their children within safe accommodation) to require local authorities to monitor any impact on the new duty on the provision of community-based support in their area;

c) require public authorities conducting domestic homicide reviews to send a copy of their completed reports to the Domestic Abuse Commissioner;

d) more closely align the provisions in the Bill in respect of the eligibility for special measures and the prohibition on cross-examination in person in the civil courts with the approach taken in the Bill in the respect of the family courts;

e) amend the extraterritorial jurisdiction provisions in the Bill to remove the dual criminality requirement for relevant sexual offences (including rape) committed outside the UK by UK

nationals. This is so that UK nationals who commit *marital* rape in countries where such behaviour is not criminal may be prosecuted in UK courts; and

f) clarify the circumstances where a barring order under section 91(14) of the Children Act 1989 is available.

In addition, the Government is supporting amendments tabled by Baroness Lister of Burtersett, Baroness Morgan of Cotes and Baroness Newlove; these amendments:

g) extend the offence of controlling or coercive behaviour in an intimate or family relationship to remove the co-habitation requirement and therefore cover post-separation abuse;

h) extend the offence of disclosing a private sexual photograph or film with intent to cause distress to an individual who appears in the photograph or film (the so-called "revenge porn" offence), so as to include threats to disclose private sexual photographs and films;

i) create a new offence in respect of non-fatal strangulation.

Further details of these amendments are set out in the attached annex.

We also attach:

- Keeling schedules showing section 76 of the Serious Crime Act 2015 and section 33 of the Criminal Justice and Courts Act 2015 as amended by the relevant new clauses; and
- a supplementary delegated powers memorandum.

We are copying this letter to all Peers who spoke during the debates on the relevant amendments at Committee stage, and placing a copy of the letter and enclosures in the library of the House and on the Bill page on gov.uk.

Baroness Williams of Trafford

LORD (DAVID) WOLFSON OF TREDEGAR, QC

Annex

Community-based support (new clause "*Duty to report on domestic abuse services in England*" and amendments to clauses 54, 55 and 76)

In Committee there was a good debate on Lord Polak's amendment 176 to place new duties on local authorities, police and crime commissioners and clinical commissioning groups in respect of the provisions of specialist community-based support services to victims of domestic abuse victims and their children. As I (Baroness Williams) indicated when responding to this amendment, the Government's firm view is that it is premature to legislate on this matter without having a full understanding of the current landscape of provision, knowing where the gaps are, how best to fill those gaps and at what cost. Moreover, we should not be imposing new duties on local authorities, PCCs and CGCs with first having undertaken a full consultation.

While, for these reasons, we do not consider it appropriate to legislate now for any new duties in respect of the provision of community-based support, we recognise the desire amongst Peers on all sides of the House for there to be some recognition of the issue on the face of this Bill. We have therefore tabled amendments which do two things.

First, we have been clear that the Domestic Abuse Commissioner's work to map the existing community-based support landscape is critical to our understanding of what is and what is not currently available. We expect the Commissioner to report on her findings and make recommendations to Ministers and perhaps others. We propose to codify this process. New clause "*Duty to report on domestic abuse services in England*" will require the Commissioner to prepare and publish a report under clause 8 of the Bill on the need for community-based domestic abuse services in England and the provision of such services. The report must be published no later than 12 months after this new clause comes into force. By virtue of the existing provisions in clause 16 of the Bill, Ministers will be under a duty to respond promptly – within 56 days – of the report being published.

Second, we recognise the concerns raised in Committee that the new statutory duty in Part 4 of the Bill relating to the provision of support within safe accommodation may have unintended consequences regarding community-based support currently provided or funded. As a result of the £125m funding we are providing to tier one local authorities to support the delivery of Part 4, we believe such concerns are unfounded, nonetheless, we recognise that there would be merit in making provision in Part 4 to monitor any unintended impact.

To this end, we have tabled amendments to clauses 55 and 56 which do three things:

- require a 'relevant' local authority that publishes a strategy under clause 55 to keep under review any effect of that strategy on the provision of community-based support in its area;

- enable regulations made under clause 55(8) to make provision about the frequency with which a relevant local authority must review any effect of its strategy on the provision of community-based support in its area; and

- provide for the Domestic Abuse Local Partnership Board appointed under clause 56(1) to provide advice to a relevant local authority about the provision of community-based support in the authority's area.

Domestic Abuse Commissioner and domestic homicide reviews (new clause "*Duty to send conclusions of domestic homicide review to Commissioner*")

Section 9 of the Domestic Violence, Crime and Victims Act 2004 enable, or at the direction of the Home Secretary require, chief officers of police, local and health authorities and providers of probation services to undertake a review of the circumstances of a domestic violence-related homicide. The aim of such reviews is to learn the lessons from such deaths in order to prevent future homicides. We are looking to strengthen the effectiveness of such reviews, including by involving the Domestic Abuse Commissioner in the process. Baroness Burt tabled an amendment at Committee stage which, amongst other things, sought to require the review partners to send a copy of their final report to the Commissioner; this new clause introduces such a requirement.

Special measures in civil proceedings (amendment to clause 62)

At Committee stage, Lord Marks of Henley-on-Thames tabled an amendment seeking to align the provisions on special measures in civil courts with those provisions in family courts. I (Lord Wolfson) undertook to consider that amendment further. Given the under-reporting of domestic abuse to the police, stakeholder feedback and comments during Committee stage, the Government proposes to augment the existing provisions in the Bill by enabling those who are 'at risk' of domestic abuse to access special measures in the civil courts. Courts will consider whether special measures are provided in a particular case and whether they will assist the quality of the witness's evidence in such cases. The Civil Procedure Rules will further specify how this provision will operate in practice. This brings the civil provisions more in line with the provisions in family courts as proposed in Lord Marks' amendment.

Prohibiting cross-examination in person in civil proceedings (amendments to clause 64)

Lord Marks of Henley-on-Thames also tabled amendments at Committee stage to align the provisions on prohibiting cross-examination in civil courts with those provisions in family courts. The Bill currently prohibits perpetrators from cross-examining their victims in person in civil proceedings in England and Wales. Such cross-examination in person can serve to re-traumatise victims and prevent them giving their best evidence in court.

The Government has taken on stakeholder feedback that this ban needs to be more accessible to domestic abuse victims who may not have reported their abuse to police, and is, therefore, introducing these amendments to clause 64. They will extend the provision to allow domestic abuse victims to introduce other evidence (such as a letter from a doctor or an employer) of domestic abuse perpetrated by a party to the proceedings towards a witness (or vice versa) in order to qualify for this ban.

The Government also proposes to provide for an automatic ban on cross-examination in person when the party to proceedings has been convicted or cautioned of an offence, or if there is an injunction between the parties. This again brings the civil provisions more into line with the provisions in family courts and responds to Lord Marks' amendments.

Amendment to the Children Act 1989 relating to section 91(14) 'barring orders' (new clause "*Orders under section 91(14) of the Children Act 1989*" and amendment to the title)

Section 91(14) of the Children Act 1989 allows courts to bar individuals from making further applications without permission of the court, but without any detail as to the circumstances in which such barring orders should be used. Courts have therefore generally elaborated the principles for their use. Last year the 'Assessing Risk of Harm to Children and Parents in Private Law Children Cases' report concluded that barring orders were not being used sufficiently to prevent

perpetrators from continuing their abuse through court applications under the Act, and that amendments should therefore be made. The Government committed in its Implementation Plan to explore an amendment to the Act to address this.

During Committee stage of the Bill in the Lords, a number of peers asked about how the Government had progressed on its commitments in its Implementation Plan. Lord Rosser and Baroness Newlove specifically asked for an update on the Government's commitment with respect to barring orders, and Lord Ponsonby tabled an amendment about the use of barring orders in certain circumstances of abusive behaviour.

Sadly, perpetrators do sometimes use the family courts as a way to continue their abuse, often bringing their victims back to court repeatedly, which can be traumatising. The Government is clear that barring orders are available to parents and children to protect them where further proceedings would risk causing them harm, particularly where proceedings could be a form of continuing domestic abuse.

This new clause seeks to clarify that barring orders are available in such circumstances. Whilst the new clause does not expressly mention 'domestic abuse', it refers to the concept of 'harm' that is already found in the Children Act 1989. The definition of 'harm' is broad and already includes coercive control and other forms of domestic abuse.

The new clause will also make clear that courts can make these orders of their own initiative (i.e. without an application), and that they must consider whether there has been a material change of circumstances when deciding whether to grant permission to apply to a person who has received a barring order. The new clause also responds to recommendations made by the Harm Panel.

The Government is confident that this new clause will ensure that barring orders are used more often by courts to protect victims of domestic abuse where further applications put them at risk of harm.

Extraterritorial jurisdiction (amendments to Schedule 2)

During debate in Committee on Schedule 2 to the Bill, I (Lord Wolfson) undertook to consider Baroness Bertin's amendments seeking to ensure that UK citizens who commit marital rape in countries where such behaviour is not criminal may be prosecuted in the UK.

Schedule 2 to the Bill contains amendments to various enactments to provide for extraterritorial jurisdiction over certain offences under the law of England and Wales, Scotland and Northern Ireland. This will ensure that, as required by the Istanbul Convention, the UK will be able to prosecute the relevant offences when they are committed outside the UK by one of our nationals or habitual residents. Part 1 of the Schedule covers England and Wales; Parts 2 and 3 cover Scotland and Northern Ireland respectively.

In keeping with the normal principles of extraterritorial jurisdiction and the terms of the Convention, there is a requirement that a prosecution for one of the relevant sexual offences – which include rape where the victim of the offence is aged 18 or over - may only be brought in the UK when the offending behaviour is also an offence in the country where it happens. In most circumstances, a dual criminality requirement will not be a barrier to prosecution because serious sexual offences against adults are likely to be criminal in most other countries. As Baroness Bertin identified, however, it could mean that, in some circumstances, UK authorities would not be able to prosecute someone for marital rape committed in the small number of countries where such behaviour is not included in, or exempt from, the equivalent offence in the other jurisdiction. Whilst this is a narrow gap, we agree that the Bill should be amended to cater for it.

As it stands, the Bill applies a dual criminality requirement for relevant sexual offences committed outside the UK by UK nationals and by UK residents. To ensure that the courts of England and Wales could prosecute UK nationals who commit marital rape in countries where such behaviour is not criminal, these amendments remove the dual criminality requirement for UK nationals from Part

1 of Schedule 2. Ministers in Scotland and Northern Ireland have agreed that corresponding amendments should be made to Parts 2 and 3 of the Schedule.

A dual criminality requirement will, however, continue to apply for UK residents meaning that we could only prosecute UK residents who commit marital rape abroad if the behaviour is also criminal in the country where it is committed. Existing law already makes the same distinction between UK nationals and UK residents in relation to extraterritorial sexual offences where the victim is aged under 18. The amendments will therefore ensure that our own nationals comply with our laws even when abroad, and respect principles of international law and comity in relation to non-UK nationals ordinarily resident in the UK.

At the request of the Scottish Government, the amendments to Part 2 of Schedule 2 also make provision - for offences where a dual criminality requirement is being retained - for proof of dual criminality and a rebuttable presumption that the act in question constitutes an offence under the law of the country where it took place.

Extending the controlling or coercive behaviour offence (new clause "*Controlling or coercive behaviour in an intimate or family relationship*" and amendments to clauses 73, 74 and 75)

During the debate in the Lords Committee stages, Baroness Lister of Burtersett and Lord Hunt of Kings Heath tabled amendments to extend the controlling or coercive behaviour (CCB) offence in section 76 of the Serious Crime Act 2015. The amendments focussed on widening the scope of the definition of "personally connected" in the CCB offence so that the offence may apply to former partners and family members who do not live together. I (Baroness Williams) undertook to consider these amendments in conjunction with our review into the CCB offence.

The Review has now been completed and has been published today. It considered views from a number of stakeholders who expressed concern that the "living together" requirement within the offence is preventing some victims of this abuse from seeking justice, and poses challenges for police and prosecutors to evidence and charge abusive behaviours that are not captured by other legislation. Calls from domestic abuse organisations echo concerns around the cohabitation requirement of the CCB offence, given victims who leave their perpetrator are often subjected to sustained or increased coercive or controlling behaviour post-separation.

Having considered the findings of the review, the Government agrees that the CCB offence should be amended so that it also applies to controlling or coercive behaviour by a former intimate partner that takes place post-separation or by a family member who does not reside with the victim. The new clause in Baroness Lister's name achieves this by amending the definition of "personally connected" within the CCB offence to align it with the definition of "personally connected" in clause 2 of the Bill. These amendments mean that it will no longer be a requirement of the CCB offence for ex- intimate partners or family members to live together in order to be considered "personally connected".

Extension of the so-called "revenge porn" offence (new clause "*Threatening to disclose private sexual photographs and films with intent to cause distress*" and amendments to clauses 74, 75 and 79 and the title)

During the debate at Second Reading and at Lords Committee stages, several peers called for the extension of the so-called "revenge porn" offence (section 33 of the Criminal Justice and Courts Act 2015) to cover threats to disclose private, sexual images as well as their actual disclosure. Baroness Morgan of Cotes tabled an amendment to that effect in Committee.

The current section 33 offence is committed if a person discloses private, sexual images of another individual without the consent of the individual in the photograph, with the intent to cause distress

to that individual. Threatening to disclose private, sexual images can, in many circumstances already be covered by a range of existing offences such as stalking, harassment, malicious communications or blackmail or the controlling or coercive behaviour offence under section 76 of the Serious Crime Act 2015. However, there is no one offence which covers threats to disclose these images.

The Government believes it is vital that the criminal law keeps up with the constant changes in online communication technology and the use of social media in all its forms and has therefore commissioned the Law Commission to review in detail the law relating to the non-consensual taking and sharing of intimate images. The review is considering the current range of criminal offences in this area, including the "revenge porn" offence, and the Law Commission published its initial recommendations for consultation last Friday.

It is important to allow the Law Commission to carry out its work in full, and make recommendations across a range of aspects in this complex area of law. However, the Government has listened to the voices of victims, campaigners and has noted with respect the strength of feeling on this issue in Parliament, in particular in your Lordships' House.

Against the background of these concerns, and the possibility that some occasions where damaging and distressing threats to disclose such images may not be caught by the existing criminal law, the Government has decided to use the opportunity granted by the present Bill to act now to strengthen the law in this area.

The new clause tabled by Baroness Morgan of Cotes extends the existing section 33 offence to include "threats" to disclose private, sexual images. Taking into account the ongoing Law Commission review in this area, this extension is drafted to stay as close as possible to the drafting of the existing section 33 offence rather than making any broader changes to the law in this area.

We will however continue to keep this area of law under review. In particular, we look forward to the Law Commission's proposals in this area; once their final recommendations are published, we will consider carefully what next steps are needed.

Non-fatal strangulation (new clause "*"Strangulation or suffocation*" and amendments to clauses 73, 74 and 75 and the title)

In Committee, in response to amendments tabled by Baroness Newlove, I (Lord Wolfson) reiterated the Government's commitment to legislate for a new offence of non-fatal strangulation. We have been working closely with Baroness Newlove and others on this matter and we intend to table amendments to introduce a new criminal offence of strangulation or suffocation for Report stage of the Bill.

The amendments, tabled by Baroness Newlove, will create a new criminal offence of strangulation or suffocation. Given it is the Government's intention that the offence should have general application and not be restricted to cases of domestic abuse, we propose that the new offence be inserted into the Serious Crime Act 2015. The offence will apply where a person intentionally strangles another person. However, the offence will also cover a range of behaviours, including suffocation and other acts that affect a person's ability to breathe and which amount to a battery. The offence will apply in England and Wales, be triable either way and therefore be heard in either a magistrates' court or the Crown Court. The maximum penalty on conviction on indictment in the Crown Court will be five years' imprisonment and/or a fine. The new clause also extends extraterritorial jurisdiction to this offence so that it covers those cases committed abroad by UK nationals or someone who is habitually resident in England or Wales.

As with any new offence, the Government will also consider the training and guidance that will be necessary to accompany the new offence on commencement.

"Keeling Schedules"

Section 76 of the Serious Crime Act 2015 as amended by new clause *"Controlling or coercive behaviour in an intimate or family relationship"*

The amended text is added in italics; the deleted text is struck through.

Controlling or coercive behaviour in an intimate or family relationship

(1) A person (A) commits an offence if—

(a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
(b) at the time of the behaviour, A and B are personally connected, *(see subsection (6))*
(c) the behaviour has a serious effect on B, and
(d) A knows or ought to know that the behaviour will have a serious effect on B.

~~(2) A and B are "personally connected" if—~~

~~(a)A is in an intimate personal relationship with B, or~~
~~(b)A and B live together and—~~

~~(i) they are members of the same family, or~~
~~(ii) they have previously been in an intimate personal relationship with each other.~~

(3) But A does not commit an offence under this section if at the time of the behaviour in question—

(a) A has responsibility for B, for the purposes of Part 1 of the Children and Young Persons Act 1933 (see section 17 of that Act), and
(b) B is under 16.

(4) A's behaviour has a "serious effect" on B if—

(a) it causes B to fear, on at least two occasions, that violence will be used against B, or
(b) it causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities.

(5) For the purposes of subsection (1)(d) A "ought to know" that which a reasonable person in possession of the same information would know.

~~(6) For the purposes of subsection (2)(b)(i) A and B are members of the same family if—~~

~~(a) they are, or have been, married to each other;~~
~~(b) they are, or have been, civil partners of each other;~~
~~(c) they are relatives;~~
~~(d) they have agreed to marry one another (whether or not the agreement has been terminated);~~
~~(e) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);~~
~~(f) they are both parents of the same child;~~

~~(g) they have, or have had, parental responsibility for the same child.~~

(6) A and B are "personally connected" if any of the following applies—

(a) they are, or have been, married to each other;
(b) they are, or have been, civil partners of each other;
(c) they have agreed to marry one another (whether or not the agreement has been terminated);
(d) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);
(e) they are, or have been, in an intimate personal relationship with each other;
(f) they each have, or there has been a time when they each have had, a parental relationship in relation to the same child (see subsection (6A));
(g) they are relatives.

(6A) For the purposes of subsection (6)(f) a person has a parental relationship in relation to a child if—

(a) the person is a parent of the child, or
(b) the person has parental responsibility for the child."

(7) In subsection (6) *and (6A)*—

- "civil partnership agreement" has the meaning given by section 73 of the Civil Partnership Act 2004;
- "child" means a person under the age of 18 years;
- "parental responsibility" has the same meaning as in the Children Act 1989;
- "relative" has the meaning given by section 63(1) of the Family Law Act 1996.

(8) In proceedings for an offence under this section it is a defence for A to show that—

(a) in engaging in the behaviour in question, A believed that he or she was acting in B's best interests, and
(b) the behaviour was in all the circumstances reasonable.

(9) A is to be taken to have shown the facts mentioned in subsection (8) if—

(a) sufficient evidence of the facts is adduced to raise an issue with respect to them, and
(b) the contrary is not proved beyond reasonable doubt.

(10) The defence in subsection (8) is not available to A in relation to behaviour that causes B to fear that violence will be used against B.

(11) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding five years, or a fine, or both;
(b) on summary conviction, to imprisonment for a term not exceeding 12 months, or a fine, or both.

Sections 33 and 35 of the Criminal Justice and Courts Act 2015 as amended by new clause "*Threatening to disclose private sexual photographs and films with intent to cause distress*"

The amended text is added in italics; the deleted text is struck through.

Section 33: Disclosing *or threatening to disclose* private sexual photographs and films with intent to cause distress

~~(1)It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made—~~
~~(a)without the consent of an individual who appears in the photograph or film, and~~
~~(b)with the intention of causing that individual distress.~~

(1) A person commits an offence if—

(a) the person discloses, or threatens to disclose, a private sexual photograph or film in which another individual ("the relevant individual") appears,

(b) by so doing, the person intends to cause distress to that individual, and

(c) the disclosure is, or would be, made without the consent of that individual.

(2) But it is not an offence under this section for the person to disclose*, or threaten to disclose,* the photograph or film to the *relevant individual* ~~individual mentioned in subsection (1)(a) and (b)~~.

(2A) Where a person is charged with an offence under this section of threatening to disclose a private sexual photograph or film, it is not necessary for the prosecution to prove—

(a) that the photograph or film referred to in the threat exists, or

(b) if it does exist, that it is in fact a private sexual photograph or film.

(3) It is a defence for a person charged with an offence under this section to prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime.

(4) It is a defence for a person charged with an offence under this section to show that—

(a) the disclosure*, or threat to disclose,* was made in the course of, or with a view to, the publication of journalistic material, and

(b) he or she reasonably believed that, in the particular circumstances, the publication of the journalistic material was, or would be, in the public interest.

(5) It is a defence for a person charged with an offence under this section to show that—

(a) he or she reasonably believed that the photograph or film had previously been disclosed for reward, whether by the *relevant individual* ~~individual mentioned in subsection (1)(a) and (b)~~ or another person, and

(b) he or she had no reason to believe that the previous disclosure for reward was made without the consent of the *relevant individual* ~~individual mentioned in subsection (1)(a) and (b)~~.

(6) A person is taken to have shown the matters mentioned in subsection (4) or (5) if—

(a) sufficient evidence of the matters is adduced to raise an issue with respect to it, and

(b) the contrary is not proved beyond reasonable doubt.

(7) For the purposes of subsections (1) to (5)—

(a) "consent" to a disclosure includes general consent covering the disclosure, as well as consent to the particular disclosure, and

(b) "publication" of journalistic material means disclosure to the public at large or to a section of the public.

(8) A person charged with an offence under this section is not to be taken to have intended to cause distress by disclosing, or threatening to disclose, a photograph or film merely because that was a natural and probable consequence of the disclosure or threat. ~~A person charged with an offence under this section is not to be taken to have disclosed a photograph or film with the intention of causing distress merely because that was a natural and probable consequence of the disclosure.~~

Section 35: Meaning of "private" and "sexual"

(1) The following apply for the purposes of section 33.

(2) A photograph or film is "private" if it shows something that is not of a kind ordinarily seen in public.

(3) A photograph or film is "sexual" if—

(a) it shows all or part of an individual's exposed genitals or pubic area,

(b) it shows something that a reasonable person would consider to be sexual because of its nature, or

(c) its content, taken as a whole, is such that a reasonable person would consider it to be sexual.

(4) Subsection (5) applies in the case of —

(a) a photograph or film that consists of or includes a photographed or filmed image that has been altered in any way,

(b) a photograph or film that combines two or more photographed or filmed images, and

(c) a photograph or film that combines a photographed or filmed image with something else.

(5) The photograph or film is not private and sexual if—

(a) it does not consist of or include a photographed or filmed image that is itself private and sexual,

(b) it is only private or sexual by virtue of the alteration or combination mentioned in subsection (4), or

(c) it is only by virtue of the alteration or combination mentioned in subsection (4) that the *relevant individual (within the meaning of section 33)* ~~person mentioned in section 33(1)(a) and (b)~~ is shown as part of, or with, whatever makes the photograph or film private and sexual