

**IN THE MATTER OF THE DOMESTIC ABUSE BILL 2021 ('DA BILL')
AND IN THE MATTER OF THE APPLICATION OF THE DA BILL TO
THE RELATIONSHIP BETWEEN DISABLED PEOPLE AND THEIR CARERS**

OPINION

Introduction

1. We are asked to provide a brief opinion on matters arising from the Domestic Abuse Bill 2021 ('DA Bill'), namely whether the substantive provisions of the Bill ought expressly to apply to the relationship between disabled people and their carers. An amendment tabled by Baroness Grey-Thompson and taken forward by Baroness Campbell at Lords Committee stage sought to achieve this, through adding the relationship between disabled people and carers to the defined list of situations where two people are 'personally connected' to each other for the purposes of clause 2(1) of the DA Bill. However, this amendment was resisted by Government, on the basis that existing legislation gives disabled people sufficient protection from abuse by their carers.
2. In summary, our opinion is that:
 - a. The relationship between disabled people and their carers is analogous to the other relationships which fall within the definition of 'personally connected' for the purposes of clause 2(1) of the DA Bill.
 - b. None of the existing legislation identified by Government provides equivalent protection against domestic abuse for disabled people so as to make it unnecessary for the relationship between disabled people and their carers to be brought within the scope of clause 2(1), and thereby the substantive provisions of the DA Bill.
 - c. Failing to bring the relationship between disabled people and their carers within the scope of clause 2(1), and thereby the substantive provisions of the DA Bill, is likely to result in unlawful discrimination against disabled people contrary to Article 14 European Convention on Human Rights (ECHR), read with Articles 3 and 8 ECHR.
3. Such unlawful discrimination may be avoided by:

- a. an amendment to clause 2(1) of the DA Bill of equivalent effect to the amendment tabled by Baroness Grey-Thompson at Lords Committee stage, and
 - b. a parallel amendment to section 76 of the Serious Crime Act 2015, which established an offence of ‘Controlling or coercive behaviour in an intimate or family relationship’.
4. We discuss each of these issues further below.

A. Analogous relationship

5. The importance of two individuals being ‘personally connected’ is clear from the definition of ‘domestic abuse’ in clause 1(2) of the DA Bill (emphasis added):

‘Behaviour of a person (‘A’) towards another person (‘B’) is ‘domestic abuse’

if—

(a) A and B are each aged 16 or over and are personally connected to each

other, and

(b) the behaviour is abusive.’

6. Clause 2(1) of the DA Bill defines the relationships in which two people are ‘personally connected’ to each other. In summary, these relationships are:
- a. Marriage and engagement to marry;
 - b. Civil partnership or entry into a civil partnership agreement;
 - c. An ‘intimate personal relationship’;
 - d. A parental relationship in relation to the same child; and
 - e. Being a ‘relative’, as defined by section 63(1) of the Family Law Act 1996.

7. The relationships which currently give rise to ‘personal connection’ under clause 2(1) of the DA Bill are therefore, in summary, actual or historic partnerships or sexual relationships, and family relationships.

8. However, for many disabled people, particularly those who employ their own carers via 'direct payments' from local authorities or the NHS, some of their closest and (in terms of the care they receive) most intimate relationships will be with their carers, who may not be individuals from any of the categories of 'personal connection' within clause 2(1) currently. These relationships may involve power imbalance and are just as susceptible to abuse as the relationships that fall within the definition of 'personal connection'. Ruth Bashall, giving evidence on behalf of Stay Safe East and Disabled Survivors to the Joint Parliamentary Bill Committee, expressed concern that the definition of 'personally-connected' did not reflect the fact that many disabled people: *'...have emotionally intimate relationships with the people who, in very large inverted commas, 'care' for us, and the experience of abuse by those people is exactly the same as domestic abuse: the coercive control, the violence, the financial abuse and so on'*. The Committee recognised that *'abuse of disabled people by their 'carers' often mirrors that seen in the other relationships covered by the Bill'* and went on:¹

We recommend the Government review the 'personally connected' clause with the intention of amending it to include a clause which will cover all disabled people and their carers, paid or unpaid in recognition of the fact this type of abuse occurs in a domestic situation.

9. Those instructing us share the same concern and endorse the Committee's recommendation. They are rightly concerned that the absence of reference to the relationship between disabled people and their carers in clause 2(1), if left unaddressed, will deprive disabled people of the protections from domestic abuse in the DA Bill in relation to some of the individuals with whom they have the closest personal connection – those providing them with day to day care.

B. Other legislation

10. It is, in our view, obvious that none of the existing statutory protections for disabled people render insignificant the exclusion of the relationship between disabled people and carers from the scope of the 'personal connections' currently covered by the DA Bill.
11. The DA Bill is landmark legislation which is intended to mark a culture shift in relation to domestic abuse. The new measures envisaged by the DA Bill include the establishment of a Domestic Abuse Commissioner and the creation of powers to tackle

¹ Joint C'ee Report Draft Domestic Abuse Bill, 11 June 2019, ¶51

domestic abuse, including domestic abuse protection notices and orders. It is axiomatic that no equivalent measures to these exist in current legislation; this is precisely why the DA Bill is needed and has been introduced.

12. In relation to the statutory provisions on which the Government has relied to resist the amendment tabled by Baroness Grey-Thompson and taken forward by Baroness Campbell to date:
13. Section 42 of the Care Act 2014 creates a duty on local authorities to make enquiries, where a series of tests are met, in relation to situations where an adult is at least at risk of abuse or neglect. However, the substantive duty in section 42(2) is simply for the local authority to 'make (or cause to be made) whatever enquiries it thinks necessary to enable it to decide whether any action should be taken in the adult's case (whether under this Part or otherwise) and, if so, what and by whom'. Unlike the DA Bill, section 42 of the Care Act does not create any new powers to act to protect disabled people from abuse or neglect; it is merely a duty to make enquiries and to consider exercising existing powers.
14. Section 20 of the Criminal Justice and Courts Act 2015 creates a criminal offence of 'ill treatment or willful neglect' by care workers. However:
 - a. The offence is only potentially committed by paid carers; unpaid carers are excluded from the ambit of the offence;
 - b. The threshold of 'ill treatment or willful neglect' is higher than the definition of 'abuse' under the DA Bill; and
 - c. Section 20 of the 2015 only creates a single criminal offence. It does not bring with it the panoply of measures (for example the Commissioner) which will be focused on eliminating domestic abuse under the DA Bill, once enacted.
15. It is also notable that neither of these provisions provides disabled people with any mechanism for dealing with abuse, rendering them entirely reliant upon others to address it, whereas the DA Bill provides tools by which disabled people and those concerned for their welfare can obtain immediate protections.

C. Potential discrimination

16. The exclusion of the relationship between disabled people and carers from the scope of clause 2(1) of the DA Bill has real potential, in our view, to give rise to unlawful

discrimination, contrary to Articles 3 or 8 and Article 14 of the European Convention on Human Rights.

17. The preliminary questions arising under Article 14 ECHR can be answered very shortly in this case:
18. In our view the issues covered by the DA Bill are within the scope or 'ambit' of the prohibition of inhuman or degrading treatment in Article 3 and the 'private life' limb of Article 8 ECHR, which includes issues of physical or psychological integrity which are interfered with or violated by domestic abuse. It is also well-established that Articles 3 and 8 bring with them positive duties on the state to take measures, including by the introduction of primary legislation, to protect vulnerable groups from abuse by third parties. In *Opuz v Turkey* (2010) 50 E.H.R.R. 28, for example, the European Court of Human Rights found that this duty had been breached by a law which required a criminal complaint to be maintained, and not withdrawn, for criminal proceedings to be continued against an alleged perpetrator of domestic abuse. In that case the domestic abuse was committed by a husband against his wife, but the Court recognized that such abuse was prevalent in all societies and did not only affect women:

132 However, before embarking upon these issues, the Court must stress that the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse, cannot be confined to the circumstances of the present case. It is a general problem which concerns all Member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly. Accordingly, the Court will bear in mind the gravity of the problem at issue when examining the present case.

19. The underlined words are clearly broad enough to encompass abuse within the 'personal relationship' or 'closed circuit' that can exist between a disabled person and their carer.
20. Disability is a well-established 'other status' for the purposes of Article 14 ECHR.
21. Discrimination may arise from 'treating similarly, without an objective and reasonable justification, persons in relevantly different situations' (known as *Thlimmenos* discrimination): see *R (DA) v Secretary of State for Work and Pensions* [2019] UKSC 21 at [48].

22. In the present context, disabled people are in a relevantly different situation to the non-disabled population. Some of their most important personal relationships are with individuals who provide them with care; care which, in the main, non-disabled people do not require. These caring relationships are as susceptible to abuse as those between persons who are 'personally connected' within the meaning of clause 2(1) of the DA Bill. In order for disabled people to enjoy the protection of the law on an equal basis with non-disabled people they require to be treated differently, namely by including the relationships between them and their carers as falling within the scope of 'personally connected' for the purposes of the DA Bill.
23. If this omission is not remedied, then it will be necessary for the government to show an objective justification for the failure to treat disabled people differently in this way. At present, we cannot see what objective justification could be advanced. This is not a case where treating disabled people differently would incur additional costs, or would in some way undermine the achievement of the objective behind the measure.
24. In the absence of such an objective justification, legislation enacted in the terms of the current clause 2(1) would in our view be very likely to give rise to unlawful discrimination contrary to Article 14 ECHR taken with Articles 3 and 8.

Amendments required

25. To avoid unlawful discrimination and remedy the obvious deficiency in the current Bill, we propose that the list of situations where two people are 'personally connected' in clause 2(1) of the DA Bill is amended to include the relationship between a disabled person and their carer (whether paid or unpaid).
26. To ensure the coherence of the statutory scheme in relation to domestic abuse overall, we would also propose that section 76 of the Serious Crime Act 2015 is similarly amended, so that controlling or coercive behaviour by a carer towards a disabled person to whom they provide care (whether paid or unpaid) is covered by the offence of 'Controlling or coercive behaviour in an intimate or family relationship' which section 76 creates. This again would be achieved through amending the definition of when two people are 'personally connected', here found in section 76(2), but which in all other respects is materially the same as the definition in clause 2(1) of the DA Bill.

Conclusion

27. We hope that this opinion assists to outline the key legal issues for disabled people arising from the definition of 'personally connected' in the DA Bill. We would be pleased to consider further any matters arising from this opinion.

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