



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Joint Letter from the Minister of Justice and
the Minister of Finance on the Domestic
Abuse and Family Proceedings Bill:
Mrs Naomi Long MLA, Minister of Justice

8 December 2020

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Ms Linda Dillon (Deputy Chairperson)
Mr Doug Beattie
Ms Sinéad Bradley
Ms Jemma Dolan
Mr Gordon Dunne
Mr Paul Frew
Ms Emma Rogan
Miss Rachel Woods

Witnesses:

Mrs Long	Minister of Justice
Mr Peter May	Department of Justice

The Chairperson (Mr Givan): I formally welcome Naomi Long, the Minister of Justice, and Peter May, the permanent secretary of the Department of Justice, to the meeting. As normal, the session will be reported by Hansard and a transcript will be published on the Committee web page in due course. Minister, I hand over to you for opening remarks, and members, I am sure, will have questions.

Mrs Long (The Minister of Justice): Thank you, Mr Chairman. I appreciate the opportunity. I have very few opening remarks to make. Most of what I had to say was included in the correspondence. I believe that, having worked constructively together to ensure that the legislation works as well as possible, it would be a huge shame if, at this stage, we cannot find a way to resolve quickly the last outstanding issue. We share the same determination and desire to safeguard those who are victims of domestic abuse and to have the new legislation in place as quickly as possible. If we are able, through the due diligence that is undertaken on those aspects of the legal aid provisions that have been included in the Bill, via amendment, and if there are no repercussive issues that would lead to a claim from the Northern Ireland block grant from other parts of GB, it remains my intention to commence those provisions, and it is my legal duty to do so. However, on the understanding that it was not the intention of the Committee that we would end up having such repercussive implications, I was not able to proceed yesterday with the Bill as I had hoped because I had to be reassured that the amendment that tied the commencement of the offences to the commencement of legal aid would not go through. That would have meant that we could end up in a situation, if these are repercussive, whereby we would then not be in a position to commence the offences, and that would have been a huge loss.

I am happy to answer any questions that the Committee might have at this stage, but I want to remind members that we are at a very early stage of trying to understand the implications of this as it emerged as an issue at only the end of last week in discussion with the Department of Finance.

As you rightly note, the Minister of Finance is not available today. We cannot necessarily answer all the questions in relation to finance, but we can certainly answer some of the questions about the due diligence that we are doing to resolve the issue.

The Chairperson (Mr Givan): Thank you, Minister. Before I bring in members, which I will do quickly, I would like clarity on some points so that we all understand the issues we are talking about.

A press release was issued last night, Minister, under your name. I want to reference some of the comments in it because it mentions legal aid amendments. The first paragraph states:

"as a result of amendments brought forward by the Justice Committee".

It goes on to quote you as saying:

"The proposals made by the Justice Committee were much wider ranging than victims getting access to legal aid".

It goes on to state:

"Those amendments, relating to legal aid provision" —

What Justice Committee amendments are those?

Mrs Long: Amendment No 15.

The Chairperson (Mr Givan): The press release goes on to state:

"A further amendment to be moved by the Committee today would have prevented the domestic abuse offences" —

The final paragraph refers to a "further amendment", so what are the previous amendments?

Mrs Long: It was the cumulative effect. The previous amendments were those tabled by Rachel Woods and Paul Frew, supported by Justice Committee members in the Chamber.

The Chairperson (Mr Givan): Just for clarity, those were not Justice Committee amendments. Do you accept that? They were —

Mrs Long: Yes, I do.

The Chairperson (Mr Givan): OK. Well, the press release is then inaccurate, so it is useful to have that clarity on the record.

The final paragraph of the press release states:

"It is imperative that we take time now to ensure whatever legislation is passed does not have unintended consequences."

The press release spoke about taking your time. Then, in a letter to the Committee that you sent, I think, at 22:40, you state that you wanted Further Consideration Stage to be next week and that you were going to ask the Business Committee to do that. Has that been done?

Mrs Long: That request has been put on a to-be-confirmed basis, based on the decision that will be taken by the Committee with respect to amendment No 15.

The Chairperson (Mr Givan): OK. I will open up to members now to ask questions.

Mr Beattie: Thank you, Chair. Does the Deputy Chair want to go first?

Ms Dillon: No, go ahead, Doug.

Mr Beattie: Thank you, Naomi and Peter, for coming. It is difficult, as so much work has been put into this by everybody concerned. It is really important that we get this absolutely right. I am not here to debate a press release. I am not interested in any press release. What I am interested in is the new information that has been provided. That new information comprises the Treasury Budget guidelines, which could see a residual cost coming to our block grant if we bring in something that is more advantageous in Northern Ireland than in the rest of the United Kingdom.

Naomi, or Peter, could you give us a scope of that, please? I know that you are saying that you do not have that full scope, but can you give us an idea of just how large of an issue we are talking about in regard to our fiscal responsibilities?

Mrs Long: It is very difficult for us at this stage to estimate figures, so anything that we give you now is a very rough estimate. Even since we have been discussing this issue after it came to light, those figures have gone up and down considerably. I am happy to hand over to Peter, who can give you our latest best guess of what it could be.

Bear in mind, however, that it is unpredictable because this is a demand-led service, so while we are trying to estimate based on previous demand, we cannot anticipate future demand. We also cannot anticipate what the demand might be if this were to be repercussive with uptake in GB. There are many unknowns, which is why it is important that we have time to do further due diligence and work out the exact costs that might be incurred. We are working between a range of figures, and Peter is happy to set those out.

Mr Peter May (Department of Justice): It might help the Committee if I read into the record the Treasury's statement of funding policy for 2020. Paragraph 8.14(2) states:

"The DEL of the devolved administration will be adjusted downwards to compensate for costs incurred by the UK government as a result of the actions of a devolved administration".

That is the issue that we need to explore in greater detail.

As the Minister said, we are at a very early stage of trying to work out what that could mean for costings. It is important to say that the numbers that I will quote are potentially the highest that they could be. As we go through this, we will need to see what it looks like. We know that the current legal aid costs of article 8 proceedings in the family courts are around £8 million a year. The additional costs of article 8 proceedings if clause 27 becomes law are estimated to be up to £14 million a year. There is a range but that is at the top of the range. The actual costs will depend on a number of factors, including how the provision is implemented and how much additional business the provision generates. We need to do more work and further due diligence to determine with greater certainty what the real cost will be.

There will also be some additional costs of article 8 proceedings if the Minister's amendment No 3 replaces clause 27 and amendment Nos 4, 5 and 6 are not carried. We estimate that to be in the region of half a million pounds a year, but, again, we would want to do further due diligence.

There are two areas of repercussiveness. One is if there were a view that someone in Great Britain could seek to rely on what we have done here and to argue, perhaps using human rights grounds, that it was unfair and unreasonable that they were not able to have the same provision in Great Britain. The repercussiveness there, if you use crude population-based assumptions from that £14 million, the figure could be in the region of £400 million a year. However, as I said, that is the whole area where we need to do more due diligence.

The second potential area of repercussiveness is within Northern Ireland where other victims might seek to make the same argument that I have just described in Great Britain. So, for example, the victims of a sexual crime might seek to make the same arguments about their rights. Again, we have not been able to put a figure on that yet, but those are the areas that we need to explore in greater detail. We have already begun to work on that, but it will take us some time to get a sensible answer. It is one of those areas where it is better to get the right answer rather than to get a quick answer.

Mr Beattie: Those figures are staggering. Did this come to light on Friday? How did it come to light?

Mrs Long: Which part?

Mr Beattie: The part about the Treasury guidelines and that repercussiveness. When did it come to light that that was the case? I will be honest: until you said so, I had not picked up on it.

Mrs Long: There are two elements to it. First, on the wider issues of repercussiveness in the Northern Ireland context and the implications that this could lead to further claims from other people who are entitled to legal aid and the fact that the quantum of cost was unknown, I made that case in the Chamber during Consideration Stage and set that out clearly, and the Assembly decided to continue down that route, so that was the choice that was made, and we have to facilitate that.

Secondly, on the issue about repercussiveness in the GB context, my understanding is that it was raised with officials who were engaging with the Department of Finance, and the Department of Finance raised the particular issue about the implications for the block grant of repercussiveness. That was raised late on Thursday evening. It was then worked on throughout Friday. It was brought to my attention on Friday afternoon when people realised that there was a particular risk. So, at that stage, we started to look at the likely impact of that in terms of quantum of cost. That is when we reached a conclusion from the early estimates that this was not something that we as a Department could enter into or, indeed, that the Department of Finance could allow us to enter into, based on the fact that this could have a catastrophic impact on the block grant as opposed to simply asking the Executive to reprioritise their funding priorities. At that stage, we took a decision that the Minister of Finance and I would write to the Committee to make you aware of it, and we did that over the weekend so that the Committee would be fully aware of the problem that had arisen.

Mr Beattie: Am I right in saying that, if this were to go through and that expense were to be realised in a reasonable worst-case scenario, the Minister of Finance had already given that warning that the cost would not be covered?

Mr May: It is a cost on the block, I think. I do not think that it necessarily falls to any individual Department.

Mrs Long: My understanding is that it is deducted before the block grant is disbursed, so it would not be a matter of the Department of Finance covering the cost. It would be that we would never receive it. It would be taken as a deduction. That is if it is fully repercussive. It may not be. It may only be partially repercussive. These are the things that we cannot answer at this stage because we have not had the opportunity to do due diligence. This may not prove to be repercussive at all, which is the other element of this that I was saying to you yesterday, Doug. This may not prove to be repercussive at all, but we cannot say that with any confidence at this stage. The risk is too high to proceed on the basis that it is not when it may be. Essentially, we are trying to stop the risk being carried forward by saying that we will do the due diligence.

My solution, I guess, to this was that we could continue with the rest of the Bill. Provided there was not any link between that and starting the offences, we could continue with the commencement of the offences. That would not delay the delivery of the main objectives of the Bill. We could then work through the repercussive issue with legal aid. If it proves not to be repercussive, it is our intention that we would commence those elements of the Bill that relate to legal aid. If the repercussive implications in GB were significant, we would not be able to commence that. At that stage, we would be able to come to the Committee and set out clearly what the implications of that are financially and otherwise and look towards other mechanisms by which we would be able to move forward that would not have the same repercussive implications in order to obtain the objective of the Assembly.

Mr Beattie: I get that. If you had the time, when would you be able to find out and do that due diligence and realise whether it is going to be repercussive throughout the whole of the UK or not? How long will that take?

Mrs Long: We are drafting instructions for senior counsel to look at this. We will, hopefully, be able to get legal counsel advice back this side of Christmas. We will then need to take time to consider that along with the Department of Finance. However, we would also then need to look at some other

issues. Peter, do you want to come in on that? We also need to look at what the implications would be. Remember that these build on each other, so, if, for example, we find that this could be repercussive on sexual offences here or on other classes of victim here, that would also potentially have further repercussions on the block grant. We need to clarify all of this, and it is not easy for me to say how long that will take, which is part of the problem. Obviously, we are working on it now, which is how the due diligence threw this particular issue up.

Mr Beattie: Thank you. To finish, I will throw back what is a real concern for me and, I guess, for other people. As it stands in the commencement, it is:

"provision as the Department of Justice considers appropriate."

I guess that there is that real concern, Minister, that this will be knocked on and knocked on and knocked on.

Mrs Long: There are two things that I will say on that, Doug, and Peter can come in on this. There is a legal ruling from the House of Lords dating back to the 1990s that makes it clear that a Minister is not at liberty simply not to commence parts of a Bill without good reason. Good reason would not be something that I just did not like, so, to be clear about that, there is a legal obligation. More than that, this comes down to trust and integrity. I have given you my word in the Committee that, if this is not repercussive in GB, we will go ahead and take the will of the Assembly on board. That is my duty as a member of the Executive and as a Member of the Assembly. I may disagree with how this came about, but that is neither here nor there. Consideration Stage has passed, and a decision has been made by the Assembly that this is how Members want to proceed. Therefore, it is my duty to implement that. The issue here is this: if you want to tie my hands because you do not trust me, I think that we have much bigger issues than just the repercussive nature of the amendment.

Mr May: It might help the Committee, just in case anyone wishes to go into the detail, to quote the legal precedent here. As the Minister said, it is a UK House of Lords case from 1995 — R versus the Secretary of State for the Home Department, ex parte Fire Brigades Union — and it found that there was a duty to keep the question of implementation under review. Just to be clear, the Committee could, at any point, ask the Minister to explore how she is fulfilling that duty.

Mr Beattie: I do not want to ask a question; I just want to finish my point. I want to be clear about this; it is not an issue of trust for me. I trust the Minister —

Mrs Long: Thank you.

Mr Beattie: — and I absolutely trust her staff. I have no issue with the staff; I think that you work incredibly hard. For me, it is about making sure that I have all the information, and this is new information for me to take in, which came out only on Friday.

Mrs Long: I appreciate that. The information is new to us all, and it rocked us all back on our heels somewhat on Friday. We were doing due diligence with respect to estimating how much it is likely to cost so that we could be prepared to bid in the Executive processes. We were not doing it expecting that there would be a major issue. It has thrown us all slightly backwards, but I want to focus on getting the legislation implemented, getting the offences on the books and getting a legal aid solution that we can bring forward safely without having an undue impact on the Executive's budget.

I believe that that is possible if we can deal with the repercussive issue. We have not ruled out that it may not prove to be repercussive, in which case we will be able to proceed. It would be our intention, as we said in the letter from the Minister of Finance and me, to commence the proceedings at the same time as the offences, provided that repercussive issue has been addressed to everyone's satisfaction and we are confident that it will not be repercussive.

Mr Frew: I thank the Minister and the permanent secretary for attending today's emergency meeting, which was needed in order to discuss not moving Further Consideration Stage yesterday. Everyone recognises that we need good, sound and secure law, so that is not the issue. For the record, Minister, I wish to make a correction. My amendments with Rachel were to clause 9 —

Mrs Long: I apologise.

Mr Frew: — not to clause 27. The credit for that should go to Rachel, not me.

Mrs Long: It seems like a long time ago now that you were praising her highly in the Chamber, Paul [Laughter.]

Mr Frew: You talked about liaison with the Department of Finance and the Minister of Finance. What questions did he pose to you?

Mrs Long: The Finance Minister did not pose questions to me; my officials were liaising with Department of Finance officials and they raised the issue of repercussiveness. They asked what due diligence we had done to ensure that that was not an issue, and we then started to look at that element because we had not anticipated it. We looked at it again, and that is when the issue came to light. Peter can set out more of what happened with the officials, but my understanding is that it came to light in those discussions between officials. It did not come from the Minister of Finance to me.

The engagement that I have had with the Minister of Finance has been through the Executive Committee, where I have raised concerns about the costs and how it would be budgeted for. I made my point to Executive members that, obviously, it would require additional funding to be set aside for the Department of Justice in order to cover legal aid bills in future. It was when officials were doing due diligence around some of the issues that the matter was raised with them.

Mr Frew: One of your letters to us states:

"These arose following questions from the Department of Finance on the ... legal aid costs in other jurisdictions and on other parts of the legal aid scheme in Northern Ireland".

Mrs Long: That is correct. It was the Department of Finance, not the Minister of Finance, which raised the questions.

Mr Frew: There will be a record of the questions posed. Can the Committee have sight of those questions and any minutes or correspondence between your Department and the Department of Finance?

Mrs Long: Is that a matter of process, Peter?

Mr May: Some quite simple questions were posed to us in an email. Let me take that away. I do not see any reason that that could not be shared with the Committee.

Mr Frew: Was that all the correspondence?

Mr May: Essentially, as the Minister explained, she wrote to the Executive on a couple of occasions before Further Consideration Stage. That was the only correspondence that came back.

Mr Frew: Would minutes have been kept of officials meeting, congregating or discussing?

Mr May: There has not been lots of congregating and meeting as you describe it. Our head of finance received some questions in an email from the Department of Finance. There are no minutes of meetings because there have been no meetings about this.

Mr Frew: What about Zoom meetings or phone calls? Are they recorded or are minutes of them kept?

Mr May: You certainly would not keep minutes of every phone conversation you have with colleagues in government. Otherwise, you would do nothing else other than write notes or minutes.

Mr Frew: What about diary notes or anything like that?

Mr May: There is no compulsion to keep any such notes.

Mr Frew: Minister, you talked about the due diligence that your Department has commenced. In answer to Doug, you said that you expect the advice within weeks, probably before the end of the year, and that you would have to consider that advice. How long have you left for that advice to be looked at and assessed?

Mrs Long: To be clear, it was the advice from legal counsel that I was speaking about, not due diligence. The due diligence work will have to continue in the Department on a range of issues arising from the amendments.

We are instructing legal counsel, and those instructions are being drafted. We hope to get a response from legal counsel before Christmas. We will then need to take time to consider that. It is unlikely to be a straightforward answer of yes or no. As with most legal advice, it is likely to be complex and heavily caveated. Therefore, we will have to take time to consider that and consider it along with other colleagues because of the cross-cutting implications of what we are dealing with.

I cannot give you a direct time for the completion of the due diligence or a confident timing of what might be required in terms of further discussions with Executive colleagues. I do not have sight of the legal advice.

Mr Frew: In your letter, you refer to the differences between our jurisdiction and England. Are you saying that there are no differences between the legal aid set-up in this jurisdiction and that in England? If there are differences, why are we not concerned or worried about the repercussions of those differences?

Mrs Long: First, there are differences. Our legal aid system is considerably more generous than the legal aid system in England and Wales. For that reason, there are differences.

In the letter, I referred to a case that has been taken, I think on human rights grounds. Peter, is that correct? I think that it has been taken on those grounds to seek equality of treatment essentially. We cannot judge whether that case will be successful, but it may have implications for us down the line.

Mr May: To be clear, that case is being taken by someone in Northern Ireland who is arguing that the provision in GB is more attractive or beneficial.

Mrs Long: In their circumstances.

Mr May: In their circumstances. They are arguing that that is discriminatory on human rights grounds. We are defending that case.

Mr Frew: How many cases like that have you fought in the past?

Mr May: I do not know the answer to that question. By all means, I can see whether we can find that out. I do not know how easy it will be to do that, but I will try.

Mr Frew: Would it be zero?

Mr May: I do not know.

Mrs Long: Paul, the more fundamental point is that it is a tangible risk and that, to do due diligence, we have to assess that risk and look at what the implications are if that were to materialise. We cannot operate on the basis that no one has noticed to date and, therefore, no one has taken a case. Were that proven to be the case, it would not be a sound basis on which to make decisions.

The other issue that, I think, you were asking about was the basis on which we can have different legal aid arrangements. Much of that will rest on the expectation that the courts accept the principles around devolution, although, as you will be aware, that is being tested increasingly. The other aspect is that, normally, if we were to make changes to legal aid, we would do so after a policy development process. That would mean that, for example, there would be a defence position that, in the round, the legal aid system was comparable if not the same. However, we do not have that defence, because these are unique and individual changes. It is not a comprehensive package of measures to bring balance; ours is a specific measure. Therefore, my concern is that we would be more exposed. Again, we need to take legal advice so that we are sure about the implications.

You are right to say that there is a difference between the legal system here and the legal system in England and Wales. That has consistently been the case. As you know, we have reviewed the legal aid system. We have reduced the amount of spend on legal aid considerably, but it is still more generous in most regards than the system in England and Wales. It is also quite different, so direct comparators are difficult.

Mr Frew: Indeed. We will not talk about a particular case, because we all understand the pitfalls. Are you saying that, if someone in Northern Ireland were to take a case against the more generous system in England, you would expect a positive Barnett consequential change?

Mr May: If we were to lose such a case, we would have to look at the circumstances of the case and on what grounds that finding had been made. The logic of something being repercussive is that it can apply either way. The point that the Minister made is that we will not know the extent of the repercussions until we see the legal advice. Counsel may be very definitive, one way or another, or they may say that there are some issues in the middle that need to be explored further. At this stage, we do not know what that legal advice will be.

Mr Frew: Minister, have you costed amendment No 3 and assessed its repercussive impact?

Mrs Long: The repercussive element will affect all of the legal aid provisions. The purpose of our amendment — previously, it was amendment No 27 — to clause 27 is to ensure that only respondents will be affected, for example. That significantly reduces the potential cost of the legal aid measure and therefore the repercussive consequences. Obviously, all of this will depend on the final outcome with regard to the overall cost of the legal aid provision. At the moment, it is an expansive provision, and therefore the implications are significant. If, for example, we were to reduce the extent of the provision by restricting and narrowing it, that might make the repercussive implications much smaller, and it might make the balance regarding how big an issue it was very different. It depends on the degree of expenditure that we foresee this amounting to. That is what we need to get reassurance about. In any event, we can do that only once we know whether this will be repercussive, because that starts a different conversation. It will, essentially, become a Finance issue because the Department of Finance, not the Department of Justice, is responsible for the block grant and what happens to the block grant.

Mr Frew: As it sits, clause 27 would, at the top of the range, have a £14 million cost impact for Northern Ireland and £500,000 a year for other associated costs. How much would it be with your restrictive?

Mr May: The outer limit is anticipated to be £500,000 a year, but, again, further due diligence would be needed. That is on the basis that amendment No 3 replaces clause 27 and that amendment Nos 4, 5 and 6 are not carried.

Mr Frew: So, we go from a top range of £14 million a year to a top range of £500,000 a year.

Mr May: Yes.

Mr Frew: According to clause 27 as it sits and your amendment.

Mrs Long: Yes.

Mr Frew: The repercussions, if clause 27 stays, could be upwards of £400 million a year.

Mr May: We gave you a very broad-brush figure. It is fair to say that we do not have a high level of confidence in the numbers that we are offering today. However, we feel that, if we do not offer any numbers, that will be open to misinterpretation. Repercussion is determined by how much additional cost is incurred in the other jurisdiction. There is no slide rule judgement; it determines that in advance. We used population equivalence as a means of trying to make a stab at what that would look like.

Mr Frew: What I am getting at is that your amendment No 3, because it is not aligned to the English legal aid mechanisms, is repercussive.

Mr May: As the Minister said, all of these issues could be repercussive, although the quantities are much smaller.

Mr Frew: Minister, if somebody in the Department of Finance had not raised this issue with your Department and the Bill had gone through as it is now, or even with your amendment to clause 27, when were you seriously considering commencing clause 27?

Mrs Long: Our intention was to do the due diligence and then commence clause 27.

Mr Frew: Have you a date for that?

Mrs Long: No.

Mr Frew: At one time, you were able to forecast commencement a year after Royal Assent. Are we talking about that type of timescale?

Mrs Long: As stated in our correspondence, that year would have given us time to do some of the due diligence and to make sure that there were no issues. Whatever issues were thrown up, we would have to deal with, which is what is happening now in advance of the Bill finalising its passage.

Our correspondence to the Committee also stated that it was our intention to commence the two at the same time. The issue has arisen because, if the repercussive issue were to preclude our being able to commence the clause as set down, we would not be able, with amendment No 15 in place, to commence any of the domestic abuse offence provisions, meaning, essentially, that the Bill was not doing anything, which would cause real difficulties. We would then need to find a further vehicle to make corrections to the Bill and so on and so forth. That is the fundamental issue.

If these repercussive costs and risks of repercussion are minor and legal advice deems them not to be significant, and if the quantum of finance that this would affect is deemed to be small, we hope to be in the position that we originally stated, which is to commence both at the same time. That is the intention.

Mr Frew: I do not know what is in the minds of Committee members today — we may know later — but members were very sure in their minds last week, which is why we tabled the commencement amendment. Minister, it was absolutely your right not to move the Bill yesterday. However, surely you realise that, even if the Committee does not move the amendment, your not moving the Bill on the Floor of the Assembly does not prevent any MLA from moving exactly the same amendment. You could face a two- or three-week delay and still have to address the amendment at that time.

Mrs Long: If the Committee withdraws its amendment — it is the Committee's right to do that — another Member would have to table a similar one. If another Member chose to do that, we would have to take that into consideration. I am willing to accept the reassurances of members of the Committee that they and their parties would not vote for it. On the basis of trusting that we would be able to take this forward, I would continue. What I could not do, as in the case that you suggest, was to proceed yesterday at considerable risk and without any such reassurance.

Had I thought that the Chairman was going to move the amendment only because he had to — he would have had to do so unless he had met the Committee beforehand — but that other members and other parties were not going to support it, I would have been able to proceed yesterday. I did not have those reassurances. Therefore, I had no choice yesterday. Had I gone to the Chamber without all the figures and all the information, the risk was that the questions being answered only today would not have been answered to people's satisfaction yesterday, because we are still working our way through this, and Members would not have taken us at our word. There seems to be a distinct lack of trust in what we are trying to achieve. Therefore, we would not have been able to convince Members on the Floor of the House that this would cause a difficulty with the Bill. For that reason, I did not want to jeopardise the offences being taken forward. I recognise that there are people out there who want to see these offences in place. I want to see them in place — it was my priority when I came into office — and the Committee wants to see these offences in place.

I could not take the risk that, by not being able to deal with this issue in the House yesterday, we might end up with a catastrophic impact on the block grant or not being able to commence any of the offences. That was our Hobson's choice, and there is no good outcome from that. Therefore, the

better option was to pause, albeit that it was very difficult to do, and I was not at all happy about having to do it. The only option available to me yesterday was to pause to ensure that we could have this conversation fully informing members of the consequences of passing such an amendment and the implications of that for the Bill.

Mr Frew: You talk about consequences for a Bill, Minister, but you say that having just moved health regulations on which no impact assessment had been completed.

Mrs Long: I am not sure that I follow your point.

Mr Frew: You have just moved legislation in the House that is quite draconian — legislation with no impact assessment whatsoever — yet you will not afford democratic accountability and due process on this Bill.

Mrs Long: The process for the health regulations is, Chairman, well off beam in relation to the conversation that we are having. I am not responsible for the drafting or scrutiny of the health regulations, and the process for approving them was agreed by the Assembly. Therefore, the Assembly had the opportunity to say that it was not happy with the mechanism for agreeing the health regulations. The Assembly agreed the mechanism for the health regulations, and I brought those forward today on behalf of the Health Minister and the Executive Office. I am simply assisting them with their work. I did not prescribe the process; the Assembly chose the process. Whilst I understand people's concerns about the process, your point is not properly directed at me.

Mr Frew: I look forward to seeing all the correspondence between the Department of Finance and the Department of Justice.

The Chairperson (Mr Givan): Before I bring in Sinéad Bradley, I would like clarity on this: when the Department tabled amendment No 3, it had not carried out due diligence on that or identified the repercussive potential; that emerged only on Thursday of last week.

Mrs Long: Yes, that is correct. As you are aware, the purpose and the outworking of amendment No 3 is to restrict clause 27. Therefore, any implications or repercussions are less than if clause 27 were to stand unamended.

Ms S Bradley: Thank you, Chair, for convening the meeting, which is appreciated. I thank the Minister and permanent secretary for being here given the tight window of opportunity to try to arm ourselves with as many facts as possible. Having had conversations with the Minister and the permanent secretary, I was reassured to hear the Minister's opening remarks in which she further stated, on the record, that it is her intention to commence this part of the Bill. She received a red flag warning from the Department of Finance at the eleventh hour, and she has a duty to explore that and understand its significance. The Committee and its individual members also have that duty.

Ultimately, there is an irony here. If the scale of the problem is as suggested, we could end up with a reduction in the block grant, which, ironically, would no doubt be spread across all Departments, and the Bill, as we intend it, might suffer because the Department did not have the resource to lean into the other things that we talked about, such as training and the delivery of the Bill. That said, I take some comfort in the Minister's reaffirming her intention to commence it.

I will not speak to the trust issue, because I do not think that it is about that. It is fair for members to ask questions so that we understand. It is not that we do not trust anybody; we want to understand better what is being presented to us. I have tried to retrace the issue. I understand that the information arrived on a Friday afternoon. The timing was unfortunate because everybody had the common objective of getting the Bill across the line. We were buoyed up and determined to see it happen, and it is disappointing for all of us when an obstacle is put up.

I am looking back and walking through what happened from the outset. Am I right to say that we had to satisfy ourselves that it was a devolved matter and that the Bill was within the competence of the Assembly? I also think that it was put down as cost-neutral. On reflection, I now wonder whether it was any of those things. Surely the issue of repercussive effect could apply to almost any devolved matter, if there is deviation from other parts of the UK, which puts a question mark over devolved matters. I do not think that we even have the time to get into all that, but it is worth flagging up because, if the

principle is not fully bottomed out so that we understand it better, this could reappear at any Committee at any time and with any Bill.

I understand everything that the Minister is saying: a red flag has been raised, so we cannot unsee or unhear that; nor should we. I absolutely agreed with the Minister when she said at the outset that we are determined to get the offence on the statute book without delay. Nobody wants it to be delayed. That does not deviate from or diminish in any way the importance of the legal aid effect on victims, and that is a significant part of it. I want to be sure that we are absolutely clear. If the Committee did not take a position to decouple the commencement of clause 27 from the rest of the Bill, what would the Minister's intention be in that set of circumstances? Also, as Paul Frew outlined, if the Committee took such a position but an MLA tabled the same amendment, what would the Minister's intention be under those circumstances?

Mrs Long: I will answer your last question first, if I may. If amendment No 15 is made, we will still have to do the due diligence work required in order to understand and mitigate the risks associated with the legal aid provisions. If, as a result of that work, it is clear that the risk of commencing the provisions is too great, we cannot responsibly commence them. Amendment No 15 would therefore stop us from commencing the other provisions, including those that relate to the creation of domestic abuse offences. That is not an outcome that we want or expect. We hope that that is not the case, but it is a real possibility, and I have to let the Committee know that, because it would have an impact on us and, most of all, on victims. I can give you the commitment again and make it absolutely clear that I will commence clause 27 on completion of the necessary due diligence work, provided that it is safe to do so, and I will report to the Committee on that work as it progresses. Amendment No 15 is not needed to force me to do that, because I am not resisting the Assembly's decision. I will implement that.

The member raised the wider issue of whether anything can be repercussive and how, in that case, we can have any devolution. Clearly, the point of devolution is that different jurisdictions can have different positions on issues, and that is the case across a number of different areas, including health, the economy and education. However, what can occur in these circumstances is that any person can make an argument to a court that, on human rights, equality or other grounds, they should be entitled to the more favourable treatment that is available elsewhere. That is a particular risk when it comes to legal aid provision, because it deals directly with access to justice issues and the exercise of fundamental rights, and because it is heavily contested and litigated. Repercussive cost is routinely examined in any economic appraisal of policy in legislative proposals so that risks can be fully identified, properly understood and, where possible, mitigated. The difficulty here is that, because of the way in which the clause came about, there has been no opportunity to do that work, which I referred to during Consideration Stage, so we are left with a large unqualified and uncontrolled financial exposure, and we need to take the time to put that right.

The statement on funding policy — Peter read that out this afternoon — sets out how UK Government funding for the devolved Administrations is determined and notes that the Budget of the devolved Administration will be adjusted downwards to compensate for costs incurred by the UK Government as a result of the actions of a devolved Administration. There is no easy way for us to identify exactly what those costs will be, because it will depend on demand — it is a demand-led service. However, they could be significant. That is what we have been able to determine and why we were unable to proceed. As I set out in my earlier answer, the consequence of amendment No 15 being made is that we would not be able to proceed with any elements of the Bill. As I have said, I am willing to take members at their word if parties commit to not pass amendment No 15 and vote against it. I will take members at their word on that and proceed. Of course, if another Member decides to put down such an amendment, I expect the support of the Committee members and their parties in resisting it. It is important to decouple those two issues to allow us to deal with legal aid, but I reiterate the point that I made in my letter and in conversations with you today: it is my intention to commence clause 27, and I intend to do so at the same time as we commence the offences. We do not want to delay this, but we have to do it only on the basis that it is safe to do so and does not expose the Department to this level of risk. We need to be able to do that, and I was unable to do that yesterday.

Ms S Bradley: Thank you, Minister. That was fairly comprehensive. From that, I take it that you will go ahead and table the Bill, regardless of the outcome in Committee.

Mrs Long: I am saying that I am willing to table the Bill and have asked for it to be brought back to the Chamber. We had a slot held for Final Stage next week. I have asked the Business Committee to hold that slot for Further Consideration Stage, but that is to be confirmed following discussion with the

Committee. Should the Committee still be minded to push amendment No 15, I will confirm that I do not intend to take it forward next week. If amendment No 15 is not supported by the Committee, and I have the reassurances that the amendment will not be supported by the various parties, I will continue with Further Consideration Stage. I was unable to get that reassurance yesterday. I was willing to operate on the basis of such reassurance yesterday so that we could continue with the Bill, but we were unable to do that. I accept that it was very short notice, as it was for me when the issue was raised at the weekend. Nevertheless, I am willing to continue on that basis. If that is not agreed, I will not be able to proceed until the due diligence is done, because amendment No 15 would mean that we were unable to proceed with any part of the Bill. It would leave us in an intractable situation where we could not commence any of its provisions.

Ms S Bradley: I appreciate that, Minister. Basically, the Department would take on the role of doing due diligence while the Bill sat there and did not proceed. OK. Through due diligence, the Department and officials need to be satisfied that there will be no repercussive effect, and an economic appraisal of the further costs of any legal aid proposal is required. What parameters will you set for you to be able to say, "We are safe to go" or, "This is problematic for the Department"? The repercussive part in GB is clearer because it either is or is not. With regard to measuring legal aid, at what point would the Department say, "We have considered this and are good to go. We will go ahead"? We have no measure. I do not understand at what point you can say whether it is safe or unsafe to proceed.

Mrs Long: There are two separate parts to your question. The first is about the implications in Northern Ireland; the second is about the implication in GB. Peter can keep me right on this. On repercussions in GB, I understand that it was not the intention of the Assembly to reduce the block grant to fund any legal aid claim from England and Wales. Certainly, that is my perspective on that. I do not believe that voting for clause 27 to be part of the Bill was done with that intent. Therefore, yesterday, I felt that we had to stop to clarify the position. When it comes to legal aid in Northern Ireland, you know my view on how it should have been handled. The Assembly made a decision and will make further decisions on that. I will give my advice and guidance, as always, and set out the alternative propositions. However, if the Assembly, in its wisdom, decides to continue with larger expenses, repercussive costs and so on, that is a decision that the Assembly is taking with intent. That is a different matter from repercussive costs in Northern Ireland. We have explained the knock-on effects for other victims. We have made Members aware of that risk. We have made them aware of the potential challenges around legal aid more generally because of this, but the Assembly decided to proceed, so it would not be appropriate for me to set a limit on what would be done. However, I would expect Members who supported it also to support the bid from the Department for any additional finances that we might need to cover the costs of it.

That is separate and distinct from the repercussive issue in GB. Maybe that clarifies that I would not say that I would not commence clause 27 if it was simply do to with the cost to the Northern Ireland block grant and the impact on the departmental budget. However, if it was to do with us potentially losing significant amounts of the block grant as a result of repercussions in GB, that is a different matter altogether, and I do not think that it would reflect the intent of those who voted at Consideration Stage and who will vote at Further Consideration Stage.

Ms S Bradley: Thank you, Minister. I have two further points. Doug Beattie referenced the timeline. New clause 27A has, I think, a two-year provision, so clause 27A will pick up on much of what clause 27 is trying to achieve. Minister, you mentioned having advice from counsel before Christmas. From the conversations that we had, it seemed likely that you would not be able to get that advice until into the new year. Has that changed? If that is the case, is it a change for the better?

It is still open to you, Minister, and the Department to table amendments. Do you or the Department intend to do so, particularly relating to this issue with clause 27 or on the commencement?

Mrs Long: When I spoke to you yesterday, the advice that I had was that the advice would not be available to us until after Christmas. In further discussions this morning, I was advised that we will potentially get the advice before Christmas. We are drafting instructions for counsel, but we will need further time after that to assess the legal advice. There is unlikely to be a one-word answer of yes or no. It is likely to be a complex issue and involve weighing up the various aspects and looking at legal precedents. It is unlikely to be straightforward. Therefore, we will need some time to reflect on the advice and consider it with colleagues in the Department of Finance.

At this stage, it is not my intention to table further amendments. The tabled departmental amendments on which I have briefed the Committee are as far as I intend to go. I was not intending to bring

anything further. I do not see much purpose in trying to change further elements of the Bill at this stage. Further Consideration Stage should be a tidying-up exercise, and we have already done that with the Committee and discussed the implications of those amendments. However, if something massive were to arise again, we would have to look at that. The fact that I have held space in the Assembly next week for Further Consideration Stage means that the effective time for amendments will close very quickly anyway, so it is unlikely that anything will emerge in the interim.

Ms S Bradley: Thank you.

Miss Woods: Thank you, Minister and permanent secretary, for being here, and thanks to Paul for earlier clarifying the issues with the amendment, which is why we are here today.

A couple of points about the court case were mentioned. Where in the courts system is it?

Mr May: It is at the High Court.

Miss Woods: Has it been accepted? Has it been granted leave? Is a judgment about to be issued?

Mr May: I do not have the detail on that, I am afraid.

Mrs Long: It is not appropriate for us to discuss it, to be honest, Rachel, given that we are respondents in that case.

Miss Woods: I appreciate that. We are trying to get to whether, if we are waiting to find out what repercussions there might be, the Department is seeking legal advice or seeking the outcome of a court case.

Mr May: It is not the outcome of the court case. We hope that legal advice and further due diligence in the Department will be able to take us down the path. Clearly, you always adjust your view depending on what the latest legal cases determine, but you would not hold off reaching a view for that purpose.

Mrs Long: It is also worth bearing in mind that, as we said, it is a similar point of law, but it is not the same one, so it does not necessarily have direct read-across.

Miss Woods: Is that a similar point of law to do with a domestic abuse case or with a legal aid waiver?

Mr May: It is a legal aid case to do with a statutory charge. That is all the information that I have at the moment. It is broadly analogous rather than being the same point.

Miss Woods: OK. Thank you. Peter, you mentioned potential victims of sexual crime as an example of possible court cases or future judicial action. Will you elaborate on that a little bit more, please? That is new information. It was not in any of the letters that were sent to the Committee about the potential for different types of victims.

Mr May: I was just drawing out that, in Northern Ireland, other cases could be brought by individuals who were not subjected to domestic abuse but have been subjected to other offending, and they could seek to make a case, based on human rights or equality grounds, that they should be entitled to the same provisions. The Minister already rehearsed that, in her view, the Assembly has spoken on that and that is a decision that it has consciously taken. Therefore, that is not going to be material grounds for the way in which the Department or the Minister take forward the legislation, but I was just drawing it out again. It has been drawn out in previous stages of the Bill as a relevant consideration.

Miss Woods: It has.

Mrs Long: It is part of the response, Rachel, that I gave when it came to why I felt that this would be better dealt with through regulations, for example, which we could then tailor and respond with rapidly. Obviously, one of the issues would be that, if there were repercussive implications for other victims and if there was a kind of open-ended and uncosted provision, it could have implications.

At each stage where we place more restrictions around the particular measures, the less repercussive they are likely to become, because we are constraining the number of people who might be able to

argue that they have a similar entitlement. That was really the point that I was making. Normally, we would do a business case and look at the financial appraisal of the measure, and we would then know whether there were other categories of respondent who may feel that they would be unfairly disadvantaged if they were not able to access the same provisions. We do not know the extent to which that would be the case, but I think that members were aware of that. I certainly raised the unknown implications of that in the discussions. I can only presume that members were content to proceed on that basis at Consideration Stage and that, therefore, that would not preclude us moving forward.

Miss Woods: Thank you, Minister. Where being unfairly disadvantaged is concerned, have cases been taken yet on the waivers that already exist for nominal station orders and forced marriage?

Mr May: I do not know the answer to that.

Mrs Long: The issue, again, is not whether people have taken cases. Whilst that might indicate whether people have already taken cases, it does not mitigate the risk of people in future taking them. In mitigating risk, there are lots of things that have not happened yet that could happen, and one has to prepare for them. My house has never been flooded, but I still take out flood insurance.

Miss Woods: I appreciate that. If we are going for this measure, we would never legislate on anything because of things that could happen. However, I am looking at it through the mindset of victims of —.

Mrs Long: No, with respect, that is not the case. We are not saying that we would never legislate on anything because that might happen. We are saying that, before we would legislate on something that is complex and has potential for repercussive implications, we would do due diligence, a proper economic appraisal and engage with the Department of Finance and other Ministers on how the provision might impact on their work. I could draw a parallel, for example, with the decision that was taken today by the Minister of Health on pay for people who were on strike during the health workers' strike. Before that was brought forward, even though it was the intention of the Executive to do that, a lot of due diligence was done and a lot of legal opinion and advice had to be sought and taken in order to ensure that there were no repercussive implications. It is not as simple as deciding that something is a good thing to do. We all accept that those are good things to do. It is about being certain before we do them of their implications on the budget and finances and being confident that they do not have unintended consequences. That is something that we have not, as yet, been able to do on this particular amendment. We need to do that. However, as I stated, it is not about this particular amendment. It has been passed, and it will be a matter for the Assembly to decide whether it amends it further at Further Consideration Stage. The key question is whether we couple the commencement of legal aid to the commencement of the domestic abuse provisions. Provided that that does not happen, we will have the time to do the due diligence, and it will not prevent us going ahead in circumstances where the repercussive implications are so significant that they make it impossible to proceed.

Miss Woods: At the end of the day, it is about a waiver of the financial eligibility limit for victims and survivors of abuse. That should not be forgotten in all this. I do not believe that the block grant should be used for schemes in other jurisdictions. It is very simple. I am sympathetic to the Minister's concerns, which were outlined in the letter and today.

The press release is about the scope of legal aid, including for those who perpetrated the violence. As I said before, surely that is covered in the Minister's amendment in section 2 on the eligibility criteria, which will be worked through. I do not buy that argument about opening it up. I have said before that I am more than happy to work on wording. I believe that that is in the amendments that were to be debated yesterday and —.

Mrs Long: With respect, that is the point. We were speaking about the clause as it stands. That is an accurate reflection of the clause as it stands. My amendment has not yet been passed. The statement is accurate about the amendment as it stands. If my amendment is passed, it is correct that only respondents will be able to benefit, which should help to prevent perpetrators of domestic abuse being able to misrepresent themselves and use the legal aid system to continue to perpetrate abuse on their partner or another member of the family. As it stands, however, that would be possible. That is why there is a significant reduction by limiting it to only respondents.

Miss Woods: I am sure that we can debate this in the House, but I argue that it is not the respondent; the eligibility criteria that the Department set itself would weed out perpetrators who seek to misrepresent themselves as victims. It is not —.

Mrs Long: It is both those things. It does both. As you know, we are trying to work through how that could be done in the eligibility criteria. You have been involved in the discussions with the Department on that, which have been incredibly helpful. Again, I think that we are all intent on doing the same thing. It is an issue that has been raised with me many times as a constituency MLA and by friends who have had to go through the family courts. It would be beneficial if we could do it in a way that does not expose the Department and the block grant to excessive risk. It is a bit of both in the implications of the amendment, as some of the ability of respondents to, first of all, be eligible and, secondly, the actual criteria through which people are eligible would be restricted.

Miss Woods: Are there any examples of a precedent of the repercussive costs? On what evidence are the assumptions based that the block grant would be used to fund legal aid elsewhere? Has it been brought up by Department of Finance officials, or is there other precedent that has been set through any other judicial action?

Mrs Long: Department of Finance officials raised it because it forms part of Treasury rules and guidance. Therefore, it is something that we have to protect against. We have to be sure that nothing that we do will have repercussive implications. As you know, any deviation from parity can have consequences for the block grant. For example, if you look at the situation with RHI, where we deviated from the scheme in England and Wales and our scheme was more generous, you will see that that did not come through Treasury paying all of the scheme. It indemnified us only up to the cost of the scheme in England and Wales, the equivalent cost for Northern Ireland. That is where the debate arose on whether significant costs were likely to be incurred by the block grant in Northern Ireland. That is the reverse of the situation that we are concerned about, which is where somebody claims in England and Wales that they have been disadvantaged by not having access to something that someone could have access to in Northern Ireland.

There are examples of where it has operated where the block grant may be put at risk, but I am not aware of any in the current circumstances. There have been other challenges, for example, on the number of cycles of IVF that people are entitled to in different parts of the UK. There has been considerable challenge on that. In some cases, those challenges have been resolved either by Departments deciding to change the policy here, or, simply resisting that based on the fact that it was unaffordable. I am not sure that any of those have made it to court. However, where someone takes a case to court, it has consequences.

There is an example of a case that may already be before the courts. Carál Ní Chuilín, the Communities Minister, had to take a defensive position in the case of the six-month rule for benefits for people who have terminal illnesses. If she did not defend the case in court, even though she fundamentally disagrees with the principle that she is defending, and if the case was won in Northern Ireland, the principle would be overturned in the rest of the UK and the Department for Communities would then become liable for the costs of the six-month rule. That advice was given to the Executive and the Minister, and, therefore, the Minister was put in an invidious situation where she had to defend something that, I think we would all agree, was not an appropriate piece of legislation. However, she had no choice because the alternative would have been to pay the costs of the change across the UK from the Northern Ireland block grant.

Those are real and present issues. They are not fanciful or imaginary; they are real and present. Every Minister has to grapple with them at some point, and this is one point at which we are having to grapple with this one.

Miss Woods: Thank you, Minister. I am not sure if you can speak for Minister Murphy, but have you or any officials contacted the Treasury to get confirmation of the value of the repercussive costs?

Mrs Long: It would not be for Treasury to provide that. That would come as the result of a sequence of events. We know Treasury rules and how they operate. It is our job to do the due diligence to ensure that we are protected against those particular costs.

If this is discovered to be repercussive — that is one outcome — it does not automatically mean that we will owe money to the Ministry of Justice (MOJ); it would lie with somebody, first of all, taking and being successful in a legal challenge. The degree to which it is repercussive would be decided in

court, and that is a discussion that would have to happen with Treasury. There are a number of stages in this that we cannot predict the outcome of. All that we can do is look at the degree of risk that we are exposed to and then try to mitigate that as best we can. That is what we are trying to do by ensuring that we can complete the due diligence without endangering all the other measures in the Bill. I agree entirely that these are sensitive issues. We recognise that many people have suffered serious financial harm as a result of what is, essentially, an extension of financial coercive control by a partner through the family courts. That is well-documented.

As I explained, there are other mitigations against that. I hope to see those used more frequently by judges looking at the potential for vexatious cases and so on. As I also said, there are options for them to do that. There are a number of issues in this, but, on the fundamental point, we have to mitigate that risk. Treasury would not be able to tell us now what that risk is likely to be because it would be the result at the end of a court case. Remember, it would also be demand-led, so it would depend on how many people in any year then chose to use this mechanism in order to seek legal aid in England and Wales. Therefore, it is really about how long a piece of string is, which we cannot judge. That is one of the reasons why we are very reluctant to give out figures on this, but we felt that we needed to give some substance to the concern that we had. However, it can really be only a very rough estimate, which is based on population at this stage.

Miss Woods: Thank you, Minister. Just on that, I know that they are rough estimates, and you mentioned that they are crude estimates in that they use population equivalents. How were the quantities reached? Was it done by using the numbers of people in the rest of the UK by population size? Was it done by using as the crude estimate the number of people who are going through the family courts, seeking child contact orders, being respondents to child contact orders or the prevalence of domestic abuse in certain societies?

Mr May: It was a population estimate. We would not have ready access so easily to those other metrics.

Mrs Long: The population estimate was used because that is the rough basis on which the Barnett formula operates.

Miss Woods: Thank you. I appreciate that the potential costs are estimates, but is there any more information on how they have been calculated?

Mr May: I think that I have already given the information that we have about how they have been estimated. The purpose of the further due diligence work, in addition to the legal advice, is to understand more completely what the likely, or potential, cost impacts would be.

Miss Woods: OK.

Is the issue with amendment No 15 the fact that it ties the commencement of legal aid provisions with a new offence, or is it that it commences the legal aid provisions?

Mrs Long: First of all, it ties our hands on the commencement, and it is both, as it ties the legal aid provisions commencement to the offences commencement. Therefore, in circumstances where the due diligence shows that that would have significant repercussive implications for GB and, therefore, on the block grant, we would, first of all, not have the opportunity to not commence the legal aid provisions but could instead commence the offences. Therefore, the entire Bill would essentially be suspended. The secondary part of that is that, were we to discover that this had serious repercussive costs, to be clear, we would come back to the Committee. The Assembly made a decision to allow some form of legal aid waiver for those who are victims of domestic abuse and domestic violence. That is the will of the Assembly. At the point where we believe that those provisions could not be commenced in circumstances where the repercussiveness in GB was too significant, we would then have to come back to the Committee to provide an alternative mechanism on how to achieve that objective. That is because that is what the Assembly agreed to do. We would then come back and look either at regulations or at an alternative that would allow us to do what the Assembly intended. That would be done because the Assembly binds the decisions that we make.

Miss Woods: Thank you. I appreciate that, but I would have concerns if something was in a Bill and was not commenced, but that was from last week. I appreciate the reassurance that the Minister has given in the last couple of days that that would happen.

Is it possible, in your view, to disentangle the commencement of the legal aid provisions from the commencement of the new offence while ensuring that both come into operation? If it is, will it be by us not moving amendment No 15?

Mrs Long: It is not possible for the Bill to still be coherent while requiring commencement of the legal aid provisions. It is possible to disentangle the legal aid provisions from the abuse provisions in order that we can do the due diligence required. If that due diligence says that there is not a significant risk of repercussiveness, we can commence both at the same time as intended. If it says that there is a significant risk of repercussiveness, we can look to see whether there are mitigations that we can put in place before we can commence that section on legal aid. If, in extremis, no mitigations could be provided and we could not safely commence that part of the Bill, we would still be able to commence the offences in the Bill and then come back to the Committee in slower time with an alternative mechanism to achieve what the Assembly directed we should. By disentangling those two things, we protect the position that we would still be able to commence the provision for the particular offences without that being tied to our being able to be confident that there are no repercussiveness implications of the legal aid.

We cannot give a commitment to the legal aid provisions having a separate commencement given that we do not know at this stage whether it will be possible to commence the legal aid portion because of its potential repercussiveness. We will not know that until we have done full due diligence. The alternative, of course, is that we simply pause and do nothing until we have that piece of work done. However, I think that that is contrary to what people intended, which is that we would bring those offences into place as quickly as possible. By decoupling that, we can still do that and progress the legal aid aspects in order to ensure that we can bring those forward safely either by the commencement of the provisions in the Bill if they are not repercussive or by an alternative means if they are.

Miss Woods: Thank you, Minister. I appreciate that answer. I will not take very much longer. Could amendment No 15 be amended?

Mrs Long: Anything that requires us to commence the legal aid provisions in the Bill will cause me not to be able to move forward with it.

Miss Woods: OK. Just to clarify that the —.

Mrs Long: If I can be clear about this: it is highly unusual for a Committee or a legislature to say when a Minister or Department will commence any parts of a Bill. That is a highly unusual measure in legislation. Given the potential pitfalls in these issues, where things change or need to be corrected or amended post the point of passage of a Bill, it is normal that the Minister and Department are allowed to make the judgements about the best time to commence provisions. We have set down in the Bill our intention on commencement. We have been clear about that from the outset.

Insisting on the commencement of the legal aid provisions being in the legislation creates a specific problem, given that we cannot confidently say at this stage that they could be commenced. Frankly, I cannot sit here and pretend that I would be comfortable with that, because that would be dishonest. If I were to agree to a longer commencement time for those legal aid provisions while knowing full well that, in light of legal advice that I get, it may not be possible to ever commence them, I believe that I would be misleading the Committee.

I am being clear that any requirement on me in the legislation to commence the provisions on legal aid at this point would have to be resisted. I believe that, given the risk to the block grant, we would not be able to proceed with the Bill. I have also made it clear that it is my intention to commence both at the same time, if that is possible, after due diligence has been completed. I have been clear and robust about that on a number of occasions. Peter has also made it clear that, on the basis of the 1995 case, I have an obligation to do so under law. It is not just a commitment that I have given; it is a legal obligation.

Miss Woods: OK. Thank you.

Ms Dillon: I thank the Minister and Peter for coming to the Committee, and I thank the Chair for calling the meeting. It has certainly been helpful in clarifying things. You will have heard from last Thursday's meeting that I was never comfortable with commencement. I was certainly not happy to commence through Rachel's amendment. The reason why I had issues with that is all on the record. It is not

because of the intent, and Rachel knows that. I know that the intent is absolutely good and honourable. It is the right intent on protecting victims and allowing them access to legal aid.

To nail it down, I think that, at this point, we can all agree that we all want to get to the same place. It is just about how we get there. I spoke to the Minister yesterday prior to going into the Chamber, but, obviously, I could give assurances only on how my party would vote. I gave assurances that we would vote against the commencement on the basis that we were not prepared to allow the Bill to be delayed. To be perfectly honest, I think that that would be unacceptable. We were very clear from the outset when we took on this piece of legislation that it was really important to all of us to get it on the books as quickly as possible.

Having said all that, we made a number of amendments that delayed it, but that is OK, because we wanted it to be the best piece of legislation that we could possibly get. The intention of the Committee in all its amendments was about making the Bill better legislation. It was never about being difficult or obstructive. I appreciate that the Department worked with us on a number of those amendments, specifically on things that were very important to me, such as protection notices and orders and information sharing with education settings.

Having said all that, our position remains the same. I am prepared to not vote for the commencement even if it is left on the books as an amendment and is moved. That is our party's position. It carries too great a risk not only in delaying — I already had concerns when I thought it might delay the rest of the Bill — but there is now the potential that it will not come into place at all based on potential repercussiveness, and that is just too big a concern for me. I am not prepared to see the Bill not going on to the books on that basis.

I share all the concerns that other members have about legal aid and commencement, but I accept the Minister's reassurances on it. We have a responsibility, as a Committee, to hold the Minister to account. That is our job. That is what I will certainly do, and I do not expect any less from any other member of the Committee. That is my position on that specific amendment.

Obviously, there are other amendments, and I spoke to officials at the end of last week to clarify positions on amendments because I want to make sure that, at the end of this, we make good law, the right law and something that is deliverable for victims. For me, that is important. There is a whole section of people out there who do not have a say in this matter because they do not know yet that they will need the Bill, and we need to look after those people too. They do not have any say in this. They have not responded as stakeholders because they do not know yet that they are stakeholders. We have to consider all that when we are looking at this. For me, that is vital.

I spoke to the stakeholders in the sector over the weekend as well because, obviously, I want to hear from everybody. I am not taking the Department's position or any specific stakeholder's position. I am taking every bit of information that I can get my hands on and, in the round, trying to come not to the perfect position because there is not one, particularly on the specific issue, but to the best position that I can find. I have said to the Minister that clause 27A is as important to me as clause 27 because that is the best place to find where I want to get to, where, I know, the rest of the Committee wants to get to and where, I hope, the Minister and the Department want to get to, and that is to a point where we can improve access to legal aid where it is not just as tight as it is at the moment.

Apologies for setting that out, but I just want to make my position clear, and it is fair to the rest of the Committee for me to set out our party position. My question is in a slightly different vein. It is on eligibility and who would be considered a victim. I am asking you to be as upfront on this as you have been on everything else. Can I clarify, if I were to support Rachel's amendment where applicants as well as respondents are considered victims — that is not my intention at this moment in time, but I just need to clarify it — rather than the Minister's amendment, which considers respondents to be victims, would that narrow the potential for defining a victim? Is the reality that it could become only when there is a conviction that you can consider that person to be a victim? That would narrow it so much. I found myself supporting your amendment because of that concern, so I am asking for the same frankness.

Mrs Long: There are a couple of parts to what you said. First of all, to be clear, the amendments that the Committee made and the Committee's scrutiny of the Bill have been helpful. The Bill is better as a result of it and has been enhanced.

I do not think that there is any difference between the sector, the Committee and ourselves in the Department with regard to what we are trying to achieve, either on the main thrust of the Bill or, indeed, the legal aid provisions. I think that we all accept, as I have said already, that there is an issue,

which we have identified, relating to people who are constantly dragged to court by a partner with vexatious complaints, and that it can be financially painful, to put it mildly, for them to continue to go to court. That is a challenge.

Therefore, I do not think that there is any difference with regard to intent. There may be a difference with regard to approach and how we go about it. However, the intent is the same: that we will get to a point where we can provide legal aid to those who are genuine victims of domestic abuse, and that we can move forward with regard to getting the offences on the books.

Peter will talk about the work that is going on in the (Legal Services Agency) LSA on the eligibility criteria. Obviously, there are challenges with regard to how we determine who is a victim. One of the easiest ways to do that is to look at what we are actually trying to prevent. What happens in most of the cases that I receive complaints about is that person A, the abuser, will continually want to take person B, the victim, into the courtroom over and over and over again in order that person B is financially constrained because they have to pay for legal advice, support and other things, but also because it causes psychological trauma to be constantly tied to that person.

If by saying that the waiver applies only to respondents to cases, we immediately rule out the possibility of person A getting legal aid to do that: to initiate proceedings that would drag somebody back into court. Therefore, we are not saying that, if somebody has a genuine reason to go to court, they would not be able to get legal aid, but it would be the normal means-tested manner of legal aid that would apply in other cases. What we are saying is that the waiver would apply only in those cases where you are responding.

Therefore, if someone persistently brings you to court, you, the respondent, could access the waiver if you were a victim of domestic abuse or violence. That cuts out the opportunity for, for example, a perpetrator of domestic abuse to claim that they are a victim of domestic abuse, claim legal aid, and then use public funds to drag their partner to court, while their partner then has to establish that they are entitled to the waiver. That could actually increase, first of all, the number of cases that would be taken, which is contrary to what the Department is trying to do, which is to encourage non-court-based outcomes for families, so that there is more upfront negotiation, support and arbitration between partners rather than simply recourse to the courts.

More fundamentally, it could also lead to an increase in the number of perpetrators actually taking their partners through the court system repeatedly because there would be, essentially, little or no jeopardy: they would have legal aid to cover the costs. In doing that, we are immediately reducing that to deal specifically with somebody being brought repeatedly back and forward to court. That is the reason why we are focused on respondents.

With respect to the issue that I think LSA is looking at, the eligibility criteria, we recognise that there are issues with saying — I know that Rachel has had discussions with LSA on it —.

The Chairperson (Mr Givan): Can I just encourage a bit more brevity to try to keep within *[Inaudible]*?

Mrs Long: The issue with that is very specific, in that we recognise that having a conviction for an offence is quite a high bar and that somebody may be leaving a partner, for example, rather than taking them through the courts; opting not to go to court but instead simply wanting to be able to leave, take their children with them and break contact. In cases like that, it would be very difficult to say that, without a conviction, there could be no support.

However, there has to be some threshold. That is the area that we have been looking at. I will pass to Peter on that one. We are trying to look at what the threshold would be and what evidentiary test there would be to stop people abusing the system. This is public money, and it is important that the people who need it can reach it. There is no quibble about people who are entitled to it being able to get it. The concern is about those who ought not to be entitled to it being able to get it. That is something that we have to do due diligence on.

Mr May: I do not have a lot to add because this is work that is still going on, and we have not reached a conclusion. We will come back to the Committee when we have proposals. Essentially, the Minister is correct to draw out that, if there were a broad waiver, in other words for both defendants and applicants, there would probably be a need to define much more tightly the victim eligibility because of the risk that there would be about perpetrators otherwise securing legal aid. So, if the consequence of that is that there is a narrower waiver, it ought to be easier to draw a slightly less restrictive definition.

We are still thinking this through. I am afraid that we do not yet have answers on exactly how we would do that.

Ms Dillon: Are you engaging with organisations on that issue, or will you be doing that at some point when you are looking at proposals? Obviously, they have worked quite a bit with victims.

Mr May: Yes.

Ms Dillon: Thank you.

The Chairperson (Mr Givan): If Further Consideration Stage were taken next week, when would you anticipate Final Stage?

Mrs Long: In the new year, as early as possible.

The Chairperson (Mr Givan): Assembly plenary sittings do not start until 18 January.

Mrs Long: Yes. It would probably be the week commencing 18 January that we would be seeking to have Final Stage.

The Chairperson (Mr Givan): What is the time frame for getting your legal advice and due diligence carried out?

Mrs Long: As I said earlier, we will be looking to have the legal advice this side of Christmas. Counsel advised that it would be this side of Christmas, with consideration of it in the new year. I cannot commit to a time frame on the due diligence because that may, in turn, raise further questions that we need to pursue in the Department. We just have to make our way through this as we go. Obviously, however, we want to complete it as soon as possible because that will allow us to move on to the other preparatory work that needs to be done to operationalise the Bill before commencement.

The Chairperson (Mr Givan): If the Assembly were to proceed with voting for this commencement — amendment No 15 — what options would be available to the Department, if, having conducted due diligence, there was this repercussive impact of £400 million, to come back to the Assembly to say that there is a very real issue and that you cannot now commence the offences in chapters 1 and 2 of the Bill because of it? What powers are available to the Department to ask the Assembly to remove that?

Mrs Long: As far as I am aware, the only powers that we would have at that stage would be for us not to commence anything. That would be the first thing. We could not commence anything, and we would need to find another primary legislation vehicle to bring forward amendments to the Bill. Peter can keep me right on this. I think that that would not be possible in this mandate. Is that a reasonable assessment?

Mr May: The timings are, obviously, dependent on how quickly we identify the problem, but primary legislation can only be changed by primary legislation.

The Chairperson (Mr Givan): You have your miscellaneous justice provisions Bill, so you could repeal this if the Assembly proceeded, or you could introduce a one-line piece of legislation and get accelerated passage, which I am sure Members would grant. Within weeks, you could repeal it.

Mr May: As I said, you can change primary legislation only through primary legislation. It would be odd to pass primary legislation in the knowledge that there could be a problem.

Mrs Long: It would also, I think, be a difficult argument for me to make to Executive colleagues that I was going to continue down a route that I knew exposed us to considerable risk on the basis that we would vote for that and repeal it later. The sensible thing would be not to do it in the first place.

The Chairperson (Mr Givan): To try to find a way for everyone to get off this issue, what if amendment No 15 were amended to include provision for the Department being able, by way of regulation, to take forward an affirmative resolution of the Assembly to rescind it? Then you could come forward with a position if that transpires to be the case. That way, everybody wins.

Mrs Long: It really is not about everybody winning because I did not think that it was a battle. It is about trying to get the Bill through and to ensure that we do not have repercussive implications and can advance all the parts of this. I have been clear that I intend to commence all parts of the Bill, including the clauses on legal aid.

It is not about winners and losers. It is not a battle of wills; it is about trying to get the right decision. There is no intent on our part not to commence the legal aid provisions unless that repercussive issue is there. As Peter said, there is guidance on the legal requirement for me to do that.

The Chairperson (Mr Givan): I am trying to find a middle way so that we can make progress collectively. That is why I made the suggestion. I would need to get advice from the Assembly about whether we could table an amendment to that amendment. Are you saying that it is either your way or no way?

Mrs Long: That is not what I am saying, Chair, I am suggesting that the simplest resolution is to remove amendment No 15, as that will allow us to do exactly what you suggest: progress the legal aid provisions and commence them if we can. If we cannot, we will come back to the Committee and discuss how we can implement the will of the Assembly in some other way.

The Chairperson (Mr Givan): Is it normal to prevent the Assembly from having a Further Consideration Stage on the precondition that political parties need to tell you how they will vote on amendments that Members are entitled to table?

Mrs Long: That was not the precondition on which we would have the Further Consideration Stage, Chairman. I cannot move the Further Consideration Stage while the risk of amendment No 15 being passed remains live. It would be irresponsible of me to do that. However, if I was aware that that amendment was not going to be pressed, I would be willing to take the Committee and other colleagues at face value and trust their integrity on that issue so that we can make quick progress. Of course, I could say that I will not move it until that amendment is withdrawn or until a further amendment is tabled, but I would be willing to progress based on trust.

The most important thing is to get it done. That is why I said that I would be happy to move the Further Consideration Stage with the understanding that amendment No 15 would not proceed. It is not a matter of political opinion; it is a matter of my ministerial responsibilities. I cannot proceed while there was a risk of that amendment being passed in the Chamber. It is as simple as that.

I did not take the decision not to move the Further Consideration Stage lightly. I had prepared for it and was looking forward to the conclusion of the Bill before Christmas. In light of the new information that came to my attention, I had no alternative because I was not in a position to know the mind of the Assembly on amendment No 15. The risk of it passing was too great with the damage and harm that it would cause to the Bill and, consequently, to those who are relying on the domestic abuse provisions being passed.

The Chairperson (Mr Givan): For clarity, you are not asking for a commitment that Executive parties would instruct their MLAs to vote for your amendment, amendment No 3, and against amendment Nos 4, 5 and 6.

Mrs Long: I will ask for that at the Executive, but I am not asking for it from the Committee. I am making a particular, specific request to the Committee about amendment No 15.

My general request is in line with provisions, regulations and advice set out in guidance to Ministers on how to deal with Executive legislation. Those make it clear that where issues are brought forward by amendment that would change the nature of the Bill or its provisions or represent policy changes, other than those considered minor, they have to be brought to the Executive for agreement. Where I choose to amend the Bill or resist an amendment that has been tabled by a Committee or a Member, that also has to be brought to the Executive for agreement. That guidance also states that it is the duty of members of the Executive to seek the support of their colleagues in the legislature to ensure that the Executive's will is passed in the Chamber.

The Chairperson (Mr Givan): If the Executive will instruct MLAs what to do, it begs the question of what the point is in having an Assembly or Committee.

Mrs Long: It is a matter for Executive parties to decide. Obviously, not all members of the Committee are from Executive parties. Furthermore, there will always be rebels in any party, as the Member well knows, and people will choose to do what they want. I can only progress on the basis of Executive advice. I am a Minister; therefore I am bound by the code of conduct for Ministers. I am also bound by the advice and guidance presented to me as a Minister to guide how I take these things forward. The issue has been a matter for discussion not only between Ministers at the Executive but also between party leaders. There seems to be a fundamental misunderstanding coming from parties in the Executive, based on their own advice and guidance, about the consequences of being in a five-party Government.

In any other coalition Government, members of those parties would be expected to support the Government in their objectives. This is a Government Bill, not a Department of Justice Bill and, therefore, it would be understood that, in a five-party coalition Government, members of the Government parties would support the Minister. That has not been the case to date, and there will be further discussions in the Executive about this in a slower time, and that has already been agreed by the party leaders.

I will continue to write to the Executive to notify it of any changes that I propose, to notify it of any changes proposed by the Committee, and to note whether I intend to oppose, support or amend any part of the Bill because that is my duty.

The Chairperson (Mr Givan): I appreciate your interpretation of how government should work. Vis-à-vis the Assembly and my responsibility as an MLA, I beg to differ.

Mrs Long: With respect, it is not my interpretation of how government should work; it is a factual representation of how a coalition Government work. Furthermore, it is the guidance that is issued to all Ministers on how we take forward legislation. It is not something that was agreed in my time in the Executive. It precedes my time in the Executive, and I am simply bound by it.

The Chairperson (Mr Givan): I am certainly not rebelling in the position that I am taking [*Inaudible.*] party.

Ms S Bradley: Chair, I want to go back to a point that you raised, and I take it in the spirit in which it was raised. It was disappointing that the Bill did not proceed yesterday. I immediately asked you to call this meeting and an emergency meeting with the Minister. I also took it on myself to explore other options. I accept what the Minister says and that a delayed commencement is not helpful or a good solution. I enquired at the Bill Office about the potential of a conditional delayed response, but we were not able to pin that down. I thought that that might be helpful in the deliberations. Unfortunately, however, it was not a solution that could come to pass. I take it in the spirit, Chair, that you offered it here as well.

The Chairperson (Mr Givan): OK. Thanks, Sinéad.

Mr Frew: I have a quick question on the Executive piece, Minister. What advice did you give the Executive on your amendment No 3 and the cost risks? What did the Executive tell you?

Mrs Long: I advised the Executive and wrote to it about what I was doing. As I said earlier, the Department did not do full due diligence on it because it would be a reduction of the current situation. My initial request to the Executive was to resist the legal aid amendment because it was not fully formed and a proper appraisal had not been done on it. When I was amending it to restrict it further, the key issue for the Executive was that it would reduce the implications of a binding decision of the Assembly. From my perspective, I did not need to do specific due diligence on that particular amendment because it would have reduced the overall impact of the original change, and that would be done in due course. That is the process we are now engaged in.

Mr Frew: Did you also advise the Executive that it is possible for you to amend amendment No 15?

Mrs Long: No, I did not advise the Executive that it was possible for me to amend amendment No 15 because I could not have done that in the time available. As you know, the opportunity for further amendments had closed at that point. It is also not my duty to inform the Executive of amendments that I may bring to the Bill Office. It is my duty to inform the Executive of amendments that I am tabling

to the Bill and of my position on amendments that have been tabled by others. That is what I did in the correspondence with the Executive as per my duty to report to the Executive Committee.

Mr Frew: How would you respond to a Minister who wrote to you asking or advising you to amend amendment 15 or any other amendment?

Mrs Long: I would consider their advice and respond.

Mr Frew: Thank you, Minister.

The Chairperson (Mr Givan): We have another witness, from Women's Aid, so I will suspend the meeting for five minutes.