Women’s Aid Federation Northern Ireland welcomes the opportunity to provide comment to the Secondary Legislation Scrutiny Committee on the Social Security (Restrictions on amounts for children and qualifying young persons) (Amendment) Regulations (Northern Ireland) 2017 and issues associated with the operation of the 2-child tax credit cap and rape clause in Northern Ireland and the UK. This submission is in addition to, and should be read in conjunction with, our previous submission to the Committee.

**Duty to report serious crime to Police Service of Northern Ireland (PSNI)**

Under Section 5(1) of the Criminal Law Act (Northern Ireland) 1967, as amended by the Police and Criminal Evidence (Amendment) (Northern Ireland) Order 2007, a duty is placed on every person who knows or believes: (a) that the offence or some other relevant offence has been committed and, (b) that he has information that is likely to secure or to be of material assistance in securing, the apprehension, prosecution or conviction of any person for that offence; to give that information within a reasonable time to a constable and if, without reasonable excuse, he fails to do so he shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment according to the gravity of the offence about which he does not give that information.

As rape is a serious crime, it invariably falls under the scope of this law. Therefore any staff assessing the non-consensual conception exception would be legally obligated to report disclosures to police. This inevitably has serious consequences for victims of rape, who may not have wanted to disclose the rape in the first place, and do not want to engage with the criminal justice system.

On examination of the regulation and accompanying explanatory memorandum, it is our view that these do not resolve the section 5 issue. Paragraph 7.20 of the explanatory memorandum merely clarifies what we already know, that “If the third party knows or believes that a relevant offence (such as rape) has been committed, the third party will normally have a duty to inform police of any information that is likely to secure, or be of material assistance in securing, the apprehension, prosecution or conviction of someone for that offence.” Thus, the
The proceeding statement, that “an approved professional will not have to determine whether the incident actually occurred” and that “nobody will be required to reach a view about whether a criminal offence has actually been committed” does not mitigate the duty of assessors to report their belief that an offence may have been committed. Any assessor would remain duty-bound to report a disclosure of rape to police, if the disclosure was such that a perpetrator was identifiable as a consequence of that disclosure (ie if the rapist was known to the victim, which accounts for most cases of rape). It would be especially problematic not to report to police if a rape had been committed by a partner, ex-partner or family member, as the relationship of perpetrator to victim may automatically pinpoint who the perpetrator is.

Organisations who commit to be third party assessors have a duty of care to staff carrying out the assessments. This includes an obligation to protect staff from being open to criminal charges in the course of dispensing their role. No organisation could afford to ‘turn a blind eye’ to disclosures, lest they abdicate their responsibility to staff or potentially place them in the position of committing a crime.

If a positive decision has been reached by an assessor, using the balance of probabilities, this indicates an assessment that it is more likely than not that the accusation is founded, and would necessarily trigger section 5 obligations. The standard of beyond reasonable doubt only applies in a criminal court setting, and not to the duty to report under section 5. The standard there is that if someone “knows or believes” that an offence has been committed. This standard would be met through an affirmative assessment under the non-consensual conception rule.

We note that the explanatory memorandum states that the applicant “will not be required to disclose the identity of that other party” for the purposes of self-reporting that the rapist is no longer living with them. While that may be the case for the purposes of filling out this section of the form, we find it difficult to reconcile this with the overall requirement to report rape and provide sufficient evidence that satisfies the assessor that the applicant’s story is consistent with rape. If the perpetrator is a partner, the most basic disclosure would require information about who raped them, if not by name then at least by identification of the relationship between perpetrator and victim. This would be sufficient information to report to police if it was a husband / partner / father etc.

Therefore, we do not believe that the issue of section 5 has been successfully resolved in relation to rape clause assessments. While we acknowledge that the Department for Communities has made efforts to minimise the suffering of victims as a consequence of this law, the fact remains that it is not possible to circumvent the clear legal imperative in section 5, and the obligation to report remains.

We would also wish to address some further issues that have arisen in relation to the section 5 obligation.
Firstly, the Department for Communities in Northern Ireland has stated its intention that no assessments relating to rape or coercive control should be conducted by officials and that “eligibility for this exception will normally be determined by using a third party evidence model”. While we appreciate the sentiment underpinning this, that only those with expertise at dealing with such as sensitive issue should carry out the assessments, there remain problems with this course of action. This places the burden of navigating the tricky territory relating to section 5 obligations, and potential criminal sanction, entirely on the shoulders of designated voluntary sector organisations and healthcare professionals.

Secondly, there is a danger that, due to the problems arising out of section 5 and the general trauma relating to disclosing rape that has resulted in pregnancy, there may be an inclination to instead rely on the coercive control exception instead. This would have several implications. It may put pressure on applicants and assessors to engage in dishonesty while filling in the forms, by categorising rape as coercive control instead. This has ramifications given that dishonesty in the context of welfare claims may equate to fraud, and allegations of fraud against the public purse are a serious matter. There are also issues around how section 5 and the rape exception as a whole might discourage reporting under the rape exception. This would skew any monitoring or statistics relating to the exceptions, impacting negatively on statistics on how many women have been raped and become pregnant as a consequence. It would also constitute an extra layer of silencing or hiding rapes, particularly in cases where women do want to be able to say that they were raped but don’t want to report to police. Given the cultural taboos surrounding rape, and the well-evidenced difficulties that women already have in disclosing rape in the UK, this scheme could end up perpetuating a culture of silence instead of ending it.

Finally, we wish to address the argument that section 5 is rarely used or enforced in Northern Ireland. This is a comment that is periodically made in the course of discussions about the obligations of support organisations under section 5. We wish to make it clear that organisations simply cannot force or advise their staff to break the law, no matter how often it is enforced. We have a duty of care to our staff, and a duty as an organisation to act within the confines of the law. And ultimately this has a direct impact on victims of sexual violence and rape. We would also point out that there are other cases in recent history where laws that were ‘never enforced’ were actually enforced and resulted in conviction. One pertinent example is our anti-abortion law, a statute that was anecdotally considered unlikely to ever be used, but in fact was used to convict a young woman for her procurement of abortion pills which are otherwise legal in other parts of the UK, and has been used to pursue criminal charges against a mother who acquired the same pills for her daughter.

Equality Duties in Northern Ireland

We note that the UK and Northern Irish Governments’ statutory equality duty has not been dispensed with regard to either the 2-child cap or the rape exception.
A statutory obligation to promote equality was enshrined in the Belfast Agreement and made domestic law in section 75 of the Northern Ireland Act 1998. Section 75 places a statutory duty on public authorities in carrying out functions relating to Northern Ireland to have due regard to the need to promote equality of opportunity between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation; between men and women generally; between persons with a disability and persons without; and between persons with dependants and persons without.

Both the Department for Communities and the Northern Ireland Office fall under the remit of this law. The 2-child cap and rape clause are yet to be equality screened either by the Secretary of State for NI/NIO or the Department for Communities.

**Concerns about who will assess claims**

The Department for Communities has indicated in the Explanatory Memorandum that they do not plan for assessments to be carried out by Department officials (ie in benefits offices), indicating that the task will be left to “health professionals, social workers and relevant approved specialist charities”.

We wish to draw attention to the Committee that many organisations have refused to carry out this work on moral and ethical grounds. Women’s Aid Federation Northern Ireland has regionally rejected a request from HMRC to become a regional third-party assessor, although two individual Women’s Aid groups have agreed to do so, due to the acute fears expressed by women in their services around the welfare changes. In Northern Ireland, ISVAs are not structured in the same way as they are in England & Wales and are attached to a voluntary organisation. To our knowledge, they have similarly refused to become assessors on moral and ethical grounds. Questions have also been raised by certain health bodies about the assessments, and whether for example GPs are even contractually obliged to do this. This raises the question of whether the law and associated regulations are workable if there is so much opposition to them from expert and professional quarters.

**Transitional Protection**

Women’s Aid NI is concerned that the operation of the 2-child cap, and provisions outlined within the regulations, may discourage abused women from leaving their abuser.

Under the regulations, Universal Credit recipients who have made a claim as part of the Department’s managed migration of legacy claimants will be offered transitional protection to ensure those claimants will not receive less benefit as a result of their ‘managed’ move to UC where their circumstance have remained the same. Therefore if their situation remains
the same, then they will still receive support for children that they were supported for at the point of transition.

However, from 1 November 2018, regardless of the child’s date of birth, new claimants will not receive the child amount for three or more children unless an exception applies to the third or subsequent child. Households who have been in receipt of support for children or Qualifying Young People in UC, CTC, IS or JSA in the last six months will be protected so that their existing level of entitlement is maintained, as long as they remain entitled and responsible for the same children and QYPs.

Our concern arises out of the operation of transitional protection and Universal Credit in this way, whereby it will end altogether if a claimant’s circumstances change significantly. The following occurrences are defined as a significant change in circumstance –

- a partner leaving/joining the household;

- A sustained (3 month) earnings drop beneath the level of work that is expected of them according to their claimant commitment;

- The UC claim ending; and/or

- one (or both) members of the household stopping work.

Thus, if a partner joins or leaves the household, this is regarded as a significant change in circumstance and result in the 2 child limit being implemented, even for those with children born before the 6th April 2017 cut-off point.

Women’s Aid is concerned that this could discourage women from leaving abusive relationships, as they risk further reduction in child tax credits as a consequence. Leaving an abusive relationship usually involves a step into poverty as it is. And for many women, years of financial and economic abuse may have left them with no disposable income or financial means to support themselves and their children. The prospect of actually losing benefit entitlements instead of gaining them upon leaving an abuser may make the idea of fleeing abuse financially and practically untenable.

For further information, please contact:

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