JUN 11 2019

The Honourable Serge Joyal, PC, OC, OQ
Chair of the Standing Senate Committee on Legal and Constitutional Affairs
Senate of Canada
Ottawa, Ontario
Canada
K1A 0A4

Dear Senator Joyal:

On June 5, 2019, I was honoured to appear alongside my officials before the Standing Senate Committee on Legal and Constitutional Affairs in the context of the Committee’s study of Bill C-78, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act (Bill C-78). As you know, Bill C-78 is the first substantial update of Canada’s family laws in over 20 years. The reforms contained in the Bill will put children first, address family violence, reduce child poverty and make Canada’s family justice system more accessible and efficient.

Before you begin your clause-by-clause consideration of the Bill, I would like to reiterate several key points and respond to the undertakings that officials and I were asked to provide.

Family Violence

Though not all cases of divorce and separation involve violence, those that do must be treated extremely seriously. This is why Bill C-78 includes a definition of “family violence” in the Divorce Act and will require courts to consider family violence in determining the best interests of the child, along with other orders, proceedings or measures relating to civil protection, child protection or criminal matters.
A number of issues were raised in relation to the definition of family violence, in particular with respect to the French version of the definition. The definition of family violence is intentionally broad. Any conduct that (1) is violent; or (2) is threatening; or (3) constitutes a pattern of coercive and controlling behaviour; or (4) causes a family member to fear for their own safety or for the safety of another person constitutes family violence. In the case of a child, any exposure to family violence is family violence in and of itself; in other words, exposure to family violence is a form of child abuse.

Legislative jurilinguists in the Department of Justice have confirmed that the French and English versions of the definition of family violence convey the same meaning. For more information, please see Annex 1.

It is also important to reiterate that the list set out in the definition is not exhaustive, which is clear from the word “includes”. Moreover, for conduct that is violent, threatening or that causes a family member to fear for their safety there does not need to be a pattern of behavior. The pattern refers only to coercive and controlling behavior, which research demonstrates is predominantly exercised by men against women. By referring to this form of violence, the Bill is highlighting a particularly dangerous and gendered form of family violence.

**Screening for Family Violence**

I would like to briefly revisit the topic of adding a requirement to screen for family violence into Bill C-78 that has been raised during your study of this Bill. At the outset, let me be clear that we completely agree that family law practitioners should be screening for cases of family violence. That is precisely why the Department of Justice, with key partners such as Luke’s Place, is developing a family violence screening tool for legal practitioners, based on extensive research, that will support family law professionals in better serving their clients and supporting the needs of those who have experienced family violence. Such a validated tool does not currently exist and has been rightly identified as a gap by family law practitioners.

It is important to note, however, that a requirement to screen for family violence, without the appropriate training, could be ineffective and possibly even dangerous. Screening for family violence is a very sensitive and specific process that should be only practiced by individuals who have received training. Training falls under the purview of the provincial law societies, which govern the regulation of lawyers and the practice of law. The Department of Justice has highlighted the importance of this issue to Law Societies across the country as well as to the Federation of Law Societies. We will continue to engage with them on the importance of training on and screening for family violence in the family law context.

Our approach in this regard aligns with the recommendations of Luke’s Place.

In her testimony in the other place, Pamela Cross from Luke’s Place stated that international research “showed that a good tool, used properly, which means by a professional who has been trained how to use and interpret it, leads to more accurate disclosures of family violence.”
To that end, in their report on family violence screening tools, Luke’s Place made the following specific recommendations¹:

1. That provincial and territorial law societies implement a requirement for universal family violence screening for Family Law Professionals.

2. That all family law practitioners receive training in how to administer and score Family violence screening tools, including training in the appropriate follow-up where they encounter a positive screen.

Maximum Parenting Time – Marginal Note for 16(6)

Several witnesses raised concerns with respect to the “Maximum parenting time” marginal note for proposed section 16(6). There is a concern that although the provision itself focuses on the best interests of the child, the marginal note could give the impression that it creates a presumption of equal parenting time. I have heard and carefully considered these concerns.

To make it clear that the best interests of the child is the only consideration when making any decision about a child, and to facilitate speedy passage of this important bill, I commit to making an administrative change to this marginal note to remove the word “Maximum” and instead use wording along the lines of “Parenting time consistent with the best interests of child,” which more closely reflects the legislative intent behind this provision.

Highlights of the Gender-based Analysis Plus (GBA+) completed by the Department. The Committee was advised that the analysis is subject to Cabinet Confidences but that highlights would be provided.

As with any legislative initiative, a gender-based analysis was carried out for Bill C-78. Attached as Annex 2 is a summary of key considerations taken into account with respect to Bill C-78. On the whole, I firmly believe that the measures contained in this Bill will help us address the feminization of poverty.

Any available statistics on rates of failure to pay child support, including reasons for failure to pay. The Committee was advised that that data available may be limited, due to most of the information falling within provincial jurisdiction.

The Committee asked how many parents do not pay their family support. As indicated at Committee, national statistics are limited with respect to this issue, as provincial and territorial governments responsible for the enforcement of family support hold most of

¹ “What You Don’t Know Can Hurt You: The importance of family violence screening tools for family law practitioners” - Pamela C. Cross, Sara Crann, Kate Mazzuocco, and Mavis Morton
EN: https://www.justice.gc.ca/eng/rp-pr/jr/can-peut/index.html
FR: https://www.justice.gc.ca/fra/pr-rp/jr/peut-can/index.html
the data. Our best estimate is that there is over a billion dollars in unpaid support across Canada. In 2016-2017, approximately 60 percent of cases enrolled in a provincial/territorial maintenance enforcement program were in arrears (i.e. had amounts owing). This percentage was derived from Statistics Canada’s Survey of Maintenance Enforcement Programs (SMEP), 2016-2017. These data, however, includes only the jurisdictions that report data to the SMEP and do not include some of the larger provinces, including Ontario, British Colombia, Quebec and Manitoba. The Department does not have any data that would provide you with a national picture of reasons for failure to pay (failure to comply with) support obligations.

Any Departmental analysis conducted on the compatibility of the changes to the Divorce Act and Quebec civil law.

Family law is an area of shared jurisdiction. The Divorce Act must operate harmoniously with provincial and territorial family law Acts. The proposed changes to the Divorce Act were drafted to take both civil and common law into account and to be flexible enough for courts in each province and territory to apply the new provisions in a manner consistent with both legal traditions.

Attached as Annex 3 is a summary of key considerations taken into account in our compatibility analysis of Bill C-78 with the civil law regime.

I hope this response will be helpful to the Committee’s study of Bill C-78. Our Government has listened to families and law practitioners, and we are proud of the significant legislative changes we are bringing forward. Together with our expansion of Unified Family Courts, these measures will strengthen and modernize Canada’s family justice system, so that it works for today’s families. I therefore hope you will seize the opportunity before us to ensure that this legislation becomes law before Parliament rises.

As always, we remain ready to support your review and study of this Bill. I look forward to our continued collaboration to ensure we have a justice system that all Canadians can be proud of.

Sincerely,

[Signature]

The Honourable David Lametti, P.C., M.P.
Minister of Justice and Attorney General of Canada
The definition of "family violence"

The definition of family violence in Bill C-78 is intentionally broad. It is defined as any conduct, whether or not it constitutes a criminal offence, that is violent or threatening, that constitutes a pattern of coercive and controlling behaviour, or that causes a family member to fear for their own safety or for the safety of another person. The definition also makes it clear that in the case of a child, any exposure to family violence constitutes family violence in and of itself; that is, exposure to family violence is a form of child abuse.

The definition of family violence also sets out a list of types of conduct that may constitute family violence. The list is not exhaustive, and any conduct that meets the broad definition would come within the definition of family violence, regardless of whether the conduct is included in the list.

There were questions raised by members of the Committee as to whether the English and French versions of the definition have the same meaning. Legislative jurilinguists in the Department of Justice have confirmed that the French and English versions of the definition of family violence convey the same meaning.

The legislative intent of the definition is that the reference to "pattern" in English or "aspect cumulatif" in French applies only to conduct that is coercive and controlling. It is not intended to apply to conduct that is violent or threatening or that causes fear for safety. This intent is important, as it is clear that a single act can constitute family violence if the conduct is violent or threatening or causes fear.

Both the English and French versions of the definition achieve this legislative intent. With respect to the French version, the repeated use of the word "qui" before the different types of conduct, along with the use of the word "ou" between them, makes it clear the "aspect cumulatif" applies only to coercive and controlling family conduct.

The definition uses the term "pattern" in English and "aspect cumulatif" in French in relation to coercive and controlling violence. The legislative intent behind the use of both terms is to describe conduct that is repeated or is part of a series of acts or events, versus an isolated act. The English and French versions achieve this same policy objective.

The requirement for a pattern of conduct or "aspect cumulatif" in relation to coercive and controlling behaviour is important to include in the definition. The broad definition is intended to capture acts that on their own may not constitute violence, but do amount to family violence when they form a pattern of behaviour.

Coercive and controlling family violence is most often identified as a pattern of cumulative attempts to dominate or otherwise control another person. For example, one partner may choose the friends or clothing of the other partner, limit the partner’s ability
to work, or maintain control over finances. The control is not only physical, but can include psychological, emotional and financial abuse as well.

In addition, perpetrators of coercive and controlling violence may use the children to attempt to control their ex-spouse. For example, an abusive spouse may refuse to comply with parenting orders, or threaten their partner with the loss of parenting time with a child, in order to maintain control of them. When children are used in this way, it is particularly relevant in determining their best interests.

These examples are intended to demonstrate that while individual acts viewed in isolation may not constitute family violence, they can amount to family violence when the behaviour forms part of a pattern of conduct aimed at controlling a family member. The impact of this type of family violence is compounded, as in most cases the family violence occurs over an extended period of time rather than in a single incident. In addition, perpetrators of coercive and controlling family violence are more likely to attempt to exert family violence or control over family members in the future.
Gender-based Analysis +

Bill C-78, An Act to amend the Divorce Act, the Family Orders and Agreements Enforcement Assistance Act and the Garnishment, Attachment and Pension Diversion Act and to make consequential amendments to another Act

For any legislative initiative, a gender-based analysis + (GBA+) is carried out to assess the potential impacts of law reform on diverse groups (e.g. women, men, people with other gender identities as well as other factors such as use of official language, culture and income). Department of Justice officials completed a GBA+ in relation to Bill C-78.²

This document provides examples of key considerations taken into account in the development of Bill C-78. This information was considered in the original GBA+ undertaken in the preparation for the tabling of Bill C-78, as well as for amendments made in the House of Commons. It also includes other relevant information and some updates where available.

Highlights

Gender: Women and men typically experience separation and divorce in different ways. Court data from 2010 to 2012 indicate that although parents in 74.8% of cases were ordered to make decisions about their children jointly, mothers are more likely to have sole decision-making authority than fathers. In 19.5% of cases, courts ordered sole decision-making authority to mothers, and in 2.9% of cases to fathers. Similarly, although children in 21.3% of cases lived with each parent at least 40% of the time, and in 5% of cases, at least one child lived with each parent, if court ordered that a child would live primarily with one parent, that parent was more likely to be the mother. In 62.2% of cases, courts ordered that children reside primarily with their mother, and in 9.4% of cases, they ordered that children live primarily with their father (Survey of Family Courts, internal analysis, Justice Canada, April 2013).

Separation and divorce also have different economic impacts on women and men. American data indicate that, in the year of separation or divorce, women’s median income dropped by about 30%, whereas men’s median income dropped by 6%. Statistics Canada reports that in 2013, family income for male-led single-parent families was $51,800, while it was $39,400 for female-led single-parent families. Further, Canadian

² As a matter of policy, Justice officials of all levels are responsible for applying GBA+ in their work, and the analysis is a requirement for all Justice-led and co-led memoranda to cabinet (see Department of Justice Policy on Gender-Based Analysis Plus introduced in May 2017: https://www.justice.gc.ca/eng/abt-apd/pbgappacsp.html#a). The Policy on GBA+ seeks to ensure that GBA+ is integrated into decision-making processes. The Policy also requires all Justice officials in all parts of the Department to follow GBA+ training, to apply GBA+ and to ensure that their work considers and reflects the diverse needs of different groups of people. The Policy recommends that GBA+ be conducted throughout key stages of initiatives and that the GBA+ and its impacts on initiatives be clearly documented.
and Australian data indicate that women have more difficulty returning to their pre-
separation income than men.

**Family Status:** Family status, or more specifically status as a single parent, is a relevant 
factor in considering policy and legislative changes to the family justice system. Statistics 
Canada reports that, in 2012, the average net worth of lone-parent families was $47,300, 
which is less than a sixth of the average net worth of couples with children under 18, at 
$303,000. In 2016, lone-parent families with one or two children had a reported median 
income of $47,680: Census 2016, Statistics Canada. Many of the parents involved in the 
family justice system are single parents and have limited funds to pay for legal assistance.

**Income:** Although low income inhibits social inclusion in many areas, income plays a 
particularly important and somewhat distinct role in the family justice system. The cost of 
legal representation is very high, even prohibitively high, for many Canadians. Although 
in many spheres, the lowest-income Canadians face the greatest barriers, this is not 
extactly the case in access to family justice. Very low-income Canadians will often have 
better access to family justice services than low- to medium-income Canadians because 
of eligibility for legal aid. Depending on an individual’s jurisdiction and the specifics of 
their family law dispute, they may be able to access a range of legal services from 
mediation, to advice from duty counsel, to full representation by a family law lawyer. 
The financial eligibility cutoff to access these services is extremely low, however. 
Families earning an income above the cutoff in their jurisdiction, including most low- to 
middle-income Canadians, cannot access such assistance.

**Family Support:** Statistics Canada data indicate that 96% of support recipients 
registered in provincial or territorial maintenance enforcement programs are women and 
4% are male (Survey of Maintenance Enforcement Programs). Bill C-78 will increase the 
efficiency of the support enforcement system thus helping to address the feminization of 
poverty and helping to ensure that children receive the child support to which they are 
entitled. At the same time, Bill C-78 improves the *Divorce Act* framework for the 
recalculation of child support by allowing requests for recalculation to occur upon 
request, rather than simply at regular intervals. Where available, this will allow payors – 
who are predominantly men – who have a reduction in income to request a modification 
of the child support amount to reflect their actual ability to pay and avoid the 
accumulation of arrears.

**Family Violence:** All members of a family may be victims of family violence, and the 
proposed definition of family violence in Bill C-78 reflects this. Children can be 
particularly vulnerable members of the family. The definition of family violence 
recognizes that children can be direct victims of family violence. It also explicitly 
recognizes that, when children are exposed to intimate partner violence, this is family 
violence in and of itself.

In the context of family violence, Statistics Canada data indicate that in comparison to 
men, women are more likely to suffer more serious types of violence and more serious 
injuries. Women are substantially more likely to report fearing for their lives as a result of 
post-separation violence and are more likely to be killed by a former partner.
Similarly, research indicates that women are more likely to be the victims one of the most serious forms of family violence – coercive and controlling violence. The definition of family violence in Bill C-78 explicitly identifies this form of violence and directs courts to look at patterns of behavior and not simply individual incidents.

**Relocation:** Most applications to relocate a child are brought by mothers, and most respondents to relocation applications are fathers. Ultimately, however, all decisions must be made on the basis of the best interests of the child. Bill C-78 includes a relocation framework that reflects many contextual factors at play. For example, one factor the court must consider is the reason for the proposed relocation of the child. This could include reasons such as a move for a parent’s employment, potentially improving their financial circumstances. Another factor the court must consider is the reasonableness of the proposal to vary the exercise of parenting time in light of the relocation – thus taking into account the importance of maintaining a relationship with both parents.

**Indigenous Heritage:** A child’s heritage can be closely tied to their identity. The best interests criteria in Bill C-78 – which are key factors related to the child’s well-being – explicitly require courts to consider a child’s linguistic, cultural and spiritual heritage and upbringing, including Indigenous heritage, when making decisions about parenting arrangements for the child. This is intended to direct courts to consider what parenting arrangements might be necessary to ensure that the child’s Indigenous heritage could be fostered.

**Official Languages (Amendment Made in the House of Commons):** An amendment to Bill C-78 relating to official languages and the right for individuals to be able to use either official language during divorce proceedings was proposed in the Standing Committee on Justice and Human Rights and adopted by the House of Commons.

GBA+ was considered in preparing the amendment. The family justice system operates in the context of family relationships, which often involve gendered experiences. These experiences are driven by underlying factors of social and cultural roles and expectations relating to families as a unit as well as to individuals within the family. While women tend to have lower incomes than men do, and as a result may potentially benefit more from the official language amendments, overall, the most likely outcome is that individuals in official language minority communities will benefit, no matter their gender.

**Anticipated Impacts**

The amendments in Bill C-78 are expected to have a positive impact on Canadians going through separation and divorce and on the family justice system.

Bill C-78 and its objectives (i.e., promoting children’s best interests; addressing family violence; helping to reduce poverty; making Canada’s family justice system more accessible and efficient) aim to address the impact of separation and divorce on Canada’s diverse population outlined above. Efforts to address these issues also include committing ongoing funding
for family justice activities through Budget 2017, signing two international family law Conventions in 2017, and Budget 2018’s commitment to expand unified family courts.

For more information

Compatibility of the changes to the Divorce Act and Quebec civil law

Bijuralism Review of Bill C-78
The Bijuralism Group revises government draft bills, regulations and orders, and drafting instructions with respect to bijuralism so that both linguistic versions respect the rules, principles, concepts or institutions of the civil law and common law, when it is necessary to refer to such rules, principles, concepts or institutions for the application of the draft legislative text.

Bijural revision is a necessary step in ensuring the implementation of the Cabinet Directive on Law-Making and the Policy on Legislative Bijuralism, and in establishing the quality legislative texts.

The Cabinet Directive on Law-Making requires legislative bijuralism as an obligatory drafting norm for all federal legislative texts in both language versions. The Policy on Legislative Bijuralism is a Justice Policy. It formally recognizes that it is imperative that federal legislation speak to Canadian citizens in a language that acknowledges, in both English and French, the common law and civil law legal traditions and, in that respect, allow its citizens to read federal statutes and regulations in the official language of their choice and be able to find in them terminology and wording that are respectful of the concepts, notions and institutions proper to the legal system of their province or territory.

A draft version of Bill C-78 dated February 21, 2018 was revised by the Bijuralism Group. The issue that was then addressed was the reference to the common law concept of set-off and the civil law concept of compensation and how the reference to these concepts should be drafted. The present version of Bill C-78 implemented the bijural drafting proposal. The draft did not raise any other bijural drafting issue.

Provincial and Territorial Support for Bill C-78
In November 2018, all provincial and territorial Ministers of Justice and Public Safety, including the Minister for the province of Quebec, indicated their support for Bill C-78.

Interaction of Parental Authority and Parenting Orders
The Québec Civil Code provides that parents jointly exercise “parental authority,” unless a court orders otherwise. The principal attributes of “parental authority” are generally described as custody (physical custody), supervision, maintenance and education of their children. These attributes are to be enjoyed and exercised jointly by both parents, but physical custody, supervision or education of the child can be delegated. Where there are problems in exercising parental authority, either parent may ask the court to make a decision in the best interests of the child. Even where physical custody is awarded to one parent or a third party, the parents retain the right to supervise the maintenance and education of the child, and are to contribute to their support.
The Québec Court of Appeal has confirmed the compatibility of the existing custody and access provisions of the Divorce Act and the Civil Code provisions dealing with parental authority. Bill C-78 would not change this.

The Divorce Act currently permits “either or both spouses or… any other person” to apply for an order for “the custody of or the access to, or the custody of and access to any or all children of the marriage.” This means that a non-spouse—even if they are not standing in the place of a parent—may currently apply for custody of a child, although non-spouses must seek leave of the court.

Under the new proposed terminology, “parenting orders” are intended for individuals who have or seek a parental relationship with a child. As non-spouses are not automatically parties to a proceeding, they have to seek leave to apply for a parenting order. A court would only grant leave if it were in the best interests of the child to do so. There are situations when it may be important to allow a non-spouse not currently in the place of a parent to apply for a parenting order. One example could be if a grandparent were to apply for a parenting order because their child, who is one of the spouses, became incapacitated.

Bill C-78 also clarifies that day-to-day decisions follow the child, which is compatible with Québec’s case law. The Québec Court of Appeal has confirmed this principle, explaining that with all decisions except for day-to-day decisions, parental authority continues to be joint between the parents regardless of which parent has physical custody.

It is also important to note that both section 16(1), the custody orders provision in the current Act, and proposed section 16.3, which establishes parenting orders, are permissive in nature and not mandatory. In other words, the court may address various issues related to parenting in an order, but is not required to do so. In Québec, most Divorce Act orders are silent on decision-making responsibility, as both parents generally have parental authority under provincial law. It is not anticipated that the proposed amendments would change this practice.

New term “legal adviser”
The term “legal adviser” would replace “barrister, solicitor, lawyer or advocate” currently used in section 9 of the Divorce Act. The term is clearer than the terminology currently used under the Act. It recognizes the differing terminology and legislative requirements that apply to a legal representative in each jurisdiction in Canada and would include lawyers and notaries in Québec.

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3 *DW c AG, 2003 CanLII 47442 (QC CA).*
4 Ibid.