



Law Society
of Scotland

Written evidence

Call for evidence: Domestic Abuse (Scotland) Bill

May 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Criminal Law Committee (the Committee) previously responded to the Scottish Government's *Consultation on a criminal offence of domestic abuse* in March 2016¹ and the further *Consultation on the creation of a specific offence of domestic abuse – proposed associated reforms to criminal procedure* in December 2016.² The Committee welcomes the opportunity to consider and respond to the Scottish Parliament's Justice Committee's *Call for evidence on the Domestic Abuse (Scotland) Bill*.³ The Committee has the following comments to put forward for consideration.

General Comments

We are supportive of the objective of the Bill and in particular welcome the recognition of the damaging effects of psychological and emotional, as well as physical, abuse on victims.

We support the aims of the Equally Safe Strategy in protecting women and children from abuse. However, it is important to note that this bill covers a wide range of abusive behaviour. In the context of this bill we feel it is important to note that men may also be victims of domestic abuse. Regardless of gender or sexual orientation a person may be the victim of domestic abuse, whether psychological or physical and the law should seek to offer equal protection to all potential victims. We therefore welcome the gender neutral nature of the bill.

¹ <https://www.lawscot.org.uk/media/745236/consultation-response-criminal-offence-of-domestic-abuse-march-2016.pdf>

² <https://www.lawscot.org.uk/media/978132/CRIM-Consultation-Response-the-Creation-of-a-Specific-Offence-of-Domestic-Abuse-Proposed-Associated-Reforms-to-Criminal-Procedure-SUBMITTED.pdf>

³ <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/104171.aspx>

We note the terms of Section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. We note in particular that Section 1 of the Bill provides for the aggravation of the offence where abuse by the perpetrator is of a partner or ex-partner.

In response to the Scottish Government's Consultation Paper entitled "Equally safe: reforming the law to address domestic abuse and sexual offences", we stated that we had expressed concern regarding the creation of a distinct offence of domestic abuse where that abusive behaviour can already be prosecuted under existing legislation.

In particular, we note that the domestic violence disclosure scheme (also known as 'Clare's Law') was rolled out in Scotland in October 2015 and this scheme enables people to make inquiries about their partner, or the partner of someone they know, if there is a concern, that that person may be being abusive towards their partner.

We also note that an offence of controlling or coercive behaviour in an intimate or family relationship has been created in terms of Section 76 of the Serious Crime Act 2015 and is now in force in England and Wales where the parties are 'personally connected' to partners or ex-partners.

We also believe that, as part of any measure to improve the criminal justice system in responding to abusive behaviour including domestic abuse, then adequate support is not only available to victims, but is also made available to those who have either physically or emotionally abused their partners in order that they are able to recognise the impact of this abusive behaviour, learn how to change their behaviour and to better protect against reoccurrence.

It is also important to ensure that the law is clear. At present, we consider that the bill does not offer that clarity.

We believe that there are some practical issues with regard to the proposed offence of abusive behaviour in relation to partners or ex-partners. In particular, it is anticipated that there may be difficulties in the Crown obtaining sufficient evidence for a prosecution,

In all the circumstances, while we continue to welcome any measure which helps improve how the criminal justice system responds to abusive behaviour, including domestic abuse, we are concerned at the fragmented approach and lack of clarity surrounding the law in this case.

In response to the questions posed in the Justice Committee's call for written evidence we would like to respond as follows.

Response to questions

Q1. Do you agree with the proposal in the Bill to create a new offence of abusive behaviour towards a person's partner or ex-partner covering both physical violence and non-physical abuse?

As we have previously stated, we are not convinced that the case has been made for the creation of a distinct offence of domestic abuse which may already be prosecuted under existing legislation. We referred in particular to the statutory offence of threatening or abusive behaviour in terms of Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 and also the offence of stalking in terms of Section 39 of that Act.

Section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, rather than creating a distinct offence of abusive behaviour, provides for a new specific 'domestic abuse' statutory aggravation where the abuse is of either a partner or an ex-partner. We note from paragraph 26 of the Justice Committee's Stage 1 Report on 17 November 2015 that Crown Office prefer the approach which has now been taken in the Abusive Behaviour Scotland Act 2016 (ie statutory aggravation) as opposed to the introduction of a domestic abuse offence, which they consider as potentially problematic. Also, abusive behaviour can already be prosecuted under existing legislation. It therefore is not clear how the bill would improve the current system. We are therefore concerned that the proposed bill may create fragmentation.

We would welcome changes to the existing law to reflect better the current understanding of what constitutes domestic abuse, which might offer victims or potential victims of psychological abuse greater protection. However, any such law must be practically enforceable and more work needs to be done to tackle the practical issues that such legislation would encounter, in particular in relation to acquiring sufficient evidence to bring a prosecution.

Q2. Do you consider that the proposed offence is needed to address a gap in the existing law which currently makes it difficult to prosecute some forms of domestic abuse?

We reiterate our support for any measures which help to improve how the criminal justice system responds to allegations of domestic abuse.

We recognise the difficulty in prosecuting certain forms of domestic abuse and that this requires to be addressed. The exact scope of an offence must be clearly ascertainable: we are concerned that the current proposal does not satisfactorily meet the requirement of legal certainty.

Q3. Do you have any views on the definition of the offence, such as the requirement for a course of behaviour, the definition of abusive behaviour, or the defence that the behaviour was reasonable in all the circumstances?

We maintain our position that a single incident of non-physical coercion should not be sufficient to justify prosecution and therefore support the requirement for a course of behaviour in that context.

We consider that the definition of abusive behaviour requires further clarification. We offer the following comments on the drafting of the bill in terms of defining the offence and the practical effect of the current drafting.

As we have commented previously we also agree that the appropriate test should be an objective “reasonable person” test. However, there may be a question as to whether a reasonable person would always be able to assess psychological harm without expert input and we are not sure how this would necessarily be evidenced without evidence being given by the alleged victim and by a medical practitioner. At section 1(3) of the bill there is a reference to psychological harm including “fear, alarm and distress”. On the one hand it is unclear what would constitute psychological harm which would fall outwith this definition and on the other, it is difficult to know how these might be proved, particularly where the victim had showed no outward signals.

There may also be some issues around the definition of recklessness in the bill. By its very nature, we believe that the behaviour to be struck at should be intentional. Given our comments on the need for certainty in the law, we are concerned that the condition at section 1(2)(b)(ii) of the bill could create a difficulty in either defining or advising upon the point at which behaviour stops being part of the occasional disharmony that arises in every relationship and becomes behaviour that should attract the attention of the state by way of prosecution.

At section 4(2) (b) it is not clear whether the accused needs to be aware of the presence of a child. The wording “makes use of a child” is also rather vague as is the more general idea of “making use of a third party” under section 9. In this context it is also important to note that there is legislation in place which are specifically designed to protect children.

On the face of it, the Bill provides that the offence is aggravated even where, on a single occasion, a seventeen year old child of the couple (who could themselves be a parent and in full time employment), of whose presence the accused is not aware, hears or sees behaviour that causes distress. Given the definitions in Section 9 (2), this behaviour may be constituted by non-communication. While the issue may ultimately be one for the courts, we are not wholly convinced that such behaviour would necessarily justify prosecution for the aggravated offence.

Similarly, it would, in fact be possible for domestic abuse to arise within a relationship where one or both parties are themselves under the age of 18. It is not clear what impact the aggravation would have in that context. Similarly if a couple were aged 17 and 18, it is also quite likely that their friends would be a similar age. If a couple of friends who were both aged 17 were to witness an incidence of abuse, again we are not wholly convinced that such behaviour would necessarily justify prosecution for the aggravated offence.

We also note that the Policy Memorandum at Paragraph 4 refers to “a course of conduct which takes place over a sustained period of time” but section 9(4) of the bill requires only two incidents, without any specification of what gap in time might be reasonable, to constitute the offence. In theory, a prosecution could take place based upon two incidents many years apart. As any violent, threatening or intimidating behaviour would be caught by a single incident under the existing law, a threshold of two incidents might be seen as quite a low bar to establish what most people would consider to be a “course of behaviour”, particularly where neither incident involved violence or a threat of violence. The practical effect of this would be dependent upon the prosecution policy followed.

Defence

We agree with the defence provided in the Bill that the behaviour was reasonable in all the circumstances. However, we have already identified some issues with section 5 as currently drafted. It is not clear at section 5(2)(a) and (b) whether the subsection (1) referred to is subsection one of that section 5 or section 1(1).

Furthermore, it seems to envisage the possibility of establishing that all the behaviour caught in the definition is reasonable but we would question whether behaviour defined as including violent, threatening or intimidating behaviour can ever be reasonable.

Q4. The offence is restricted to abuse between partners and ex-partners. Do you agree with this approach? For example, during the Scottish Government’s consultation on a draft offence, concerns were raised that it did not properly reflect the impact of domestic abuse on children. The Scottish Government has sought to address this concern in the Bill, primarily by providing that the offence will be aggravated where it involves a child. Do you have any views on this aspect of the Bill?

As previously noted, it is not wholly clear why relationships with partners or ex-partners are the only relationships which should be covered by the specific provisions of the bill. Domestic abuse is not solely confined to intimate partners. Adult siblings or other relatives, parents and adult children (particularly adults with learning difficulties or mental health problems) and even persons in houses in multiple occupation (HMOs) may all experience similar abuse, including psychological harm.

As previously noted, the offence under Section 76 of the Serious Crime Act 2015⁴ applicable in England and Wales extends to those who live together and are members of the same family. This appears to offer greater consistency in terms of approaching abusive behaviour and could offer benefits to a wider group.

⁴ <http://www.legislation.gov.uk/ukpga/2015/9/section/76/enacted>

We note that this statute also benefits from a simple and clear definition of “coercive and controlling behaviour”.

Section 10 Meaning of partner and ex-partner

We do not think that the meaning of partner or ex-partner in terms of section 10 is sufficiently clear. It is not clear what would constitute an “intimate personal relationship” and this term could be open to a wide spectrum of interpretations. The definition of relationships in Section 76 of the Serious Crime Act 2015 is a clearer one and the more detailed examples of the types of relationships to which the provisions apply mean that the circumstances in which an “intimate personal relationship” might need to be proved are reduced.

Furthermore, proving or disproving such a relationship where a challenge is made under Section 6 would require parties to expose potentially quite intimate details of their relationship in order to assess whether the complaint or indictment was relevant before the court could even allow the case to proceed to the hearing of evidence. It is not difficult, given that the behaviour struck at is that of coercive and controlling behaviour, to imagine a situation where the complainer’s perception that the accused was a partner may be at odds with the position of the accused. This matter must be determined as a preliminary one; in summary proceedings presumably by a pre-trial evidential hearing that may well be distressing to the complainer.

Q5. Do you have any views on factors which might impact on the reporting, investigation and prosecution of the offence?

Reporting

We do not have detailed views on the factors which might impact reporting but it seems likely that similar factors would affect reporting of non-physical abuse as relate to physical abuse. Furthermore, psychological abuse is neither as obvious to external parties, nor as easy to evidence as physical abuse. A person who is being manipulated – whether through threat of violence or other forms of intimidation – is vulnerable and may find it difficult to report abusive actions being carried out against them.

Investigation

As noted in our response to the Scottish Government consultation in March 2016 we believe that there may be some practical difficulties in the Crown acquiring sufficient evidence both for prosecution and conviction. An issue also arises as to how many witnesses the police should speak to when seeking to gather evidence. This, again, is particularly relevant in a situation where the alleged victim is not prepared to provide a statement.

Prosecution

Similarly, the problems with investigating the offence may have a knock-on effect in terms of prosecution as it may be difficult to secure the necessary evidence to justify harm, particularly where no physical harm has been caused. This very point was raised by the then Crown Agent when she gave evidence in relation to the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 at bill stage. We also note that it would be difficult to prove coercive and controlling behaviour and the kind of psychological abuse which the Bill seems to be aiming at without leading evidence from the “victim”.

Paragraph 52 of the Policy Memorandum states that respondents to the first consultation did not think that the existing criminal law provides the police and prosecutors with sufficient powers to investigate and prosecute the full range of perpetrators of domestic abuse. We are not aware, however, that there is any evidence to support this view. It is also unclear how this Bill would effect improvements in this regard.

A further question also arises where an incident identified in the course of behaviour could be prosecuted in its own right but would fall to be treated under the solemn, rather than summary, procedure, however prosecution is not possible as it cannot be corroborated. It is not clear what would happen in such a case. A hypothetical case study might be as follows:

There is a course of abusive conduct with behaviour such as A demanding his dinner on the table at a particular time, forbidding B from going out and seeing her friends and B mocking A when they are in company. This conduct can be corroborated. Some of the mocking includes sexual references and even what might be threats of a sexual nature which can also be corroborated. Then at some point during this “course of behaviour” B makes an allegation of rape against A. There is no other corroboration so it cannot be prosecuted as a separate offence.

The question then arises whether it can be included as part of the libel for an offence in the terms of the bill. It could be argued that as the bill is currently drafted it could be included to the extent that an allegation of rape would be an evidential fact that would not require to be corroborated in the context of a course of (sexually) violent, threatening and humiliating behaviour which would have the effect of frightening, humiliating and degrading B. Similar questions would arise in the case of other uncorroborated criminal acts such as attempted murder. It would seem that this one part of the charge, albeit uncorroborated, may take the charge from a summary trial to a High Court case and a lengthy sentence upon conviction. We are not clear that this is the intent of the bill and wonder whether such an outcome accords with the combination of interests to be considered in ensuring fair trial procedure.

Q6. The Bill makes a number of reforms to criminal procedure, evidence and sentencing. For example, it would prohibit the accused in a domestic abuse case from personally conducting the defence. Do you agree with this prohibition?

We note that a new standard bail condition is proposed which prohibits an accused, when charged with domestic abuse offences, from obtaining precognitions or statements from a complainer except through a solicitor. Section 24(5) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) sets out the standard set of bail conditions applicable in all cases where an accused individual is released on bail. Where an accused individual is charged with certain sexual offences, there exists a standard bail condition preventing the accused from obtaining, other than by way of a solicitor any statement or precognition from the complainer in preparation of their defence.⁵

We support the proposal to introduce a similar bail condition in cases of alleged domestic abuse as it provides clarity to the existing standard bail conditions which prevent the accused from interfering with witnesses, or acting in a manner which is likely to cause a witness alarm and distress.

In cases of alleged domestic abuse, we note that prosecutors tend to seek, and that courts often grant further special conditions of bail to prevent the accused from approaching or contacting the complainer.

Protection during Trial: Accused person conducting their own defence

The proposal seeks to prohibit⁶ accused individuals from conducting their own defence case when they are charged with domestic abuse offences. We note that the prohibition already exists in circumstances related to certain sexual offences (section 288C of the 1995 Act), in certain serious offences involving child witnesses under the age of 12 years old (section 288E of the 1995 Act), or in certain cases involving vulnerable witnesses (section 288F of the 1995 Act).

We support the proposal, but note that if it is extended to cases of alleged domestic abuse, it is likely that there could be a significant increase in the number of cases⁷ where the prohibition could apply, and where courts may be required to appoint a defence solicitor. It is not clear, however, how common it is for accused persons in domestic abuse cases to conduct their own defence and to what extent, given the availability of special measures (screens, videolinks, supporters), it is felt that justice may not be done under the current system.

⁵ Section 24(5)(e) of the 1995 Act.

⁶ At page 7 of the Scottish Government Consultation Document - “The Creation of a Specific Offence of Domestic Abuse – Proposed Associated Reforms to Criminal Procedure.”

⁷ For example, [see statistics published on the number of domestic abuse case reported to COPFS in 2015-2016.](#)

In addition, the eligibility criteria for resourcing and legal aid may require to be considered. For example, in the situation where an accused has the financial means to pay for a solicitor to conduct their defence but either has not engaged a solicitor, or having engaged a solicitor has dismissed the solicitor, or the solicitor has withdrawn and where the court is not satisfied that the accused intends to engage a solicitor, then the court may appoint a solicitor to conduct the defence case. At present under the provisions of section 288 of the 1995 Act, where legal aid is granted under a court appointment, no consideration is given to the financial means of the accused and in both solemn and summary cases legal aid accounts are paid by the Scottish Legal Aid Board on a time and line basis. We believe the proposal could have a financial impact for Legal Aid purposes and consideration may be required as to whether those fees would be met under Legal Aid without any inquiry into means. This might create a perverse incentive upon accused persons who are well able to pay for their own defence simply not to instruct legal representation. The result of this could be that an alleged abuser with substantial income and capital could have a solicitor appointed for him by the court, funded from the public purse, by reason only of his refusal to instruct a solicitor. The obstructive accused could then use this public funding to instruct the undertaking of inquiries into the complainer that could increase the potential for distress. While the duties of the appointed solicitor are properly to the court rather than to the “client”, such an appointed solicitor must act properly and professionally in putting forward the accused’s defence.

Protection during Trial: Expert evidence relating to the behaviour of the complainer

The proposal allows for the introduction of expert evidence relating to the behaviour of the complainer in domestic abuse cases. The consultation refers to this evidence as being of use to the “court/jury”, which implies that such expert evidence could be led in a case prosecuted on summary complaint or on indictment.

We submit that this provision should only apply where a case is being tried on indictment. If experts were called in a number of summary prosecutions, there would be resource implications. For example, if the Crown leads an expert relating to the behaviour of the complainer as part of the prosecution case, the solicitor acting on behalf of an accused may be required to consider instruction of an independent expert to prepare a report to lead rebuttal evidence as part of the defence case. This can only lengthen and complicate summary cases which are expressly designed to provide a swift and easy form of justice in less serious cases. The proposal also does not seem to consider the potential attitude of the Scottish Legal Aid Board to the making of numerous requests in summary “fixed fee” cases for the employment of a defence psychologist.

We note that a similar provision already exists in respect of certain sexual offences (section 275C of the 1995 Act). Section 275C allows the introduction of expert evidence to rebut any inference adverse to the complainer’s credibility or reliability as a witness which might otherwise be drawn for their behaviour or statements after the offence was committed. This is an exception to the general rule that the credibility or reliability of the witness is a matter for the jury (solemn) or sheriff (summary). Evaluation of the impact of section 275C of the 1995 Act would be welcome, in particular: the number of cases; types of cases; the types of behaviour the expert witnesses have been called to comment upon; the forum where such expert

evidence were led; whether an independent expert were instructed and rebuttal evidence led in respect of the defence case.

If this proposal for reform were to be adopted consideration of any resource and legal aid implications will be required, particularly if such expert evidence could be led in both summary and solemn prosecutions. There remains a question as to whether this measure is proportionate in summary cases, particularly given that under section 3(1) it is not necessary to prove that the course of behaviour actually caused B to suffer harm.

Q7. The Bill would also require the court in a domestic abuse case to consider making a non-harassment order. What are your views on this approach?

Mandatory consideration by the court of a Non-Harassment Order

The proposal seeks to introduce a mandatory requirement for the court to consider imposition of a non-harassment order (NHO) in all cases where an offender is convicted of a domestic abuse offence. This is not an automatic grant, but a requirement for the Sheriff or Judge to consider imposition of an NHO at sentencing stage and give reasons for their decision.

We support of the proposal which could reduce administrative burden for the prosecution and provide some clarity at sentencing in terms of one available option.

For further information, please contact:

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