

Justice Committee

Abusive Behaviour and Sexual Harm (Scotland) Bill

Written submission from the Crown Office and Procurator Fiscal Service

SECTION 1

INTRODUCTION OF STATUTORY AGGRAVATION OF ABUSE OF PARTNER OR EX-PARTNER

1. COPFS supports the creation of a statutory aggravation of abuse of partners and ex-partners. COPFS has an unapologetically robust approach to the prosecution of domestic abuse and the aggravation will provide an additional tool to prosecutors.
2. The provisions of the Abusive Behaviour and Sexual Harm (Scotland) Bill ('the Bill') will advance the prosecution of offences involving domestic abuse by allowing evidence to be led contextualising the offence before the court and highlighting the impact and consequences of the offence upon the victim. This will mean that, within limits, victims can speak more candidly about the nature and cumulative impact of the accused's behaviour rather than restricting their evidence to an isolated incident of criminality.
3. Courts will have important information before them in relation to the victim's experience of the offence and will have a statutory duty to take into account the fact that an offence involved abuse of a partner or ex-partner when sentencing.
4. The aggravation proposed will assist courts by providing them with a fuller picture of events before them, allowing them to take this into account when considering factors relevant to sentencing such as the risk posed by the accused.
5. Furthermore the creation of the aggravation sends a strong message to victims, perpetrators and the public at large that abusing your partner or ex-partner is rightly considered to be an aggravating factor in offending – far from being hidden from view, it will be investigated and presented to the court.

SECTIONS 2-4

CREATION OF OFFENCE OF DISCLOSING/THREATENING TO DISCLOSE AN INTIMATE PHOTOGRAPH OR FILM

6. COPFS supports the creation of a statutory offence of disclosing, or threatening to disclose an intimate photograph of another without their consent where either the intention is to cause fear, alarm or distress or where the person is reckless as to the consequences.
7. The Crown is aware of an increase in this type of offending behaviour which is hugely upsetting for the person affected and those close to them and can have far reaching and extremely harmful consequences.

8. Whilst this type of behaviour is currently prosecuted either under various other pieces of legislation or under the common law, the creation of a specific offence sends out a strong message to victims, perpetrators and the public that this behaviour will not be tolerated in Scotland which given its very serious nature is desirable.

9. The scope of the offence and the definition of an “intimate situation” appears to be appropriate to COPFS. We note however that the wording of subsection (6) which provides for the circumstances in which a fact or matter is established for the purposes of the defences in subsections (3) and (5) is worded differently from other statutes. For instance, in terms of sections 38 and 39 of the Criminal Justice and Licensing (Scotland) Act 2010 it is a defence for a person charged with an offence “to show” certain things whereas in subsection (6) of the Bill the fact or matter is established “if sufficient evidence is adduced to raise an issue..” Accordingly, it may be helpful to both prosecutors and the defence for there to be clarification as to what is meant and what standard of proof applies for the defences in the Bill.

SECTION 5

EXTENSION OF AVAILABILITY OF NON-HARASSMENT ORDERS IN CRIMINAL CASES

10. COPFS welcomes the extension of the availability of non-harassment orders (NHOs) in criminal cases.

11. The provisions of the Bill, if passed, will enable prosecutors to apply to the court to make an NHO against a person who has not been *convicted* of an offence involving misconduct towards the victim but has, following an examination of facts, been found to have carried out the acts constituting the offence or has been acquitted under section 51A of the 1995 Act because they were not criminally responsible for their actions at the time they committed the offence.

12. Currently, the court has no power to impose an NHO in those circumstances and the focus of the court is on the status and health of the accused and not the safety and protection of the victim.

13. It is open to the victim to apply to the civil court to impose an NHO or interdict, but this requires the victim to initiate a separate legal process notwithstanding that the criminal court has already come to the view that the accused has committed acts constituting an offence of misconduct towards the victim. There are obvious resource implications for courts and the legal aid system by this approach which does not permit the criminal court, fully appraised of the circumstances of the accused and their conduct, to consider an application for an NHO but requires additional proceedings to be commenced.

14. COPFS considers the provisions of the Bill represent significant progress in the protection of victims in these circumstances. Extending the availability of NHOs is a quicker and more efficient response than requiring a victim to apply for a civil order. An NHO in these circumstances may provide a measure of safety and security

to the victim and will ensure that the authorities can respond quickly and effectively to any further misconduct towards the victim by the accused.

SECTION 6

JURY DIRECTIONS IN SEXUAL OFFENCE CASES

15. COPFS welcomes the introduction of statutory jury directions in these two complex areas: firstly where the complainer does not immediately report a sexual incident to the police or delays in such reporting; and secondly where there is an absence of physical resistance or physical force. These are complex areas for a jury to determine and there is concern that there are public misconceptions and myths surrounding these two areas which statutory jury directions could assist with.

SECTIONS 7 & 8

SEXUAL OFFENCES COMMITTED ELSEWHERE IN THE UNITED KINGDOM

16. As noted in the Policy Memorandum attached to the Bill, the Lord Advocate while giving evidence at the Public Petitions Committee in June 2013, indicated that there were concerns regarding the terms of the current legislation governing extra territorial jurisdiction. The proposed provisions will resolve those concerns and allow the appropriate prosecution of offenders across territorial borders.

Crown Office and Procurator Fiscal Service
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