

Justice Committee

Abusive Behaviour and Sexual Harm (Scotland) Bill

Written submission from Abigaël Candelas de la Ossa

This evidence submitted focuses on Sections 1, 2, and 6 of the Abusive Behaviour and Sexual Harm (Scotland) Bill, and draws on my AHRC-funded research on information about sexual consent and sexual violence produced for the public in Scotland and England and Wales.

1 Abuse of a partner/ex-partner as aggravation of offence

1.1 The idea that a context of domestic abuse makes a criminal offence “worse” is intuitive, and allows that context to be taken into account in sentencing. However, I have two concerns about this provision, set out in 1.1.1-1.1.2 below:

1.1.1 ***Intent to cause physical or psychological harm or recklessness as to causing physical or psychological harm.*** As it stands, the definition in Section 1(2) is too broad, and could be misused by an abuser to manipulate and further abuse a victim who tries to resist abuse or defend themselves or a child from abuse (cf Respect 2013). I note that although the Policy Memorandum refers to coercive control, coercive control is not mentioned in Section 1(2), and I recommend that the definition in Section 1 be rephrased in terms of a pattern of coercive control.

1.1.2 ***Restriction of the statutory aggravation to partners or ex-partners.*** Section 1 is specific to partner abuse, though the Policy Memorandum notes that the statutory aggravation could be applied to an offence committed against someone other than a partner or ex-partner such as a child, if done with the intent of causing psychological harm to a partner or ex-partner. Making the statutory aggravator specific to partner abuse would exclude many forms of domestic abuse, where abuse occurs in the context of other forms of familial relationships. Applying a statutory aggravation to partner abuse but not other forms of domestic abuse risks sending a message to victims or perpetrators of other forms of domestic abuse that these forms of abuse are “less serious”, which may itself be harmful. It would be clearer and more effective to broaden Section 1 to include all forms of domestic abuse, rather than limiting the statutory aggravation to partner abuse.

1.2 Statutory aggravation applies to conduct such as criminal assault which is already covered in existing legislation. These forms of conduct may appear in some abusive relationships, but many abusive behaviours are not covered by existing legislation. For this reason, a statutory aggravator cannot substitute for a specific offence of domestic abuse, and this gap should be addressed through the creation of a specific offence of domestic abuse, defined in terms of coercive control (cf Pain and Scottish Women’s Aid 2012).

2 Disclosing, or threatening to disclose, intimate media

2.1 I support the introduction of a specific provision to address non-consensually disclosing, or threatening to disclose, intimate media. Threats to non-consensually distribute intimate media can be as coercive and harmful as the distribution itself (Scottish Women’s Aid 2015) and I support the recognition in the law that threats alone – whether or not they are actually carried out – are a form of abuse. However, I have two concerns about this provision in the Bill, set out in 2.2-2.3 below:

2.2 **The definition of “intimate situation”.** Media need not be sexually explicit to be intimate and private, and restricting the definition of “intimate situation” to material that depicts a sexual act or shows specific body parts is too limited. A definition phrased in terms of sexual explicitness also reflects a set of values that are not universal. I recommend a definition worded in terms of situations where a person has a reasonable expectation of privacy, such as when sleeping or unconscious, or when not wearing religious clothing that the person would habitually wear. It is important that the law protect all members of Scotland’s diverse society equally.

2.3 Types of media covered by the Bill.

2.3.1 The restriction in Section 3(2) of the Bill to include only images and not other forms of intimate media such as audio recordings, text, or combinations of images and text, and does not take into account the reality of how people actually use modern digital technology. Instant messaging applications, social media sites, dating sites, and mobile apps such as Snapchat, etc, allow users to share many types of media such as audio files, or text paired with images or audio files. Restricting the types of media covered by the Bill would allow users would be able to get round the law by, for example, distributing sexually explicit audio files instead of videos, or sharing non-explicit images together with sexually explicit text. This kind of non-consensual disclosure of intimate media may be just as invasive and harmful to victims as the non-consensual sharing of intimate images or videos. For the law to be fit for purpose and provide effective protection, it must be brought up to date with the way modern digital media is actually used, and must cover all types of media including audio files and text.

2.3.2 The Bill’s inclusion of altered or “photoshopped” images is appropriate, and should be extended to include altered or composite media of all types such as edited sound files.

3 Jury directions relating to sexual offences

3.1 I support the provision for jury directions relating to sexual offences in Section 6 of the Bill relating to delayed communication or lack of communication about an offence.

3.2 I support the provision for jury directions relating to absence of physical resistance, and recommend that these be broadened to include *absence of direct verbal resistance* as well, for the reasons set out below:

3.2.1 ***Sexual non-consent is normally communicated without direct verbal confrontation.*** Research by Kitzinger and Frith (1999) and by O’Byrne et al (2008) shows that people commonly communicate sexual non-consent in the same way as they decline other kinds of non-sexual propositions, for example by saying “I’m not ready” or “I’m flattered, but I’m actually not feeling well” (Kitzinger and Frith 1999; O’Byrne et al 2008), and generally not by engaging in direct forms of verbal confrontation such as shouting “No!” Men and women use and understand these politer ways of communicating non-consent. It is also common for victims to submit or “freeze” in situations of sexual violence, out of fear or to try to prevent the escalation of violence. Using politer communication, submitting, or “freezing” does not indicate that a person has consented to a sexual act, nor should they be taken as indicating that a person is not telling the truth.

3.2.2 ***Stereotypical attitudes about sexual consent and sexual violence influence every stage of the legal system.*** Sexual violence perpetrated by intimate partners without a physical struggle is less likely to be reported to authorities, investigated, or prosecuted, than violence that has greater resemblance to stereotypes (Estrich 1987). Unrealistic expectations of physical or verbal resistance such as shouting “No!” or physically struggling continue to influence mock jury deliberations (Ellison and Munro 2010, Rumney and Hanley 2010) as well as actual adjudications (Ehrlich 2001). Additionally, Ellison and Munro (2010) found that some of their mock jury participants seemed to misunderstand the notion of guilt “beyond reasonable doubt” as meaning that *any* uncertainty however slight necessitated acquittal, suggesting that some jury members may not have a clear understanding of legal concepts that are central to their deliberations and this may exacerbate the effect of biases on decision making.

3.3 The provisions of the Bill for jury directions are for factual information that will help jury members in assessing the evidence. In order to be effective in this aim, I would recommend that jury directions include non-technical explanations of important legal concepts, and be provided in writing as well as verbally (or other accessible formats such as Braille or British Sign Language, as appropriate), to help jury members understand and remember the information.

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