Justice Committee

Abusive Behaviour and Sexual Harm (Scotland) Bill

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Summary:

We note with disappointment the omission of a specific offence of domestic abuse from the Bill, and support the aggravation provision. We are somewhat sceptical as to the necessity of the offence of disclosing an intimate image, and identify a number of definitional issues. We welcome the proposed provisions on jury directions and make some recommendations to strengthen these. Finally we flag up some key procedural and rights-based concerns regarding the preventive orders in the Bill.

Section 1: Domestic abuse

a. Specific Offence

1. We are disappointed to see that the specific offence of domestic abuse has been dropped from the Bill, particularly given that, according to the SPICe Briefing, there was strong support for the creation of such an offence. The Briefing points in particular to objections raised by the Faculty of Advocates and Families Need Fathers Scotland (FNFS) as support for the decision to resist introducing a specific offence at this time. It must be noted that neither are considered expert in the field of domestic abuse.

2. The Faculty states that if we are to depart from the current 'snapshot' approach of criminal law, "this will be extremely difficult to codify". However, as pointed out in our original response, some criminal offences *do* go beyond this traditional compartmentalised approach. For example, legislative provisions on 'stalking' criminalise repeated conduct. With respect to domestic abuse, the legislature in England and Wales has managed to formulate such an offence in the form of s 76 of the Serious Crime Act 2015. The provision requires that a. the behaviour is repeated or continuous, b. the parties are personally connected, c. the behaviour has a serious effect on the complainer, and d. the defendant knows, or ought to have known that this effect would occur. The serious effect results where the complainer fears on at least two occasions that they will suffer violence, or the behaviour causes "serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities". [We recognise that as a gender neutral offence, this could apply equally to male and female perpetrators and victims, while acknowledging the overwhelmingly gendered nature of domestic abuse in practice.]

3. We see no reason why a similar provision could not be enacted in Scotland. Since COPFS, which would have to prosecute a specific offence, and Women's Aid, which arguably understands the nature and impact of domestic abuse better than any other organisation in the UK, were both in favour of the offence, as well as many others,

it is not clear to us why the Faculty and FNFS arguments were given such prominence in the SPICe Research Briefing. It is worth remembering that the Sexual Offences Act 2003 in England and Wales formed much of the template followed by the Scottish Government in drafting the Sexual Offences (Scotland) Act 2009. Reforms to the law of provocation in homicide law in England and Wales have also been introduced, which allow for the cumulative impact of domestic violence to be taken into account, but there is as yet has no Scottish counterpart. In other words, it is with regret that we note Scotland often finds itself behind the curve with respect to reforms of the criminal law that properly take into account the impact of gender-based violence. We would also like to remind the Government that when the Justice Committee heard evidence on the Sexual Offences Bill in 2008, they were told by Faculty representatives that, notwithstanding the evidence of academic and other researchers in the field, the existing law on sexual offences was sufficient, explicitly stating that "if it ain't broke don't fix it". We are not convinced that the Faculty, or indeed FNFS, are in the best position to assess whether and how the law on gender-based violence needs reform.

4. It is clearly both practically possible to draft and implement the offence, and politically and morally justifiable to do so, given the wealth of existing research evidence. As some of us pointed out in our response to the "Equally Safe" consultation, a specific offence would explicitly recognise the repeated and cumulative nature of domestic abuse, and the trauma caused by the on-going nature of the offence. It would also acknowledge the relationship between psychological and emotional harm caused by coercive and controlling behaviour, and a range of other intimidating conduct, including violence and threats of violence. The Bill is the right place to house a specific offence of domestic abuse and such an offence should be included. If it is not included, priority should be given to considering specific offence at the earliest opportunity.

b. Aggravation

5. We note the Bill's provisions on a new statutory aggravation of abusive behaviour towards a partner or ex-partner and agree that such an approach is appropriate. We assume that the intention here is that any criminal offence can be aggravated by the fact that there was abuse of a partner or ex-partner involved (for example, an offence of trespass or malicious mischief would be aggravated if there was concurrent intention to cause - or recklessness as to causing - physical/psychological harm to a partner or ex-partner). We recognise that as drafted, it is possible for an offence to be aggravated even where the harm is recklessly as well as intentionally caused and this seems appropriate.

Section 2: Disclosing, or threatening to disclose, an intimate photograph or film

6. We are not convinced that there is a gap in the law in this respect, given the existing range of offences like breach of the peace, threatening or abusive behaviour, and improper use of a public electronic communications network. As noted in our earlier submission, the unclear scope of existing law could be remedied by an articulation of prosecution policy in this area. Nonetheless, we understand the labelling imperatives that underpin the creation of the new offence and find these quite persuasive. The

labelling of an act as a particular crime is of symbolic and practical effect;[1] labelling matters in its communication to the public of the nature and severity of the offence. Critically, precise labelling also may be fairer to the complainer, more fully reflecting his/her experience.

7. We are unsure of the meaning and scope of "any section of the public" in section 2(1)(c). What does the numerical focus entail here? If a person shares an intimate image with a number of previous partners, and re-shares it with a later partner who then discloses it, does the previous consensual sharing preclude her from complaining about the latter behaviour?

8. While we understand the logic behind s 2(5), in its current form it fails to make appropriate distinctions and so could undo much of the effect of s 2(1). The explanatory notes claim that this defence ensures the exclusion from the scope of the offence photographs or films taken of "naked protestors" or "streakers". However, the way the subsection is framed serves to exclude the sharing of intimate images taken in a public place, like a park or beach. This excludes far too broad a range of situations. This should be refocused to take account of B's expectations: e.g. did B believe that members of the public were able to witness the "intimate situation"?

9. We have some concerns about the interpretation provisions in s 3. Firstly, we question the necessity of the definition of an intimate situation requiring that it is not "of a kind ordinarily done in public". Does the former (conjunctive) requirement that "a reasonable person would consider [it] to be a sexual act" not suffice? While one could argue that this latter "ordinarily public" criterion is necessary to exclude romantic kissing, say, from falling within the scope of this offence, such cases could be excluded by a properly-drafted version of s 2(5). Secondly, we regard the other definition in paragraph (b) of an intimate situation, where the person's genitals, buttocks or breasts are exposed or covered only with underwear, as too narrow. Such parts of a person's body could be covered with another body part (such as an arm), an object, or other type of clothing, and still be intimate, and thus warrant inclusion in this offence.

Section 6: Jury directions

10. Section 6 inserts two new sections in to the 1995 Act, which provide that jury directions must be given by the judge in sexual offence trials on indictment in certain circumstances, including: where evidence is given which suggests that the complainer did not tell anyone about the offence or report it to an investigating agency, or delayed in doing so; and where evidence is given which suggests that the sexual activity took place without physical resistance on the part of the complainer (or where a question is asked or a statement is made with a view to eliciting or drawing attention to either of these sets of circumstances). The judge must advise the jury that there can be good reasons why a person against whom a sexual offence is committed may not tell others about it or report it to an investigating agency, or may delay in doing so; or might not

[1] See J. Chalmers and F. Leverick, "Fair Labelling in Criminal Law" (2008) 72 *Modern L Rev* 217.

physically resist the sexual activity; and that delay, or an absence of physical resistance, does not necessarily indicate that an allegation is false.

11. On the whole, we welcome these proposed provisions. However, as the explanatory notes make clear, the precise wording of the jury directions would remain a matter for the particular judge. We disagree with this proposal. We instead suggest that the directions should take a set format, in order to promote consistency and clarity.

12. Additionally, the Bill provides that the judge will not be required to issue the above advice to the jury if he or she considers that, in the circumstances of the case, no reasonable jury could consider the evidence, question or statement to be material to the question of whether the alleged offence is proved. The examples given in the explanatory notes to illustrate when this might be the case are (i) where the complainer was a baby or very young child and could not understand that an offence had been committed against them or (ii) where the complainer was asleep or unconscious at the time of the alleged offence.

13. It may be that there are reasonable juries who, in cases where the complainer was a young child, or asleep or unconscious, would consider the question of delay or lack of resistance as irrelevant to whether the alleged offence is proved. However, there is a rich body of empirical evidence demonstrating that (mock) jurors often hold a number of unreasonable or otherwise problematic views, based on gender stereotypes, which influence their perception of responsibility in sexual assault trials. This has been shown to be the case particularly where there has been a delay in reporting, a lack of physical resistance, or a lack of obvious distress on the part of the complainer (see for example the work of Louise Ellison and Vanessa Munro). Whether a *reasonable* jury could consider the evidence to be material to the question of whether the alleged offence is proved is therefore somewhat beside the point.

14. We therefore suggest that the judge **must** advise the jury as above in all cases where evidence is given, a question is asked or a statement is made with respect to either a delay in reporting sexual assault, or a lack of physical resistance on the part of the complainer.

Chapters 3 and 4 of Part 2: Civil Preventive Orders

15. For both Sexual Harm Prevention Orders (SHPOs) and Sexual Risk Orders (SROs), breach would be a criminal offence, carrying a severe maximum sentence. It is therefore crucial that the conditions for obtaining and enforcing these orders should legitimise such a serious response. We doubt that this is currently the case, on several counts. We believe that the Scottish Parliament should take this opportunity to address this concern – and that it can do so without compromising the aims of this part of the Bill.

16. First, since these orders make criminal conviction possible, their imposition should be subject to relatively strict procedural protections. This is necessary to ensure

compatibility with the spirit, and arguably the letter, of Articles 6 and 7 of the European Convention on Human Rights. In particular, we note that for both SROs and SHPOs on application, a sheriff must be 'satisfied' that the relevant conditions are met (ss 11(2), 26(2)). We suggest that this standard should be clarified by adding the words "beyond a reasonable doubt". Similar concerns lead us to doubt the legitimacy of using cautions as a basis for some SHPOs on application (ss 13 and 14). We suggest that SHPOs ought always to be predicated upon the findings of a criminal court – particularly given that, in light of the even more relaxed criteria for obtaining SROs, this suggestion should not hinder the effectiveness of this regime as a whole.

17. Second, SHPOs and SROs are governed by criteria of necessity: both the orders in general and their specific conditions must be necessary in order to prevent the relevant harm (ss 10, 11, 15, 26 and 27). However, similar standards in the context of other civil orders tend to be policed poorly by courts. This is worrying, as these orders significantly restrict their subjects' liberties: they criminalise conduct that is otherwise lawful. Therefore, additional guidance would be welcome on the interpretation of these standards. In particular, it should be made clear (a) that orders may be made only if the existing criminal law is not sufficient to protect the public from the relevant harm; and (b) that particular prohibitions and/or requirements may be imposed only if no less extensive set of prohibitions and/or requirements would suffice for this purpose.

18. Finally, we believe that the definition of "harm" for the purposes of SROs should be the same as that used for the purposes of SHPOs: that is, the definition in s 9 of the Bill. Interpreted literally, the definition of harm in s 25 is absurdly broad: the relevant harms need not have any connection whatsoever to sexual offending. Therefore, SROs could in theory be used to threaten criminal sanctions against people who are not deemed to pose any risk of criminal behaviour. Such a broad definition gives unacceptable levels of discretion to applicants and courts, and correspondingly risks difficulties in interpretation. Not only that, it is unnecessary to ensure the flexibility of SROs: the lack of a requirement for a previous conviction suffices to ensure flexibility. In light of this, we see no reason why SROs should not be limited explicitly to those who are deemed to pose a threat of harm *from sexual offending*, as is the case for SHPOs.

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