Justice Committee

Abusive Behaviour and Sexual harm (Scotland) Bill

Written submission from Scottish Women's Aid

Foreword

Scottish Women's Aid ("SWA") is the lead organisation in Scotland working to end domestic abuse. We play a vital role in campaigning and lobbying for effective responses to domestic abuse.

We provide advice, information, training and publications to our 37 member groups and to a wide variety of stakeholders. Our members are local Women's Aid groups which provide specialist services, including safe refuge accommodation, information and support to women, children and young people.

An important aspect of our work is ensuring that women and children with experience of domestic abuse get both the services they need and an appropriate response from the civil and criminal justice systems.

Introduction

SWA welcomes the Bill and we support the general principles. We note that it does not contain proposals for a specific "*coercive control*" domestic abuse offence as discussed in the pre-legislative consultation and would urge the Scottish Government to continue with their commitment to address violence against women by progressing the introduction of this specific offence as soon as possible.

Section 1- Aggravation of offence where abuse of partner or ex-partner

As the Policy Memorandum notes, the statutory aggravation model is well understood and SWA support this proposal with reference to both the comments made in our response to the consultation preceding this Bill and also paragraph 19 of the Bill's Policy Memorandum, namely *"… even once a specific offence has been introduced, there may be individual cases where it is more appropriate to prosecute the offender for another substantive offence and libel the aggravation to reflect the fact that the offence amounted to the abuse of the offender's partner or former partner."*

It is important that a statutory aggravation of domestic abuse be created in addition to a substantive offence of domestic abuse as the aggravation is both an important addition to the armoury of the COPFS in prosecuting these offences and a positive response from the justice system as a whole in identifying the spectrum of criminal offences and behaviours constituting domestic abuse.

The aggravation will allow the COPFS to bring perpetrators of domestic abuse to account in cases where there is insufficient evidence to prosecute under any specific offence of domestic abuse but the background and context of the offence nonetheless indicates that domestic abuse has been present. It places the offence

firmly within the context of domestic abuse and is authority for the COPFS to lead evidence about the presence of such abuse in the background to the offence.

Further, where the aggravation is proved, this must be taken into account by the court when determining sentence, and the conviction must be recorded in a manner which shows that the offence was aggravated by constituting abuse of a partner or ex-partner, as opposed to, for instance, an assault which simply appears to be an isolated incident.

We have a query on the wording of the section. It provides the aggravation can be committed if the offence is perpetrated with the intention to cause physical or psychological harm to a partner or ex-partner, regardless as to whether the actual offence is committed directly against that partner, meaning the offence can, in this case, be committed against a third party.

The intention would be strengthened by explicitly stating this fact. While the wording of clause 1(3) attempts to do so by stating" *It is immaterial for the purposes of subsection (2) that the offence does not in fact cause the partner or ex-partner physical or psychological harm"* this does not make clear on the face of the Bill that the offence could have been directed against a third party.

It is therefore suggested that clause 1(2) contains the additional text in bold,
"… (2) An offence is aggravated as described in subsection (1) (a) if in committing the offence—
(a) the person intends to cause the partner or ex-partner to suffer physical or psychological harm, **regardless as to whether the offence is committed directly against that partner or ex-partner** *or*
(b) in the case only of an offence committed against the partner or ex-partner, the person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm.
(3) It is immaterial for the purposes of subsection (2) that the offence does not in fact cause the partner or ex-partner physical or psychological harm."

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

We support the creation of this offence, the intention of which is expressed clearly in paragraphs 25, 26 and 33 of the Policy Memorandum. A specific offence of this nature makes the exact scope of the law clear, plugs gaps in existing law and sends a very clear message to victims and perpetrators that such conduct is criminal.

However, while supporting it, we are of the opinion that it does not go far enough to capture the spectrum of behaviours perpetrated against women, and several matters require clarification, as follows:

Omission in definition of sharing of private and intimate written and audio communications

By referring specifically to only photographs or films the offence specifically excludes the sharing of private and intimate written and audio communications, such as letters, text messages, e-mails and voice-mail recordings. The Policy Memorandum

states that that offences committed through these media would be difficult to define and interpret and there would be a risk of "…*unintended consequences in terms of interference with freedom of speech."* It also goes on to state, at paragraph 35, "…*It should be noted that it will remain possible for the Crown Office and Procurator Fiscal Service (COPFS) to prosecute the sharing of such materials using, for example, the Communications Act 2003 offence or the offence of threatening or abusive behaviour, in appropriate cases. "*

However, the Communications Act 2003 ("the 2003 Act") is not an adequate substitute as it does not have the same powers of prevention and protection as the Bill proposals:-.

- Firstly, unlike the proposed offence in the Bill, the offence under section 127 of the 2003 Act can only be tried under summary procedure, not solemn, which limits the overall custodial and financial penalties, since the proposals allow for offences under this section to be tried under either summary or solemn procedure.
- Further, the maximum term of imprisonment under the summary procedure in section 127 is limited to six months, as opposed to the 12 months in the Bill, meaning that women who are abused by having private written and audio communications shared without their consent would have a lesser protection and perpetrators may well tailor their behaviour to accommodate this gap in the law.
- It should also be noted that the offence under section 127 is subject to a specific time limit for bringing prosecutions; from the date of the offence to three years from that date, provided that the prosecution is brought not more than six months after evidence which the prosecutor considers sufficient to justify proceedings comes to the prosecutor's knowledge. Section 2 contains no such constraints.
- The matter of "unintended consequences" referred to in paragraph 35 of the Policy Memorandum is also misleading in that if the 2003 Act offence exists and has been used without any issue of "unintended consequences" then the Scottish offence is perfectly capable of being defined in similar terms to meet the lack of suitable penalties under the 2003 Act.

We would agree with the comments made by Police Scotland that the offence should "*take cognisance of all forms of communication and distribution*."

- *the impact of the written word and sound files of an intimate nature cannot be understated - if directed to the family, friends and work colleagues of the victim, they can be just as harmful as images*
- *The exposure (or threat of exposure) of any of this material/data is designed to humiliate, control and abuse the victim and thus, victims must have access to, and confidence in, the application of robust justice*
- *"Should this type of offending be split into two tiers, with new bespoke legislation 'covering' private, intimate images including moving images and existing legislation 'covering' written words and sound files, a justice lottery may develop,"*

In summary, the offence should be expanded to include sound files, e-mails, texts, voicemails on the grounds that the offence under the 2003 Act is not an adequate alternative to support the prosecution of offences involving these media.

Section 2(1) (c) – no definition of "consent"

We note that the Bill does not define what is meant by a person giving "consent", an important omission given that the proposed offence is intended to address the fact that the image was shared without the consent of the person involved. The Bill must make clear that explicit consent is required by B to A.

Given the connection that the Bill makes to the Sexual Offences (Scotland) Act 2009 ("the 2009 Act") in relation to other definitions,, and the fact that that the 2009 Act contains a useable and implemented definition of "consent", it would appear sensible to follow an already established explanation and base the definition of "consent" around that in section 12 of the 2009 Act, which states that *"consent means free agreement (and related expressions are to be construed accordingly). "*

The definition would have to be worded appropriately to emphasis that "free agreement" meant agreement given in the absence of coercion, threats, duress or misrepresentation in any form and was informed. For instance, consent is not defined in the Data Protection Act but the European Data Protection Directive (to which the Act gives effect) defines an individual's consent as"…*any freely given specific and informed indication of his wishes …"*

Consent must also be appropriate to the age and capacity of the individual and to the particular circumstances of the case and take account of the fact that consent is not permanent or even continuous; an individual will be able to withdraw consent,

Section 2 (3) (b) - no definition of "reasonable belief"

This section inserts possible defences against the offence, one of which being "*reasonable belief*", stating that *"… A reasonably believed that B consented to the photograph or image being disclosed."* Again, the Bill is silent on the definition of what constitutes "*reasonable belief*" and once more, we would refer to the definition of *"reasonable belief"* in section 16 of the 2009 Act. In arriving at a form of words, it would be useful to use the text in that section, so a possible definition could be "*In determining, whether a person's belief as to consent was reasonable, regard is to be had to whether the person took any steps to ascertain whether there was consent and if so, to what those steps were*."

Section 2(3) (d) – no definition of "Public interest"

This section offers a defence of a reasonable belief that the disclosure was in the public interest. This is very wide and a definition or explanation of public interest is needed to narrow the application of this.

Section 2(4) (b) – assumption of general consent

This allows for "general" consent to be assumed in relation to the sharing of images. A blanket presumption of consent being present at all times contradicts the intention behind the offence, which is intended to protect a person who did not give consent

for a particular image or film to be shared. “Consent” to one image does not mean consent to a second act or a forwarding of an image. A general approach neither enforces the requirement that consent is required on each occasion nor does it support the principle of consent, which necessitates an informed decision and free agreement being present.

Section 3- Interpretation of section 2 in sexual context

We note that the definition of “intimate” images is essentially restricted to being only those with a sexual context based on the definition of a ‘private act’ contained at section 10 of the 2009 Act. This is not a position we support and submit that the test for an “intimate image” should be that an image is private and intimate if the person featured in the image and the person sharing the image understand or consider it to be so.

Section 4, via Schedule 1- offence against “hosts”, etc.

This section and the Schedule intend to give effect to the EU Commerce Directive giving protection to host services where they are unwitting “hosts” of prosecutorial material, by providing a defence to any crime or offence that they may commit under section 2. It is our understanding that to give effect to the EU Directive, Member States’ domestic law must contain some civil/criminal liability or penalty which occurs on a failure to “take down. However, it is not clear that section 2 does actually create a criminal offence against host services, particularly since section 2(7) of the Bill refers to offences committed by “a person”, not hosting services, Information Society Service Providers, etc.

We would therefore welcome clarity whether section 2 does, indeed, create an appropriate crime/offence. If this is not the case, the Bill will require a new section placing a liability on service providers, ISSPs and so forth.

Further, Schedule 1, section 3(3) refers to hosting services avoiding liability if they “*expeditiously removed*” information and for clarity, and to ensure that host services do not delay in taking down abusive material, “expeditious” should be defined in the Bill by a specific time limit within which this must happen.

Section 5 Making of non-harassment orders in criminal cases

We fully support this section and it plugs a loophole in the law that has allowed persistent stalking and harassing behaviour to continue

Section 6 Jury directions relating to sexual offences

SWA fully supports these proposals. They are to be commended and will, hopefully, go some way to address the misconceptions and prejudices faced by complainers in rape trials around what jurors believe constitutes a ‘normal’ reaction to sexual victimisation, as highlighted in the University of Nottingham research paper *“Complainant Credibility & General Expert Witness Testimony in Rape Trials: Exploring and Influencing*
Mock Juror Perceptions”

http://www.rapecrisisscotland.org.uk/workspace/publications/Briefing-Report-Munro.pdf

Section 7 - Incitement to commit certain sexual acts elsewhere in the United Kingdom
Section 8- Commission of certain sexual offences elsewhere in the United Kingdom

We support the creation of these offences intended to close loopholes in the law around these matters

Scottish Women's Aid
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