

Justice Committee

Abusive Behaviour and Sexual Harm (Scotland) Bill

Written submission from the Law Society of Scotland

Introduction

The Law Society of Scotland aims to lead and support a successful and respected Scottish legal profession. Not only do we act in the interests of our solicitor members but we also have a clear responsibility to work in the public interest. That is why we actively engage and seek to assist in the legislative and public policy decision making processes.

The Law Society of Scotland's Criminal Law Committee ("the Committee") has considered the Scottish Parliament's Justice Committee's call for written evidence upon the general principles of the Abusive Behaviour and Sexual Harm (Scotland) Bill introduced into the Scottish Parliament by the Cabinet Secretary for Justice, Michael Matheson MSP on 8 October 2015 and has the following comments to make.

General Comments

In June 2015, we responded to the Scottish Government consultation paper entitled "Equally safe – Reforming the criminal law to address domestic abuse and sexual offences"

<http://www.lawscot.org.uk/media/538818/crim-equally-safe-reforming-the-criminal-law-to-address-domestic-abuse-and-sexual-offences.pdf>

Also, we took part in the conference organised by Holyrood Communications and entitled "Equally safe: domestic abuse and the law" on 4 June 2015 at which Grazia Robertson and Bernadette Monaghan, both members of our Criminal Law Committee, participated.

We make specific reference to the policy objectives of the bill and welcome any measure which helps improve how the justice system responds to abusive behaviour including domestic abuse and sexual harm.

We have, however, reservations as to whether the bill as drafted will help improve the justice system in this regard.

The Committee has the following specific comments upon the general principles of the bill.

PART 1 ABUSIVE BEHAVIOUR

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

We refer to our consultation response where we expressed concern as to the creation of a stand-alone offence of domestic abuse on the basis that controlling and manipulative behaviour can already be prosecuted under existing legislation. In particular, we note the recently created 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.

We note that, rather than the creation of a new offence of domestic abuse, Section 1 of the Bill provides for an aggravation of an offence where the abuse is directed towards either a partner or an ex-partner.

We believe that the aggravation may be difficult to prove in that the provisions at Section 1(2) of the bill provide for either intent or recklessness. Also the provision does not seem to take into account the priority given to domestic abuse cases within the criminal justice system at present.

We question why existing measures are not adequate and also whether the increased use of statutory aggravations are improving the criminal justice system.

We also note that “partner” is defined at Section 1(6) of the bill.

At Section 1(6) (c) of the bill the person is the partner of another person if they are in an intimate personal relationship with each other. We believe that this particular provision may be problematic and open to some interpretation as to the parties’ relationship. While we note that there are a number of other statutory aggravations, these are so aggravated by the actions of the accused as opposed to the nature of the relationship between the accused and the complainer which, in terms of this statutory aggravation, would require to be proved.

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

We refer to our consultation response.

We refer to Section 33 of the Criminal Justice and Courts Act 2015 applicable in England and Wales

33 Disclosing private sexual photographs and films with intent to cause distress

(1) It is an offence for a person to disclose a private sexual photograph or film if the disclosure is made-

(a) without the consent of an individual who appears in the photograph or film, and

(b) with the intention of causing that individual distress.

(2) But it is not an offence under this section for the person to disclose the photograph or film to the individual mentioned in subsection (1)(a) and (b).

(3) It is a defence for a person charged with an offence under this section to prove that he or she reasonably believed that the disclosure was necessary for the purposes of preventing, detecting or investigating crime.

(4) It is a defence for a person charged with an offence under this section to show that—

(a) the disclosure was made in the course of, or with a view to, the publication of journalistic material, and

(b) he or she reasonably believed that, in the particular circumstances, the publication of the journalistic material was, or would be, in the public interest.

(5) It is a defence for a person charged with an offence under this section to show that—

(a) he or she reasonably believed that the photograph or film had previously been disclosed for reward, whether by the individual mentioned in subsection (1)(a) and (b) or another person, and

(b) he or she had no reason to believe that the previous disclosure for reward was made without the consent of the individual mentioned in subsection (1)(a) and (b).

(6) A person is taken to have shown the matters mentioned in subsection (4) or (5) if—

(a) sufficient evidence of the matters is adduced to raise an issue with respect to it, and

(b) the contrary is not proved beyond reasonable doubt.

(7) For the purposes of subsections (1) to (5)—

(a) “consent” to a disclosure includes general consent covering the disclosure, as well as consent to the particular disclosure, and

(b) “publication” of journalistic material means disclosure to the public at large or to a section of the public.

(8) A person charged with an offence under this section is not to be taken to have disclosed a photograph or film with the intention of causing distress merely because that was a natural and probable consequence of the disclosure.

(9) A person guilty of an offence under this section is liable—

(a) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine (or both), and

(b) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine (or both).

(10) Schedule 8 makes special provision in connection with the operation of this section in relation to persons providing information society services.

(11) In relation to an offence committed before section 154(1) of the Criminal Justice Act 2003 comes into force, the reference in subsection (9)(b) to 12 months is to be read as a reference to 6 months.

(12) In relation to an offence committed before section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 comes into force, the reference in subsection (9) (b) to a fine is to be read as a reference to a fine not exceeding the statutory maximum.

We remain of the view that there is a strong argument for modelling this offence on the equivalent English legislation rather than operating a different legal regime north and south of the border.

We believe that conviction of an offence under Section 2 of the bill would no doubt be stigmatic and the offence should therefore not be drawn so broadly as to result in people being convicted of what is popularly termed as a “revenge pornography” offence when their actions may well be far removed from this given the interpretation of Section 2 at Section 3 of the bill.

We note in particular that, in England and Wales, the offence is one of disclosing private sexual photographs and films with content to cause distress and that it is not an offence when the photograph or film is disclosed only to the individual.

We also believe, with reference to Section 2 (4) of the bill, that some consideration is given to further clarification of “consent” given that this is to be a defence to this offence in terms of Section 2 (3) of the bill which is read with Section 2(4), (5) and (6) of the bill. For example, consent can be based on a reasonable belief which, if there is sufficient evidence, the prosecution does not prove beyond reasonable doubt that it is not the case.

We note, in terms of Section 33 of the English act the offence is simply without the consent of the individual and with the intention of causing that individual distress.

We refer specifically to Paragraph 39 of the Policy Memorandum accompanying the bill which refers to how the offence could impact on particular groups such as children or those with a learning disability who may not understand the consequence of their behaviour.

We believe that consideration should be given to making this an offence which can only be committed by a person over the age of 16 otherwise it would be treated as an offence even within the children’s hearings system.

Given the prevalence of “sexting” among teenagers, we believe that some consideration should be given to this type of behaviour to be considered as an additional ground for referral to a children’s hearing rather than considered as an offence based ground in terms of section 67(2) (j) of The Childrens Hearings (Scotland) Act 2011.

Section 3 – Interpretation of section 2

We refer to our comments above and, in particular the difference between Section 2 of the bill and section 33 of the Criminal Justice and Courts Act 2015. An “intimate situation” would cover a situation where an individual is dressed in underwear.

Section 5 – Making of non-harassment orders in criminal cases

We refer specifically to Section 5 (2) of the bill which inserts a new Section 234A (1) into the Criminal Procedure (Scotland) Act 1995. We express some concern that a non-harassment order can now be applied where, in terms of the proposed new Section 234A (1) (b) of the 1995 Act, a person is acquitted of such an offence (involving misconduct towards a person) (“the victim”) by reason of the special defence set out in Section 51A (a person not being criminally responsible for conduct constituting an offence) or where in terms of the proposed Section 234A (1) (c) of the 1995 Act, where the person is found by a court to be unfit for trial under Section 53F of the 1995 Act

We are concerned that a non-harassment order can be made in these circumstances where the mental health of the individual is such that they cannot now nor did at the time comprehend their actions.

We note the case of Finegan v Heywood 2000 JC 444 where the accused went drink-driving whilst sleepwalking; the court held that there were special reasons for not disqualifying as a disqualification order could not prevent the accused driving whilst sleepwalking in the future. We accordingly question the point in the court making an order with which the individual cannot be expected to comply.”

We refer specifically to Paragraph 52 of the Policy Memorandum and note that at present the court can impose a Sexual Offences Prevention Order (SOPO) where a person has been found to have committed an offence following a finding of facts or where they have been acquitted because they lacked criminal responsibility at the time that the offence was committed.

While it may be more appropriate to impose a SOPO whether or not a person is criminally responsible in order to protect the public, we question the requirement for a non-harassment order which would criminalise behaviour in those who were mentally unwell and not responsible for their actions.

We suggest that this proposed provision should be properly considered as part of a review of mental health legislation in general. In our view, it would not be fair to isolate one particular instance of behaviour of someone mentally ill or with a learning disability, without looking at it in its proper forum i.e. mental health legislation.

PART 2 SEXUAL HARM

Section 6 – Jury directions relating to sexual offences

We refer to our consultation response. This proposal would represent a major departure from existing practice where the distinct roles of a judge and jury are clear. Such a departure should only be considered where there is good evidence to show that it is necessary to achieve a clearly stated aim.

We remain concerned as to whether the introduction of a mandatory jury direction only in respect of a sexual offence would be fair albeit this provision will not apply where the judge considers that, in the circumstances of the case, no reasonable jury could consider the evidence, question or statement by reason of which this provision would otherwise apply to be material to the question of whether the alleged offence is proved.

We note that Lord Bonomy's Review Group rejected the idea of abolition of corroboration only for certain types of offences. We remain of the view that this inherent unfairness would be mirrored in any attempt to introduce mandatory jury directions only for sexual offences.

We note that at present, this issue is dealt with by the Crown lodging a psychologist's report which specifically deals with the issue of delay of any complainer disclosing to the police or other relevant authorities.

While in the majority of cases no criticism can be made with regard to delay by the complainer, there can, however, be incidents where delay may well be a vital component in the defence.

There shouldn't be a mandatory jury direction, but rather a jury direction on what evidence was actually placed before the court.

We also note that Lord Bonomy's Post Corroboration Safeguards Review Report recommended research into how juries deliberate and form views on evidence and that such research should properly consider the issue as to whether juries are misunderstanding why those who make an allegation of sexual assault may do so after a lengthy period of time has passed.

On the basis that Lord Bonomy's Post Corroboration Safeguards Review Report recommended research into how juries deliberate and form views on evidence, we believe that, prior to imposition of this provision, Scottish Government should at least carry out or commission a literature review of the relevant research before making this change, or consider whether it may be incorporated into any programme of jury research to be carried out following Lord Bonomy's Review.

CHAPTER 2 SEXUAL ACTS ELSEWHERE IN THE UNITED KINGDOM

We refer to our consultation response.

While we appreciate that this provision should assist in a prosecution of all offending behaviour on a single indictment or complaint where the accused has allegedly engaged in a course of conduct consisting of a number of separate offences within the United Kingdom, we are concerned that jurisdiction may be taken in Scotland over a UK national not habitually resident in Scotland committing a sexual offence anywhere in the United Kingdom.

It appears from Section 54A of the Sexual Offences (Scotland) Act 2009 as inserted by Section 8 of the bill that the Scottish courts are to have jurisdiction over a case where neither the act nor the parties have any connection to Scotland at all on the basis that the act also constitutes an offence under the law enforced in the country where it took place.

CHAPTER 3 SEXUAL HARM PREVENTION ORDERS

Section 10 – Making of order on dealing with person for offence

We note Section 10 (2) and (3) of the bill.

We believe that the person should be entitled to legal representation where such an application is being made and that this should be reflected in the bill.

Section 11 – Making of order against qualifying offender on application to sheriff

We believe that there should be some indication of standard of proof before such an order is made by the sheriff in terms of Section 11 (2) of the bill.

Section 15 – Content and duration of order

We refer to section 15 (3) of the bill and believe that the period of the order should be a matter for the court.

Section 16 – Prohibitions on foreign travel

We refer to our comments at Section 15 above and believe that the period should be specified by the court.

Section 20 – Interim orders

We note section 20 (2) of the bill where an interim sexual harm prevention order may be made if the sheriff considers it just to do so.

There is no indication of what the basis of such an order would be nor is there any mention of the right of the accused to make representations. Again, there is no indication of the standard of proof.

Section 23 – Offence of breaching order

We note Section 23 (3) of the bill and are concerned that this provision appears to interfere with the court's discretion regarding sentencing.

CHAPTER 4 SEXUAL RISK ORDERS

Section 26 – Making of order

We note that this provision would deal with a situation where a person has not been convicted of a sexual offence but that their behaviour indicates a risk that others may be harmed and intervention at an early stage is necessary to prevent that harm.

While the sheriff may only make an order if satisfied that the person against whom the order is sought has done an act of a sexual nature and as a result an order is necessary to protect the public or protect children, there is no indication of the standard of proof and no indication in terms of Section 26 as to the person's right to legal representation before the sheriff makes such an order.

Section 27 – Content and duration of order

We refer to our comments above the fixed period of not less than two years interferes with the court's discretion.

Section 28 – Prohibitions on foreign travel

We refer to our comments above. The fixed periods interfere with the court's discretion.

Section 30 – Interim orders

We refer to our comments above.

There is no indication of the basis for these particular orders or any indication of the standard of proof.

In all the circumstances, we question whether, with regard to Sexual Harm Prevention Orders and Sexual Risk Orders, another layer imposed on Sexual Offence Prevention Orders (SOPO) is required as opposed to a modification of the existing order.

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