Justice Committee

Domestic Abuse (Scotland) Bill

Written submission from Vanessa Bettinson

Question 1

Do you agree with the proposal in the Bill to create a new offence of abusive behaviour towards a person’s partner or ex-partner covering both physical violence and non-physical abuse?

I agree that the proposed new offence in the Bill is required and should capture behaviour by a partner or ex-partner that involves a pattern of coercive and controlling behaviour. It is rightly acknowledged in the Policy Memorandum\(^1\) and the majority of respondents from previous consultations on the issue of a discrete domestic abuse offence that the criminal law needs to reflect the real lived experiences of victim/survivors of domestic abuse. To achieve this, the offence does need to cover both physical and non-physical abuse.

As a new offence is being proposed, it should certainly include the context of a controlling and coercive relationship that is not currently reflected in the existing offences. This is achieved by ensuring that the specific offence encompasses all forms of conduct that occurs in these cases and in my view, the draft offence achieves this.

Question 2

Do you consider that the proposed offence is needed to address a gap in the existing law which currently makes it difficult to prosecute some forms of domestic abuse?

In my earlier response to the Scottish Government Consultation Paper\(^2\) I noted that existing offences, particularly s. 38 and 39 Criminal Justice and Licensing (Scotland) Act 2010 are on the face of it extensive and have the advantage of not requiring the complainer to have suffered actual fear or alarm ([Paterson v Harvie](http://www.parliament.scot/Domestic%20Abuse%20Scotland%20Bill/SPBill08PMS052017.pdf) [2014] HCJAC 87) and the behaviour is construed widely. On the other hand, a course of conduct model tends to focus on single incidents linked together, rather than looking at the ongoing nature of the behaviour and the context of the relationship.

The existing law does recognise a wide range of behaviours, but does not adequately reflect the extent of the harm experienced by a victim of coercive or controlling behaviours. In this regard I agree with the Policy Memorandum that a new offence is needed to fill a symbolic gap in the law, indicating to the public and law enforcement that such behaviour will not be tolerated and the severity of the harm is not underestimated.

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The proposed offence also allows a wide degree of discretion at the sentencing stage which will enable sentencers to reflect the greater or lesser degrees of harm and culpability involved in each case. This is an important element of the Bill that is seeking to capture the ongoing pattern of behaviour and the harm it can cause within a single offence. The Maximum term of imprisonment for this offence set at 14 years (8(b)) is to be welcomed.

Question 3

Do you have any views on the definition of the offence, such as the requirement for a course of behaviour, the definition of abusive behaviour, or the defence that the behaviour was reasonable in all the circumstances?

Course of behaviour - This term will help victims recognise that their experiences are of behaviour criminalised by law, without the need of physical violence. More than one instance of behaviour is required to prevent reaching into healthy relationships. I agree with the Policy Memorandum that serious single incidents can be dealt with under existing legislation.

Abusive behaviour - This term proves useful and dispenses with the complexities surrounding the terms coercion and control as acknowledged in the consultation paper. I think this is a well drafted term.

The defence - The reasonable defence would be helpful in situations where the behaviour was generally for a good reason, or for the benefit of the victim. 5(2) correctly identifies the need for objective evidence and allowing the defence to be judged on the circumstances as the perpetrator believed them to be. It is necessary to permit a defence as the elements are quite far reaching, especially as the victim does not need to suffer the harm.

Question 4

The offence is restricted to abuse between partners and ex-partners. Do you agree with this approach? For example, during the Scottish Government’s consultation on a draft offence, concerns were raised that it did not properly reflect the impact of domestic abuse on children. The Scottish Government has sought to address this concern in the Bill, primarily by providing that the offence will be aggravated where it involves a child. Do you have any views on this aspect of the Bill?

In my view this offence should be restricted to current or former partners as expressed in the proposed offence. This is in line with the development of criminal justice responses in Scotland e.g. the Joint protocol between Police Scotland and Crown Office and Procurator Fiscal Service and specialist domestic abuse courts, which employ a definition of domestic abuse focused on intimate partner relationships.

3 See Bettinson, V. ‘Criminalising Coercive Control in Domestic Violence Cases: Should Scotland Follow the Path of England and Wales?’ [2016] Criminal Law Review (3) 165-180
However, I agree that the harm a child experiences through witnessing abusive behaviour occurring in the family home should be addressed as far as is practicable to do so in the terms of the offence. The method of aggravation adopted in the Bill appears to be a good way to deal with this issue.

Question 5

The Bill makes a number of reforms to criminal procedure, evidence and sentencing. For example, it would prohibit the accused in a domestic abuse case from personally conducting the defence. Do you agree with this prohibition?

Yes, the extensions of the prohibition on a person conducting their own defence and bail conditions concerning precognition to include domestic abuse related offences will be a welcome amendment to the Legal Aid (Scotland) Act 1986 as outlined in the Policy Memorandum (paragraphs 109-116 and 123-131).

I agree that there can often be a negative impact on a complainer’s credibility when giving evidence before a court as a consequence of the effects of trauma, resulting from domestic abuse. Allowing expert evidence to be presented about reactions to traumatic experiences arising from domestic abuse generally is necessary to prevent adverse inferences being drawn from a complainer’s natural, but too often misunderstood, responses during the criminal justice process.

Question 6

The Bill would also require the court in a domestic abuse case to consider making a non-harassment order. What are your views on this approach?

In my view, it is preferable that the court be asked to consider an NHO in all domestic abuse cases, rather than only doing so in the event the prosecutor makes an application for the court to do so. The mandatory provision permitting the prosecutor to make representations is a good safeguard to ensure the victim’s wishes are heard by the court.

It is also correct to require the court to give reasons for its decision, whether an NHO was made or not.

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