Justice Committee

Domestic Abuse (Scotland) Bill

Written submission from Glasgow Bar Association

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?

Whilst supportive of the aims of the bill we have significant concerns that the perceived benefits of the proposed offence have to be balanced against the very real risk of over-criminalisation.

We recognise the damaging effects of domestic abuse upon families but believe that any measures to improve the response of the criminal justice system to domestic abuse should also recognise the impact which a conviction for domestic abuse may have upon the partner and family of a convicted person. A conviction, leading to disclosure implications and the subsequent loss of employment and diminished employment opportunities could have long term financial implications for the family unit and we would welcome research in this area. We have concerns even within the existing framework of domestic prosecutions about the very wide range of behaviours in the context of domestic relationships which have been criminalised and about issues of proportionality which have arisen. We are concerned about the very wide scope of the proposed offence and the very wide range of behaviour which would potentially be caught by the legislation.

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 respect of physical abuse and indeed incidents of threatening and abusive behaviour we consider that these can already be prosecuted under existing legislation. We note that the scope of sections 38 and 39 of the Criminal Justice and Licensing Scotland Act are wide and do not require the complainer to have suffered actual fear or alarm. We note that The Abusive Behaviour and Sexual Harm Scotland Act 2016 now also makes provision for a domestic abuse aggravator to be attached to a complaint or indictment and that in evidence given to the Justice Committee by the former Crown Agent the view was expressed that the statutory aggravator rather than a specific offence of domestic abuse was the correct approach. In respect of the proposed discrete offence of domestic abuse we have concerns that the offence can be established on the basis of conduct on only two occasions, that it can be committed recklessly and that the bill makes provision for the offence to be made out not only by acts but by omissions. Further specification of these concerns is outlined in Question 3 below.

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

We do not believe that a single incident of non-physical coercion should be considered sufficient for prosecution and accordingly agree with the requirement for a course of behaviour. However we have concerns about the gap between the policy memorandum and the bill as proposed. We understand that one of the policy objectives of the bill is to seek to address on-going controlling and coercive behaviour and note that the policy memorandum to the bill refers to a "course of conduct which takes place over a sustained period of time. However this not in our view reflected in the bill which provides (at Section 9 (4) ) that a course of behaviour can be established by behaviour on “at least two occasions”. There is of course precedent in other legislation for a course of conduct to be established by conduct on more than one occasion (ie Section 39 of the Criminal Justice and Licensing Scotland Act 2010) However in a situation involving two incidents ,perhaps a year apart, and not involving violence or a threat of violence we are not satisfied that this could be properly viewed as a course of behaviour.

The definition of Abusive Behaviour

We recognise that the proposed test for abusive behaviour outlined in Section 1 of the bill has the benefit to the prosecution of not requiring to show that "B" was in fact adversely impacted by the behaviour of "A". However this objective test raises other concerns:

The test to be applied is not to assess the impact upon the reasonable person but for the reasonable person to assess the likely impact upon "B". Whilst the bill achieves its aim of not requiring to lead evidence from "B" the proposed test asks the judiciary to consider how the reasonable person might consider "B" to have been impacted. Particularly in situations of psychological harm that might require evidence to be led from "B" and indeed from a medical practitioner.

We note that the bill provides in Section 1(2) that abusive behaviour can be committed by "A" intending by their course of behaviour to cause "B" to suffer physical or psychological harm or by "A" being reckless as to whether the course of behaviour causes "B" to suffer physical or psychological harm. The bill also envisages that abusive behaviour can include (Section 9 (2) ) a) saying or otherwise communicating something as well as doing something or b) intentionally failing to do something or to say or otherwise communicate something.

We are concerned in particular about a person being criminalised for a reckless omission.

We are concerned that the definition of what constitutes abusive behaviour is too wide and lacks clarity. We do not anticipate that the public would readily understand a situation where criminal liability can arise from a reckless failure to say something.

We appreciate that the understanding of the dynamics of domestic abuse has developed in recent years. We observe that in many relationships one partner may take the lead in certain areas of their life and in the conduct of their affairs, for example financial.
It will be extremely difficult for police and prosecutors to assess and indeed prove where such situations have moved outwith such parameters and into areas which one could consider abusive behaviour.

We are concerned, for example, in a situation where there is a breakdown of a marriage that there could be marginal cases where the question is whether behaviour is the basis of an action for divorce or is in fact behaviour which should attract criminal liability.

In respect of the defence outlined in Section 5 (1) we are satisfied with the defence as drafted.

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?

It appears to us that there are a significant number of other domestic or family relationships in which incidents of abusive behaviour (including coercion and control giving rise to psychological harm) can occur. For example adult children and dependent elderly parents or adults with physical or learning difficulties being cared for in a familial situations. Whilst we consider it important to acknowledge that abusive behaviour occurring in such situations is equally unacceptable we recognise that the restriction of the offence to partners or ex partners may be necessary to maintain consistency with other legislative provisions such as Domestic Abuse Interdicts in terms of the Domestic Abuse Scotland Act 2011.

With regard to the Section 4 of the Bill (Aggravation in relation to a child) we recognise the desire to address the very damaging impact of domestic abuse upon children but would make the following observations:

a) In cases involving domestic abuse prosecuted under the current legislative provisions it is our experience that Sheriffs in sentencing will always take cognizance of the presence of a child during an incident of domestic abuse and will consider this as a significant aggravating factor without the need for specific legislative provision.

b) That there are already provisions in place seeking to protect children namely that The Children’s Hearing Scotland Act 2011 introduced for the first time a specific ground of referral (ground 67(2)f) -that a child has or is likely to have a close connection with a person who has carried out domestic abuse. It is important to note that such a referral can be made even in the absence of a conviction for domestic abuse and thereafter such domestic abuse would only require proof to the civil standard (on the balance of probabilities).

c) That it is not clear from Section 4(2) b whether the accused has to be aware of the presence of a child.
5) Do you have any views on factors which might impact on the reporting, investigation and prosecution of the offence?

It appears to us that those persons who are the subject of coercive and controlling behaviour are likely to be reluctant to provide a statement to the police and particularly in respect of cases where no physical harm has occurred we consider that there are likely to be real difficulties in securing sufficient evidence to justify a prosecution.

It appears to us that the reasonable person test may present difficult and marginal decisions for prosecutors and judges - what if the complainer herself is set against a prosecution? The proportionality of decisions to take proceedings will be critical and our members would be interested to know whether there would be Lord Advocates Guidelines to police and prosecutors. We would be interested to know the tenor of any proposed guidelines. We are aware from the Thomson report on the Review of Victim care in the Justice Sector in Scotland that the Crown Office and Procurator Fiscals Service has developed Independent Review Panels around offences including domestic abuse to seek to demonstrate that its policies and practices in the prosecution of crime are fair, sensitive and robust and to learn from cases. The Panel at present allows selected finalised cases to be reviewed independently by organisations that represent the interests of the victim and witnesses. We would consider it an important step for these groups to be expanded to those representing the interests of the accused.

However we think it important to stress that whilst such steps may be beneficial they should be utilised firstly in the context of the existing domestic abuse legislation. We are anxious that the introduction of further domestic abuse legislation will lead to additional pressure upon the crown to prosecute even marginal cases.

6) 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?

a) A new standard condition of bail is proposed which would prohibit an accused person, when charged with a domestic abuse offence, from obtaining precognitions or statements from a complainer except through a solicitor.

The standard conditions of bail are listed at Section 24(5) of the Criminal Procedure (Scotland Act) 1995. The standard conditions of bail include a condition that the accused does not interfere with witnesses or behave in such a way which would cause alarm or distress. An additional standard condition of bail applies in sexual offence cases (as listed in section 288C of the 95 Act) which prohibits the accused from seeking to obtain precognitions or statements concerning the subject matter of the offence from the complainer, other than by way of a solicitor.

We are not aware of any significant number of domestic cases in which an accused has attempted to obtain a statement or precognition from a complainer directly and comment that the courts at present, in addition to the standard bail conditions of bail, regularly impose additional special conditions of bail which seek to prevent an
accused person from contacting, approaching, or attempting to contact or approach the complainer.

In respect of the cases prosecuted at present within the domestic abuse courts in Glasgow prosecutors almost invariably seek special conditions of bail designed to prevent an accused person from contacting or approaching the complainer and indeed invariably seek a condition requiring them to reside at an address separate to that of the complainer, until the proceedings have been concluded. The court however can of course refuse such a request by the prosecutor and impose standard conditions of bail (allowing the accused and complainer to continue to have contact and on occasion continue to reside at the same address). There can be a variety of sound reasons why prohibiting contact and requiring parties to reside separately is not appropriate in a particular case (eg, the complainer adamantly does not wish such conditions, the accused is required to assist with childcare, is required to care for a complainer who has health difficulties or simply that there has been such a passage of time between the alleged incidents and prosecution and the accused and complainer have continued to have contact - rendering such enforced separation inequitable.

We offer these examples to illustrate that bail conditions in domestic abuse cases prohibiting contact between the accused and the complainer are not always appropriate.

However, we agree that a new standard condition of bail prohibiting an accused person from obtaining statements or precognitions from a complainer except through a solicitor has merit. In cases where there may be the likelihood of an accused person using the processes of the justice system to exert undue influence and control over the complainer such a provision can assist and, given that we see merit in the proposal to prevent an accused person in a domestic abuse case from conducting their own defence, it would seem appropriate that the gathering of statements or the taking of precognitions from the complainer, associated to such a trial, should be through a solicitor. Such a provision would not impact upon the situations outlined above where contact between the parties is, notwithstanding the court proceedings, continuing and would underline that the formal preparation for trial must be done by a solicitor and would underline the formality and gravity of the court process.

b) It is proposed that an accused person charged with a domestic abuse offence be banned from conducting their own defence.

At present Sections 288C, 288E and 288F of the 95 Act contain provisions prohibiting an accused person from conducting their own defence. Section 288C imposes the ban in relation to certain sexual offences, Section 288E does so in relation to certain serious offences involving child witnesses under the age of twelve and Section 288F empowers the court to prohibit an accused from conducting their own defence where a vulnerable witness is to give evidence. When such circumstances apply the court must notify the accused that the hearing must be conducted by a solicitor and Section 288D of the 95 Act provides that the court may appoint a solicitor for this purpose. Under Section 22(1) (dd) of the Legal Aid (Scotland) Act 1986 legal aid is automatically available where Section 288D applies.
It is recognised that, at present, in certain cases prosecuted in the domestic courts, a vulnerable witness application may be granted bringing the terms of Section 288F and Section 288D into play. It is also recognised that if a new domestic abuse offence is enacted complainers under such an offence might be deemed vulnerable witnesses. The current proposal would bring uniformity of approach in all domestic abuse cases. Whilst again we have not aware of information which would suggest a particular difficulty with accused conducting their own defence in domestic abuse cases the GBA acknowledges that in some cases there could be a risk of the accused using the trial process to intimidate the complainer and a prohibition on an accused conducting their own defence would be an appropriate continuum to the ban on an accused obtaining precognitions or statements except through a solicitor.

c) It is proposed to allow the introduction of expert evidence relating to the behaviour of the complainer in domestic abuse offence cases.

At present in criminal trials assessing a witness’s credibility is a matter for the jury and the evidence of expert witnesses regarding normal human nature and behaviour is usually inadmissible, and evidence as to the credibility of a witness is generally not admissible unless it is also relevant to a fact in issue at the trial.

The proposal to allow expert evidence in respect of the behaviour of a complainer in a domestic case mirrors the provision introduced by Section 275C of the Criminal Procedure Scotland Act 1995 in respect of sexual offence cases (to allow expert evidence to rebut any inference adverse to the complainer’s credibility or reliability as a witness which might otherwise be drawn from her or his behaviour or statements after the offence has been committed). This is an exception to the usual rule the credibility or reliability of any witness is a matter for the jury.

We imagine that such a proposal is primarily intended to apply in solemn cases but, as stated, the proposal would also extend to summary cases. We question whether a sheriff presiding alone in summary proceedings requires the assistance of expert evidence to reach a decision on the facts and circumstances of the case before him or her and, whether a jury, bringing their collective knowledge and experience of human behaviour to a solemn case requires such expert evidence. Issues, for example, of why a complainer may have chosen to remain within a relationship during which domestic abuse is said to have occurred, can be addressed in examination in chief by a prosecutor and it is submitted that a complainer answering “I chose to remain for the sake of the children” is something which a jury might readily understand without the need for expert evidence.

We also have concerns about the intended scope of such evidence. In our experience the expert evidence allowed in sexual offence cases has largely been directed to issue of delayed reporting or disclosure of sexual abuse. Indeed it is understood that in many instances the crown and defence can agree by joint minute that complainers in sexual offence cases often delay for many years disclosing such abuse. It is not clear to us the nature and extent of expertise which could be offered. We would welcome the publication of a full literature review in respect of the research conducted in this area.
We also observe that the introduction of such expert evidence could significantly lengthen the trial process: not least because the admission of such expert evidence for the crown is likely to lead to applications by the defence to lead expert evidence in rebuttal. This could also have clear cost implications for the Scottish Legal Aid Board. In short we question why this proposed reform is considered necessary.

7) 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?

It is proposed that it will be mandatory for the court to consider the imposition of a non-harassment order in all cases where an offender is convicted of a domestic abuse offence. It is noted that such a provision would apply to both the intended new domestic offence (pursuing a course of behaviour which is abusive to a partner or ex-partner) and in respect of any offence with a domestic abuse aggravator. It is also noted that by virtue of the Criminal Justice and Licensing Scotland Act 2010, amending the terms of Section 234A of the 95 Act, it is not necessary for an accused to have been convicted of an offence which in itself involved conduct on more than one occasion. At present Section 234A of the Criminal Procedure Scotland Act 1995 provides that a court may make a non-harassment order if satisfied "on the balance of probabilities" it is appropriate to do so to protect the complainer from the harassment. At present a prosecutor requires to make such an application. We appreciate that the proposal is not that the court must automatically impose a non-harassment order.

We have some concerns about how it is intended, in every case, that the prosecutor will be equipped to advise the sheriff of the full information they may require in order to reach such a decision in respect of a non-harassment order as the views of the complainer will always be an overriding consideration. Is it intended in every case, upon a prosecution being raised that every complainer will be asked their views on the imposition of a non-harassment order? At the present time prosecutors equip themselves with the necessary information before making such an application. It is envisaged that in order to reach such a decision Sheriffs may require Criminal Justice Social workers to conduct an assessment when background reports are being obtained before sentencing. One of the reasons for the proposal is to "ease the administrative burden upon prosecutors". We wonder if such burden of furnishing the court with such information will simply be passed to other personnel within the criminal justice system.

We also note that at present, in terms of Section 234A(6) of the 95 Act it is only a person against whom a non-harassment order is made (ie the convicted person) or the prosecutor who can apply to the court to revoke a non-harassment order previously made. We wonder whether at the stage a domestic abuse prosecution is commenced is every complainer to be asked their views on a non-harassment order and informed that, once made, an application to revoke is something which must be sought by the convicted person or through the prosecutor?

We note that this proposal is made to strengthen the use of NHO and to "ensure the protection needs of victims are always directly considered by the courts". Sheriffs are already obliged to state their reason for imposing a particular sentence and it is clear
to us that Sheriffs already carefully consider issues of public protection and the protection of complainers in domestic cases and indeed in every case.

Glasgow Bar Association
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