Introduction

Sacro is a national voluntary organisation working across Scotland to make communities safer by reducing conflict and offending. It does this through: being a leading provider of direct, innovative services in Criminal Justice, Restorative Justice and Community Mediation; Consultancy and Training services; research and; seeking to influence policy and legislation. Sacro works in the community with those in conflict, those responsible for causing, and those affected by, crime or other harm.

Sacro is the lead partner in ‘Fearless’, a domestic abuse support service for ‘hard-to-reach’ victims of domestic abuse: men, LGBTI (Lesbian, Gay, Bisexual, Transgender and Intersex), and BME (Black and Minority Ethnic). This serviced is delivered in partnership with LGBT Youth Scotland, Shakti Women’s Aid and the Men’s Advice Line.

Proposal to create a specific offence of domestic abuse to address a gap in the existing law

Sacro supports the introduction of the proposed specific offence of domestic abuse. A specific offence is necessary so that the criminal law in Scotland can adequately address the reality of domestic abuse. Domestic abuse is a pattern of behaviour, designed to control the victim. Although physical violence is used as a method of control, more insidious and discreet behaviours are a prominent feature, sometimes in the absence of any physical violence. Physical violence is used by the perpetrator as a function of control. Psychological abuse can be just as effective as a method of control as physical abuse, and the current law does not sufficiently cover such behaviour.

Definition of the offence

The ‘course of conduct’ requirement in section 1(1), which is defined in section 9(4), is appropriate for this offence as domestic abuse is a pattern of behaviour. It is therefore acceptable to define a course of behaviour as behaviour occurring on at least two or more occasions.

The mens rea of this offence in section 1(2)(b) is appropriate, as a perpetrator of domestic abuse can be skilled at manipulation and present in a manner that suggests that they did not intend to cause harm. A determination of their recklessness as to their behaviour provides a safeguard against this.

The condition in section 1(2)(a) requiring a reasonable person to consider A’s behaviour to cause B to suffer physical or psychological harm is welcome. The individual characteristics and vulnerabilities of the victim are a particularly important consideration e.g. a young gay man who is not ‘out’ to his family, and is threatened
to be ‘outed’ by his abusive partner would cause psychological harm. Domestic abuse perpetrators use intimate knowledge and perceived ‘vulnerabilities’ against the victim. This condition is further strengthened by the absence of a requirement that harm actually occurred, rather that it would be likely to occur given A’s behaviour, further clarified in section 3(1) and (2). This places the emphasis on A’s actions and motives, and does not rely on how an individual has been impacted by the behaviour.

Sacro welcomes the addition of behaviour directed at a child or a third party, as detailed in section 2(2)(b) as perpetrators will often seek to harm the victim by directing behaviour at their children or other loved ones, often making the victim feel responsible for such behaviour. This provision, combined with the aggravation in relation to a child in section 4, will strengthen child protection responses in domestic abuse cases. In particular, section 4(2)(b) recognises the damaging impact domestic abuse can have on a child you sees, hears or is present during A’s abusive behaviour. This places a greater focus on potential harm caused to a child.

The relevant effects outlined in section 2(3) are wide reaching and appropriate descriptors of the impact of domestic abuse. An exhaustive list of actual behaviours would be impossible to draft as many controlling behaviours are innocuous and specific to the victim, especially individuals from minority groups e.g. highlighting parts of a trans woman’s body which she feels uncomfortable with, causing her significant psychological harm. This specific action would be adequately covered under section 2(3)(e) as ‘degrading’ her. A list of specific behaviours would risk undermining the efficacy and underlying purpose of this offence.

The inclusion of sexual violence in section 2(4)(a) is a welcome clarification on the definition of ‘violent behaviour’. Through Sacro’s ‘Fearless’ service it has been noted that gay and bisexual men experience significant levels of sexual coercion and sexual violence in abusive relationships.

**Defining abuse as between partners or ex-partners**

Sacro supports the definition outlined in section 10(2) limiting the offence to current or ex-partners, and without a requirement for cohabitation. The dynamics of domestic abuse (intimate partner violence) are different to other forms of abuse as it is underpinned by a gendered analysis, and as such a broader definition would dilute the purpose and nuances of this offence. The gendered analysis recognises that domestic abuse is both a cause and a consequence of gender and other structural inequalities in our society. Other forms of familial abuse would benefit from similar, but separate, legislation e.g. honour-based violence, recognising the different dynamics and drivers.

**Factors impacting on the reporting, investigation and prosecution of the offence**

It is well established that victims of domestic abuse will experience multiple incidents of abuse before reporting. This is further compounded by the difficulties some groups have in labelling their experiences as domestic abuse. For example, LGBTI victims often struggle to relate to the ‘public story’ of domestic abuse, which locates the
issue as something that men do to women. LGBTI victims can face additional barriers to reporting, such as the fear of being ‘outed’ and anxiety around services providing a homo/bi/transphobic response. At the point of implementation, as concerted publicity campaign, inclusive of all groups, will help engage groups that can traditionally be marginalised from mainstream service provision.

The investigation and prosecution of this offence will benefit from the revised Police Scotland and Crown Office Procurator Fiscal Service Joint Protocol on Domestic Abuse which launched in March 2017. This revised protocol places greater emphasis on establishing the history and risks relevant to the case, and is inclusive of multiple identities. The efficacy of this document, and how it is used in conjunction with the new offence, will be determined by the training and support provided to Police Scotland and COPFS on understanding how domestic abuse manifests in different types of relationships. This is essential for the offence to be applied as intended, and to demonstrate how the ‘relevant effects’ manifest in different ways e.g. referring to a trans woman with male pronouns would be degrading and humiliating for trans women.

There are additional issues surrounding service-generated risks which could impact on the safety of the victim. This could occur when a support service shares information with the police which could be easily traced back to the victim. Sharing information without a careful approach to risk management could increase the risk of serious harm to the victim. This will be particularly important when dealing with any behaviour that has happened in private, without a third party witnessing it or based on very intimate knowledge of the victim.

Reforms to criminal procedure

The introduction of a standard bail condition prohibiting the accused from personally obtaining precognitions or statements from a complainer in relation to the new offence is an appropriate safeguarding measure. Where the complainer has taken steps to break the cycle of abuse it would be wholly inappropriate for the criminal justice system to afford the accused the opportunity to exert further control and/or coercion. Without this condition, the process of justice and quality of evidence could be severely undermined. This also prevents re-victimisation and is in keeping with the behaviours that the new offence seeks to address. For the same reasons, Sacro supports the prohibition of the accused conducting their own defence at trial. Where person A is charged with the new offence, the opportunity to question person B in court provides the opportunity for degradation and humiliation. This is behaviour which the new offence seeks to address, yet it would be legitimised by the criminal justice process.

Mandatory consideration of non-harassment orders

Sacro supports this measure. Protection is afforded to the complainer prior to and during the trial through special bail conditions, so it is appropriate that upon conviction the criminal justice system can continue to provide this protection where a non-custodial sentence has been determined.
The new offence is being introduced to address a pattern of behaviour. A civil non-harassment order can be granted where the pursuer has established a pattern of behaviour based on the civil burden of proof (balance of probabilities). Where the new offence is proven in the criminal courts, with the criminal burden of proof (beyond reasonable doubt), it would be illogical for the courts not to consider imposing a non-harassment order, given that it has exceeded the requirements of the civil courts.

Sacro
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