Justice Committee

Domestic Abuse (Scotland) Bill

Written submission from Andrew Tickell, Glasgow Caledonian University

1. In the interests of brevity and focus, this submission focuses only on the Committee's first three consultation questions on the proposed new offence of "a course of abusive behaviour" – and the potential impact of the corroboration rule on the prosecution of "abusive behaviour."

2. This submission aims to make two key points. On the proposed offence of "abusive behaviour", I have serious concerns that the offence as drafted is too broad, risks (a) excessively criminalising commonplace friction in family relationships, (b) fails to introduce adequate thresholds of wrongdoing to justify prosecution, and consequently (c) extends to prosecutors too wide a discretion to determine who ought to be prosecuted.

3. Secondly, I argue the corroboration rule must be considered in assessing the likely efficacy of the new offence. In many cases – even the most severe cases of abusive relationships the legislation aims to tackle – achieving a sufficiency of evidence in law to convict accused people is likely to be extremely difficult. These two points lead to an ambivalent conclusion on the proposed legislation: as drafted, the Bill simultaneously risks (a) over-criminalising behaviour which ought not to be criminal, while (b) the corroboration rule risks transforming the offence into a paper tiger, of limited utility to prosecutors and complainers experiencing abusive relationships.

4. In principle, I am broadly supportive of the aims of the Bill. The idea that the criminal law may legitimately sanction harms suffered by citizens is a longstanding one. It is an artificial distinction to regard serious physical wrongs as falling within the scope of the criminal law while ignoring the profound effects which psychological cruelty can have on the lives of individuals subjected to it. However, the regulation of family and romantic life is fraught with peril for the law-maker. The risks of over-criminalisation are considerable here. Entering into any relationship inevitably restricts the "freedom of action" of both parties. Even broadly healthy relationships are occasionally characterised by hurtful conduct, jealous behaviour, and distressing episodes. This Bill must discriminate between serious wrongs which deserve to be prosecuted and even unpleasant and irrational behaviour which ought to fall below the threshold of criminality. This is no easy task.

5. The Scottish Government's Policy Memorandum on the Bill incorporates a striking case-study of why some kind of new domestic abuse offence is not only defensible but necessary, vividly illustrating the emotional injury which abusive relationship can inflict on those trapped within them. In scrutinising this Bill, however, it is essential that the Committee should consider the potential impact of this legislation across the wide field of its potential application, from core cases like those articulated in the case-study, to the debateable lands at the bottom end of the severity threshold where the application of the new offence may be more problematic.

6. The Bill defines "abusive behaviour" very broadly. The concept of "abusive behaviour" incorporates not only violent, threatening, frightening, humiliating and degrading behaviour – but also any behaviour which gives rise to dependency in the relationship, subordination, regulation or monitoring of the partner's behaviour, or which restricts the abused partner's "freedom of action." It is easy to imagine a range of behaviours – innocuous, commonplace, unpleasant, and abusive – which would arguably fall within these definitions of potentially "abusive" behaviour. Given the breadth of this definition, it is essential that the further thresholds for criminalisation in the Bill are adequately high. Distinguishing "good" and "bad" domestic behaviour is not a particularly helpful approach here. The key issue ought to be whether "bad" behaviour has attained a sufficient level of severity to justify the intervention of the criminal law.

7. The offence of "coercive or controlling behaviour", created by the Westminster Parliament in 2015, reflected an appropriate concern with thresholds for criminalisation. To establish the offence, the prosecutor must establish that the coercive or controlling behaviour had a "serious effect" on the complainer. A "serious effect" is defined as a "fear" of "violence," or "serious alarm or distress which has a substantial adverse effect" on the complainer's "usual day-to-day activities."

8. As drafted, the Scottish Bill contains no such thresholds. The Scottish Government attempt to mitigate against the breadth of their definition of "abusive behaviour", by requiring the court to be satisfied that a reasonable person would consider the course of behaviour "likely to cause" the complainer "physical or psychological harm," and that the accused either intended or was reckless about causing such harm. Superficially, these restrictions appear significant. However, if the Bill's definitions of "harm" are more carefully examined, it becomes apparent that these "restrictions" are of limited significance.

9. The Bill envisages two key categories of "harm": "physical" harm, and "psychological harm." The Bill defines psychological harm as including not only the traditional concepts of "fear" and "alarm" – but also "distress." In view of the breadth of the Bill's definition of "abusive behaviour", defining "psychological harm" as "distress" appears an inappropriately low threshold for criminalisation.

10. The concept of "distress" is not used, for example, in the existing offences of stalking, or threatening or abusive behaviour, both created by the Criminal Justice and Licensing (Scotland) Act 2010. Both require the Crown to demonstrate the impugned behaviour gave rise to "fear or alarm" – intuitively, a higher standard. The common law offence of breach of the peace, similarly, requires the Crown to demonstrate that the accused has "engaged in conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community." The concept of severity is also missing from the Bill as introduced. This is an extremely problematic omission. The illiberal potential of this omission is further aggravated by section three of the draft Bill.

11. Although the Bill has been justified on the basis of the significant harm domestic abusive gives rise to, the draft legislation provides that the commission of

an offence "does not depend on the course of behaviour actually causing" any "harm" to the complainer under the Act, or having any humiliating, subordinating, or controlling effect. If the goal of this legislation is not to criminalise swathes of domestic behaviour – but to catch the most serious forms of domestically abusive behaviour not currently captured by statutory or common law offences – it seems irrational to exclude any question of the severity of the harm caused or likely to be caused from the court's deliberations.

12. Weaving these strands together, to prosecute an individual for "abusive behaviour" under the proposed legislation, the prosecutor need only show that the accused has engaged in monitoring or controlling behaviour on more than one occasion which was likely to cause distress, whether or not any distress actually arose. While monitoring behaviour may give rise to substantial harm – even relatively minor episodes in a relationship clearly have the potential to give rise to "distress." To categorise this behaviour as criminally "abusive" risks being dramatically excessive.

13. The Scottish Government have justified the proposed "reasonable person" test on the basis that it is "intended to ensure that innocuous behaviour which may have, for example, the effect of making a person dependent on their partner (e.g. arrangements around work or childcare) or which may amount to monitoring their partner (e.g. phoning to find out when they are coming home) is not inadvertently brought within the scope of the offence."

14. This is not a helpful approach. A key function of this Bill must be to discriminate between degrees of wrongful behaviour, not simply to distinguish wrongful behaviour from innocuous behaviour, or rational from irrational behaviour, as the Scottish Government implies. It is easy to foresee that some of the controlling behaviours potentially caught by the new offence will be both (a) unreasonable and (b) not of a severity to warrant criminal prosecution. The Bill's thresholds fail to deal with situations of this kind.

15. The Scottish Government have defended the no-harm requirement on the basis that "this approach is considered appropriate as it ensures that the court can take account of any particular vulnerability of the victim, without requiring COPFS to prove that the victim did in fact suffer physical or psychological harm, which might in many cases require the victim to give evidence to the court of the harm that they suffered and risks re-victimising the victim by forcing them to re-live, in court, the effects that the abuse had on them."

16. Respectfully, this seems a distinction without a difference. Complainers will be the key source of evidence in cases prosecuted under this offence. They will experience the often challenging, often unpleasant experience of testifying in open court and under cross-examination about the circumstances of their private life. There is no avoiding this in our adversarial system.

17. Complainers and witnesses will, inevitably, have to "re-live, in court" the nature of the behaviour that they have experienced. If this is "re-victimisation," it is difficult to see how it can be meaningfully avoided. If the purpose of this legislation is to prosecute the real and substantial harms which arise as a consequence of

sustained emotional abuse – it seems paradoxical that the legislation as drafted avoids restricting itself to the prosecution of behaviour giving rise to such serious injuries. Even if the Committee is not sympathetic to this observation – there is no reason why the offence, focused on the offender's behaviour, should not be defined as "abusive behaviour" which is likely to cause serious or substantial emotional harm to the complainer.

18. I would urge the Committee to consider the following doubts about the proposal as currently drafted:

1. Are the thresholds for criminalising behaviour in the Bill appropriately high?
2. In particular, is the low threshold of "distress" an appropriate definition of "psychological harm", in view of the very broad definition of "abusive behaviour" and the severity of the penalties potentially attaching to this offence?
3. Would it not be appropriate, for example, for the Crown to be obliged to demonstrate that the alleged "abusive behaviour" was of an intensity which the reasonable person would consider likely to give rise to "serious" or "substantial" psychological harm to the complainer, in echo of the English legislation?

19. A final word on the impact of corroboration. Any assessment of the effectiveness of the proposed offence must take account of the law of evidence, and in particular, the corroboration rule. Simply stated, the general rule of corroboration requires two independent pieces of evidence for all of the essential facts of a criminal case, the essential facts being that (a) a crime was committed and that it was (b) the accused who committed it.

20. Crimes committed in private, domestic contexts are notoriously difficult to prosecute under these rules. The complainer is likely to be a principal source of direct evidence that a criminal wrong has been committed – whether a sexual assault, or the proposed new offence of domestic abuse. It will be necessary therefore for prosecutors to discover a second source of evidence that the "abusive behaviour" took place, in order to meet the demands of legal sufficiency. This may well be provided, for example, by a family member or friend who witnesses "abusive" behaviour under the legislation with their own eyes.

21. Where abusive behaviour is undertaken via communications networks – communications data from mobile telephones and computers may be capable of corroborating the complainer's testimony. In many cases, however, this independent corroboration will not be available. In such circumstances, the accused cannot be convicted. It is essential the Committee understands that (a) evidence that the complainer was observed distressed after an "abusive" incident, or (b) subsequent statements made by the complainer to third parties about the alleged abuse – cannot be used under the current law independently to corroborate the complainer's direct evidence that the abuse actually took place.

22. Where the accused is alleged to have abused multiple partners – and the only evidence of this abuse is the direct evidence of more than one complainer – the Moorov doctrine may be applicable where the multiple courses of "abuse" are

connected by a similarity in “time, character and circumstance,” indicating an “underlying unity of intent such as to indicate a course of conduct on the part of the accused,” connecting the crimes committed against multiple complainers. This “mutual corroboration” will not be possible, however, where there is only one complainer, even if that complainer can testify to a range of different abusive episodes.

23. It may be appropriate, on this basis, for the Committee to consider whether it is appropriate for the corroboration rule to be disapplied to proceedings taken under this offence. This is approach is not unprecedented in Scots criminal law. however, likely to be an extremely controversial proposal. It is essential, however, that the efficacy of this new offence is understood in the context of the law of evidence now applying – and its potentially substantial impact on precisely the kind of cases the Bill aspires to address.

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