

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response to ensure that we handle your response appropriately



1. Name/Organisation

The Faculty of Advocates

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3. Permissions - I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

- (a) Do you agree to your response being made available to the public? (on the Scottish Government Consultation Hub)

Please tick as appropriate

Yes No

- (b) If you answered yes, please select an option below.

Please tick **ONE** of the following boxes

- (c) Do you agree to your organisation's **details** and **response** being made available to the public? (on the Scottish Government Consultation Hub)

Please tick as appropriate

- Yes, publish my response and details
 No, do not publish my response

(form continues below)

Yes, make my response
and name all available

or

Yes, make my response
Available without my
name (anonymously)

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate **Yes** **No**

CONSULTATION QUESTIONS

1. Are you content that any specific offence of domestic or partner abuse should be drawn so as to encompass both conduct, such as threats or physical abuse, which is currently criminal, and psychological abuse & coercive control?

Yes No

Comments:

The Faculty is content that a specific offence of domestic or partner abuse should encompass threats, physical abuse, psychological abuse and coercive control. It is acknowledged that drafting such an offence is not without difficulty.

2. Do you have any comments on the general structure of the offence set out above, in particular:

- **the requirement that a reasonable person would consider the accused's behaviour would be likely to cause the victim to suffer physical or psychological harm;**

Comments:

The Faculty recognises that the proposed test has the advantage of the prosecution not requiring to show that "B" was in fact adversely impacted by the behaviour. However, reliance on an objective test is problematic for a number of reasons.

First, the proposed test requires the reasonable person to assess the likely impact on B. The test of the likely impact of conduct on the reasonable person is one far more readily recognised in the criminal law – for example in relation to breach of the peace or section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. The adoption of a test of the likely impact on the reasonable person would achieve the aim of not requiring evidence to be led about the impact on B. The currently proposed test invites the fact finder to decide how the reasonable person might consider B, as an individual, is likely to be impacted. That in itself may necessitate that some evidence be led about the impact on B or about B as an individual. The stated objective would not be achieved.

That is not to say that the "reasonable person" test found elsewhere should be adopted here. Section 2 of the draft offence defines abusive behaviour. The definition includes behaviour that is violent, threatening or intimidating or behaviour that has as its purpose one of the effects listed or that a reasonable person would consider likely to have one or more of the effects. The effects listed are behaviours that have been routinely recorded in academic literature as typical of abusive behaviour. Such behaviours that are well documented as 'typical' of abusive behaviours may not be viewed as such by the reasonable person. It is

recognised that myths and misconceptions still inform attitudes and understanding of domestic abuse. Thus there is some value in the offence requiring evidence of harm to B in order to prevent any myths or misconceptions allowing a perpetrator to escape conviction.

The third difficulty with the absence of a requirement to show harm to B arises in cases where B is not the instigator of the complaint, where B is not in fact harmed, and where B does not themselves consider the conduct abusive. The effects listed in the draft offence may also arise in a non-abusive context. For example, the draft offence lists the effects of abusive behaviour as including making B dependent on A. This can include financial dependency. This could apply where one partner/spouse ceases paid employment to provide child care. If this is combined with seeking to control spending by the non-earning party on shoes or clothes, that may fulfil “effects” (a) and (c), as drafted. Where B does not consider this abusive, employing an objective test may cause difficulty.

- **the requirement for a course of behaviour consisting of behaviour on at least two occasions;**

Comments:

Employing a requirement for a course of conduct recognises that domestic abuse is not a series of isolated incidents.

- **the mental element of the offence to be intention to cause harm or recklessness as to harm being caused?**

Comments:

The adoption of either intention or recklessness as the mental element of an offence is common in criminal law. There is no reason, per se, why it should not be employed in respect of an offence of domestic abuse. However, the problems identified above in respect of the *actus reus*, where the stated “effects” of behaviour are very widely defined and may encompass behaviours that one would not expect to be criminalised, combined with both intention and recklessness as the *mens rea*, would not provide the legal certainty that is sought.

The Faculty notes that, in section 3(1)(b), liability can arise from an omission. One can envisage situations where a failure, for example, to provide money to a dependent spouse, thus perhaps controlling their access to sufficient food, can easily be recognized as abusive behaviour causing harm. It is rather harder to envisage a situation where criminal liability should properly be attributed for a failure to say something. There is a concern as to whether the definition is sufficiently clear, accessible and foreseeable to meet the requirement for legal

certainty. The risk of uncertainty is exacerbated when the *mens rea* for committing the offence by omission includes recklessness.

3. Do you have any comments on the definition of ‘abusive behaviour’ contained in the draft offence?

Comments:

Please note the response to question 2. In particular, the employment of the ‘effects’ of behaviour requires more detailed consideration and specification. The employment of an objective test, whilst being envisaged to aid prosecution, raises the issues narrated above.

The official definition of domestic abuse in Scotland, developed by the National Strategy to Address Domestic Abuse (2000), contains behaviours that are not criminalised but are evidenced as being common in abusive relationships, for example, withholding money. The Faculty recognises that there has been an attempt to criminalise those actions that make up the individual components of domestic abuse, when they occur against a background of coercive control, however, the approach adopted in section 2 does not achieve this. Whilst the Faculty recognises that there has been an attempt to define both the purpose and effect of abusive behaviour to demonstrate that those actions are part of on-going coercive control within a relationship, we are not of the view that this has been achieved. As noted in our previous response to “Equally Safe”, the Faculty is of the view that embodying a distinction between common couple violence and coercive control in a workable definition of a crime is extremely challenging. Further consideration of the “effects’ in section 2(2) will be required if a robust offence that will achieve Parliament’s aim of both legal certainty and protection from and criminalisation of domestic abuse is to be achieved.

4. Do you have any comments on the relationships the offence should apply to?

Comments:

Any offence of domestic abuse should be restricted to partners or ex-partners. This is necessary to keep the offence consistent with the definition developed by the National Strategy (2000) and other legislative provisions such as domestic abuse interdicts.

5. Do you have any comments on the proposed defence to the offence?

Comments:

In section 1(4)(a), the Faculty recommends the word “sufficient” be deleted. The Government’s expressed intention is to create what is known as an evidential burden only on the accused (strictly speaking this is not a “defence”). This is a common type of statutory provision (for example section 38(2) of the Criminal Justice and Licensing (Scotland) Act 2010). In order to discharge an evidential burden, an accused requires to “put the fact in issue”. Thereafter the Crown must discharge its legal burden of proof beyond reasonable doubt. The expression “sufficient evidence” is commonly used to mean “corroborated evidence”. The requirement for corroboration does not ordinarily apply to evidential burdens on an accused. It would therefore be appropriate to delete the word “sufficient”. There is no need for a substitute adjective since it will be a matter of law for the judge whether the evidence adduced “raises an issue” as to the reasonableness of the behaviour. Such a revised provision would achieve the aim of placing an evidential burden on the accused while the Crown retains the burden of legal proof.

This proposed draft defence applies an objective test of reasonableness. However, at paragraph 3.20 of the consultation document, the justification for there being a statutory defence is that there may be circumstances in which an accused reasonably believed his actions to be necessary to protect himself or others. If that is the rationale, then the draft defence does not appear to meet it, as the rationale appears to be based on partly subjective rather than entirely objective considerations.

The draft defence is not a defence of necessity (which, in any event, is available at common law in respect of any statutory offence). In order to reflect the stated intention, ought not the defence to be available in circumstances where the accused *reasonably believed* that his conduct was necessary for the protection of himself or others?

Consideration ought to be given to expanding section 1(3) to also include that it is a defence for a person to show that he reasonably believed the behaviour was necessary in the particular circumstances in order to protect himself or others, from harm.

6. Do you have any comments on the proposed maximum penalty for the offence?

Comments:

The Faculty traditionally does not comment on sentencing issues. However the rationale for ascribing higher maximum sentences than those available for stalking is not apparent. In those cases involving serious abuse, it seems highly likely that conduct will be capable of being prosecuted as a discrete offence of violence or a sexual offence. Many of these carry potential life sentences and it is there that the

gravity will be reflected. It is difficult to envisage a course of behaviour amounting to abuse which would not include offences of violence or sexual offences, and yet might warrant a 10 year prison sentence. It is also hard to envisage the Crown deciding not to prosecute an allegation of rape or serious violence as a discrete offence, whether or not they also label it as a statutory charge of domestic abuse.

7. Do you have a view on whether provision should be made to enable a court to convict the offender of ‘alternative’ offences without the need for these to be libelled in the complaint or indictment? If so, what offences do you think should be included as ‘alternative offences’?

Comments

The Faculty does not have a view on this matter.

8. Do you have any other comments on the draft offence attached to this consultation?

Comments:

Charges involving abuse and sexual violence against current and/or former partners commonly rely for proof on the rule of mutual corroboration (often referred to as the “Moorov doctrine”). This arises because of the difficulty in providing corroboration of the alleged crimes when they have occurred in private and are only spoken to by the complainer. The corroboration hurdle is overcome by the evidence of each complainer providing corroboration, provided there is sufficient connection in time, character and circumstances, and that the separate instances form part of a single course of criminal conduct being systematically pursued by the accused. The proposed definition of domestic abuse is very wide, evidenced by the proposed “effects”. The Faculty is concerned that as domestic abuse is to be defined by the effect of the behaviour, not by the conduct, mutual corroboration may arise between charges of domestic abuse where one is withholding money and the other (with a different complainer) is of serious assault or rape. These offences would potentially provide mutual corroboration because of underlying similarity of the coercive nature and effect of the behaviour and not the nature of the actual conduct. This would arguably lead to a widening of the doctrine of mutual corroboration as currently understood.