FACULTY OF ADVOCATES

Abusive Behaviour and Sexual Harm (Scotland) Bill

[1] The Faculty of Advocates is the professional body to which advocates belong. The Faculty welcomes the opportunity to provide written evidence to the Justice Committee of the Scottish Parliament in relation to the Abusive Behaviour and Sexual Harm (Scotland) Bill. We draw the Committee's attention to the Faculty's response to the Scottish Government's Consultation Paper: Equally Safe – Reforming the Criminal Law to Address Domestic Abuse and Sexual Offences http://www.advocates.org.uk/media/1924/final-faculty-response-equally-safe.pdf

PART ONE: ABUSIVE BEHAVIOUR

Section 1:

[2] The Faculty agrees that the creation of a statutory aggravation will promote the policy articulated in the Policy Memorandum. The proposed provision would address both abusive relationships that are underpinned by coercive control and what has been termed "common couple violence". The Faculty suggested in its response to the Government consultation paper that there is a material distinction between these two situations: the variety of circumstance may be reflected in different approaches to sentencing.

Sections 2-4:

[3] The Faculty agrees that there would be benefits in the creation of the proposed offence standing the policy articulated in the Policy Memorandum.

[4] We welcome the inclusion of statutory defences. In its submission to the Government, the Faculty suggested that there should be a further statutory defence where A shows that the distribution was, in the particular circumstances, reasonable – so that the law could be applied with flexibility having regard to the variable dynamics of personal relationships. While there might be a question about the certainty of such a defence, Parliament has legislated for such an objectively assessed statutory defence elsewhere (e.g. section 38 Criminal Justice and Licensing (Scotland) Act 2010).

[5] Further the absence of a "journalistic material" defence in the Bill, equivalent to that in the English Criminal Justice and Courts Act 2015, section 33) may cause serious problems in respect of UK-wide journalistic publications. If the intention of section 2(3)(d) is to create such a defence, it should be expressly stated.

Section 5:

[6] If NHOs are to be used to improve the safety of victims of abuse, improved enforcement of such orders and response to breaches will be necessary. The extension of the law to enable NHOs to be imposed where an individual had been found unfit to plead invites the question of whether a NHO could usefully be granted unless the offender understands its terms and is capable of complying with it.

PART TWO: SEXUAL HARM

Chapter 1 - Section 6:

[7] The Faculty opposes the introduction of statutory jury directions. The need for, and the appropriate content of, particular directions in the context of a particular case is best left to the trial judge who has heard the evidence and is fully aware of the issues in dispute in the trial.

[8] In relation to delayed disclosure, the Crown regularly leads expert evidence to explain that delay in disclosure is not unusual and has causes which are not related to the credibility and reliability of the witness. A statutory direction may result in the trial judge being seen by the jury to be endorsing such evidence, even if it is a matter in dispute in the particular circumstances of the individual case. In cases where there is agreement as to such expert evidence, the jury is bound to accept it, which renders a direction unnecessary.

[9] In relation to absence of physical resistance or force, the Faculty questions the necessity for the provision given the current definition of consent and the requirement for any belief in consent to be reasonable under the Sexual Offences (Scotland) Act 2009.

[10] The mere asking of a question should not lead to a mandatory direction. Questions and speeches are not evidence in the case and the jury will routinely be directed to that effect. Thus the directions provided for in this legislation are otiose and may prove confusing to the jury. The provisions in that regard may lead to issues being raised as to whether or not a question has been asked with a view to eliciting evidence of a particular nature.

Chapter 2 - Sections 7 and 8:

[11] The Faculty recognizes that these provisions fill a gap in the law, insofar as the current law allows the prosecution in Scotland of offences against children committed in other parts of the world, but not where the offence is committed in another part of the United Kingdom. We consider that decisions of local prosecutors elsewhere in the UK to prosecute or not to prosecute should be respected by the Scottish criminal justice system. Although there is provision for consultation under section 54B(3)(b)(i) it does not appear that a decision by a prosecutor in one of the other UK jurisdictions not to prosecute would require to be respected by the prosecution authorities in Scotland. It could be unfair to an accused if he or she has been told that he or she is not to be prosecuted for an offence by the prosecuting authorities in England & Wales or Northern Ireland, but is nevertheless prosecuted in Scotland

Chapter 3 – Sections 9-24:

[12] Chapter 3 seeks to provide increased statutory protection to adults and children from those who may commit sexual offences by replacing sexual offences prevention orders with sexual harm prevention orders. Sexual harm prevention orders will provide protection from sexual harm; sexual offences prevention orders presently provide protection from **serious** sexual harm. By removing the requirement for the sexual harm to be serious, the threshold for the making of an order will be lower. This will increase the scope of the statutory protection.

[13] The Bill provides for an order (unless it is a prohibition order on foreign travel) to last for a minimum period of 5 years. This period mirrors the period in the equivalent legislation which applies in England. Depending on the particular circumstances of a case and te particular prohibitions and/or requirements contained in a sexual harm prevention order, it might be argued that this statutory minimum period is arbitrary and could potentially infringe Article 5

(the right to liberty) and Article 8 (the right to respect for private and family life) of European Convention on Human Rights. It might be argued that the lower harm threshold should result in a shorter minimum period or in the introduction of a discretion as to the period of restriction. In such circumstances, it would remain open to the court to impose a longer period and/or for an order to be renewed where necessary.

[14] Section 19(7) of the Bill removes the entitlement to an oral hearing in respect of an application for the variation, renewal and/or discharge of an order. The present legislation [section 108(4) of the Sexual Offences Act 2003] provides for the subject, chief constable and, in some situations, the prosecutor to be heard by the court determining an application for the variation, renewal and/or discharge of an order. This mirrors the provisions (section 103 of the same Act) which apply in England. The Bill provides an opportunity to make representations. Having regard to (i) the potential restrictions and requirements of an order and (ii) the penalties for breaching an order, the Faculty considers that there should be an entitlement to an oral hearing whenever there is an application for such an order is to be varied, renewed or discharged except where the matter is dealt with by consent of both parties.

[15] The test for making an order [sections 10(4) and 11(2) of the Bill] and the test for renewal or variation of an order [section 19(5)] is one of necessity. Section 20 provides that an interim order may be made "if the sheriff considers it just to do so". The Faculty considers that this test should be amended. It is not a test routinely applied in the courts and is not defined. This carries the risk of inconsistency in interpretation and application. The Faculty considers that the test should be two fold: first whether a *prima facie* case of necessity is made out, and second, whether it is in the interests of justice to grant an interim order. This would reflect the sort of test the court is used to applying in respect of interim orders in other types of summary applications. The same test should apply to interim sexual risk orders.

[16] The maximum length of an interim order is not specified. Section 20(11) of the Bill allows for an interim order to be renewed. The Faculty respectfully suggests that consideration is given to specifying the maximum periods for an interim order and for an extended interim order.

Chapter 4 – Sections 25-34

[17] Chapter 4 seeks to provide increased statutory protection to children from harm and to provide statutory protection to adults by replacing risk of sexual harm orders with sexual risk orders. Whereas risk of sexual harm orders provide statutory protection to children only, sexual risk orders would provide protection to adults.

[18] Chapter 4 sets out criteria for making a sexual risk order which are different from the existing criteria for making a risk of sexual harm order. Firstly, only one prior act of a sexual nature would be required; the existing criteria require at least two acts. Secondly, while the prior act would require to be of a sexual nature, the act does not require to be criminal; the existing criteria require the sexual acts to be criminal and to involve a child. "Act of a sexual nature" is not defined. The Sexual Offences (Scotland) Act 2009 uses the term "sexual act." The Courts are also accustomed to dealing with acts which involve a "significant sexual element". Some consistency in definition may be appropriate.

[19] Depending on the particular circumstances of a case and the particular prohibitions and/or requirements contained in a sexual risk order made in the absence of a prior criminal offence the Faculty considers it possible that the order would infringe Article 5 (the right to liberty) and Article 8 (the right to respect for private and family life) of European Convention on Human Rights. The absence of flexibility as to the minimum period appropriate is of concern. Further, the possibility of unlimited applications for renewal gives rise to a risk that an individual who has never committed an offence may end up being subject to a sexual risk order for life.

[20] As presently drafted, it appears that the Bill provides no right to make representations or to an oral hearing in respect of the granting of the order in the first place. This is a matter of concern given the relatively low threshold for granted an order.

[21] Section 29(6) of the Bill removes the entitlement to a hearing. The present legislation (section 4(3)(b) of the Protection of Children and Prevention of Sexual Offences (Scotland) Act 2005) provides for the subject and chief constable to be heard by the court determining an application for the variation, renewal and/or discharge of an order. This mirrors the legislation [section 122D(3) of Sexual Offences Act 2003] which applies in England. The Bill provides an opportunity to make representations. Having regard to (i) the potential restrictions and requirements of an order and (ii) the potential penalties for breaching an order, the Faculty considers that there should be an entitlement to a hearing.

[22] The test for making an order in terms of section 26 of the Bill and the test for renewal or variation of an order is one of necessity whereas an interim order may be made "if the sheriff considers it just to do so" in terms of section 30. The Faculty reiterates its comment that such a test is poorly defined and that the familiar two fold test for interim orders should be applied. The maximum length of an interim order is not specified. Section 30 (9) of the Bill allows for an interim order to be renewed. The Faculty respectfully suggests that consideration is given to specifying the maximum periods for an interim order and for an extended interim order.

[23] In respect of prohibitions on foreign travel, the Faculty has two concerns. First the mandatory surrender of a passport may have unintended consequences such as difficulties for citizens in terms of providing identification for particular purposes (such as opening a bank account or registering for benefits). Further the Faculty notes the absence of any provision allowing an exemption for foreign nationals to return to their country of origin.

[24] It is not clear why the sentencing options for breach are limited to a fine or a prison sentence. Sentencing would best be left to the discretion of the court, subject to statutory maximums. The inability to impose a community payback order restricts the opportunity for rehabilitation. Further a "level 1" community payback order ought to be available in lieu of a fine to avoid the unnecessary imprisonment of offenders for whom a fine is appropriate but who do not have the means to pay.

[25] In terms of the appeal provisions, the Faculty considers it would be appropriate to permit appeal in relation to the appropriateness of the inclusion of a particular prohibition or requirement in the orders under chapters 3 and 4. It is not clear that such an appeal would be competent as the legislation is presently drafted.