
To: Education and Children Policy Board

On: 20 August 2015

Report by: Director of Children's Services

Heading: Consultation "Equally Safe - Reforming the criminal law to address domestic abuse and sexual offences"

1 Summary

- 1.1 The Scottish Government's commitment to tackling domestic abuse, as outlined in the Scottish Government's publication ***Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls*** recognises that while existing legal provision, such as common law offences of breach of the peace and assault, along with offences of alarming and threatening behaviour and stalking under the Criminal Justice and Licensing (Scotland) Act 2010, provides some powers to investigate and prosecute perpetrators of domestic abuse, more can be done to recognise the true causes and consequences of domestic abuse.
- 1.2 A national consultation exercise, Equally Safe - Reforming the criminal law to address domestic abuse and sexual offences was undertaken between 26 March and 19 June 2015.
- 1.3 The consultation exercise sought views on:
- creating a specific criminal offence concerning domestic abuse, if any specific offence of 'domestic abuse' should be restricted to people who are partners or ex-partners, or if it should cover other familial relationships.
 - creating a specific criminal offence to share private, intimate images of another person without their consent.
 - If there should be statutory jury directions which require the trial judge to make the jury aware that there may be good reasons why a victim of a sexual offence may not report that offence until some time after it has been committed and that this does not, in and of itself, indicate that the allegation is more likely to be false.

- If non-harassment orders should be available to the court after examination of the facts that the person did carry out the offence for which they are charged even when a perpetrator is not found criminally responsible for the offence or is unfit for trial.
- 1.4 Due to the timing of the consultation Renfrewshire's multi agency Gender Based Violence Strategy Group submitted a draft response, attached as an appendix.
-

2 Recommendation

- 2.1 The education and children policy board is asked to homologate the draft response to the consultation exercise, Equally Safe - Reforming the criminal law to address domestic abuse and sexual offences attached as an appendix.
-

3 Background

3.1 Domestic Abuse as a Specific Criminal Offence

Domestic abuse is not an individual incident or occurrence. Nor is it purely about physical abuse, although this can be a feature. Domestic abuse is pattern of behaviour that is sustained over time, which is based on control and coercion, and which is not appropriately recognised within our existing legal framework. The nature of the intimate relationship between perpetrators and women experiencing domestic abuse allows for the repeat abuse and victimisation of women and children, including young people, abuse that does not end when the relationship ends. Leaving an abuser is often the most dangerous time for women and children, and post-separation child contact is frequently used as a vehicle to continue the abuse and control. Psychological and emotional control is used, with the threat of physical and or sexual violence to frighten and control their victims. Perpetrators exert control to subvert the victim's autonomy and sense of self. These behaviours are part of a pattern of violence.

The key elements of the offence should:

- a. allow the court to take into account a variety of behaviours within a course of conduct in an intimate partner relationship, which together create an environment where the woman is controlled by the perpetrator and her participation, liberty, autonomy and self-determination are obstructed
- b. take into account the psychological harm on the woman and any children or young people involved and the impact on the day-to-day activities these behaviours cause, but without having to refer to an inappropriate and invasive benchmark of psychiatric diagnosis
- c. reflect the role that contact with children can play in enabling perpetrators to continue to pursue a regime of abuse, and the impact that this can have, not only on women, but also on their children, through placing them at ongoing risk and preventing recovery from abuse.

3.2 Gendered Analysis of Domestic Abuse

Including other family members who experience violence within relationships and others who experience abuse within a domestic context contravenes the gendered analysis underpinning Scotland's *Equally Safe* strategy. Violence against women is a consequence of women's inequality, and the dynamics of violence against women must be clearly set out in the public understanding and governmental response, which in turn inform the criminal justice response. Turning away from an analysis that places the inequality firmly in the context of partners and ex-partners, to a broader and indiscriminate framework that is essentially "family violence" will not achieve this, and will undo the work done by successive Governments in Scotland that has allowed us to reach the progressive and much admired position we enjoy in relation to our response to domestic abuse and violence against women here and abroad.

3.3 A specific criminal offence to share private, intimate images

An increasing numbers of women are experiencing non-consensual sharing of intimate media, more commonly known as "revenge porn" or the threat to share this, from partners or ex-partners through the internet and/or social media. Scottish Women's Aid has indicated from their research that the sharing or threat to share these images form part of ongoing patterns of abuse to which women and girls were being subjected. The motivation is to distress, alarm, and humiliate in addition to continuing to abuse and control social media sites generally. As such we would support this being addressed through legislation.

3.4 Statutory jury directions that there may be good reasons why a victim of a sexual offence may not report immediately.

Again we would support the proposal that where evidence is given which suggests that the complainer did not physically resist their assailant or that the accused did not use physical force against the complainer, the judge must:

- warn the jury that the fact that the complainer did not physically resist the accused, or sustain physical injury, or that it is not alleged that the accused used physical force against the complainer, does not of itself mean that the allegation that the offence was committed is false; and
- inform the jury that people react differently to non-consensual sexual activity and it should not be assumed that a victim will necessarily physically resist or loudly protest, and may be as likely to freeze or offer no resistance, and that the attacker may not use physical force to commit the offence."

3.5 Non-harassment orders should be available to the court even when there has been no conviction because the defendant is not found criminally responsible for the offence or is unfit for trial.

Currently a Non Harassment Order (NHO) is only available on conviction. This loophole was clearly demonstrated in the recent court case where a woman subjected to persistent stalking was left unprotected and was repeatedly harassed by the perpetrator. This was a consequence of him being found not fit to stand trial and undergoing an examination of facts, which does not constitute a conviction.

The fact that a perpetrator is not found criminally responsible for the offence or is unfit for trial should not be the sole and overriding factor in deciding whether a protective order is imposed. The safety of the victim must also, crucially, be a prime concern, and the Crown Office and Procurator Fiscal Service (COPFS) should be able to apply for a NHO if it is in the interests of the complainant, to ensure that she is not subject to future harassment or misconduct from the accused. This would also allow the Police, COPFS, and courts to respond appropriately to any breach of a protective order.

Implications of this report

1. Financial Implications

None.

2. HR and Organisational Development Implications

None.

3. Community Plan/Council Plan Implications

Children and Young People - None

Community Care, Health and Well-being - None

Empowering our Communities - None

Greener - None

Jobs and the Economy - None

Safer and Stronger - Victims of domestic violence are vulnerable within their own homes and communities. The proposed legislation will support the community planning partnership in ensuring that women can be safe from violence, be respected and free from abuse.

4. **Legal Implications**
None.
5. **Property/Assets Implications**
None.
6. **Information Technology Implications**
None.
7. **Equality and Human Rights Implications**

The recommendations contained within this report have been assessed in relation to their impact on equalities and human rights. No negative impacts on equality groups or potential for infringement of individuals' human rights have been identified arising from the recommendations contained in the report because for example it is for noting only. If required following implementation, the actual impact of the recommendations and the mitigating actions will be reviewed and monitored, and the results of the assessment will be published on the council's website.

8. **Health and Safety Implications**
None.
9. **Procurement Implications**
None.
10. **Risk Implications**
None.
11. **Privacy Impact**
None.

List of Background Papers

The foregoing background papers will be retained within Social Work for inspection by the public for the prescribed period of four years from the date of the meeting. The contact officer within the service is Dorothy Hawthorn, Head of Child care and Criminal Justice Services.

*Children's Services
DH
22 July 2015*

Author: Dorothy Hawthorn, 0141 618 6827
dorothy.hawthorn@renfrewshire.gcsx.gov.uk

Equally Safe – Reforming the criminal law to address domestic abuse and sexual offences



RESPONDENT INFORMATION FORM

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

1. Name/Organisation

Organisation Name

Renfrewshire Multi Agency GBV Strategy Group

Title Mr ☐ Ms ☐ Mrs ☐ Miss ☐ Dr ☐ *Please tick as appropriate*

Surname

Hawthorn

Forename

Dorothy

2. Postal Address

Renfrewshire council

Cotton Street

Paisley

Postcode PA1 1JD

Phone **0300 300 0345**

Email
Dorothy.hawthorn@renfrewshire.gcsx.gov.uk

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 (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate ☐ Yes ☐ No

- (b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available ☐

or

Yes, make my response available, but not my name and address ☐

or

Yes, make my response and name available, but not my address ☐

- (c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate ☒ Yes ☐ No

- (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. Does the existing criminal law provide the police and prosecutors with sufficient powers to investigate and prosecute perpetrators of domestic abuse? Yes / No (if No, please specify how the existing law should be strengthened)

Yes ☐ No ☒

Comments:

The existing legal process provide powers to investigate and prosecute perpetrators but the existing laws could be strengthened by making a clearer and more significant link to the elements/impacts of domestic abuse as detailed within the definitions of coercive control, making it about a pattern of abusive behaviour and not solely about a physical assault/threat and a single incident.

The prosecutor can then lead on the indictment from an evidence base that looks at all controlling behaviours over a period of time

2. One of the ways in which it has been proposed the law could be strengthened is through the creation of a specific criminal offence concerning domestic abuse. Do you agree that this would improve the way the justice system responds to domestic abuse?

Yes ☒ No ☐

Comments

This would provide an opportunity for the legal system to respond positively by highlighting the pattern of behaviour by the perpetrator. Should DA becomes a specific offence it can be assumed that great knowledge and skills will develop over time of those working within the legal system resulting in more positive outcomes for victims

3. What behaviours which are not currently criminalised should be included within the scope of a specific offence?

Comments

Coercive Control – isolation (jealousness and possessiveness, controlling who she speaks to and where she goes, etc.) This can be exercised for example through;

- Child contact (enabling perpetrators to continue the abuse)
- Psychological harm (putting her down and name calling etc and impact on daily living)
- shame and blame (blames her for her own abuse) making all the decisions, denies her rights, prevents her from going to work or education. Creates debt for which she becomes responsible.

Also, using the children and criticism of her parenting against her either by continually reporting her to social work, continual requesting hearings for child access,

4. Should any specific offence of 'domestic abuse' be restricted to people who are partners or ex-partners, or should it cover other familial relationships?

Comments

Yes – The dynamics of the abuse relationship are reflected both within the Scottish government's definition of Gender Based Violence and the model of coercive control. This would also sit well the Domestic Abuse Risk assessment currently being used within the Assist service.

DA within intimate partner relationships has a different power base from that of other forms of family violence. Including other family members who experience within a domestic context contravenes the gendered analysis underpinning our *Equally Safe* strategy.

Child Protection and Adult Protection should be used to protect any individual from violence or abuse occurring within familial relationships.

5. Are there any other comments you wish to make about the creation of a specific offence of domestic abuse?

Comments

This would be a welcome addition to our legal system since it has the potential to maximise the safety of women and children and ensure perpetrators receive a robust and effective response.

This will in fact could create a clearer distinction between DA and other forms of conflict (ie. situational couple violence and violent resistance)

Some caution must be taken, given to the points raised by SWA about the increasing number of dual arrests for DA, so that perpetrators cannot use the new legislation to criminalise women.

6. Do you think that there should be a statutory aggravation that a criminal offence was committed against a background of domestic abuse being perpetrated by the accused? Yes/No if no, please give reasons for your answer

Yes ☒ No ☐

Comments

7. If you think that there should be a statutory aggravation of this kind, do you think this should be in addition to, or instead of, a specific statutory offence of 'domestic abuse'? Give reasons

Comments

The statutory aggravation should be in addition to a specific statutory offence.
This will allow for the case to be built around discrete abusive behaviours ensuring the court recognises the victim's experiences.

8. Do you agree that it should be a specific criminal offence to share private, intimate images of another person without their consent? If no, give reasons

Yes ☒ No ☐

Comments

Recognised that this is an increasing 'trend'

9. Do you agree with the proposal that the offence should be restricted to images?

Yes ☐ No ☒

Comments

This could be made wider to allow for other kinds of communication media/methods such as email, texting, with private message-type systems, where personal and intimate content is shared for malicious purposes/embarrassment/blackmail of the other person

10. Should the types of images covered by the offence be based on the definition of a 'private act' contained at section 10 of the Sexual Offences (Scotland) Act 2009? Or do you think a definition which defines an image as 'private and intimate' if the person featured in the image and the person sharing the image understand it to be such would be more appropriate?

Comments

The 'private and intimate' definition would take account of the many ways an abusive (ex)partner may try to control or humiliate and/or blackmail their victim. The burden of proof would require only that the individual shared the images with deliberate intent to humiliate or control their victim because they .

11. Do you agree that the offence should be framed so that a person commits an offence where they share a private image of another person and they knew or ought to have known that its sharing/distribution would be likely to cause that person alarm or distress

Yes ☒ No ☐

Comments

This emphasises the deliberate nature of this behaviours as a means to have control over or punish another

12. Do you agree that it should be an offence to threaten to share private, intimate images of another person without their consent?

Yes ☒ No ☐

Comments

Threats to expose intimate images are consistent with strategies to control or punish their partner

13. What level of maximum penalty do you think should apply for the new offence? Do you have any other comments regarding the penalties for the new offence?

Comments

5 months to 6 years as proposed

14. Do you think that there should be statutory defences to the proposed offence of disclosing a private, intimate image?

Yes ☒ No ☐

Comments

This offers clarity and guidance to the legal process

15 If so, what defences do you think should be provided and why do you think they are needed?

Comments

As listed in section 2.32 of the Equally Safe consultation doc.

16. Do you agree that there should be statutory jury directions which require the trial judge to make the jury aware that there may be good reasons why a victim of a sexual offence may not report that offence until some time after it has been committed and that this does not, in and of itself, indicate that the allegation is more likely to be false?

Yes ☒ No ☐

Comments

Yes - Addresses issues where common misconceptions or juror values or attitudes to rape/sexual offence would negatively impact on the case – Reminders or explanations of how the law see this may be required during the trial should it be inferred otherwise.

Also useful at the point of closing directions to the jury to remind jurors to disregard any insinuation made to this effect.

17. Do you consider that the terms of the jury direction used in New South Wales, Australia, requiring the judge to warn the jury that the absence of complaint or delay in complaining does not necessarily mean an allegation is false and that there may be good reasons why a victim of a sexual assault may hesitate in making, or refrain from making a complaint about the assault, is an appropriate model for a similar direction in Scots law?

Yes ☒ No ☐

Comments

This would allow for the judge to deal immediately with suggestions that the victim is somehow at fault for delaying to report the offence.

18. Do you agree that there should be **statutory jury directions which require the trial judge to make the jury aware that there may be good reasons why a victim of a sexual offence may not physically resist their attacker and that this does not indicate that it is false?**

Yes ☒ No ☐

Comments

Addresses issues where common misconceptions or juror values or attitudes to rape/sexual offence would negatively impact on the case – a reminder during the trial as required should it be inferred otherwise and at the point of closing directions to the jury to disregard

19. Do you have any comments on how such a statutory jury direction should be worded?

Comments

It should be noted that all women respond very differently to sexual violence and indeed to any other form of trauma that they experience. There should, therefore, be no importance placed on when the complainer made her first disclosure or, indeed, when she made the decision to report to the police. The idea that women's responses to sexual violence is a linear process is completely misleading as often shock, disbelief of what has happened and fear can inform the reactions women have. For example a woman may carry on as though nothing has happened, go to work as normal and tell no one in the immediate aftermath. This does not mean that the assault has not occurred.

It is also a misconception that all sexual assaults/rapes involve physical violence. Again this is misleading as often no violence is used. Women may appear to comply with the attacker due to fear or because she believes that to defend herself may lead to further injury or perhaps death, therefore physical injury to the woman should not be a requirement of proof of the assault. Another situation where violence need not be used is if the woman is intoxicated, drugged, asleep or in any other way does not have the capacity to give or withhold her consent.

Intimate partner sexual violence may not be physically violent, although is no less traumatic for the woman. Unwanted sex without consent is still rape.

20. Do you agree that non-harassment orders should be available to the court where the court is satisfied, following an examination of facts, that a person did carry out the acts constituting the offence with which they were charged?

Yes ☒ No ☐

Comments

This would offer the victim of this crime a speedier resolution and immediate protection and would close current loopholes in the law

21. If you do not support extending the circumstances in which the courts can make a non-harassment order in this way, do you have any views on other approaches that would protect victims from harassment or stalking by persons found unfit for trial?

Comments

n/a

22. Do you agree that the provisions concerning extra-territorial effect of Scots law on sexual offences against children should be amended to enable Scottish courts to prosecute offences committed in other jurisdictions within the United Kingdom?

Yes ☒ No ☐

Comments

This would be beneficial.

There is evidence to suggest this change would benefit a number of cases including those where trafficking has occurred.

23. Do you consider that any of the reforms proposed in this paper will have a particular impact - positive or negative - on a particular equality group (e.g. gender, race, disability, sexual orientation)

Yes ☐ No ☐

Comments

Yes

Positive impact for women who in the main are the victims of these crimes. Positive impact for women from BME community or those with a disability (disabled women and girls disproportionately experience GBV) Coercive Control is comprehensive, and encompasses the additional ways in which women can be controlled and abused because of their race or disability.

This model is also sensitive to issues faced by others from GLBT community.

24. Are there any other issues relating to equality which you wish to raise in relation to the reforms proposed in this paper?

Comments

25. Do you have any comments or information on the likely financial implications of the reforms proposed in this paper for the Scottish Government (police, Scottish court service, prison service, COPFS), local government or for other bodies, individuals and businesses?

Comments

Financial and increased activity/workload because more of the reported cases will be heard at court.

Training for legal staff to ensure understanding and appropriate values and attitudes prevail

26. Do you consider that any of the proposals would have an impact on island communities, human rights, local government or sustainable development?

Comments

Impact on the Sherriff courts covering the islands - Access for women from rural communities to these courts or centralised alternatives may mean women find difficulty in access services and therefore justice.

27. Do you have any other comments about the content of this paper?

Comments

What provision will there be in the law in relation to offences found out about by the complainer after the law has been made but the images themselves and/or the sharing of them pre-dates the law.