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Domestic Violence: The Criminal Law Response.

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Introduction.

Domestic violence is serious violence and should be severely dealt with by the criminal law. There is no offence of domestic violence as such instead the criminal law responds to it with a number of different offences which will be considered in this article as will the issue of how a prosecution for domestic violence is facilitated. The orders available to deal with domestic violence will also be examined. There is a legal definition of domestic violence contained in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) as follows:

“[D]omestic violence” means any incident of threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other.¹

This definition to a large extent mirrors the non-legal definition of domestic violence that was used by the government until 31st March 2013² when the non-legal definition was changed so that “domestic violence and abuse” is now defined as follows:

Any incident or pattern of incidents of controlling³, coercive or threatening⁴ behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can

¹ Schedule 1, Part 1, paragraph. 12(9). “Associated individuals” are those as defined in section 62 of the Family Law Act 1996 and does not just include partners but can include relatives such as parent and child.

² “Any incident of threatening behaviour, violence or abuse [psychological, physical, sexual, financial or emotional] between adults who are or have been intimate partners or family members, regardless of gender or sexuality”.

³ Controlling behaviour is a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.

⁴ Coercive behaviour is an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.

encompass, but is not limited to, the following types of abuse: psychological, physical sexual, financial and emotional.⁵

This new definition, which is not a legal definition, includes so called “honour” based violence, female genital mutilation and forced marriage, and is clear that victims are not confined to one gender or ethnic group.⁶ This new definition provides welcome clarity and reflects the fact that young people as just as likely to suffer domestic abuse as any other age group. The definition in LASPO will need to be changed to reflect this clarity.

The criminal law’s response to domestic violence.

The new definition of domestic violence has to be wide because domestic violence takes many forms and to deal with it the criminal law has a variety of offences that can be prosecuted. The law is complex but to aid prosecutors the Crown Prosecution Service (CPS) has produced an *aide-memoire* which is available on the CPS website.⁷

In addition, there are now two specific offences of stalking which have been added to the Protection from Harassment Act 1997 (PHA) by the Protection of Freedoms Act 2012.⁸ The first is the basic offence of “stalking”⁹ and the second an aggravated offence of “stalking involving fear of violence or serious alarm or distress”.¹⁰ The former offence could be used in response to excessive personal contact whilst the latter could be a response to menacing telephone calls, text messages or letters.

The substantive law is complex but it has to be so because of the large number of behaviours which can count as domestic violence. It is not feasible to define a domestic violence offence, or even offences, which cover all of this conduct. Perhaps what is more important is how a prosecution involving domestic violence is facilitated and what orders are available after a conviction or indeed an acquittal.

⁵ <http://www.homeoffice.gov.uk/crime/violence-against-women-girls/domestic-violence/>. Accessed 27th March 2013.

⁶ Ibid.

⁷ http://www.cps.gov.uk/legal/d_to_g/domestic_violence_aide-memoire/index.html. Accessed 27th March 2013.

⁸ Section 111.

⁹ PHA section 2A.

¹⁰ PHA section 4A.

How is a prosecution involving domestic violence facilitated?

Given the large number of offences that can be used to prosecute domestic violence there needs to be specialisation to facilitate the effective prosecution of these offences. This has been achieved in a number of ways. First, there is the use of Independent Domestic Violence Advisers (IDVAs) whose role is, inter alia, help victims in respect of the prosecution of domestic violence.¹¹ Second, there is the Code of Practice for Victims' of Crime. The code means that all victims must be told when a suspect has been arrested and why an offender received a particular sentence as a matter of course. A victim's rights include the right to information about the crime within specified time scales, including the right to be notified of any arrest and court cases. There is also the right to an enhanced service in the cases of vulnerable or intimidated victims which applies to victims of domestic violence. Third, every CPS area, including CPS Direct, has a coordinator responsible for domestic violence and Crown Prosecutors are given training in respect of domestic violence. This has increased the conviction rate for criminal offences relating to domestic violence. Fourth, there has been the roll out of specialist domestic violence courts (SDVCs). SDVCs identify domestic violence related cases and carry out a fast-track process that deals solely with criminal offences relating to domestic violence. This has encouraged a multi-agency approach to domestic violence within the criminal justice process.¹² These specialised courts have increased the conviction rate of domestic violence offences. In 2007-8 the CPS prosecuted 75,000 cases involving domestic violence against women and girls. By 2011-12 that number was 91,000. Over the same period the number of convictions rose from 52,000 to almost 67,000.¹³ Fifth, there are special measures for victims and witnesses. These are a series of provisions that help vulnerable and intimidated witnesses give their best evidence in court and help to relieve some of the stress associated with giving evidence. Special measures

¹¹ IDVAs can represent the victim at a Multi-Agency risk Assessment Conference (MARACs).

¹² The Specialist Domestic Violence Court (SDVC) programme has been running since 2005 and there are now 127 courts, across England and Wales. Local Criminal Justice Boards (LCJBs) will have responsibility for the governance and performance management aspects of SDVCs from the 1st April 2010.

¹³ http://www.cps.gov.uk/news/articles/prosecuting_violence_against_women_and_girls_improving_culture_confidence_and_convictions/ Accessed 31st March 2013.

apply to prosecution and defence witnesses, but not to the defendant. Victims of domestic violence, who are very likely to be vulnerable and intimidated as a witness, can make use of these special measures.¹⁴ These measures may be the difference between a domestic violence prosecution succeeding or failing because without the victim's evidence the CPS is frequently unwilling to proceed with a prosecution.

The restraining order.

There is an order which is particularly useful in relation to domestic violence and that is the restraining order. A restraining order is a court order intended to protect victims of domestic violence from further harm or harassment by keeping the abuser away from the victim. This may involve keeping the abuser from the scene of the violence, which may include victim's home or place of work. It is a civil order and it does not give the abuser a criminal record. Previously a restraining order could only be imposed upon a defendant following their conviction of the basic or aggravated forms of harassment under the PHA.¹⁵ However, section 12 of the Domestic Violence, Crime and Victims Act 2004 amended the PHA to allow for a restraining order to be made either when a defendant is convicted of *any* offence¹⁶ or, more controversially, when a defendant is acquitted of *any* offence¹⁷ if the court considers the order is necessary to protect a person from harassment by the defendant.¹⁸ The court will have regard to the evidence it heard during the criminal trial when determining whether a restraining order is required. However, further evidence may be required especially where the defendant has been acquitted and the civil standard of proof is applied.¹⁹ Breach of a restraining order is a criminal offence for which the punishment is a maximum of five years imprisonment on indictment. There is a defence of reasonable excuse.²⁰

Conclusion.

¹⁴ Sections 23-30 Youth Justice and Criminal Evidence Act 1999.

¹⁵ Section 2 (basic) and section 4 (aggravated).

¹⁶ PHA section 5.

¹⁷ PHA section 5A.

¹⁸ Harassment is defined in section 7 (2) PHA as causing a person alarm or distress. A person who is in "fear of violence" will be alarmed and distressed thus making the use of the term "fear of violence" in section 5 redundant.

¹⁹ Whilst a court can make a restraining order of its own volition, prosecutors also have an obligation to remind sentencing courts of the option of making a restraining order, including when the defendant has been acquitted. The procedural rules for making applications are set out in Part 50 of the Criminal Procedure Rules. These apply in both the magistrates' court and the Crown Court.

²⁰ Section 5 and section 5A PHA. The criminal standard of proof is applied when there is a prosecution for the alleged breach of a civil order.

The response of the law to domestic violence is complex for not only is there the criminal law response outlined above there is also the civil law response. Under the Family Law Act 1996 a person who has been subject to domestic violence can apply for a non-molestation order from a civil court in which the civil standard of proof applies.²¹ Breach of a non-molestation order is a criminal offence for which the punishment is a maximum of five years imprisonment on indictment.²² Non-molestation orders are resonant of restraining orders in that both can be made where the court is satisfied, to the civil standard of proof, that either the victim or another person requires protection from the abuser. The PHA also has a civil side, as in a civil action for the statutory tort of harassment, there can be an award of damages together with a civil injunction, the violation of which is a criminal offence also carrying a maximum of five years imprisonment on indictment.²³

The law needs to be simplified but its complexity grows. For example, domestic violence protection notices and orders (DVPOs) are available in West Mercia, Wiltshire and Greater Manchester police areas. DVPOs give victims - who might otherwise have had to flee their home - time to get the support they need. Before these orders, there was a gap in protection, because the police could not charge the abuse for lack of evidence (and therefore the abuser could not be remanded in custody although he could be subject to bail conditions) and because the process of granting an injunction took time. DVPOs close that gap. They give police and magistrates the power to protect a victim immediately after an attack, by stopping the abuser from contacting the victim or returning home for up to 28 days. These orders are to be welcomed and they should be rolled out throughout England and Wales but they do add to the complexity of the law.

There is also the use of community resolutions to deal with incidents of domestic violence. Community resolutions involve restorative justice techniques, such as the offender apologising to the victim, paying compensation or repairing any damage caused. Unlike a caution, a community resolution does lead to a criminal record. These resolutions were used in 2,488 domestic violence cases in 2012. Three conditions have to be satisfied for restorative justice to be an option-low level harm, the offender accepting their guilt and the

²¹ Section 42.

²² Section 42A.

²³ Section 3 PHA.

victim has to consent. In respect of domestic violence doubts may arise as to whether the victim genuinely consents and there is evidence that community resolutions are being used in cases of domestic violence involving serious violence. This development is a cause for concern because it is bad for victims of domestic violence and therefore bad for justice. It should be noted that the increase in community resolutions has occurred since the Coalition Government started cutting police budgets.²⁴

The state's response to domestic violence could be simplified. That simplification could be achieved by giving the jurisdiction for dealing with domestic violence solely to the criminal justice process. There is evidence that this is already happening *de facto* as the number of applications for non-molestation orders is reducing as many victims of domestic violence turn first to the criminal justice process.²⁵ The reason for this switch is that the criminal justice process has specialised in response to domestic violence, in particular with the introduction of SDVCs. This specialisation is lacking in the civil courts. There is also the difficulty in obtaining civil legal aid through the domestic violence gateway.²⁶ In addition there is a case for rationalising the number of different orders and resolutions currently available to deal with domestic violence so that victims have a better understanding of the legal process and thus know where to go and what to apply for.

An earlier version of this article first appeared in the Criminal Law and Justice Weekly in April 2013.

²⁴ <http://www.bbc.co.uk/news/uk-22346971> accessed 30 April 2013.

²⁵ M. Burton "Civil Law Remedies for Domestic Violence: Why Are Applications for Non-Molestation Orders Declining?" (2009) *Journal of Social Welfare & Family Law* 109.

²⁶ The Civil Legal Aid (Procedure) Regulations 2012 regulation 33. See W. Hewstone "The Impact of LASPO" *Hampshire Legal, Journal of the Hampshire Law Society*, Spring 2013 pp 24-25.