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Defence on Grounds of Reasonableness

The briefing should not be relied upon as legal or professional advice (or as a substitute for these) and a suitably qualified professional should be consulted if specific advice or information is required.

1 Introduction

This Briefing Note has been prepared for the Committee for Justice in the context of its consideration of the Domestic Abuse and Family Proceedings Bill. Clause 12 of the Bill provides that, in respect of a charge of the domestic abuse offence, it is a defence for a person to show that the course of behaviour was reasonable in the particular circumstances.

Reasonableness is a construct found in many branches of law and the reasonable person standard is not uncommon in criminal law. This does not, however, signify consensus regarding the standard and one legal expert has noted that:

Countless legal standards ask what the 'reasonable person' would do. But who is this person? The reasonable person is not just the average person. That's

easily seen. Sometimes, average people do unreasonable things. This insight has led theorists to propose the reasonable person as some 'ideal person', such as the virtuous person, the person who achieves the best consequences, or the person who acts in accord with moral duty.

But this is all too quick. The reasonable person isn't just the average person, but neither is it simply the ideal person. Instead, the 'reasonable person' represents someone who is both common and good.¹

In this paper, the reasonableness defence contained in clause 12 is examined through comparison with a number of other statutory defences in criminal law, including those relating to coercive control and domestic abuse offences.

2 Domestic Abuse and Family Proceedings Bill - Clause 12

Clause 12 of the Domestic Abuse and Family Proceedings Bill states the following:²

Defence on grounds of reasonableness

12.—(1) In proceedings in respect of a charge against a person ("A") of the domestic abuse offence, it is a defence for A to show that the course of behaviour was reasonable in the particular circumstances.

(2) That is shown if —

(a) evidence adduced is enough to raise an issue as to whether the course of behaviour is as described in subsection (1), and

(b) the prosecution does not prove beyond reasonable doubt that the course of behaviour is not as described in subsection (1).

The Explanatory and Financial Memorandum which accompanies the Bill states that:

This clause provides that it is a defence for the accused to show that the course of behaviour was, in the particular circumstances, reasonable. This may apply where, for example, the accused acted to prevent their partner from associating with certain persons or frequenting certain places if they are recovering from alcohol or drug addiction or to restrict their freedom of movement for their own safety due to the effects of suffering from dementia.

Subsection (2) allows for the accused to adduce evidence that is enough to raise an issue as to whether the course of behaviour was reasonable, with the prosecution then needing to disprove this version of events. Nothing in this

¹ Tobia, K. (2019) Legal standards invoke the 'reasonable person'. Who is it? <https://aeon.co/ideas/legal-standards-invoke-the-reasonable-person-who-is-it> [accessed 26/08/2020]

² Domestic Abuse and Family Proceedings Bill <http://www.niassembly.gov.uk/assembly-business/legislation/2017-2022-mandate/primary-legislation---bills-2017---2022-mandate/domestic-abuse-bill/> [accessed 26/08/2020]

clause affects the broader requirement for the prosecution to prove beyond reasonable doubt that the offence has been committed.³

3. Defence of the grounds of reasonableness

The specific statutory defence that provides for a person to show that his or her course of behaviour was reasonable in the particular circumstances is found in a number of pieces of criminal law statute including:

- Protection from Harassment Act 1997
- Criminal Justice and Licensing (Scotland) Act 2010
- Serious Crime Act 2015
- Domestic Abuse (Scotland) Act 2018

The relevant provisions of each piece of legislation are considered below.

Protection from Harassment Act 1997⁴

Section 1 of the Protection from Harassment Act 1997⁵ prohibits a course of conduct which amounts to harassment. Section 1 also provides, in subsection 3, that a course of conduct will not constitute harassment if the person who pursued it shows:

- (a) that it was pursued for the purpose of preventing or detecting crime,
- (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
- (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

Criminal Justice and Licensing (Scotland) Act 2010⁶

Section 39 of the Criminal Justice and Licensing (Scotland) Act 2010 created an offence of stalking. The section also provides, in subsection 5, that it is a defence for a person charged with the offence of stalking to show that the course of conduct:

- (a) was authorised by virtue of any enactment or rule of law,
- (b) was engaged in for the purpose of preventing or detecting crime, or
- (c) was, in the particular circumstances, reasonable

³ Domestic Abuse and Family Proceedings Bill – Explanatory and Financial Memorandum <http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2017-2022/domestic-abuse/domestic-abuse-bill---efm---as-introduced.pdf> [accessed 26/08/2020]

⁴ <https://www.legislation.gov.uk/ukpga/1997/40/contents> [accessed 26/08/2020]

⁵ Provisions extend to England and Wales only.

⁶ <https://www.legislation.gov.uk/asp/2010/13/contents> [accessed 26/08/2020]

Section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 created the offence of ‘Threatening or abusive behaviour’ and also provides, in subsection 2, that it is a defence for a person charged with such an offence ‘to show that the behaviour was, in the particular circumstances, reasonable’.

Serious Crime Act 2015⁷

The Serious Crime Act 2015 (section 76 subsection 1)⁸ created an offence of controlling or coercive behaviour in intimate or family relationships, other than parent-child or analogous relationships. A specific defence which may be invoked in the limited circumstances is provided for by subsections (8) to (10) of section 76.

(8) In proceedings for an offence under this section it is a defence for A to show that—

(a) in engaging in the behaviour in question, A believed that he or she was acting in B's best interests, and

(b) the behaviour was in all the circumstances reasonable.

(9) A is to be taken to have shown the facts mentioned in subsection (8) if—

(a) sufficient evidence of the facts is adduced to raise an issue with respect to them, and

(b) the contrary is not proved beyond reasonable doubt.

(10) The defence in subsection (8) is not available to A in relation to behaviour that causes B to fear that violence will be used against B.

The Explanatory Note⁹ which accompanies the Serious Crime Act provides the following commentary on subsections (8) to (10).

Subsections (8) to (10) provide for a limited defence where the accused believes he or she was acting in the best interests of the victim and can show that in the particular circumstances their behaviour was objectively reasonable. The defence would not be available where a victim has been caused to fear violence (as opposed to being seriously alarmed or distressed). This defence is intended to cover, for example, circumstances where a person was a carer for a mentally ill spouse, and by virtue of his or her medical condition, he or she had to be kept at home or compelled to take medication, for his or her own protection or in his or her own best interests. In this context, the person’s behaviour might be considered controlling, but would be reasonable under the circumstances. The evidential burden will apply to the defence, that is, it will be enough for a defendant to produce sufficient evidence for the matter to be considered by the jury; it would then be for the prosecution to demonstrate to the criminal standard

⁷ <https://www.legislation.gov.uk/ukpga/2015/9/contents/enacted> [accessed 26/08/2020]

⁸ Provisions extend to England and Wales only.

⁹ <https://www.legislation.gov.uk/ukpga/2015/9/notes/division/3/5/2/11> [accessed 26/08/2020]

of proof, namely beyond reasonable doubt, that the defence has not been made out.

Statutory guidance issued by the Home Office under section 77 of the Serious Crime Act states that:

Subsections (8) to (10) of Section 76 of the Act provide for a defence where the suspect or defendant believes he or she was acting in the best interests of the victim and can show that in the particular circumstances their behaviour was objectively reasonable.

The defence outlined above is not available to those who have caused another person to fear that violence could be used against them.

In order to be able to rely on the defence, a defendant needs to show that they believed that they were acting in the best interests of the victim and that their actions were reasonable in the circumstances. Therefore, a person who genuinely believed that they were acting in the other person's best interests but where a reasonable person with access to the same information would not find that behaviour to have been reasonable would not be able to rely on the defence.

For example, it is not just a question of A saying "I think it was in B's best interests." There is an objective element to the defence that allows a magistrates' court or a Crown Court jury to reject the defence where they find that the behaviour of the defendant was not reasonable in all the circumstances.¹⁰

Some analysis considers the defence appropriate given the nature of the controlling or coercive behaviour offence itself.

Having a wide-ranging offence that encompasses the many forms of abuse is the only effective way of capturing the broad behaviour designed to destroy personal autonomy. However, it is also imperative that the offence is not so far reaching that it criminalises anything less than acts which result in undermining victim's privacy, self-respect and autonomy. Appropriately, the English coercive control offence also contains specific defences, including if the defendant was acting in the best interests of the victim, or if the behaviour was reasonable in the circumstances. An example of this could be controlling the finances of someone with an intellectual disability to ensure they have enough to sustain their living costs. However, the accused abuser may not avail of these defences where they have caused the victim to believe physical violence will be used against them. Adding an objective defence where the behaviour was reasonable

¹⁰ Home Office (December 2015) Controlling or Coercive Behaviour in an Intimate or Family Relationship - Statutory Guidance Framework https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf paras 46-49 [accessed 26/08/2020]

under the circumstances allows for the defendant to rely on an objective standard to justify his actions and protect from any unjust conviction.¹¹

Others, however, have questioned the need for such a defence given the mental (*mens rea*) elements of the offence.

...the defendant must either know the behaviour would have a serious effect on the victim or “ought to have known” based on a reasonable person in possession of the same information. The effect must cause serious alarm or distress culminating in a substantial adverse effect on the victim’s usual day-to day activities (author’s own italics added). Benign instances of administering medication or keeping the victim at home indicate actions that, contrary to having an adverse effect on the victim’s activities, have a positive effect. This could be supported by medical evidence and would mean that the *actus reus* of the offence could be disproved. In this context the defence is therefore redundant. The example set out in the Explanatory Notes does convey behaviour that might be considered controlling, although such behaviour would not necessarily have a substantial adverse effect on the victim’s daily activities. In some instances, the care needed may have a short term substantial adverse effect on the victim for a longer term gain and the defendant would be able to rely on s.76 (8). However, this defence extends further than is desirable. Preferable would be an alternative provision providing a defence only where the defendant had received prior medical approval to employ the specific controlling or coercive behaviour in question. Seeking advice from professionals would help carers to administer the treatment required and provide an opportunity for professionals to check on their patient and the patient’s needs.¹²

The defence contained in subsection 8, labelled by some as the ‘carers defence’, has been, and will likely continue to be, subject to consideration during passage of the Domestic Abuse Bill in Westminster. A House of Lords Library Research Briefing notes that:

A non-government clause (new clause 25), supported by Labour MPs and others, sought to repeal the ‘carers defence’ for the offence of controlling or coercive behaviour in intimate or family relationships. This offence is found within the Serious Crime Act 2015 (the SCA). Section 76(8) of the SCA provides a defence where a person believed they were acting in the victim’s best interest.

¹¹ Sheehy, D. (2019) Toward a new ‘measuring of harm’: A critique of the offence of ‘coercive control’ under the Domestic Violence Act 2018 *The King’s Student Law Review*, Vol 10, Issue 1 <https://blogs.kcl.ac.uk/kslr/files/2019/10/Article-3-10.1-.pdf> [accessed 26/08/2020]

¹² Bettinson, V. (2016) Criminalising coercive control in domestic violence cases: Should Scotland follow the path of England and Wales? *Criminal Law Review*, 3, pp. 165-180

Peter Kyle, Shadow Minister for Justice, spoke of data suggesting that disabled adults are at least 1.5 times more likely to be a victim or survivor of violence than non-disabled adults. Mr Kyle said:

The [new clause 25] reflects 10 years' worth of casework by Stay Safe East, one of only two organisations in England and Wales led by disabled women supporting disabled survivors, and its partner organisations, in an advisory group on domestic abuse and disability.

The Parliamentary Under Secretary of State for Justice, Alex Chalk, did not support the amendment:

If an individual does not have that defence, considering the elements of section 76 [of the SCA], we would be left with a person who is apparently being caused some distress—as would be evident to the first responder, or indeed to a police officer, who might have to effect an arrest—and the distress would appear to have been caused by that person's liberty having been restricted. In those circumstances, unless the individual has the defence that they were exercising proper control in the interests of the other person, they are at risk of being arrested and prosecuted.

Mr Kyle subsequently withdrew the new clause. He said he hoped it would be considered again in the House of Lords.¹³

Domestic Abuse (Scotland) Act 2018¹⁴

Part 1 of the Domestic Abuse (Scotland) Act 2018 contains provisions relating to the creation of an offence of domestic abuse. Within Part 1, Section 6 of the Act provides a statutory defence on the grounds of reasonableness.

6 Defence on grounds of reasonableness

(1) In proceedings for an offence under section 1(1), it is a defence for A to show that the course of behaviour was reasonable in the particular circumstances.

(2) That is to be regarded as shown if—

(a) evidence adduced is enough to raise an issue as to whether the course of behaviour is as described in subsection (1), and

(b) the prosecution does not prove beyond reasonable doubt that the course of behaviour is not as described in subsection (1).

¹³ House of Lords Library Briefing (July 2020) Domestic Abuse Bill HL Bill 124 of 2019 –21 <https://researchbriefings.files.parliament.uk/documents/LLN-2020-0116/LLN-2020-0116.pdf> [accessed 26/08/2020]

¹⁴ <https://www.legislation.gov.uk/asp/2018/5/contents/enacted> [accessed 26/08/2020]

The Explanatory Note addresses the defence on the grounds of reasonableness in the following terms:¹⁵

Section 6 provides that it is a defence to the offence at section 1 for the accused to show that the course of behaviour was, in the particular circumstances, reasonable. This may apply where, for example, the accused acted in order to protect the household finances where their partner is suffering from a gambling addiction, or to prevent their partner from associating with certain persons or frequenting certain places if they are recovering from alcohol or drug addiction, or to restrict the freedom of movement of a partner who is suffering from dementia.

Section 6(2) provides that the accused is subject to no more than an evidential burden of proof to bring forward enough evidence to raise an issue with respect to the defence; the legal burden of disproving the defence and proving that the offence has been committed stays with, the prosecution.

4. Concluding comments

The concept of reasonableness is a construct found in many branches of law and is not uncommon in criminal law, albeit that discussion around the conceptualisation and use of the standard exists.

In addition to any general defences that might be available, specific statutory defences also exist in relation to a number of criminal offences. Included amongst such defences is that which provides for a person to show that his or her course of behaviour was reasonable in the particular circumstances. This specific defence is contained within the Domestic Abuse and Family Proceedings Bill and the Domestic Abuse (Scotland) Act 2018.

The Serious Crime Act 2015 which created an offence of 'controlling or coercive behaviour' in England and Wales also provided for a defence where the suspect or defendant believes he or she was acting in the best interests of the victim and can show that in the particular circumstances their behaviour was objectively reasonable. This defence, however, is not available to those who have caused another person to fear that violence could be used against them. The 'best interests' element of this defence has been, and will likely continue to be, subject to debate during passage of the Domestic Abuse Bill at Westminster.

There is no 'best interests' element within the relevant defences contained in the Domestic Abuse and Family Proceedings Bill and the Domestic Abuse (Scotland) Act 2018.

¹⁵ <https://www.legislation.gov.uk/asp/2018/5/notes/contents> [accessed 26/08/2020]

In relation to the offence of controlling or coercive behaviour, it has been noted that 'What amounts to reasonable will need to be subject to judicial scrutiny and will be based on individual circumstances'.¹⁶ However, as it was only in late 2015 that the offence came into effect in England and Wales, it is too early for appeal court judgements to have been delivered. Research has, however, been undertaken to examine media reports relating to more than one hundred individuals convicted of the offence of controlling or coercive behaviour. The findings from the research suggest, amongst other things, that 'the offence is (appropriately) operationalised in a highly gendered manner' and 'has captured a diverse range of behaviours that would not previously have been considered criminal'.¹⁷ In the context of this paper, however, it is worth noting that no reference is made in the analysis of the research to the use, inappropriate or otherwise, of the relevant statutory defence.

¹⁶ Bettinson, V. (2020) A Comparative Evaluation of Offences: Criminalising Abusive Behaviour in England, Wales, Scotland, Ireland and Tasmania. In: McMahon M., McGorrery P. (eds) Criminalising Coercive Control.

¹⁷ McGorrery, P. & McMahon, M. (2019) Prosecuting controlling or coercive behaviour in England and Wales: Media reports of a novel offence. *Criminology & Criminal Justice*