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## **Justice Committee Comataidh a' Cheartais**

# **Stage 1 Report on the Domestic Abuse (Scotland) Bill**



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# Justice Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice.



<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/justice-committee.aspx>



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# Executive Summary

1. The Domestic Abuse (Scotland) Bill has two main purposes: (a) to create a new offence of engaging in an abusive course of conduct against a partner or ex-partner, and (b) to amend other primarily procedural or evidential aspects of criminal law in relation to domestic abuse offences.
2. The Committee took evidence on the Bill over six meetings earlier this year, as well as holding private meetings with survivors of domestic abuse from different parts of Scotland, and receiving written evidence from over 40 organisations and individuals.
3. The domestic abuse offence is intended to address a gap in the criminal law, as it is not currently possible to convict an individual on the basis of a course of conduct that includes psychological abuse. (The current law focusses on discrete incidents of physical violence or on threatening behaviour that causes fear or alarm.)
4. The Committee received compelling and persuasive evidence that psychological abuse within a relationship or by an ex-partner can cause immense and enduring trauma and harm. This evidence was underlined in the powerful and moving private testimony received from abuse survivors. It was sobering to reflect that some of the conduct described to the Committee cannot currently be prosecuted because it is not criminal. The Committee is persuaded that there is a gap in the law that needs to be closed.
5. A minority of evidence expressed significant reservations about the wording and practical effect of the proposed new offence. This evidence mainly came from legal experts and from representatives of frontline police officers. They said it was not easy to legislate in the realm of human relationships, and that there was a risk of inadvertently making bad law, and in particular of setting the threshold for criminalisation too low. Concerns were also raised that the crime would sometimes be difficult to enforce and to prove in court. The Committee does recognise that some aspects of the new offence may give rise to questions in relation to interpretation and enforcement, as is often the case with new laws, and that, at times, there may be hard cases.
6. However, the Committee does not consider that the obstacles mentioned in evidence are insurmountable, and notes the views of the Crown Office and Procurator Fiscal Service (COPFS) and Police Scotland that they welcome this Bill and see the new offence as something they can work with to better protect the public. It will be important for the COPFS and the police to set clear policies on how they intend to prosecute and enforce the new offence before it comes into force, and to keep these policies under review in the light of experience. A Government-led publicity campaign to draw attention to the new law, and to underline the message that psychological abuse in a relationship is unacceptable, will also be important. Given the pernicious nature of psychological abuse, and the methods perpetrators can use to further it, the Government and agencies should give careful consideration as to how best to communicate this message to those most likely to benefit from it, including hard to reach groups.
7. The scope of the offence is restricted to partners or ex-partners, in line with the Scottish Government's general approach to domestic abuse. However, the drafting

takes account of the fact that third parties, and children in particular, can be used by a perpetrator as a means to further their abuse and control. The Bill also provides for a statutory aggravator for instances of partner abuse in which children are directly involved. Stakeholders welcomed this approach, but some felt the Bill should have gone further, recognising abuse of a child as a criminal act in its own right. The Committee notes the Scottish Government's view that the current Bill strikes the right balance and that any major reform of the criminal law on the abuse of children is best considered separately, and that the Government has committed to consult on this issue in the coming months. The Committee also notes troubling evidence of the often problematic interaction between decisions made by courts in domestic abuse cases and decisions in the civil courts on child contact. The Committee asks the Government to consider this issue as part of its forthcoming review of the law relating to children and their interaction with key adults in their lives.

8. The Bill proposes reforms of various other aspects of criminal law, as they relate to domestic abuse cases. These are mainly procedural or evidential changes, but evidence to the Committee made clear that they are important nonetheless, and in most cases much welcomed. The common thread is to ensure that victims of domestic abuse are not re-victimised by contact with the criminal justice process - and accordingly are not discouraged from coming forward in the first place - and that victims have their needs taken into account at appropriate points in the process. The proposal to require a court to consider whether to make a non-harassment order (NHO) at the end of every domestic abuse case, rather than this being at the discretion of the prosecutor, was welcomed in the vast majority of evidence. However, the Committee asks the Scottish Government to note evidence that NHOs, once granted, do not always offer victims the protection that was intended.
9. The Committee welcomes this Bill and recommends to the Parliament that its general principles be approved.



# Introduction

1. The Domestic Abuse (Scotland) Bill<sup>i</sup> was introduced into the Parliament on 17 March 2017 by Michael Matheson MSP, Cabinet Secretary for Justice. The aims of the Bill are (a) to create a new offence of engaging in an abusive course of conduct against a partner or ex-partner, and (b) to amend other primarily procedural or evidential aspects of criminal law in relation to domestic abuse offences.
2. The Policy Memorandum accompanying the Bill places it in the context of the Scottish Government's "Equally Safe" strategy, the aims of which include building a society where women and girls live free from abuse and the attitudes which perpetuate it.<sup>ii</sup> The strategy is based in part on a "gendered analysis" of violence against women; in essence the view that women and girls are at increased risk of violence and abuse by nature of their gender, from men. However, the Bill is gender-neutral in its language, including in the definition of the new offence.
3. Much of what would be recognised as partner abuse is already criminal in Scotland. However, there are concerns that the current criminal law does not adequately cover the lived experience of many victims and that some forms of abuse, particularly psychological abuse, cannot be dealt with adequately in the criminal courts, or at all.
4. In the Scottish Government's view, the new offence set out in the Bill will address this in two main ways: first, by recognising the lived experience of domestic abuse as a *course of conduct* taking place over a period of time, rather than the focus being on a single incident, as is ordinarily the case with the criminal law. (The fact that particular conduct took place will still have to be proven in court under the usual evidential rules.) Secondly, the new offence provides for a definition of abuse expressly encompassing both physical and psychological abuse.<sup>iii</sup>
5. The Policy Memorandum accompanying the Bill includes what is described as a composite case study of behaviour within an abusive relationship, based on real-life examples. It is presumed that this is done in order to give an indication of the sort of behaviour the Scottish Government wishes the Bill to address, although it would, as ever, be for the courts to determine whether the facts and circumstances of a case amount to a crime. The behaviour described in the Memorandum includes the perpetrator constantly checking up on the victim's movements and communications (including reading her phone messages), criticising her as a mother and threatening to have the children taken from her, mocking and criticising her appearance, controlling her daily schedule, trying to prevent her having ordinary, everyday social interactions, losing his temper frequently and blaming her for it, and preventing her accessing her own money, all over a period of years.<sup>iv</sup>

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i Bill and accompanying documents available at: <http://www.parliament.scot/parliamentarybusiness/Bills/103883.aspx>

ii Policy Memorandum, paragraph 9

iii Policy Memorandum, paragraph 5

iv Policy Memorandum, paragraph 16

6. Section 1 of the Bill sets out the new offence of abusive behaviour towards a partner or ex-partner. Sections 2 to 10 elaborate on the parameters of the offence, with section 5 providing for a defence.
7. The schedule to the Bill makes various modifications in relation to criminal cases that have a domestic abuse element (including prosecutions of the new section 1 offence). These relate to matters such as the granting of bail, the leading of evidence, and the availability of non-harassment orders following a conviction. Again, the Scottish Government has placed these reforms in the overall context of the Equally Safe strategy.<sup>v</sup> These reforms are intended to provide for more sensitive handling of domestic abuse cases in the criminal courts, and better protection of victims, including reducing the opportunities available for perpetrators of abuse to use aspects of the criminal justice process to cause further harassment or abuse.

## Committee consideration

8. The Bill was allocated to the Justice Committee for Stage 1 scrutiny of the general principles. The Committee issued a call for evidence on the Bill shortly after it was introduced. Forty-five responses (including supplementary submissions) were received, of which two were published anonymously, as well as a letter about one of the procedural reforms in the schedule from Linda Fabiani MSP.<sup>vi</sup>
9. The Committee took public evidence on the Bill at six meetings in May and June. A list of witnesses at those meetings is set out in the Annexe. On 16 May, Committee Members heard private testimony from victims of domestic abuse supported by Scottish Women's Aid, Victim Support Scotland, and Shakti Women's Aid, at three concurrent meetings. Anonymised notes of those meetings are available on the Committee's website.<sup>vii</sup>
10. The Committee is grateful to all of those who provided evidence on the Bill. Particular thanks are due to those victims of abuse who met the Committee to relate their experiences or who contributed written evidence. Their courage in coming forward in this way is much appreciated and their impactful and often moving testimony helped bring to life the background issues to this Bill.

## Consideration by other committees

11. The Bill confers just two powers to make subordinate legislation upon the Scottish Ministers, both of a standard nature (transitional provisions and commencement). The Delegated Powers and Legislative Reform Committee reported that it was content with both of these.<sup>viii</sup>
12. The Finance and Constitution Committee issued a call for evidence inviting written submissions on the estimated financial implications of the Bill as set out in its

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<sup>v</sup> Policy Memorandum, paragraphs 6-8

<sup>vi</sup> All written evidence and correspondence available here: <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/104168.aspx>

<sup>vii</sup> Referred to in future references as "Note of meeting with ...". Available here: <http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/104168.aspx>

<sup>viii</sup> Report available at: <https://sp-bpr-en-prod-cdnep.azureedge.net/published/DPLR/2017/4/27/Domestic-Abuse--Scotland--Bill-at-Stage-1/22nd%20Report.pdf>

accompanying Financial Memorandum. It received 16 responses. The Committee then took evidence from the Scottish Government Bill Team on 31 May 2017. Following this, the Committee issued its main findings to this Committee in the form of a short submission.<sup>ix</sup> Some points raised in the submission are cited later in this report.

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<sup>ix</sup> Available at: [http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/20170608FCC.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/20170608FCC.pdf)

# Offence of engaging in course of abusive behaviour

13. Under the current law, there are a number of ways in which conduct commonly thought of as abuse of a domestic partner, or former partner, may be prosecuted. It may be prosecutable at common law as assault if it involved physical violence. Uttering threats may also be a common law offence. Causing fear or alarm by means of threatening or abusive behaviour may be an offence either at common law (breach of the peace) or under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010. Section 39 of that Act also sets out an offence of stalking, requiring a course of conduct manifested on at least two separate occasions.
14. Following a recent law reform, approved by the Scottish Parliament in 2016, it is also possible for prosecutors to add to a charge that the alleged offence is aggravated by domestic abuse.<sup>x</sup> If this is proven, this enables the courts: (a) to formally recognise that the offence took place in that context (meaning, amongst other things that the number of domestic abuse aggravations can be recorded in official statistics); and (b) to impose what it considers an appropriate penalty, taking the aggravation into account.
15. The Scottish Government began consulting on a bespoke offence of domestic abuse, following a May 2014 speech by then Solicitor General Lesley Thomson QC, in which she identified the lack of such an offence as a gap in the criminal law, which was letting victims down.<sup>xi</sup> In large part, this gap was perceived as relating to conduct within a relationship that caused emotional and psychological damage. Following Dr Thomson's speech, the Scottish Government began to consult on how the law in this area could be improved. This led, in the first instance, to the introduction of the aggravator mentioned above. In relation to a bespoke offence, this was considered to raise some technical issues requiring a longer period of consideration. The Scottish Government set out its proposals in a consultation paper, "A Criminal Offence of Domestic Abuse" in December 2015.
16. At around the same time, in England and Wales, a new offence of "coercive and controlling behaviour" was being agreed to and brought into force.<sup>xii</sup> This may be considered the rough equivalent of the new offence in the Bill, although it differs in some key aspects. For instance, it may be committed against family members other than a partner or ex-partner and the offence does not encompass physical violence. As discussed earlier, physical violence against anyone (including a partner or ex-partner) is already *prima facie* criminal in Scotland, as it is in England and Wales. The Scottish Government took the decision to include both physical and psychological abuse within the new offence in order to enable prosecutors to include all acts of abuse in a single charge as evidence of a course of conduct, rather than having to bring a separate charge for the physical aspect of the abuse.<sup>xiii</sup>

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x Abusive Behaviour and Sexual Harm (Scotland) Act 2016, section 1

xi Policy Memorandum, paragraph 12

xii Serious Crime Act 2015, section 76

## Description of the offence

17. Under section 1 of the Bill, an offence is committed if a person ("A") engages in a course of behaviour which is abusive of their partner or ex-partner ("B") and two conditions are met-
- that a reasonable person would consider the course of behaviour likely to cause B to suffer physical or psychological harm, and
  - either A intended to cause this harm, or was reckless as to whether the course of behaviour would cause B to suffer physical or psychological harm.

It can be seen from the wording of the first condition that it is not required for the prosecution to demonstrate that B actually suffered harm in order for the offence to be committed, and this is made expressly clear in section 3. It is the Scottish Government's view that proving a crime was committed should not hang on demonstrating in court that the complainer suffered harm. The Scottish Government considers that this reduces the likelihood of the trial process being traumatic for the victim (by forcing them to "re-live" the experience of the abuse in order to establish that the crime was committed). It also means that the fact that a particular individual was resilient in the face of the abuse is of no relevance to the prosecution case.<sup>xiv</sup> Instead, the focus is on what the accused actually did (or failed to do), on whether they had the requisite mental element of recklessness or intent, and on an objective assessment of what the outcome for the victim would likely have been.

18. A "course of behaviour" consists of behaviour on at least two occasions. No time period is specified in the Bill. In theory, it therefore appears that these two (or more) instances could be separated by minutes or, conversely, by years. The Policy Memorandum notes that "two isolated incidents occurring far apart in time" are perhaps unlikely to be considered a "course of behaviour", but says that ultimately this would be a matter for the court to determine in each given case.<sup>xv</sup> Behaviour is behaviour "of any kind" and may include communicating something (as opposed to doing something) or failing to communicate or do something.

## Third parties, children and the aggravator

19. The offence is restricted to situations where A and B are partners or ex-partners. (The Bill defines this as situations where (a) they are or were spouses or civil partners, (b) they are or were living together as if spouses of each other, or (c) they are or were in an "intimate personal relationship".<sup>xvi</sup>) The Scottish Government considered that the Bill should not be a vehicle for addressing abuse within other types of relationship, for instance the parent (or step-parent) and child relationship or the relationship between a dependent individual and their live-in carer, who is often a relative. The Government's view is that this detracts from the primary focus of the Bill, which is on partner abuse, and that the approach taken in the Bill is consistent with its overall "gendered analysis" and with the strategies pursued by

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<sup>xiii</sup> Policy Memorandum, paragraph 31

<sup>xiv</sup> Policy Memorandum, paragraph 44; Justice Committee, Official Report, 9 May 2017, col. 40 (Patrick Down, Scottish Government)

<sup>xv</sup> Policy Memorandum, paragraph 41

agencies such as Police Scotland and the Crown Office and Procurator Fiscal Service (COPFS). It also points to other work currently being undertaken on reforming the law relating to the abuse of children.<sup>xvii</sup> As discussed below, opinion was divided on whether this was the right approach.<sup>xviii</sup>

20. Behaviour criminalised under the Bill does include behaviour by A "directed" at "another person" or at a "child of B" (section 2(2)(b)). This is if, and only if, such conduct has, as its purpose, one or more effects ("the relevant effects") listed in the Bill, or if such effects are a reasonably likely outcome of the directed behaviour. These effects include frightening or humiliating B, making B dependent on A, or socially isolating B. In other words, the offence remains one committed against B, and it is B, not the third party, who is the "complainant" (i.e. in the event of a guilty conviction, the victim) in the language of the criminal law.
21. The provision exists in recognition of the capacity of perpetrators of domestic abuse to use others as "pawns" in their efforts to have control over their partner or ex-partner. That this happens, especially in relation to children, was widely acknowledged in evidence to the Committee. The Policy Memorandum states that the intention with this provision is not to criminalise conduct such as A's having an affair with a third party. In the Scottish Government's view, such conduct, of itself, would not be captured within the offence because it is not behaviour "directed at" the third party within the terms of the Bill.<sup>xix</sup> As regards the express reference to "a child of B" in this provision - which does not appear to be technically necessary since "a child of B" would, anyway, be "another person" - Scottish Government officials told the Committee that it had been included to give a "clear signal" of the Government's awareness that perpetrators of abuse often use children to continue and extend their abuse.<sup>xx</sup>
22. There is express reference to children in relation to one other aspect of the offence. This is section 4, which enables prosecutors to specify in any charge for an offence under section 1 that the offence was aggravated by reason of involving a child - not "a child of B" as in section 2, although the Policy Memorandum acknowledges that this will often be the case.<sup>xxi</sup> If this is proven, this is recorded on conviction. The offence is so aggravated if, during the commission of the offence, A directs behaviour at a child or makes use of a child in directing behaviour at B. Alternatively, the aggravation is established if the child "sees or hears, or is present" during an incident of A engaging in a course of abusive behaviour towards B.
23. The aggravator was not part of the Scottish Government's initial consultation on the new offence. It emerged in response to concerns raised during the consultation that there needed to be more account taken of the effects of an abusive relationship on any children of B. It does not change the position under the section 1 offence that it

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xvi Section 10

xvii Policy Memorandum, paragraphs 93-103

xviii See the discussion beginning at paragraph 74

xix Policy Memorandum, paragraph 37

xx Justice Committee, Official Report, 9 May 2017, col. 37 (Philip Lamont)

xxi Policy Memorandum, paragraph 92

is B, and B alone, who is technically the victim. However, the judge may take the aggravation into account in determining the appropriate sentence. The Policy Memorandum acknowledges the validity of the views expressed during the consultation preceding the Bill's introduction that children in a household where one partner is a victim of psychological abuse are, in effect, victims of abuse themselves. However, it states that the Scottish Government does not consider the Bill to be the appropriate vehicle to revise the criminal law in relation to the abuse of children. The Memorandum notes that abuse of a child is already a criminal offence (under the Children and Young Persons (Scotland) Act 1937, section 12) whilst acknowledging that there are questions over whether the wording of that provision requires to be updated. It explains that this issue is currently under review by the Minister of Childcare and Early Years.<sup>xxii</sup>

## Financial implications on police, courts and prisons

24. The Financial Memorandum accompanying the Bill notes "a relatively high level of uncertainty" in modelling the likely cost implications of putting the new offence on the statute book, because so many variables are potentially involved.<sup>xxiii</sup> It also notes evidence indicating that domestic abuse is currently significantly under-reported. The Memorandum estimates that creating the new offence will lead to an increase in the reporting of domestic abuse cases of between 2% and 10%. Taking 6% as the median, its best estimate is that increased costs on the COPFS and the Scottish Courts and Tribunals Service will be just over £2.5 million per annum.<sup>xxiv</sup> In estimating costs to the police a number of variables are considered to apply: the best estimate in terms of police called to deal with the offence is around £720,000 per annum.<sup>xxv</sup>
25. Using the same estimate, costs on the Scottish Prison Service are estimated at just under £1.1 million per annum.<sup>xxvi</sup> This is based on an assumption that the same general pattern of disposals occurring in current domestic abuse cases (many of which, the Committee assumes, would be cases involving violence) is followed in relation to disposals under the new offence.
26. Evidence to the Committee noted that there would be resource implications in ensuring that the offence is brought into force effectively, for instance publicity, and training for the police and others. (The Financial Memorandum estimates the costs of training the police at around £450,000 ). This is discussed further below.

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<sup>xxii</sup> Policy Memorandum, paragraphs 93-103

<sup>xxiii</sup> Financial Memorandum, paragraph 30

<sup>xxiv</sup> Financial Memorandum, paragraph 44

<sup>xxv</sup> Financial Memorandum, paragraph 55

<sup>xxvi</sup> Financial Memorandum, paragraphs 47-52

## Evidence on the new offence

27. The Committee sought views at Stage 1 on whether stakeholders agreed with the creation of the new offence and, in particular, whether they agreed with the Scottish Government that there was at present a gap in the criminal law.

### A gap in the law?

28. Most evidence strongly supported the creation of a new offence on the ground that the current law did not adequately recognise the reality of abuse within a relationship, much of which was not primarily physical in nature. In that sense, most respondents agreed that there was a gap in the law. This included evidence from organisations supporting female and male victims of domestic abuse;<sup>xxvii</sup> from organisations working with children and young people;<sup>xxviii</sup> from organisations representing the interests of older people;<sup>xxix</sup> from psychologists, social workers, and others working with offenders;<sup>xxx</sup> from academic lawyers;<sup>xxxi</sup> and from the Equalities and Human Rights Commission.<sup>xxxii</sup>
29. A minority of evidence expressed some doubt as to whether there was really a significant gap in the law, with some evidence noting recent legislative reforms and suggesting these be given more time to bed in.<sup>xxxiii</sup> Even if there was a gap, attempting to fill it was, in the view of this minority of stakeholders, not without significant risks.<sup>xxxiv</sup> This evidence is referred to further below.<sup>xxxv</sup>
30. Comments in support of the new offence included: that it "provides a much-needed mechanism through which psychological and emotional abuse can be prosecuted";<sup>xxxvi</sup> that it "clarifies the definition of domestic abuse in a way which is

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<sup>xxvii</sup> Eg Abused Men in Scotland, written submission; Scottish Women's Aid, written submission; Victim Support Scotland, written submission; Zero Tolerance, written submission,

<sup>xxviii</sup> Eg Aberlour, written submission; Barnardos Scotland, written submission; Children 1st, written submission; LGBT Youth Scotland, written submission; NSPCC Scotland, written submission; Scottish Children's Reporter Administration, written submission; Scottish Commissioner for Children and Young People, written submission

<sup>xxix</sup> Action on Elder Abuse Scotland, written submission; Age Scotland, written submission

<sup>xxx</sup> British Psychological Society, written submission; Sacro, written submission; Social Work Scotland, written submission

<sup>xxxi</sup> Dr Vanessa Bettinson, written submission

<sup>xxxii</sup> Written submission

<sup>xxxiii</sup> Glasgow Bar Association, written submission; Law Society of Scotland, written submission

<sup>xxxiv</sup> Andrew Tickell, written submission; Scottish Police Federation, written submission

<sup>xxxv</sup> See the discussion beginning at paragraph 46



significantly broader than that contained within existing criminal law";<sup>xxxvii</sup> or simply that it was "a fantastic step forward".<sup>xxxviii</sup> Rape Crisis Scotland commented that the current law often fails to recognise the context and impact of domestic abuse, but that allowing courts to consider a course of behaviour "should enable the Scottish criminal justice system to be more responsive to the reality of abuse experienced by domestic abuse survivors".<sup>xxxix</sup> Sacro, which works with both victims and offenders, stated that-

” Domestic abuse is a pattern of behaviour, designed to control the victim. Although physical violence is used as a method of control, more insidious and discreet behaviours are a prominent feature, sometimes in the absence of any physical violence ... Psychological abuse can be just as effective as a method of control as physical abuse, and the current law does not sufficiently cover such behaviour.<sup>xi</sup>

31. The Bill was also welcomed because it was seen as having the potential to raise awareness of the existence and unacceptability of psychological abuse, and to change behaviours, as well as to provide a criminal sanction.<sup>xli</sup> Some evidence referred to a continuing need for a change in social attitudes towards abuse which the passing of the law could play a part in helping to deliver.<sup>xlii</sup>

## Impact of psychological abuse

32. The Committee received compelling and persuasive evidence that psychological abuse within a relationship (or following the acrimonious end of one) is a real and pernicious issue, the effects of which can be every bit as harmful as violent abuse. This evidence was underlined in the private testimony Members received from abuse survivors. The potentially devastating effect of serious psychological abuse was not disputed even by those who had significant reservations about the wording and practical effect of the proposed new offence.
33. This evidence and testimony outlined the different forms such abuse may take. It may encompass ridiculing, humiliating and "gaslighting"<sup>xliii</sup> the victim in myriad ways, or issuing threats (either overt or veiled) that leave them in genuine fear for their safety. It may mean depriving victims of ordinary social contact with friends or family, seeking to turn children of the relationship against the victim, or forcing the

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<sup>xxxvi</sup> Centre of Excellence for Looked After Children (CELCIS), written submission

<sup>xxxvii</sup> Children and Young People's Commissioner Scotland, written submission

<sup>xxxviii</sup> The Impact Project (a partnership between young survivors of domestic abuse and Dr Clare Houghton, University of Edinburgh), written submission

<sup>xxxix</sup> Written submission

<sup>xi</sup> Written submission

<sup>xli</sup> Eg Justice Committee, Official Report, col. 20 (Megan Farr, Children and Young People's Commissioner Scotland)

<sup>xlii</sup> Zero Tolerance, written evidence

victim into economic dependency on the perpetrator even where they superficially have financial independence.<sup>xliv</sup> False rumours may be spread about the victim, which can be particularly damaging in rural or minority communities,<sup>xlv</sup> whilst non-"out" bisexual, gay or lesbian victims may be threatened with having their sexuality exposed non-consensually.<sup>xlvi</sup> Whilst most evidence to the Committee concerned female abuse victims (in line with wider statistical trends about who victims are most likely to be), the Committee also received evidence about the devastating effect abuse has had on men.<sup>xlvii</sup>

34. The Committee also noted powerful testimony that abuse can continue for years, to the point where the victim sees it as "normal" and may feel helpless.<sup>xlviii</sup> On the other hand, bringing a long-term abusive relationship to an end can, if anything, intensify the abuse, and leave the victim at serious risk. The Committee heard real-life stories of how efforts to escape a relationship and move on meant survivors having to leave their home and leave friends behind, give up their job, abandon social media, or even change their name. The Committee also heard that any children of the relationship risked being used as "pawns", with bitter and costly legal battles the sometimes inevitable consequence.<sup>xlix</sup>
35. The two main public services responsible for applying the current law, police and prosecutors, both indicated that a new domestic abuse law could help them protect the public better. Anne Marie Hicks of the COPFS told the Committee that the essence of the current law was that prosecutors were, in effect, restricted to prosecuting offences that "attack someone's physical integrity" (which may include threats rather than actual violence). They could not prosecute controlling behaviour amounting to an abuse of power. For prosecutors, this was a gap in the law with real-life consequences. The current law, with its emphasis on particular acts, also prevented what she called "the bigger picture" behind an abusive relationship being put before the court. This, she said, "cannot be right".<sup>l</sup> Detective Chief Superintendent Lesley Boal of Police Scotland agreed, saying that the gap in the law sometimes meant that "horrific" behaviour could not be addressed adequately by the criminal law.<sup>li</sup>

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<sup>xliii</sup> i.e. a form of psychological abuse in which the perpetrator, often using a variety of methods, seeks to make the victim doubt their memory, their perception and, ultimately, their grasp on reality, the underlying aim being to increase the victim's helplessness

<sup>xliv</sup> Note of meeting with Shakti Women's Aid; Note of meeting with Scottish Women's Aid; Note of videoconference with Victim Support Scotland

<sup>xlv</sup> Note of meeting with Scottish Women's Aid; Justice Committee, Official Report, 13 June, col. 3 (Girijamba Polubothu, Shakti Women's Aid)

<sup>xlvi</sup> Sacro, written evidence; Justice Committee, Official Report, 20 June 2017, col. 16 (Brandi Lee Lough Dennell, LGBT Youth Scotland)

<sup>xlvii</sup> Abused Men in Scotland, written submission

<sup>xlviii</sup> Justice Committee, Official Report, 13 June 2017, cols. 28-29 (Heather Williams, Scottish Women's Aid) and 35 (Alison Waugh, Abused Men in Scotland)

<sup>xlix</sup> Note of meeting with Scottish Women's Aid

<sup>l</sup> Justice Committee, Official Report, 6 June 2017, cols. 6-7

36. There is compelling evidence of the trauma and lasting damage that can be caused by serious psychological abuse within a relationship or by an ex-partner. The Committee is satisfied that it is appropriate in principle for the criminal law to apply in this area to address what is, in effect, a gap in the law. The Committee also recognises the potential deterrent effect of any new legislation, and its potential to raise awareness and change attitudes.

## Definition of the offence: views from supporters

37. Amongst those who indicated their strong support for the new offence, the reference in it to "course of behaviour" was generally welcomed.<sup>lii</sup> This wording appeared to them to more closely reflect the reality of an abusive relationship, which is not a series of isolated events but a pattern of behaviour. A few submissions queried why two separate acts were considered necessary, on the ground that one sufficiently serious act ought to be enough.<sup>liii</sup> Conversely, some evidence argued that two instances of conduct may be too low a threshold to establish criminality.<sup>liv</sup> Most evidence supportive of creating the new offence appeared to be content with the requirement for two or more acts.<sup>lv</sup> In relation to the inclusion of recklessness within the *mens rea* (mental element) for the offence, Scottish Women's Aid described this as "critical in ensuring that the offence successfully operates to include all manifestations of the abusive behaviour it is intended to address".<sup>lvi</sup>
38. Supporters of the new offence broadly welcomed the manner in which "abusive behaviour" had been defined in the Bill.<sup>lvii</sup> The Scottish Government's aim had been to strike a balance between providing a degree of certainty as to what conduct is covered and leaving sufficient discretion to enable courts to apply the definition in widely varying circumstances.<sup>lviii</sup> The balance of evidence to express a view seemed to consider that this had been achieved. It was seen as vitally important that the definition should have some built-in flexibility, given the very different ways in which psychological abuse within a relationship might be manifested. The Committee also notes evidence that some abusers may be skilled at threatening

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li Justice Committee, Official Report, 6 June 2017, col 18

lii e.g. The Impact Project, written submission; NSPCC, written submission; Scottish Women's Rights Centre, written submission

liii e.g. George Eckton, written submission

liv Abused Men in Scotland, written submission

lv e.g. Dr Vanessa Bettinson, De Montford University, written submission; Sacro, written submission; Scottish Women's Convention, written submission. A large number of submissions expressed support for the definition of "course of conduct" in general terms without express reference to the requirement for two or more incidents.

lvi Written submission

victims in subtle and insidious ways, again pointing to the need for a definition that enables the court to take into account all the relevant facts.<sup>lix</sup>

39. Finally, supporters of the new offence tended to warmly welcome provision excluding the prosecution from having to lead evidence that B actually suffered harm, as this put the focus on the accused's behaviour rather than the complainer's reaction to it.<sup>lx</sup>
40. The Committee notes evidence from one submission that the Bill should make specific provision that abuse resulting in the loss of a viable foetus is an offence<sup>lxi</sup> and from others that there should be more clarity as to whether "financial abuse" is encompassed within the definition.<sup>lxii</sup>

## Contact orders and the new offence

41. The submission from Families Need Fathers referred to situations (which it described as "ambushes") where a resident and non-resident parent, the latter with a civil contact order, are meant to be exchanging the child but the parent handing over the child deliberately engineers an "incident" that may lead to the involvement of the police, or in less extreme form, mean that the handover does not take place. In either case, the underlying aim is to provoke the other parent. This evidence argued that it is the non-resident parent (usually male) that is invariably the victim in such situations. Families Need Fathers said that it gave a qualified welcome to the new offence because it envisaged that conduct of this type would potentially be encompassed within the definition of "domestic abuse".<sup>lxiii</sup> For Abused Men in Scotland, Alison Waugh told the Committee that situations where the resident parent changed contact arrangements (even contact orders; i.e. those enshrined in a court order) "on a whim" were-

” ... a major issue, and people who support fathers in those situations feel strongly that it should be included as one of the behaviours that constitute coercive control. That sort of behaviour abuses the child too, because it deprives a child of a loving parent. .... This is a major problem and it even extends to schools being told by one parent not to allow the other parent any information about the child when there is no reason why. It is constant controlling and making life difficult for the other person, and it can be very upsetting for the person who is affected and for the child.<sup>lxiv</sup>

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lvii e.g. Abused Men in Scotland, written submission; British Psychological Society, written submission

lviii Policy Memorandum, paragraph 13

lix Zero Tolerance, written submission; Justice Committee, Official Report, 13 June 2017, cols. 17-18 (Evidence of Girijamba Polubothu, Shakti Women's Aid and Heather Williams, Scottish Women's Aid)

lx e.g. Scottish Women's Aid, written submission; Rape Crisis Scotland, written submission

lxi Dr Mary Neal, University of Strathclyde, written submission

lxii Action on Elder Abuse Scotland, written submission; Scottish Children's Reporter Administration, written submission

lxiii Written submission. See also Anonymous 4, written submission

42. Conversely, the Committee heard both formal evidence and compelling private testimony as to how contact orders can be used to continue psychological abuse long after a relationship has ended and, in effect, to nullify the effects of a non-harassment order that may have been granted against the abuser. (There is a discussion of NHOs later in this report.) The Committee also heard that there is the potential for child contact centres, intended to facilitate handover arrangements between estranged parents, to instead become a forum for further abuse or harassment.<sup>lxv</sup> This underlines the complexities that are present in this area of the law where intersecting legal rights and obligations, both civil and criminal, may come into conflict. This is an issue that exceeds the parameters of this Bill. The Committee notes that the Scottish Government has commenced a review of the Children (Scotland) Act 1995 "to ensure the interests of children and their need to form and maintain relationships with key adults in their lives", and intends to consult publicly on the issue next year.<sup>lxvi</sup> An 8 June 2017 joint letter from the Cabinet Secretary for Justice and the Minister for Childcare and Early Years provided further information on this work-

” Specific concerns have been raised about whether child contact arrangements take sufficient account of the views of children and young people and that they can expose adult victims to further risk of abuse.

A range of work is in progress to try and improve these arrangements, in particular through the Family Law Committee of the Scottish Civil Justice Council. However, we have acknowledged the need to go further and have committed publicly to undertake a review of the Children (Scotland) Act 1995 with reference to parental responsibilities and rights, child contact and residence, alongside a wider Family Justice Modernisation Strategy. We recognise that these are sensitive and challenging issues. We plan, therefore, to start dialogue with key stakeholders, including organisations representing the interests of children, adult victims of abuse, parents and other family members during 2017, ahead of wider public consultation during 2018.<sup>lxvii</sup>

43. The Committee asked the Cabinet Secretary to comment on circumstances where a child is used by the parent to continue coercive or controlling behaviour or where a child is denied contact with a parent who has been abused and is no longer resident in the home. He responded that "the Bill is not and was never intended to tackle those issues".<sup>lxviii</sup>

44. The Committee invites the Scottish Government to note the evidence the Committee has received on the often problematic intersection between orders

<sup>lxiv</sup> Justice Committee, Official Report, 13 June 2017, col. 44

<sup>lxv</sup> Aberlour, written submission; Justice Committee, Official Report, 20 June 2017, col. 20 (Megan Farr, Commissioner for Children and Young People Scotland); Note of meeting with Scottish Women's Aid

<sup>lxvi</sup> See further: <http://www.gov.scot/Topics/Justice/law/17867/review-of-children-scotland-act-1995>

<sup>lxvii</sup> Available at: [http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/20170608CSfJandMfCEYtoMM.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/20170608CSfJandMfCEYtoMM.pdf)

<sup>lxviii</sup> Justice Committee, Official Report, 27 June 2017, col. 24

allowing contact with a child and the decisions of the criminal courts in domestic abuse cases, as part of its forthcoming consultation on the Children (Scotland) Act 1995.

45. The Committee also asks the Scottish Government to note the evidence received on so-called "ambush" situations (i.e. situations where it is alleged that one parent deliberately frustrates the handover of a child to the other parent, who is entitled to have contact with the child, with the intention of trying to provoke the other), and the suggestion in some evidence that this could amount to an abusive course of conduct within the terms of the Bill. The Committee asks the Scottish Government to also take this evidence into account as part of its review of the 1995 Act.

## Concerns with the offence

46. A minority of stakeholders, mainly legal experts, expressed significant reservations about the new offence as currently set out in the Bill. Their concerns split into two main areas: first, that the Bill may have drawn some definitional lines in the wrong places, effectively setting the bar of criminality too low, and potentially leading to the wrong cases being prosecuted. Conversely, there was a fear that aspects of the law of criminal evidence (specifically the requirement for corroboration) would make successful prosecutions difficult and that the Bill therefore risked over-promising and under-delivering.

## Concerns with the definition

47. The Committee did not take any of this criticism to reflect a rejection of the fundamental aims behind the Bill or of the possibility of reform in this area, as some of this evidence made expressly clear. However, this evidence tended to the view that legislating in this area - effectively, in the field of broken, damaged or unhealthy human relationships - was inherently difficult, and that addressing the concerns raised was not necessarily a matter of simply tidying up the drafting.<sup>lxi</sup> Any reform at all carried the risk of inadvertently making bad law. Calum Steele of the Scottish Police Federation referred to how couples, at the time of a relationship breakdown, may sometimes be "particularly horrible to each other" but said it was the experience of frontline police officers called to deal with these situations that, a few months down the line, the parties would often regret getting the criminal justice system involved.<sup>lxi</sup>
48. Andrew Tickell of Glasgow Caledonian University Law School commented on the risk of over-criminalisation when the law intervenes in "family and romantic life"-

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<sup>lxi</sup> Justice Committee, Official Report, 30 May 2017, cols. 9-16 (Grazia Robertson, Law Society of Scotland, Andrew Tickell, Glasgow Caledonian University, Lindsey McPhie, Glasgow Bar Association, Clare Connelly, Faculty of Advocates)

<sup>lxi</sup> Justice Committee, Official Report, 6 June 2017, col. 32



- ” Entering into any relationship inevitably restricts the freedom of action of both parties. Even broadly healthy relationships are occasionally characterised by hurtful conduct, jealous behaviour and distressing episodes. The Bill must discriminate between serious wrongs which deserve to be prosecuted and even unpleasant and irrational behaviour which ought to fall below the threshold of criminality. This is no easy task.<sup>lxxi</sup>
49. Mr Tickell had a specific concern as to the inclusion within the definition of "psychological harm" of "fear", "alarm" or "distress". The first two are relatively well-used terms in the criminal law, but the latter is more novel. Mr Tickell argued that it was self-evident that "distress" set the bar much lower than "fear" or "alarm", and questioned whether it was really the intention of the Scottish Government to make potentially criminal the "distressing" conduct of a partner or ex-partner.<sup>lxxii</sup> The absence of any requirement for the prosecution to prove that the complainant actually suffered harm also concerned him. On this point, Mr Tickell concluded that-
- ” Weaving these strands together, to prosecute an individual for "abusive behaviour" under the proposed legislation, the prosecutor need only show that the accused has engaged in monitoring or controlling behaviour on more than one occasion which was likely to cause distress, whether or not any distress actually arose. While monitoring behaviour may give rise to substantial harm - even relatively minor episodes in a relationship clearly have the potential to give rise to "distress". To categorise this behaviour as criminally "abusive" risks being dramatically excessive.<sup>lxxiii</sup>
50. In response to the argument that it would not be in the public interest to take relatively trivial cases to court, Mr Tickell said he did not find this reassuring. Rather than trusting prosecutors to use the law as it was intended, legislators should try to get the law right in the first place.<sup>lxxiv</sup> To this end, he suggested including in the definition wording along the line that the abuse must be such that a reasonable person would consider likely to give rise to "serious" or "substantial" psychological harm. This would be similar to the wording used in England and Wales in relation to the offence of coercive control.<sup>lxxv</sup>
51. Concerns of a broadly similar nature were laid out in the evidence of the Law Society of Scotland and the Glasgow Bar Association (GBA). The Law Society's evidence noted that there had been a number of recent reforms relating to the criminalisation of domestic abuse and argued that a case had not been convincingly made that further reform was necessary.<sup>lxxvi</sup> The GBA considered that the new offence was drawn too widely and also thought that there was a risk of over-criminalisation.<sup>lxxvii</sup>

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<sup>lxxi</sup> Written submission

<sup>lxxii</sup> Written submission; Justice Committee, Official Report, 30 May 2017, cols. 12, 15 and 35

<sup>lxxiii</sup> Written submission

<sup>lxxiv</sup> Justice Committee, Official Report, 30 May, col. 15

<sup>lxxv</sup> Justice Committee, Official Report, 30 May 2017, cols. 12-13

<sup>lxxvi</sup> Written submission;

<sup>lxxvii</sup> Written submission

52. Both organisations raised some drafting concerns. The Law Society queried how the court would distinguish in practice between psychological abuse that, from the perspective of a "reasonable person" would appear likely to cause fear, alarm or distress and psychological abuse that would not. It also queried whether recklessness was a sufficient *mens rea* (necessary mental element) for the offence.<sup>lxxviii</sup> The GBA made the same point, noting that "abuse" as set out in the Bill could include failing to do or communicate something. It argued that-

” We do not anticipate that the public would readily understand a situation where criminal liability can arise from a reckless failure to say something.<sup>lxxix</sup>

In relation to the definition of "course of behaviour", the Law Society queried how it would be interpreted in practice. The Society said that if it were to be COPFS policy to prosecute two non-violent incidents separated by years this risked setting the bar of criminality too low.<sup>lxxx</sup>

53. As noted, Mr Tickell had concerns about the absence of a requirement to prove B had suffered harm on grounds of over-criminalisation. He also queried its practical application; he thought it would be unlikely to achieve the policy outcome the Scottish Government intended-

” Complainers will be the key source of evidence in cases prosecuted under this offence. They will experience the often challenging, often unpleasant experience of testifying in open court and under cross-examination about the circumstances of their private life. There is no avoiding this in our adversarial system. Complainers and witnesses will, inevitably, have to "re-live in court" the nature of the behaviour that they have experienced. If this is "re-victimisation", it is difficult to see how it can be meaningfully avoided.<sup>lxxxii</sup>

54. This was a view shared by the GBA, which said it was highly likely that B would have to be called to give evidence, in order to help the court come to a view on whether there had been an intention to cause psychological damage.<sup>lxxxii</sup> In this connection, the Committee notes the evidence of the COPFS's Anne Marie Hicks that in most current domestic abuse prosecutions, the primary evidence would come from the complainer, and that it would be "unusual" to conduct a case based on third-party evidence alone.<sup>lxxxiii</sup>

55. The Faculty of Advocates stated that, overall, it was "content" with a new offence encompassing physical and non-physical abusive acts. But it did not think that the

<sup>lxxviii</sup> Written submission; in oral evidence, representatives of the Faculty of Advocates (Clare Connelly) and Glasgow Bar Association (Lindsey McPhie), indicated that they shared the Law Society's views that recklessness should not be a sufficient *mens rea*: Official Report, 30 May 2017, cols. 26-27

<sup>lxxix</sup> Written submission

<sup>lxxx</sup> Written submission; Justice Committee, Official Report, 30 May 2017, cols. 34-35 (Grazia Robertson, Law Society of Scotland)

<sup>lxxxii</sup> Written submission

<sup>lxxxiii</sup> Written submission

<sup>lxxxiii</sup> Justice Committee, Official Report, 6 June 2017, col. 5.



offence as set out in the Bill sufficiently "contextualised" the conduct to be made criminal. Its submission distinguished between "common couple violence" and "coercive control". It was the latter, the Faculty argued, that the new offence should attempt to tackle.<sup>lxxxiv</sup> The Committee asked the Faculty's representative, Clare Connelly, to elaborate on these points. She explained that, in essence, "common couple violence" is violence and aggressive language that couples may use intermittently during arguments in a relationship not otherwise underpinned by on-going coercive control. By contrast, the defining characteristic of a relationship where there is coercive control, is a desire by one partner to control the other. Another characteristic is an increased risk of homicide where the relationship has come to an end because the perpetrator has lost control and, as Ms Connelly put it, "cannot handle that fact".<sup>lxxxv</sup> Ms Connelly said that her reservations about the new offence were that-

” ...some of the behaviours that are listed [in the Bill] could easily occur outwith a relationship that is underpinned by coercive control. Without accurate identification of the context of coercive control, it might become difficult to criminalise the behaviour that the bill seeks to criminalise and to maintain public confidence in what the Parliament is trying to achieve.<sup>lxxxvi</sup>

56. However, Ms Connelly conceded that this was an issue that might be difficult to legislate on, adding that a publicity campaign focussed on addressing coercive control alongside passing the Bill might be a more effective approach.<sup>lxxxvii</sup>

## Establishing and proving the offence

57. Andrew Tickell's other main concern was that the requirement for corroboration risked rendering the new offence a "paper tiger" that prosecutors would find difficult to make use of.<sup>lxxxviii</sup> Corroboration is a legal rule requiring two independent sources of evidence to establish each of the essential facts of the trial: that the crime was committed and that it was the accused who committed it. In the case of the new offence, corroboration would be required in the case of each of the two incidents that are the minimum requirement to establish proof of a "course of behaviour".
58. Mr Tickell noted that "crimes committed in private, domestic contexts are notoriously difficult to prosecute". (It is well known that conviction rates in prosecutions for crimes such as rape or sexual assault tend to be well below the national average.) He queried whether it might be appropriate, on this basis, to disapply the corroboration rule for the new offence, but noted that this was "likely to be an extremely controversial proposal".<sup>lxxxix</sup> Mr Tickell's concerns about the effect of corroboration on the new offence were shared by some stakeholders who were otherwise strong supporters of the new offence, such as the PCS Union<sup>xc</sup> and Rape Crisis Scotland.<sup>xci</sup>

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<sup>lxxxiv</sup> Written submission

<sup>lxxxv</sup> Justice Committee, Official Report, 30 May 2017, cols. 9-10

<sup>lxxxvi</sup> Justice Committee, Official Report, 30 May 2017, col 10

<sup>lxxxvii</sup> Justice Committee, Official Report, 30 May 2017, col 10

<sup>lxxxviii</sup> Written submission

59. The evidence of the Scottish Police Federation (SPF) focussed in large part on the point of arrest. It said it envisaged a possibility of frontline officers becoming "pawns in routine family disagreements". Police officers were accustomed to applying a "reasonable person" test when called to a disturbance, but not when they were being asked to make a judgement on whether someone had suffered psychological harm. The SPF expressed fears that officers were being asked to become "thought police". Its evidence also said that policing the provision requiring evidence of a "course of behaviour" may prove problematic in practice-

” If we consider for a moment the police attending an incident where B alleges A behaved in a particular manner, and then states that A behaved in the same manner last week, is this a course of behaviour for the purposes of this legislation?<sup>xcii</sup>

60. In oral evidence, Calum Steele of the SPF said he did not envisage the concerns the SPF had raised as being "insurmountable" but said there was a "fundamental difference" between arresting on the basis of physical evidence and interpreting whether there had been psychological abuse. He said that, at the very least, police officers would need training in how to apply the law before it came into force.<sup>xciii</sup>

## Responses to these concerns

61. Mr Steele also acknowledged that, if the Bill were passed, it was possible that most police investigations into the new offence might take the form of an historical inquiry rather than an on-the-spot arrest.<sup>xciv</sup> This ties in other evidence and testimony the Committee received that it is only after the spell of a coercive relationship is broken that the victim is likely to seek help.<sup>xcv</sup> Detective Chief Superintendent Lesley Boal of Police Scotland indicated that the investigatory work officers would be called upon to undertake in relation to the new offence would be of a similar character to other police work, such as investigations into the abuse of children. She said that it was already considered good practice for officers assigned to a domestic abuse case to try to build up a complex picture of the relationship. To that extent, she said, "this is a new Bill, but what is in it is not anything new. Police officers are well equipped."<sup>xcvi</sup>

62. In relation to the inclusion of "distress" within the definition of the offence, the Cabinet Secretary told the Committee that this accurately reflected the Scottish

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lxxxix Written submission; Justice Committee, Official Report, 30 May 2017, cols. 30-31

xc Written submission

xcii Written submission

xciii Written submission

xciv Justice Committee, Official Report, 6 June 2017, col. 2

xcv Justice Committee, Official Report, 6 June 2017, col. 3

xcvi Note of meeting with Scottish Women's Aid; Note of meeting with Victim Support Scotland; Note of meeting with Shakti Women's Aid

xcvii Justice Committee, Official Report, 6 June 2017, col. 10

Government's policy choices. He said that "merely referring to "fear" or "alarm" would mean that courses of conduct that should be criminal as a matter of policy would not be included in the scope of the offence." The Cabinet Secretary said that he expected the courts, in interpreting the offence, to take into account dictionary definitions of terms used. The Concise Oxford Dictionary, he advised the Committee, defines distress as "extreme anxiety or suffering".<sup>xcvii</sup> For the COPFS, Anne Marie Hicks said she did not see any need for "distress" to be qualified as "serious distress", as insufficiently serious incidents would not be considered to be "abusive" in the first place, and there would be no public interest in prosecuting them.<sup>xcviii</sup>

63. On the issue of the required mental element for the offence, the Cabinet Secretary said it was considered necessary to include recklessness as intention could be difficult to prove in cases where the prosecution case rests on proof of coercive and controlling behaviour.<sup>xcix</sup> Anne Marie Hicks said that recklessness was a familiar legal concept, which prosecutors were accustomed to. As used in the criminal law, it signified not mere carelessness but "a criminal disregard in which the person disregards the possible consequences".<sup>c</sup>
64. Overall, the Cabinet Secretary said that he did not accept that the Bill set the threshold for criminalisation too low, referring to the "threefold test" set out in the Bill (ie the requirement for a course of behaviour plus the two conditions in section 1 and the existence of a defence).<sup>ci</sup> For the COPFS, Anne Marie Hicks said that she was content with the definition as set out in the Bill, saying that in her view there was no risk of the Bill criminalising "normal friction" within a relationship. She considered that the Bill delivered the necessary legal certainty for prosecutors to work with it.<sup>cii</sup>
65. In relation to corroboration, Detective Chief Superintendent Boal acknowledged that this would create challenges. There would be cases where an insufficiency of evidence might lead to cases not going forward and there would need to be a conversation with the complainer to explain why the case was not proceeding. The complainer could be put in touch with other organisations that could help them.<sup>ciii</sup> The written evidence of the COPFS acknowledged that corroboration could impact on the investigation of the new offence, but said that prosecutors had refined their methods for gathering evidence in relation to crimes committed in private. Giving oral evidence on behalf of the COPFS, Anne Marie Hicks said she saw the requirement for corroboration as one of the "safeguards" against over-criminalisation built into the new law.<sup>civ</sup>

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xcvii Justice Committee, Official Report, 27 June 2017, col. 9

xcviii Justice Committee, Official Report, 6 June 2017, col. 27

xcix Justice Committee, Official Report, 27 June 2017, col. 18

c Justice Committee, Official Report, 6 June 2017, col. 7

ci Justice Committee, Official Report, 27 June 2017, col. 18

cii Justice Committee, Official Report, 6 June 2017, cols. 6 and 21-22

ciii Justice Committee, Official Report, 6 June 2017, cols. 24-25

civ Justice Committee, Official Report, 6 June 2017, col. 22

66. Most evidence that the Committee received expresses contentment with, and welcomes, the drafting of the new offence of domestic abuse, as set out in the Bill, considering that it reflects the lived experience of many victims of domestic abuse much more effectively than the current law.
67. The Committee notes concerns with some aspects of the definition from a minority of stakeholders, including legal experts and the Scottish Police Federation. The Committee asks the Scottish Government to further reflect on, and respond to, observations that the current definition may have inadvertently set the bar of criminalisation too low, in that it may capture behaviour that does not amount to a course of psychological abuse.

## Defence on grounds of reasonableness

68. Section 5 states that it is a defence for A to show that the course of behaviour was reasonable in the particular circumstances. Reasons for including a statutory defence are not set out in the Policy Memorandum although the Explanatory Notes provide some examples of when the defence might be used, such as protecting the family finances where B has a gambling addiction, restricting B's movement where B is suffering from dementia, or preventing B from associating with certain people where B is a recovering addict.<sup>cv</sup>
69. Most evidence to express a view on this provision either welcomed it<sup>cvii</sup> or did not object to it.<sup>cvii</sup> The COPFS described it as an "appropriate safeguard",<sup>cviii</sup> with its representative, Anne Marie Hicks, pointing out that its inclusion paralleled the inclusion of a similarly worded defence in relation to the statutory offence of stalking.<sup>cix</sup> The submission from Dr Vanessa Bettinson of De Montford University Law Department said that the defence-

” ...would be helpful in situations where the behaviour was generally for a good reason, or for the benefit of the victim. [Section] 5(2) correctly identifies the need for objective evidence and allowing the defence to be judged on the circumstances as the perpetrator believed them to be. It is necessary to permit a defence as the elements are quite far reaching, especially as the victim does not need to suffer the harm.<sup>cx</sup>

<sup>cv</sup> At paragraph 37

<sup>cvii</sup> Abused Men in Scotland, written submission; Faculty of Advocates, written submission; Glasgow Bar Association, written submission

<sup>cviii</sup> Scottish Women's Convention, written submission; Victim Support Scotland, written submission

<sup>cix</sup> Written submission

<sup>cx</sup> Justice Committee, Official Report, 6 June 2017, col. 32

<sup>cx</sup> Written submission

70. Andrew Tickell said that he did not find the inclusion of the defence in the Bill particularly reassuring, as it would fall on the accused to prove that their behaviour had been reasonable.<sup>cxix</sup> The Law Society of Scotland said that, whilst it agreed with the defence provided for in the Bill, "we would question whether behaviour defined as including violent, threatening or intimidating behaviour can ever be reasonable".<sup>cxii</sup>
71. Some evidence went further, querying the basis for including the defence.<sup>cxiii</sup> Scottish Women's Aid (SWA) said that the Explanatory Notes had not made a convincing case for the provision, suggesting that the examples given, rather than being instances of the accused acting "reasonably" raised human rights issues around individual autonomy.<sup>cxiv</sup> In oral evidence, Dr Marsha Scott of SWA said that it was a common characteristic of many controlling personalities to present a facade to the world that was "rational, reasonable and righteous", which gave her concerns about the defence.<sup>cxv</sup> She considered that there were sufficient safeguards already in the definition not to require there to be a statutory defence, but said that she accepted that a decision had been made.<sup>cxvi</sup> Girijamba Polubothu of Shakti Women's Aid, which works with female victims of abuse from ethnic minority communities, expressed concern about the defence being used to seek to justify behaviour on the basis that it is accepted within a minority community.<sup>cxvii</sup>
72. The Cabinet Secretary told the Committee that he was aware of no evidence to suggest that the defence could be misused (for instance by excusing abusive behaviour or slowing down the case). In his view, the defence offered a safeguard for the accused to argue that they acted reasonably.<sup>cxviii</sup>

73. In a sensitive area of the criminal law, concerning relationships and the personal lives of individuals, the Committee recognises the necessity of providing the accused with an opportunity to seek to demonstrate to the court's satisfaction that their conduct was reasonable under the circumstances. It therefore supports the inclusion of the statutory defence to the charge of domestic abuse, as set out in the Bill. The Committee invites the Scottish Government to note, and to respond to, evidence received expressing concern that the defence should not become a "loophole" enabling manipulative abusers to present evidence that the conduct was reasonable to them.

cxix Justice Committee, Official Report, 30 May 2017, col. 12

cxii Written submission

cxiii e.g. Children and Young People's Commissioner Scotland, written submission; Scottish Women's Rights Centre, written submission; Zero Tolerance, written submission

cxiv Written submission

cxv Justice Committee, Official Report, 13 June 2017, col. 7

cxvi Justice Committee, Official Report, 13 June 2017, cols. 18-20

cxvii Justice Committee, Official Report, 13 June 2017, col.5

cxviii Justice Committee, Official Report, 27 June 2017, col. 21

## The Bill's focus on partner relationships

74. At the start of oral evidence-taking, Scottish Government officials informed the Committee that, in prior Government consultations the question of what types of relationship to include in legislation had been put and that "there was strong support for an offence that relates to partners and ex-partners, because there is such a particular dynamic to that type of abuse."<sup>cxix</sup>
75. Evidence to the Committee was divided as to whether the Bill was right in defining the new offence in this way, rather than (as in England and Wales) legislating for an offence that would apply to relationships within households generally. A large number of stakeholders considered that the Bill took the right approach. They accepted the Scottish Government's argument that it flowed from its "gendered analysis" and the definition of "domestic abuse" consistently used by the Government itself and by law enforcement agencies such as the police and the COPFS. These included third sector organisations supporting female victims of crime and abuse,<sup>cxx</sup> Police Scotland,<sup>cxxi</sup> Victim Support Scotland,<sup>cxxii</sup> and some legal academic respondents.<sup>cxxiii</sup> Anne Marie Hicks of the COPFS said that it would be "difficult" for the police and prosecutors to move away from a definition of domestic abuse that had been in place since before 2004. Widening the definition of domestic abuse, she said, could risk "diluting" its meaning and seriousness.<sup>cxxiv</sup> Marsha Scott of Scottish Women's Aid agreed, adding that there would, in any case, be "adequate protections in the Bill for people of all ages, if it is used appropriately",<sup>cxxv</sup> and that-
- ” ... if you start to broaden the definition, the Bill will be confused with child abuse legislation and there will be a variety of other difficulties that take our eyes off the prize of gender.<sup>cxxvi</sup>
76. A number of stakeholders disagreed.<sup>cxxvii</sup> Ronnie Barnes of Action on Elder Abuse Scotland said that his organisation's response to such evidence was "if this is not the right Bill what is?" Mr Barnes referred to evidence collected by his organisation indicating that elder abuse was a consistently under-reported problem, and was rarely prosecuted. He queried why widening the category of people to whom the offence was potentially applicable would in any way weaken the Bill.<sup>cxxviii</sup> However, he did acknowledge that the issue of criminalising elder abuse did give rise to some

<sup>cxix</sup> Justice Committee, Official Report, 9 May 2017, col. 40

<sup>cxx</sup> Rape Crisis Scotland, written submission; Zero Tolerance, written submission

<sup>cxxi</sup> Justice Committee, Official Report, 6 June 2017, cols. 11-12 (Detective Chief Superintendent Lesley Boal)

<sup>cxxii</sup> Justice Committee, Official Report, 13 June, cols. 21 and 30-131 (Kevin Kane and Alan McCloskey)

<sup>cxxiii</sup> Dr Vanessa Bettinson, de Montford University, written submission.

<sup>cxxiv</sup> Justice Committee, Official Report, 6 June 2017, cols. 12-13

<sup>cxxv</sup> Justice Committee, Official Report, 13 June 2017, col. 21

<sup>cxxvi</sup> Justice Committee, Official Report, 13 June 2017, col. 21

complexities, such as where a carer for an older relative becomes "an abuser by default" because they have difficulty coping with their new caring responsibilities, or where there has been abusive behaviour but the victim may not want the abuser, who may be their carer as well as a relative, to be barred from the home.<sup>cxxix</sup>

77. A significant number of organisations working with children and young people provided evidence at Stage 1, with some expressing some disappointment that the Government had not defined the offence more widely. They tended to say that an opportunity had been missed to update the law and to send out a clear message about the unacceptability of emotional or psychological abuse of children. A number of submissions said that the Bill should expressly provide that a dependent child of a victim of domestic abuse is also a victim of criminal abuse.<sup>cxxx</sup>

## The aggravator

78. However, the inclusion of the aggravator in relation to a child alongside the offence was in general warmly welcomed.<sup>cxxxi</sup> Witnesses from organisations working with children and young people told the Committee that the inclusion of the aggravator showed that the Scottish Government had at least listened and responded to concerns raised during the pre-legislative consultation.<sup>cxxxii</sup>
79. A number of submissions considered that some work was still required on the drafting of the aggravator, and in particular on the provision requiring the child to see, hear, or be present during, the incident that constitutes part of a course of abusive behaviour towards B in order for the aggravation to be established.<sup>cxxxiii</sup> The Committee heard evidence that any child of a household in which there is partner abuse is, by definition, also themselves a victim of abuse, and considered that this should be more clearly reflected in the language of section 4. The charity Aberlour stated that-

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<sup>cxxvii</sup> Law Society of Scotland, written submission; Justice Committee, Official Report, 30 May, cols. 25-26 (Andrew Tickell, Glasgow Caledonian University; Grazia Robertson, Law Society of Scotland)

<sup>cxxviii</sup> Justice Committee, Official Report, 13 June 2017, cols. 29-32, 34 and 43

<sup>cxxix</sup> Justice Committee, Official Report, 13 June 2017, cols. 32 and 40

<sup>cxxx</sup> e.g. Children 1st, written submission; The Impact Project, written submission NSPCC Scotland, written submission; Scottish Children's Reporter Administration, written submission; British Psychological Society, written submission

<sup>cxxxi</sup> e.g. Aberlour, written submission; Barnardos, written submission; Rape Crisis Scotland, written submission; LGBT Youth Scotland, written submission; Scottish Women's Convention, written submission

<sup>cxxxii</sup> Justice Committee, Official Report, 13 June 2017, cols. 10-11 (Marsha Scott, Scottish Women's Aid); Justice Committee, 20 June 2017, cols. 10-12 (Ruth Friskney, Barnardos Scotland, Megan Farr, Children and Young People's Commissioner Scotland)

<sup>cxxxiii</sup> e.g. Barnardos, written submission; Community Safety Glasgow, written submission; Zero Tolerance, written submission



” ...we have concerns that this will limit the experience of domestic abuse to children who can express or identify they could see, hear or were present during the abuse. This presents a difficulty in recognising or establishing that younger children, infants, babies, or children who have limited capacity for communication due to a physical or learning disability, may have experienced domestic abuse. This wording of the offence aggravator also fails to take account of, or recognise, the ongoing impact and effects on children of domestic abuse, where they may not have seen, heard or been present during any one incident, but can suffer the negative effects of that abuse due to the impact on the mother's wellbeing.<sup>cxxxiv</sup>

80. Witnesses from Barnardos and the office of the Children's Commissioner also said that the current drafting risked missing situations where the victim seeks to protect a child from the abuse they are suffering.<sup>cxxxv</sup>

## Scottish Government response

81. A joint letter to the Committee from the Cabinet Secretary for Justice and the Minister for Childcare and Early Years midway through the Committee's evidence-taking stated that the Government was "absolutely clear that being in an environment where domestic abuse is taking place is damaging to children". In relation to evidence on the aggravator, the letter noted that-

” ... a number of respondents have questioned the specific wording of the aggravation and whether this should be amended or extended, for example to where a child is “living in the household” where the abuse takes place.

In framing the aggravation, our aim has been to reflect circumstances that link directly to the actions of the abuser, which a court could take into account in sentencing. Whilst we are clear that seeing, hearing or being present during a specific incident of abuse are not the only ways in which a child may be harmed by domestic abuse, we are also concerned that an aggravation that is drafted too broadly - i.e. acknowledging that living in any abusive environment is harmful to children - might undermine the effectiveness of the aggravation as it would be difficult for the court to assess the particular culpability of the perpetrator where an aggravation is not tied to specific actions of the perpetrator. However, we recognise that this is an issue that is likely to be the subject of further debate during the progress of the Bill.<sup>cxxxvi</sup>

The letter continued by noting that Section 12 of the Children and Young Persons (Scotland) Act 1937 already allows prosecutors to bring charges where someone with parental responsibilities for a child, or who has charge or care of a child, ill-treats or neglects, etc. a child aged under 16, and that-

<sup>cxxxiv</sup> Written submission

<sup>cxxxv</sup> Justice Committee, 20 June 2017, cols. 11-12 (Ruth Friskney, Barnardos Scotland, Megan Farr, Children and Young People's Commissioner Scotland)

<sup>cxxxvi</sup> Available at: [http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/20170608CSfJandMfCEYtoMM.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/20170608CSfJandMfCEYtoMM.pdf)



” ...we acknowledge and share the concerns raised by children’s organisations and others that the current definitions within Section 12 have not kept pace with modern understanding of the neglect and harm experienced by children, including emotional and psychological harm. The Child Protection Improvement Programme report, published in March 2017, examined the current provision in the 1937 Act and concluded that it would benefit from being amended.

As we announced to Parliament on 2 March, we will consult this year on reforms to Section 12, with the aim of seeking consensus on the terms of a new, modernised criminal offence of abuse and neglect of children to be introduced in this parliament. We have committed to working closely with children's organisations and other relevant stakeholders in considering and developing the terms of the proposed modernised offence.

82. In oral evidence, the Cabinet Secretary underlined that there was a separate criminal law in relation to child abuse and that it was under review. In relation to the evidence the Committee had heard on ensuring that the Bill recognised the child as a victim, he said it was his understanding that what stakeholders were, in effect, asking for was for the accused to be charged with two separate offences with regard to the same behaviour: partner abuse and abuse of a child. In his view, this was not necessary as the existence of the section 4 aggravator should ensure that "no separate offence is needed in order for the child to be regarded as a victim and for the impact on that child to be recognised".<sup>cxxxvii</sup> The Cabinet Secretary said that, in circumstances where the police had become involved in a domestic abuse case and there were concerns about the child's welfare, he would expect the social work department and children's reporter to be notified, as this is what currently happens.<sup>cxxxviii</sup>

83. The Committee accepts the Scottish Government's decision to restrict the offence to abuse within a relationship or by an individual against their former partner, rather than defining it more widely (for instance to include the parent-child relationship, or abuse of other family members). The Committee welcomes the Bill being drafted so as to take account of the fact that third parties, and children in particular, can be used by a perpetrator as a means to further their abuse and control, and welcomes the inclusion of a statutory aggravator for instances of partner abuse in which children are directly involved.
84. Whilst some stakeholders considered that the Bill should have gone further, recognising abuse of a child as a criminal act in its own right, the Committee notes and accepts the Scottish Government's view that the Bill strikes the right balance and that any major reform of the criminal law on the abuse of children is best considered separately. The Committee welcomes the Government's undertaking to consult on this issue in the coming months.
85. The Committee invites the Scottish Government to respond to evidence that the reference in the current drafting to the aggravation being established where a

<sup>cxxxvii</sup> Justice Committee, Official Report, 27 June 2017, col. 9

<sup>cxxxviii</sup> Justice Committee, Official Report, 27 June 2017, col. 15

child "sees or hears, or is present, during" an incident of abusive behaviour is too narrow. It was argued in this evidence that children in the care of a victim of abuse are likely to suffer trauma as a result of that abuse, whether or not they directly witnessed particular abusive incidents, and that there is therefore "aggravation".

## Enforcement of the new law and treatment of abusers

86. Evidence discussed earlier [cross-ref] referred to a perceived risk of the Bill setting too low a threshold for criminality.<sup>cxxxix</sup> The Glasgow Bar Association noted the potentially severe impact of a conviction for domestic abuse on a person's family relationships, career and future.<sup>cxl</sup> Abused Men in Scotland, whilst welcoming the new offence, also commented on the real risk of "normal behaviour" within a relationship being criminalised.<sup>cxli</sup> The Scottish Police Federation argued that, whilst domestic abuse was "abhorrent" current policy appeared to be-

” ... geared almost exclusively towards punishment. We find this at variance with diversionary and educational activities in most other crimes. We simply ask whether a long term strategy that seems built on prosecutorial activities is likely to bring about the attitudinal changes that are necessary to help eradicate domestic abuse.<sup>cxlii</sup>

87. During the Committee's recent inquiry into the COPFS, there were clear differences of views amongst witnesses as to whether domestic abuse cases were being treated by prosecutors and the police with an appropriate level of robustness and concern for public safety or whether the approach was too strict and did not allow for sufficient discretion in individual cases.<sup>cxliii</sup> (The focus of that evidence was more on arrests and on prosecution policy rather than on penal policy in relation to domestic abuse offenders although there is clearly some crossover between the two issues.) The end of the inquiry roughly coincided with the publication of a revised Joint Police Scotland- COPFS protocol on the handling of domestic abuse cases that both organisations said was intended to improve upon prior iterations, and which the SPF, during scrutiny of this Bill, welcomed as a step forward.<sup>cxliv</sup> However, both Police Scotland and the COPFS disagreed that the previous protocol had set out an inappropriately punitive and inflexible approach.<sup>cxlv</sup>

cxxxix Discussion beginning at paragraph 46

cxl Written submission

cxli Written submission

cxlii Written submission

cxliii Justice Committee, 9th Report, 2017 (Session 5): Role and Purpose of the Crown Office and Procurator Fiscal Service, paragraphs 148-160, available at:

<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/104512.aspx>

88. The maximum penalty for an offence under section 1 is up to 14 years on indictment. The maximum sentence for the offence of "coercive control" in England and Wales is 5 years, although that offence does not include physical violence. Bill Team officials told the Committee that this perhaps helped explain the discrepancy. However, they also clarified that there would be nothing in the Bill to stop the court setting the penalty at the upper end on the basis of psychological abuse only, if it was satisfied that the circumstances were sufficiently serious.<sup>cxlvi</sup>
89. Sentencing is a matter for the courts. However, prosecution policy (which is set by the Lord Advocate) can help determine how many cases end up in court. The prosecution service also has the power to divert cases from prosecution where they consider this appropriate. This may involve the individual concerned undertaking a regulated activity intended to address particular behaviour. The Committee notes that best estimates as to the costs to the prison service set out in the Financial Memorandum<sup>cxlvii</sup> are based on an assumption that disposals in relation to the new offence will follow a similar pattern to current disposals in relation to domestic abuse cases, although this may not turn out to be the case in practice. Many current cases are likely to involve violent behaviour whereas convictions under this Bill may not.
90. A joint letter to the Committee from the Cabinet Secretary for Justice and the Minister for Childcare and Early Years received around halfway through the Committee's evidence-taking referred to-
- ” ... the Caledonian System, which is an integrated approach to address men's domestic abuse and to improve the lives of women, children and men. Crucially, in addition to working with male perpetrators of domestic abuse to reduce re-offending, the programme offers integrated services to women and children to seek to reduce the risk of further harm. In November 2016, we announced additional funding to increase the capacity of the Caledonian services in existing locations and also to explore the potential to expand the programme to other geographic locations. The Equally Safe strategy acknowledges that the most effective way to eradicate domestic abuse and other forms of violence is through prevention.<sup>cxlviii</sup>
91. The Committee invited views from some witnesses as to whether they thought Scottish Police Federation's observations on the treatment of offenders in domestic abuse cases were valid. Kathryn Sharp of Social Work Scotland said she thought that the SPF's viewpoint did not really reflect how social workers approached the

cxliv Justice Committee, Official Report, 6 June 2017, col. 21 (Calum Steele, Scottish Police Federation)

cxlv Justice Committee, Official Report, 6 June 2017, cols 16 and 19-20 (Detective Chief Superintendent Lesley Boal, Police Scotland, Anne Marie Hicks, COPFS); Justice Committee, 9th Report, 2017 (Session 5): Role and Purpose of the Crown Office and Procurator Fiscal Service, paragraph 152; COPFS response to the Justice Committee's 9th Report 2017, available at: [http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/20170530COPFSresponsetoReport.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/20170530COPFSresponsetoReport.pdf);

cxlvi Justice Committee, Official Report, 9 May, col. 44 (Philip Lamont)

cxlvii At paragraph 52

cxlviii Available at: [http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/20170608CSfJandMfCEYtoMM.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/20170608CSfJandMfCEYtoMM.pdf)

issue. Social workers would be "focussed on rehabilitation and have a clear belief that we should work with the perpetrators of abuse..." She said that the Bill would be welcomed by the profession in that (amongst other things) it would raise further awareness of domestic abuse and could help encourage more early intervention.<sup>cxlix</sup> Anne Marie Hicks also did not accept the SPF's evidence, commenting that from the COPFS's perspective, the main focus was not on punishment but on public protection.<sup>cl</sup>

92. However, Aaron Slater of Sacro, which works in the field of restorative justice, agreed that there was at times an over-emphasis on punitive approaches, primarily because, in many parts of the country, rehabilitation programmes were scarce. He said that many more voluntary programmes for perpetrators needed to be made available, if gains were to be made in early intervention strategies.<sup>clii</sup> Heather Williams of Scottish Women's Aid also commented on the patchiness of service availability, particularly in some rural areas. In her experience, only those whose offending was at the more serious end of the scale tended to be offered an intervention. She said that, overall, the justice system was not currently good at getting abusers to address their offending behaviour.<sup>clii</sup>
93. The submission from NSPCC Scotland commented that "perpetrator programmes/ services are often working with people "long after the effect": endeavouring to address behaviours that have become entrenched over many, many years".<sup>cliii</sup>
94. The Cabinet Secretary responded to the evidence the Committee had heard on offender programmes that more could be done to make programmes available but that he was "confident that we have a broad spread of programmes across the country".<sup>cliv</sup>
95. The Committee notes evidence that, in relation to domestic abuse, not all offenders benefit from interventions<sup>clv</sup> and that therefore certain types of community-based interventions may not be appropriate. Sometimes the priority must be to ensure that the perpetrator is kept away from the victim.<sup>clvi</sup> Another specific concern brought to the Committee's attention was a lack of an age limit for the offence, meaning that it would appear that young people could be convicted.<sup>clvii</sup> Witnesses from Barnados and the office of the Children's Commissioner told the Committee that they were not arguing for anything specifically to be added to the Bill, but said that anyone aged under 18 who became the subject of an investigation should be subject to child protection procedures and have access to services that will help them address their behaviour.<sup>clviii</sup>

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cxlix Justice Committee, Official Report, 20 June, cols. 24-25

cl Justice Committee, Official Report, 6 June, col. 14

cli Justice Committee, Official Report, 20 June, cols. 24-26

clii Justice Committee, Official Report, 13 June, col. 25

cliii Written submission

cliv Justice Committee, Official Report, 27 June, col. 25.

clv Justice Committee, Official Report, 20 June 2017, col. 27

clvi Justice Committee, Official Report, 20 June, cols. 27 and 32 (Kathryn Sharp, Social Work Scotland)

96. Kathryn Sharp told the Committee that appraising the success of interventions that had been used in Scotland - the Caledonian System and Respect were two mentioned in evidence - was "a hugely contested area" and that there was "no straightforward answer". Recent evaluations of both interventions had indicated that there had been a continuum of outcomes, and that, whilst some very positive changes had been encountered, the exact impact of the work was extremely hard to gauge. She estimated that the Bill would lead to an increase in mandatory referrals to rehabilitation programmes.<sup>clix</sup> In this connection, the Committee notes evidence collected from local authorities by the Finance and Constitution Committee indicating that the Bill would lead to a significant increase in social work reports but that this had not been adequately costed in the Financial Memorandum. Evidence from Bill Team officials to that committee had acknowledged this as a "gap" in the Memorandum.<sup>clx</sup>

97. The Committee asks the Scottish Government to comment on the factors it took into account in drafting the Bill so as to enable the penalty for the new domestic abuse offence to be set at the upper end (14 years) on the basis of psychological abuse alone.

98. The Committee notes the importance of the Crown Office and Procurator Fiscal Service and Police Scotland setting clear prosecution policies in relation to the new domestic abuse offence, in advance of it coming into force, including providing guidance on when prosecutors would consider diversions from prosecution to be appropriate.

99. The Committee notes evidence received indicating that there is patchiness in the availability of programmes to help address offending behaviours, especially outwith urban areas, and ask the Scottish Government for a response to this evidence. The Committee asks the Scottish Government to clarify whether it envisages more resources being required in relation to a likely uplift in demand for criminal justice social work services, should the new offence come into force, and if so, whether additional funding will be made available.

## Implementation of the new law and barriers to its effectiveness

100. As part of its Stage 1 scrutiny, the Committee sought evidence as to what practical barriers might obstruct the policy aims behind the creation of the new offence.

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clvii e.g. British Psychological Society, written submission

clviii Justice Committee, Official Report, 20 June, cols 9-10 (Ruth Friskney, Barnardos, Megan Farr, Commissioner for Children and Young People Scotland).

clix Justice Committee, Official Report, 20 June, cols. 27-28

clx Finance and Constitution Commission submission to the Justice Committee

101. As discussed in more detail immediately below, there was a consensus in evidence that there were some significant obstacles to making the new law work. Amongst these was the requirement for corroboration in proving the offence. As this is a rule of law, it was discussed earlier in that context, although corroboration is very much a practical issue too. A number of other perceived legal obstacles - for instance, the entitlement of the accused in a domestic abuse case to defend themselves personally rather than through a lawyer, which can leave the complainer frightened to go to court - are addressed in the Bill itself, and these are discussed in the next section. Most evidence to express a view on implementation of the Bill said that the fact that there were these obstacles in no way raised questions over bringing forward the Bill. Instead, it underlined the need for the Bill to be implemented effectively and with appropriate resources.<sup>clxi</sup>
102. In oral evidence, the Cabinet Secretary acknowledged that the financial consequences of the new offence, like any new offence, were uncertain, but said that as the Bill was phased in, the consequences would become more certain-
- ” ... we have used a central estimate of 6 per cent, which is based on the impact that we know the legislation has had in England and Wales. The estimate in the financial memorandum goes from 2 per cent up to 10 per cent, and we have taken 6 per cent as a broad figure that we believe reflects the overall financial implications.... We will look at refining the financial information and at the financial support that is necessary to ensure that the legislation is effectively resourced and implemented.<sup>clxii</sup>

## Hard to reach groups and the role of the third sector

103. Evidence frequently referred to the intrinsic dynamic of a coercively controlling relationship as potentially a barrier, in itself, to the effectiveness of any criminal sanction.<sup>clxiii</sup> Perpetrators may present as very plausible people.<sup>clxiv</sup> For this and other reasons, stakeholders said that abuse is consistently under-reported.<sup>clxv</sup> A recurring theme of testimony from victims whom Committee members spoke to privately was the duration of the abuse and the capacity of the victim to put up with it for years, sometimes blaming themselves.<sup>clxvi</sup> In those cases, victims ultimately came to a realisation that the status quo was intolerable. The Committee recognises that there will be cases where victims, for a variety of reasons, never reach that point. These reasons may include a lack of certainty that psychological abuse is "real" abuse or even a lack of awareness that they are in a criminally abusive relationship at all.<sup>clxvii</sup> The Committee notes that awareness-raising (as discussed below) can, however, have a positive impact in this area.

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clxi e.g. Justice Committee, Official Report, 13 June 2017, cols 6-7 and 12 (Marsha Scott, Scottish Women's Aid)

clxii Justice Committee, Official Report, 27 June, col. 28

clxiii Children 1st, written submission; Social Work Scotland, written submission

clxiv PCS, written submission; Justice Committee, Official Report, 13 June 2017, col. 7 (Marsha Scott, Scottish Women's Aid)

clxv COPFS, written submission; Equalities and Human Rights Commission, written submission



104. Evidence was led that there are sectors of society that may experience particular barriers to reporting crimes; for instance people with mental illnesses or personality disorders,<sup>clxviii</sup> LGBT people who, for personal reasons, may be reluctant to go through a public trial process,<sup>clxix</sup> older people, who may fear embarrassment or loneliness,<sup>clxx</sup> or members of ethnic or religious minorities, who may fear ostracism from their community.<sup>clxxi</sup>
105. The Scottish Government's long-standing "gendered analysis" of domestic abuse was welcomed by most stakeholders to express a view on this issue.<sup>clxxii</sup> However, some concerns were expressed about the consequences of a public narrative of abuse as mainly something that men do to women. These included concerns that it led to men or people in same-sex relationships not reporting the crime or to cases being involving them being handled badly.<sup>clxxiii</sup> The evidence from Abused Men in Scotland commented on the challenges it faced as a small charity supporting male victims of abuse and cited statistical evidence indicating that men may be less likely to report abuse to the authorities. It commented on the persistence of gender stereotyping on the part of investigatory agencies that can lead to "the unquestioning belief of one partner, even when the other is the abuser". Its submission commented that-
- ” We cannot stress enough that the final Domestic Abuse Law must enable men and their families to feel this law is just as much to protect them as any other victims.<sup>clxxiv</sup>
106. Some evidence focussed on the experience of children as both victims of and witnesses to domestic abuse. It is not easy to capture the evidence of children by way of the formal criminal justice process.<sup>clxxv</sup> This was an issue the Committee considered during its recent inquiry into the COPFS, when it noted that the Justice Board, composed of key agencies in the delivery of criminal justice in Scotland, was working on methods to gather that evidence more humanely and effectively.<sup>clxxvi</sup> The Committee notes the recent announcement of a Scottish Government Bill to bring some of these proposals forward.<sup>clxxvii</sup>

clxvi Note of meeting with Scottish Women's Aid; Note of meeting with Shakti Women's Aid; Note of videoconference with Victim Support Scotland

clxvii Aberlour, written submission; The Impact Project, written submission; Zero Tolerance, written submission; Justice Committee, Official Report, 13 June 2017, cols. 28-29 (Marsha Scott and Heather Williams Scottish Women's Aid)

clxviii Anne O'Donnell, written submission; People First, written submission

clxix LGBT Youth Scotland, written submission; Sacro, written submission

clxx Action on Elder Abuse Scotland, written submission

clxxi Justice Committee, 13 June 2017, cols. 2-4 (Girijamba Polubothu, Shakti Women's Aid)

clxxii e.g. Children 1st, written submission; Scottish Women's Aid, written submission; Zero Tolerance, written submission

clxxiii Sacro, written submission; Victim Support Scotland, written submission

clxxiv Written submission

107. The Committee notes evidence that the Bill will raise awareness of domestic abuse.<sup>clxxviii</sup> It is to be expected that this may mean increased demand on some third sector organisations, including in relation to helping individuals report their case to police and prosecutors. In evidence to the Finance and Constitution Committee, Bill Team officials said that Ministers would keep funding arrangements for third sectors organisations under review, and consider whether pressures arising indirectly from the Bill should be factored into future spending reviews.<sup>clxxix</sup> In evidence to this Committee, the Cabinet Secretary referred to the "record levels" of funding the Scottish Government had given to third sector organisations dealing with gender-based violence but said that otherwise it would be for local authorities to decide how best to prioritise their funding for third sector organisations in the light of any additional or changed demands created by the Bill.<sup>clxxx</sup>

## Awareness raising

108. The very fact that the creation of a new offence raises awareness of the issue was seen by many stakeholders as a reason in itself (though not the main one) for welcoming the Bill.<sup>clxxxi</sup> Some evidence said that, by creating the new offence, the Scottish Parliament would give victims of abuse greater confidence to report it.<sup>clxxxii</sup> For the COPFS, Anne Marie Hicks said she was confident that the Bill would have an "If you build it they will come" effect: although the situation would not change overnight, confidence would build up that cases could be dealt with.<sup>clxxxiii</sup> Several stakeholders said it was vital that the passing of the Bill be accompanied by a public education campaign, with some submissions noting the perceived success of previous campaigns on related issues, such as domestic violence.<sup>clxxxiv</sup> In this connection, the Committee notes the recent public campaign to highlight the introduction of the new offence of sharing intimate images without consent.

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clxxv e.g. Children 1st, written submission; Scottish Children's Reporter Administration, written submission; Justice Committee, Official Report, 20 June 2017, col. 14 (Chloe Riddell, Children 1st)

clxxvi Justice Committee, 9th Report, 2017 (Session 5): Role and Purpose of the Crown Office and Procurator Fiscal Service, paragraphs 113-132; available at: <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/104512.aspx>

clxxvii Proposed Vulnerable Witnesses and Pre-recorded Evidence Bill. See further: <http://www.gov.scot/Publications/2017/09/8468/6>

clxxviii COPFS, written submission; Justice Committee, Official Report, 6 June 2017, cols. 19 and 25-26 (Anne Marie Hicks, COPFS, Detective Chief Superintendent Lesley Boal, Police Scotland; Calum Steele, Scottish Police Federation)

clxxix Finance and Constitution Committee submission to the Justice Committee

clxxx Justice Committee, Official Report, 27 June 2017, cols. 16-17

clxxxi e.g. Scottish Women's Rights Centre, written submission; Justice Committee, Official Report, 20 June 2017, col. 20 (Megan Farr, Commissioner for Children and Young People Scotland)

clxxxii e.g. LGBT Youth Scotland, written submission



109. In oral evidence, the Cabinet Secretary confirmed that there would be a public evidence campaign if and when the new offence comes into force, and that it was likely that third sector organisations would be part of it.<sup>clxxxv</sup>

## Legal profession

110. The need for raised awareness amongst relevant professions was also highlighted in a number of submissions. These professions included the legal profession and judges, with some evidence indicating that legal professionals did not always handle domestic abuse cases sensitively or with sufficient awareness of the dynamics of abusive relationships and coercively controlling behaviour.<sup>clxxxvi</sup> The evidence of the COPFS highlighted the "skills and expertise" that staff had developed in recent years in handling domestic abuse cases and cases of a similar nature.<sup>clxxxvii</sup> From its recent inquiry, the Committee is aware that the COPFS is under resourcing pressure, but has made plans on how to maintain service standards on reduced resources. The COPFS's evidence did not comment directly on how it would respond to the increased cost and time pressure of prosecuting the new offence. In oral evidence, its representative, Anne Marie Hicks said that-

” ...we will keep the situation under review and, if there is a need to ask the Scottish Government for further money to deal with it, we will do that as we do for other operational matters.<sup>clxxxviii</sup>

111. In relation to judicial training, the Cabinet Secretary told the Committee that training on domestic abuse forms part of a new sentencer's induction and that refresher training is available throughout a judge's career. Supervision of training for judges rests with the Judicial Institute and, ultimately, the Lord President. The Cabinet Secretary said that he was not minded to specify mandatory training for judges, as he was conscious of the need to ensure that the Government does not direct the judiciary.<sup>clxxxix</sup>

## Police service

112. As discussed earlier, the Scottish Police Federation expressed various uncertainties about the policing of the Bill, arguing that it threw up new challenges.<sup>cx</sup> The

clxxxiii Justice Committee, Official Report, 6 June 2017, col. 19

clxxxiv e.g. Faculty of Advocates, written submission; Children 1st, written submission; Rape Crisis Scotland, written submission

clxxxv Justice Committee, Official Report, 27 June 2017, cols. 11-12

clxxxvi e.g. Community Safety Glasgow, written submission; NSPCC Scotland, written submission; Scottish Women's Aid, written submission, Scottish Women's Convention, written submission

clxxxvii Written submission

clxxxviii Justice Committee, Official Report, 6 June 2017, col. 26

clxxxix Justice Committee, Official Report, 27 June 2017, cols. 22-23

representative of Police Scotland questioned this, saying that police officers were not fundamentally being asked to do anything significantly different.<sup>cxci</sup> Police training costs are estimated in the Financial Memorandum at just under £450,000; a figure the SPF described as "wildly inaccurate" as they did not include the cost of taking officers away from their frontline roles to undergo training.<sup>cxcii</sup>

113. In oral evidence, the SPF's Calum Steele said it was self-evident that introducing the offence would increase the pressure of police resources. He explained that domestic abuse was already resource-intensive, in terms of police time. The Scottish Government's policy in relation to resourcing the Bill appeared to consist of asking the Parliament to agree to the law change and then to hand responsibility to Police Scotland to decide how best to accommodate the increased demand within current resources.<sup>cxciiii</sup>

114. The Committee agrees with evidence that, if the Bill is agreed to, it will be crucial for the Scottish Government to have in place a plan for its implementation, especially in relation to the new offence of domestic abuse. The Committee welcomes indications from the Scottish Government that it intends to mount a publicity campaign around the new offence, and that third sector organisations are likely to be involved in it.

115. The Committee acknowledges that the Scottish Government's "gendered analysis" is based on evidence showing that domestic abuse victims are overwhelmingly female and that perpetrators are overwhelmingly male. The Committee asks the Scottish Government to note views expressed during Stage 1 scrutiny that it is vital that the public narrative on the unacceptability of domestic abuse takes account of male victims of abuse and abuse within same-sex relationships, and that the public message about the Bill is an inclusive one.

116. The Committee recognises the importance of all those involved in the process of implementing the new offence, if and when it becomes law, receiving appropriate training, including the judiciary.

117. The Committee notes that implementation of the new offence will have cost implications for the police, the prosecution service, the third sector, and criminal justice social work, and considers it crucial that the Scottish Government keep these implications under review.

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cxci Written submission

cxcii Justice Committee, Official Report, 6 June 2017, cols. 8-10 (Detective Chief Superintendent Lesley Boal)

cxciiii Scottish Police Federation, written submission

cxciiv Justice Committee, Official Report, 6 June 2017, col. 26

## Non-harassment orders

118. The schedule to the Bill makes various reforms in the field of criminal procedure, evidence and sentencing, in relation to cases of sexual offending or domestic abuse. One of the most significant of these changes concerns non-harassment orders (NHOs). In essence, an NHO is an order requiring an individual to refrain from harassing another person identified in the order. In effect, this may mean ordering the individual to refrain from having contact with that person or ordering them to stay away from particular places all the time or at particular times. Where a person is convicted of an offence involving misconduct towards another person, the prosecutor may apply to the court for an NHO to be imposed.
119. The current law has been criticised on the ground that it leaves the initiative in criminal cases entirely with the prosecution. The prosecutor may decline to apply for an NHO for reasons that the victim may find unconvincing. Indeed, the prosecutor is under no formal legal obligation to engage with the victim at all on whether an application should be made. Concerns over how the law is operating arose in evidence during the Committee's inquiry into the COPFS. During the inquiry, the Committee also had a private meeting with a victim of domestic abuse who had been left shocked, angry and fearful by the Crown's decision not to apply for an NHO, a decision that the victim said they had found mystifying.<sup>cxciv</sup> These concerns were once again raised with the Committee during Stage 1 scrutiny of this Bill.<sup>cxcv</sup>
120. If an NHO is not asked for at the conclusion of a criminal trial, and it is therefore not granted, there is the option of seeking one via a civil action, but this is likely to be expensive for the victim. The burden of having to return to the court also imposes additional stress on the victim. Witnesses were clear that, whilst this remedy exists on paper, it is not satisfactory in practice.<sup>cxcvi</sup>
121. The Scottish Government accepts that the law is not working as it should and, as a consequence, has brought forward a reform in paragraph 8 of the schedule. This makes provision to require the court *a/ways* to consider whether to make an NHO in the case of a conviction for (a) an offence under section 1 of the Bill, or (b) any other offence which the court has found was aggravated by reason of occurring in the context of domestic abuse. As the Policy Memorandum explains-

” Discretion will continue to lie with the court to determine whether to impose an NHO, but this provision will make it mandatory for the court to consider whether to impose an NHO ... Prosecutors are being given an express power to make submissions to the court on the question of whether the court should impose an NHO. This will ensure the views of the prosecutor, including views being expressed on behalf of the victim, can be brought before the court as the NHO is being considered.<sup>cxcvii</sup>

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cxciv Note of meeting available at: [http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/Note\\_of\\_meeting\\_with\\_victim\\_Z\\_-\\_04102016\\_Final.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/Note_of_meeting_with_victim_Z_-_04102016_Final.pdf)

cxcv Anonymous 1, written submission; [http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/20170424LFtoMM-NHOs.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/20170424LFtoMM-NHOs.pdf) (Letter from Linda Fabiani MSP);

cxcvi Justice Committee, Official Report, 13 June 2017, col. 14 (Heather Williams, Scottish Women's Aid)

122. This reform was welcomed in practically all evidence to express a view. Stakeholders considered that the law was not working and that victims were being let down.<sup>cxcviii</sup> Supporters of the reform included the COPFS itself.<sup>cxciX</sup> Dr Marsha Scott of Scottish Women's Aid was amongst those who cited statistical evidence of the very low incidence of NHOs being granted in relevant cases, saying that this showed that NHOs "are not working".<sup>cc</sup> A minority of submissions considered that the reform did not go far enough. They would have preferred it that the Bill set out a presumption in favour of an NHO being granted in cases where the court would be required to consider making one.<sup>cci</sup> Dr Scott said that this approach would ensure that "if a non-harassment order is not issued, somebody should have to make a really good case for why it was not issued".<sup>ccii</sup> However, other evidence considered it was right that court's discretion should be unfettered.<sup>cciii</sup>

## NHOs and children

123. The evidence of Abused Men in Scotland said that it would be opposed to a presumption in favour of NHOs, as it might put at severe disadvantage non-resident fathers who wished to maintain contact with their children.<sup>cciv</sup> These comments underline that, as discussed elsewhere in this report, there is a sometimes problematic lack of clarity on the interplay of orders and decisions from different courts, and on the interaction of legal judgments with family life generally. Evidence from NSPCC Scotland referred to their awareness of a case where an NHO was granted against an abuser but subsequently overturned when he obtained a contact order.<sup>ccv</sup> Girijamba Polubothu of Shakti Women's Aid referred to the difficulty of applying NHOs in the context of a minority culture in which victims and their children may have extended family ties.<sup>ccvi</sup> Describing domestic abuse as "a parental choice", Heather Williams of Scottish Women's Aid said the courts needed to be more willing to consider refusing contact to parents who have abused their partner or ex-partner.<sup>ccvii</sup>

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<sup>cxcvii</sup> Policy Memorandum, paragraphs 160-161

<sup>cxcviii</sup> E.g. Justice Committee, Official Report, 13 June 2017, cols. 41-42 (Kevin Kane, Victim Support Scotland); Rape Crisis Scotland, written evidence

<sup>cxciX</sup> COPFS, written submission

<sup>cc</sup> Justice Committee, Official Report, 13 June 2017, col. 11

<sup>cci</sup> Anonymous 1, written submission; Letter from Linda Fabiani MSP, available at: [http://www.parliament.scot/S5\\_JusticeCommittee/Inquiries/20170424LFtoMM-NHOs.pdf](http://www.parliament.scot/S5_JusticeCommittee/Inquiries/20170424LFtoMM-NHOs.pdf)

<sup>ccii</sup> Justice Committee, Official Report, 13 June 2017, col. 13

<sup>cciii</sup> COPFS, written submission; Glasgow Bar Association, written submission

<sup>cciv</sup> Written submission

<sup>ccv</sup> Written submission

<sup>ccvi</sup> Justice Committee, Official Report, 13 June 2017, col. 25

<sup>ccvii</sup> Justice Committee, Official Report, 13 June 2017, col. 13

124. A number of submissions said that the Bill should also have made equivalent provision to that already in the Bill pertaining to NHOs in relation to NHOs and children who had experienced domestic abuse.<sup>ccviii</sup> Marsha Scott of Scottish Women's Aid said that it was critical that NHOs also cover children because "if they cover just the mother, there is a massive tool for further abuse through approaching the children".<sup>ccix</sup>
125. The Cabinet Secretary told the Committee that this issue was one he would be happy to consider further as the Bill progressed.<sup>ccx</sup>

## Effectiveness of NHOs

126. Some evidence was led during scrutiny as to the effectiveness of NHOs after they have been granted. Clare Connelly of the Faculty of Advocates cited international research on the effectiveness of NHOs and orders of a similar nature. It showed that their main benefit is not so much that they actually protect the recipient but that-
- ” ... they empower the recipient, because a formal external process has said that the behaviour is wrong and should not happen again. Women - it is predominantly women - report that that is one of the big benefits for them. In the worst or most extreme situation of an estranged partner who, having lost control, is going to carry out an act of homicide, a non-harassment order will not change that. Let us be honest: an order will not change that extreme violence.<sup>ccxi</sup>
127. Ms Connelly said it did not necessarily follow from this that there needed to be a legislative redesign of NHOs. It might be better to provide more training to those who had to enforce them. Grazia Robertson of the Law Society expressed similar views, saying that from her perspective as a criminal lawyer NHOs did not often seem to provide much of a remedy-
- ” People think that there are not enough orders, yet when there are, people do not find them effective. If there is an issue with the orders, the Bill will not necessarily assist matters.<sup>ccxii</sup>
128. The Equality and Human Rights Commission noted that victims of harassment granted an NHO "need to be reassured that such orders are effective and that the police have both the ability and the resources to be able to prevent harassment as and when it occurs."<sup>ccxiii</sup> Heather Williams of Scottish Women's Aid said that currently individuals subject to an NHO appear able to commit low-level breaches with relative impunity: these may not appear serious but they can be distressing or threatening from the perspective of the victim. Her colleague Marsha Scott called for a more imaginative use of technology to police NHOs more effectively.<sup>ccxiv</sup>

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ccviii e.g. Children 1st, written submission; Barnardos, written submission

ccix Justice Committee, Official Report, 13 June 2017, col. 11

ccx Justice Committee, Official Report, 27 June 2017, col. 12

ccxi Justice Committee, Official Report, 30 May 2017, col. 23

ccxii Justice Committee, Official Report, 30 May 2017, col. 23

## Cost and administrative burden

129. The Financial Memorandum estimates the cost of this reform as around £100,000 *per annum*, falling solely on the Scottish Courts and Tribunals Service, mainly for increased court time to hear an increased number of applications for NHOs.<sup>ccxv</sup> Some evidence queried whether this would be the sole cost. The Glasgow Bar Association noted that the reform would lead an increase in the number of times the courts would have to consider whether to impose an NHO, which would require the court to have the relevant information to hand. Whilst the Scottish Government has envisaged a positive side-effect of the reform as being that it would "ease the administrative burden upon prosecutors", the GBA speculated that the burden would simply be passed on to social workers.<sup>ccxvi</sup> Social Work Scotland's written evidence to this Committee commented that on the Bill being "silent on the sources of information which may inform decision making"<sup>ccxvii</sup>.
130. In oral evidence, Anne Marie Hicks of the COPFS said that she envisaged the reform having no financial consequences, in terms of the granting of orders, as the information that sheriffs may need would be information that prosecutors would already have to hand.<sup>ccxviii</sup> Giving evidence later, Kathryn Sharp of Social Work Scotland said that she had been encouraged by these comments, which indicated that no extra reporting burden would fall on criminal justice social workers.<sup>ccxix</sup> In her evidence, Ms Hicks also made the obvious point that there are (or ought to be) resource consequences if an NHO is breached.<sup>ccxx</sup> An increase in NHOs would inevitably mean an increase in the number of breaches, but this is not discussed in the Financial Memorandum.

## Emergency barring orders

131. Some submissions from third sector organisations representing female victims of abuse or violence, argued that the Bill had missed an opportunity to ensure that victims of domestic abuse are protected from immediate danger without having to vacate their homes, by providing courts with the power to make "emergency barring orders" in appropriate cases. The purpose of such an order would be to ban a perpetrator of domestic violence from the home of their victim for as long as is considered necessary to secure the victim's safety. It was argued in this body of

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ccxiii Written submission

ccxiv Justice Committee, Official Report, 13 June 2017, cols. 23-24

ccxv Financial Memorandum, paragraph 123

ccxvi Written submission

ccxvii Written submission

ccxviii Justice Committee, Official Report, 6 June 2017, col. 33

ccxix Justice Committee, Official Report, 20 June, col.29

ccxx Justice Committee, Official Report, 6 June 2017, col. 33



evidence that Scots law risked being in non-compliance with the Council of Europe Convention on preventing and combating violence against women and domestic violence (the "Istanbul Convention").<sup>ccxxi</sup> The UK has signed but not ratified the Convention.

132. Scottish Women's Aid said that Scots law lacked a "short, sharp immediate response" to abusive conduct that risked leaving women and their children homeless.<sup>ccxxii</sup> It argued that-

” Failure to provide for some version of an emergency barring order in this legislation is a critical oversight. An appropriate amendment will address a serious threat to safety for children and women and is in our view required for compliance and ratification with [sic] the Convention. In addition, any language around extraterritorial jurisdiction required for compliance with Istanbul should also be included.<sup>ccxxiii</sup>

133. In oral evidence, SWA's Marsha Scott said that the absence of such an order put Scotland in a minority amongst Western countries and referred to SWA research indicating that "current practice in housing and homelessness departments has been essentially to make women become homeless in order to access services".<sup>ccxxiv</sup>

134. The Cabinet Secretary told the Committee that the issue of emergency barring orders had not been raised during pre-legislative consultation, but that he would be happy to engage further with SWA. Referring to current law, he said that-

” An exclusion order has to be applied for by the person who has directly experienced the abuse; the police, for example, cannot apply for one. I am happy to consider whether that should be extended - in terms of who should be able to apply for exclusion orders and whom they should apply to. I am conscious that some people have suggested that, in certain circumstances, children should be able to apply. Again, we are happy to look at that.<sup>ccxxv</sup>

135. The Committee supports provision in the Bill that will require the court, at the end of a domestic abuse case, to consider whether to impose a non-harassment order (NHO) to protect a victim of abuse. It is clear from evidence that the current law is not operating satisfactorily, in that courts are not often enough being asked to consider whether to grant an NHO. The Committee is, however, concerned by evidence that, even when it has been granted, an NHO is not always an effective remedy for victims of abuse or harassment, and asks the Scottish Government whether it accepts this evidence and, if so, what plans it has to address this issue.

ccxxi Engender, written submission; Scottish Women's Aid, written submission and first supplementary written submission

ccxxii First supplementary written submission

ccxxiii Written submission

ccxxiv Justice Committee, Official Report, 13 June 2017, cols. 9-10

ccxxv Justice Committee, Official Report, 27 June 2017, col. 11

136. The Committee notes, and is sympathetic to, evidence that the courts should also be required to consider whether to make an NHO to protect a child, in a case where the domestic abuse victim has parenting responsibilities in relation to a child, and evidence led during the victim's case indicates that the child was also abused, or is at risk of abuse. The Committee welcomes the Cabinet Secretary's commitment to consider this issue further and ask him to update the Committee over the course of the Bill's passage.
137. The Committee welcomes the Cabinet Secretary's undertaking to engage further with third sector organisations on proposed "emergency barring orders" (EBOs), which would ban a perpetrator of abuse from the home of the victim for as long as is considered necessary to secure the victim's safety. The Committee notes that the Bill may create an opportunity to legislate in this area and, should the Bill progress to Stage 2, intends to take more evidence on EBOs at that Stage.



## Other reforms in the Bill

138. The schedule to the Bill makes a number of reforms to criminal law, principally of a procedural nature. Their underlying aim is to ensure that victims of domestic abuse are not re-victimised by contact with the criminal justice process (and accordingly are not discouraged from coming forward in the first place) and have their needs taken into account at appropriate points in the process. These reforms include-
- a prohibition on the accused conducting their own defence in domestic abuse cases;
  - a new standard bail condition prohibiting the accused in a domestic abuse offence from directly precognosing the complainer;<sup>ccxxvi</sup>
  - provision to permit certain expert psychological or psychiatric evidence to be introduced into domestic abuse cases, relating to the behaviour of the complainer. The purpose of such evidence would be to help rebut inferences that might be drawn as to the complainer's credibility or reliability. An example given in the Policy Memorandum is of the complainer continuing to reside with the accused, despite alleging that he or she had abused them;<sup>ccxxvii</sup>
  - provision expressly requiring the court to have to regard to the safety of the victim when sentencing following a guilty verdict in a domestic abuse case.

The references above to a "domestic abuse offence" mean either an offence under section 1 of the Bill or any other offence in relation to which the already-existing domestic abuse aggravator is specified in the charge.

139. In general, these reforms were welcomed. Stakeholders often indicated support in the generality for these reforms, without necessarily commenting in detail on specific provisions. Third sector organisations representing victims (including female and child victims of domestic abuse) who expressed a view on these provisions saw them as important and necessary. Some specific points were raised.
140. *Prohibition on accused conducting own defence:* In practice, this would mean that the accused in relevant cases would have no option but to engage a lawyer to represent them in court or else be represented by a court-appointed lawyer. Practically all submissions that expressed a view on this reform welcomed it.<sup>ccxxviii</sup> It was seen as of a similar nature to preventing the perpetrator of an alleged rape or sexual assault from conducting their own defence, which has been part of Scots law for several years. Third sector organisations representing victims of abuse (including children and older people) were in general enthusiastically in favour of this reform, seeing it as vital in giving abuse victims more confidence to go to trial and to speak up, as the absence of such a rule was seen as something of a loophole enabling perpetrators to continue their abuse in the court setting.<sup>ccxxix</sup> The Equality and Human Rights Commission said that in principle it supported this

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<sup>ccxxvi</sup> Precognition is the practice of conducting interviews with or taking statements from witnesses, who may include the complainer, before the commencement of a trial

<sup>ccxxvii</sup> At paragraph 141

change, whilst recognising that balancing the rights of the accused and the (alleged) victim was a sensitive area for the law.<sup>ccxxx</sup>

141. Legal practitioners generally indicated that they had no objection to the reform, although the Law Society cautioned that it could "create a perverse incentive upon accused persons who are well able to pay for their own defence simply not to instruct legal representation", with the bill then being picked up from the public purse.<sup>ccxxx</sup><sup>ccxxx</sup><sup>i</sup>
142. *New standard bail condition*: again, this was welcomed by those stakeholders who expressed a view upon it. This included legal representatives. The Law Society said that it would augment existing bail conditions preventing an accused from interfering with witnesses or acting in a manner that may cause alarm or distress.<sup>ccxxx</sup><sup>ii</sup>
143. *Expert evidence*: Scottish Women's Aid welcomed this proposed reform, on the ground that it would help buttress the "reasonable person" test that is a key element of the offence, by helping add to the court's understanding of the dynamics of a coercively controlling relationship.<sup>ccxxx</sup><sup>iii</sup> However, both the Glasgow Bar Association and the Law Society of Scotland expressed some doubts about this provision, with the Law Society suggesting that there should first be an evaluation of a roughly similar provision enabling expert evidence to be used to rebut inferences in sexual offences cases, which is an exception to the general rule that issues as to the witness's credibility are for the jury or, as appropriate, the sheriff, to determine.<sup>ccxxx</sup><sup>iv</sup> Both the Society and the Glasgow Bar Association queried the benefit of applying the provision in summary trials - where there is no jury - remarking that it could significantly slow the trial process down.<sup>ccxxx</sup><sup>v</sup>
144. *Provisions not in the Bill*: there were views that the Bill should take the opportunity to provide that the complainer in a domestic abuse case has a right to anonymity.<sup>ccxxx</sup><sup>vi</sup>

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<sup>ccxxxviii</sup> Social Work Scotland, written submission; Victim Support Scotland, written submission; British Psychological Society, written submission

<sup>ccxxxix</sup> Action on Elder Abuse Scotland, written submission; Children 1st, written submission

<sup>ccxxx</sup> Written submission

<sup>ccxxx</sup><sup>i</sup> Written submission

<sup>ccxxx</sup><sup>ii</sup> Written submission

<sup>ccxxx</sup><sup>iii</sup> Written submission

<sup>ccxxx</sup><sup>iv</sup> The provision to which the Society refers was inserted by the Vulnerable Witnesses (Scotland) Act 2004.

<sup>ccxxx</sup><sup>v</sup> Glasgow Bar Association, written submission; Law Society of Scotland, written submission

<sup>ccxxx</sup><sup>vi</sup> Rape Crisis Scotland, written submission

145. The Committee welcomes reforms set out in the schedule to the Bill, relating to criminal procedure, evidence and sentencing in domestic abuse cases. Most evidence to the Committee indicated that these reforms would benefit complainers and victims in domestic abuse cases, without concerns being raised about the accused suffering detriment in relation to their right to a fair trial and a presumption of innocence.

# Conclusion

146. The Committee recommends to the Parliament that the general principles of the Bill be approved.

# Annex

## Extracts from the minutes of the Justice Committee

### **13th Meeting, 2017 (Session 5) Tuesday 28 March 2017**

**Domestic Abuse (Scotland) Bill (in private):** The Committee considered its approach to the scrutiny of the Bill at Stage 1 and agreed (a) to hold an introductory briefing session with Scottish Government officials at a future meeting; (b) to issue a call for written evidence; and (c) to hold private informal meetings with victims of domestic abuse.

### **17th Meeting, 2017 (Session 5) Tuesday 9 May 2017**

**Domestic Abuse (Scotland) Bill (in private):** The Committee agreed witnesses for its scrutiny of the Bill at Stage 1.

### **20th Meeting, 2017 (Session 5) Tuesday 30 May 2017**

**Domestic Abuse (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Clare Connelly, Faculty of Advocates;

Lindsey McPhie, Past President, Glasgow Bar Association;

Grazia Robertson, Member, Criminal Law Committee, Law Society of Scotland;

Andrew Tickell, Lecturer in Law, Glasgow Caledonian University.

### **21st Meeting, 2017 (Session 5) Tuesday 6 June 2017**

**Domestic Abuse (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Anne Marie Hicks, National Procurator Fiscal for Domestic Abuse and Head of Victims and Witnesses Policy Team, Crown Office and Procurator Fiscal Service;

Detective Chief Superintendent Lesley Boal QPM, Public Protection, Specialist Crime Division, Police Scotland;

Calum Steele, General Secretary, Scottish Police Federation.

### **22nd Meeting, 2017 (Session 5) Tuesday 13 June 2017**

**Domestic Abuse (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Dr Marsha Scott, Chief Executive, and Heather Williams, Chair, Board of Directors of Scottish Women's Aid, and former Manager of Ross-shire Women's Aid, Dingwall, Scottish Women's Aid;

Girijamba Polubothu, Manager, Shakti Women's Aid;

Alison Waugh, Trustee, Abused Men in Scotland;

Ronnie Barnes, Trustee, Action on Elder Abuse Scotland;

Alan McCloskey, Director of Operations, and Kevin Kane, Parliamentary, Policy and Research Officer, Victim Support Scotland.

**23rd Meeting, 2017 (Session 5) Tuesday 20 June 2017**

**Domestic Abuse (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Dr Ruth Friskney, Research and Policy Officer, Barnardo's Scotland;

Chloe Riddell, Policy Manager, Children 1st;

Megan Farr, Policy Officer, Children and Young People's Commissioner Scotland;

Brandi Lee Lough Dennell, Policy and Research Manager, LGBT Youth Scotland;

Aaron Slater, Edinburgh Services Manager, Safeguarding Communities - Reducing Offending (Sacro);

Kathryn Sharp, Member, Criminal Justice Standing Committee, Social Work Scotland.

**24th Meeting, 2017 (Session 5) Tuesday 27 June 2017**

**Domestic Abuse (Scotland) Bill:** The Committee took evidence on the Bill at Stage 1 from—

Michael Matheson, Cabinet Secretary for Justice, Scottish Government.

**26th Meeting, 2017 (Session 5) Tuesday 12 September 2017**

**Domestic Abuse (Scotland) Bill (in private):** The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed to continue consideration at its next meeting.

**27th Meeting, 2017 (Session 5) Tuesday 19 September 2017**

**Domestic Abuse (Scotland) Bill (in private):** The Committee continued consideration of a draft Stage 1 report. Various changes were agreed to and the Committee agreed its report to the Parliament.

