



The Scottish Parliament  
Pàrlamaid na h-Alba

## JUSTICE COMMITTEE

### AGENDA

21st Meeting, 2017 (Session 5)

Tuesday 6 June 2017

The Committee will meet at 10.00 am in the Mary Fairfax Somerville Room (CR2).

1. **Domestic Abuse (Scotland) Bill:** The Committee will take 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.

2. **Subordinate legislation:** The Committee will consider the following negative instruments—

First-tier Tribunal for Scotland (Oaths) Regulations 2017 (SSI 2017/148);

Act of Sederunt (Fees of Sheriff Officers) (Amendment) 2017 (SSI 2017/153);

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (Consequential Provisions) Regulations 2017 (SSI 2017/156).

3. **Justice Sub-Committee on Policing:** The Committee will consider a report back from the Sub-Committee meeting on 1 June 2017.

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The papers for this meeting are as follows—

**Agenda item 1**

Paper by the clerk - Domestic Abuse (Scotland) Bill	J/S5/17/21/1
Private paper - Domestic Abuse (Scotland) Bill	J/S5/17/21/2 (P)
SPICe briefing - Domestic Abuse (Scotland) Bill	J/S5/17/21/3

[Domestic Abuse \(Scotland\) Bill and associated documents](#)

[Written submission from the Crown Office and Procurator Fiscal Service](#)

[Written submission from the Scottish Police Federation](#)

[All written submissions received on the Bill](#)

**Agenda item 2**

Paper by the clerk - Negative SSIs	J/S5/17/21/4
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**Agenda item 3**

Paper by the clerk - Justice Sub-Committee on Policing	J/S5/17/21/5
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**Justice Committee**  
**21st Meeting, 2017 (Session 5), Tuesday 6 June 2017**  
**Domestic Abuse (Scotland) Bill**  
**Note by the clerk**

**Introduction**

1. The Scottish Government introduced the Domestic Abuse (Scotland) Bill<sup>1</sup> in the Scottish Parliament on 17 March 2017. The Parliamentary Bureau designated the Justice Committee as lead committee for Stage 1 scrutiny on 29 March 2017.
2. The Committee agreed its overall approach to scrutiny of the Bill at Stage 1 at its meeting on 29 March 2017 and issued a call for evidence. Responses received and accepted as evidence are published on the Committee's [webpage](#).

**Justice Committee consideration**

3. At its meeting on 9 May 2017, the Committee took evidence from Scottish Government officials assisting Ministers in taking the Bill through the Parliament (the "Bill team").
4. On 16 May, the Committee took private testimony from victims of domestic abuse. The intention is to publish brief notes of those meetings in due course
5. At its 30 May meeting, the Committee took evidence from a panel of legal experts; academics and practitioners.
6. The official reports of meetings will be posted on [this webpage](#) as they become available.
7. At its 6 June meeting, the Committee will take evidence from Anne Marie Hicks, National Procurator Fiscal for Domestic Abuse, Crown Office and Procurator Fiscal Service, Detective Chief Superintendent Lesley Boal of Police Scotland, and Calum Steele, General Secretary of the Scottish Police Federation. The session is likely to focus on the prosecution of the new offence created by the Bill and on evidential matters.
8. In future evidence sessions, the Committee expects to hear from third sector organisations, including representatives of victims of crime and the Cabinet Secretary for Justice. The Committee will report on the Bill to Parliament in early autumn.

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<sup>1</sup> <http://www.parliament.scot/parliamentarybusiness/Bills/103883.aspx>

**SPICe**

**The Information Centre**  
An t-Ionad Fiosrachaidh

**Justice Committee**

**21<sup>st</sup> Meeting, 2017 (Session 5) Tuesday 6 June 2017**

**Domestic Abuse (Scotland) Bill**

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## INTRODUCTION

The Scottish Government introduced the [Domestic Abuse \(Scotland\) Bill](#) in the Parliament on 17 March 2017. It seeks to improve how the justice system deals with domestic abuse by:

- (a) creating a statutory offence of domestic abuse against a partner or ex-partner
- (b) making changes to criminal procedure, evidence and sentencing in domestic abuse cases

The offence is intended to cover behaviour which is already criminal as well as abuse which might not be captured by existing offences. The [policy memorandum](#) states that the abusive behaviour could:

“consist of both physical violence and threats which can be prosecuted under existing laws, and psychological and emotional abuse which either cannot be or, at the very least, can be difficult to prosecute under existing laws”. (para 4)

It would require proof of a course of behaviour, which is defined as requiring behaviour on at least two occasions.

The proposed changes to criminal procedure, evidence and sentencing seek to:

- (a) better protect the alleged victim and other vulnerable witnesses during the prosecution process (eg by prohibiting the accused from personally conducting the defence)
- (b) allow expert evidence concerning the behaviour which victims of domestic abuse can display, so as to counter possible adverse inferences relating to the credibility or reliability of the alleged victim in the current case
- (c) support effective sentencing (eg by specifically requiring the court to consider future protection of the victim when sentencing the offender)

## CONSULTATION

During March to June 2015, the Scottish Government consulted on a number of issues, including the possibility of a statutory domestic abuse offence and a domestic abuse aggravator.<sup>1</sup> The aggravator is now provided for in section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.<sup>2</sup> In relation to a new offence, the policy memorandum published along with the current Bill states that:

“Analysis of responses to that consultation suggested that the great majority of respondents agreed that the existing laws used to prosecute domestic abuse did not always reflect the experience of victims, especially those suffering on-going severe emotional or psychological abuse (often described as ‘coercive and controlling behaviour’) by their partner or ex-partner. However, there was no

<sup>1</sup> Equally Safe: Reforming the Criminal Law to Address Domestic Abuse and Sexual Offences: Scottish Government Consultation Paper (Scottish Government 2015).

<sup>2</sup> An aggravating factor makes an offence more serious and is likely to increase the sentence imposed by the court. Some, but not all, are set out in legislation. (A mitigating factor makes an offence less serious.)

consensus on how such an offence could be developed with a range of views expressed by consultation respondents on how a specific offence could be crafted.” (para 20)<sup>3</sup>

Between December 2015 and April 2016, the Scottish Government carried out a second consultation focused on a new statutory domestic abuse offence.<sup>4</sup> The consultation included a draft offence which, with some important alterations, forms the basis of the offence set out in the Bill.<sup>5</sup> The policy memorandum notes that:

“Responses to that consultation and meetings with stakeholders have informed the further development of the offence which is contained in the Bill.” (para 21)

A further Scottish Government consultation (published in October 2016)<sup>6</sup> sought views on some of the changes to criminal procedure, evidence and sentencing now set out in the Bill.

Following the introduction of the Bill, the Scottish Parliament’s Justice Committee issued a call for evidence seeking views on its provisions. The [submissions](#) are available on the Justice Committee’s website. They are also considered below – both in relation to specific provisions of the Bill and the policing/prosecution of domestic abuse more generally.

## LAW IN ENGLAND AND WALES

Section 76 of the Serious Crime Act 2015 created a new offence of ‘controlling or coercive behaviour in an intimate or family relationship’. A Home Office [factsheet](#) (2015) on the new offence states that:

“The new offence in the Serious Crime Act closes the gap in the current legal framework in order to capture repeated or continuous coercive or controlling behaviour, specifically where that behaviour takes place in an ongoing intimate partner or inter-familial relationship.

Non-violent coercive behaviour which is a long-term campaign of abuse, may fall outside common assault, which requires the victim to fear the immediate application of unlawful violence.

Some patterns of non-violent domestic abuse could be captured by legislation that covers stalking and harassment. However, the law on stalking and harassment does not explicitly apply to coercive and controlling behaviour in intimate relationships. As some respondents to the consultation noted, the law on stalking and harassment is not designed to capture the dynamic of sinister exploitation of an intimate relationship to control another, particularly where a relationship is

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<sup>3</sup> The Scottish Government has published the analysis – Equally Safe: Reforming the Criminal Law to Address Domestic Abuse and Sexual Offences: Analysis of Consultation Responses (2015).

<sup>4</sup> A Criminal Offence of Domestic Abuse: Scottish Government Consultation Paper (Scottish Government 2015).

<sup>5</sup> The Scottish Government has also published an analysis of this second consultation – Criminal Offence of Domestic Abuse: Analysis of Consultation Responses (2016).

<sup>6</sup> The Creation of a Specific Offence of Domestic Abuse: Proposed Associated Reforms to Criminal Procedure (Scottish Government 2016).

ongoing. The element of control is not such a feature of stalking or harassment, which is generally intended to intimidate or cause fear. (...)

The Serious Crime Act explicitly criminalises patterns of coercive or controlling behaviour where they are perpetrated against an intimate partner or family member. Like stalking this behaviour, when viewed in isolation, may appear unexceptional, but the cumulative impact on the victim's every-day life will be significant, causing the victim to feel fear, alarm or distress." (paras 6-10)

The new offence has been in force since 29 December 2015.

The Home Office has also published [statutory guidance](#) (2015) for the police and criminal justice agencies involved in investigating the offence. It states that:

"Controlling or coercive behaviour does not relate to a single incident, it is a purposeful pattern of behaviour which takes place over time in order for one individual to exert power, control or coercion over another." (para 10)

It provides examples of relevant behaviour (eg isolating a person from friends and family, monitoring their time and repeatedly putting them down). In relation to police investigations, it notes that:

"It is important to consider the wider context and the potential evidence for these patterns of controlling or coercive behaviour." (para 28)

The concerns, leading to the UK Parliament legislating for the offence, were similar to those highlighted in Scotland (ie that existing criminal offences did not adequately cover some forms of domestic abuse). However, there are important differences between the proposals in Scotland and the offence in England and Wales. These include the fact that section 76 of the Serious Crime Act 2015 focuses more narrowly on controlling or coercive behaviour. The policy memorandum, published with the Domestic Abuse (Scotland) Bill, notes this difference when considering alternative approaches:

"Another approach considered was that of drafting a specific offence which is focused exclusively on those forms of psychological and emotional abuse which do not currently amount to a criminal offence under the existing law. The offence of 'controlling or coercive behaviour in an intimate or family relationship' at section 76 of the Serious Crime Act 2015, which applies in England and Wales, takes this approach."

A number of other differences in approach are (along with some of the similarities) highlighted below when considering the provisions of the current Bill in more detail.

Early evidence relating to the policing and prosecution of the new offence in England and Wales is also outlined later in this briefing.

## THE BILL: OFFENCE OF DOMESTIC ABUSE

### Overview

Sections 1 to 10 of the Bill provide for a statutory offence of domestic abuse against a partner or ex-partner. As noted earlier, it is intended to cover behaviour which is already criminal as well as abuse which might not be captured by existing offences.

Section 1 of the Bill sets out three conditions, all of which must be proven if there is to be a conviction for the offence:

- (a) the accused engaged in a course of behaviour which was abusive of the accused's partner or ex-partner
- (b) a reasonable person would consider the course of behaviour to be likely to cause the partner/ex-partner to suffer physical or psychological harm
- (c) the accused either intended the course of behaviour to cause such harm or was reckless as to whether it would

Section 5 provides that it is a defence for the accused to show that the course of behaviour was reasonable in the particular circumstances.

In relation to the need for a new offence, a written submission from the Crown Office & Procurator Fiscal Service (COPFS) to the Justice Committee's call for evidence on the Bill states:

"The current framework of common law and statutory offences enables prosecutors to hold perpetrators to account for a wide spectrum of abuse. However, gaps exist in relation to the effective prosecution of psychological abuse and controlling and coercive behaviour that cannot overtly or easily be characterised as violent or threatening.

The proposed offence addresses a gap in existing law by recognising that domestic abuse may not only damage or violate a victim's physical integrity; but may also undermine a victim's character, restricting a victim's autonomy and freedom and their ability to live their life in the manner they choose."

A submission from Scottish Women's Aid agrees that the proposals in the Bill would fill a gap in existing laws and notes that:

"Domestic abuse is not an individual incident or occurrence. Nor does domestic abuse necessarily include physical violence, although this can be a feature. Victim-survivors have been telling us for 40 years that the harm from emotional and psychological abuse is the most traumatic."

In its submission, LGBT Youth Scotland states:

"For those that recognise the abuse and who are confident and willing to report, a specific criminal offence of domestic abuse will likely increase access to justice as the proposed measures more closely reflect the lived experiences of domestic abuse as a pattern of coercive control rather than individual incidences."

However, some responses strike a more cautious note. A submission from the Glasgow Bar Association says:

“Whilst supportive of the aims of the Bill we have significant concerns that the perceived benefits of the proposed offence have to be balanced against the very real risk of over-criminalisation. (...) We have concerns even within the existing framework of domestic prosecutions about the very wide range of behaviours in the context of domestic relationships which have been criminalised and about issues of proportionality which have arisen. We are concerned about the very wide scope of the proposed offence and the very wide range of behaviour which would potentially be caught by the legislation.”

In its submission, the Law Society of Scotland states that:

“We recognise the difficulty in prosecuting certain forms of domestic abuse and that this requires to be addressed. The exact scope of an offence must be clearly ascertainable: we are concerned that the current proposal does not satisfactorily meet the requirement of legal certainty.”

### **Course of behaviour**

The new offence would require proof of a “course of behaviour”, which section 9 of the Bill says involves behaviour on at least two occasions. The policy memorandum notes that:

“The offence is designed to criminalise a ‘course of behaviour’ so single incidents of abuse are not covered, though of course other laws may still be used for single incidents depending on the facts and circumstances of an incident eg where a one-off physical assault has taken place.” (para 25)

Submissions, in response to the Justice Committee’s call for evidence, expressing support for the focus on a course of behaviour include one from Rape Crisis Scotland:

“We consider that prosecuting a course of behaviour rather than individual assaults is an important change, and one which should enable the Scottish criminal justice system to be more responsive to the reality of abuse experienced by domestic abuse survivors.”

Whilst two incidents are required, the policy memorandum indicates that this may be insufficient to establish a course of behaviour:

“A court may decide that two isolated incidents occurring far apart in time do not form a course of behaviour and therefore do not fall within the scope of the offence. This would be a matter for the court to determine in any given case.” (para 41)

However, the submission from the Law Society of Scotland questions whether the Bill is sufficiently clear in relation to what amounts to a course of behaviour. It notes that:

“section 9(4) of the Bill requires only two incidents, without any specification of what gap in time might be reasonable, to constitute the offence. In theory, a prosecution could take place based upon two incidents many years apart. As any violent, threatening or intimidating behaviour would be caught by a single incident under the existing law, a threshold of two incidents might be seen as quite a low bar to establish what most people would consider to be a ‘course of behaviour’, particularly where neither incident involved violence or a threat of violence. The practical effect of this would be dependent upon the prosecution policy followed.”

In England and Wales, the offence of controlling or coercive behaviour set out in section 76 of the Serious Crime Act 2015 applies where a person “repeatedly or continuously engages in behaviour towards another person”. In relation to this requirement, the statutory guidance published by the Home Office (2015) states:

“Behaviour displayed on only one occasion would not amount to repeated or continuous behaviour and courts may look for evidence of a pattern of behaviour established over a period of time rather than, for example, one or two isolated incidents which do not appear to establish a pattern. However, each case must be considered on an individual basis, there is no set number of incidents in which controlling or coercive behaviour has been displayed which must be proved. As much evidence as possible must be gathered to show that the behaviour is of a repetitive or continuous nature. The Act does not specify a timeframe between the incidents of the behaviour when it takes place repeatedly, therefore, the occurrences do not necessarily have to take place in immediate succession. However, two such controlling incidents taking place 10 years apart (for example) are unlikely to be sufficient, because it is unlikely that this will be considered to be behaviour that is occurring ‘repeatedly or continuously’.” (para 14)

### **Abusive behaviour**

Under section 1 of the Bill, it must be shown that the course of behaviour was “abusive” of the accused’s partner or ex-partner. Section 2 expands on what amounts to abusive behaviour. The policy memorandum explains that it provides:

“a non-exhaustive definition of what constitutes ‘abusive behaviour’, which is intended to guide the courts in determining the kind of behaviour which the offence is intended to cover”. (para 28)

Under section 2, abusive behaviour includes behaviour that is violent, threatening or intimidating. With regard to this form of abuse, the policy memorandum states:

“It should be noted that behaviour of this kind can generally be prosecuted under existing laws using, for example, the common law of assault or breach of the peace or the statutory offence of threatening and abusive behaviour. However, in individual cases, it may be that COPFS consider it more appropriate to libel both behaviour of this kind and other abusive behaviour in a single charge as it can best be seen as forming part of a pattern of abuse of that person’s partner or ex-partner with the creation of the new offence allowing that to happen.” (para 31)

The policy memorandum goes on to say that, for this reason, the Bill does not adopt the approach taken in the Serious Crime Act 2015 of focusing more narrowly on controlling or coercive behaviour.

Section 2 of the Bill also provides that abusive behaviour includes behaviour which is intended or likely to:

- (a) make the partner/ex-partner dependent on, or subordinate to, the accused
- (b) isolate the partner/ex-partner from friends, relatives or other sources of support
- (c) control, regulate or monitor the partner's/ex-partner's day-to-day activities
- (d) deprive or restrict the partner's/ex-partner's freedom of action
- (e) frighten, humiliate, degrade or punish the partner/ex-partner

The policy memorandum explains that this second form of abusive behaviour is:

“intended to bring within the scope of the offence behaviour that is controlling, coercive and emotionally or psychologically abusive, which may not fall within the definition of any existing criminal offence” (para 34)

In relation to this form of abusive behaviour, the Bill provides that it includes behaviour directed at a third party that is intended or likely to have one of the listed effects on the partner/ex-partner. The policy memorandum suggests examples of an accused requiring a child of a relationship to spy on the partner, or encouraging a family friend to call the partner offensive names.

The types of controlling and coercive behaviour which the Bill is intended to cover are similar to those highlighted in respect of the offence set out in the Serious Crime Act 2015. The offence in England and Wales uses the phrase “controlling or coercive” behaviour, the meaning of which is expanded on in the statutory guidance published by the Home Office (2015, paras 10-13).

A number of submissions to the Justice Committee's call for evidence express support for the definition of abusive behaviour in the Bill. They suggest that the definition appears to cover the different types of conduct found in cases of domestic abuse. For example, one from Zero Tolerance states that:

“The definition of domestic abuse contained in this Bill is commendable – it notes the economic, psychological and physical abuse experienced; and highlights the interlinked inequalities which place women in a subordinate position, both making them more vulnerable to abuse and less able to escape it. This is not common knowledge. It must become so if we are to encourage women to speak up about abuse, and Scottish society to understand the scale of the issue. Thus to reap the maximum reward from this Bill the public must be educated – not specifically as to its contents – but on the comprehensive definition of domestic abuse contained therein.”

However, some submissions raise concerns about the potential breadth of behaviour covered. These include one from Andrew Tickell (Glasgow Caledonian University):

“The Bill defines ‘abusive behaviour’ very broadly. The concept of ‘abusive behaviour’ incorporates not only violent, threatening, frightening, humiliating and degrading behaviour – but also any behaviour which gives rise to dependency in the relationship, subordination, regulation or monitoring of the partner’s behaviour, or which restricts the abused partner’s ‘freedom of action’. It is easy to imagine a range of behaviours – innocuous, commonplace, unpleasant, and abusive – which would arguably fall within these definitions of potentially ‘abusive’ behaviour. Given the breadth of this definition, it is essential that the further thresholds for criminalisation in the Bill are adequately high. Distinguishing ‘good’ and ‘bad’ domestic behaviour is not a particularly helpful approach here. The key issue ought to be whether ‘bad’ behaviour has attained a sufficient level of severity to justify the intervention of the criminal law.”

In relation to “further thresholds for criminalisation”, see below.

### **Likely to cause physical or psychological harm**

The second condition set out in section 1 of the Bill is that a reasonable person would consider the course of behaviour likely to cause the partner/ex-partner to suffer physical or psychological harm. The policy memorandum indicates that:

“This is intended to ensure that innocuous behaviour which may have, for example, the effect of making a person dependent on their partner (eg arrangements around work or childcare) or which may amount to monitoring their partner (eg phoning to find out when they are coming home) is not inadvertently brought within the scope of the offence.” (para 42).

Psychological harm is defined in section 1 as including “fear, alarm and distress”.

The [explanatory notes](#) published with the Bill highlight that the test is intended to take account of the personal characteristics of the partner/ex-partner:

“The test would be met where the course of behaviour was such that a reasonable person would consider the behaviour likely to cause harm to that particular individual, taking account of their particular characteristics, irrespective of whether the behaviour in question would be likely to cause harm to a ‘reasonable person’.” (para 15)

Section 3 makes it clear that an offence may be committed in situations where the course of behaviour does not in fact cause the partner/ex-partner to suffer physical or psychological harm.

The offence in the Serious Crime Act 2015 differs in that it states that the behaviour must actually have a serious effect on the victim. “Serious effect” is defined as behaviour which causes the victim to fear the use of violence, or causes the victim serious alarm or distress which has a substantial adverse effect on usual day-to-day activities.

The policy memorandum seeks to justify the approach taken in the Bill as a protection for vulnerable witnesses:

“This approach is considered appropriate as it ensures that the court can take account of any particular vulnerability of the victim, without requiring COPFS to prove that the victim did in fact suffer physical or psychological harm, which might in many cases require the victim to give evidence to the court of the harm that they suffered and risks re-victimising the victim by forcing them to re-live, in court, the effects that the abuse had on them. However, it would remain open for COPFS to lead evidence of the actual harm caused to the victim in individual cases if they considered it appropriate to do so.” (para 44)

Responses to the Justice Committee’s call for evidence, expressing support for the approach in the Bill, include the submission from Scottish Women’s Aid:

“on balance we can see the utility of the test if the effect is to remove the requirement to prove specific harm. Proving harm will inevitably lead to invasions of privacy, inappropriate focus on victim rather than perpetrator behaviour, and systematic re-victimisation by court processes.”

However, some submissions question whether the stated aim, of sparing victims from having to give evidence on how they were affected, would be achieved in practice. The submission from the Glasgow Bar Association notes that:

“The test to be applied is not to assess the impact upon the reasonable person but for the reasonable person to assess the likely impact upon ‘B’ [the alleged victim]. Whilst the Bill achieves its aim of not requiring [the prosecution] to lead evidence from ‘B’ the proposed test asks the judiciary to consider how the reasonable person might consider ‘B’ to have been impacted. Particularly in situations of psychological harm that might require evidence to be led from ‘B’ and indeed from a medical practitioner.”

The approach taken in the Bill is also questioned on the basis that it fails to adequately limit the scope of the offence. The submission from Andrew Tickell argues that:

“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.”

### **Mental element of the offence**

The third condition set out in section 1 of the Bill relates to the accused’s state of mind. It must be proven that the accused intended the course of behaviour to cause physical or psychological harm or was reckless as to whether it would.

The explanatory notes state that:

“An example of how recklessness as to course of behaviour may occur is a person who is persistently verbally abusive and demeaning towards their partner

and who may claim that they did not intend that their behaviour cause psychological harm to their partner. If the court is satisfied that their behaviour was such that the accused person was, at the very least, reckless as to whether their behaviour would cause such harm, then this condition would be met.” (para 16)

Submissions to the Justice Committee’s call for evidence, supporting the dual approach for the mental element of the offence, include one from Sacro stating that it:

“is appropriate, as a perpetrator of domestic abuse can be skilled at manipulation and present in a manner that suggests that they did not intend to cause harm. A determination of their recklessness as to their behaviour provides a safeguard against this.”

However, the submission from the Glasgow Bar Association expresses concern about “a person being criminalised for a reckless omission”, whilst the one from the Law Society of Scotland argues that the nature of domestic abuse involves intentional behaviour.

### **Relationships covered by the offence**

The offence in the Bill deals with the abuse of a partner or ex-partner. Section 10 defines partners as any of the following:

- (a) spouses or civil partners of each other
- (b) people living together as if spouses of each other
- (c) people in an intimate personal relationship with each other

Ex-partners are defined by reference to the above. The definition is gender neutral.

The explanatory notes state that:

“The phrase ‘intimate personal relationship’ is intended to cover relationships between boyfriends and girlfriends (including same-sex relationships), although the relationship need not be sexual. Other family relationships and other types of relationship (eg between friends or business partners or work colleagues) are not covered by the offence.” (para 53)

The offence of controlling or coercive behaviour, set out in the Serious Crime Act 2015, applies to people who are “personally connected”. The manner in which this is defined means that the scope of the offence in England and Wales is, in different ways, both narrower and wider than the proposals in the Bill.

The offence in the Serious Crime Act 2015 does not apply to the abuse an ex-partner unless they are living together at the time of that abuse. Home Office statutory guidance (2015), notes that stalking and harassment legislation may apply where the domestic abuse offence does not. However, a number of responses to the Justice Committee’s call for evidence on the Bill highlight the potential impact of abusive behaviour involving the children of separated parents. For example, a submission from Aberlour states that:

“It is common for women we support to continue to be impacted by non-physical abuse and controlling behaviour resulting from entitlements of the abusive partner regarding contact with children who are the product of a relationship. In our experience, more than 10% of the families whom we support in our Bridges Partnership service encounter issues around child contact as a result of continuing abusive behaviour, even though the relationship may have ended. In such circumstances, it is often the case that an abusive partner uses child contact as a means of continuing their abusive and controlling behaviour.”

Whilst one from Families Need Fathers Scotland says:

“The FNF Scotland caseload includes a host of examples of how disrupting the time and frustrating the quality of the relationship between the non-resident parent and his/her children is used by the parent with most care to disrupt the life, drain the resources and undermine the self-confidence of their former partner and ultimately to undermine the relationship he has with his children.”

Unlike the Bill, the offence in the Serious Crime Act 2015 is not restricted to partners and ex-partners. It can apply to the abuse of a wider range of family members (eg the abuse of an elderly parent) where they are living with the abuser. The Bill’s policy memorandum states that the narrower approach proposed for Scotland was favoured by the majority of respondents to its consultation and that:

“Many emphasised that abuse of partners and ex-partners has a particular dynamic that differs from violence or abuse that occurs generally and may occur within a family between, for example, siblings or parents and adult children.

A number of respondents felt it important to continue with the current understanding and definition of domestic abuse, including by keeping a clear focus on domestic abuse within the broader understanding of gender inequality and gender-based violence and coercive control. The particular concern was that extending the legislation to cover other familial relationships could lead to a dilution and diminution of the understanding of and response to domestic abuse.”  
(para 65-66)

Responses to the Justice Committee’s call for evidence, voicing support for the approach the Bill takes in this area, also highlight the above arguments. Some submissions also note that it is consistent with other Scottish legislation on domestic abuse.

The submission from Sacro, although supportive of the approach taken in the Bill, argues that “other forms of familial abuse would benefit from similar, but separate, legislation”. In addition, whilst referring to the importance of a gendered analysis in responding to domestic abuse, it also notes that:

“LGBTI victims often struggle to relate to the ‘public story’ of domestic abuse, which locates the issue as something that men do to women”.<sup>7</sup>

Submissions questioning the restriction of the offence to partners and ex-partners include one from the Law Society of Scotland.

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<sup>7</sup> As noted above, the offence in the Bill is gender neutral.

## Impact of domestic abuse on children

The offence in the Bill does not seek to deal directly with child abuse.<sup>8</sup> The policy memorandum states that:

Abuse of a child is already a criminal offence which can be prosecuted under the section 12 offence in the Children and Young Persons (Scotland) Act 1937. It is noted that there are concerns about the extent to which it is possible to prosecute psychological abuse, as distinct from physical abuse or neglect, of a child using this offence and its limitations in cases where the person committing the abuse is not someone who has parental responsibilities in relation to the child. In March 2017, the Minister for Childcare and Early Years made a statement to Parliament outlining the next phase of work on the Scottish Government's Child Protection Improvement Plan, in which he announced that the Government would review the terms of the offence at section 12 of the 1937 Act to ensure that it accurately reflects a modern understanding of the different ways that abuse and neglect of a child can be committed." (para 97)

However, section 4 of the Bill seeks to respond to concerns expressed during earlier consultation that initial proposals failed to recognise the impact which domestic abuse has on children. It does this by setting out a statutory aggravation for cases where the offence set out in section 1 involves a child.<sup>9</sup> The policy memorandum explains that:

"The aggravation is intended to ensure the new offence effectively captures the seriousness of perpetrators involving children in domestic abuse by providing that the offence is aggravated if, in committing the offence of abuse of a partner or ex-partner, the perpetrator used a child in the commission of the offence. The aggravation also reflects the harm that can be caused to a child who grows up in an environment where domestic abuse is taking place by providing that the offence is aggravated where a child sees, hears or is present during an incident that happens as part of the abuse." (para 85)

Responses to the Justice Committee's call for evidence were mainly supportive of the inclusion of the statutory aggravator. There were, however, calls for clarification and/or further legislative protection for children (either in the Bill or separate legislation). For example, a submission from Barnardo's Scotland said:

"We strongly welcome the inclusion of an aggravator in relation to a child in the Bill. This is an important step toward recognising the harm done to children in domestic abuse. (...)

We have concerns that the aggravator as currently drafted does not reflect the full experience of harm done to children through domestic abuse. Children have described their experience of domestic abuse as living in a climate of fear; a child may never have witnessed a particular incident of a perpetrator threatening their

<sup>8</sup> In this respect it is similar to the offence in the Serious Crime Act 2015. The offence in England and Wales does not apply to the abuse of a child under 16 by a parent (or other person who has responsibility for the child's care). Home Office statutory guidance (2015) states that this is on the basis that child cruelty/neglect offences cover such cases.

<sup>9</sup> The offence in the Serious Crime Act 2015 does not include an equivalent provision.

mother, but they still experience, and are harmed by, the coercive control of their environment. For example, a perpetrator's coercively controlling behaviour may limit the time that the non-abusing parent is able to interact with the child – if the perpetrator requires the mother to adhere to a strict timetable this may prevent her playing with her child or helping her child with homework. The child, and the relationship between the child and the mother, may be harmed by how the perpetrator's behaviour limits their interaction, but it is not clear to us that the aggravator as currently drafted would necessarily be applicable to such harm."

And one from Children 1<sup>st</sup> stated that it:

"I would have preferred a parallel criminal offence of domestic abuse against children to be included on the face of the Bill. We remain concerned that failing to recognise children as victims of coercive and controlling behaviour within the proposed offence will make children less visible to services and place them at greater risk of continued abuse by the perpetrator. Domestic abuse is separate to the types of abuse currently set out in Scottish legislation, and we think it is important to ensure that children and young people who experience domestic abuse are protected."

### **Defence that behaviour was reasonable**

Section 5 of the Bill provides for a defence where the accused can show that the course of behaviour was reasonable in the particular circumstances. The defence would have to produce evidence raising the defence as an issue. However, the legal burden of proving the case beyond reasonable doubt (including countering any such defence) would remain with the prosecution.

The explanatory notes suggest that the defence might, for example, be relevant where:

"the accused acted in order to protect the household finances where their partner is suffering from a gambling addiction, or to prevent their partner from associating with certain persons or frequenting certain places if they are recovering from alcohol or drug addiction, or to restrict the freedom of movement of a partner who is suffering from dementia." (para 37)

In relation to the proposed defence, responses to the Justice Committee's call for evidence include ones expressing support and ones highlighting concerns. A submission from Community Safety Glasgow urges caution:

"Extreme care will be required when considering the defence of whether someone's behaviour is reasonable. For example, vulnerable victims can experience domestic abuse from their partner, who is also the person responsible for their care. These situations can be complex and present particular challenges that will require investigators and prosecutors to have a good knowledge of the nature of domestic abuse. Some actions may well be reasonable, whilst others may not and the criminal justice system must be adept at identifying both and ensure that the most vulnerable receive appropriate protection. Those who perpetrate domestic abuse sometimes target those who could be considered vulnerable to ensure their actions are less likely to be identified."

The submission from Zero Tolerance states that:

“Black or Minority Ethnic (BME) women also experience ‘double discrimination’ and very specific forms of coercive control. It is therefore important this provision not be used to allow defences by BME perpetrators that their actions were culturally or scripturally reasonable.”

### **Maximum penalty**

Section 8 of the Bill provides for a maximum custodial sentence of 12 months under summary procedure and 14 years under solemn procedure.<sup>10</sup> The policy memorandum notes that:

“The maximum penalty for the offence on conviction on indictment is 14 years imprisonment. This reflects the fact that the offence consists of a course of behaviour that could take place over many years and this maximum penalty has been set to ensure our courts have appropriate powers to deal with the wide range of conduct that is covered within the new offence and ensure that the High Court has the appropriate sentencing powers to deal with the small number of most serious cases.” (para 50)

The offence in the Serious Crime Act 2015, applying in England and Wales, has a maximum custodial sentence of five years (or 12 months on summary conviction).

## **THE BILL: CRIMINAL PROCEDURE, EVIDENCE AND SENTENCING**

### **Overview**

Section 11 and Part 1 of the Schedule of the Bill set out changes to criminal procedure, evidence and sentencing in domestic abuse cases. The proposed reforms seek to:

- (a) create a standard condition of bail prohibiting an accused from obtaining a statement (or precognition) from an alleged victim other than through a solicitor
- (b) prohibit an accused from personally conducting the defence in court
- (c) apply special measures aimed at protecting child witnesses during trial
- (d) permit certain expert evidence relating to the behaviour of an alleged victim
- (e) require the court to consider the future protection of the victim when sentencing an offender
- (f) require the court to consider making a non-harassment order when sentencing an offender

The reforms would apply to cases involving the domestic abuse aggravator provided for in section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, as well as to prosecutions for the new offence set out in the Bill.

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<sup>10</sup> Solemn procedure is used for the prosecution of the most serious of criminal cases whilst summary procedure is used for less serious offences.

Prior to the introduction of the Bill, a Scottish Government consultation paper sought views on four of the proposals – those relating to bail conditions, conducting the defence in court, the use of expert evidence and non-harassment orders.<sup>11</sup>

Where they address the issue, responses to the Justice Committee’s call for evidence on the Bill are mainly supportive of the proposed reforms to criminal procedure, evidence and sentencing. Some of the concerns which are raised (including the need for further reform) are highlighted below.

### **Bail condition concerning precognition**

The release of an accused on bail is subject to a number of standard conditions (eg requiring the accused to appear at relevant court hearings).

In relation to cases involving certain sexual offences, the standard conditions include one prohibiting an accused from seeking to obtain a statement (or precognition) from an alleged victim, concerning the subject matter of the offence, other than through a solicitor. The Bill seeks to add this as a standard condition of bail in domestic abuse cases. The policy memorandum notes that:

“The policy objective is to prevent an accused seeking to further their control over an alleged victim through the processes of the justice system; in particular by seeking to approach that person and discussing the alleged offence with the pretext of preparing a defence to the criminal case.” (para 107)

### **Prohibition on conduct of own defence**

The Bill seeks to automatically prohibit an accused from personally conducting the defence in domestic abuse cases. Such a prohibition currently exists in some other cases (eg those involving certain sexual offences). Where the prohibition applies, the defence must be conducted by a lawyer.

The courts already have a wider power to prevent an accused from conducting the defence where a vulnerable witness is to give evidence. This may be relevant in domestic abuse cases but is not an automatic prohibition.

The policy memorandum notes that:

“The policy objective is to prevent an accused seeking to further their control over an alleged victim through the processes of the justice system; in particular by personally examining or cross-examining that person in court.” (para 122)

Whilst supporting the proposal, the Law Society of Scotland’s response to the Justice Committee’s call for evidence suggests that current legal aid rules for such cases may need to be looked at. It notes that they:

“might create a perverse incentive upon accused persons who are well able to pay for their own defence simply not to instruct legal representation. The result of this could be that an alleged abuser with substantial income and capital could have a

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<sup>11</sup> The Creation of a Specific Offence of Domestic Abuse: Proposed Associated Reforms to Criminal Procedure (Scottish Government 2016).

solicitor appointed for him by the court, funded from the public purse by reason only of his refusal to instruct a solicitor.”

### **Special measures for vulnerable witnesses**

The Bill seeks to extend the application of existing provisions setting out a general rule that child witnesses under the age of 12 do not present their evidence in the court-room (eg giving evidence by live television link instead).

The current provisions apply in relation to a range of offences, including ones of a violent or sexual nature. The Bill provides for the addition of domestic abuse cases.

### **Presentation of certain expert evidence**

The Bill seeks to allow expert evidence concerning the behaviour which victims of domestic abuse can display, so as to counter possible adverse inferences relating to the credibility or reliability of the alleged victim in the current case.

The Scottish Government’s consultation on changes to criminal procedure, evidence and sentencing noted that:<sup>12</sup>

“In criminal trials, assessing a witness’s credibility is considered a matter for the jury. The evidence of expert witnesses regarding normal human nature and behaviour is usually inadmissible, and evidence as to the credibility of a witness is generally not admissible unless it is also relevant to a fact in issue at the trial or is evidence of mental illness.” (para 33)

It highlighted, however, that an exception already exists in relation to cases involving certain sexual offences. The exception allows expert evidence to rebut any negative inference, relating to credibility or reliability, which might otherwise be drawn from the behaviour of the alleged victim. The consultation went on to state that:

“The exception was made because there is considerable research that demonstrates that an alleged victim of a sexual offence may respond in a number of ways and their reaction may be something with which members of a jury may be completely unfamiliar. For example, a complainer may appear very calm and not demonstrate distress, and the court or jury members may expect distress to be shown in a ‘normal’ reaction.” (para 35)

The Scottish Government argues that the same reasoning justifies the exception being extended to domestic abuse cases. The policy memorandum states that:

“Perhaps even more than sexual offence cases, domestic abuse cases present unusual features making consideration by the jury or the court far from straightforward.

For example, in a domestic abuse case the alleged victim may well continue to reside in the local area or even actually with the accused, and may well co-

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<sup>12</sup> The Creation of a Specific Offence of Domestic Abuse: Proposed Associated Reforms to Criminal Procedure (Scottish Government 2016).

operate with him or her in the matter of the upbringing of children, following an offence having been alleged.

Thus, at first sight, the alleged victim could seem to be seen as undermining her or his case in the eyes of the jury or the court. However, expert evidence could demonstrate why actually such behaviour may be seen as an understandable reaction in the particular situation – again, there is considerable research available to draw upon.” (paras 140-142)

The Law Society of Scotland’s response to the Justice Committee’s call for evidence argues that the reform should be restricted to cases prosecuted under solemn procedure (ie more serious cases where a trial involves a jury):

“We submit that this provision should only apply where a case is being tried on indictment. If experts were called in a number of summary prosecutions, there would be resource implications. For example, if the Crown leads an expert relating to the behaviour of the complainer as part of the prosecution case, the solicitor acting on behalf of an accused may be required to consider instruction of an independent expert to prepare a report to lead rebuttal evidence as part of the defence case. This can only lengthen and complicate summary cases which are expressly designed to provide a swift and easy form of justice in less serious cases.”

### **Victim safety in relation to sentencing**

The Bill provides that, when sentencing an offender in a domestic abuse case, the court “must have particular regard to the aim of ensuring that the victim is not the subject of a further such offence committed by the convicted person”.

The policy memorandum explains that:

“There is a high incidence of repeat offending in domestic abuse cases with victims being targeted repeatedly. As such, the safety of the victim will be a key consideration for the court whenever they sentence for the new offence and it is considered this new requirement will ensure beyond doubt that the court has particular regard for the protection of the victim from further offending by the convicted person.” (para 152)

### **Consideration of non-harassment order**

Existing provisions allow the prosecutor to apply to the court to make a non-harassment order (NHO) against a person convicted of an offence involving misconduct towards the victim.

The Bill seeks to require the court to consider making such an order, without the need for an application by the prosecution, in domestic abuse cases. The court could still decide that an NHO is not appropriate in the particular circumstances of a case. The policy memorandum states that:

“Given the requirement in domestic abuse cases for either an on-going or prior relationship between two people, and the incidence of repeat offending in these

cases, consideration of whether to impose an NHO will almost always invariably be relevant in cases of domestic abuse.” (para 159)

Responses to the Justice Committee’s call for evidence generally welcome the proposed reform. Areas where further change is suggested include the use of NHOs to protect children, with a submission from NSPCC Scotland stating:

“NSPCC considers it imperative that this protective provision is extended to children with a parallel requirement on the court to consider making a non-harassment order covering children in domestic abuse cases. The inclusion of the aggravator formally recognises the harm caused to children by domestic abuse, as specified in the policy memorandum. It is of fundamental importance that the new legislation addresses children’s right to protection in domestic abuse cases, and provides courts with the necessary authority to make protective orders relating to children.”

In evidence to the Justice Committee on 9 May 2017, a member of the Scottish Government’s bill team noted that:

“The provision that relates to non-harassment orders links back to the existing provision in the Criminal Procedure (Scotland) Act 1995, which refers to a non-harassment order being available where a victim is subject to misconduct. In a case a couple of years ago, a court ordered a non-harassment order for a partner who had been abused and also their children, but that was overturned on appeal because it was found that the court had gone too far in interpreting existing law.

The Domestic Abuse (Scotland) Bill still limits the order to the partner or ex-partner as the direct victim of the abuse. Children 1<sup>st</sup> and one or two other stakeholders have suggested that, because we have child aggravation in the Bill, the policy could go further so that where a domestic abuse offence is proven and a child was involved in that abuse, a non-harassment order should be available for those children. We are happy to consider the views of members and stakeholders during stage 1 scrutiny on whether the provision in that area can go a bit further.” (cols 33-34)

## **POLICING AND PROSECUTION OF DOMESTIC ABUSE**

### **Scotland**

In 2016 and 2017, the Justice Committee carried out an inquiry into the work of the COPFS (the public prosecution service in Scotland). It included consideration of the prosecution of domestic abuse cases. The Justice Committee’s 2017 [report](#) on the inquiry notes that:

“In relation to prosecutions in domestic abuse cases and certain other types of case that the Lord Advocate has deemed to be prosecution priorities, the Committee heard mixed evidence: on the one hand, that the COPFS is prosecuting these cases with precisely the rigour they deserve; on the other that policies are being applied too rigidly and that sometimes the wrong cases end up in court.” (executive summary)

The report refers to a [joint protocol](#) between Police Scotland and the COPFS on domestic abuse as part of the policy approach to such cases.<sup>13</sup> The joint protocol states that tackling domestic abuse is a priority for both organisations and that a “consistent and robust approach is essential when dealing with criminal conduct arising from domestic abuse” (para 2). The Justice Committee’s report includes the following conclusion:

“The Committee acknowledges that the criminal justice system has not always prioritised domestic abuse as it should have or treated it with the seriousness it deserves. It was necessary for a clear message to be sent by public agencies working in the system that domestic abuse is unacceptable and would be tackled robustly, in order to give victims confidence that their case would be taken seriously. The COPFS/Police Scotland Joint Protocol on domestic violence has played an important role in that process. The Committee notes the differing views it has received during this inquiry as to the COPFS’s application of the protocol, notes the Lord Advocate’s response to it, and asks the COPFS and the Scottish Government to reflect further on the views that the Committee heard.” (para 160)

The Justice Committee’s call for evidence on the Bill included a request for evidence on factors which might affect the reporting, investigation and prosecution of the proposed new offence. Issues highlighted by submissions include:

- (a) factors which may discourage victims from reporting abuse
- (b) the importance of training for criminal justice professionals and of public education
- (c) identifying cases of abuse and obtaining sufficient evidence
- (d) other types of intervention

In relation to factors which may discourage victims from reporting abuse, a submission from Victim Support Scotland notes that:

“It is common for victims of domestic abuse to be reluctant to report abuse for fear of reprisal and/or when there are consequences for involved children. The stigma which continues to surround domestic abuse means victims may also fear they will not be believed or adequately supported if they come forward. It is crucial for those in this situation to have faith in the justice system and to know that they will be listened to and served by the new offence, and not failed due to a course of abusive behaviour being too difficult to prove.”

Submissions also highlight particular issues which may discourage people from certain groups reporting abuse (eg those from ethnic minority backgrounds or LGBT people).

With regard to the importance of training for criminal justice professionals, the submission from Scottish Women’s Aid says:

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<sup>13</sup> A fourth edition of the protocol was produced in March 2017, prior to publication of the Justice Committee’s report but following evidence taking.

“Clearly, additional specialist training and guidance for criminal justice professionals and the judiciary, social work, adult and child protection professionals and courts on the nature of coercive control and the impact of this behaviour on women, children and young people will be required.”

Whilst on public education, a response from the Faculty of Advocates notes that:

“The Faculty is of the view that a public education campaign will be required to highlight and educate as to the terms of the Bill and in particular the criminalisation of certain behaviours for the first time. Previous public education campaigns including ‘Behind Closed Doors’ and ‘Domestic violence – end the silence’ have been very effective and adapted for use in other jurisdictions.”

A submission from the Scottish Police Federation raises concerns that police officers may feel pressurised to intervene in situations where an offence may not have been committed:

“Whilst self-evidently no one wants to see victims being left to suffer, we see real risks that police officers could be used as pawns in routine family disagreements where the police happen to be called.”

Turning to sufficiency of evidence, the challenges of prosecuting offences which generally occur in private are highlighted in various submissions. The response from Andrew Tickell states that:

“Any assessment of the effectiveness of the proposed offence must take account of the law of evidence, and in particular, the corroboration rule. Simply stated, the general rule of corroboration requires two independent pieces of evidence for all of the essential facts of a criminal case, the essential facts being that a crime was committed and that it was the accused who committed it. Crimes committed in private, domestic contexts are notoriously difficult to prosecute under these rules.”

On this point, the response from the COPFS says:

“Factors which might impact on the investigation of the proposed offence will include the challenge to investigators to secure corroborated evidence, particularly in relation to psychological abuse and certain controlling and coercive behaviours. The very nature of this type of abuse in many cases limits the potential sources of evidence available eg lack of direct witnesses, CCTV, or forensic evidence.

However, investigators and prosecutors have developed skills and expertise in the investigation and prosecution of crimes that are routinely committed in private without the presence of witnesses and where there are often no meaningful forensic opportunities to pursue. These skills are evidenced in the prosecution of domestic abuse, sexual offences (including historic allegations) and other offences such as the stalking offence under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010. Police and prosecutors will apply skills and expertise developed in these areas to the robust investigation and prosecution of offences under the proposed legislation. Potential evidence may be available from a range of sources including friends and family who may not have directly witnessed the behaviour of the accused but may be well placed to give evidence on the ‘relevant effects’ this has had on the victim.”

Finally, in relation to other types of intervention, the submission from the NSPCC notes that it is:

“strongly of the view that legislation capturing coercive control be developed in parallel with prevention / early intervention services. Professionals at the NSPCC expert forum were clear that perpetrator programmes / services are often working with people ‘long after the event’: endeavouring to address behaviours that have become entrenched over many, many years. Earlier intervention to address coercive controlling behaviour / gender based violence within young people is critical and we would hugely welcome a commitment to funding appropriate prevention and early intervention programmes for young people with problematic behaviour in relation to gender based violence. We would also note the critical role of consistent and appropriate Relationships, Sexual Health and Parenthood (RSHP) education, at universal level, in promoting healthy relationships.”

### England and Wales

In September 2016, the Crown Prosecution Service published a [report](#) including figures for the prosecution of domestic abuse in England and Wales during 2015-16. It states that there were 100,930 completed prosecutions for domestic abuse during the year (of which just under 75% resulted in convictions).

In relation to the new domestic abuse offence set out in section 76 of the Serious Crime Act 2015, the report notes that:

“From 31 December 2015 to 31 March 2016, five prosecutions were completed under the new offence – two defendants were convicted of the new offence; one was convicted of harassment; one of common assault and one was unsuccessful.” (p 33)

In considering the figure of five completed prosecutions up to 31 March 2016, it should be borne in mind that the new offence only came into force at the end of December 2015 and that time is needed for allegations to be investigated and prosecuted.

An article in the Guardian, [‘Police failing to use new law against coercive domestic abuse’](#) (31 August 2016) reports figures for police use of the new offence during the first six months. It also notes concerns about the level of use:

“A law protecting victims of domestic violence from controlling and coercive behaviour has been used just 62 times in the first six months since it was introduced.

Eight out of 22 police forces in England and Wales have not charged a single person with the offence, according to a freedom of information request. Nine forces have made two or fewer charges since the new law came into effect in December 2015, including Lincolnshire, Northamptonshire, Warwickshire and Wiltshire.

Emma Pearmaine, head of family services at the law firm Simpson Millar, which made the Fol request, called for increased awareness and understanding of the new laws and said more specialist training for police officers could be necessary.”

A news release from the College of Policing, '[Police support victims of coercive control](#)' (21 September 2016) refers to plans for additional training:

“Victims of coercive control are the focus of a new police pilot being run by the College of Policing to support officers to spot the signs of someone who is being controlled by their partner.

Coercive control may be the most high risk form of domestic abuse where perpetrators exert almost complete control over a victim’s life, leading to greater long-term physical and psychological injury.

In a first of its kind for UK policing, officers from three forces will take part in a College of Policing pilot which will focus their attention on dangerous patterns of abusive behaviour.

The pilot comes on the back of research which found officers may not recognise high risk patterns of coercive and controlling abuse because they concentrate on the facts of the incident they are attending, rather than the pattern.”

The Crown Prosecution Service report (2016) also outlines a number of cases where allegations had been prosecuted under the new offence:<sup>14</sup>

“A man prevented his victim from seeing her friends and further isolated her by stopping her from using her mobile phone and controlling her social media, such as making her delete friends on Facebook. He was convicted and sentenced to six months’ imprisonment and subject to a two year restraining order.

A man rarely allowed his victim to go out alone, and when she did, he would keep track of her, including making her keep parking receipts. He belittled her and made her believe she needed only him, pushing her family and friends away. He checked her social media accounts and phone messages and told her what to wear, as well as changing her hairstyle. He also assaulted her. He was convicted and sentenced to 18 weeks’ imprisonment, suspended for 18 months, with a community order for 18 months for assault and coercion and control. He was also ordered to pay costs for two counts of criminal damage against property.

A man controlled his victim in various ways, including checking her phone messages, accusing the victim of having relationships with other people, asking the victim to quit her job and he assaulted her. He was convicted and sentenced to a Community Order for two years and ordered to pay a £60 surcharge and £85 court costs.

A man engaged in a campaign of physical and psychological abuse and allegations included making the victim seek permission for everyday matters including leaving the house and even going to the toilet. He was convicted and sentenced to 12 months’ imprisonment for controlling or coercive behaviour as well as 16 months for other offences related to assault and criminal damage. A five year restraining order was also imposed.

A man was convicted and sentenced to 16 weeks’ imprisonment (suspended for 12 months) along with a range of other sentences (including for common assault; assault by beating; criminal damage and rehabilitation activity requirement up to 20 days).” (p 34)

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<sup>14</sup> The report noted that some of the cases were completed in 2016-17.

## PUBLIC ATTITUDES TO ABUSIVE BEHAVIOUR

A [Scottish Social Attitudes](#) survey is carried out by ScotCen Social Research (an independent research organisation). Some of the findings from the 2014 survey are presented in the report [Attitudes to Violence against Women in Scotland](#) (Scottish Government 2015). It includes information on attitudes to domestic abuse – covering physical abuse, verbal abuse and controlling behaviour.

Although domestic abuse occurs in a range of relationships, for the purposes of the survey respondents were asked about scenarios involving a husband and wife. Following the description of a scenario, respondents were asked how wrong they thought the behaviour of the perpetrator was, or how much harm it did to the other person (depending on the specific scenario). The views of some respondents were sought when the man was the perpetrator and others where the perpetrator was the woman.

Responses were sought using a seven point scale with 1 being 'not wrong at all' and 7 'very seriously wrong'. For the purposes of the report, respondents choosing 5, 6 or 7 on the scale were described as thinking that something is 'seriously wrong'.

Some of the scenarios (and responses) are outlined below.

In relation to verbal abuse, respondents were asked to imagine a married couple who both work. When the man has a stressful day at work, he often takes it out on his wife by putting her down and criticising her. An alternative scenario involved the roles being reversed. Where the scenario involved the:

- (a) husband putting down his wife – 72% of respondents thought it was very seriously wrong, with 94% thinking that it was seriously wrong
- (b) wife putting down her husband – 46% of respondents thought it was very seriously wrong, with 88% thinking that it was seriously wrong

In relation to controlling behaviour, respondents were asked to imagine a married woman who wants to go out with her friends for a meal in the evening. When she tells her husband about it, he gets very annoyed. He tells her that he doesn't want her going out without him. Again, an alternative scenario involved the roles being reversed. Where the scenario involved the:

- (a) husband not wanting his wife to go out – 50% of respondents thought it was very seriously wrong, with 82% thinking that it was seriously wrong
- (b) wife not wanting her husband to go out – 23% of respondents thought it was very seriously wrong, with 65% thinking that it was seriously wrong

In another of the scenarios relating to controlling behaviour, respondents were asked to imagine that a woman is getting ready for a night out. When her husband sees she is dressed up more than usual, he tells her he doesn't like her going out looking like that and tells her to change. An alternative scenario involved the roles being reversed. Where the scenario involved the:

- (a) husband telling his wife to change clothes – 39% of respondents thought it was very seriously wrong, with 81% thinking that it was seriously wrong

(b) wife telling her husband to change clothes – 21% of respondents thought it was very seriously wrong, with 48% thinking that it was seriously wrong

In relation to physical abuse, respondents were asked to think about the same couple where the man sometimes puts down his wife and criticises her. Imagine that one day he also gets angry and ends up slapping her in the face. As above, an alternative scenario involved the roles being reversed. Where the scenario involved the:

(a) husband slapping his wife – 92% of respondents thought it was very seriously wrong, with 98% thinking that it was seriously wrong

(b) wife slapping her husband – 81% of respondents thought it was very seriously wrong, with 95% thinking that it was seriously wrong

The report also analysed responses with reference to various characteristics of the respondent (eg age and gender).

Based on the above (including responses to additional scenarios) the report advanced the following conclusions:

(a) types of domestic abuse – people were most likely to see physical abuse as seriously wrong, whilst controlling behaviour was least likely to be considered seriously wrong

(b) characteristics of respondents – women and people who do not hold stereotypical views on gender roles were more likely to consider a range of abusive behaviour as seriously wrong

(c) gender of perpetrator – people were less likely to consider abusive behaviour as seriously wrong where carried out by a woman on a man

(d) other factors – the circumstances in which abusive behaviour took place (eg in response to finding out about an affair) led to some people viewing it less seriously

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Scottish Parliament Justice Committee (2017), Official Report 9 May 2017

(<http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10931>)

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**Justice Committee****21<sup>st</sup> Meeting, 2017 (Session 5), Tuesday 6 June 2017****Subordinate legislation****Note by the clerk****Purpose**

1. This paper invites the Committee to consider the following negative instruments:
  - [First-tier Tribunal for Scotland \(Oaths\) Regulations 2017 \(SSI 2017/148\)](#) [see page 3];
  - [Act of Sederunt \(Fees of Sheriff Officers\) \(Amendment\) 2017 \(SSI 2017/153\)](#) [see page 5];
  - [Inquiries into Fatal Accidents and Sudden Deaths etc. \(Scotland\) Act 2016 \(Consequential Provisions\) Regulations 2017 \(SSI 2017/156\)](#) [see page 6].
2. If the Committee agrees to report to the Parliament on any of the instruments it is required to do so by 12 June on the first one and by 19 June on the other two.

**Procedure for negative instruments**

3. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
4. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
5. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
6. Each negative instrument appears on the Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.

7. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

#### **Guidance on subordinate legislation**

8. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

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

#### **Recommendation**

9. **The Committee is invited to consider the instruments.**

## **FIRST-TIER TRIBUNAL FOR SCOTLAND (OATHS) REGULATIONS 2017 (SSI 2017/148)**

### **Introduction**

10. The instrument is made under section 80 of the Tribunals (Scotland) Act 2014 (“the 2014 Act”). The Regulations will allow a person who is to become a Chamber President or a member of the First-tier Tribunal for Scotland to take the oath of allegiance and the judicial oath in advance of actually taking up office in the First-tier Tribunal.

11. Further details on the purpose of the instrument can be found in the policy note (see below).

12. The instrument comes into force on 12 June 2017.

### **DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION**

13. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 23 May 2017 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

### **JUSTICE COMMITTEE CONSIDERATION**

14. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 12 June 2017.

### **Policy Note: First-tier Tribunal for Scotland (Oaths) Regulations 2017 (SSI 2017/148)**

#### **Policy Objectives**

The 2014 Act requires Chamber Presidents and members of the First-tier Tribunal for Scotland (First-tier Tribunal) to take the oath of allegiance and the judicial oath. The policy objective of these Regulations is to allow these oaths to be taken in advance of a person actually taking up office in the First-tier Tribunal.

These Regulations allow the President of Tribunals to administer the oaths to an individual who is likely to become a Chamber President of the First-tier Tribunal. This can be done as long as the individual has received a letter from the Scottish Ministers stating that it is their intention to appoint the person as a Chamber President.

These Regulations also allow a member of a tribunal listed in schedule 1 of the 2014 Act to take the required oaths in advance of transfer to the First-tier Tribunal and in the presence of an “appropriate office holder”. An “appropriate office holder” is defined as the President of the relevant tribunal listed in schedule 1 of the 2014 Act or another person who is to become the Chamber President of the relevant chamber.

Fuller details of the policy objectives relating to the 2014 Act are described in the Policy Memorandum which accompanied the Tribunals Bill. The link below shows the passage of the Bill through Parliament and includes the Policy Memorandum.  
<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/62938.aspx>

## **Consultation**

A targeted consultation with the relevant Tribunal Presidents and the President of Tribunals was undertaken.

## **Impact Assessments**

An Equality Impact Assessment was completed for the Tribunals (Scotland) Bill  
<http://www.scotland.gov.uk/Resource/0042/00421637.pdf>

An Equality Impact Assessment is not required for these Regulations.

A Business and Regulatory Impact Assessment is not required as the instrument has no financial effects on the Scottish Government, local government or on business.

**ACT OF SEDERUNT (FEES OF SHERIFF OFFICERS) (AMENDMENT) 2017  
(SSI 2017/153)**

**Introduction**

15. The instrument is made under section 106(1) of the Courts Reform (Scotland) Act 2014. The Act of Sederunt amends the Act of Sederunt (Fees of Sheriff Officers) (No. 2) 2002 to extend its application to work carried out by Sheriff Officers in simple procedure cases and appeals in the Sheriff Appeal Court. It does not alter the current fee levels.

16. The instrument comes into force on 15 June 2017.

**DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION**

17. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 23 May 2017 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

**JUSTICE COMMITTEE CONSIDERATION**

18. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 19 June 2017.

## **INQUIRIES INTO FATAL ACCIDENTS AND SUDDEN DEATHS ETC. (SCOTLAND) ACT 2016 (CONSEQUENTIAL PROVISIONS) REGULATIONS 2017 (SSI 2017/156)**

### **Introduction**

19. The instrument is made under sections 41(1) and (2) of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016. The Regulations make provision in consequence of the coming into force of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 on 15 June 2017.

20. Further details on the purpose of the instrument can be found in the policy note (see below).

21. The instrument comes into force on 15 June 2017.

### **DELEGATED POWERS AND LAW REFORM COMMITTEE CONSIDERATION**

22. The Delegated Powers and Law Reform (DPLR) Committee considered this instrument at its meeting on 23 May 2017 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

### **JUSTICE COMMITTEE CONSIDERATION**

23. If the Committee agrees to report to the Parliament on this instrument, it is required to do so by 19 June 2017.

### **Policy Note: Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (Consequential Provisions) Regulations 2017 (SSI 2017/156)**

### **Background**

The 2016 Act received Royal Assent on 14 January 2016. It provides a framework for the implementation of most of the recommendations of the Review of Fatal Accident Inquiry (“FAI”) Legislation carried out by Lord Cullen of Whitekirk. The overarching aim of the 2016 Act is to reform and modernise the law governing the holding of FAIs in Scotland. The 2016 Act entirely replaces the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (the “1976 Act”).

### **Policy Objectives**

The Consequential Regulations make a number of changes to secondary legislation that are consequential to the commencement of the 2016 Act. Separate Commencement Regulations (the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (Commencement No. 3, Transitional and Saving Provisions) Regulations 2017) provide for commencement, transitional and saving arrangements.

Articles 2, 4 and 7 revoke the Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977 and amending instruments.

Articles 3 and 6 amend other instruments to replace references to the 1976 Act with reference to the 2016 Act.

Article 6 repeals a redundant transfer of functions provision relating to the 1976 Act.

Because the Commencement Regulations referred to save the 1976 Act for certain purposes, described in the Policy Note for those regulations, none of the consequential modifications referred to apply to FAIs to which the 1976 Act continues to apply. Where the 1976 Act applies to a FAI the Fatal Accidents and Sudden Deaths Inquiry Procedure (Scotland) Rules 1977 will also apply.

Similar consequential modifications are set out in schedule 2 of the 2016 Act and in the schedule of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 and the saving arrangements referred to apply to those modifications in the same manner as provided for in the Consequential Regulations.

### **Commencement**

The Consequential Regulations come into force on 15 June 2017 which is the date of full commencement of the 2016 Act prescribed in the Commencement Regulations.

### **Consultation**

The Crown Office and Procurator Fiscal Service have been consulted. No formal consultation has taken place on the Regulations as they are being made as a consequence of the 2016 Act which has already been the subject of a consultation exercise.

The Government consulted on the Bill in the summer of 2014. The consultation can be viewed on the Scottish Government website at:

<http://www.gov.scot/Publications/2014/07/6772>

The analysis of consultation responses can be viewed on the Scottish Government website at:

<http://www.gov.scot/Publications/2014/11/2861>

### **Impact assessments**

An Equality Impact Assessment (EQIA) for the Bill was published on the Scottish Government website at <http://www.gov.scot/Publications/2015/04/6163> and the Bill was found to have no significant effects in relation to the protected characteristics.

No other impact assessments are required in respect of these Regulations.

### **Financial effects**

Responses to the consultation and meetings with stakeholders indicated that the Bill would have only a minimal financial impact on organisations. Business or consumer groups did not respond to the consultation despite being sent a notification. It is assumed that they consider that they will not be affected by the Bill.

A Business and Regulatory Impact Assessment (BRIA) was not considered necessary because changes in the Bill to the current system will not affect business except in the very exceptional circumstances that they may be obliged to respond to a sheriff's recommendation. Any additional costs for public sector organisations will also only relate to responding to sheriffs' recommendations.

**Justice Committee**

**21<sup>st</sup> Meeting, 2017 (Session 5), Tuesday 6 June 2017**

**Feedback from the Justice Sub-Committee on Policing**

**Note by the clerk**

1. The Justice Sub-Committee on Policing met on 1 June 2017 when it took evidence on the Auditor General's reports on the review of Police Scotland's i6 programme and the 2015-16 audit of the Scottish Police Authority.
2. The Sub-Committee took evidence from Andrew Flanagan, Chair, and John Foley, Chief Executive of the Scottish Police Authority, and from David Page, Deputy Chief Officer for Corporate Services, Strategy and Change, James Gray, Chief Finance Officer, and Martin Leven, Director of ICT from Police Scotland
3. The Sub-Committee will next meet on 15 June, when it will hold an evidence session on the use of police body-worn cameras.