

# **DOMESTIC ABUSE (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. As required under Rule 9.3.3 of the Parliament's Standing Orders, this Policy Memorandum is published to accompany the Domestic Abuse (Scotland) Bill introduced in the Scottish Parliament on 17 March 2017. This Policy Memorandum has been prepared by the Scottish Government to set out the policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

2. The following other accompanying documents are published separately:

- statements on legislative competence by the Presiding Officer and the Cabinet Secretary for Justice (Michael Matheson MSP) (SP Bill 8–LC);
- a Financial Memorandum (SP Bill 8–FM);
- Explanatory Notes (SP Bill 8–EN).

### **POLICY OBJECTIVES OF THE BILL**

3. The provisions of this Bill will improve how the justice system responds to domestic abuse.

4. The Bill will do this by ensuring that the criminal law reflects that domestic abuse can often be a course of conduct which takes place over a sustained period of time. In addition, the course of conduct can 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.

5. By enabling abuse of various types which takes place over a period of time to be prosecuted as a single course of conduct within a new criminal offence of domestic abuse, the criminal law will better reflect how victims actually experience such abuse. The Bill will also ensure that a course of conduct of entirely non-physical abuse of a person's partner or ex-partner is criminalised.

6. Along with the introduction of the new domestic abuse offence, a number of associated reforms to criminal procedure, evidence and sentencing are included within the Bill.

7. These reforms are intended to reduce the possibility of an accused person using the processes of the justice system to further exert control and influence over the complainer and

will help to minimise the trauma for the complainer while ensuring the proper administration of justice is achieved.

8. Reforms relating to the evidence that may be presented to the court in domestic abuse cases are included that will enable the court to be provided with expert opinion on the range of reactions and decision-making typical of persons traumatised by domestic abuse, i.e. on matters that may be beyond the experience of the court. This will assist the court in reaching a just decision in a given case.

### **Wider context**

9. In June 2014, the Scottish Government launched the Equally Safe Strategy. This strategy was developed in partnership with CoSLA and in association with a wide range of partners including Scottish Women's Aid and Rape Crisis Scotland alongside Police Scotland and NHS Health Scotland. It seeks to create a strong and flourishing Scotland where all individuals are equally safe and respected, where women and girls live free from abuse and the attitudes which perpetuate it. There is a clear and unequivocal message which runs through the Strategy - that violence against women and children will not be tolerated and a bold and unapologetic approach is needed, which links systematic gender inequality with the root causes of violence against women in order to achieve necessary improvements.

10. The Equally Safe Strategy has driven forward significant progress in this area. There are 4 workstreams (Justice, Accountability, Capacity and Capability and Primary Prevention) which seek to provide clear direction of the work needed to help prevent and ultimately eradicate violence against women, girls and children, including significant steps that require to be taken not just within the justice system but across society and in a range of different sectors. It is a whole systems approach which is designed to create a major culture shift within Scottish society that will tackle this problem from all angles and seek to end tolerance for these abhorrent crimes in Scotland's communities.

11. In June 2016, £11.8m of equalities funding was announced by the Scottish Government to continue to support efforts to tackle violence against women and provide support for victims. This is in addition to the bespoke three year (2015-18) funding stream of £20m being made available from the justice budget to specifically support the violence against women and girls agenda.

### **Key background in relation to the new domestic abuse offence**

12. At the Crown Office and Procurator Fiscal Service's ("COPFS") Domestic Abuse Conference in May 2014, the then Solicitor General, Lesley Thomson QC, called on the Scottish Parliament to consider the creation of a "bespoke" offence of domestic abuse<sup>1</sup>. In her speech, she said that a specific offence of domestic abuse, which reflected the experience of victims of long-term domestic abuse would provide recognition of the impact and consequences of all types of abusive behaviour, including patterns of coercive and controlling behaviour by perpetrators,

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<sup>1</sup><http://www.crownoffice.gov.uk/images/Documents/Our%20Priorities/Domestic%20abuse/Speech%20by%20PF%20Domestic%20Abuse%20at%20COPFS%20Conference%208%20May%202014.pdf>

making the prosecution of this kind of crime more effective and allowing more people to access justice.

13. The Solicitor General highlighted concerns that many forms of emotional abuse or behaviours that could be described as “coercive and controlling” do not fall within the scope of any existing criminal offence and the existing law, by focusing on individual incidents of, for example, assault, threatening or abusive behaviour or damage to property, does not truly reflect the cumulative psychological harm caused by on-going domestic abuse.

14. In setting out the Scottish Government’s Programme for Government in November 2014, the First Minister announced that the Scottish Government would seek views through a Scottish Government consultation on whether a specific offence of domestic abuse would enable the justice system to better respond to this form of offending. This initial consultation was the first formal step towards the development of the new offence contained within this Bill.

15. The domestic abuse advocacy and support service, ASSIST have provided the following case study (which has been anonymised and is a composite of the experience of a number of different users whom they have worked with).

16. The case study is presented from the perspective of a domestic abuse victim. It demonstrates the type of pernicious behaviour that reflects a modern understanding of domestic abuse and what kind of behaviour is relevant in the context of consideration of the new domestic abuse offence.

*“He wants to know where I am, who I’m with and what I’m doing every minute of the day. It makes me panic because I know what will happen when I got home, the threats and accusations, so I avoid going out as much as I can. It’s just not worth the hassle to try and go out. He says I’m selfish if I go out and that’s why he constantly texts and phones me. When I get back, he accuses me of being with other men.*

*“He doesn’t trust my friends since he found out I was thinking of leaving so I don’t see them much at all now. He went through my phone a few months ago and found out I’d been talking to a friend about leaving him. Things got much worse after that. He poured juice over me in front of the children and told them it was my fault for winding him up. (Daughter) was really upset and hasn’t been sleeping well since.*

*“He says I’m a bad mother and no one likes me anyway. He says he’d get the children taken off me because I can’t look after them properly and that no one will believe me if I tell them anything. He says I’m useless at helping the children with their homework because I’m so stupid. I never got any qualifications. The children can’t have sleepovers or friends to play as he says they’re too noisy. He once said that if I left him, he do anything to make sure I never saw them again but I’m not sure what he meant by this.*

*“He’s always really nice to my friends when they bump into him in the street and he’s polite to my family on the phone, so they don’t know what’s going on either. My family don’t live near us. He wanted us to move to a new area, so I don’t have much contact*

*with them now. When I do speak to them on the phone, he's always making signs for me to hurry up, so I'm sure they think I don't want to talk to them.*

*"Everything's got to be done to his timetable, I need to pick him up after work and I need to be there five minutes before he comes out, so our car is the first thing he sees. His meals need to be ready at the same time every night and that's really hard. I stopped working after I had our daughter and I don't have access to my own money anymore – he gives me what he thinks I need, but I'm expected to buy stuff for them as well. My heart sinks every time the kids need shoes. He's paranoid about the heating bills, so I've worked out exactly when the heating needs to come on to reach the temperature he wants. It's a nightmare when the temperature changes though.*

*"If I do go out, he always has to drop me off and pick me up. He tells me I shouldn't wear certain clothes because I look ridiculous. After I had the kids, he'd tell me I looked fat and ugly. He doesn't like the kids socialising that much either, I was friendly with some of the other mums when (son) was little but he put a stop to that once (daughter) was born. He says it's my fault (son) has been in trouble at school recently because I don't know how to raise him properly.*

*"He says if I leave him, he'll make sure he gets the house and the children and once he threatened to kill himself if I ever tried to take the children away from him."*

17. Discussion of the specific provisions in the Bill is below.

## **SPECIFIC PROVISIONS**

### **Sections 1 to 10 - Offence as to domestic abuse**

#### Policy objectives

18. By making it a criminal offence for a person to engage in a course of behaviour which is abusive of their partner or ex-partner, the criminal law will reflect a modern understanding of what is domestic abuse and will help ensure that victims and perpetrators are clear what amounts to criminal behaviour and that this can be addressed through the justice system.

#### Key information

19. Between March and June 2015, the Scottish Government undertook a public consultation<sup>2</sup> seeking views on the question of whether a specific offence of domestic abuse would improve the ability of the police and prosecutors to tackle domestic abuse effectively.

20. Analysis of responses to that consultation<sup>3</sup> 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

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<sup>2</sup> [www.gov.scot/Publications/2015/03/4845](http://www.gov.scot/Publications/2015/03/4845)

<sup>3</sup> [www.gov.scot/Publications/2015/10/7350](http://www.gov.scot/Publications/2015/10/7350)

abuse (often described as “coercive and controlling behaviour”) by their partner or ex-partner. However, there was no 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.

21. Between December 2015 and April 2016, the Scottish Government undertook a further consultation<sup>4</sup> seeking views on a specific draft offence which was published with the consultation. Responses to that consultation<sup>5</sup> and meetings with stakeholders have informed the further development of the offence which is contained in the Bill.

22. The offence is a general offence of “domestic abuse” which is intended to cover the wide range of conduct that can make up a pattern of abusive behaviour within a relationship: both physical violence and threats which can be prosecuted using the existing criminal law and other behaviour amounting to psychological abuse or coercive control which either cannot be or, at least, cannot easily be prosecuted using existing criminal laws.

23. The Bill provides that for the criminal offence to have been committed, it is necessary for three conditions to be met. All three conditions must be met for the offence to have been committed.

24. The first condition is that a person has pursued a course of behaviour which is “abusive” of their partner or ex-partner. A “course of behaviour” must involve behaviour on at least two occasions.

25. If this condition is not met, the offence can never be committed i.e. behaviour that is abusive must always have taken place on at least two occasions. 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 e.g. where a one-off physical assault has taken place.

26. The second condition is that a reasonable person would consider the course of abusive behaviour would be likely to cause the victim to suffer physical or psychological harm.

27. The third condition is that the accused either intended through the abusive course of behaviour to cause the victim physical or psychological harm, or else has been reckless as to the causing of such harm.

28. The Bill 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.

29. This definition is split into two parts.

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<sup>4</sup> <https://consult.scotland.gov.uk/criminal-law-and-sentencing-team/criminal-offence-domestic-abuse>

<sup>5</sup> <http://www.gov.scot/Publications/2015/10/7350/0>

30. The first part of the definition relates directly to specific types of behaviour. This first part of the definition provides that “abusive behaviour” includes behaviour directed at the victim that is “violent, threatening or intimidating”.

31. 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.

32. The second part of the definition relates indirectly to behaviour by reference to the effect the behaviour is intended to have, or that a reasonable person would consider is likely to have, on the person being abused. This approach is intended to capture behaviour within a relationship which is abusive because it is coercive or controlling or otherwise amounts to psychological or emotional abuse of a person’s partner or ex-partner.

33. Rather than try to describe the exact behaviour, which would be difficult, if not impossible to do exhaustively in such a way as to capture all the different ways in which a person may abuse their partner or ex-partner, this second part of the definition contained within the offence provides that behaviour is abusive if it has as its purpose, or a reasonable person considers it is likely to have the effect of:

- making a partner or ex-partner dependent on or subordinate to the perpetrator;
- isolating a partner or ex-partner from friends, relatives or other sources of support;
- controlling, regulating or monitoring the day-to-day activities of a partner or ex-partner;
- depriving a partner or ex-partner of, or restricting their freedom of action; or
- frightening, humiliating, degrading or punishing a partner or ex-partner.

34. This approach 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.

35. The behaviour by the perpetrator can be directed:

- at the partner or ex-partner directly (for example, denying a person access to money, or preventing a person from seeing friends or family);
- at the partner or ex-partner’s child or children (for example, requiring the child of the person to spy on or report on that person’s movements);
- or any other person (for example, encouraging a family friend to call the person offensive names).

36. Behaviour directed at a person includes behaviour directed at property including pets. As such, a threat to abuse a family pet or vandalism of personal property can be covered by the

offence. Property can be owned by anyone rather than being restricted to the partner or ex-partner (so it could cover, for example, threats to vandalise a partner or ex-partner's parents' property).

37. Behaviour which is not "directed at" a person is not covered by this provision. This ensures that where, for example, a person has an affair with a third party, which may cause their partner to be humiliated (i.e. one of the relevant effects), this does not directly fall within the scope of the offence. This is because such behaviour (having an affair) cannot be said to be "directed" at a person, but rather is simply carried out or undertaken with another person.

38. However, if a person were, for example, to tell their partner directly or tell the family or friends of their partner about their affair or affairs in order to humiliate their partner, such behaviour may fall within the scope of the offence as that is behaviour directed at a person (telling your partner or family and friends of your partner about an affair)<sup>6</sup>.

39. In any given case, it will be a matter for the court to determine whether particular behaviour falls within the terms of the offence. However, such behaviour may include, for example, the following forms of domestic abuse:

- preventing their partner or ex-partner from making contact with friends or family;
- checking or controlling their partner's or ex-partner's use of their phone or social media;
- preventing their partner or ex-partner from attending work/college;
- taking control of their partner's or ex-partner's finances/denying access to money;
- forcing their partner or ex-partner to leave or change their religion;
- abusive name-calling of the partner or ex-partner;
- controlling their partner's or ex-partner's access to toilet;
- making their partner or ex-partner eat food off the floor.

*Conditions that must be met for the offence to be committed*

40. As noted above, for the offence to be committed, it is firstly necessary that an accused engaged in a course of behaviour which is abusive of their partner or ex-partner. If this condition is met, two other conditions still require to be met for the offence to have been committed.

41. In respect of this first condition, the Bill provides that a course of behaviour involves behaviour on at least two occasions. The requirement for a "course of behaviour" is an essential element of the offence and will therefore require to be corroborated. 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.

42. The second condition is that the court must be satisfied that a reasonable person would consider that the course of behaviour would be likely to cause the victim to suffer physical or

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<sup>6</sup> The other two conditions of the offence would of course also require to be met.

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

43. For the offence to be committed, there is no requirement to prove that the victim suffered actual physical or psychological harm from the course of behaviour. Instead, the court must be satisfied that a reasonable person would consider the course of behaviour would be likely to cause the harm described to the person's partner or ex-partner.

44. 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.

45. The inclusion of psychological harm is intended to ensure all relevant types of harm are included. For example, it is considered that psychological harm includes emotional harm and financial harm, two common ways in which domestic abuse may give rise to harmful effects on the victim.

46. The third condition is the element of the offence relating to the accused's state of mind.

47. This condition is that the accused either intends by the course of behaviour to cause the victim to suffer physical or psychological harm, or is reckless as to whether the course of behaviour causes the victim to suffer physical or psychological harm.

48. This approach avoids the offence either being triggered or not triggered through the simple fact that behaviour may not have the effect that it would be expected to have on the victim. For example, a person may respond in an unexpected manner to behaviour which would be expected to give rise to the effects listed within the offence. This approach ensures that the focus remains on the offender's behaviour and not the victim's reaction.

49. The offence applies to abuse of a person's partner or ex-partner, adopting the definition of people who are or have been in a relationship that has been used in the Domestic Abuse (Scotland) Act 2011 and in the domestic abuse aggravation contained in the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 ("the 2016 Act") (subject to minor updating to reflect the current status of various types of partnerships).

50. 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.

Alternative approaches

51. Two other approaches were considered to meeting the policy objective of enabling the courts to respond effectively to on-going domestic abuse.

52. The first was to continue to rely on the existing law to prosecute perpetrators of domestic abuse. However, a clear majority of respondents to the first consultation (March 2015 to June 2015) were of the view that the existing criminal law does not provide the police and prosecutors with sufficient powers to investigate and prosecute the full range of perpetrators of domestic abuse.

53. Relying on the existing law would mean prosecutions would have to continue to be focused on individual incidents of e.g. physical violence or threats which does not recognise that domestic abuse is often a pattern of abusive behaviour sustained over a considerable period of time.

54. Furthermore, such an approach would mean it would continue to be difficult to prosecute those who engage in on-going psychological or emotional abuse of their partner, without reverting to the use of physical violence or overt threats, or to prosecute where there is corroborated evidence only of the on-going psychological abuse and not of any individual incidents of threatening or violent behaviour.

55. 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<sup>7</sup>, which applies in England and Wales, takes this approach.

56. This approach could be seen as one which avoids the overlap between the existing criminal law concerning, for example, assault or threats and a new offence. However, while this may have some advantages, in practice, it is not clear that such an overlap would not still exist. There are many circumstances in which threatening or abusive behaviour, in particular, might reasonably be considered to be “controlling or coercive” as well as amounting to an offence under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, and it would be a matter for the prosecutors to decide whether to charge a person with the new offence or with the threatening and abusive behaviour offence.

57. Furthermore, there may be cases where behaviour that may appear innocuous when seen out of context can clearly be seen as psychologically abusive when viewed in the context of, for example, past threats or physical violence between the perpetrator and the victim. Equally, the

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<sup>7</sup> <http://www.legislation.gov.uk/ukpga/2015/9/section/76>

threats or violence may be seen as relatively low-level offences if viewed in isolation, and not against the background of on-going psychological abuse of the victim by the perpetrator.

58. In such cases, while it would remain possible for prosecutors to libel especially serious individual incidents as separate offences where they consider it appropriate to do so, it is considered extremely useful for the prosecutor to be able to libel the accused's whole course of conduct under a single charge of domestic abuse.

59. The approach adopted in England and Wales crucially does not allow the wide range of conduct that constitutes domestic abuse to be contained within one offence. If such an approach were adopted, this would not deliver an essential part of the policy intent with the new offence in this Bill.

### Consultation

60. The consultation *Equally Safe: Reforming the law to address domestic abuse and sexual offences*<sup>8</sup> was held between March 2015 and June 2015 and sought views on whether the existing law provided the police, prosecutors and the courts with sufficient powers to investigate and prosecute perpetrators of domestic abuse, and, if not, whether the creation of a specific offence of domestic abuse would improve the ability of the justice system to respond to this type of crime.

61. The consultation also asked those respondents who supported the creation of a specific offence what behaviours which are not currently covered by the criminal law they thought should be included within the scope of a specific offence and whether such an offence should apply only to partners and ex-partners or should cover other familial relationships.

62. The clear majority of respondents to that consultation (93%) considered that the existing criminal law did not provide sufficient powers to investigate and prosecute perpetrators of domestic abuse. There was a broad consensus that, while the existing legal framework does provide powers to investigate and prosecute perpetrators of domestic abuse, it does not recognise the particular nature and consequences of domestic abuse sufficiently. In particular, many respondents noted that the fact that the existing legal framework focuses on individual incidents of e.g. assault or threatening behaviour does not adequately recognise that domestic abuse is often a pattern of abusive behaviour that is sustained over time.

63. Many also said that the law does not reflect the coercive and controlling, psychologically or emotionally abusive behaviours that are often a central part of long term abusive relationships.

64. A number of respondents referenced the work on "coercive control" by Professor Evan Stark<sup>9</sup> and suggested it would provide a useful guide in identifying the kinds of behaviours which are not currently criminalised that should be covered by any offence. In terms of the specific types of behaviour which should be criminalised, the most frequently made suggestions were:

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<sup>8</sup> [www.gov.scot/Resource/0047/00473932.pdf](http://www.gov.scot/Resource/0047/00473932.pdf)

<sup>9</sup> See for example [http://www.stopvaw.org/uploads/evan\\_stark\\_article\\_final\\_100812.pdf](http://www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf)

- deprivation of liberty/autonomy;
- isolating an individual from friends, family and wider society;
- withholding or controlling access to resources, including money;
- psychological control and manipulation;
- threats and creation of a climate of fear, including threats towards children; and
- controlling or withholding access to health care, education and employment opportunities.

65. The majority of respondents thought that any specific offence of “domestic abuse” should be restricted to people who are partners or ex-partners. 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.

66. 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.

67. More details of the responses received to this consultation can be found in the independent analysis of responses which was published by the Scottish Government in October 2015<sup>10</sup>.

68. The Scottish Government undertook a further consultation between December 2015 and April 2016 seeking views on a draft offence of “Abusive behaviour in relation to partner or ex-partner”<sup>11</sup>.

69. That consultation sought views both on the general principles underlying the approach taken in drafting the offence and on a number of specific issues including the maximum penalty and defences available to the offence.

70. Nearly all respondents supported the broad approach that a specific offence of domestic or partner abuse should be drawn so as to encompass both conduct such as threats or physical abuse, which is currently criminal, and psychological abuse and coercive control which may not amount to a criminal offence under the existing law.

71. There was support from most respondents for the broad structure of the offence, though there were differing views on the requirement that an accused’s conduct must be such that a reasonable person would consider the course of behaviour would be likely to cause the victim to suffer physical or psychological harm.

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<sup>10</sup> <http://www.gov.scot/Publications/2015/10/7350/3>

<sup>11</sup> <https://consult.scotland.gov.uk/criminal-law-and-sentencing-team/criminal-offence-domestic-abuse>

72. On the one hand, some respondents were of the view that the requirement that a reasonable person would consider that the accused's behaviour would be likely to cause the victim physical or psychological harm would increase victims' willingness to report as it would avoid making a judgment as to whether an offence has been committed based on the state of mind of the victim or on their own assessment of the impact which resulted.

73. However, other respondents voiced concerns about the "reasonable person" test because they saw it as being overly subjective or possibly requiring too much interpretation. Some of these respondents suggested removing this provision, or that the focus of the offence should be an objective measure of harm caused to the victim.

74. Many of those who commented on the fact that the offence requires a course of behaviour noted that there will be occasions when a single incident is very serious and in the case of individual physical abuse incidents, might be the pivotal event that underpins the notion of fear, an essential element in coercive, controlling relationships. It was suggested that serious individual offences – such as physical or sexual assault, can and should be dealt with under other existing legislation, including with the addition of the domestic abuse aggravation (as now contained in the 2016 Act).

75. Some respondents suggested expanding the definition of the kinds of harm that "abusive behaviour" can cause to the victim beyond physical or psychological harm. Other types of harm or abuse which respondents thought should be added included sexual violence, abuse or exploitation, emotional abuse and financial abuse or exploitation.

76. Respondents were broadly supportive of the definition of "abusive behaviour" proposed. More specifically, it was suggested that the "abusive behaviour" term is useful in dispensing with the complexities surrounding the exact meaning of the terms "coercion" and "control". There was some explicit support for not seeking to provide an exhaustive definition of what constitutes abusive behaviour. A number of respondents said that the effects of abuse should be more explicit in terms of reflecting the deprivation of rights, autonomy and the manipulating and restriction of choices, health and wellbeing.

77. Although the majority of respondents to the first consultation considered the offence should be between partners and/or ex-partners, a number of respondents made substantive comments about the coverage of children and young people within the draft offence.

78. The concern of most respondents who raised this was that, as the draft offence was defined, the impact which domestic abuse has on children and young people is not recognised. Many went on to comment on the impact that domestic abuse has on children, both in terms of the sheer number of children affected and the impact it can have on individual children.

79. Although a number of respondents noted that they understood the rationale behind defining domestic abuse by its impact on the abused partner or ex-partner, there were nonetheless calls to do more to recognise the impact of domestic abuse on children and young people, either within the definition of "abuse" or elsewhere in the offence provision.

80. The draft offence consulted upon provided for a maximum penalty of 10 years imprisonment on conviction on indictment. The majority of respondents who commented noted their agreement with the proposed maximum penalty, in view of the seriousness of the offence. However, a number of respondents considered that the maximum penalty was insufficient and did not adequately reflect the seriousness of the harm caused by such behaviour. There were also some respondents who felt the suggested maximum penalty of 10 years was too high.

81. The consultation also asked respondents for any further comments on any aspect of the draft offence.

82. A number of respondents said there needed to be clarity as to what would determine when the proposed offence would operate and when behaviour which is already criminal – such as assault or sexual assault – would continue to be prosecuted under existing legislation.

83. Other comments raised the issue of accused persons representing themselves in court. It was suggested that, given the impact of domestic abuse, it is inappropriate to permit someone accused of the offence to represent themselves in court, as this could provide a platform from which to intimidate and potentially re-traumatise the victim.

84. A detailed analysis of the responses received to this consultation can be found in the independent report of responses which was published by the Scottish Government in September 2016<sup>12</sup>.

## **Aggravation in relation to a child**

### Policy objectives

85. 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.

### Key information

86. The 2016 Act provides that an offence is aggravated because it involved the abuse of the perpetrator's partner or ex-partner and the accused intended to or was reckless about causing their partner or ex-partner to suffer harm.

87. There are a range of other statutory aggravations which exist to assist in the identification and prosecution of different types of crime. For example, the Offences (Aggravation by Prejudice) (Scotland) Act 2009 provides for statutory aggravations that an offence was committed through a motivation of malice or ill-will towards an individual based on their sexual orientation, transgender identity or disability.

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<sup>12</sup> <http://www.gov.scot/Publications/2016/09/4616>

88. The aggravation in this Bill applies where a perpetrator directs behaviour at a child in committing the new offence. An example would be where the perpetrator directs verbally abusive behaviour at a child for the purpose of frightening or controlling their partner or ex-partner so as to make that person fearful for the safety or well-being of their child.

89. The aggravation also applies if the person, through whose behaviour the perpetrator directs behaviour at the partner or ex-partner, is a child. An example would be where the perpetrator encourages their partner's or ex-partner's child to "spy" on their parent and report back to the perpetrator.

90. The aggravation also applies where a child sees, hears or is present during an incident of the perpetrator's behaviour that happens as part of the course of abusive behaviour amounting to the offence. This could be an instance of physical abuse or, for example, threatening behaviour or verbal abuse. The provision is framed widely to reflect the many different forms of abuse that a child may see, hear or be present during the commission of the offence. This aspect of the aggravation is intended to reflect the harm that can be caused to children who see or hear abuse taking place or are otherwise present, irrespective of whether the perpetrator directly involves them in the commission of the abuse.

91. A statutory aggravation provides a means of ensuring that the courts formally recognise that the perpetrator has involved a child in the commission of the offence or that a child has seen, heard or otherwise been present during the abuse. By placing a statutory duty on the courts to take this fact into account when sentencing the offender, as they are required to do by existing aggravations e.g. offences aggravated by prejudice, victims can have greater confidence that the sentencing decisions of the courts reflect the facts and circumstances of the case. It will ensure that the fact that a perpetrator involved a child in the commission of the offence is formally recorded.

92. The aggravation is framed so that it can be libelled in respect of *any* child. In practice, it is likely that in the majority of such cases, the child would be the child of either the victim or the perpetrator or both. However, the aggravation has not been restricted so as to ensure that it can be libelled in appropriate cases for any child as not all children who are affected by domestic abuse will necessarily be the children of the victim or perpetrator. So, for example, the aggravation can be libelled where a niece or nephew of the victim whom the perpetrator involves in the commission of the offence, or a child who is a family friend who witnesses the abuse.

#### Alternative approaches

93. As noted previously, a number of respondents to the consultation on the draft offence expressed views that the offence as drafted did not reflect the harm done to children through domestic abuse, and did not recognise children as victims of domestic abuse.

94. For example, the Commissioner for Children and Young People commented that:

*"I am concerned that children do not feature in the draft offence...There is sound evidence of the negative effects coercive control can have on children, either indirectly as a result of the abuse and control of their non-abusing parent (usually their mother) or directly as victims of abuse and control themselves. For example, they may be denied*

*access to support networks or prevented from participating in social or extra-curricular activities.”*

95. The offence is framed as one of abuse of a partner or ex-partner. As such, it does not directly extend to abuse of a child (unless the perpetrator’s partner or ex-partner who is subject to the abuse is themselves a child).

96. Some consultees suggested creating a specific offence of “domestic abuse of a child”, modelled on the offence contained in the Bill.

97. 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<sup>13</sup>.

98. It is considered that the way that the offence in this Bill has been developed to address psychological abuse and coercive control of a person’s partner or ex-partner would require considerable adaptation if it were to be considered as a template for use in dealing with psychologically abusive behaviour directed towards a child.

99. The list of “effects” of abusive behaviour contained within the draft offence was crafted with relationships between partners and/or ex-partners in mind. Therefore applying the list of “effects” in a different context may be seen as inappropriate. For example, it might be seen as reasonable, for example, for a parent or carer to control, regulate or monitor the day-to-day activities of a child, or to punish the child for misbehaviour<sup>14</sup>. That is not to say that there are not forms of control or punishment of a child which would amount to psychological abuse, but it is considered that this question is best addressed by considering the wider issue of how best to reform the existing criminal law more generally concerning abuse of a child.

100. It should be noted that where a perpetrator directs abusive behaviour at a child as a means of furthering abuse of that child’s parent or carer or where a perpetrator encourages a child to participate in abuse of the partner or ex-partner, the offence is crafted in such a way as to enable this to be libelled in the charge as the offence includes behaviour directed at a third person with the intent of causing one of the effects contained within the draft offence on the partner or ex-partner, and includes behaviour which is carried out through a third party.

101. Some respondents to the consultation also suggested that the offence should be re-framed so as to reflect the fact that children growing up in an environment in which their parent or carer

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<sup>13</sup> <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10818&i=99109>

<sup>14</sup> These are some of the relevant ‘effects’ contained in the offence in the Bill

is being abused by her or his partner are themselves victims of domestic abuse. In subsequent discussions between Scottish Government officials and stakeholder groups, it was suggested that an aggravation could be drafted more widely, so that it is sufficient that there were children in the household where the victim was living, regardless of whether those children see or hear incidents of abuse. They note that there is widely accepted evidence that growing up in such an environment is harmful to children, irrespective of whether they are present when the abuse is taking place.

102. The Scottish Government fully acknowledges the clear evidence that children who grow up in an environment where their parent or carer is being abused are harmed and are therefore, in this wider sense, victims of domestic abuse.

103. However, an aggravation that was framed as widely as this could potentially lose a direct connection with a perpetrator's specific actions that the court could consider in determining whether and to what extent to enhance the perpetrator's sentence. The aggravation contained in the Bill requires the court to consider the specific incidents that a child saw, heard or were present during, or was involved in, or the behaviour that was directed at the child in determining the appropriate sentence for the offender. If the aggravation was framed more widely so that it applied whenever children were living in the victim's household, the court may lack sufficient information to enable them to determine how to take account of the aggravation in sentencing the offender, as it would not be clear from the aggravation itself whether the children were necessarily aware of the abuse that took place.

### Consultation

104. As noted above, a number of respondents to the consultation on the specific draft offence raised concerns that the offence as drafted did not recognise that children are victims of domestic abuse committed against their parents/carers.

105. The aggravation was developed in response to the comments received during the consultation, as a means of acknowledging through the criminal law the impact that domestic abuse can have on children, and ensures that the fact that a perpetrator involved or directed behaviour at a child in committing the offence is formally recorded and that there is transparency as to what account has been taken of this in sentencing.

106. While there has been no formal consultation on the aggravation, Scottish Government officials have met with a number of stakeholders who raised the issue of how the offence deals with the impact of domestic abuse on children during the earlier consultation to help inform development of the aggravation.

### **Schedule 1(1) - New standard bail condition in domestic abuse cases**

#### Policy objectives

107. 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.

Key information

108. Amongst the characteristics of domestic abuse is an exercise of control in an especially intrusive and intimate way by the perpetrator over the victim. The Scottish Government wishes to avoid a situation in which court processes themselves give alleged abusers further opportunities to exercise such control.

109. An opportunity for doing so would present itself where an accused person, under cover of preparing a defence, were to be able to interview the alleged victim about the offence and other matters, purportedly with a view to obtaining a precognition – information about the sort of evidence that person could give – or a statement from the alleged victim for use in the trial.

110. Domestic abuse shares the characteristic of the exercise of control with a range of sexual offences. However, the attempted exercise of such control is likely to be a *more* essential feature of domestic abuse offences than of sexual offences in general, given that the former must necessarily involve an intimate relationship while the latter need not.

111. The potential exercise of control in taking precognitions<sup>15</sup> – which might even amount to putting pressure on the alleged victim not to appear - is one which has already been recognised in the context of sexual offences.

112. A list of standard conditions of bail, which are applied in all cases where an accused individual is released on bail, is given at section 24(5) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). Along with standard conditions that apply whatever offence is alleged to have been committed, a particular standard condition is set out in section 24(5)(e) of the 1995 Act which applies where the offence in question is one on a list of sexual offences contained in section 288C of the 1995 Act.

113. The standard condition at section 24(5)(e) prevents persons accused of relevant sexual offences from seeking to obtain precognitions or statements concerning the subject matter of the offence from the complainer, other than by way of a solicitor.

114. By this means alleged victims of sexual offences are protected from being directly interviewed by the accused prior to trial by a standard condition of bail i.e. one which is always applied whenever bail is granted. Clearly if bail is not granted there is no danger of this situation arising as the individual will be remanded in custody.

115. It is important to note that the accused is not to be deprived of the right to seek to obtain precognitions and statements<sup>16</sup>. This is part of the right to a fair trial and so the accused will still be able to obtain them by means of a solicitor.

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<sup>15</sup> There are other policy reasons for the ban on precognitions in relation to sexual offences too such as a recognition of the intimate nature of the offending and the underlying indignity of allowing the accused to be able to question the victim on such intimate matters.

<sup>16</sup> On occasion, the court may be required to decide whether it is necessary to instruct a precognition under oath.

116. Given that this protection exists in sexual offence cases, and it is arguably even more appropriate in domestic abuse cases, the Scottish Government considers it appropriate to seek to extend the standard condition in section 24(5)(e) to domestic abuse offences.

#### Alternative approaches

117. The current legislation on bail does not restrict the special conditions which may be applied. Section 24(4)(b) of the 1995 Act permits the court to attach such further conditions as it may consider necessary to secure that the standard conditions are observed. The standard conditions include requirements that an accused person does not interfere with witnesses, or behave in a manner which causes or is likely to cause alarm or distress to them. Consequently the court is already able to set conditions which would prevent attempts by the accused to further control over the alleged victim. Indeed the Scottish Government understands that at present the courts regularly impose additional special conditions of bail designed to prevent the accused from contacting, approaching and attempting to contact or approach the complainer.

118. It would consequently be possible to leave this matter to the discretion of the courts themselves. The use of such special conditions could be a matter for further specific judicial training (which would be a matter for the Lord President to consider).

119. The Scottish Government is generally reluctant to impose limits on judicial discretion. However, as indicated, it is considered appropriate to seek to do so given that the exercise of control in an especially intrusive and intimate way is even more necessarily a feature of domestic abuse than it is of sexual offences. It is therefore logical that the specific statutory protection already provided in sexual offence cases by the standard conditions of bail should be extended to domestic abuse cases.

#### Consultation

120. The Scottish Government specifically invited comments on this proposal in the paper *The Creation of A Specific Offence of Domestic Abuse – Proposed Associated Reforms to Criminal Procedure*, which was published on 3 October 2016<sup>17</sup>. The paper was published on the Scottish Government website and sent to organisations with a direct interest.

121. The responses received were published in March 2017<sup>18</sup>.

### **Schedule 1(2)-(4) - Accused persons conducting their own defence**

#### Policy objectives

122. 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.

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<sup>17</sup> <http://www.gov.scot/Publications/2016/10/3259>

<sup>18</sup> <http://www.gov.scot/Publications/Recent>

Key information

123. In respect of an accused being given the opportunity to further their control over an alleged victim through the processes of the justice system, what is true of obtaining precognitions and statements is likely to be even more true of the conduct of court proceedings themselves.

124. Examining or cross-examining the alleged victim in court would give an accused an opportunity, in the most traumatic of circumstances, to exercise control over that person in an especially intrusive and intimate way.

125. As with the provisions on precognitions, the protection the Scottish Government is proposing is already available in sexual offence (and indeed other) cases.

126. Sections 288C, 288E and 288F of the 1995 Act contain provisions prohibiting an accused person from conducting their own defence in the case of the sexual offences listed in section 288C and in the case of certain offences against under 12s.

127. The court also has the power to prohibit the conduct of one's own defence and (as a power rather than as a duty) of other vulnerable witnesses.

128. It is important that the right of an accused to a fair trial is preserved within these existing provisions. The court must notify the accused that the hearing be conducted by a lawyer. Section 288D of the 1995 Act provides that the court may appoint a solicitor at its own hand for this purpose, and under section 22(1)(dd) of the Legal Aid (Scotland) Act 1986 legal aid is automatically available where section 288D applies.

129. The Scottish Government considers it is logical and consistent with the approach to precognitions described above to prevent the accused in domestic abuse cases from conducting their own defence. In particular, the Scottish Government considers that attempts at controlling the alleged victim are even more likely in domestic abuse cases than in sexual offence cases. Consequently it is logical to extend the protections already available in sexual offence (and other) cases to those of domestic abuse.

Alternative approaches

130. Where a person is alleged to have been the victim of (*inter alia*) a domestic abuse or stalking offence, section 271 of the 1995 Act (as amended by section 10 of the Victims and Witnesses (Scotland) Act 2014) provides that that person shall automatically be considered to be a vulnerable witness. This entitles such persons to special measures when giving evidence. Evidence may be given by video link, for example, or with the use of screens.

131. It would be possible to leave the protection of alleged victims of domestic abuse to these measures. However, the Scottish Government's view is that invasive and intimate controlling behaviour of a kind which would be intolerable in a courtroom situation is even more distinguishing a characteristic of domestic abuse as it is of sexual offences. It is also even more likely in a domestic abuse case than in a sexual offence case that the accused would have the

knowledge to focus on specific details that are particularly distressing for the alleged victim. Therefore it is appropriate that protections which are automatically granted to alleged victims in sexual offence cases should be automatically granted in domestic abuse cases as well.

### Consultation

132. As described above, this specific issue was raised by a number of respondents in their replies to the consultation exercise on the draft offence.

133. As a result, the Scottish Government specifically invited comments on this proposal in the paper *The Creation of A Specific Offence of Domestic Abuse – Proposed Associated Reforms to Criminal Procedure*, which was published on 5 October 2016. The paper was published on the website and sent to organisations with a direct interest.

134. The responses received were published in March 2017<sup>19</sup>.

## **Schedule 1(5) - Expert evidence relating to the behaviour of the complainer**

### Policy objectives

135. The policy objective is to ensure that expert psychological or psychiatric evidence, relating to behaviour or statements made by the alleged victim, should be admissible in domestic abuse cases, for the purpose of rebutting adverse inferences as to credibility or reliability which might otherwise be drawn from their behaviour or statements.

### Key information

136. Expert evidence is generally competent only where it is necessary for the resolution of a dispute rather than merely to assist a jury, or the court. Ordinarily juries, or the court, are to make up their own minds about the credibility or reliability of witnesses, and expert psychological or psychiatric evidence is not to be led in an attempt to influence them.

137. Deciding about the credibility or reliability of a witness is a central part of the function of a jury, or the court, and legislative provision in this area is relatively rare.

138. However, such evidence has been made admissible in sexual offence cases, by means of section 275C of the 1995 Act. The justification for this approach relates to the fact that the subsequent behaviour of an alleged victim, and her or his conduct in general, are often raised in cases by the defence as a means of trying to cast adverse inference on the credibility of the alleged victim.

139. There is considerable research that demonstrates what the range of understandable reactions of an alleged victim may be to a sexual offence being committed and these reactions may be something that members of a jury are unlikely be familiar with. It is therefore considered appropriate to assist them with the evidence of experts familiar with these aspects.

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<sup>19</sup> <http://www.gov.scot/Publications/Recent>

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

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

142. 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.

143. The Scottish Government considers it appropriate to make provision in domestic abuse cases similar to that in sexual offence cases. While the evidence the Government wishes to make admissible will be of a psychological or psychiatric nature, it does not intend to provide that only evidence from qualified psychologists and psychiatrists shall be admissible. It may be provided by an expert in any relevant field, if they can demonstrate sufficient specialist expertise in relation to domestic abuse cases.

144. A report prepared in 2004 for the Crown Prosecution Service in England and Wales<sup>20</sup> notes that such evidence is routinely admitted in some jurisdictions in the United States. There, a range of professions may be allowed to give evidence as experts on domestic violence, e.g. psychologists, psychotherapists, counsellors, social workers, academics, trained police officers, and women’s shelter workers.

145. The Scottish Government wishes to ensure that the right of an accused to a fair trial is observed. Where such expert evidence is permitted, the defence will also be able to call evidence of a similar nature to rebut it.

#### Alternative approaches

146. Given that expert evidence as to behaviour of the alleged victim is not generally admissible, and statutory provision was felt necessary to allow it to be admitted in sexual offence cases, the Scottish Government does not consider there is any alternative to statutory provision to achieve the policy aim.

#### Consultation

147. The Scottish Government specifically invited comments on this proposal in the paper *The Creation of A Specific Offence of Domestic Abuse – Proposed Associated Reforms to Criminal Procedure*, which was published on 3 October 2016. The paper was published on the website and sent to organisations with a direct interest.

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<sup>20</sup> [The Use of Expert Witness Testimony in the Prosecution of Domestic Violence](#), March 2004

148. The responses received were published in March 2017<sup>21</sup>.

### **Schedule 1(6) – Victim safety in relation to sentencing**

#### *Policy objectives*

149. The policy objective is to improve the sentencing process by requiring the court to have particular regard when sentencing for the need to protect domestic abuse victims from further such offences by the offender.

#### *Key information*

150. The Scottish Government considers this new requirement will be a helpful indication to the court of the unique circumstances of domestic abuse cases. In particular, it should be noted that the new offence requires there to be a direct relationship between the perpetrator and the victim (i.e. either an existing or previous relationship) and for behaviour giving rise to the offence to have been committed by the perpetrator on at least two occasions.

151. While other offences can of course often have this direct connection between a perpetrator and victim, the new domestic abuse offence is generally unlike any other offence in always requiring this direct connection between a perpetrator and a victim.

152. 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.

153. The provision will apply to offenders being sentenced for the new domestic abuse offence and any other offence where the domestic abuse aggravation (section 1 of the 2016 Act has been proven.

#### *Alternative approaches*

154. The Scottish Government could opt to make no provision in this area. However, this would not meet the policy objectives which is to put beyond doubt that the court should have particular regard to victim safety in the very specific circumstances when an offence associated with domestic abuse has been committed.

#### *Consultation*

155. No formal consultation has been undertaken. However, informal engagement has been undertaken with stakeholders such as Scottish Women's Aid.

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<sup>21</sup> <http://www.gov.scot/Publications/Recent>

## **Schedule 1(7) – Consideration of a non-harassment order**

### *Policy objectives*

156. The policy objective is to ensure protection of the victim is considered in every domestic abuse case by requiring a court to always consider whether the imposition of a non-harassment order is required to protect the victim from further harassment.

### *Key information*

157. Non-harassment orders (NHOs) are intended to provide a means of ensuring that on-going harassment by one individual of another can be prevented. NHOs can be granted by a civil court on application by the person suffering harassment, or by a criminal court (on application by the prosecutor) following conviction for a criminal offence involving misconduct towards another person.

158. In either case, an NHO can require a person to refrain from such conduct in relation to the victim, for example to desist all contact with the victim, for a period of time as laid down by the court within the terms of the order. Breach of the terms of an NHO is a criminal offence.

159. Where a person is convicted of an offence involving misconduct towards another person, the court is only able to consider imposition of an NHO following an application by the prosecutor. 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.

160. 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 following a conviction for the new domestic abuse offence or in cases where the domestic abuse aggravation is proven.

161. 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 an NHO is being considered.

### *Alternative approaches*

162. The current position whereby prosecutors continue to be required to apply could be left as it is. However, this would not be an efficient approach given the requirement of the court to consider making an NHO in every case of domestic abuse. If the possibility of making an NHO will be considered by the court as a matter of course in cases of domestic abuse there is no need for a separate application to be made by the prosecutor.

163. An alternative approach would be to place an obligation on the court to impose an NHO in every case where an offender is convicted of the domestic abuse offence or where the domestic abuse aggravation is proven. However, such an approach was considered

disproportionate as it would require the court to impose an order even in cases where the victim did not wish this to happen, or where, for whatever other reason, the court did not consider it necessary or appropriate.

### Consultation

164. The Scottish Government specifically invited comments on this proposal in the paper *The Creation of A Specific Offence of Domestic Abuse – Proposed Associated Reforms to Criminal Procedure*, which was published on 3 October 2016. The paper was published on the website and sent to organisations with a direct interest.

165. The responses received were published in March 2017<sup>22</sup>.

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

### **Equal opportunities**

166. The Domestic Abuse Recorded by the Police 2015/16<sup>23</sup> publication notes that where gender information was recorded, 79% of all incidents of domestic abuse had a female victim and a male accused. This percentage share has fallen from 87% in 2006-07. The proportion of incidents with a male victim and a female accused (where gender was recorded) has increased from 11% in 2006-07 to 18% in 2015-16.

167. In 2015-16, the 26-30 years old age group has the highest incident rate for both victims (283 incidents recorded per 10,000 population) and those accused (272 incidents recorded per 10,000 population). Incidents of domestic abuse recorded by the police are more common at weekends with 36% of all incidents in 2015-16 occurring on a Saturday or Sunday. In 2015-16, 87% of all incidents of domestic abuse occurred in a home or dwelling.

168. The Scottish Crime and Justice Survey Partner Abuse Module 2014/15<sup>24</sup> found that a much higher proportion of women had experienced partner abuse since the age of 16 than men (18.5% of women, compared to 9.2% of men). That survey also found that the risk of having experienced partner abuse in the previous 12 months varied with age: it was highest amongst young people aged 16 to 24 years (6.9%) and lowest amongst those aged 65 or over (0.4%).

169. That survey found that women were much more likely than men to report having experienced psychological abuse of the kind that might indicate they had experienced long-term coercive and controlling behaviour from a partner or ex-partner. Since the age of 16, 10.9% of women and 3.9% of men report that, their partner had behaved in a jealous or controlling way towards them; 9.9% of women and 2.4% of men said that they had been repeatedly put down by their partner, and 9.9% of women and 1.7% of men said that their partner had threatened them with violence.

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<sup>22</sup> <http://www.gov.scot/Publications/Recent>

<sup>23</sup> <http://www.gov.scot/Publications/2016/10/2442/0>

<sup>24</sup> <http://www.gov.scot/Publications/2016/05/2505>

170. An Equality Impact Assessment (EQIA) has been carried out and the results will be published on the Scottish Government's website<sup>25</sup>.

171. The Scottish Government considers that the Bill's provisions do not discriminate on the basis of the protected characteristics namely age, maternity and pregnancy, marriage and civil partnership, gender reassignment, race, disability, religion and belief, sex or sexual orientation. The Scottish Government considers that the provisions will help to advance equality by providing greater protection under the law to victims of, in particular, psychological abuse and coercive and controlling behaviour whom available evidence suggests are disproportionately likely to be female.

### **Human rights**

172. The Scottish Government has considered whether issues arise in relation to the following articles of the European Convention on Human Rights:

- article 7 (no punishment without law)
- article 8 (right to respect for private and family life)
- article 6 (right to a fair trial)
- article 14 (prohibition on discrimination) considered with article 6

173. Regarding article 7, the offence will not be retroactive in effect. It will apply only to conduct which took place on or after it comes into force. Separately, the Scottish Government is satisfied that, to the extent that the offence describes criminal behaviour in terms of effects on the victim rather than the particular actions of the perpetrator, it provides legal certainty. It does so by communicating clearly what behaviour, by reference to the effects it has, should be avoided in order to avoid breaking the law, providing a firm basis for foreseeable judicial decision-making addressed to the particular circumstances of each case.

174. Regarding article 8, the Scottish Government has considered whether the offence could be viewed as a disproportionate interference in private and family life, criminalising the ordinary highs-and-lows, disagreements and power imbalances that exist in many relationships. Article 8 is a qualified right and it may be interfered with in order to protect the rights and freedoms of others. The Scottish Government is satisfied that the offence pursues a legitimate aim in tackling a form of abuse which can have very damaging effects on individuals. The offence contains various checks and balances in order to pursue this aim in a proportionate way – for example, for the offence to be committed a reasonable person must consider physical or psychological harm to be the likely result of particular behaviour, and the accused has a defence if evidence can be provided that the behaviour was reasonable in the particular circumstances.

175. Article 8 also imposes positive obligations on states to secure effective respect for the moral and physical integrity of individuals, for example by providing criminal sanctions to deter people from causing serious harm to others. The offence can be viewed as a manifestation of this positive obligation.

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<sup>25</sup> <http://www.gov.scot/Publications/Recent>

176. The Scottish Government considers that applying the special procedural and evidential provisions in the schedule only to domestic abuse offences does not give rise to any incompatibility under article 6 considered on its own or with article 14. None of the special rules will prevent the trial process being fair overall. In relation to article 14, persons being prosecuted for a domestic abuse offence do not have a different “status” from persons being prosecuted for other offences, such as to engage article 14. Alternatively, should article 14 be engaged, there is an objective and reasonable policy justification for each difference in treatment, as discussed above. For example, the prohibition on personal conduct of the defence by the accused is to prevent the trial process being misused to intimidate and abuse the complainer; and admitting expert evidence as to the complainer’s behaviour aims to address common misconceptions about how victims ought to behave.

### **Island communities**

177. Domestic abuse can occur in urban, rural and island communities. The Scottish Government is satisfied that the Bill has no differential impact upon island or rural communities.

### **Local government**

178. Courts may use community sentences in dealing with some of those convicted of the offence. Local authorities will have responsibility for implementing such sentences as part of their wider responsibility for criminal justice social work. This would include, for example, responsibility for planning and supervising unpaid work to be carried out by an offender as part of a community payback order. The financial implications for local authorities are set out in the Financial Memorandum accompanying the Bill.

### **Sustainable development**

179. The Scottish Government is satisfied that the Bill has no negative effect on sustainable development. The potential environmental impact of the Bill has been considered. A pre-screening report confirmed that the Bill has no impact on the environment and consequently that a full Strategic Environmental Assessment does not need to be undertaken. It is, therefore, exempt for the purposes of section 7 of the Environmental Assessment (Scotland) Act 2005.

180. The Government Economic Strategy, which has Inclusive Growth at its heart, sets out the Scottish Government’s dual ambition to tackle inequality and boost competitiveness, so that the benefits of a flourishing Scotland can be shared by all. Tackling domestic abuse and the negative impact it has on victims’ lives will help to enable a skilled healthy productive workforce that can face up to economic challenges and create prosperity in future.

### **Business and Regulatory Impact Assessment**

181. The Scottish Government is satisfied that the Bill has no significant impact on businesses and other non-public bodies.



*This document relates to the Domestic Abuse (Scotland) Bill (SP Bill 8) as introduced in the Scottish Parliament on 17 March 2017*

# **DOMESTIC ABUSE (SCOTLAND) BILL**

## **POLICY MEMORANDUM**

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