Stage 1 Report on the Abusive Behaviour and Sexual Harm (Scotland) Bill
Summary of recommendations

Domestic abuse aggravator

The Committee supports proposals for a domestic abuse aggravator as set out in the Bill. We agree with the bulk of evidence received that this provision will help underline that the criminal justice system should treat any case of partner abuse with the seriousness that it deserves.

Whilst we see advantages in the aggravation being introduced with a focus on partner abuse, rather than other forms of abusive relationships, we note evidence that it would be fairer to include other types of domestic abuse, for instance, abuse of an elderly family member, within the definition. We would not, however, wish the Scottish Parliament to legislate in haste on this issue, as the wider implications of any such proposals would require consideration. We invite the Scottish Government to maintain an open mind as to the possibility of extending the definition of the aggravation in the light of experience, should the Bill be passed.

The Committee notes that the aggravation would not require any evidence of a past pattern of abusive behaviour. We do not oppose this, as we would not wish prosecutors to be denied sufficient flexibility to make appropriate use of the aggravator, but would expect prosecutors to have regard to the principle of proportionality in each individual case where it appears possible to attach the aggravation to a criminal charge. The Lord Advocate may wish to consider the appropriateness of guidance to prosecutors on this issue.

The Committee notes that the Scottish Government is consulting on proposals for a discrete offence of domestic abuse that might enable conviction following proof of coercive control within a relationship. The Committee invites the Scottish Government to note the significant body of opinion manifested during Stage 1 in support of introducing the offence.

Non-consensual sharing of images

The Committee supports the introduction of a new offence of the non-consensual sharing of intimate images, as set out in section 2 of the Bill. The behaviour the offence would address can be enormously hurtful and humiliating, and treating it as criminal is not disproportionate. Indeed, we note evidence that some of the conduct encompassed in the proposed offence may already be criminal. We do not see this as eliminating the need for the new offence, as some such conduct may not currently be criminal, or may not be subject to sufficiently stringent sanctions under existing law. The drafting of a new law provides an opportunity to set out the parameters of the offending behaviour with greater clarity and consistency. It also sends a clear message about the unacceptability of conduct...
that modern technology has rendered disturbingly easy to undertake, and may therefore have a deterrent effect.

The Committee notes differing views in evidence as to whether the proposed restriction of the section 2 offence to photographs or film is appropriate. Some witnesses considered it important that the focus of the offence remain on images of the body which, they considered, had particular power to humiliate. Others saw merit in including, for instance, text or voice recordings of intimate conversations. A clear majority of the Committee supports the approach set out in the Bill, and is mindful of the risks of unintended consequences if the Bill takes too wide an approach. We do, however, ask the Scottish Government to keep an open mind on this issue, in the light of the evidence we received.

The Committee supports the inclusion of recklessness within the mens rea of the new offence of the non-consensual sharing of images. Making the new offence an “intention-only” crime risks making the offence too narrow, potentially allowing conduct that may properly be considered criminally irresponsible and humiliating to escape prosecution. However, the Committee does invite the Scottish Government to reflect on the evidence we have received indicating that the interplay between the Bill’s definition of “intimate image” (which includes non-sexual images) and the inclusion of recklessness within the mens rea has, at the very least, the potential for a wider category of behaviour than may have been intended to be included within the scope of the offence. If so, we ask the Scottish Government and, as appropriate the Lord Advocate, to consider whether this requires to be addressed either in the legislation itself or in guidance to prosecutors.

The Committee notes concerns that the behaviour of children and young people may be caught by the new section 2 offence, perhaps disproportionately compared to older age groups. However, we also note a significant body of evidence, including from charities and advocacy groups for children, that the solution is not to exempt young people who have passed the minimum age of criminal responsibility from the scope of the offence, as this could result in the offending behaviour not being adequately addressed, and in victims (often children) not finding in law the remedy they deserve. The same evidence also argued that in the vast majority of cases, the correct forum for addressing this behaviour is Children’s Hearings and not criminal courts. The Committee shares these views.

It is also crucial that the criminal reforms set out in this part of the Bill are accompanied by a campaign of education and information, so that children and young people are made aware of the effect of the behaviour the new offence is targeting; not only the criminal legal effect but also the emotionally harmful effect that it may have on others. The Committee would be grateful for information from the Scottish Government as to what work it proposes to do on this matter.

The Committee agrees that it is necessary to set out statutory defences to the section 2 offence, to clarify when conduct that would otherwise be considered criminal may be excused by particular circumstances. However, we invite the
Scottish Government to consider evidence set out in this report indicating that some aspects of the defences may be too wide. In particular, we invite the Government to reflect on evidence that the Bill goes too far in providing a defence in relation to images taken in a public place, and may provide an insufficient protection of an individual’s right to a private life, as set out in human rights law.

The Committee also invites the Scottish Government to note evidence led before the Committee in relation to consent, or belief as to consent, as a defence to the section 2 offence. Again, views were expressed that the Bill may provide too wide a defence. We note views that modelling a definition of consent on previous legislation (where consent is referred to in terms of “free agreement”) may not only provide greater legal clarity and consistency, but also provide some assurance that the defence will not unwittingly compromise the protection from manipulative behaviour that the law should afford to young people or vulnerable adults.

The Committee invites the Scottish Government to clarify its intentions as to the aim of schedule 1 to the Bill, in relation to “information society services” and the section 2 offence. We also invite the Government to respond to evidence that the schedule may lack legal effect. We are concerned by evidence from the Cabinet Secretary to the effect that the Scottish Government in most cases, is likely to lack legal powers to prevent internet platforms hosting images that this section of the Bill seeks to render illegal. We would welcome further clarification from the Scottish Government as to what measures it could take (unilaterally or in partnership with other jurisdictions) to ensure that platforms adhere to relevant domestic laws and are placed under a positive duty to remove unlawful images.

Non-harassment orders

The Committee recognises that the primary purpose of section 5 of the Bill, which extends the circumstances in which the criminal courts may grant non-harassment orders, is to extend the protections available to victims of abuse. We note evidence that the granting of an NHO enables the police to intervene to arrest a person who is breaching its terms. However, in the case of the section 5 reform, a consequence of an arrest is likely to be the arrested person re-entering the criminal justice system, despite previously having been found unfit for trial. Some individuals subject to NHOs under the reform may find it difficult either to fully understand the terms of an NHO granted against them or to modify their behaviour in response to it.

Accordingly, whilst we do not doubt the good intentions of the proposed reform, we are sceptical as to its utility. We note evidence that, in some cases, other forms of disposal may be a more appropriate way to deal with the behaviour the NHO seeks to address. We invite the Scottish Government to reflect on these comments and on the evidence on which they are based.
Jury directions relation to sexual offences

The Committee has not come to a common view on the introduction of the proposed two statutory jury directions set out in the Bill. However, a clear majority of the Committee supports their introduction on the ground that they would appear to do no more than ensure that judges provide relevant factual information to juries to inform their deliberations and, in so doing, help ensure that these directions are delivered more consistently than is currently the case. The minority considers that jury research on use of the directions is necessary before any decision is taken to introduce the directions by statute. The Committee is unanimous in agreeing that introducing the directions by statute should not lead to any reduction in the use of expert evidence as to victims’ reactions to sexual trauma in cases where it is considered that such evidence could be material to the outcome of the case.

The Committee notes evidence that the propositions set out in the two directions set out in the Bill could be regarded as being part of judicial knowledge. The mechanism by which any matter could be deemed to have “become” judicial knowledge, and what role if any Parliament would have in that process, is not currently clear to the Committee. To that end, the Committee would welcome clarification from the Scottish Government.

Sexual acts elsewhere in the UK

The Committee welcomes provisions in the Bill to extend the jurisdiction of the Scottish courts to include sexual offences against children committed in the rest of the UK. The Committee notes the potential benefit to the complainer and to witnesses in making it possible for multiple offences of a similar nature occurring in Scotland and elsewhere in the UK to be prosecuted on a single charge. We do, however, expect that these provisions would only be used where there appears to be a clear public interest in the Scottish courts assuming jurisdiction.

We invite the Scottish Government to note and respond to evidence expressing some concerns about the appropriateness of the definition of Scottish “residency” in the Bill. The Committee also seeks from the Scottish Government clarification as to the policy behind the requirement on Scottish prosecutors to “consult” the relevant Director of Public Prosecutions before proceeding with the prosecution.

Sexual harm prevention orders

The Committee broadly welcomes provision in the Bill reforming the system of civil orders available to reduce the risk of individuals committing sexual offences, noting some evidence that orders may currently be being underused. We note that the provisions have been introduced without full consultation and that a number of concerns about detailed but sometimes important aspects of the reforms have
arisen in evidence. These have arisen particularly in relation to proposed new sexual risk orders, which could be imposed without evidence of criminal wrongdoing.

We invite the Scottish Government to respond to evidence suggesting that the criteria for imposing an SRO appear to be quite broad and that the right of the person against whom the order is being sought to make representations to the court should be made expressly clear. We also invite the Scottish Government to comment on evidence that there should be more flexibility set out in the Bill as to the duration of the new orders and more clarity as to the reasons for granting interim orders.

General principles

The Committee supports the general principles of the Bill. The Committee considers that the case for agreeing to the six main reforms made by the Bill is well supported by the evidence.

A clear majority of Committee members support proposals for statutory jury directions in sexual offence cases. Others do not.

There is also some scepticism as to whether proposed reforms in relation to non-harassment orders will be practicable.

Some detailed aspects of the proposed new offence of disclosure of an intimate photograph or film or of the new civil orders to prevent sexual harm might merit careful examination to ensure that they achieve the right balance.

We expect discussions around all these matters to continue at Stage 2.
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Justice Committee

To consider and report on a) the administration of criminal and civil justice, community safety and other matters falling within the responsibility of the Cabinet Secretary for Justice and b) the functions of the Lord Advocate other than as head of the systems of criminal prosecution and investigation of deaths in Scotland.

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Introduction

Overview of the Bill

1. The Abusive Behaviour and Sexual Harm (Scotland) Bill was introduced into the Scottish Parliament on 8 October 2015. It is a Scottish Government Bill. In the Government’s own words, the Bill “will help improve how the justice system responds to abusive behaviour including domestic abuse and sexual harm.” The Policy Memorandum accompanying the Bill explains that the Bill—

- provides a new specific “domestic abuse” aggravator that an offence was aggravated by involving abuse of a person’s partner or ex-partner,
- provides a new specific offence for the non-consensual sharing of private, intimate images (often called revenge porn),
- allows courts to directly protect victims where the court is satisfied a person did harass another person, but a conviction does not take place due to the mental or physical condition of the person,
- requires juries in sexual offence cases to be given specific directions about how to consider the evidence,
- ensures child sexual offences committed in England and Wales by Scottish residents are capable of being prosecuted in Scotland,
- reforms the system of civil orders available to protect communities from those who may commit sex offences.”

2. Although there is a very broad linking theme within the Bill of addressing abusive behaviour manifested in various ways, these six elements are distinct, and the Bill will not stand or fall if any one of them is removed. This is underlined by the diversity of approaches taken to tackling abuse in the Bill: through creating one substantive new criminal offence (on the non-consensual sharing of images); through sentencing (the domestic abuse “aggravator”); through various reforms to criminal procedure, including, for the first time, a statutory restraint on judicial discretion in jury directions; and through reforming the system of civil orders available to counter the risk of sexual abuse.

3. The architecture of the Bill has dictated the Committee’s approach to Stage 1 scrutiny. Standing Orders mandate that at Stage 1 we must report to the Parliament on the Bill’s general principles. We do not in this report make much in the way of any general pronouncement on the Bill as a whole. Instead, we consider each of the six listed elements in detail on its individual merits, concluding the report with a short comment on the general principles. We should make clear from the outset that the two aspects of the Bill to have provoked the greatest debate were those on the non-consensual sharing of intimate images and
on jury directions; the former because of uncertainty as to whether the Bill set out appropriate parameters for the offence, the latter as to whether the provision should exist at all.

Matters not contained in the Bill

4. The Committee received evidence calling for a range of measures not currently in the Bill to be introduced by amendment or, at the very least, to be promoted by the Scottish Government in parallel with the passing of the Bill. As the Bill’s scope is relatively broad, amendments on new matters relating to the prevention of abuse that are of a broadly similar character to any of those already in the Bill could be introduced. Whether amendments on matters such as education on healthy personal relationships, the reduction of children’s exposure to sexualised material, or the purchase of sex would be within scope is more of a grey area. In our view, any entirely new measures would require consultation and evidence-taking before they could be agreed to, and we doubt there is time left in this session to do so via this Bill. Our focus at Stage 1 has been on considering the important and wide-ranging measures that are already in the Bill rather than what is not in it, but could be. However, we make reference in the report to the discussion on whether the Bill should have contained, rather than omitted, a bespoke crime of domestic abuse.

Committee scrutiny

5. The Committee took evidence on the Bill at four meetings (see further Annexe A):

- on 17 November, the Committee heard from a panel comprising representatives of the Law Society of Scotland, the Faculty of Advocates, Police Scotland and the Crown Office and Procurator Fiscal Service, followed by a panel of legal academics;

- on 24 November, the Committee heard from a panel comprising representatives of Abused Men in Scotland, Rape Crisis Scotland, Scottish Women’s Aid and Victim Support Scotland, followed by the Children’s Commissioner and a representative of the Scottish Human Rights Commission;

- on 8 December, the Committee heard from the then Lord Justice Clerk, Lord Carloway, and Sheriff Liddle, Vice Chair of the Sheriffs Association;

- on 5 January, the Committee heard from the Cabinet Secretary for Justice and Scottish Government officials.

6. We also issued a call for written evidence on the Bill shortly after its introduction. This elicited 34 responses (see further Annexe B to this report). As ever, we are grateful to all those who provided evidence to the Committee, which helped inform our scrutiny of the Bill.

7. At an informal private meeting on 24 November, the Committee heard from three victims of domestic abuse. This meeting did not form part of the Committee’s
formal evidence taking, but was most useful in helping Committee members come
to an informed view on the needs and experiences of victims of abuse, as well as
of areas in current law or practice where there is a need for change. A clerk’s note
of the meeting is set out in Annexe C. We are grateful to those three individuals
for being willing to share their experiences with us, and to Victim Support
Scotland, who helped arrange the meeting.

8. The Bill was referred to the Delegated Powers and Law Reform Committee
because it contains order-making powers. The DPLR Committee reported that it
was content with the drafting of the powers.

9. The projected costs as set out in the Financial Memorandum accompanying the
Bill appear relatively modest, and the Finance Committee decided not to report to
this Committee on the financial implications of the Bill. In terms of Rule 9.6.2 of
Standing Orders, we report that the Financial Memorandum provided adequate
guidance on the likely cost implications of the Bill. Any specific comments on
discrete cost elements of proposals in the Bill are set out in the appropriate part of
this report.

Scottish Government consultation preceding the Bill

10. The Scottish Government consulted on proposals for reform prior to introducing
the Bill, in a consultation document titled Equally Safe - Reforming the criminal law
to address domestic abuse and sexual offences (henceforth “Equally Safe”). This
is with the exception of the proposals for reform of civil orders to protect the public
from the risk of sexual harm. Those proposals were not consulted on in Equally
Safe. At points in this report there are references to the consultation and
responses to it. Put broadly, consultation responses were generally favourable to
the main proposals for reform set out in Equally Safe, which then went on to
become the key elements of the current Bill. There were two main exceptions. On
proposals on mandatory jury directions, opinion was quite sharply divided, but
these proposals nevertheless went on to become part of the Bill. And, as noted
above, the Bill did not take forward proposals for a bespoke offence of domestic
abuse.

11. The Scottish Government’s Policy Memorandum accompanying the Bill discussed
Equally Safe, the responses it elicited, and the action the Government decided to
take in the light of those responses. Under Standing Orders, the lead Committee
at Stage 1 is obliged to report on the Policy Memorandum. The Policy
Memorandum is for the most part helpful in explaining the policy choices made by
the Government in introducing the Bill. Where we consider that, at points, some
further elucidation might have been helpful, this is set out in the body of the report.
The domestic abuse aggravator

Definition in the Bill

12. Section 1 of the Bill provides that where it is libelled, and subsequently proved, in a criminal charge that an offence was aggravated by involving abuse of a partner or ex-partner, this must be taken account of in sentencing. The court must also record the aggravation. Subsection (2) elaborates that an offence is considered to be aggravated if—

- (a) the person intended to cause their partner or ex-partner to suffer physical or psychological harm, or
- (b) the person was reckless as to whether committing the offence would cause their partner or ex-partner to suffer physical or psychological harm.

13. For the purposes of the section, a person is a partner, or ex-partner, of another person if they are, or were, (a) spouses or civil partner, (b) living together as if spouses or civil partners, or (c) in “an intimate personal relationship” with each other. The language of section 1 is gender neutral.

The aggragator and third parties

14. Two significant points of detail in relation to the new aggravation merit being brought to the Parliament’s attention. First, the drafting of section 1 does not exclude the possibility of the aggravation being established even where the offence set out in the charge was not committed against the partner or ex-partner. (This is provided the Crown shows that person intended, by targeting the third party, to cause harm to their partner or ex-partner, rather than being reckless about this being the outcome.) The Policy Memorandum mentions a crime against a partner or ex-partner’s child as an example of conduct that might be addressed by this provision. An example provided in evidence was of the friend of a person being targeted by that person’s ex-partner precisely because they were providing emotional support at a difficult time. This aspect of section 1 was in general welcomed by advocacy groups. We note evidence from one group that the drafting might be improved if it were expressly stated, rather than implied, that the aggravation could apply in cases where the offence is against a third party.

A pattern of behaviour?

15. The second point of detail is that section 1 does not require a past pattern of abusive behaviour to be set out in the charge. Indeed, it does not require evidence of one previous instance of the accused causing physical or psychological harm to their partner or ex-partner. A point made commonly in evidence was that domestic abuse tends to be cumulative and repeated, and that this is why strong legal remedies are needed. We asked the Cabinet Secretary if it was the Scottish Government’s policy that it should be possible to make use of the aggravation on
practically any occasion where there has been a crime involving physical or psychological abuse of a partner or ex-partner, regardless of a lack of evidence of a prior pattern of such behaviour. He confirmed that it was.\textsuperscript{10}

The general rationale for statutory aggravations

16. It could be argued that the primary purpose of having aggravations in the criminal law is to ensure that the fact that criminal acts have been carried out in particular ways, or because of particular motivations, is recognised and, as appropriate acted upon by the courts in sentencing. In other words, aggravations help ensure that such acts are treated by the courts with the seriousness they deserve. Behind this is the sense that society holds the behaviour the aggravation targets in particular disregard, and that Parliament has legislated to reflect this.

Same crime, different sentence?

17. Judges have general discretion to take exacerbating, or indeed mitigating, factors into account at the point of disposal. It is an intrinsic feature of any statutory aggravation first that it \textit{requires} the court to reflect on the fact of the aggravation at disposal, and secondly that it \textit{permits} the court to treat the offence in a different way at disposal to an offence that, but for the fact of the aggravation being proven, would be identical. Statutory aggravations are no longer a novelty in Scots criminal law, but the latter point in particular requires that the case for introducing any new one must always be shown to be justified by the evidence.

18. To put the issue in context, what section 1 would mean, if agreed to, is that the courts would be given formal sanction to treat a crime such as an assault against a partner or ex-partner as a different, and more grave, matter, than an assault of otherwise equal seriousness against a person in a different relationship to the accused, for instance a parent or child, or indeed against a complete stranger. This issue was picked up in a couple of submissions. They argued that it seemed arbitrary that section 1 applied the aggravation only to partner abuse and not to other forms of domestic abuse.\textsuperscript{11} Other submissions did not pick up on this matter. The Committee notes that legislating to create one form of aggravator does not exclude the possibility of creating others in future. It may even help pave the way.

An “appropriate” disposal

19. Some evidence also argued that the introduction of the aggravation should increase the possibility of the perpetrator getting not only the disposal they \textit{deserve}, but also the disposal that they might \textit{need}, in order to address their offending behaviour (for instance an intervention by criminal justice social work).\textsuperscript{12} In other words, the aggravation should be seen not merely as a means of visiting additional punishment on the accused, but of helping ensure - preferably at an early stage of the case - that the criminal justice system works in the right way to deal with the crime. In this connection, it should be noted that section 1 states that the court must take the aggravation into account in determining an “appropriate” sentence, and not that the court must impose a tougher sentence. Against this, we
are mindful of the Crown Agent’s comments, when she gave evidence, that she expected the end result of the aggravator being introduced to be abusers getting tougher sentences.\textsuperscript{13}

**Data capture**

20. Another purpose of creating a statutory aggravation might be to enable more effective recording of offending behaviour of a particular type. For instance, statistics on racially motivated offences (another statutory aggravation), collected over several years, can provide a snapshot view of whether racial crime is rising or falling. It is not necessary to introduce a statutory aggravation in order to allow specific data to be collected, but it ought to make it easier. This appears to the Committee to be a perhaps less significant ground for creating any new aggravation, but we do note evidence supporting stage 1 for expressly this reason.\textsuperscript{14} Subsection (5) of section 1 requires that a court must record the aggravation in every instance where it has been established in court (but not in every case where the aggravation has been prosecuted).

**The Scottish Government case for the domestic abuse aggravator**

21. In its Policy Memorandum, the Scottish Government does not advance a detailed rationale for the new statutory aggravator for domestic abuse. The Policy Memorandum does note that statutory aggravations exist “to assist in the identification and prosecution of a number of different types of crime.”\textsuperscript{15} It does not explain how aggravations “assist in the prosecution” of a crime; adding the aggravator to any criminal charge may, if anything, make the prosecutor’s task more complex, in that it constitutes additional matters to be proven in court, although the offence itself should not be any more difficult to prove. The Memorandum adds that the aggravator would provide “a means of ensuring that the courts formally recognise a victim’s experience” and give victims “greater confidence that the sentencing decisions of the courts reflect the fact that the offence occurred in the context of an abusive relationship.”\textsuperscript{16} The Cabinet Secretary elaborated on this point when he was asked to explain why the Scottish Government had taken the approach it had in section 1—

> The purpose behind the aggravator is to ensure that the issue is formally recorded by the court and recognised at the time of an offender being sentenced. We have taken a similar approach in other areas of the law in relation to issues such as religious and racial hatred. We believe that a specific aggravator will provide reassurance to victims that the issue will be formally taken into account by the courts when the effects of the offence are being considered. The purpose is to ensure that the matter is formally recorded and recognised by the court.”\textsuperscript{17}
22. Under the heading “Alternative Approaches”, the Memorandum does not discuss the option of doing nothing, and therefore does not explain why the Scottish Government has come to the view that it is necessary to introduce a statutory aggravator for domestic abuse rather than, for instance, discussing the introduction of stricter sentencing guidelines with the judiciary or asking the Crown Office to update its policies on domestic abuse cases.

23. As the Policy Memorandum notes, the Scottish Government consulted in *Equally Safe* on proposals for a statutory aggravation alongside proposals for a new statutory offence of domestic abuse, which would permit prosecutions on the basis of non-violent but controlling behaviour (often called “coercive control”). Ultimately, the Scottish Government decided, in the light of consultation responses, to develop its thinking further before bringing such proposals before Parliament.  

24. During Stage 1, we received some evidence urging the Scottish Government (and the Committee) to consider the case for a bespoke domestic abuse offence, and to take the opportunity to legislate for it in the Bill. As it happened, the Scottish Government announced a further consultation on proposals for an offence of domestic abuse shortly after the Bill’s introduction although it is clear that the Scottish Government is working to a longer timetable for bringing in that offence, if that is what it ultimately chooses to do, than the period for Parliamentary consideration of this Bill. Meanwhile, in England and Wales, a new offence part-based on the coercive control model came into effect in December 2015.

25. The wording of section 1 would appear to permit non-violent behaviour that is nevertheless considered coercive and abusive to be added to the libel as proof of aggravation. It also makes no distinction between psychological and physical abuse. Although the Policy Memorandum does not expressly say so, it is perhaps to be inferred that, whilst questions around the concept of a bespoke domestic abuse offence remain to be resolved, introducing a statutory aggravator for domestic abuse represents to the Government a more straightforward, and less contentious, way to make progress on tackling domestic abuse, including coercive control, in the interim.

26. We note evidence from a number of stakeholders that, while the introduction of the aggravator is welcome, it should not be seen as a substitute for a new offence of domestic abuse. At the same time, legal practitioners, including the Crown Office, told us they preferred the approach taken in the Bill because introducing a domestic abuse offence along the lines proposed in *Equally Safe* was potentially problematic. We note one witness’s comment that the Scottish Government may have been anticipating a “post-corroboration landscape” when it consulted on proposals for a domestic abuse offence, and that coercive control might in practice be difficult to prove whilst the requirement for corroboration remains. We await the outcome of the Scottish Government’s consultation.
Views of witnesses on the domestic abuse aggravator

27. The vast majority of evidence that expressed a view on section 1 supported it. This generally included those who may have had reservations about particular aspects, including those who considered it unfair that the aggravation applied only to partner abuse. Allowing for some reservations as to particular aspects of its wording, most stakeholders appeared to view the wording of section 1 as robust. Police Scotland, who would of course have to rely on the provision in practice, described it as “clear and concise” and reflective of “tried and tested” legislation on other aggravations that the police are accustomed to applying. There was also broad support for the approach of making no distinction in seriousness between physical and psychological harm, thus enabling behaviour that might be labelled coercive rather than violent to be included in the charge.

28. The Crown Office and Procurator Fiscal Service supported introduction of the aggravator, describing it as “an additional tool to prosecutors.” The Crown Agent, Catherine Dyer, told us that she supported the policy behind section 1 because—

domestic abuse happens where people should expect to be safe, in their own home, and with someone with whom they are intimately involved, so it seems like an even greater betrayal of trust. The criminality aspect is that it involves picking on someone whom a person knows to be vulnerable.

29. It may be helpful to clarify that section 1 does not require that the aggravating behaviour took place in the victim’s home, although we expect that if section 1 is passed it may often be used in relation to acts taking place at home. Evidence from other stakeholders singled out breach of trust as being the key element of domestic abuse, arguing that this in itself justified treating offences in a domestic abuse context differently from, and more severely than, other types of offence.

30. A number of stakeholders saw it as a key feature of the new aggravator that it would help ensure that the courts took partner abuse seriously and would consider it in a wider context than in relation to the bare facts of the offence itself. As the Crown Office noted, the provision would enable victims to “speak more candidly about the nature and cumulative impact of the accused’s behaviour rather than restricting their evidence to an isolated incident of criminality.”

31. Children 1 expressed support for the aggravator, but expressed concern about a possible side-effect; an increase in the number of children being required to testify in domestic abuse cases, in order to speak to matters set out in the aggravation. It noted that children exposed to partner abuse were often in “an emotionally conflicted position.”

32. The most significant dissent towards the new provision came from the Law Society of Scotland. It argued that the aggravation would in practice “be difficult to prove”, because of the requirement to establish intention or recklessness. It also queried the phrase “intimate personal relationship with each other”, as being “open to interpretation”. The Society noted that previous statutory aggravations
introduced into Scots law had tended to be based on the actions of the accused rather than on the nature of the relationship between the accused and the complainant (the implication being that the latter is harder to prove).  

33. However, the Crown Agent, Catherine Dyer, told us that she did not expect the definitions used in section 1 to cause significant difficulties. She said that the police and Crown Office were already accustomed to separating domestic from non-domestic cases and would use similar criteria if section 1 came into force.

34. In oral evidence, the Law Society representative, Grazia Robertson, expanded on the Society’s written commentary, arguing that she did not think section 1 was necessary. Domestic abuse cases, she told us—

> are assiduously prosecuted in the courts and they are given a lot of special attention. The person is often taken into custody immediately, will appear in court and will be subject to bail conditions and restrictions. In Glasgow, which deals with a lot of these cases, there will be specialist sheriffs and attempts to have not too long a time before the case is brought to trial. A lot of special things are put in place to deal with domestic abuse cases […] Where there is a domestic element to a conviction, it is recorded in the conviction so that, if the person appears in court again on a similar matter, the sheriff can see that there is a pattern of behaviour. All the steps are in place. The system already accommodates the importance of domestic violence cases being treated with all seriousness. To add aggravation might lead people to expect consequences that the system will not deliver, so it might lead to disappointment for those who feel that it is a good idea.”

35. The Crown Office itself told the Committee that it takes “an unapologetically robust approach to the prosecution of domestic abuse”, although, as noted above, it does support the new provision. We note evidence from individuals, charities and advocacy groups that, despite legislative and policy advances in recent years, gaps and “loopholes” remain and that too many abusers escape punishment, and to some extent this evidence was borne out in the testimony we received during our informal discussion with victims of domestic violence. At the very least, there is reason to believe that good practice in the handling of domestic abuse cases within the criminal justice system may sometimes be patchy.

36. The Committee supports proposals for a domestic abuse aggravator as set out in the Bill. We agree with the bulk of evidence received that this provision will help underline that the criminal justice system should treat any case of partner abuse with the seriousness that it deserves.

37. Whilst we see advantages in the aggravation being introduced with a focus on partner abuse, rather than other forms of abusive relationships, we note evidence that it would be fairer to include other types of domestic abuse, for instance, abuse of an elderly family member, within the definition. We would not,
however, wish the Scottish Parliament to legislate in haste on this issue, as the wider implications of any such proposals would require consideration. We invite the Scottish Government to maintain an open mind as to the possibility of extending the definition of the aggravation in the light of experience, should the Bill be passed.

38. The Committee notes that the aggravation would not require any evidence of a past pattern of abusive behaviour. We do not oppose this, as we would not wish prosecutors to be denied sufficient flexibility to make appropriate use of the aggravator, but would expect prosecutors to have regard to the principle of proportionality in each individual case where it appears possible to attach the aggravation to a criminal charge. The Lord Advocate may wish to consider the appropriateness of guidance to prosecutors on this issue.

39. The Committee notes that the Scottish Government is consulting on proposals for a discrete offence of domestic abuse that might enable conviction following proof of coercive control within a relationship. The Committee invites the Scottish Government to note the significant body of opinion manifested during Stage 1 in support of introducing the offence.

Non-consensual sharing of images

Principle of the offence

40. Section 2 of the Bill creates a new offence; of disclosing or threatening to disclose an intimate photograph or film.

41. As noted above, the Policy Memorandum states that the provision is intended to provide a criminal remedy to activity sometimes called “revenge porn”. This is a term now quite commonly used in the media and to some extent it has entered everyday usage. The Committee is aware of views that “revenge porn” is an insensitive or inappropriate term, best avoided. We note that the term may be slightly misleading as to the range of behaviour that is actually covered by section 2 (as explained further, below) and we do not use it in the discussion that follows except where the context requires.

42. Section 2(1) provides that a person commits an offence if—

- they disclose or threaten to disclose a photograph or film showing, or appearing to show, another person in an intimate situation;

- the person intends to cause fear, alarm or distress in doing so, or is reckless as to causing fear, alarm or distress, and

- the photograph or film has not previously been disclosed to the public at large, or any section of the public, by the other person, or with the other person’s consent.
43. The maximum penalty is five years’ imprisonment on indictment.

44. We note the views of many stakeholders that the conduct addressed by section 2(1) is “gendered” behaviour, overwhelmingly practised by males against females.\textsuperscript{36} We do not doubt that women and girls are likely to make up the clear majority of victims, although men and boys can be victims too. As with section 1 of the Bill, the drafting of the new offence is gender neutral.

The Scottish Government’s rationale for the new offence

45. The Scottish Government Policy Memorandum states that the new offence is considered necessary because advances in technology—

mean that it is easier than ever before to take and share pictures, messages and videos with friends and family in the wider world. Unfortunately, a small number of people have used this technology to threaten, harass and abuse other people. This can take many forms, but one which has attracted much attention in recent years has been the non-consensual sharing of private and intimate images, typically of partners or former partners.\textsuperscript{37}

46. The Memorandum goes on to acknowledge that in some cases there may already be criminal remedies to address this type of conduct. It cites a mixture of common and statute law crimes including blackmail, threatening or abusive behaviour, stalking, and improper use of a public communications network.\textsuperscript{38} However—

in the absence of an offence specifically concerned with the sharing of intimate images the exact scope of the law in this area can be seen by many as being unclear. Victims of this kind of behaviour may not be aware that a criminal offence has been committed against them, and potential perpetrators may not be aware that what they are doing is criminal. Even where a successful prosecution has taken place, a victim may consider that the prosecution of the perpetrator for an offence such as threatening and abusive behaviour does not fully reflect their particular experience.

By providing for a new offence concerning the sharing of private, intimate images, we intend to make clear that it is unlawful to share private, intimate images of another person without their consent.\textsuperscript{39}

Witnesses’ views on the principle of the offence

47. The remainder of section 2 and section 3 of the Bill go on to flesh out the offence, providing further detail in relation to the key terms used, and setting out defences to the charge. The debate at Stage 1 tended to focus on these more detailed aspects of the Bill, and the discussion around them thus takes up the bulk of this part of the report.

48. Before proceeding to that discussion, it is important to make clear that most evidence supported the offence in principle,\textsuperscript{40} and many stakeholders saw it as
very important that it become law.\textsuperscript{41} Stakeholders (including the Crown Office\textsuperscript{42}) tended to agree with the Scottish Government that at least some of the conduct covered by section 2 was already criminal, but that the position was in some cases uncertain, and that available sanctions were not necessarily tough enough. There was also benefit in the law being seen to be keeping abreast with technological changes.\textsuperscript{43}

49. Witnesses also tended to agree that, even if there are potentially some criminal remedies available, there are benefits in having a new and clearly labelled offence to cover a relatively new type of socially unacceptable behaviour\textsuperscript{44} (or an old type of unacceptable behaviour manifested in a new way\textsuperscript{45}). A new law would send out a clear message that society does not tolerate that behaviour, clears up uncertainties about whether the behaviour is legal or not, and might have a deterrent effect.\textsuperscript{46} The fact that threats to disclose, as well as the disclosure itself, are encompassed within the offence was also generally welcomed.\textsuperscript{47}

50. A number of submissions referred to the devastating and humiliating effect that the behaviour can have on people’s lives.\textsuperscript{48} The submission from Professors Clare McGlynn and Erika Rackley argued that the behaviours covered by the new offence—

\begin{quote}
constitute a fundamental breach of privacy and dignity, a serious form of harassment and abuse and, therefore, result in significant harm. The prevalence of image-based sexual abuse is a form of cultural harm contributing to the normalization of non-consensual sexual activity and creating a climate in which women’s sexual expression is not respected.
\end{quote}

51. Police Scotland told us that while there would always be “challenges” in policing cyber-crime, they had existing processes for tackling online offences that could be put to use for the new crime.\textsuperscript{49}

52. The Committee supports the introduction of a new offence of the non-consensual sharing of intimate images, as set out in section 2 of the Bill. The behaviour the offence would address can be enormously hurtful and humiliating, and treating it as criminal is not disproportionate. Indeed, we note evidence that some of the conduct encompassed in the proposed offence may already be criminal. We do not see this as eliminating the need for the new offence, as some such conduct may \textit{not} currently be criminal, or may not be subject to sufficiently stringent sanctions under existing law. The drafting of a new law provides an opportunity to set out the parameters of the offending behaviour with greater clarity and consistency. It also sends a clear message about the unacceptability of conduct that modern technology has rendered disturbingly easy to undertake, and may therefore have a deterrent effect.
Detailed aspects of the offence

53. The main debate was as to whether the drafting used in sections 2 and 3 would address with sufficient accuracy the behaviour the Scottish Government was seeking to target, or whether some further refinement would be required. Some evidence was to the effect that the offence was too broad; other that it was too narrow. The debate was at points technical and complex; made more so by the fact that different detailed elements of the offence were to some extent inter-connected and a change in one area might require a rethink in another. We have sought to separate out the main elements of the debate below.

The medium of disclosure: “photograph or film”

54. The offence applies only in relation to the disclosure of a photograph or film showing a person in an “intimate situation”. Section 3(1) goes on to define this as being one of two situations:

- where the person in the film or photo is seen engaging or participating in, or being present during an act which (a) a reasonable person would consider to be a sexual act, and (b) is not of a kind ordinarily done in public; or

- where the person’s genitals, buttocks or breasts are exposed or covered only in underwear.

55. Section 3(2) provides that the fact that the film or photograph has been digitally altered does not exclude it from the scope of the offence, although the Explanatory Notes to the Bill state that images that are entirely computer generated would be.

56. The Committee considered some evidence during Stage 1 that the offence was too narrowly drawn, in that it only applied to photographs or film of an intimate situation, and not, for instance to sound files or text dialogue about an intimate matter. In this connection, the Committee notes that the “screenshot” function of tablets and smartphones makes it very easy to post extracts from private text conversation on social media. Abused Men in Scotland described the restriction of the offence to images as “a loophole, rendering this legislation ineffective”. Other evidence did not go that far but concerns were expressed that the Bill created an artificial distinction between different types of digital media, when the focus should be on the victim’s experience. Louise Johnson of Scottish Women’s Aid remarked that—

> The exposure or the threat of sharing has the same outcome – it is designed to humiliate and control the victim … Sometimes, text and images can be sent at the same time. Would we criminalise the image but not the abusive and threatening text?
57. Ms Johnson acknowledged that sending a threatening text may already be a crime, but said that existing sanctions may not go far enough and that the opportunity should be taken to make the law more consistent in this area.

58. The alternative view was that amending the definition to include texts would amount to a significant change to the nature of the offence. To some extent, this overlaps with the debate set out below as to whether the focus of the offence should be on “revenge porn” or whether it should have wider parameters. The written submission from Professors Erika Rackley and Clare McGlynn said that the non-consensual sharing of images tended to cause more, and more lasting, harm than the sharing of written messages, in part because images tend to be more discoverable than text on internet searches. In this connection, we note comments in the Policy Memorandum that “almost all of the cases” the Scottish Government is aware of involving the non-consensual sharing of intimate personal data have involved images.

59. The Cabinet Secretary told us that his mind was not closed on the potential for altering this aspect of the definition in the light of evidence but expressed concern that “if we widen the definition further, the potential for unintended consequences to emerge from the legislation also widens.”

60. The Committee notes differing views in evidence as to whether the proposed restriction of the section 2 offence to photographs or film is appropriate. Some witnesses considered it important that the focus of the offence remain on images of the body which, they considered, had particular power to humiliate. Others saw merit in including, for instance, text or voice recordings of intimate conversations. A clear majority of the Committee supports the approach set out in the Bill, and is mindful of the risks of unintended consequences if the Bill takes too wide an approach. We do, however, ask the Scottish Government to keep an open mind on this issue, in the light of the evidence we received.

A loss of focus on “revenge porn”?

61. Conversely, the Committee heard evidence that the offence was, if anything, too broadly drawn, and that there had been a drift from the Scottish Government’s stated aim of targeting revenge porn. A working definition of “revenge porn” might be that it is the use of digital technology to share a sexual image of a person with others, in order to cause humiliation or hurt. Witnesses noted that the Bill does not necessarily require proof that an image is “sexual” for an offence to have been committed; an image of a person in their underwear would be sufficient (if, of course, other elements of the offence are proven). It was queried whether this made the offence too broad.

62. It is important to add that other evidence supported this element of the definition. It was argued that images of this sort were equally capable of causing hurt, or could be used coercively, as a form of threat. Some evidence argued that this element
of the offence was, in fact, too narrowly drawn, in that it contained drafting
loopholes\textsuperscript{59} or did not take account of different cultural or religious interpretations
of “intimacy”.\textsuperscript{60} We note the Scottish Government’s view that a drafting approach
setting out a more flexible definition of “intimate image” “risked perpetuating the
very ambiguity in the law which a specific offence is seeking to address”.\textsuperscript{61}

63. Michael Meehan of the Faculty of Advocates invited the Committee to reflect on
the interplay between the Bill’s definition of “intimate image” and the fact that the
offence could be committed without any intention to cause fear, alarm or distress;
recklessness being sufficient—

\begin{quote}
I will give an example. A person comes home to find his flatmate asleep on
the couch wearing only his boxer shorts and takes a picture of the flatmate.
If he was to show that to another flatmate, he would be guilty of an offence
under the Bill. The Bill provides no defence to that. […] A person might
think “this is amusing” and take a photograph to record the amusing
moment. The last thing that that person intended to do was to cause fear,
alarm or distress. However, because that requirement [that the offence can
only be committed by intent] is not there, taking that photograph would be
criminal conduct.\textsuperscript{62}
\end{quote}

64. The Crown Agent, Catherine Dyer, appeared not to disagree that the
circumstances set out by Mr Meehan might potentially be a crime, describing the
situation as “probably an intrusion”. She asked the Committee to focus on—

\begin{quote}
the impact on the victim. There has to be a victim. It is not to do with jokes.
There must a person who indicates that the exposure was harmful,
upsetting and distressing to them.\textsuperscript{63}
\end{quote}

The mental element of the offence

65. Other witnesses picked up on Mr Meehan’s concerns in relation to the inclusion of
recklessness within the \textit{mens rea}\textsuperscript{64} of the offence. The Law Society
representative, Grazia Robertson, said that—

\begin{quote}
“There should be intention to cause harm or humiliation rather than
recklessness. The term “recklessness” is too wide. I do not like the term
“revenge porn” but I think that we all understand what it means. The issue
is not the porn: it is the revenge element. Revenge is crucial in order for it
to be that type of offence; if a person has exposed images that we find
embarrassing, humiliating or upsetting, for example, that would be more of
a privacy offence.\textsuperscript{65}
\end{quote}

66. On the other hand, we heard evidence that the definition of the mental element set
out in the Bill had created an evidential hurdle that would lead to the wrong people
being acquitted (or not prosecuted). One submission, for instance, argued that the
Bill had got the mental element the wrong way round, by “focus[ing] attention on
the motives of the perpetrator rather than the harm of the victim”. The same
submission argued that the mens rea of the offence should simply be “an intention to distribute materials without the consent of the victim.”66 One of the authors of that submission, Professor Clare McGlynn of Durham Law School told the Committee that the drafting of the Bill on this point risked creating a loophole in relation to computer hacking—

“When someone is hacking a computer and then distributing images, they are not often doing it … to cause direct distress to a particular victim. They are doing it for a whole range of other reasons, such as for financial gain, because they have been hacked, for sexual gratification or for a laugh.”67

67. The Committee is not certain whether these concerns are comprehensively addressed by the fact that the mens rea of the offence includes recklessness as well as intent. It appears to the Committee that it could certainly be argued that a hacker who puts intimate images of strangers online is being reckless as to whether they cause distress, fear or alarm. Professor McGlynn conceded that she was not an expert on the Scots law of recklessness, but two witnesses who are, Professor Chalmers of the Glasgow University School of Law, and Professor Maher of Edinburgh University Law School, agreed that it is difficult to give definite answers on such points because of a lack of clarity as to what constitutes “recklessness” in Scots law.68

68. On Professor McGlynn’s proposal for a mens rea based solely on intention to distribute without consent, the Law Society’s Grazia Robertson said that the Parliament would then be legislating on “a privacy issue” rather than creating an offence where “revenge, hurt and control” combined with a lack of consent were the key considerations.69 Nicola Merrin of Victim Support Scotland remarked that—

“The Bill started from the need to address revenge pornography … The person’s intention is quite important, in that either they want to control, manipulate or try to cause harm or distress, or they are reckless with regard to harm or distress.”70

69. Professor Chalmers said that the mens rea set out in the Bill seemed appropriate, having regard to the seriousness of the offence being created.71 After noting that the offence set out in the Bill covered non-sexual images as well as sexual images, he argued that—

If you create an offence that simply disclosing an image without consent is a criminal offence, regardless of any issue of intent or recklessness as to distress, you have created an extremely broad offence, which carries a maximum penalty of five years’ imprisonment. Therefore, if you were minded to widen the fault requirement and remove the requirement for intention or recklessness as to fear or distress, you would correspondingly have to have a rather narrower definition of the kind of images that this offence covers.”72
70. The Scottish Government’s Policy Memorandum stated that it had considered mirroring related English law (introduced in 2015), which requires “intent to cause distress”, rather than either intent or recklessness, but rejected this, expressly because it considered that this was too narrow an approach and “could represent a significant barrier to prosecution”.  

The Committee supports the inclusion of recklessness within the *mens rea* of the new offence of the non-consensual sharing of images. Making the new offence an “intention-only” crime risks making the offence too narrow, potentially allowing conduct that may properly be considered criminally irresponsible and humiliating to escape prosecution. However, the Committee does invite the Scottish Government to reflect on the evidence we have received indicating that the interplay between the Bill’s definition of “intimate image” (which includes non-sexual images) and the inclusion of recklessness within the *mens rea* has, at the very least, the potential for a wider category of behaviour than may have been intended to be included within the scope of the offence. If so, we ask the Scottish Government and, as appropriate the Lord Advocate, to consider whether this requires to be addressed either in the legislation itself or in guidance to prosecutors.

Impact of the new offence on children and young people

72. We also heard concerns raised in relation to “sexting”: the sending and receiving of sexually suggestive text messages by digital device. It is not only teenagers who “sex”, but the evidence we received indicated that it is teenagers and young adults who do so most, and who might therefore be disproportionately affected by the new law. Vulnerable adults were also identified as potentially susceptible to the new provisions. Texting is not caught by the offence as it is currently drafted, but an intimate picture sent with a text could be. In the example Mr Meehan set out that we quoted above he proposed that the mere showing of an image appearing on a phone to a friend could be an offence. He also pointed out that it would not be necessary to prove intent to cause distress, only recklessness.

73. Evidence from the National Organisation for the Treatment of Abusers stated that—

> there are many situations where young people are victimised and exploited by their peers in relation to online behaviour and appropriate sanctions are necessary. None the less, we have concerns about the potential for increased criminalisation of young people as an indirect consequence of this legislation and even the possibility that young people involved with exploitative adults may resist coming forward for fear they themselves may be prosecuted.”

74. The Law Society’s proposal was that the offence should not be applicable to under-16s, although it could be a ground for referral under the Children’s Hearing
We understand that it is not the Crown’s general policy to prosecute children under 16 for crimes involving social media. We

Other evidence did not disagree that the new provision might potentially criminalise sexting and might, therefore, have an impact on young people, but did not consider this a sufficient reason for a rethink on this aspect of the offence. Evidence pointed out that consideration also needed to be given to the “victims” of sexting, often, or even perhaps usually, children themselves. Nicola Merrin of Victim Support Scotland remarked that if the children were excluded from the ambit of the offence “we would lose out on the ability to intervene and make it clear that it is harmful behaviour.” Professor McGlynn said—

Yes, we do not want to criminalise large numbers of young men. I have a 14-year old boy myself so I am aware of that, but I also have a 12-year old daughter, and we need to think about the experiences of young girls and the harms they might suffer. When we talk about inadvertent sharing and the common practice of sharing such images, my argument is that that common practice is what we are challenging. Rather than accepting the practice as commonplace in our society, we need to counteract it. As long as there is an education campaign to go with it, the Bill could be one way of counteracting the practice.

The Children’s Commissioner, Tam Baillie, told us that he was “not looking for an exemption for children and young people”, noting that the Crown would have discretion whether to press charges, and that he expected Children’s Hearings to deal with any cases of the new offence involving children. He called for resources to be put into educating children and young people, in parallel with the legislative changes wrought by the Bill.

The Cabinet Secretary told us that he “would be concerned about bringing a lot of teenagers into our criminal justice system unnecessarily when a more reasonable route could perhaps be taken to address the issue more effectively.”

The Committee notes concerns that the behaviour of children and young people may be caught by the new section 2 offence, perhaps disproportionately compared to older age groups. However, we also note a significant body of evidence, including from charities and advocacy groups for children, that the solution is not to exempt young people who have passed the minimum age of criminal responsibility from the scope of the offence, as this could result in the offending behaviour not being adequately addressed, and in victims (often children) not finding in law the remedy they deserve. The same evidence also argued that in the vast majority of cases, the correct forum for addressing this behaviour is Children’s Hearings and not criminal courts. The Committee shares these views.

It is also crucial that the criminal reforms set out in this part of the Bill are accompanied by a campaign of education and information, so that children
and young people are made aware of the effect of the behaviour the new offence is targeting; not only the criminal legal effect but also the emotionally harmful effect that it may have on others. The Committee would be grateful for information from the Scottish Government as to what work it proposes to do on this matter.

The “public place” defence

80. Section 2(5) provides for a defence in a situation where the film or photograph was taken in a place “to which members of the public had access (whether or not on payment of a fee), and members of the public were present”. The Policy Memorandum explains that—

This ensures that the offence does not extend to, for example, photographs taken by members of the public of a naked protestor, or of a “streaker” at a sporting offence.\(^\text{82}\)

81. For a number of witnesses, the trouble with this exception was that it went too far, and that the Government had unwittingly created a loophole for peeping Toms. It would appear that the effect of this provision is that there would be a defence in the case of photographs taken in parks, on beaches or (depending on the premises) in changing rooms. Our attention was drawn to the practice of “upskirting”; taking photographs of intimate body parts without the consent, or knowledge, of the subject. Recent changes to the law have made clear that the practice itself is illegal, but stakeholders expressed concern that the distribution of images obtained from it appears not to be covered by the Bill because of the section 2(5) defence.\(^\text{83}\)

82. Evidence also queried what appeared to be the assumption underlying the provision: that the issue of consent is vitiated where a person allows themselves to appear in an intimate situation in a public place (as defined in the Bill). Some stakeholders considered this to be unfair.\(^\text{84}\) They argued that it was the humiliation of the victim that was the significant issue, not the question of where the photographs or film was taken.\(^\text{85}\) The Scottish Human Rights Commission noted that—

the ECtHR [European Court of Human Rights] has held that photographs or images captured in a public place can still infringe on a person’s private life. It is not the place the photograph is taken that is determinative; rather it is whether the photograph infringes on a person’s private sphere. The Commission therefore questions whether the defence provided for in section 2(5) of the Bill is appropriate as a general defence.\(^\text{86}\)
The “public interest” defence

83. It is a defence to a charge under section 2 that the person sharing the image reasonably believed that disclosure of it was in the public interest. We note evidence that the defence is unnecessary and may encourage “spurious defences.” The Faculty of Advocates said that if the intention of this provision was to allow for the publication of “journalistic material”, this should be made expressly clear, and that there might be benefit in using terminology consistent with English law.

“Consent” as a defence

84. It is also a defence to a charge under section 2 (under subsection (3) of that section) that the person whose image appears on the photograph or film consented to it being disclosed or that the accused reasonably believed that they had so consented. Such consent may be specific; ie, consent as to the particular disclosure that forms the subject matter of the charge. Or it may be general, defined by the Bill as “consent to disclosure generally where that consent covers the particular disclosure or …particular threatened disclosure”.

85. This latter element troubled some witnesses, who queried under what circumstances someone could be considered to have effectively signed away their future right to object to disclosure of an intimate image because they had given prior general consent to any such images being shared. Professor James Chalmers of Glasgow University School of Law described the setting out of two categories of consent as—

an unhelpful distinction which opens up the possibility of an accused seeking to avoid conviction on the basis of some vaguely defined “general” consent. In fact, consent must always be specific. B can consent, for example, to disclosure to the world at large, or a group of people, but they must specifically do so.

86. Views were also expressed that there was insufficient clarity about what “consent” actually meant in the context of the offence. The term is not defined in the Bill. Some evidence argued that the Bill should have followed the wording in the Sexual Offences Act 2009. The Mental Welfare Commission raised specific concerns in relation to adults with learning difficulties—

Part 2 of the Sexual Offences Act 2009 makes clear that consent is not the same as acquiescence and means “free agreement”. Consideration should be given to similar provisions in this Bill. However, we suggest that such provisions should draw on the provisions of s311 of the Mental Health (Care and Treatment) (Scotland) Act, which have been replaced by the 2009 Act. Both Acts make clear that a person who cannot understand an act or form of decision about the act cannot consent. […] It appears to us highly plausible that a person with learning disabilities could be persuaded,
87. The Committee agrees that it is necessary to set out statutory defences to the section 2 offence, to clarify when conduct that would otherwise be considered criminal may be excused by particular circumstances. However, we invite the Scottish Government to consider evidence set out in this report indicating that some aspects of the defences may be too wide. In particular, we invite the Government to reflect on evidence that the Bill goes too far in providing a defence in relation to images taken in a public place, and may provide an insufficient protection of an individual’s right to a private life, as set out in human rights law.

88. The Committee also invites the Scottish Government to note evidence led before the Committee in relation to consent, or belief as to consent, as a defence to the section 2 offence. Again, views were expressed that the Bill may provide too wide a defence. We note views that modelling a definition of consent on previous legislation (where consent is referred to in terms of “free agreement”) may not only provide greater legal clarity and consistency, but also provide some assurance that the defence will not unwittingly compromise the protection from manipulative behaviour that the law should afford to young people or vulnerable adults.

**Internet platforms and the new offence**

89. Section 4 introduces schedule 1 to the Bill. Schedule 1 makes special provision in relation to providers of “information society services” and the new offence in section 2. The Policy Memorandum gives no guidance as to the reasons for section or as to its intended effect, and the discussion in the Explanatory Notes is brief. We understand “information society services” to be a term originating in European Union law. The Bill describes it as covering “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of a service.” It would include providers of internet services as well as internet “platforms” (ie websites hosting digital data provided by others).

90. Put broadly, schedule 1 sets out that providers of information society services are not guilty of the section 2 offence if acting as “mere conduits” of photographs or film caught by the offence; if caching such images; or if hosting such images. This is provided certain conditions set out in schedule 2 are met. In the case of a provider hosting intimate images or films (ie a platform), the conditions include that the host lacked “actual knowledge” that—

- the image or film was an “intimate image” within the meaning of section 2,
the image had been obtained without the consent of the person shown in the image, and

- the image had been provided with the intention to cause fear, alarm and distress to the person in the image, or with recklessness as to whether it would do so.

91. If the host acquires actual knowledge of those three matters (ie, if, in effect, it becomes aware that it is hosting an image in respect of which a crime under section 2 has been committed), it must take the image down “expeditiously”. (We note evidence that it would be helpful, for the sake of legal clarity, to define “expeditiously”.)

92. As noted, we did not have in the Policy Memorandum the benefit of the Scottish Government’s thinking as to the why section 4 and schedule 1 were included in the Bill. However, we understand that they are intended to help give effect to EU requirements that member states impose on internet providers a legal responsibility to take down prosecutorial material if requested to do so. The Committee received evidence questioning, on drafting grounds, whether schedule 1 actually achieves that aim. Evidence from Professor Lilian Edwards of Strathclyde Law School argued that schedule 1 was “redundant” on the basis that internet platforms lacked the requisite mental element to commit the crime set out in section 2: a platform “does not intend to cause fear, alarm or distress, nor is it reckless to such a consequence”. Professor Edwards remarked that—

- the key issue for victims of this crime is often not the infliction of criminal justice on the perpetrators but a way to obtain speedy removal of the material from the site where it is hosted. This may be reputable sites like Facebook or Twitter or it may be a dedicated revenge porn site where pictures are displayed, often with full names, email addresses and other personal information alongside, till “ransom” is paid to have them taken down.

93. Professor Edwards said in her submission that Scotland “would be leading the world” if it enshrined a requirement on platforms to take down any image where they have been “told it is illegal and that they will commit a crime if they do not remove expediently. This is how child pornography was eradicated from UK and EU websites.”

94. Evidence from the Cabinet Secretary when he gave evidence before us indicates that he considers the Scottish Government to have relatively limited powers to tackle the hosting of images by internet platforms, especially where the host is not Scottish domiciled. The Cabinet Secretary said that where this was the case (he thought that the “vast majority” of platforms would be non-Scots domiciled), “we would not be able to take legal action against them”.

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95. The Committee invites the Scottish Government to clarify its intentions as to the aim of schedule 1 to the Bill, in relation to “information society services” and the section 2 offence. We also invite the Government to respond to evidence that the schedule may lack legal effect. We are concerned by evidence from the Cabinet Secretary to the effect that the Scottish Government in most cases, is likely to lack legal powers to prevent internet platforms hosting images that this section of the Bill seeks to render illegal. We would welcome further clarification from the Scottish Government as to what measures it could take (unilaterally or in partnership with other jurisdictions) to ensure that platforms adhere to relevant domestic laws and are placed under a positive duty to remove unlawful images.

Non-harassment orders

96. Section 5 of the Bill concerns non-harassment orders (“NHOs”). Put broadly, NHOs are granted against individuals to prevent them making contact with another person because the court is satisfied that the individual has been harassing the other person. Breach of an NHO is a criminal offence.

97. An application for an NHO may be made by way of civil process. A prosecutor may also apply for an NHO to be made against an accused at the conclusion of a trial, but only where there has been a conviction. The Scottish Government’s view is that while this is sound as an overall policy, there is a gap in the law. It is not currently possible to obtain an NHO where it has been determined that the individual committed the acts libelled in the charge but was found to be, in colloquial terms, not fit for trial, by reason of their mental or physical state, either at the time the acts were committed or at the time of the trial. A separate statutory procedure is laid out for either situation, but in either case, there can be no conviction.

98. In *Equally Safe*, the Scottish Government consulted on whether this perceived loophole should be closed. A number of respondents to the overall consultation did not provide a specific response and, of those that did, responses were sometimes short. This was essentially replicated in our call for evidence. In other words, many respondents do not appear to consider the Scottish Government’s proposal for reform in this area to be particularly controversial or significant compared to other reforms in the Bill. A number of respondents expressly noted that the proposed change would be unlikely to affect many people. For some, that was reason enough to question whether the reform was worthwhile.

Views from stakeholders

99. Of the evidence we did receive on this proposal, a majority supported it. Support came in particular from women’s groups, and from charities and advocacy groups
representing victims of harassment and similar crimes, as well as from the Crown Office. Supporters of the reform noted that its principle purpose was to protect victims. Police Scotland told the Committee that they welcomed the proposed reform, stating that it would reduce the “financial burden” and “possible trauma” of a victim having to initiate a separate legal process to obtain a civil NHO. Police Scotland said that the reform would demonstrate—

> a robust and consistent approach to the granting of NHOs in Scotland and negates the possibility of (domestic abuse) victims enduring further unnecessary and prolonged court proceedings.102

100. A significant number of submissions raised concerns, including from those who did not express opposition in principle to the proposal. Objections generally raised the same concern, relating to the practicality of the proposed reform: that the individuals it is likely to target are, by definition, likely to find it disproportionately difficult either to understand the terms of an NHO granted against them or to modify their behaviour in response to it. And if they do not, they risk being arrested and charged for breach of an NHO, at which point the issue of the accused’s fitness for trial might again arise.103

101. The Mental Welfare Commission’s written evidence expressed “considerable scepticism” about the value of the new disposal. The Commission acknowledged that an NHO “is not a punitive disposal” but expressed “serious concerns” that the new provision risked “imposing requirements on people which they are not able to fulfil, and which cannot realistically be enforced”. It argued that in most cases either a formal mental health disposal or a supervision and treatment order would be a more appropriate way of dealing with the person.104 The Law Society of Scotland expressed similar views, calling for a review of the issue within the context of reform of mental health law generally, rather than criminal law.105

102. We invited the Scottish Human Rights Commission to consider the concerns raised in some evidence about section 5. The response from the SHRC indicated that the key consideration in relation to Convention compliance was as to the proportionality of the measure being proposed, requiring assessment on a case-by-case basis. The SHRC noted that, under the process set out in section 5, the granting of an NHO would be preceded by a judicial process—

> The making of such an order, provided the requirements of legality, furtherance of a legitimate aim and proportionality are met, is not in and of itself precluded by human rights law. The real issue is perhaps more practical, in that where a person has not been able to stand trial originally, there is every possibility that they will not be able to tried for a breach of the Non-Harassment Order. It is therefore more a policy consideration on how useful the orders would be set against that practical reality.”106
Government view

103. The Scottish Government’s Policy Memorandum acknowledged the validity of concerns similar to those stakeholders raised with us, but added that—

"it is not considered that this negates the usefulness of an NHO. Having an NHO in place may make it easier for the police to intervene to protect the victim of harassment at an early stage in the event of on-going harassment by the subject of the order, as behaviour which is contrary to the terms of the NHO (eg approaching the person named in the order) would not necessarily otherwise constitute a criminal offence."

104. The Memorandum goes on to note that the courts can already impose a sexual offences prevention order (which has some similarities to an NHO, although granted for different reasons) against individuals in relation to whom criminal charges could not be pressed because of their mental or physical state. The implication is that the proposed reform is therefore to some extent precedent.

105. The Cabinet Secretary focussed on the benefit to the police when he was invited to address the concerns about section 5 laid before the Committee—

"The purpose of the non-harassment order is to provide a mechanism that gives clarity to the police that they can take action should the order be breached, which will therefore provide greater reassurance to the victims in such circumstances. A person’s circumstances may change before they are presented before the court again, so they could be prosecuted. The measure provides the police with clarity on enforcement should an order be in place, despite the fact that the person may not have been fit for trial previously."

106. The Committee recognises that the primary purpose of section 5 of the Bill, which extends the circumstances in which the criminal courts may grant non-harassment orders, is to extend the protections available to victims of abuse. We note evidence that the granting of an NHO enables the police to intervene to arrest a person who is breaching its terms. However, in the case of the section 5 reform, a consequence of an arrest is likely to be the arrested person re-entering the criminal justice system, despite previously having been found unfit for trial. Some individuals subject to NHOs under the reform may find it difficult either to fully understand the terms of an NHO granted against them or to modify their behaviour in response to it.

107. Accordingly, whilst we do not doubt the good intentions of the proposed reform, we are sceptical as to its utility. We note evidence that, in some cases, other forms of disposal may be a more appropriate way to deal with the behaviour the NHO seeks to address. We invite the Scottish Government to reflect on these comments and on the evidence on which they are based.
Jury directions relating to sexual offences

Proposals in the Bill

108. Section 5 of the Bill inserts new sections 288DA and 288DB into the Criminal Procedure (Scotland) Act 1995. Both sections apply at the same point in a trial on indictment (ie a jury trial) for a sexual offence; when the leading of evidence has concluded, and the judge is charging the jury before they retire to consider a verdict.

109. New section 288DA applies where evidence has been led that the complainer either—

- did not tell, or delayed in telling, anyone about the offence, or
- did not report, or delayed in reporting, the offence to an “investigating agency” (for instance, the police).

110. In that case, the judge must advise the jury that there can be good reasons why people delay in mentioning or reporting, or do not mention or report, the offence; and that this therefore does not necessarily indicate that an allegation is false. We refer to the direction set out in proposed new section 288DA as “the delay direction”.

111. New section 288DB applies where either—

- evidence is led suggesting that the sexual activity took place without physical resistance by the complainer, or
- a question is asked or a statement is made with a view to eliciting or drawing attention to evidence of that nature.

112. In that case, the judge must advise the jury that there can be good reasons why a person may not physically resist the sexual activity; and that absence of physical resistance does not necessarily indicate that an allegation is false. We refer to the direction set out in proposed new section 288DB as “the physical resistance direction”.

Scottish Government case for the proposals

113. The Policy Memorandum explains that the two statutory directions are considered necessary because—

> Concern has been expressed that certain ill-founded preconceptions held by members of the public, who make up juries, about the nature of sexual
violence makes understanding victims’ responses to such crimes more difficult.

It is thought that some members of the public imagine that a sexual assault is almost always violent and that, if assaulted, a victim would be very likely to respond by trying to physically resist their attacker.

Equally, it has been suggested that jurors may regard the fact that a significant period of time passed between the time an alleged crime takes place and a report being made to the police about a rape or sexual assault as evidence that the allegation is false, despite the fact that there are many reasons that a victim may not tell anyone or make a report to the police about a sexual offence committed against them until some time after it has happened. Police Scotland management information for 2013-14 indicated that a quarter of all sexual crimes and 36% of rapes were reported 1 year or more after the alleged incident took place.”

114. In relation specifically to the delay direction, the Memorandum goes on to note that the number of cases in which there has been a significant lapse of time between the alleged offence and the trial taking place has been increasing in recent years.

Judicial discretion

115. Some witnesses described the statutory directions as mandatory directions. There is limited provision entitling the judge not to give the direction under certain circumstances. This is where the judge considers, under the circumstances, that no reasonable jury could consider the evidence, question or statement by reason of which the direction would otherwise require to be made to be material to the guilt or innocence of the accused. In the case of the delay direction, the example given in the Explanatory Notes to the Bill is of a sexual assault against a young child who could not understand at the time that an offence had been committed. In the case of the physical resistance direction, the example given in the Notes is of someone who was asleep when they were sexually assaulted.

116. A minority of evidence argued that it was a failing of the Bill that it did not require the directions to be given in all relevant cases, ie any sexual assault case where there had been a delay, or where it appeared that the complainer had failed to offer physical resistance, whether or not the issue had actually been raised during the trial. We asked the then Lord Justice Clerk (now Lord Justice General), Lord Carloway, to comment on the scope of the discretion. Lord Carloway, who did not support the reform for reasons set out below, indicated that the discretion was in practice too narrow to allay his concerns, commenting that “if you decide that a case is one in which subsection (2) applies [the provision, in each of the new sections, laying out when the direction should be given], you must give that particular direction”.

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117. We note the Cabinet Secretary’s view when he gave evidence that the provisions gave judges “sufficient flexibility” not to threaten their capacity to give appropriate directions. But he also made clear that the whole point of the reforms was to require judges to give directions under particular circumstances.\(^\text{115}\)

The statutory nature of the directions

118. The two new sections would be the first use of statute to direct judges in Scotland on how to advise juries in particular types of case. The Cabinet Secretary told us that the proposals in the Bill were “not unique”\(^\text{116}\) because judges give juries directions in other areas, but this puts to one side the statutory nature of the directions and, subject to the qualification outlined above, their mandatory nature too.

119. We also note evidence that Scots criminal law already effectively has mandatory (but non-statutory) jury directions: on the presumption of innocence, the standard of proof, and the requirement for corroboration.\(^\text{117}\) But these directions are of a different character to the directions in the Bill, in that they are relevant and applicable in all criminal trials. It is hard to think of any circumstances where (leaving aside the fact that a failure to do so might lead to the case being appealed on grounds of misdirection) any reasonable judge would consider it inappropriate to remind the jury of the presumption of innocence. The directions in the Bill are different: they are not applicable in all criminal trials and, as outlined below, there is no consensus that, even in circumstances where it \textit{may} be considered appropriate to provide them, it is \textit{always} appropriate to do so.

120. It is therefore accurate to describe the proposals in the Bill as unprecedented. There is nothing wrong with using legislation to set a precedent: often that is the point. Plenty of evidence received by the Committee indicates that legislative intervention is justified in this area. But the Committee also heard arguments that, in this area of the law more than most others, it may be wise to proceed with caution. Lord Carloway told us that what was proposed in the Bill “could be done but it is not what we would see as the best way of doing it”. He said that the Bill—

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sets a precedent. If Parliament dictates what should be said to juries by a judge in this area, other people will no doubt seek to extend that to other areas and will wish other directions to be given, and that is where we get into the constitutional divide.”\(^\text{118}\)

121. By “constitutional divide”, Lord Carloway explained, he meant a risk of a breach in the line between the role of politicians and the role of judges. Lord Carloway’s fears in relation to statutory directions are to some extent supported by evidence the Committee received supporting the reforms but arguing that it would only be fair to make statutory provision for various other directions, on a wide variety of matters, in order to address various other misconceptions perceived to lurk in the minds of juries.\(^\text{119}\) Of course, no such proposals could come into being without the future agreement of Parliament.
122. The Cabinet Secretary sought, to some extent, to downplay the significance or distinctiveness of the proposed reforms in the Bill—

> Parliament regularly makes decisions on various matters that have an impact on the judiciary. I do not believe that the proposal is political interference that involves directing a judge on what they should or should not say.”

123. The Scottish Government, in its Policy Memorandum, also pointed out that the changes set out in the Bill are to some extent precedent, in that other jurisdictions (mainly Australian states) already have statutory directions. One of our witnesses, Gerard Maher, Professor of Criminal Law at Edinburgh University, asked us to consider that precedent. He said he had no objection in principle to the proposed directions, but that it was not clear how, as statutory directions, they would interact in practice with the model jury directions Scottish judges are already expected to give in certain cases. (These are set out in the Jury Manual, an advisory document for judges discussed further below.) He warned of unintended consequences, noting that—

> some countries have a whole body of statutory jury directions: that is the case in many of the Australian jurisdictions. I am starting to worry that we are introducing something without seeing the complete picture of what jury directions are supposed to achieve. In the state of Victoria … there is controversy about a particular direction in relation to delay in reporting. Some think that the directions should also include a direction called forensic disadvantage, which you might say was in favour of the accused. If the jury is to be directed about the effect of delay in understanding the position of the complainer, it should also be directed in respect of the possibility of prejudice to the accused in waiting so long for a trial to come into being.”

The role of juries

124. There was fundamental disagreement amongst stakeholders at Stage 1 about whether this part of the Bill should be agreed to. But there was also some common ground. No one appeared to dispute that individuals serving on juries may bring their misconceptions into the jury box, and that these may include misconceptions about how victims respond to sexual trauma. At most, the evidence base for the reforms was queried, as discussed below. Opponents of the proposed reforms disputed whether it could be assumed that juries tended to be ill-informed about this matter. They argued that, if juries did have misconceptions that might lead them to wrongly acquit, it should be the role of the prosecution to dispel them with evidence. But they did not dispute that juries could have prejudices to begin with.

125. A submission we received noted that some of the mock jurors, in research we discuss further below, “seemed to misunderstand the notion of “guilt beyond
reasonable doubt.” This underlines that if juries do have misconceptions they go wider than the matters covered in the Bill. (We noted above the evidence arguing that various other directions should be made statutory.) A police witness, remarked that juries – “the body that is ultimately charged with delivering justice”, as she put it – lack the “enlightenment” that police, prosecutors and health professionals tend to have on the effect of sexual trauma. She indicated that this could be considered a weakness of the criminal justice system.

126. Representatives of the judiciary we heard from at Stage 1 reminded us that the role of juries is to be “masters of the facts”. Determining what is and is not “factual” in a criminal trial is an inexact science: it may involve apprising subjective matters, such as whether a witness is lying or telling the truth. Sheriff Gordon Liddle of the Sheriffs’ Association told us that—

> Each juror, as an ordinary member of the public, brings with them – and I mean this in the most anodyne way – certain prejudices. They bring with them their own feelings and views. These views will cover all manner of things and not just this single aspect [ie reaction to sexual trauma].

127. Juries are meant to reflect society at large. At the same time, the hope is that in the jury room they will leave any unfair prejudices behind and take informed and rational decisions. Guidance provided during the trial may well help them to do so, provided both the guidance’s content, and the manner of its delivery are appropriate. The Committee has kept this in mind as we have considered the evidence for and against the proposals set out in the Bill

Evidence on the case for reform

128. The case for reform along the lines set out in the Bill rests on two propositions: first, that there are misconceptions in the minds of juries that require to be tackled; and second that the best (or only) way to do so is via statutory jury directions. We examine each of these in turn.

Misconceptions on reactions to sexual trauma

129. We have already noted the broad consensus around the issue of whether juries may have prejudices in relation to the matters addressed by the proposed directions. For many stakeholders, this was the strongest and clearest reason why the reforms should be supported. Support of this nature came particularly from advocacy groups or charities working for victims of crime or abuse (some but by no means all of them women’s groups), as well as from the Crown Office and Police Scotland.

130. Representatives of organisations representing women who had been victims of abuse, including sexual crime, told us that they were certain that misconceptions existed, including that, in the words of one of them, “a significant minority of the Scottish public blame women in particular for rape.” The written submission from Rape Crisis Scotland noted that—
reactions to rape can be counter intuitive, for example not telling someone about what happened for hours, days, weeks, months or even years. It is unlikely that jury members will be aware that delayed disclosure is a common reaction to experiencing trauma.”

131. Stonewall Scotland expressed support in particular for the delay direction, noting that LGBT individuals who have been the victim of a sexual assault may have particular reasons for being unable, or reluctant, to report the offence immediately. Nick Smithers of Abused Men in Scotland also backed the proposals, stating that men in long-term abusive relationships may not perceive that particular conduct was a sexual assault until later.

132. Some evidence also alluded, in a more general sense, to a lack of confidence in the justice system on the part of victims of sexual offences, in particular women, and of a sense that the criminal justice system is skewed against securing convictions for particular sexual offences. Such evidence saw the proposals in the Bill in this light, and supported them on this ground. We note a number of measures brought in over recent years, many by this Parliament, to seek to address these concerns.

Opposing views

133. Both the Law Society of Scotland and the Faculty of Advocates argued that the Scottish Government had not made a sufficiently strong evidential case that, in the circumstances the directions have been tailored for, juries acquit for the wrong reasons. Grazia Robertson of the Society told us that there was—

no evidence to support what seems to be simply a suggestion that jurors might be thinking in a particular way, without any empirical evidence of how they are thinking. It would be presumptuous to rush to produce directions when we are making presumptions about what jurors might or might not be thinking.”

134. Michael Meehan of the Faculty of Advocates, questioned—

how victims of rape know how a jury is thinking, when jurors do not give reasons for their decisions? We simply do not know. I am not disputing that there are cases in which complainers have given evidence and there has been distress, there have been injuries and there have been acquittals. There are acquittals in a range of cases, perhaps for a range of reasons.”

Research on juries

135. The Policy Memorandum does not quote any hard evidence backing its view that juries have biases in relation to the two matters covered in the Bill, and that these cause the wrong verdict to be reached. It notes “concerns being expressed” about ill-founded misconceptions. It states that “it is thought” some members of the
public think that a sexual assault is always violent and that a victim is likely to try to physically resist their attacker. And it says that “it has been suggested” that jurors may consider that an allegation is false if the victim took time to report it.  

136. There is a major practical obstruction to gathering evidence on how juries in the UK actually reach decisions. As we understand it, it is effectively banned under the Contempt of Court Act 1981. Research with mock juries is possible though. The Committee received evidence from two legal academics, Professors Louise Ellison and Vanessa Munro, who had set up mock trials to research jury attitudes at rape trials under English law. The “trials” were conducted in England under English law. Actors played the female victims. Three scenarios were covered—

“In three of the trials, the (female) complainant displayed signs of bruising and scratching and reported the attack immediately, but was emotionally “flat” and calm during testimony. In another three of the trials, she displayed signs of bruising and scratching – this time she was visibly upset during testimony but had waited 3 days after the incident before reporting it to the police. In the final set of three trials, the complainant reported immediately and was visibly upset during testimony but displayed no signs of physical injury, and sought to explain her lack of resistance on the basis that she had “frozen” during the attack.”

137. In some cases, the mock jurors received directions similar to the two set out in the Bill, or, as appropriate, in relation to complainers who appear “flat” in the witness box, which is not dealt with in the Bill. In some cases, they received expert advice from a prosecution witness (a “real” clinical psychologist) to the same general effect.

138. Among the main conclusions the academics reached were that—

“In the absence of educational guidance, the (relatively short) three day delay between assault and report presented in trial scenarios proved to be a significant stumbling block for many jurors, who were adamant that their instinctive reaction would have been to phone the police immediately"

In regard to demeanour, it was clear that participants who did not receive educational guidance were often perplexed by the calmness exhibited by the complainant during her testimony. The majority of jurors expected a visible display of emotion...

Despite being directed that the use of force is not a requirement of the law of rape, in scenarios in which the complainant showed no signs of physical injury, jurors routinely emphasised the significance of this to their not guilty verdicts
139. However—

in regard to non-resistance, we were unable to identify any clear impact upon deliberations as a result of educational guidance. Most jurors continued to expect the complaint to have offered physical resistance and/or to have sustained injury…

140. Finally, the researchers conclude that—

jurors responded in similar ways to the educational guidance, regardless of whether it was presented by an expert near the start of the trial or by a judge towards the end.

141. We invited one of the co-authors, Professor Vanessa Munro of Leicester University School of Law, to the Committee, to speak to her research. She made clear that she acknowledged that, because the trials were mock trials, this raised some uncertainty as to the “transferability” of the research into real-life situations. However, she also told us that, in her view, the research was evidence that jury directions worked, and could be beneficial to justice.¹³⁷

142. Munro and Ellison’s research was cited by a number of stakeholders who supported the provisions in the Bill. They also took it as proof that misconceptions definitely exist and can affect trial outcomes, and that jury directions work. We note evidence calling for the inclusion in the Bill of a direction in relation to the scenario of a complainer who appears emotionally “flat”, perhaps on the back of the research conclusions.¹³⁸

143. Opponents of the proposals in the Bill tended to be less aware of the research. The relatively small sample size was noted.¹³⁹ The Law Society witness said she had considered the research and had noted that it did not appear to provide strong backing for the physical resistance direction.¹⁴⁰ Professor Munro herself acknowledged that this direction had not had “the same impact” as other directions used in the mock trials (nor had expert evidence on this matter) but said that this might only indicate that the relevant direction given in the mock trials needed some “reshaping”.¹⁴¹

Scottish Government research on jury decision-making

144. In early September, the Cabinet Secretary told the Committee that the Scottish Government would proceed with Lord Bonomy’s recommendation (in his Review of Post-Corroboration Safeguards) that there be research into decision-making by juries in Scotland.¹⁴² It is our understanding that the full scope of that research has not yet been announced. When he appeared before us during scrutiny of this Bill, the Cabinet Secretary explained that because of the restrictions imposed by the Contempt of Court Act 1981, the research “will largely be based on academic experience from places where this type of research has been able to take place”.¹⁴³
145. We asked some witnesses during Stage 1 whether there was merit in delaying the proposed reforms on jury directions until this work was completed. Lord Carloway indicated that this would appear appropriate. But Professor Chalmers of the University of Glasgow Law School commented on “the danger of delaying almost anything until after the research that the Government might carry out”.

Professor Munro referred to an extensive body of research that attests to the existence of problematic assumptions and misconceptions in the population at large, and it is not unreasonable to assume that those would also be a live issue in the jury room. Therefore, I am not sure that we need research to be confident that there is a problem that needs to be addressed.

146. The Cabinet Secretary was asked if it would be “prudent” not to commence the provisions in the Bill on jury directions until after the research was complete. He said that he did not consider this necessary because the Scottish Government already had sufficient understanding of the relevant issues in order to proceed. In any case, the Scottish Government research would take “a considerable time”.

Are directions being used sufficiently at present?

147. Some evidence in support of the directions appears to register a misunderstanding that the new provisions would be enabling: they would entitle judges to give the specified directions. The Crown Agent told the Committee that—

Judges give juries lots of examples [when giving directions] by telling them what to compare from their own lives. At the moment, that is restricted to things such as non-sexual assaults.

148. Evidence we received indicated that in fact there is nothing to stop judges giving either the delay direction or the physical resistance direction in what they consider to be appropriate cases. Lord Carloway told us that judges are able to make either of the directions “at an appropriate and relevant point in his charge and in a manner which is directly relevant to the particular circumstances of the case.”

The Representative of the Faculty of Advocates, Michael Meehan, a former Advocate Depute said he was—

not aware of a concern of there being a deficiency in the directions that are given now or in cases where the focus is on whether there was consent, about juries being confused because there was not a focus on whether there was an injury.

149. In the section of the Policy Memorandum headed “Alternative approaches”, the Scottish Government notes that “responses to the consultation [Equally Safe] underlined concern that such directions are not being given in appropriate cases at present.” It may be assumed that the Scottish Government considers these concerns to be valid, otherwise it would not have proceeded with the reforms, but
the Memorandum does not cite any statistics or research as to frequency of use of the directions in relevant cases. We asked Lord Carloway for more information on judicial practice. Lord Carloway told us that current use of directions in the manner envisaged in the Bill was “variable”. He explained that—

some judges take a very strict view of what they can tell the jury. In other words, if we take the proposition that there can be good reasons why a person may not tell others of an incident for a while, some judges will take the view that in a particular case there is no evidence to support that proposition and therefore that they should not give a jury such a direction. Of course the Crown may lead evidence that the proposition is correct, in which case the judge will give the direction. Other judges may be more proactive in what they say to juries and may give the directions contained in the bill, without there being an evidential base for it. If they do so, they risk the appeal court stating to them that they should not have given the direction because in that particular case there was no evidence to support it. There is that difference of view between different members of the judiciary and that is the problem area, which is why the legislation is in contemplation.”

150. The Cabinet Secretary also referred to a difference of approaches between judges as to whether they gave either direction. He said that the point of putting the directions on a statutory footing was to deliver more consistency.

Content and effect of directions

Views of supporters

151. Supporters of statutory directions tended to say that there was no good reason why they should be opposed, because all they did was provide information to the jury that is factual, uncontroversial, and unobjectionable. The submission from Rape Crisis Scotland described the content of the two directions as “factual information which will assist juries in assessing the truth.” Sandy Brindley of Rape Crisis Scotland commented that—

If the justice system is about justice and getting to the truth, I do not see why there would be an issue with giving people factual information that would assist them in interpreting the evidence that they are hearing.”

152. The view of the Scottish Human Rights Commission was that the proposals did not raise any significant concerns in relation to human rights law, and may even have a positive impact in terms of Convention compliance. The SHRC submission discussed the relevance of Article 6 (right to a fair trial) of the European Convention on Human Rights, concluding that—

jury directions of the type set out in section 6 of the Bill amount to uncontroversial statements which may indeed serve to address misconceptions held by some members of the public around the behaviour
of victims of sexual assault. The Commission does not consider that these statements, if delivered appropriately, would prejudice an accused’s Article 6 rights.”

153. The SHRC representative, Eleanor Deeming, highlighted consideration of the rights of victims to effective redress under the principle of “equality of arms” when she gave evidence to the Committee. She suggested that the proposed directions could be seen in that light.

Arguments against the reforms

154. Opponents of the proposed reforms, including the Law Society of Scotland, the Faculty of Advocates and representatives of the judiciary, tended to say that they were wrong in principle: they forced judges to give particular directions in particular circumstances, rather than letting the judge decide. Lord Carloway said that “to some extent, we must trust judges to act in an appropriate way and in an appropriate case.”

The Faculty argued that—

“The need for, and the appropriate content of, particular directions in the context of a particular case is best left to the trial judge who has heard the evidence and is fully aware of the issues in dispute in the trial.”

155. From this point of principle, witnesses went on to make two further arguments. One was that statutory directions would not do much good. The other was that they might do harm.

156. On the first point, Lord Carloway’s written submission indicated the risk of the direction to the jury becoming something of a rote exercise. He stated that the Bill set out a process that was “highly mechanistic and … likely to have little substantial effect within the dynamic of a real charge to a jury”. He said that the change would be likely to “add little in practical terms”. When he gave evidence to the Committee in person, Lord Carloway also said that it was his interpretation of the Bill that judges would effectively be required to deliver either direction using the precise words set out in the new provisions. We are not certain if this was the Scottish Government’s intention: the Cabinet Secretary told us that he considered that the Bill delivered “sufficient flexibility” to judges in delivering directions. We note evidence to the Committee, from supporters of statutory directions, that the Bill was, if anything, not inflexible enough on this point, and that there should be provision to ensure that directions “take a set format, in order to promote consistency and clarity”.

The law on consent in relation to sexual assault

157. A specific argument was also made about whether the physical resistance direction served any purpose. The Faculty argued that it was not necessary because the direction appeared to be irrelevant in law—
the Faculty questions the necessity for the provision given the current
definition of consent and the requirement for any belief in consent to be
reasonable under the Sexual Offences (Scotland) Act 2009. “164

158. The witness representing the Faculty, Michael Meehan, said that—

 For the offence of rape, the focus is very much on consent. In a case where
consent was the issue, the jury would be directed to the law in that regard. I
am not aware of a concern about there being misdirections when the issue
is consent.”165

159. The Policy Memorandum to some extent engages with Mr Meehan’s point, noting
that under Scots law—

 a sexual offence is committed when a person engages in sexual activity
with another person without consent. There is no requirement that the
offender must use physical force to overcome the will of their victim, or that
the victim must attempt to physically resist their assailant for an offence to
be committed. However, unfortunately, many people may wrongly believe
that a person who was sexually assaulted or raped would be likely to
attempts to physically resist their attacker and that an absence of physical
resistance could be indicative that an allegation is false.166

160. The Committee also notes evidence from the mock trials referred to earlier that
the physical resistance direction may not have much influence on juries. Professor
Munro (the co-author of the research on mock trials) clarified for us that the
English law in relation to consent and rape was similar to Scotland’s. She said
that—

 the issue of the need for force, the lack of resistance and the lack of
evidence continued to come out extremely strongly in all the jury
deliberations. It strikes me that, notwithstanding the fact that it is not
required definitionally, it continues to be extremely dominant in jurors’
preconceptions, understandings and expectations. To that extent, it is an
important myth to target.”167

Unintended consequences?

161. Some witnesses argued that the introduction of statutory directions might have
unintended and unwelcome consequences. For the Faculty of Advocates, Michael
Meehan argued that the reforms would simply lead to more cases of the defence
leading expert evidence to counter the direction that the trial judge would be
obliged to give.168 For Scottish Women’s Aid, which support the directions, Louise
Johnson argued that there was nothing new about the defence in sexual offence
trials carrying out “pre-emptive strikes” against the prosecution.169

162. Some witnesses referred to the risk of the directions leading to an imbalance
between consideration of the rights of the complainer and the accused. Mr
Meehan noted views (for instance in Lord Bonomy’s Post-Corroboration Safeguards Review) that witness identification evidence can tend to be unreliable, and that there might be a case for a mandatory judicial direction to cover that circumstance as well.\(^{170}\) Professor Gerard Maher of Edinburgh Law School said that in the Australian jurisdictions where mandatory directions had been introduced, there had been “controversies” about getting the right balance between the interests of the complainer and the accused—

> In any case in which there has been a long delay in prosecuting a crime, the accused is often at a disadvantage. There might be appropriate types of cases – sexual assault may be one – in which the jury has to be explicitly reminded of that fact by jury direction.\(^{171}\)

163. Some witnesses spoke of the risk, as they saw it, of the directions placing undue emphasis on particular matters in the mind of the jury. Grazia Robertson of the Law Society told us that—

> if a judge says “I will not comment on the evidence. That is for you to consider,” but then makes a direction about not putting any weight on the delay spoken about by a witness, might the jurors think that the judge is endorsing the witnesses’ evidence and supporting them in some way by asking the jury to disregard that matter?\(^{172}\)

164. Sheriff Gordon Liddle of the Sheriffs’ Association told us that it was his experience that jury members were often “looking for indicators from judges”. He said that—

> The biggest danger from the proposed mandatory jury direction would be possible unintended consequences. The mandatory aspect could take prominence to such an extent that I as a judge might be required by law to interfere to an extent with the jury function, which I never do. It is hardwired into judges that they do not interfere with the jury function, which is consideration of the evidence.\(^{173}\)

165. Lord Carloway agreed with Sheriff Liddle, remarking on the danger of judges being seen to “dictate” to juries, which could be “counterproductive”—

> There is a danger of achieving exactly the opposite of what is intended by the bill, by focusing on something that is not an issue. In other words, if nobody has said in the jury speech that the delay in reporting is significant, why focus on it?\(^{174}\)

### Alternative approaches

166. In a very short discussion on alternative approaches, the Policy Memorandum states that “no other approaches would meet the desired policy objective” and the Cabinet Secretary reiterated this message when he gave evidence to the Committee.\(^{175}\) As noted above, supporters of the change tended to see the use of
directions, as set out in the Bill as straightforward and uncontroversial, meaning that the need to consider compromises or alternative approaches did not arise. Opponents of statutory directions made alternative proposals as to how to address perceived concerns about jury preconceptions and prejudices.

Jury manual

167. Reference was made, for instance, to use of the Jury Manual. Lord Carloway explained that the Manual had two main purposes—

First, it contains statements of what the law is thought to be and secondly, it contains model directions to the jury. Judges do not have to follow those directions and, depending on the particular circumstances of a case, they will not follow them. Many judges have their own speaking styles, which are not consistent with the model in the jury manual. The jury manual is under the auspices of a committee, which is headed by one of the High Court judges, who will revise its terms on a roughly annual basis—it is in a position of constant revision. If a judge has a particular problem with a direction or some new case arises—or if Parliament decides that a direction must be given—the jury manual will be amended. The amended manual is then sent out to all judiciary.

168. Professor Munro referred to the experience in England and Wales of setting out model directions in the Crown Court Bench Book (we take this to be roughly similar to the Jury Manual), which led to a “very mixed” outcomes because, in her view, some judges were not making sufficient use of the model directions.

Statement of uncontroversial evidence

169. Mr Meehan of the Faculty of Advocates proposed greater use of the “statement of uncontroversial evidence”; a joint minute comprising evidence agreed between the defence and prosecution at the commencement of the trial. He said that more use could be made of it to reduce the likelihood of evidence being led on the matters addressed in the two directions. Lord Carloway had the same view.

170. Professor Chalmers from Glasgow University said that, if the misconceptions that the two statutory directions were meant to clarify were—as witnesses appeared to agree—uncontentious, then it would seem appropriate to make use of the joint minute, compared to which the leading of expert evidence could be “cumbersome and expensive”.

Judicial knowledge

171. Lord Carloway also suggested that there may be scope to consider the concepts set out in the direction as part of “judicial knowledge”. He defined this as “basic stuff that everybody ought to know and is accepted as fact”. If something is within judicial knowledge, then it is presumed to be known without any evidence of it having to be laid, and judges may refer to it in their direction to the jury, if it is relevant to the case.
172. Lord Carloway acknowledged that whilst the body of judicial knowledge “ought to be shared by all judges”, this is not in practice the case. He told us that in his own view, the propositions encompassed within the two directions are within the ambit of judicial knowledge, but that “I do not think that every member of the judiciary would necessarily share that view.”

In his written submission to the Committee, Lord Carloway had argued that—

if Parliament were to state that these matters [the propositions encompassed within the two statutory directions] are to be regarded as being within judicial knowledge, that would enable a judge to state them to a jury at an appropriate time and in an appropriate case.”

173. The Cabinet Secretary told us that it might be the case that the matters in the Bill could be considered judicial knowledge but that “I am not aware of clear action being taken over recent years to ensure that the issues are properly addressed.”

Leading of expert evidence

174. The Committee invited views as to whether the same outcome the Scottish Government was seeking via its proposals might be better achieved by the leading of expert evidence (for instance by clinical psychologists or police surgeons). Mr Meehan remarked that in his view, the evidence of a clinical expert would “carry far more force” with a jury than a direction from a judge. He also argued that—

the advantage of leading expert evidence in a trial is that it is before the jury at a far earlier stage in the case. A concern might be that, because the judge will give direction, the Crown might think, “Well, let’s not bother with the expert evidence”, when it would be useful to lead it at an early stage.”

175. Professor Munro said that her research showed that directions and expert evidence both help juries come to more informed decisions in rape cases. The Committee notes a number of submissions arguing that statutory directions and expert evidence should not be considered mutually exclusive and can be used together to achieve a more informed trial outcome.

176. The Policy Memorandum noted that—

in the absence of statutory jury directions on these issues, the prosecution may decide it is necessary to lead expert evidence on these issues in cases where they would not otherwise consider it appropriate, which may incur unnecessary expense…”

177. The Crown Agent, Catherine Dyer, acknowledged that there is “a cost implication” to the Crown leading expert evidence in a criminal trial. Lord Carloway said that it would be “very expensive” if the Crown were to lead expert evidence in every
relevant case.\textsuperscript{189} The Cabinet Secretary told us that nothing in the Bill would affect the leading of expert evidence and that—

\begin{quote}
if it is being suggested that we are introducing statutory jury directions because that is in some way less costly, I have to say that that is simply not the case.\textsuperscript{190}
\end{quote}

178. We note evidence from Professor Chalmers that there appears to no basis in law for leading expert evidence on the absence of physical resistance. We are not certain whether he meant by this that the leading of such evidence is not actually permitted under the current law. Lord Carloway was of the view that current legislation allows expert evidence to be led on either the delay direction or the physical resistance direction.

179. The Committee has not come to a common view on the introduction of the proposed two statutory jury directions set out in the Bill. However, a clear majority of the Committee supports their introduction on the ground that they would appear to do no more than ensure that judges provide relevant factual information to juries to inform their deliberations and, in so doing, help ensure that these directions are delivered more consistently than is currently the case. The minority considers that jury research on use of the directions is necessary before any decision is taken to introduce the directions by statute. The Committee is unanimous in agreeing that introducing the directions by statute should not lead to any reduction in the use of expert evidence as to victims’ reactions to sexual trauma in cases where it is considered that such evidence could be material to the outcome of the case.

180. The Committee notes evidence that the propositions set out in the two directions set out in the Bill could be regarded as being part of judicial knowledge. The mechanism by which any matter could be deemed to have “become” judicial knowledge, and what role if any Parliament would have in that process, is not currently clear to the Committee. To that end, the Committee would welcome clarification from the Scottish Government.

Sexual acts elsewhere in the UK

181. Since relevant provisions in the Sexual Offences (Scotland) Act 2009 came into force, it has been possible to prosecute individuals in Scotland for sexual offences against children committed abroad even if the acts constituting the offence under Scots law are not criminal in the jurisdiction where they took place. This is an exception to the principle that a person can only be convicted of an offence committed within the jurisdiction in which the relevant conduct took place. This is a general and long-standing principle of Scots law and indeed of most other legal jurisdictions.
182. Prior to those provisions coming into force, it was possible under Scots law, and in the UK generally, for someone to be prosecuted for a child sex crime committed abroad, but the relevant acts also had to be a crime in the country where they took place (the so-called dual criminality requirement).

183. The Policy Memorandum accompanying the 2009 Act explained that the change was being made to ensure compliance with the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the “Lanzarote Convention”), to which the UK is a signatory. Article 25 of the Convention requires signatories to establish jurisdiction over serious sexual offences against children – sexual abuse, child pornography and child prostitution – committed by its nationals or residents without the dual criminality requirement. (The Policy Memorandum to the 2009 Bill explained that the opportunity was being taken in the Bill to extend the jurisdiction in relation to all sexual offences against persons aged under 18 and not just these categories of offence.) The 2009 Bill, as it then was, was a very long Bill that made a number of important changes to the law on sexual offences. This element of the Bill was not seen as controversial and attracted little debate.

Reason for the reform

184. The relevant changes made by the 2009 Act did not apply in respect of the other jurisdictions of the UK. That is to say, a Scottish-domiciled person may not be prosecuted in Scotland for a sexual offence against an under-18 if the acts in question took place in England, Wales or Northern Ireland. (The Lanzarote Convention did not require this as it concerns the application of the law between and not within states.) The Policy Memorandum to this Bill explains that “in the vast majority of cases” this presents no significant difficulties, as there is no suggestion that sexual offences are failing to be prosecuted in the rest of the UK. However—

the fact that extra-territorial jurisdiction does not extend to the rest of the UK has created difficulties for prosecutors in a small number of cases. In cases where an offender engages in a course of conduct, consisting of a number of separate but connected offences committed over a period of time, it can be useful to prosecute all the offending behaviour on a single indictment or complaint. For example, in a case where an offender has abused a child in different locations around the UK over a period of time, it may be useful to be able to prosecute all the conduct on a single indictment, as the alternative would be to require the child to go through the ordeal of two separate trials or to prosecute only the offences which were committed in one jurisdiction. There may also be cases where a single offender commits offences against two (or more) different children in different jurisdictions within the UK and it may be useful to prosecute all the conduct on a single indictment (particularly where the two victims’ accounts corroborate each other under the Moorov doctrine).
185. Accordingly—

- section 7 of the Bill amends section 54 of the 2009 Act. Section 54 concerns incitement to commit sexual acts of under-18s outside of the UK. Amendments under section 7 will make it an offence to commit such sexual acts outside of Scotland;

- section 8 inserts two new sections after section 54. Section 54A essentially applies to other parts of the UK the Lanzarote Convention principle that the Scottish Parliament agreed to in 2009 in respect of foreign states. (There are, however, some important points of detail in relation to section 54A, which we discuss below.) Section 54B applies limitations on prosecutions under section 54A. The Scottish prosecutors may not prosecute an offence under Scots law that is also an offence under the law of England, Wales or Northern Ireland if a prosecution in England, Wales or Northern Ireland is underway or has taken place. If such proceedings have not commenced, Scottish prosecutors may not proceed with a prosecution unless they have consulted the Director of Public Prosecutions in England and Wales or, as the case may be, in Northern Ireland.

186. The Policy Memorandum states that the Scottish Government considers that there is no alternative approach that would meet its policy objective in this area. It also notes that 98% of respondents to Equally Safe supported the proposed change.

**Evidence on the proposal**

187. This aspect of the Bill attracted little extended comment in evidence but was almost universally supported by those who did express a view. A number of submissions noted the practical advantage in allowing a single charge to be brought against a person alleged to have committed multiple child sex offences across the UK, as well as the potential benefit to the child who is alleged to have been the victim of the acts, and other witnesses, in only having to give evidence at one trial. The Crown Agent, Catherine Dyer, indicated that the reform might also lead to cases going ahead that previously might not have—

> We have had cases where there was insufficient evidence in either jurisdiction to prosecute the person unless we took the two offences together. The Bill will allow us to apply the *Moorov* doctrine and prosecute the person in Scotland for the totality of their acts.”

188. The Law Society of Scotland, however, expressed scepticism about the reform, noting concern that—

> jurisdiction may be taken in Scotland over a UK national not habitually resident in Scotland committing a sexual offence anywhere in the United Kingdom. It appears from Section 54A of the Sexual Offences (Scotland) Act 2009 as inserted by section 8 of the Bill that the Scottish courts are to have jurisdiction over a case where neither the act nor the parties have any
connection to Scotland at all on the basis that the act also constitutes an
offence under the law enforced in the country where it took place.” 197

189. It appears to the Committee that the restraint imposed by new section 54B of the
2009 Act (as set out in paragraph 186 above) would, at the very least, mitigate
that concern. However, as the written submissions of both the Faculty of
Advocates and Professor James Chalmers of the Glasgow University Law School
noted, the requirement under new section 54B of the 2009 is only that the Scottish
prosecutors consult the relevant DPP. Professor Chalmers described this as
effectively “the power to override a decision of a DPP not to prosecute”, which
was, in his view, “surprising”. The Faculty said that it was potentially “unfair to the
accused”.

190. This was one of three concerns noted by Professor Chalmers in his written
submission to the Committee (although he stated that he supported the proposed
reforms on jurisdiction in the generality). Another was as to the issue of
uncertainty in relation to jurisdiction; where it is not clear whether a particular
sexual offence against a child was committed in Scotland or elsewhere in the UK.
He noted that, in Equally Safe, the Scottish Government had given the impression
that one consequence of the law being reformed as proposed would be that there
would be redress in cases where a victim of abuse was unable to say whether an
offence had taken place in Scotland or England. (Currently, such cases might fail
because the prosecution is unable to establish that the court has jurisdiction to
consider the case.) Professor Chalmers said that it was doubtful that the drafting
of the Bill would address this point.

191. Professor Chalmers’ remaining concern was as to residency. The Bill provides
that if a person does an act in England which is criminal under Scots but not
English law they can only be prosecuted in Scotland if they are, in the language of
the Bill, “a habitual resident of Scotland”. Professor Chalmers described this as
“appropriate and … consistent with Scots law’s general approach to extraterritorial
jurisdiction over sexual offences”. However, he described it as “peculiar” for the
Bill to have also provided that habitual residence of Scotland could, for the
purposes of this part of the Bill, become acquired subsequently to the acts
constituting the criminal charge taking place. Professor Chalmers put the issue in
context in these terms—

Suppose that there is an area of law, whether now or in the future, in which
Scots and English law differ slightly. A person, resident in England, does an
act in England which is lawful in England but unlawful in Scotland. They
are, correctly, not liable to prosecution in either jurisdiction. However, if
they later move to Scotland, they become guilty of a criminal offence at the
point at which they become a habitual resident. This seems wrong in
principle and creates difficulty in terms of article 7 of the European
Convention of Human Rights, because it would involve holding someone
guilty of a criminal offence on amount of an act which did not constitute a
criminal offence when it was committed.
192. Professor Chalmers acknowledged that the Bill did not introduce this “anomaly” in that, under provisions already in the 2009 Act, persons who acquire UK nationality subsequent to the date of committing any alleged offence abroad may become criminally liable even if the relevant acts were not a crime in the country in which they took place.

193. Professor Gerard Maher of the University of Edinburgh Law School identified another “possible anomaly” in relation to residency. As noted above, the term used in the provisions to be inserted into the 2009 Act is “habitual residency” whereas in the already existing provisions in the 2009 Act implementing obligations under the Lanzarote Convention the reference is solely to “residency”. This was not being amended by the Bill. Professor Maher explained that the two terms have different meanings under private international law and queried why two different drafting approaches were being taken. 198

194. We note that when we sought to raise questions around the issue of the residency of the accused with the police and Crown Office representatives in oral evidence, some uncertainty was evident, for instance as to whether the provisions would have retroactive effect. (Professor Chalmers told us, for reasons outlined earlier, that the Bill had effectively created a form of retroactivity in this narrow area by accident, because of the way it had defined “habitually resident”.) There also appeared to be a view that the Bill would enable a general joining together of related criminal charges occurring in Scotland and in the rest of the UK on a single libel. 199 The Bill does not go this far; it only applies to child sexual offences.

195. When he gave evidence to us in person, Professor Chalmers acknowledged that the prospect of any individual falling foul of the loophole he appeared to have identified was “extremely unlikely” 200 because the relevant Scots and English (and, we presume, Northern Irish) criminal law is, in fact, very similar. This was taken up by the Cabinet Secretary when we questioned him on this issue. He described Professor Chalmers’ comments as “largely a theoretical point rather than a practical issue”. However, he undertook to consider the matter more and reflect on whether an amendment was necessary. 201 The Committee notes Professor Chalmers’ view that, if there is a problem, the clearest solution would simply be to remove the words in the definition of “habitual resident of Scotland” that enable residency to be acquired subsequent to the acts that are the subject of the criminal charge.

196. The Committee welcomes provisions in the Bill to extend the jurisdiction of the Scottish courts to include sexual offences against children committed in the rest of the UK. The Committee notes the potential benefit to the complainer and to witnesses in making it possible for multiple offences of a similar nature occurring in Scotland and elsewhere in the UK to be prosecuted on a single charge. We do, however, expect that these provisions would only be used where there appears to be a clear public interest in the Scottish courts assuming jurisdiction.
197. We invite the Scottish Government to note and respond to evidence expressing some concerns about the appropriateness of the definition of Scottish “residency” in the Bill. The Committee also seeks from the Scottish Government clarification as to the policy behind the requirement on Scottish prosecutors to “consult” the relevant Director of Public Prosecutions before proceeding with the prosecution.

Sexual harm prevention orders

198. Sections 9 to 38 of the Bill make various reforms in relation to what the Policy Memorandum accompanying the Bill summarises as “the existing system of civil orders available to protect communities from those who may commit sex offences”. The Bill will abolish three types of civil order available under existing legislation:

- sexual offences prevention orders (SOPOs);
- foreign travel orders (FTOs); and
- risk of sexual harm orders (RSHOs).

199. It will replace these with two new types of civil order:

- sexual harm prevention orders (SHPOs), to replace SOPOs, and
- sexual risk orders (SROs) to replace RSHOs.

200. Bans on foreign travel may be imposed under either of the new orders. (FTOs are accordingly also abolished.)

The Scottish Government case for the new orders

201. Provision for these new civil orders takes up the bulk of the entire Bill. Comment on them in the Policy Memorandum is short. In fairness, much of the provision for the new orders is relatively technical, relating to matters such as cross-border and procedural issues (appeals, etc), and the consequences of breaching either order. Submissions to the Committee generally avoided much comment on the detail of the provisions. However, the Committee would have found it helpful if the Memorandum (which failing, the Explanatory Notes) had gone into more detail about the most significant differences between the current system and the new one, as well as the key differences between SHPOs and SROs. (We acknowledge the assistance of the Faculty of Advocate’s written submission in particular in helping us come to a more informed view on these issues.) It is our understanding that one of the key differences between the two orders is that the former is granted following a criminal trial during which it is established that the accused committed a sexual crime, or was found to have committed the relevant acts but to
be unfit to plead, whereas an SRO can be granted in the absence of such a criminal finding.

202. The Policy Memorandum does explain that the current system of civil orders is considered to be not as effective as it ought to be. It reports concerns, from a variety of sources, about the inflexibility and narrow application of the three types of order (or their nearest equivalent south of the border), and the fear that they are not helping protect the public as well as they should.\(^\text{203}\)

203. Judging by written evidence provided to us by Police Scotland, the problem, such as it is, with the current system is not that courts are refusing applications – the success rate is in the region of 100% – but that insufficient applications are being made.\(^\text{204}\) That may of course be because the police and other relevant agencies, working within the confines of the current law, are only putting before the courts applications that they know have a very good prospect of being agreed to, although we note evidence from an organisation working with abusers that, in their view, RSHOs have been “underused”.\(^\text{205}\) The Children’s Commissioner, Tam Baillie, told us that there were in the region of 20 RSHOs in force in Scotland, which he considered to be too low.\(^\text{206}\) The Committee observes that it is difficult to assess meaningfully what would be the “right” number of orders to have in place in Scotland to protect the public from individuals who have not been convicted of a sexual offence but may be at risk of causing sexual harm.

204. The Memorandum notes that a similar debate took place in England and Wales, leading to amending provisions in the Anti-social Behaviour, Crime and Policing Act 2014. These abolished SOPOs, FTOs and RSHOs in England and Wales, replacing them with SHPOs and SROs. The Memorandum explains that—

The new orders have a lower risk requirement than the previous orders. The existing test of serious sexual harm will be \([\text{sic}\text{,}207]\) replaced with a test of “risk of sexual harm”. Both orders can also be used to manage risk against adults and vulnerable adults abroad, as well as children. In addition, their remit is wider, enabling, for example, foreign travel restrictions to be applied under either order. Again, the aim of streamlining the orders was to provide the police and practitioners with greater clarity and flexibility.\(^\text{208}\)

205. The Memorandum goes on to state that the Bill “makes largely equivalent provision” for SHPOs in Scotland, and also for SROs, which will replace RSHOs. It explains that, as with the recent reforms in England and Wales, the intention is to widen the applicability of the orders compared to their predecessors. Three examples given are that—

- the orders may be used to manage risk to adults as well as to children;
- foreign travel restrictions may be imposed under either order;
the test of protection from “serious sexual harm” in existing orders is replaced with a test of being necessary to protect a person from “sexual harm”.209

206. We are not clear, from the terms of the Policy Memorandum alone, whether the Scottish Government considers this an exhaustive list of the main changes being made under the Bill or whether there are other significant differences that should be brought to the Parliament’s attention.

207. The Committee notes evidence from Police Scotland that, following the introduction of the new orders south of the border, there has been in the region of a 3.5-fold increase in the number of SROs and interim SROs granted, compared to the orders they replaced.210

Alternative approaches and consultation

208. The discussion on alternative approaches in the Policy Memorandum is short. The main advantage given for the proposed changes is that it will restore the “parallel regime for sex offenders [sic] north and south of the border”, which had been in existence for many years prior to the recent UK Government reforms.212

209. The reforms in sections 9 to 38 are the only significant reforms in the Bill which were not consulted upon in Equally Safe. The Policy Memorandum notes that the policy was developed in consultation with Police Scotland and that “aspects of these measures” were included in the Scottish Government’s National Action Plan to Tackle Child Sexual Exploitation.213 In other words, there does not appear to have been extensive pre-legislative consultation on these proposals.

Evidence on the proposals

210. The proposed reforms did not generally attract much comment in written submissions to the Committee. Support of a general nature was expressed in a small number of submissions.214 Barnardo’s Scotland welcomed the proposed changes on the basis that the orders that the Bill would repeal “have been little used in Scotland”. Barnardo’s stated that two of the main changes proposed under the Bill – reducing the requirement to lead evidence of two prior acts of a sexual nature to just one, and extending the scope of protection under the order to adults – should ensure that more applications are granted for the new orders.

211. Police Scotland’s submission raised a number of points in relation to the two new orders, largely of a technical or operational nature, which the Scottish Government may wish to consider further. We note in particular comments on the importance of ensuring that information on individuals made subject to SROs is integrated into multi-agency risk assessment. (Police Scotland commented that such arrangements do not currently exist in relation to individuals subject to RSHOs, which SROs will replace.)
Fairness of the proposals and ECHR considerations

212. Organisations working to help abusers address their behaviour expressed some concern about the new provisions, in particular SROs, which enable restrictions to be imposed on individual liberties in the absence of any finding of criminal guilt. They sought assurances that sufficient checks and balances were set out in the legislation. Further detailed comment on sections 9 to 38 came in three submissions: from the Law Society of Scotland; from the Faculty of Advocates; and jointly from four academics at the University of Edinburgh Law School (for the purposes of this discussion “the academics”). We set out their main concerns raised below:

213. **Standard of proof:** The Law Society expressed concern that the standard of proof in determining whether to grant either type of order is not expressly set out in the Bill. The academics said that the test set out in the Bill should be that the sheriff is satisfied beyond a reasonable doubt (and, in the case of an SHPO, on the basis of criminal findings). This followed the general point made in their submission that “since these orders make criminal convictions possible, their imposition should be subject to relatively strict procedural protections”, in order to ensure compatibility with both the spirit and the letter of human rights law.

214. **Right to be heard or make representations:** the Faculty noted that the Bill appeared to be silent on whether a person against whom an SRO was being sought would have a right to be heard or otherwise to make representations in court before an order was granted. The Faculty described this as “a matter of concern” given what it saw as the low threshold for granting an SRO in the first place. The Faculty also queried why the Bill appeared not to allow a right to an oral hearing in the case of an application for variation, renewal or discharge of either type of order. The Law Society queried whether, in the case of an application for either type of order, the person had a right to legal representation.

215. **Duration of orders:** The Law Society queried why SHPOs and SROs are not permitted to be shorter than, respectively, 5 years and 2 years in duration, saying that the length of the order should be at the discretion of the court. The Faculty of Advocates said that these provisions appeared “arbitrary”, and again could potentially infringe Articles 5 (right to liberty) and 8 (right to respect for private and family life) of the European Convention on Human Rights.

216. **Interim orders:** The Bill allows courts to grant interim SHPOs or SROs. The Faculty of Advocates queried the test set out in the Bill: that an interim order may be granted “if the sheriff considers it just to do so”. The Faculty said that the wording was unusual and that it was not clear how the courts would apply it. The Law Society made a similar point. The Faculty also noted that provision was not made for a maximum length of an interim order.

217. **SROs: nature of the test to be applied:** Under section 26 of the Bill, an SRO may be granted where the court is satisfied that a person has “done an act of a sexual nature as a result of which it is necessary to make such an order” in order to
protect the public from harm or to protect children or vulnerable adults outside of the UK from harm. “Harm” is defined in section 25 as “physical or psychological harm caused by the person doing an act of a sexual nature”. The Faculty of Advocates noted that the requirement was only for evidence of one prior “act of a sexual nature”, rather than two or more for RSHOs, which they will replace. The Faculty queried the meaning of “act of a sexual nature”, noting that it was not defined, and was not a term consistent with existing tests applied by the Scottish courts in relation to broadly similar matters. This led the Faculty to raise concerns in terms of Articles 5 and 8 of the ECHR, noting that—

…the possibility of unlimited applications for renewal [of an SRO] gives rise to a risk that an individual who has never committed an offence may end up being subject to a sexual risk order for life.”

218. The academics remarked that—

Interpreted literally, the definition of harm in section 25 is absurdly broad: the relevant harms need not have any connection whatsoever to sexual offending. Therefore SROs could in theory be used to threaten criminal sanctions against people who are not deemed to pose any risk of sexual behaviour.”

219. The point was taken further, in oral evidence, by Professor Chalmers of Glasgow University who observed that it appeared to be possible under the Bill to take “coercive measures” (ie impose an SRO) in respect of conduct that is “entirely lawful”. He described this as “problematic”, whilst acknowledging that the procedure was a civil one and that it was not for civil courts to determine guilt or innocence of crimes.217

220. Offence of breach of order: The Faculty queried why, in cases of breach of either order (a criminal offence), sentencing options are limited to a fine or prison sentence, and do not, for instance, include community payback orders. The Faculty said that this would restrict the opportunity for rehabilitation.

221. The written submission from the Scottish Human Rights Commission included a discussion, of a relatively general nature, of matters to be considered in coming to a view on whether the provisions on SHPOs and SROs in the Bill were consistent with human rights law. The submission noted that the Article 8 and 10 (freedom of expression) rights are qualified and not absolute, and that interference with them can be permitted, provided it is proportionate and legitimate. In this connection, it could be legitimate to restrict an individual’s Article 8 rights if (a) this is done in order to protect the rights and freedoms of others, and (b) there appears to be no alternative, and less intrusive, method of achieving the same outcome. The Commission concluded that—

imposed appropriately in accordance with the Bill and the human rights principles set out above, the civil orders provided for in the Bill can strike
the correct balance between the rights of members of the public and the rights of the individual concerned. Notwithstanding the safeguards already present, the Commission believes that the Bill could be further strengthened by including specific references to proportionality and the strict necessity test set out above.

222. In oral evidence, the SHRC representative, Eleanor Deeming, explained that “the real issue in terms of compliance with human rights law is how the orders are imposed in practice” rather than anything specifically in the Bill. However, she did single out one specific concern in relation to the Bill’s silence on a person’s right to make representations to the court before an SRO is made. She queried whether this was compatible with Article 6 (the right to a fair trial, including the determination of civil rights, and a public hearing).\(^{218}\)

223. Written evidence from Lord Carloway, the then Lord Justice Clerk, stated that—

> RHSOs are currently sought by way of summary application and one can perhaps anticipate that that procedure will be replicated if the SRO provisions of the Bill become law. That, however, will be a matter for the Scottish Civil Justice Council which is responsible for civil court rules.\(^{219}\)

224. The Cabinet Secretary told us that he understood concerns about equity that had been raised in relation to the fact that an SRO could be granted against a person who has not committed a crime, but asked the Committee to be mindful that the order is intended to be “primarily preventative in nature”. A sheriff considering whether to grant an order would have to consider the evidence presented and decide whether the burden of proof had been met before granting an order. He considered this, and other procedural requirements laid down in the Bill, to be a sufficient safeguard. On the question of whether individuals would have a right to make representations to the court before an order against them could be granted, the Cabinet Secretary’s remarks indicated that that would be at the discretion of the sheriff. Pressed further, he indicated that the “defender can have an oral hearing in the form of a plea in mitigation”.\(^{220}\) We note that a plea in mitigation comes following a finding of guilt in a criminal trial.

225. The Committee broadly welcomes provision in the Bill reforming the system of civil orders available to reduce the risk of individuals committing sexual offences, noting some evidence that orders may currently be being underused. We note that the provisions have been introduced without full consultation and that a number of concerns about detailed but sometimes important aspects of the reforms have arisen in evidence. These have arisen particularly in relation to proposed new sexual risk orders, which could be imposed without evidence of criminal wrong-doing.

226. We invite the Scottish Government to respond to evidence suggesting that the criteria for imposing an SRO appear to be quite broad and that the right of the
person against whom the order is being sought to make representations to the court should be made expressly clear. We also invite the Scottish Government to comment on evidence that there should be more flexibility set out in the Bill as to the duration of the new orders and more clarity as to the reasons for granting interim orders.

General principles

227. The Committee supports the general principles of the Bill. The Committee considers that the case for agreeing to the six main reforms made by the Bill is well supported by the evidence.

228. A clear majority of Committee members support proposals for statutory jury directions in sexual offence cases. Others do not.

229. There is also some scepticism as to whether proposed reforms in relation to non-harassment orders will be practicable.

230. Some detailed aspects of the proposed new offence of disclosure of an intimate photograph or film or of the new civil orders to prevent sexual harm might merit careful examination to ensure that they achieve the right balance.

231. We expect discussions around all these matters to continue at Stage 2.

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1 Abusive Behaviour and Sexual Harm (Scotland) Bill, Policy Memorandum, paragraph 2
2 George Eckton, written submission; White Ribbon Campaign, written submission
3 George Eckton, written submission; White Ribbon Campaign, written submission
4 CARE for Scotland, written submission; Women’s Support Project, written submission
5 This includes a statement by Lord Carloway, which he was unable to read out owing to time constraints. Lord Carloway helpfully agreed to the Committee adopting the statement as a written submission. We also received supplementary submissions from individuals or organisations that had provided written evidence.
6 Policy Memorandum, paragraph 17
7 Abused Men in Scotland, written submission
8 Scottish Women’s Aid, written submission
9 Eg Victim Support Scotland, written submission
10 Justice Committee, Official Report, 5 January 2016, col. 46
11 Abigail Candelas de la Ossa, written submission; Action on Elder Abuse Scotland, written submission
12 Eg Highland Violence Against Women Partnership, written submission; Abused Men in Scotland, written submission
13 Justice Committee, Official Report, 17 November 2015, col. 28
14 Eg Scottish Women’s Aid, written submission
15 Policy Memorandum, paragraph 13
16 Policy Memorandum, paragraph 16
17 Justice Committee, Official Report, 5 January 2016, col. 46
18 Policy Memorandum, paragraphs 18-19
ie the mental element of the offence. Except where it is provided by statute that an offence is a strict liability offence, all offences must contain a mental element, which must be proven by the Crown, along with the actus reus (the criminal act itself)
65 Justice Committee, Official Report, 17 November 2015, col. 39
66 Clare McGlynn and Erika Rackley, written submission
67 Justice Committee, Official Report, 17 November 2015, col. 61
69 Justice Committee, Official Report, 17 November 2015, col. 42
70 Justice Committee, Official Report, 24 November 2015, col. 19
71 James Chalmers, written submission
72 Justice Committee, Official Report, 17 November 2015, col. 62
73 Policy Memorandum, paragraph 34
74 eg Stop It Now Scotland, written submission; Zero Tolerance, written submission; National Organisation for the Treatment of Abusers, written submission; Barnardo’s Scotland, written submission
75 National Organisation for the Treatment of Abusers, written submission
76 Law Society of Scotland, written submission
77 Children 1st
78 Justice Committee, Official Report, 24 November 2015, col. 15
79 Justice Committee, Official Report, 17 November 2015, col. 64
80 Justice Committee, Official Report, 24 November 2015, col. 21-22
81 Justice Committee, Official Report, 5 January 2016, col. 43
82 Policy Memorandum, paragraph 30
83 eg Clare McGlynn, Erika Rackley, written submission; Professor James Chalmers, written evidence
84 eg Campbell, Cornford, Cowan, Kennedy, joint written submission
85 eg Police Scotland, written submission; Liz Campbell, Andrew Cornford, Sharon Cowan, Chloe Kennedy, (Edinburgh Law School) joint written submission
86 Scottish Human Rights Commission, written submission
87 Professor Lillian Edwards, written submission
88 Faculty of Advocates, written submission
89 per Michael Meehan, Justice Committee, Official Report, 17 November 2015, col. 41
90 Women’s Support Project, written submission
91 James Chalmers, written submission
92 eg Law Society of Scotland, written submission; LGBT Youth Scotland, written submission; Victim Support Scotland, written submission; Per Professor Maher, Justice Committee, Official Report, 17 November 2015, col. 62
93 Mental Welfare Commission Scotland, written submission
94 Scottish Women’s Aid written submission
95 Scottish Women’s Aid, written submission
96 Scottish Women’s Aid, written submission; Women’s Support Project, written submission
97 Lillian Edwards, written submission
98 Justice Committee, Official Report, 5 January 2016, col. 43-44
99 Policy Memorandum, paragraphs 47-49
100 eg Mental Welfare Commission for Scotland, written submission
101 eg Scottish Women’s Convention, written submission; Highland Violence Against Women Partnership, written submission; Rape Crisis Scotland, written submission; Abused Men in Scotland, written submission; Zero Tolerance, written submission, Zero Tolerance, written submission; Scottish Women’s Aid, written submission; COPFS written submission
102 Police Scotland, written submission
103 eg Law Society of Scotland, written submission; Faculty of Advocates, written submission
104 Mental Welfare Commission for Scotland, written submission
105 Law Society of Scotland, written submission
106 Scottish Human Rights Commission, supplementary written submission
107 Policy Memorandum, paragraph 51
109 Policy Memorandum, paragraphs 57-59
110 Policy Memorandum, paragraph 62
111 eg per Sheriff Liddle, Justice Committee, Official Report, 8 December 2015, col. 36 and 45
112 Explanatory Notes, paragraphs 41 and 45
113 Liz Campbell, Andrew Cornford, Sharon Cowan, Chloe Kennedy (Edinburgh University Law School), joint written submission; Victim Support Scotland, written submission
114 Justice Committee, Official Report, 8 December 2015, col. 39
115 Justice Committee, Official Report, 5 January 2016, col. 31, 32 and 34
Justice Committee
Stage 1 Report on the Abusive Behaviour and Sexual Harm (Scotland) Bill, 2nd Report, 2016 (Session 4)

116 Justice Committee, Official Report, 5 January 2016, col. 33
117 per Professor Chalmers, Justice Committee, Official Report, 17 November 2015, col. 58
118 Justice Committee, Official Report, 8 December 2015, col. 50
119 eg Police Scotland written submission; Rape Crisis Scotland, written submission; Liz Campbell, Andrew Cornford, Sharon Cowan, Chloe Kennedy (Edinburgh University Law School), joint written submission; Women’s Support Project, written submission; Abigail Candelas de la Ossa, written submission; Action on Elder Abuse Scotland, written submission
120 Justice Committee, Official Report, 5 January 2016, col. 35
121 Policy Memorandum, paragraph 66
122 Justice Committee, Official Report, 17 November 2015, col. 54
123 eg Per Michael Meehan, Justice Committee, Official Report, 17 November 2015, col. 24-25]
124 Abigail Candelas de la Ossa, written submission
125 Justice Committee, Official Report, 17 November 2015, col. 21
126 Justice Committee, Official Report, 8 December 2015, col. 38
127 eg Scottish Women’s Convention, written submission; Highland Violence Against Women Partnership, written submission; Abigail Candelas de la Ossa, written submission; Zero Tolerance, written submission; Scottish Women’s Aid, written submission; Children 1s, written submission; Action on Elder Abuse Scotland, written submission
128 per Sandy Brindley, Justice Committee, Official Report, 24 November 2015, col. 3
129 Stonewall Scotland, written submission
130 Justice Committee, Official Report, 24 November 2015, col. 3
131 eg Zero Tolerance, written submission
132 Justice Committee, Official Report, 17 November 2015, col. 18
133 Justice Committee, Official Report, 17 November 2015, col. 25
134 Policy Memorandum, paragraphs 57-59
135 Louise Ellison and Vanessa Munro, written submission
136 Louise Ellison and Vanessa Munro, written submission
137 Justice Committee, Official Report, 17 November 2015, col. 52
138 eg Rape Crisis Scotland, written evidence
139 per Sheriff Liddle, Justice Committee, Official Report, 8 December 2015, col. 38
140 Justice Committee, Official Report, 17 November 2015, col. 26
141 Justice Committee, Official Report, 17 November 2015, col. 52
142 Justice Committee, Official Report, 8 September 2015, col. 16
143 Justice Committee, Official Report, 5 January 2016, col. 39
144 Justice Committee, Official Report, 8 December 2015, col. 49-50
145 Justice Committee, Official Report, 17 November 2015, col. 58
146 Justice Committee, Official Report, 17 November 2015, col. 59
147 Justice Committee, Official Report, 5 January 2016, col. 39
148 eg Highland Violence Against Women Partnership, written submission; East and Midlothian Public Protection Committee, written submission; Barnardo’s Scotland, written submission
149 Justice Committee, Official Report, 17 November 2015, col. 19-20
150 Lord Carloway, written submission
152 Policy Memorandum, paragraph 73
153 Justice Committee, Official Report, 8 December 2015, col. 46-47
154 Justice Committee, Official Report, 5 January 2016, col. 32
155 eg Abigail Candelas de la Ossa, written submission; Zero Tolerance, written submission
156 Justice Committee, Official Report, 24 November 2015, col. 2
157 Scottish Human Rights Commission, written submission
159 Justice Committee, Official Report, 8 December 2015, col. 41
160 Faculty of Advocates, written submission
161 Justice Committee, Official Report, 8 December 2015, col. 39
162 Justice Committee, Official Report, 5 January 2016, col 31
163 Liz Campbell, Andrew Cornford, Sharon Cowan, Chloe Kennedy (Edinburgh University Law School), joint written submission
164 Faculty of Advocates, written submission
166 Policy Memorandum, paragraph 67
The Moorov doctrine applies where the accused is charged with two or more separate offences resting on similar facts, and there is only one piece of identification for each of the alleged crimes. Depending on the precise circumstances, the court may deem that there is corroboration.

The Committee understands that SHPOs and SROs have been available in England and Wales since March 2015.
216 Dr Liz Campbell, Dr Andrew Cornford, Professor Sharon Cowan, Dr Chloe Kennedy, joint written submission.
217 Justice Committee, Official Report, 17 November 2015, col. 69
218 Justice Committee, Official Report, 24 November 2015, col. 25
219 Lord Carloway supplementary written submission
Annexe A: Extracts from the minutes of the Justice Committee and associated written and supplementary evidence

29th Meeting, 2015 (Session 4) Tuesday 27 October 2015

Abusive Behaviour and Sexual Harm (Scotland) Bill (in private): The Committee considered its approach to the scrutiny of the Bill at Stage 1, and agreed to invite witnesses and to further consider its approach at a future meeting.

30th Meeting, 2015 (Session 4) Tuesday 3 November 2015

Work programme (in private): The Committee considered its work programme and agreed [...] (c) further witnesses for its forthcoming evidence sessions at Stage 1 of the Abusive Behaviour and Sexual Harm (Scotland) Bill; and (d) to invite victims of abusive behaviour and sexual harm to meet Committee members informally to help inform Stage 1 scrutiny of that Bill.

31st Meeting, 2015 (Session 4) Tuesday 10 November 2015

Abusive Behaviour and Sexual Harm (Scotland) Bill - witness expenses: The Committee agreed to delegate to the Convener responsibility for arranging for the SPCB to pay, under Rule 12.4.3, any expenses of witnesses on the Bill.

32nd Meeting, 2015 (Session 4) Tuesday 17 November 2015

Abusive Behaviour and Sexual Harm (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Catherine Dyer, Crown Agent and Chief Executive, Crown Office and Procurator Fiscal Service;
Michael Meehan, Faculty of Advocates;
Grazia Robertson, Member of the Criminal Law Committee, Law Society of Scotland;
Detective Chief Superintendent Lesley Boal, Police Scotland;
James Chalmers, Regius Professor of Law, University of Glasgow;
Gerard Maher, Professor of Criminal Law, University of Edinburgh;
Clare McGlynn, Professor of Law, Durham University;
Vanessa Munro, Professor of Law and Society, University of Leicester.

Roderick Campbell declared an interest as a member of the Faculty of Advocates.

Written evidence

Crown Office and Procurator Fiscal Service
Faculty of Advocates (202KB pdf)
Law Society of Scotland
Police Scotland
Professor James Chalmers, University of Glasgow
Professor Louise Ellison, University of Leeds and Professor Vanessa Munro, University of Leicester
Professor Clare McGlynn, Durham University and Professor Erika Rackley, University of Birmingham

33rd Meeting, 2015 (Session 4) Tuesday 24 November 2015

Abusive Behaviour and Sexual Harm (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Nick Smithers, National Development Officer, Abused Men in Scotland;
Sandy Brindley, National Co-ordinator, Rape Crisis Scotland;
Louise Johnson, National Worker - Legal Issues, Scottish Women’s Aid;
Nicola Merrin, Policy Officer, Victim Support Scotland;
Tam Baillie, Children and Young People’s Commissioner Scotland;
Eleanor Deeming, Legal Officer, Scottish Human Rights Commission.

Abusive Behaviour and Sexual Harm (Scotland) Bill (in private): The Committee further considered its approach to the scrutiny of the Bill at Stage 1 and agreed to take no further oral evidence other than from those already invited to future meetings.

Written evidence

Abused Men in Scotland
Rape Crisis Scotland
Scottish Human Rights Commission
Scottish Women’s Aid
Victim Support Scotland

Supplementary written evidence

Scottish Human Rights Commission (supplementary submission)
35th Meeting, 2015 (Session 4) Tuesday 8 December 2015

Abusive Behaviour and Sexual Harm (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Rt Hon Lord Carloway, Lord Justice Clerk;
Sheriff Gordon Liddle, Vice President, Sheriffs' Association.

Written evidence

Lord Carloway, The Lord Justice Clerk

Supplementary written evidence

Lord Carloway, The Lord Justice Clerk (supplementary submission)

36th Meeting, 2015 (Session 4) Tuesday 15 December 2015

Work programme (in private): The Committee considered its work programme and agreed to [. . . ] (e) take evidence from the Cabinet Secretary for Justice on the Abusive Behaviour and Sexual Harm (Scotland) Bill on 5 January 2016.

1st Meeting, 2016 (Session 4) Tuesday 5 January 2016

Abusive Behaviour and Sexual Harm (Scotland) Bill: The Committee took evidence on the Bill at Stage 1 from—
Michael Matheson, Cabinet Secretary for Justice, Scottish Government.

Gil Paterson indicated that he was a former member of the board of Rape Crisis Scotland.
2nd Meeting, 2016 (Session 4) Tuesday 12 January 2016

Abusive Behaviour and Sexual Harm (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed to continue consideration of its draft report at its next meeting.

3rd Meeting, 2016 (Session 4) Tuesday 19 January 2016

Abusive Behaviour and Sexual Harm (Scotland) Bill (in private): The Committee considered a draft Stage 1 report. Various changes were agreed to and the Committee agreed its report to the Parliament.
Annexe B: List of other written evidence

Abigail Candelas de la Ossa, Queen Mary University of London
Action on Elder Abuse Scotland
Barnardo's Scotland
CARE for Scotland
Children 1st
Child's Eye Line UK
Dr Liz Campbell, Dr Andrew Cornford, Professor Sharon Cowan and Dr Chloe Kennedy, University of Edinburgh
East Lothian and Midlothian Public Protection Committee
George Eckton
Highland Violence Against Women Partnership
LGBT Youth Scotland
Lilian Edwards, Professor of E-Governance, University of Strathclyde
Mental Welfare Commission for Scotland
National Organisation for the Treatment of Abusers Scotland
Scottish Women's Convention
Stirling Council/Stirling Gender Based Violence Partnership
Stonewall Scotland
Stop It Now!
White Ribbon Campaign UK
Women's Support Project
Zero Tolerance
Annexe C

Note by the clerk of private meeting with three victims of domestic abuse, Committee Room 1, the Scottish Parliament, 24 November 2015

Introduction
At a private informal meeting at the Scottish Parliament on 24 November 2015, the Justice Committee heard from three individuals with personal experience of sexual, emotional or physical abuse at the hand of their former partners. Victim Support Scotland helped facilitate their appearance. Names have been changed.

Sarah had experienced domestic abuse through two ex-partners. She said that one ex-partner used coercive and controlling behaviour during and after their relationship. Another ex-partner, father to her other children, was convicted of attempted rape against her, and of sexual abuse of children. This had required Sarah to testify against him in court. He had been given a custodial sentence of several years.

David had been in a relationship which he described as becoming incrementally more coercive and controlling. It had culminated in his ex-partner physically attacking him shortly after their relationship ended. He said this was probably her only clearly criminal act against him. He had not involved the police. It was only after the relationship had ended that he fully realised that he had been in an abusive relationship and had sought help.

Ruth’s ex-partner, the father of her two young children, had been controlling during their relationship; for instance, trying to break up Ruth’s close relationship with her mother and father. He had gone on to commit several offences against her including breach of the peace, housebreaking, threatening behaviour and stalking. He had breached his bail conditions repeatedly. A civil interdict with a power of arrest had failed to stop him approaching or threatening her. Ruth had recently obtained a civil non-harassment order and her ex-partner had “gone quiet” but there had been similar episodes in the past that had not lasted.

Jury directions relating to sexual offences
A requirement under the Bill to provide directions to the jury concerning delay in reporting a serious sexual offence was welcomed. Sarah said that it was understandable for victims to delay reporting a sexual attack. Victims have to think about how reporting a sexual attack might affect other people, including children of the abuser. Victims also might not want to go to the police because they thought they were the only victim but might change their mind when they discover otherwise. People in general seem to have preconceived ideas about how women and children “ought” to react to sexual abuse which do not reflect reality.
Cross-border issues
Proposals to try to deal with offenders who commit offences against children in both Scotland and another UK jurisdiction were also welcomed. Sarah said abuse within her family had started in England. But this only came to light later, when the family was in Scotland. A conviction was ultimately secured, but only in relation to the abuse in Scotland. Whilst Sarah was broadly content with the outcome, she did feel that the trial process had been devalued by the exclusion of the earlier offences.

Children and domestic abuse
It was agreed that abusers tend to use children as weapons to gain achieve or maintain control both during the lifetime of a relationship and afterwards. For instance, Sarah said her ex-partner had used disputes over custody of their child as a weapon to control where she lived and went. Ruth said she could see nothing in the Bill that would give her young children greater protection.

Courts’ perceived failure to take domestic abuse seriously
There was agreement that the courts often let down victims of domestic abuse. Ruth praised the help she had had from police. However, the courts were another story. They treated her ex-partner’s multiple breaches of bail orders and interdicts as trivial, failing to see them as part of a pattern of deliberate and intimidatory domestic abuse. She said her ex-partner had never received a custodial sentence and had not paid any of his fines. When new bail conditions were set, the courts did not appear to take into account her needs, or her children’s needs. Most cases involving her ex-partner had been dealt with by the same sheriff and prosecutor but this had not helped. A recent charge of stalking against her ex-partner had to be dropped because he decided to defend himself, and she did not feel able to face him in court. Ruth described herself as “surviving” rather than living: every trip out of the house was traumatic and she did not even feel safe at home, which he had broken into late at night. The court had not even recognised this as a serious incident.

Tackling domestic abuse; how should the law respond?
There were some doubts as to whether there should be a new criminal offence of domestic abuse to cover controlling or coercive behaviour. David said it was more important to make sure that when victims broke the current law there were firm consequences. This was where victims were currently being let down. He also said that there should be more of a focus on ensuring that victims are supported rather than on creating new laws to punish abusers. Ruth agreed. She said that the more abusers get off with things the stronger they become. She said that that information, education and support were what victims most needed, particularly when they were actually still in an abusive relationship. There was agreement that it was in the nature of controlling relationships that they are intense, with the victim tending to excuse their partner’s manipulative behaviour, until the spell of the relationship is finally broken. In this situation, victims have a false consciousness that might prevent them getting the help they need at the right time.
Online harassment or abuse
Ruth had been the victim of a prolonged campaign of online harassment by her ex-partner, forcing her eventually to take down her profile, depriving her of an important part of her life. It was agreed that social media provides a good opportunity for abuse, because abusers by definition tend to be manipulative, and the online world is an environment where they can play to this strength. The one conviction for stalking that had been secured against Ruth’s partner was in fact for online stalking. But this was unusual as in the past the court had thrown similar cases out. Generally, the court didn’t seem to know how to handle or prevent online abuse. Confiscating an abuser’s phone had been seen as a remedy but this would only work for a few days.