Justice Committee
Domestic Abuse (Scotland) Bill

Written submission from the Crown Office and Procurator Fiscal Service

1. Do you agree with the proposal in the Bill to create a new offence of abusive behaviour towards a person’s partner or ex-partner covering both physical violence and non-physical abuse?

COPFS supports the creation of the proposed new offence of a course of abusive behaviour towards a person’s partner or ex-partner which encompasses both physical and non-physical abuse.

Victims often suffer domestic abuse as an ongoing course of conduct and a pattern of a variety of abusive behaviours rather than isolated incidents of one type of abuse. The proposed offence will allow the totality of an accused’s abusive behaviour to be labelled within a single charge rather than artificially prosecuted as a series of distinct charges involving specific incidents and different ‘types’ of behaviour such as violence, threats, vandalism etc to be prosecuted under a variety of common law and statutory provisions.

The approach taken in defining the proposed offence recognises the underlying connection of a course of conduct involving different types of abusive behaviours and the cumulative impact this has on victims.

2. Do you consider that the proposed offence is needed to address a gap in the existing law which currently makes it difficult to prosecute some forms of domestic abuse?

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

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

3. Do you have any views on the definition of the offence, such as the requirement for a course of behaviour, the definition of abusive behaviour, or the defence that the behaviour was reasonable in all the circumstances?

The definition of abusive behaviour includes both conduct which is overtly abusive in that it is violent, threatening or intimidating and also conduct which can rightly be construed as abusive when the purpose or likely effect of the behaviour is examined. Such an approach is appropriate in the context of domestic abuse and recognises
the variety of ways in which a victim can be abused, many of which are bespoke to that victim’s circumstances and vulnerabilities.

There are a number of appropriate safeguards built into the proposed offence:

i. requirement for a course of behaviour involving at least two corroborated incidents;

ii. requirement that the behaviour must have been abusive as defined in the Bill;

iii. requirement that a reasonable person would consider the course of behaviour to be likely to cause the victim to suffer harm;

iv. requirement of mens rea of accused of intention or recklessness to cause the victim to suffer harm; and

v. the defence of reasonableness.

These safeguards ensure that the offence does not criminalise normal friction within a relationship.

4. The offence is restricted to abuse between partners and ex-partners. Do you agree with this approach? For example, during the Scottish Government’s consultation on a draft offence, concerns were raised that it did not properly reflect the impact of domestic abuse on children. The Scottish Government has sought to address this concern in the Bill, primarily by providing that the offence will be aggravated where it involves a child. Do you have any views on this aspect of the Bill?

The proposed offence has been designed to capture the nature, dynamics and consequences of domestic abuse in the context of a relationship or former relationship.

COPFS supports the application of the proposed offence to abuse between partners and ex-partners. This reflects the current operational definition of domestic abuse used by the police and prosecutors as well as the wider understanding of domestic abuse in the third sector. By restricting the definition to abuse between partners and ex-partners, the proposed offence will ensure a focus and clarity of approach in implementation. Existing legislation such as the Domestic Abuse (Scotland) Act 2011 and the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, similarly adopts a definition of domestic abuse that is restricted to abuse between partners and ex-partners.

Whilst there is no doubt that other familial abuse can be serious and involve significant and enduring consequences for victims, the dynamics of such abuse, and the risk of further offending, differ. Where criminality exists, this abuse will continue to be dealt with by prosecutors using existing common law and statutory offences.

Prosecutors acknowledge that domestic abuse can have a devastating impact on children. COPFS supports the inclusion of child aggravations within the Bill. This gives prominence and visibility to the experience of children and furthermore requires the court to take the aggravation into account when determining sentence.

5. Do you have any views on factors which might impact on the reporting, investigation and prosecution of the offence?
Domestic abuse remains chronically underreported in Scotland and there are a number of complex reasons for this.\(^1\) It is anticipated that the introduction of a bespoke offence will raise awareness and confidence in Scotland’s criminal justice system to effectively respond to victims of domestic abuse. It is expected that this will have a positive impact on the reporting of domestic abuse and encourage some victims to come forward where they previously would not have.

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

However, investigators and prosecutors have developed skills and expertise in the investigation and prosecution of crimes that are routinely committed in private outwith the presence of witnesses and where there are often no meaningful forensic opportunities to pursue. These skills are evidenced in the prosecution of domestic abuse, sexual offences (including historic allegations) and other offences such as the stalking offence under s.39 of the Criminal Justice and Licensing (Scotland) Act 2010. Police and prosecutors will apply skills and expertise developed in these areas to the robust investigation and prosecution of offences under the proposed legislation. Potential evidence may be available from a range of sources including friends and family who may not have directly witnessed the behaviour of the accused but may be well placed to give evidence on the ‘relevant effects’ this has had on the victim.

The recently re-launched Joint Protocol between Police Scotland and COPFS outlines the procedures and practices that will be followed in the investigation, reporting and prosecution of allegations involving domestic abuse. The protocol sets out the expectation of rigorous investigation to secure corroborated evidence in cases involving domestic abuse:  

6. *The Bill makes a number of reforms to criminal procedure, evidence and sentencing. For example, it would prohibit the accused in a domestic abuse case from personally conducting the defence. Do you agree with this prohibition?*

COPFS supports the prohibition on an accused from personally conducting their defence. Similar measures have been in place in relation to cases involving certain sexual offences and child witnesses under the age of twelve for a number of years\(^2\) and it is appropriate that this protection is also extended to victims of domestic abuse.

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\(^1\) The 2014/15 Scottish Crime and Justice Survey reported that of those who experienced partner abuse in last 12 months, only 19.5% told the police about the most recent or only incident.  
\(^2\) S.288C and S.288E of the Criminal Procedure (Scotland) Act 1995
Currently, provisions exist\(^3\) to allow prosecutors to apply to the court on a case by case basis to make an order prohibiting the accused from conducting their defence. The proposed reform would put the matter beyond doubt in any case involving domestic abuse and will reassure victims.

7. **The Bill would also require the court in a domestic abuse case to consider making a non-harassment order. What are your views on this approach?**

COPFS welcomes the proposed reform to require a court to consider making a non-harassment order in the circumstances set out in the Bill. Repeat victimisation is a significant feature of domestic abuse and victims often face a risk of re-offending. Non-harassment orders can offer ongoing protection to victims after the conclusion of criminal proceedings and the proposed reform ensures that consideration of such orders will become a matter of course in every case involving domestic abuse.

The provision only requires consideration to be given to making an order. This will place ongoing victim safety at the heart of sentencing without fettering the court’s ability to make an independent assessment of the facts and circumstances of each case to determine the appropriate sentence, including whether a non-harassment order should be made.

David Harvie
Crown Agent & Chief Executive
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\(^3\) S.288F of the Criminal Procedure (Scotland) Act 1995