Qu 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?

Introduction

Traditionally in the UK, the term ‘domestic violence’ has been used to distinguish from ordinary abuse and abuse which occurs in an intimate relationship. However, due to the changing opinions in society towards this type of abuse, Audrey Gillan highlights that the term domestic violence is no longer in use as it appears to signify a concern purely with violent behaviour, and is officially referred to as ‘domestic abuse’ because “verbal attack and controlling behaviour can be used to subjugate a victim to the perpetrator’s will.”

Our understanding of domestic abuse has evolved and consequently, this has prompted for a second look into the harm experienced by victims of domestic abuse. In particular, one form of behaviour that has been brought forward is coercive control. The prevention of domestic abuse is seen as a prime concern across most jurisdictions and the question of whether the coercive control in domestic abuse would be better captured in criminal offences has been raised. As a result, a significant focus of the Scottish Government’s consultation paper ‘Equally Safe – Reforming the Criminal law to address domestic abuse and sexual offences’ is the consideration of a specific offence of domestic abuse that incorporates coercive control.

What is Domestic Abuse?

To propose any sort of legal intervention in relation to domestic abuse, it is important to reflect upon the changing understandings of domestic abuse as the range of behaviour encompassed within the term has gradually expanded. It is from this that we then are able to distinguish what coercive control is.

Groves and Thomas highlight that until something is named and logically preceding, defined, it is impossible to speak about it. Legal definitions of domestic abuse have

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4 93% of respondents believe the existing criminal law does not provide the police and prosecutors with sufficient powers to investigate and prosecute perpetrators of domestic abuse.
5 Nicola Groves and Terry Thomas, Domestic Violence and Criminal Justice (Routledge 2014) 1.
shifted over the years and it wasn’t until the 1970’s that there was any recognition of domestic abuse as an issue that ought to be tackled by the legal system. Traditionally, terms such as ‘wife beating’ and ‘wife kicking’ were commonplace, yet a feminist campaigner of the time Frances Power Cobb argued that the term ‘wife beating’ did not reflect the severity of domestic abuse and preferred the term ‘wife torture’. In the 1970’s, the phrase ‘battered wife’ was popularly referred to but over time, this term has come to pass. Battering referred to only one form of violence – physical – and did not encompass psychological abuse. Therefore today, ‘domestic abuse’ is the term used in recognition of this and has been adopted to signify that abuse does not just occur between married couples.

**Psychological Abuse**

The World Health Organisation (WHO) defines violence between intimate partners broadly, as any behaviour within an intimate relationship that causes physical, psychological or sexual harm to those in the relationship; it includes: physical aggression, psychological abuse, forced intercourse and other forms of sexual coercion, as well as various controlling behaviours. This definition reflects the increasingly recognised versatile nature of intimate partner violence where physical abuse is just one part of the pattern of abusive behaviour that individuals may experience. When defining violence in this context, some researchers restrict themselves to physical or sexual violence. Whilst others restrict the violence to acts that only lead to demonstrable harm or injury or seek to study markers of victimization as a proxy to violence. Physical violence is generally a clear-cut behaviour; it is usually straightforward whether one has been hit. On the other hand, it is also increasingly becoming known that partners that have been physically abusive also will use psychological tactics to reinforce their control but what behaviours constitute psychological abuse has been unclear. For example, shouting and yelling are not uncommon in relationships, but identifying when raised voices and harsh words turn into psychological abuse is difficult. Psychological abuse includes re occurring criticism; verbal aggression; jealous behaviour and

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accusations of infidelity; threats of violence; threats to end the relationship; hostile withdrawal of affection and destroying property.

A victim of such psychological abuse is left in a ‘hostage-like’ state.\(^{13}\) This state of mind is known as the ‘Stockholm syndrome’\(^{14}\) which is a psychological response often observed in abducted hostages, in which the hostage displays signs of loyalty to the hostage taker, regardless of the danger or risk they find themselves in.\(^{15}\) Although this psychological response has been acknowledged, assessing the impact the behaviour has had on the recipient will be difficult until non-violent forms of controlling and coercive behaviour and their harm are even better understood by the public, victims and judiciary.

### A new offence in Scotland?

The issue of whether the criminal law should seek to distinguish between different forms of abuse according to the context in which it is perpetrated is a “thorny one”.\(^{16}\) There is the concern that the offence would sit at the bottom of the hierarchy of offences and will do so until physical harm is no longer seen as the most serious crime, resulting in a lesser sentence than is deserved. The degree of the harm caused and the degree of fault in the person causing it determine the current offences. However, having established that the status of the victim in the context of the relationship is not reflected in the current offences, this is a vital factor which a potential new offence could take into account.

Bettinson highlights that a focus on current and former intimate partner relationships has strengthened the collaboration between the police and the specialist support services to coordinate their responses\(^{17}\) and as a result, the potential operation of an offence restricted to partners or former partners will assist the police and COPFS to apply a new offence that is closely aligned with the Joint Protocol. The new law in England was introduced not only to criminalise infliction of psychological harm but to simultaneously address and improve police responses to domestic abuse. The Attorney General specifically stated that the offence was to “drive a culture change in the policing of domestic abuse” and change the perception that domestic abuse is not a serious crime.\(^{18}\) However, it could be said that this aim was diminished due to the expanded inclusion of family members whereas the exclusion of family members potentially within Scotland will avoid any overlap with child abuse offences.

American legal professor, Victor Tadros, is a firm believer in the creation of a specific offence for the betterment of society. He argues that a specific offence should be

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\(^{13}\) Vanessa Bettinson and Charlotte Bishop, ‘Is the creation of a discrete offence of coercive control necessary to combat domestic violence?’ NILQ 66(2) 179, 194.

\(^{14}\) The syndrome is named after the Norrmalmstorg robbery of the kreditbanken at Norrmalmstorg, Stockholm, Sweden in which the bank robbers held bank employees hostage from August 23 to August 28 1973. The victims became emotionally attached to their victimisers and eventually even defended their captors after they were freed from their six-day ordeal.

\(^{15}\) Philip Stevens, ‘Recent Trends in Explaining Abuse within Intimate Relationships’ 78 J. Crim. L. 2014 184, 188.


\(^{17}\) Vanessa Bettinson, ‘Criminalising coercive control in domestic violence cases: should Scotland follow the path of England & Wales’ Crim. L.R. 2016, 3, 165, 175.

created to identify the particular, distinctive kind of wrong. He believes that the intimacy of the relationship and the ongoing dynamics of domestic abuse diminish the freedom of the victim by limiting the range of options she has and her capacity in relation to available options:

“the wrong done through domestic violence is not just that the defendant denies the victim’s options, but also that he denies her the freedom to recognise and exploit the options that she has.”

Tadros goes onto argue that there has previously been a lack of recognition of this type of conduct in the criminal justice system and consequently has impacted any effort to police it. He suggests that a specific offence might improve this via the means of more effective investigation and prosecution of domestic abuse which will send out the message that domestic abuse is to be taken seriously. Although Nicola Padfield agrees that there is an issue with policing domestic abuse, she believes the solution is the need for training rather than a new criminal offence. Padfield highlights that due to the growing developments of domestic abuse, the difficulty to police it grows as it is more straightforward to deal with a visible injury as opposed to cases of coercive control with psychological abuse. Victims have gave examples of how the negative attitudes of some police officers had resulted in them losing trust and not being willing to report subsequent abuse to the police. Given the fact that Citizens Advice reported in December 2015 that they experienced a 24% increase in the number of people seeking help from the CABS for domestic abuse, including 3,000 victims of emotional abuse 900 victims of financial abuse, Padfield suggests victims of domestic abuse are struggling for support and more criminal offences is not the answer. She goes onto emphasise the importance of “earlier identification, intervention and prevention of domestic abuse by family members, neighbours and the police”.

In line with Padfield’s arguments, to further prevent domestic abuse we must eliminate the damaging stereotypes surrounding victims today. Victims are stereotyped as being female and the abuser being the male partner or ex-partner (stance taken by some authors used in this dissertation). This may be the case for the majority of domestic abuse cases, however cases of male victims abused by their female partner and cases occurring in same-sex relationships are often overlooked. Therefore, these victims are frightened to come forward in fear of not being believed. It is reasonable to assume that a change of attitude in society can help these victims more so than an offence.


21 Nicola Padfield, ‘Controlling or coercive behaviour in an intimate or family relationship’ (Crim. L.R. 2016, 3) 149, 150.
Qu 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?

Domestic abuse in Scotland

While there is no statutory criminal offence of ‘domestic abuse’ or statutory definition of what constitutes domestic abuse, in 2003, the then Scottish Executive’s strategy to address domestic abuse defined it as:

“Domestic abuse (as gender-based abuse), can be perpetrated by partners or ex-partners and can include
- physical abuse (assault and physical attack involving a range of behaviour);
- sexual abuse (acts which degrade and humiliate women and are perpetrated against their will, including rape) and mental and emotional abuse (such as threats, verbal abuse, racial abuse);
- withholding money and other types of controlling behaviour such as isolation from family or friends)”

Currently Police Scotland and the COPFS work to a nationally agreed definition of domestic abuse for the purpose of investigating and prosecuting such conduct. This definition, which is contained within their published Joint Protocol entitled, ‘In partnership challenging domestic abuse’ defines domestic abuse as:

“Any form of physical, sexual or mental and emotional abuse which might amount to criminal conduct and which takes place within the context of a relationship.”

“The relationship will be between partners (married, co-habiting, civil partnership or otherwise) or ex-partners. The abuse can be committed in the home or elsewhere.”

Both definitions recognise that ‘abuse’ is broader than physical assault and can encompass a range of other behaviour including ‘emotional’ abuse. However, Police Scotland and the Crown Office and Procurator Fiscal Service’s (COPFS) definition specifically confines itself to the criminal law and therefore creates difficulties for prosecutors trying to accommodate emotional and financial abuse within the range of offences that can be charged in domestic abuse cases in Scotland. Actual physical violence and threats of violence are much easier to fit within the scope of the current criminal law than emotional abuse, although there are some offences that can be used where the relationship has been mainly characterised by non-physical abuse.

Breach of the Peace

Figures from COPFS show that in 2014/2015 breach of the peace was the most common charge in domestic abuse cases, an increase in the number of convictions.

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rose 13% from 13,731 to 15,580 convictions. These figures for breach of the peace include the offences of “threatening and abusive behaviour” under the Criminal Justice and Licensing (Scotland) Act 2010 s. 38 and stalking under s. 39 of the Act. The common law breach of the peace offence is established when the defendant uses “conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community.” The conduct concerned is expensive as the courts have conceded that “a comprehensive definition which could cover all possible circumstances is neither possible nor desirable.” This judicial position may appear to be quite promising when capturing coercive control as it would include gestures, words or looks as forms of conduct. Whether the harm is considered alarming has been determined by the court in Smith v Donnelly to mean conduct that was something substantially greater than mere irritation, and must be genuinely alarming and disturbing when considered in its context, to any reasonable person. This was a reversal of earlier decisions which had accepted conduct that caused upset or disgust. This represents a step in the wrong direction as with regards to coercive control, ‘mere’ irritation may be enough to send a victim over the edge if you consider the context and the possibility of an ongoing pattern of behaviour causing psychological harm which this offence does not account for. In addition the decision emphasised the requirement that the conduct must also “threaten serious disturbance to the community” and realistically this public element is rarely present in cases where the harm occurs within the home, and outside the hearing of neighbours or family members. This public element was considered lacking in HM Advocate v Harris (No.2) where the court held that emails from the accused to the complainer alone could not form the basis of a charge of breach of the peace. The case of Hatcher v Harrower further emphasised the difficulty of applying the common law offence in domestic abuse cases on the basis that the public element was not present. In that case the court concluded that the complainer’s spouse had subjected her to verbal abuse and unreasonable behaviour within the home. However, this did not threaten the public or the community where the children were asleep upstairs. Ultimately, these rulings led to the creation of new offences under s. 38 and s. 39 of the 2010 Act, as breach of the peace could no longer be charged in domestic abuse or stalking cases which severely lacked a public element.

‘Threatening or abusive behaviour’

Depending on the facts and circumstances of the particular case, non-violent abusive behaviour can be prosecuted using the offence of ‘threatening or abusive behaviour’ at s. 38 of the Criminal Justice and Licensing (Scotland) Act 2010 (2010 Act). Ferguson and McDiarmid describe the s. 38(1) offence as “a codification of some forms of common law breach of the peace” that is now used increasingly by COPF as an alternative to breach of the peace. These statutory offences can be committed in any location, thus avoiding the public/ private difficulties which resulted

25 Smith v Donnelly 2001 SLT 1007 [17].
26 Ibid.
27 Smith v Donnelly 2001 SLT 361.
29 HM Advocate v Harris (No. 2) [2010] HCJAC 102; 2011 JC 125.
in the common law breach of the peace cases. “The Crown is, however, free to charge breach of the peace instead of any of these statutory provisions, even if the latter are arguably more apposite.”

A person, A, is guilty of the s. 38(1) offence if
(a) “A behaves in a threatening or abusive manner,
(b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and
(c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.”

The behaviour can either be a single act or a course of conduct and includes behaviour of any kind. This offence on the face of it does appear capable of including coercive and controlling conduct which is deemed to be threatening or abusive and likely to cause a reasonable person to suffer fear or alarm. In particular, the requirement that the conduct can be abusive without also being threatening should assist in this context. However, for those seeking a specific offence of domestic abuse, s. 38 does not require a consideration of the context in which the behaviour occurred. Bettinson states that without context, s. 38 does not reflect the lived experiences of many victims. Hanna explains the benefits if there were to be a doctrinal shift to focus the judge and jury on the broader context of the relationship, rather than obsessing solely on whether and how the abuse occurred:

“For example, a defendant might hide a victim’s car keys, smash her iPod, cancel a credit card, or lock her dog out of the home. None of these behaviours, in and of itself, is likely to be taken seriously by the criminal justice system, either because the behaviour itself doesn’t constitute an existing crime or because the crime is relatively minor when viewed in isolation. However, joining these behaviours into a single crime begins to paint a picture of coercive behaviour that recognizes the ongoing loss of autonomy the victim suffers. From an evidentiary perspective, the complete narrative of the relationship becomes relevant. This then allows the victim to tell her story – the whole story – and have it matter.”

The court clarified in Paterson v Harvie that s. 38(1) did not require the complainer to suffer actual fear or alarm, reasoning that “if it had been the intention of the Parliament that the complainer must have suffered actual fear or alarm, paragraph (b) could have said exactly that.” Whether the behaviour would be likely to cause a reasonable person to suffer fear or alarm is an objective test and “a reasonable person is someone who is not of abnormal sensitivity”.

‘Stalking’

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33 Criminal Justice and Licensing (Scotland) Act 2010, s 38(3)(b) and (a).
The offence of ‘stalking’ at s. 39 of the 2010 Act may also be used to prosecute non-violent abusive behaviour. The offence provides that:

A person (A) stalks another person (B) where

(a) A engages in a course of conduct (involving conduct on at least two separate occasions) which causes B to feel fear or alarm,

(b) A either acts with the intention of causing B to feel fear or alarm or

(c) A knew or ought to have known that engaging in the course of conduct would be likely to cause B to feel fear or alarm.

Conduct is defined as encompassing a wide spectrum of activities. The crime of stalking has, since its introduction in many jurisdictions in the 1990’s, suffered from some confusion about what exactly does and does not fall within its definition spectrum. As opposed to other existing offences, the offence of stalking is a step in the right direction. The introduction of anti-stalking laws was a bold development in the criminal law. This offence essentially proscribes conduct that can result in certain types of psychological harm to the victim. One of the driving forces behind this legislation was the perceived inadequacy of existing laws to protect victims until the stalker ‘did something’ which implies physical assault.\(^{38}\) However, while rooted in attempts to prevent physical assaults, this offence also had the effect of protecting stalking victims from suffering the “myriad adverse psychological effects of stalking.”\(^{39}\) Although, while it might be possible to include coercive and controlling behaviour in intimate relationships within the definition of stalking, such a development would be inappropriate. The notion of a victim being ‘stalked’ by a person with whom they are cohabiting, for example, is one that does not sit easily with most understandings of stalking. On the other hand, the concept of a victim being ‘stalked’ by a former partner is perhaps easier understood. However it can be said that overall, the description of coercive control within an intimate relationship as stalking would be likely to confuse the accused, the victim, and no doubt the public at large. Whilst the right to family privacy should not be employed to protect abusive domestic relationships, there must be some limit to how far the definition of stalking can be stretched beyond popular understandings of the term. As McMahon and McGorrery put it, “stalking offences should not be used as mental harm’s catch-all provision in the criminal law.”\(^{40}\)

**Psychological harm**

It is evident that violent behaviour occurring in an intimate relationship is criminal in Scotland, just as it would be in any other context. However, evidently the existing criminal law does not effectively cover all forms of non-violent behaviour that constitutes domestic abuse as defined by the police and COPFS’ working definition. Some form of emotional and mental abuse may fall within the scope of existing criminal offences. The offence of ‘threatening behaviour’ for example, criminalises


behaviour which is threatening or abusive and therefore enables COPFS to prosecute a person who may be overtly verbally abusive towards their partner.

However, these offences appear to be inadequate for the means of prosecuting more subtle forms of coercive control, such as preventing a person from seeing friends, or exerting control over a person’s financial affairs or movements in such a way as to ensure their dependence on the abuser. Williamson is found criticising the current law to domestic abuse in her response to Starks work, noting that an incident and ‘evidence based’ approach fails to respond to the psychological effects of domestic abuse. In some cases, there may be a history of past violence or threatening behaviour committed by the abuser against the victim, such that the fear instilled in the victim enables the abuser to exert this control without using overtly threatening behaviour such as gestures and glares. The threshold set out in the offence of ‘threatening or abusive behaviour’ that the behaviour would be likely to cause a reasonable person to feel fear or alarm may not be met. A consequence of this is that even victims whose cases are successfully prosecuted can be left thinking that their experience as a victim of domestic abuse has not been fully recognised by the courts, a concern raised previously. Furthermore this could undermine that victim’s confidence in the legal system and discourage them from reporting any further abuse, especially problematic when it is widely known that domestic abuse offences are under-reported.

In such cases, a long term pattern of abuse is prosecuted as discrete incidents of, for example, assault or threatening behaviour. Significant aspects of the abuse, which could be described as coercive control via the means of psychological abuse, may not clearly fall within the scope of any existing criminal offence. The severity of the specific incidents of violence or threatening behaviour for which the abuser is prosecuted can only be fully understood against the background of on-going psychological abuse and controlling behaviour. However, at present, it is not formally recognised by the courts and judges and sheriffs must sentence the offender on the basis of the offences which were proven in that particular case. Crimes are conceived of as occurring at a discrete moment when mens rea and actus reus coincide. However, when applied in cases of domestic abuse this criminal law paradigm is fundamentally inappropriate. Hanna argues that it is this current focus on single acts of violence that causes the criminal law to miss “the underlying deprivation of liberty and personhood that is at the heart of coercive control and therefore misconstrues the harm of partner-perpetrated abuse.” Tuerkheimer reinforces this argument as he states that the criminal law is fundamentally “incident focussed” and this is the core problem.

41 Emma Williamson ‘Living in the world of the domestic violence perpetrator: Negotiating the Unreality of Coercive Control, Violence Against Women’ (16)2 2010 1412-23.