The Equality and Human Rights Commission is the National Equality Body (NEB) for Scotland, England and Wales. We work to eliminate discrimination and promote equality across the nine protected grounds set out in the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

We are an “A Status” National Human Rights Institution (NHRI) and share our mandate to promote and protect human rights in Scotland with the Scottish Human Rights Commission (SHRC).

Thank you for offering us the opportunity to respond to this consultation. At this stage the Commission is restricting its input to a policy overview of the Bill only. We recognise that there may be legal issues that we want to return to at a later stage particularly concerning the Human Rights impacts of some of the proposals. However we would like to signal at this point that we support the aims of the Bill and welcome its publication by the Scottish Government.

On the specific questions raised in the consultation.

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?*

Yes we feel this is a welcome a necessary addition to Scots law which will extend protection from physiological or other forms of abusive behaviour not currently available.

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?*

Yes. As 1 above.

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?*

Whist the Commission supports the general thrust of the Bill we anticipate that unless the definitions of what constitutes “intent” and “abuse” are appropriately drawn the Bill itself may not afford the sorts of protections that it is intended to.

In common with law on harassment we agree that a course of behaviour will need to be apparent for the offence to have been proven. The Commission has concerns
that if not tightly defined the intent clause (1 (2) b) ii) may be difficult to prove. The "reasonable person" test introduced at section 1 (2) a) is of assistance, but we would want to see further exploration of how mens rea may apply here. This is an area which the Commission hopes to explore further over the summer.

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 literature on domestic abuse often cites examples of how an abusive partner can use access to and custody of children as a means of abuse whether or not this is something which is conducted in front of the child or not. For example a partner may seek to influence a child’s perception of their partner by using demeaning or abusive language or by trying to influence a child’s state of mind, by for example placing undue pressure on them to live with or visit them. None of these examples of coercion would be covered by the Bill as it stands.

5. Do you have any views on factors which might impact on the reporting, investigation and prosecution of the offence?

Domestic abuse is generally perceived to be an underreported crime. Current public understanding of the term domestic abuse may also be biased towards incidents which involve violence or the threat of violence rather than equally damaging but less immediately identifiable forms of conduct such as coercion. To be successful the Government will need to ensure that victims and potential victims and importantly those from whom they may seek formal or informal advice are aware of how coercive control operates and how it might be identifiable. We also anticipate that professional training will be necessary to assist those who come into professional contact with the victim – for example voluntary sector, NHS, Police or local authority staff – are also able to fully support the victim to identify it.

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?

This is potentially sensitive area where the rights of the accused need to be balanced with the rights of the victim. In principle we are opposed to (alleged) victims being cross examined by their (alleged) perpetrators where there is the potential for further abuse and re victimisation. Prosecutors will also be aware that the threat of a potential cross examination might also discourage victims from reporting or giving evidence in the first place. As above the potential for "intent" to be used as a defence during cross examination is of concern.

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?
Whilst courts already have the power of interdict to prevent further harassment the addition of a non-harassment order would be welcome. However, victims need to be assured that such orders are effective and that the Police have both the ability and resource to be able to prevent harassment as and when it occurs. As above we are concerned that unless specifically drawn “harassment” with intent may be difficult to prove.

We look forward to contributing to this Bill as it develops after the summer recess.

Chris Oswald
Head of Policy
2 May 2017