Justice Committee

Domestic Abuse (Scotland) Bill

Written submission from NSPCC Scotland

Introduction

NSPCC Scotland greatly welcomes the current bill criminalising a pattern of psychologically abusive, coercive controlling behaviour in intimate partner relationships. We consider this new legal instrument to be urgently needed in Scotland to reflect the nature of women and children’s lived experiences of domestic abuse in the law and to improve their access to justice and protection. We commend the Scottish Government for bringing this forward.

We believe improvements can be made to the bill to better reflect children’s experiences of domestic abuse and increase the scope of the measure to protect both children and women, including further development of the statutory aggravator and vitally, extension of the mandatory consideration of non-harassment orders to cover children.

We remain concerned that children are not recognised in the law as direct victims within domestic abuse situations.

About the NSPCC

The NSPCC believes every childhood is worth fighting for. Over the next five years, our aim is to make 5 million children safer. We will do this by working towards five goals which we’ll continually measure to ensure we’re making real progress:
1. Prevent child abuse in families facing adversity.
2. Prevent child sexual abuse.
3. Help children speak out and adults take action about abuse.
5. Make children safe from abuse online.

By concentrating all our work on these five goals — goals focused directly on improving the lives of children at risk of abuse and neglect — we want to achieve greater impact and inspire others to join us in our fight for childhood.

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?

NSPCC Scotland strongly supports the proposal in the Bill to create a new offense of abusive behaviour which covers both physical violence and non-physical abuse. We do not consider it a sufficient legislative response to the corrosive, widespread problem of domestic abuse to criminalise only certain aspects of this pernicious behaviour, as single incidents, within separate pieces of legislation, as is currently the case.
We understand that the main driver for creating the specific offence is to criminalise a pattern of psychologically abusive, coercive controlling behaviour, which is understood as a defining characteristic of domestic abuse in Scotland. 
http://www.gov.scot/Topics/People/Equality/violence-women/Key-Facts

We consider it important that the specific offence covers the range of abusive behaviours, both physical and psychological, that often co-exist within an overall pattern of abusive behaviour, for a number of reasons.

The understanding of what constitutes ‘domestic abuse’ has evolved in Scotland, reflecting (primarily) women’s lived experiences and the extensive research literature on this issue. The term ‘domestic abuse’ was specifically adopted by the Scottish Government to broaden the focus from physical abuse to the combination psychological and physical dimensions of abuse and the on-going manipulation of power⁴ that typifies domestic abuse relationships, in recognition of this advanced understanding.

NSPCC considers it important that this is reflected in one comprehensive piece of legislation, which vitally focuses on a pattern of abusive behaviour, which may include physical, sexual and economic violence as part of the pattern of psychological abuse. We appreciate that there is provision in Scots law to prosecute specific types of abusive behaviour that can occur in domestic abuse situations (for example, the common law of assault: the statutory offence of threatening and abusive behaviour). These measures focus on single incidents of abusive behaviour. Criminalising a pattern of on-going psychologically abusive behaviour brings a necessary clarity to the law about the nature of the offence of domestic abuse, reflecting women and children’s lived experience.

We note the UN recommendation that legislation governing domestic violence should include a comprehensive definition of domestic violence, including physical, sexual, psychological and economic violence².

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 we understand it, the law in Scotland does not currently include an offence which criminalises a pattern of psychologically abusive conduct which is intended to impair a person’s psychological integrity.

We note Article 33 of the Istanbul Convention that State parties take the necessary legislative or other measures to ensure that the intentional conduct of seriously impairing a person’s psychological integrity through coercion or threat is criminalised. We commend the Scottish Government for bringing forward the current legislation and note the timely nature of this progress, in light of the Eilidh Whiteford’s Bill on ratifying the Istanbul Convention having now received Royal Assent.

² Handbook for Legislation on Violence against Women, United Nations, 2010
As a national child protection organisation we are specifically concerned with how the new offence can help protect children who are victims of domestic abuse. An NSPCC practitioner forum convened to discuss the specific offence clearly concluded that a recognition of coercive control in intimate partner relationships within the law is extremely welcome in Scotland, given the current legislation does not offer full protection against all forms of intimate partner violence. Vitally, in relation to child protection in domestic abuse situations, they pointed out the potential for a specific offence to be helpful in supporting early intervention for children living in domestic abuse situations:

*Even where there are concerns about serious violence in a family, even where there are compulsory measure in place - it can be extremely challenging for social workers to get access to the home. Legislation could potentially help with earlier intervention for children (and women) experiencing domestic abuse. Coercive controlling behaviour has been poorly recognised as abuse within the criminal law. Recognition may lead to earlier opportunities for intervention.*

Professionals also identified huge challenges for services in working with children and families where there is domestic abuse. In their experience, perpetrator’s coercive controlling behaviour can and does often extend to controlling professionals and agencies, where perpetrators are able at times to expel child protection services that have managed to become involved. Fear of perpetrators is considered to be a significant issue impacting on professionals working with domestic abuse.

‘*Coercive control can be so scary: workers at times do not want to engage because they are so scared*’.

Professionals subsequently queried whether the new specific offence, if recognising children as victims within domestic abuse situations, could have pragmatic effect in this respect; for example leading to implications for the investigative process, with potentially a necessity for a joint investigative process.

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?

NSPCC Scotland is strongly sympathetic to the principle behind restricting the draft offence to abuse within intimate partner relationships/ex-relationships, as in keeping with the Scottish Government’s definition of domestic abuse as a *pattern of behaviours which are used to assert control over a partner in an intimate relationship* (Scottish Government, 2009) and as a form of gender-based violence. In this way, the offence will assist in sending a clear message and increasing awareness about this immensely corrosive and damaging form of gender-based violence within intimate partner relationships. We acknowledge Scottish Women’s Aid’s specific concern that:
conflating domestic abuse with wider familial violence in the law risks the dilution and diminution of both the understanding of domestic abuse and the response to it at a strategic and practical level.

Statutory Aggravator

NSPCC welcomes the inclusion of the statutory aggravator which goes some way to formally acknowledging in the law the harm to children caused by domestic abuse. The policy memorandum’s explanation that the aggravator has been included to ‘ensure the new offence effectively captures the seriousness of perpetrator’s involving children in domestic abuse’ and is ‘a means of acknowledging through the criminal law the impact that domestic abuse can have on children’ is particularly helpful. The aggravator as currently drafted reflects a variety of ways that domestic abuse impacts on children: as victims of direct abusive behaviour by the perpetrator; as being used by the perpetrator in the abuse of their partner/ ex partner; as ‘witnessing’ abusive behaviour. We welcome the inclusion of different ways children can experience domestic abuse. Practitioners at the aforementioned NSPCC forum felt that descriptions of children’s experiences in the new law could be very helpful increasing awareness whilst stressing the law should not create a ‘hierarchy of impact’:

It could be helpful to breakdown children’s experiences of domestic abuse in legislation, to increase the recognition of children’s lived experiences in the law and increase understanding of their needs in practice. However, it is vital that any separating out of children’s experiences (of DA) does not create a ‘hierarchy’ of impact i.e. a belief that one kind of experience is worse than another.

We would however recommend the aggravator goes further towards recognising that where children are living in a domestic abuse situation per se, they are inevitably victims of that abuse. The impact of domestic abuse on children is not necessarily contingent on their ‘witnessing’, seeing or hearing abuse. This might potentially be achieved by including a clause which eliminates beyond doubt any need for a child to be physically present during ‘incidents’ of abuse to be affected by abuse. We would urge a strong commitment to rigorous post legislative scrutiny on the application of the aggravator, including the impact of its application on protections for children.

Overall, whilst welcoming the aggravator with some further amendment, we remain concerned that the bill does not directly address the issue of children as victims of domestic abuse in the context of the abuse of their parent (usually their mother). The question as to whether children are harmed by domestic abuse has long since been answered in Scotland. Subsequently, ‘Domestic abuse’ is recognised in child protection guidance, policy and law as a risk to child wellbeing and safety (for example, Children (Scotland) Act, 1995; Children’s Hearings (Scotland) Act, 2011; National Guidance Child Protection, 2014) but is not currently defined in the criminal law for such purposes. It is a basic human rights and children’s rights issue that harm done to children by perpetrators of domestic abuse is recognised in criminal law.
Do you have any views on factors which might impact on the reporting, investigation and prosecution of the offence?

Whilst there has been work towards recognising children’s experiences of domestic abuse in policy and practice in Scotland over last decade, it’s vital to realise that it is only very recently that domestic abuse/ coercive control has been formally recognised as a specific threat to child wellbeing, through its inclusion as a ground for referral to the Children’s Hearings System. We still have a very long way to go in responding to children in domestic abuse situations.

(Extract from summary report, NSPCC practitioners forum, Specific Offence of Domestic Abuse)

NSPCC Scotland urges the Scottish Government to give a strong commitment to widespread training of professionals across the criminal justice system, to ensure that the approach to investigation/ prosecution reflects a comprehensive understanding of domestic abuse as a pattern of psychologically abusive behaviour.

Professionals at the NSPCC forum were clear that the legal profession as a whole needs a far better understanding of domestic abuse, both in relation to the behaviour of perpetrators and the impact on child and adult victims. Many had experiences of lawyers simply not understanding the dynamics in complex domestic abuse situations, indicating clear substantial training needs. Some felt this gap in understanding may affect rural areas more significantly than areas of expertise such as Glasgow.

Training on domestic abuse, as well as guidance around the new legislation, must specifically cover the nature of children’s lived experiences of domestic abuse and the imperative of gathering evidence about children’s experiences, to strengthen the case for the application of the statutory aggravator.

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?

NSPCC strongly agree with the proposal to prohibit the accused from personally conducting the defence in relation to the new law. It is of fundamental importance that the criminal justice system does not provide a forum for the continuation of psychologically abusive behaviour, which the offence has specifically been created to capture.

In relation to the wider associated reforms, we would urge scrutiny as to whether these can be expanded to take account of the rights and needs of children within domestic abuse cases. The inclusion of the aggravator within the specific offence formally recognises the harm caused to children by domestic abuse. It is imperative that protections available for the adult victim prior to, during and after court are equally available for children involved in domestic abuse cases.
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?

NSPCC strongly agree with the court being required to consider making a non-harassment order in domestic abuse cases. Post-trial protections are critical for victim safety; breach of non-harassment orders should be subject to serious sanctions.

NSPCC considers it imperative that this protective provision is extended to children with a parallel requirement on the court to consider making a non-harassment order covering children in domestic abuse cases. The inclusion of the aggravator formally recognises the harm caused to children by domestic abuse, as specified in the policy memorandum. It is of fundamental importance that the new legislation addresses children’s right to protection in domestic abuse cases, and provides courts with the necessary authority to make protective orders relating to children.

We understand from the Bill team that there has been at least one domestic abuse case in Scotland where a court made a non-harassment order covering children, which was subsequently overturned in a civil child contact case. NSPCC is strongly of the view that a) it must be in the authority of the court within this legislative instrument to consider making a non-harassment order in respect of children and b) where such an order is made, that it is respected by the civil courts.

We would further urge the Scottish Government to give every attention as to how criminal court rulings in domestic abuse cases can link more clearly and transparently to civil child contact actions, to better protect both child and adult victim.

Professionals at the NSPCC discussion forum expressed grave concerns about the civil process in relation to contact decisions and the far reaching impact of these decisions on children, mothers and professionals. A number of areas of concern were highlighted, including:

- Childline staff talked about cases where children contacting the service felt that they had been forced into having contact with their fathers, and expressed a concern about an ‘almost default position that contact should happen’
- Children have very little or no meaningful say in contact decisions, not least because of the huge power imbalance in the systems.
- Poor contact decisions in coercive control cases can have the most grave consequences for children. Professionals talked about cases where children had been murdered where contact was granted with an abusive father https://www.nspcc.org.uk/preventing-abuse/child-protection-system/case-reviews/learning/domestic-abuse/
- Mothers can risk being punished for trying to protect their children. Women who do not follow through contact orders can find themselves in breach of court and at risk of prosecution.
- Poor contact decisions can impact profoundly on the relationships between primary carers and vulnerable children. One member of staff spoke about a foster carer having to ‘force’ an extremely upset 3 year old into a car to have contact with her father.
Other issues. NSPCC Scotland note that there is no age restriction on the specific offence. There is considerable research evidence, including studies published by NSPCC\(^3\), that patterns of coercive control and violence in intimate relationships can begin early and impact on young people’s teenage relationships, with clear gender differences in the types of abusive behaviour experienced and the impact of abusive behaviours on boys and girls\(^4\). We would therefore ask the Scottish Government to pay particular attention to the issue of how children and young people accused of domestic abuse will be treated in relation to any new offence created. Whilst there is clearly merit in the law sending an unequivocal message that psychological abuse through coercive controlling behaviour is unacceptable in intimate relationships, there may be a danger that the new offence results in increased criminal prosecution of young people through the adult courts, given the serious nature of the crime and reflected in the proposed tariff.

NSPCC Scotland is also strongly of the view that legislation capturing coercive control be developed in parallel with prevention/ early intervention services. Professionals at the NSPCC expert forum were clear that perpetrator programmes/ services are often working with people ‘long after the effect’: endeavouring to address behaviours that have become entrenched over many, many years. Earlier intervention to address coercive controlling behaviour/ gender based violence within young people is critical and we would hugely welcome a commitment to funding appropriate prevention and early intervention programmes for young people with problematic behaviour in relation to gender based violence. We would also note the critical role of consistent and appropriate Relationships, Sexual Health and Parenthood (RSHP) education, at universal level, in promoting healthy relationships.

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2 May 2017

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