

Domestic Abuse (Scotland) Bill

Explanatory Notes

Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Domestic Abuse (Scotland) Bill, introduced in the Scottish Parliament on 17 March 2017.
2. The following other accompanying documents are published separately:
 - statements on legislative competence by the Presiding Officer and the Cabinet Secretary for Justice (Michael Matheson MSP) (SP Bill 8–LC);
 - a Financial Memorandum (SP Bill 8–FM);
 - a Policy Memorandum (SP Bill 8–PM).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

The Bill

5. The Domestic Abuse (Scotland) Bill (“the Bill”) creates a specific statutory offence of domestic abuse and makes a number of associated changes to criminal procedure, evidence and sentencing in domestic abuse cases.

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6. A more detailed explanation of the Bill's purpose can be found in the Policy Memorandum, which also explains the thinking and policy intentions that underpin it.

The structure and a summary of the Bill

7. The Bill is in two Parts.

8. Part 1 of the Bill provides for an offence consisting of abusive behaviour towards a partner or ex-partner. It also provides for an associated statutory aggravation that the perpetrator, in committing the new offence, involved or affected a child, or that a child saw, heard or was present during an incident that happened as part of the course of behaviour amounting to the offence.

9. Part 2 of the Bill introduces a schedule which makes a number of associated reforms to criminal procedure, evidence and sentencing relating to the creation of an offence of domestic abuse. These reforms are:

- creating a standard bail condition prohibiting a person accused of a domestic abuse offence from conducting precognition of the complainer other than through a solicitor;
- prohibiting an accused person in a domestic abuse case from personally conducting the defence in court;
- permitting certain expert evidence relating to the behaviour of the complainer in domestic abuse cases;
- applying the same rules for the benefit of vulnerable witnesses as apply to other serious offences;
- requiring the court, when sentencing a person convicted of a domestic abuse offence, to have regard to the aim of ensuring that the victim is not subject to further abuse by the offender; and
- placing a duty on the court to automatically consider whether to make a non-harassment order against a person convicted of a domestic abuse offence.

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Part one – offence as to domestic abuse

Engaging in course of abusive behaviour

Section 1 – Abusive behaviour towards partner or ex-partner

10. Section 1 makes it an offence for a person to engage in a course of behaviour which is abusive of the person's partner or ex-partner.

11. Section 1(1) provides that a person commits an offence if the person engages in a course of behaviour which is abusive of the partner or ex-partner of that person and the two further conditions in section 1(2) are met.

12. A description of what constitutes abusive behaviour is contained in section 2. A definition of "partner", and "ex-partner" is provided in section 10. Section 9(4) provides that a course of behaviour involves behaviour on at least two occasions, and the rest of section 9 gives a broad meaning to behaviour and how it may be effected.

13. The two further conditions in section 1(2) are as follows.

14. Section 1(2)(a) provides that, for the offence to be committed, a reasonable person must consider that the course of behaviour would be likely to cause the complainer to suffer physical or psychological harm.

15. The test that the court is being required to apply is whether the behaviour would be likely to cause the complainer to suffer harm. The test would be met where the course of behaviour was such that a reasonable person would consider the behaviour likely to cause harm to that particular individual, taking account of their particular characteristics, irrespective of whether the behaviour would in question would be likely to cause harm to a "reasonable person". As such, the court is entitled to take account of any particular vulnerability of the complainer in considering whether the accused's behaviour would be likely to cause them to suffer physical or psychological harm. But it is not a requirement for the offence to be committed that the prosecution show that the course of behaviour actually caused physical or psychological harm (see section 3).

16. Section 1(2)(b) sets out the mens rea for the offence. It provides that the accused must either intend that their course of behaviour causes the complainer to suffer physical or psychological harm, or else be reckless as to whether their course of behaviour would cause such physical or

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psychological harm. An example of how recklessness as to course of behaviour may occur is a person who is persistently verbally abusive and demeaning towards their partner and who may claim that they did not intend that their behaviour cause psychological harm to their partner. If the court is satisfied that their behaviour was such that the accused person was, at the very least, reckless as to whether their behaviour would cause such harm, then this condition would be met.

Section 2 – What constitutes abusive behaviour

17. Section 2 provides a description of what constitutes abusive behaviour. The description is non-exhaustive and it therefore remains open to the court to decide in any individual case that the accused's behaviour was abusive in some other way.

18. Section 2(2) provides that behaviour which is abusive of a person's partner or ex-partner (B) includes behaviour directed at B which is violent, threatening or intimidating (for example, assault or threats). It also covers behaviour directed at B or at any other person (in particular, a child of B) which has as its purpose, or among its purposes, or would be considered by a reasonable person likely to have, one or more of the effects on B that are listed in section 2(3).

19. Section 2(3) provides a list of effects on the victim that are relevant in order to indicate behaviour is abusive in connection with the offence. This is intended to ensure that, for example, psychological abuse or coercive and controlling behaviour that could not currently be prosecuted under existing offences falls within the definition of abusive behaviour. There is inevitably some overlap because some abusive behaviour may have several of the listed effects on the victim or may be capable of prosecution under existing offences (for example, threatening or abusive behaviour, assault).

20. Section 2(3)(a) provides that behaviour which makes the victim dependent on or subordinate to the perpetrator can be considered to have a relevant effect. This could include, for example, preventing the victim from having access to money, forcing the victim to leave their job, taking charge of household decision-making to the exclusion of the victim or treating the victim as a domestic slave.

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21. Section 2(3)(b) provides that behaviour which has the effect of isolating the victim from friends, relatives or other sources of support can be considered to have a relevant effect. This could include, for example, controlling the victim's movements or access to their phone or other forms of communication, not allowing visits from or to the victim's friends or family, or deliberately failing to pass on messages from friends or family.

22. Section 2(3)(c) provides that behaviour which has the effect of controlling, regulating or monitoring the victim's day-to-day activities can be considered to have a relevant effect. This could include, for example, checking the victim's phone, e-mail or social media use, controlling what clothes the victim can or cannot wear, or placing unreasonable requirements on the victim to, for example, prepare meals in a particular way at a particular time every day.

23. Section 2(3)(d) provides that behaviour which has the effect of depriving the victim of, or restricting the victim's freedom of action is behaviour which can be considered to have a relevant effect. This addresses behaviour which robs victims of their autonomy, for example, preventing the victim from attending work or college, preventing the victim from leaving the house alone, insisting on accompanying the victim to medical appointments, or taking decisions for the victim in relation to private, individual matters that a person would normally decide for themselves.

24. Section 2(3)(e) provides that behaviour which has the effect of frightening, humiliating, degrading or punishing the victim is behaviour which has a relevant effect. This could include, for example, abusive name-calling, threats of self-harm, playing mind games with the victim that cause them to doubt their sanity, controlling the victim's access to the toilet or forcing the victim to eat food off the floor.

25. Section 2(4) provides that references to violent behaviour include sexual violence as well as other physical violence. It should be noted that non-violent sexually abusive behaviour may be considered abusive under section 2(2)(b) and (3) where it is behaviour that is intended, or likely to have, one of the effects on the victim; for example, behaviour which has the effect of frightening, humiliating, degrading or punishing the victim. Non-violent sexually abusive behaviour may also be considered threatening or intimidating in terms of section 2(2)(a).

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Evidence, aggravation and defence

Section 3 – Evidence of impact on victim

26. Section 3(1) provides, for the avoidance of doubt, that the prosecutor does not need to establish that the accused's behaviour actually caused the victim to suffer physical or psychological harm in order for the offence to be committed.

27. Similarly, section 3(2) provides that it is not necessary to prove that a relevant effect under section 2(3) has actually been experienced by the victim.

28. This is because a 'reasonable person' test applies both in section 1(2)(a) (in relation to physical or psychological harm) and 2(2)(b)(2) (in relation to 'relevant effects'). It is therefore sufficient that a reasonable person would consider it likely that the behaviour would result in the victim suffering physical or psychological harm, or experiencing a 'relevant effect'. So, for example, section 2(2)(b) would cover behaviour which a reasonable person would consider likely to frighten, humiliate, punish or degrade the victim, irrespective of whether the victim suffers actual fear, humiliation, punishment or degradation.

29. Section 3(3) clarifies that this provision does not prevent evidence being led of actual harm suffered by the victim as a result of the alleged course of behaviour, or of effects that the behaviour actually had on the victim.

Section 4 - Aggravation in relation to a child

30. Section 4 provides for a statutory aggravation that the accused committed the offence of abusive behaviour towards a partner or ex-partner in a way which involved a child.

31. Section 4(1)(a) provides that, for the aggravation to apply, it must be specified in the complaint or libelled in the indictment.

32. Section 4(2)(a)(i) provides that the aggravation applies where it is shown that, in committing the offence, the perpetrator directed behaviour at a child. So, for example, where the court is satisfied that in committing the offence the perpetrator directed behaviour at a child, such as demeaning, abusive language about the victim which could reasonably have the effect of making the victim feel humiliated, the aggravation would be engaged.

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Similarly, the aggravation would apply where the offence is committed by threatening violence towards a child to control or frighten the victim.

33. Section 4(2)(a)(ii) provides that the aggravation applies where it is shown that, in committing the offence, the perpetrator uses a child to direct behaviour at the victim. So, for example, where the court is satisfied that the perpetrator encouraged or directed a child to spy on or report on the day-to-day activities of the victim so as to enable the perpetrator to control, regulate or monitor the victim's day-to-day activities, the aggravation would be proven. The involvement of the child could be unwitting or unwilling, and the child need not be aware of that they are helping the perpetrator to abuse the victim, for example, by telling the perpetrator about the victim's activities. The aggravation would apply to the involvement of any child in the offence, for example the victim's own child, another child living in or visiting the household, or a neighbour's child.

34. Section 4(2)(b) provides that the aggravation applies where a child sees, hears or is present during an incident of the perpetrator's behaviour that happens as part of the course of behaviour for which the perpetrator is convicted. This could, for example, be a physical assault or an incident of verbal abuse.

35. Section 4(4) requires that, where the aggravation is proved, the court must take that aggravation into account when determining sentence. It must also explain how the aggravation has affected the sentence (if at all) and record the conviction in a manner which shows that the offence was aggravated by reason of involving a child.

36. Section 4(5) clarifies that a child is a person under 18 years of age who is not either the perpetrator or the victim of the offence. The child aggravation is therefore only engaged when the child in question is a third party.

Section 5 - Defence on grounds of reasonableness

37. Section 5 provides that it is a defence to the offence at section 1 for the accused to show that the course of behaviour was, in the particular circumstances, reasonable. This may apply where, for example, the accused acted in order to protect the household finances where their partner is suffering from a gambling addiction, or to prevent their partner from associating with certain persons or frequenting certain places if they

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are recovering from alcohol or drug addiction, or to restrict the freedom of movement of a partner who is suffering from dementia.

38. Section 5(2) provides that the accused is subject to no more than an evidential burden of proof to bring forward enough evidence to raise an issue with respect to the defence; the legal burden of disproving the defence and proving that the offence has been committed stays with, the prosecution.

Presumption, alternative and penalty

Section 6 - Presumption as to the relationship

39. Section 6 provides that the matter of the accused (A) being the complainer (B)'s partner or ex-partner is to be taken as established unless the matter is challenged prior to the trial taking place.

40. In summary proceedings, this challenge will be by preliminary objection before the plea is recorded or by later objection that the court allows in special circumstances. In proceedings on indictment, this challenge will be by giving notice of a preliminary objection in accordance with established procedures in sections 71(2) or 72(6)(b)(i) of the Criminal Procedure (Scotland) Act 1995 ("the 1995 Act").

41. Section 71(2) of that Act is a procedure for dealing with preliminary pleas and preliminary issues at the first diet in solemn proceedings. Section 72(6)(b)(i) is a procedure for disposing of preliminary issues at the preliminary hearing in solemn proceedings.

Section 7 - Alternative available for conviction

42. Section 7(1) provides that where a charge is brought for the offence at section 1 of the Bill, but the court is not satisfied that the accused committed the offence, it is possible to convict the accused of a specified alternative offence where it is proved (to the normal criminal standard of proof) that the accused committed the alternative offence.

43. Section 7(2) provides that the alternative offences are the offence of threatening or abusive behaviour under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 and the offence of stalking under section 39 of that same Act.

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44. The offence of threatening or abusive behaviour may be proven where the court is satisfied that an accused engaged in at least one act that amounted to threatening or abusive behaviour, but it is not proven that the accused engaged in a course of behaviour against the complainer. The offence of stalking may be proven where the court is satisfied that an accused engaged in a course of behaviour which caused the victim to suffer fear or alarm, but it is not proven, for instance, that the accused was the partner or ex-partner of the complainer.

45. This section sits alongside the provision for a common law alternative to a statutory offence that is found in paragraph 14 of Schedule 3 to the 1995 Act.

Section 8 - Penalty for offence under section 1(1)

46. Section 8 provides for the available penalties for the offence.

Section 9 – Meaning of references to behaviour

47. Section 9 provides for the meaning of references to behaviour for the purposes of the offence.

48. Section 9(2) provides that “behaviour” includes things said or otherwise communicated as well as things done. It also encompasses an intentional failure to do, say or otherwise communicate something (e.g. a failure to pass on times and dates of appointments or social occasions, or a failure to feed a family pet).

49. Section 9(3) provides that behaviour directed at a person includes behaviour directed towards property. It is not a requirement that the property must belong to the complainer. It could, for instance, be shared property or property belonging to a third party, such as the victim’s parents. Property includes pets or other animals (for example agricultural livestock) whether belonging to the victim or others.

50. It also provides that behaviour directed at a person includes behaviour carried out with or through a third party. This might include, for example, getting another person to spy on or report on the activities of the complainer. The third party’s involvement could possibly be unwitting or unwilling, as they may be entirely unaware that their behaviour was helping the perpetrator to abuse the victim or may have been coerced into participating in the abuse.

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51. Section 9(4) provides that a course of behaviour involves behaviour on at least two occasions. It would be for the court to determine in the particular circumstances of a case whether two incidents occurring far apart in time, with no evidence that they formed part of any wider pattern of behaviour, truly amounted to a course of behaviour.

Section 10 – Meaning of partner and ex-partner

52. Section 10 provides that, for the purpose of the offence, “partner” means a person’s spouse or civil partner (or cohabiting equivalent), or a person in an intimate personal relationship with the accused. Former relationships of the specified types are covered in addition to current relationships.

53. The phrase “intimate personal relationship” is intended to cover relationships between boyfriends and girlfriends (including same-sex relationships), although the relationship need not be sexual. Other family relationships and other types of relationship (e.g. between friends or business partners or work colleagues) are not covered by the offence.

Part two – schedule and further provisions

Section 11 – The 1995 Act etc.

54. Section 11 introduces the schedule. The schedule modifies the 1995 Act as well as some other enactments.

Schedule

55. The schedule is split into two Parts. Part 1 provides for amendments relating to the rules of criminal procedure and Part 2 provides for minor and consequential amendments.

Part 1 – rules of criminal procedure

Chapter 1 - conduct of precognition and defence

Bail condition concerning precognition

56. Section 24 of the 1995 Act provides for the rules governing bail and imposition of bail conditions. Section 24(5)(e) provides that where a person is accused of any of the sexual offences listed in section 288C of the 1995 Act, a standard condition of bail applies which prohibits the accused from seeking any precognition of or statement from the complainer in relation to the subject matter of the offence other than via a solicitor.

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57. Section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 (“the 2016 Act”) provides for an aggravation where an offence involves abuse of a partner or ex-partner.

58. Paragraph 1(2) of the schedule adjusts section 24 of the 1995 Act so the prohibition in section 24 operates, in addition to section 288C cases, also in relation to persons being granted bail in respect an offence under section 1 of the Bill or an offence aggravated under section 1 of the 2016 Act.

Prohibition on conduct of own defence

59. Section 288C of the 1995 Act prohibits an accused person from conducting his or her own case in person, without representation by a lawyer, where the offence charged is among the sexual offences listed at section 288C(2), though only in respect of hearings where a witness is to give evidence. In consequence of this prohibition a number of sections of the 1995 Act set out procedure in such cases.

60. Paragraph 3(14) of the schedule inserts a new section 288DC into the 1995 Act to create a similar prohibition on an accused conducting his or her own case in respect of both the domestic abuse offence as defined by this Bill, and where the domestic abuse aggravator described in section 1(1)(a) of the 2016 Act apply. Once again the prohibition applies only to hearings where a witness is to give evidence.

61. New section 288DC(3) applies section 288D of the 1995 Act, which provides for the appointment of a solicitor by the court where the accused has not engaged his or her own, or where any solicitor appointed by the accused has been dismissed or has withdrawn.

62. Paragraph 3(2) to (13), (15) and (16) amend various sections of the 1995 Act to deal with the procedural consequences of new section 288DC, principally to ensure that the accused is repeatedly reminded, in notices served and at preliminary hearings, of the need to engage a solicitor to conduct his or her defence.

63. Paragraph 2(2) of the schedule amends section 22(1)(dd) of the Legal Aid (Scotland) Act to take account of legal aid being available automatically where a solicitor is appointed by the court as a result of the

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accused being prevented from conducting his or her own defence under new section 288DC.

64. Paragraph 4 of the schedule amends section 20 of the Criminal Justice (Scotland) Act 2016 to provide that, where a person has been arrested for a domestic abuse offence covered by new section 288DC, or has been charged with such an offence, he or she is to be advised as soon as possible of the prohibition on conducting one's own defence in hearings where a witness is to give evidence, and that consequently a solicitor should be engaged, or the court will provide one.

Chapter 2 – vulnerable witnesses and expert evidence

Special measures for vulnerable witnesses

65. Section 271B of the 1995 Act provides for rules relating to special provision for child witnesses under the age of 12. The effect of section 271B is to ensure that the views of the child in question are taken into account by the court when deciding whether the child should give evidence in the court room in relation to certain serious offences.

66. Paragraph 5 of the schedule makes a change to section 271B of the 1995 Act so that these rules also operate for cases involving the new offence under section 1 of the Bill or an aggravation under section 1 of the 2016 Act.

Presentation of certain expert evidence

67. Section 275C of the 1995 Act provides that, in cases involving those sexual offences to which section 288C applies, expert psychological or psychiatric evidence relating to subsequent behaviour of, or statements by, the complainer is admissible to rebut inferences which may be drawn from such behaviour or statement as to the complainer's credibility or reliability as a witness.

68. Paragraph 6(2) of the schedule extends the admissibility of such evidence to the subsequent behaviour of, or statements by, complainers in domestic abuse cases, that is in trials relating to the new offence under section 1 of the Bill or offences aggravated under section 1 of the 2016 Act. As the domestic abuse offence in section 1 of the Bill is an offence committed by a course of conduct, paragraph 6(3) inserts provision to clarify that the expert evidence is admissible in respect of any behaviour or statements subsequent to any part of that course of conduct.

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Chapter 3 – victim safety and non-harassment

Victim safety in relation to sentencing

69. Paragraph 7 of the schedule introduces a new section 210AB into the 1995 Act.

70. New section 210AB requires a court when sentencing for a relevant offence to have particular regard to the aim of ensuring the victim is protected from being subject of a further such offence by the convicted person.

71. The relevant offences are the new offence under section 1 of the Bill and any offence that is aggravated under section 1 of the 2016 Act.

Consideration of non-harassment order

72. Paragraph 8 of the schedule introduces a new section 234AZA into the 1995 Act. This new section provides for new rules in relation to how the court is to consider non-harassment orders when sentencing for a relevant offence. New section 234AZA(5) lists the relevant offences as an offence under section 1 of the Bill and an offence that is aggravated as described in section 1(1)(a) of the 2016 Act.

73. Section 234A of the 1995 Act provides the existing rules relating to non-harassment orders available to the court following conviction. New section 234AZA(1) provides that section 234A continues to operate in cases of domestic abuse but subject to certain modifications.

74. New section 234AZA(2)(a) provides that the court is always required to consider whether to make a non-harassment order. An application by the prosecutor is not required to initiate this process.

75. New section 234AZA(2)(b) provides that the court must offer the prosecutor the opportunity to make representations on the question of whether to make such an order. This is intended to allow the prosecutor to bring before the court any relevant information that has not already been aired during the case. This might be, for example, the specific views of the victim on the fear they feel in respect of the convicted person.

76. New section 234AZA(2)(c) provides that the court must give reasons for the decision made including why they considered a non-harassment order was either necessary or not necessary as the case may be.

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77. New section 234AZA(3) makes a number of consequential adaptations to section 234A which are necessary as a result of the prosecutor not being required to make an application in the circumstances.

78. New section 234AZA(4) preserves the position whereby a non-harassment order may be imposed as an alternative or in addition to some other disposal in the case (e.g. imprisonment or a Community Payback Order).

Part 2 – minor and consequential amendments

79. Paragraph 9 of the schedule makes a consequential change to section 79 of the 1995 Act as a result of section 6 of the Bill.

80. Paragraph 10(2) of the schedule makes a minor change to section 1 of the 2016 Act. This is to introduce consistency with the approach taken in section 10 of the Bill.

81. Paragraph 10(3) of the schedule amends the 2016 Act to provide that for the purposes of applying the domestic abuse aggravation under section 1 of that Act the matter of the accused being the complainer's partner or ex-partner is to be taken as established unless the matter is challenged by way of a preliminary objection prior to the trial taking place.

Section 12 – Ancillary provision

82. Section 12 provides a power for the Scottish Ministers to make, by regulations, incidental, supplementary, consequential, transitional, transitory or saving provision relating to the Bill.

Section 13 – Commencement

83. Section 13 provides that this section, section 12 and section 14 of the Bill come into force on the day after Royal Assent. All other provisions are to come into force on a day appointed by regulations made by the Scottish Ministers, and those regulations may make transitional, transitory or saving provision related to commencement.

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