OFFICIAL REPORT
AITHISG OIFIGEIL

Justice Committee

Tuesday 6 June 2017

Session 5

The Scottish Parliament
Pàrlamaid na h-Alba

Tuesday 6 June 2017

CONTENTS

JUSTICE COMMITTEE
21st Meeting 2017, Session 5

CONVENER

*Margaret Mitchell (Central Scotland) (Con)

DEPUTY CONVENER

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

COMMITTEE MEMBERS

*Mairi Evans (Angus North and Mearns) (SNP)
*Mary Fee (West Scotland) (Lab)
*John Finnie (Highlands and Islands) (Green)
Fulton MacGregor (Coatbridge and Chryston) (SNP)
*Ben Macpherson (Edinburgh Northern and Leith) (SNP)
*Liam McArthur (Orkney Islands) (LD)
*Oliver Mundell (Dumfriesshire) (Con)
*Douglas Ross (Highlands and Islands) (Con)
Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

George Adam (Paisley) (SNP) (Committee Substitute)
Detective Chief Superintendent Lesley Boal QPM (Police Scotland)
Anne Marie Hicks (Crown Office and Procurator Fiscal Service)
Calum Steele (Scottish Police Federation)

CLERK TO THE COMMITTEE

Peter McGrath

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Justice Committee

Tuesday 6 June 2017

[The Convener opened the meeting at 10:00]

Domestic Abuse (Scotland) Bill: Stage 1

The Convener (Margaret Mitchell): I welcome everyone to the 21st meeting in 2017 of the Justice Committee. Apologies have been received from Fulton MacGregor and Stewart Stevenson. I welcome George Adam to the meeting.

Following the terrible events in London at the weekend, the Presiding Officer has notified Parliament that there will be one minute's silence at 11 am as a mark of respect to those who died in, or who have been affected by, the attack. I will suspend the meeting at one minute to 11 and, after the minute's silence, we will resume business, which I expect will be a continuation of the first item on our agenda.

Agenda item 1 is our third evidence-taking session on the Domestic Abuse (Scotland) Bill. I refer members to paper 1, which is a note from the clerk; paper 2, which is a private paper; and paper 3, which is a Scottish Parliament information centre paper.

I welcome to the meeting Anne Marie Hicks, who is the national procurator fiscal for domestic abuse and head of the victims and witnesses policy team at the Crown Office and Procurator Fiscal Service; Detective Chief Superintendent Lesley Boal QPM, who works in public protection in the specialist crime division of Police Scotland; and Calum Steele, who is the general secretary of the Scottish Police Federation. I thank the witnesses for their written submissions, which are always very helpful to the committee. I invite questions from members.

John Finnie (Highlands and Islands) (Green): Good morning, panel. I have a question for Mr Steele on his concerns about what would be expected of police officers attending a scene. Can you elaborate on those concerns, for the record?

Calum Steele (Scottish Police Federation): Certainly. The first thing that I should say from the SPF's perspective is that we have absolutely no objections to the sentiments behind the bill, as is set out at some length in our written submission.

Where we differ from various sides of the legal profession—whether it be the Crown Office and Procurator Fiscal Service or bodies that represent defence organisations—is in the fact that the Police Service of Scotland and police officers are going to find themselves in the middle ground. There is a fundamental difference between having physical evidence and interpreting whether something might amount to a form of psychological abuse, so that will create new difficulties for police officers. I am not saying that such difficulties are insurmountable—I dare say that the service has already given some thought to the training implications of having to deal with such circumstances—but the point is that at these very early stages we just do not know what such training might be, or how police officers will be expected to deal with those circumstances.

John Finnie: Reference is often made to the joint protocol between Police Scotland and the Crown Office and Procurator Fiscal Service, so I had a look at it. I acknowledge that this relates to counter-allegations in domestic abuse cases. I note that with regard to the list of factors that could be taken on board in such circumstances the protocol says:

> "Careful consideration should be given to all relevant factors including ... officers' professional judgement".

Is not it the case that officers will not be asked to do anything different from what they do at the moment with regard to the immediate situation, and that subsequent inquiries might well have to be made?

Calum Steele: That might be the case, but what we have before us are draft proposals that, as I have said, will move us away from physical evidence to degrees of interpretation of intent. It is easier to infer intent if there is a physical act—for example, if I were to swing a punch and miss—but if there is no direct evidence other than the complainer's allegation, having to show intent with regard to, say, alleged withholding of money or constant belittling of B by A, to use the terminology in the bill, creates a potential difficulty for police officers.

John Finnie: I understand that it is unlikely that a course of behaviour would be established instantly on attendance at the scene. I am trying to understand how what is proposed differs from the situation at the moment, as I understand it, whereby police officers attend a scene, there would be liaison with the Crown Office and Procurator Fiscal Service and then an inquiry would be done on the background of the alleged perpetrator. That process has brought to light some historical cases in which a perpetrator has moved from household to household, creating mayhem. That is not something that would be immediately apparent on arrival at the locus but would be established by diligent inquiry by police officers.

Calum Steele: Again, I accept that that might be the case. However, at the risk of going back to points that were made in a previous evidence session on the role of the Crown Office and Procurator Fiscal Service, I will say that the operational experience of police officers in some instances is that the professional judgment of those who work in the legal and prosecution spheres is not as available to them as the joint protocol might suggest. That view appears to have been supported by other witnesses—in particular, witnesses who work in the legal profession, including some anonymous procurators fiscal who provided evidence.

John Finnie: Right. Is it fundamentally a resource issue? You previously mentioned training.

Calum Steele: As you well know, Mr Finnie, when it comes to policing, it is always a resource issue. In many ways—just to digress slightly—the events of recent weeks have served to reinforce that point.

However, in the event of the bill being passed, once we understand what training is to be delivered to police officers and how that is expected to be worked through in terms of practical application, we will better understand whether the police service will have in place the capability to deliver the training properly in order to enable police officers to respond effectively to the needs of victims.

John Finnie: I would be concerned if there was a suggestion that we could not rely on a police officer's judgment in situations such as those that we are discussing. What is proposed would add a string to the bow of police officers in dealing with a pernicious course of conduct in domestic abuse. I am sure that your members will rise to the occasion, should the bill be passed.

Calum Steele: I am sure that you will attest from your experience that police officers are more than able to deal with difficult situations, provided that they have the capability and the training to do what is asked of them. Police officers have lots of life skills on which to draw, but their ability to draw on them is occasionally somewhat curtailed because of an expectation that if A happens, B, C and D must follow. That does not provide—I am not saying that it should in all cases—unfettered discretion for police officers to deal with what they find before them.

Of course there will always be requirements for undertaking subsequent or additional inquiries; very rarely do we come across an incident in which everything is packaged before us to the extent that we do not have to undertake further examination. That is particularly the case with regard to domestic abuse cases, in which it is unlikely that the first occasion when the police are called is the first occasion when domestic abuse has happened. Of course, because of the way in which the service has developed over many years, particularly in relation to the work of the domestic violence task force, in undertaking retrospective examinations and seeking witnesses, the police have the capability to gather that additional evidence.

However, we need to see what the proposed training will look like. We need to ensure that the police service is going to invest properly in it. We do not want police officers to find themselves ill-equipped and unprepared for dealing with the requirements of new legislation, because they could, ultimately, find themselves in a difficult situation when a case came to court.

John Finnie: Thank you.

The Convener: I want to ask a bit more about how the bill might impinge on the role of officers. You said in your written submission, Mr Steele, that there could be cases in which police officers would be dragged into the "reasonable person" test.

Calum Steele: The "reasonable person" test is not unknown to police officers; in fact, it is very common in United Kingdom legislation and in legislation that the Scottish Parliament has passed. Such a test applies to careless driving, for example, so the notion of reasonableness is not new. However, the important point is that, in many instances, the "reasonable" assessment is drawn from an event or a series of activities that has been physically witnessed or which other visual evidence supports. That evidence is much more difficult to obtain in cases in which there are forms of psychological abuse.

Mairi Evans (Angus North and Mearns) (SNP): I want to focus on a couple of issues that were raised during last week's evidence session, in which we heard from the Faculty of Advocates and the Law Society of Scotland. They highlighted potential problems in prosecuting crimes under the proposed legislation. They gave the example of a case in which the victim is not a witness, because the person does not believe that they are the victim of a crime, so they are not able to give evidence. Do you see any difficulties in prosecuting in such a scenario, in which the case depends on third-party evidence, rather than on evidence from the person who experienced the crime?

Anne Marie Hicks (Crown Office and Procurator Fiscal Service): In most cases that involve harm—domestic abuse cases, cases that involve assault of a member of the public and so on—the complainer or victim provides the primary evidence. That is the case across the board and,

certainly, in domestic abuse cases, but there could be a case in which the complainer is not a witness. If the complainer is not a witness, there would have to be sources of evidence further afield to see whether someone else had witnessed something. That person could be a friend, a family member or a child in the family. If something had happened in public, that person could be a member of the public or a neighbour. Other sources of evidence would have to be looked for. It is unusual, but it happens. We would have to apply the same test that we currently apply to corroborating evidence.

Mairi Evans: Another concern that was expressed last week was about the admission of hearsay evidence, on which it was proposed that there is a danger in asking non-expert witnesses to express opinions in court. Currently, they are not allowed to do that. I am thinking in particular about coercive and controlling behaviour. If a person can see such behaviour towards somebody else, see its impact and see the victim's behaviour changing, they can try to express that in court without the victim giving evidence. What are your thoughts on that scenario? Do you see any difficulties with that?

Anne Marie Hicks: Obviously, that introduces quite a novel and groundbreaking concept in terms of "relevant effects". As Mr Steele said, we are more used to looking at harm that has been caused by assaults, or at threatening and abusive behaviour, where there is perhaps something more concrete, but we would still have to gather evidence on those other behaviours, and we would not look for other witnesses to give expert or opinion evidence on a person's psychological state. They would give evidence of behaviours that led a person to be distressed. Someone might speak about what they had witnessed a perpetrator doing and how the victim reacted in that particular situation, or about something else that they had witnessed. They would not give expert or opinion evidence; they would simply speak about what they had seen, heard or observed themselves. The position would be no different from the current hearsay provisions.

Mairi Evans: Another concern that we heard last week was about the broad definition of "abusive behaviour" and the fear that the proposed legislation might criminalise or capture behaviour that it is not intended to capture. Does it need to be more tightly defined, or do you agree with the current definition?

10:15

Anne Marie Hicks: I am supportive of the current definition. Dealing with domestic abuse has always been a matter in which people have said that there is a danger that we stray into family life. Even under the current law, it is sometimes asked whether we criminalise normal behaviours in a relationship. We do not, and I do not think that the bill does that. It defines "abusive behaviour" as behaviour

"that is violent, threatening or intimidating".

It also defines it in terms of "relevant effects", which include

"controlling, … frightening, humiliating, degrading or punishing"

someone. That is not how I would define normal friction in a relationship. Once we get to the boundaries of "humiliating, degrading or punishing" treatment, that is where the criminal law should step in.

The Convener: Perhaps someone will bring that up later, so we will move on.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): I will touch on some of the points that were raised in answer to Mairi Evans and some of the points that are made in Anne Marie Hicks's submission, which states:

"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."

Will you expand on why a new, specific offence is important to cover that behaviour?

Anne Marie Hicks: Absolutely. At the moment, we are limited to offences that, in essence, attack someone's physical integrity. It might be an assault or threatening and abusive behaviour. Those are properly criminal offences, but there is a gap in relation to much of the controlling and coercive behaviour, which might be very degrading, might be humiliating and might involve a tremendous abuse of power and control. Someone might be controlled in their everyday life and no longer have the freedom of action to go out and do what they would normally do and to make the normal choices that you and I would take for granted.

When those behaviours become threatening or abusive, we can use current legislation but, in many cases, we cannot. We know that such behaviours take place. We hear directly from victims all the time about the behaviours that amount to abuse of power and control but we cannot take action in respect of them. Therefore, there is a gap in respect of addressing such behaviour. The problem is that the law deals with it only in an episodic manner. We look at discrete and isolated incidents of assault or threats but do not see the bigger picture and the continuing

pattern of cumulative abuse to which people are subjected. That cannot be right.

Ben Macpherson: One of the key parts of the bill for addressing that gap will be the definitions and how prosecutors and courts can use them. One of the concerns that other witnesses have raised is the inclusion of recklessness at section 1(2)(b)(ii). What is your view as a prosecutor on the inclusion of recklessness and its relationship with the aspect of mens rea in criminal law?

Anne Marie Hicks: Recklessness is not a new concept. We have it in a number of other areas of law. We have had a crime of culpable and reckless behaviour for years. We also have a test of recklessness in the offence of threatening and abusive behaviour under section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 and the stalking offence under section 39 of that act, which describes it as being when someone

"knows, or ought … to have known,"

the effect of their conduct.

Prosecutors are familiar with the concept and it can be useful, particularly in cases in which it is not easy to establish intent. Intent in terms of the mens rea that we have to prove can usually be inferred from the actions of an accused. It is easy to establish intent if there is an assault or threats are issued but, particularly where we are dealing with more nuanced behaviour, the concept of recklessness is valid.

It is important to note that it is not recklessness in the way that you or I might regard it in our ordinary lives—as a kind of carelessness. It is a criminal recklessness. It is a criminal disregard in which the person disregards the possible consequences. The courts are used to applying those tests, as are prosecutors. When we deal with a lot of different types of nuanced behaviour, as we will do under the bill, it will be useful to have the concept of recklessness. We have seen that with the stalking offence, which includes other types of behaviour that were perhaps not traditionally criminal. Recklessness has been a very important concept in that.

Ben Macpherson: For clarity, are you saying that you support the inclusion of the word "reckless"?

Anne Marie Hicks: I absolutely do. It would be difficult not to include it.

Ben Macpherson: The Crown Office and Procurator Fiscal Service said in its written evidence:

"Domestic abuse remains chronically underreported in Scotland and there are a number of complex reasons for this. 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."

How important is that wider point about social change and the expectation that the bill, if it is passed, will have a positive impact on the reporting of domestic abuse, by encouraging victims to come forward who previously would not have done so?

Anne Marie Hicks: It is incredibly important. When there are sound laws and effective enforcement, people have the confidence to come forward.

There is something about calling people's experience what it is, as we saw with the stalking offence. In the first year after that offence was created, 67 people were prosecuted for it; five years later, nearly 800 people were prosecuted for it. There is something about people recognising behaviour and naming it for what it is.

A lot of victims of domestic abuse say, "I'm not a victim of domestic abuse, because he doesn't hit me." Scottish Women's Aid will tell you that that is very common. We can shine a light on the experience and say to people, "The law of the land recognises that the behaviour to which you are being subjected is wrong and unacceptable, and you can come forward." In a number of cases, new legislation has been a positive driver in encouraging people to report the harm that is done to them.

Ben Macpherson: Thank you.

The Convener: Does Lesley Boal want to add anything?

Detective Chief Superintendent Lesley Boal QPM (Police Scotland): Let me respond to what Calum Steele said about police officers and new legislation. What we are talking about is new legislation but not a new concept. We receive reports of coercive control and have done so for many years. Since the inception of Police Scotland, 1,893 high-tariff offenders have been investigated by the national domestic abuse task force, and I am told that nearly all those cases involved coercive control.

On the suggestion that officers might find it difficult to identify psychological harm, I think that officers already do a very good job at that and have done so for many years. We are talking about domestic abuse just now, but we can consider other areas. The threshold for child protection is that the child is or might be at risk of significant harm, and officers are able to discuss and make judgments about harm in that context. The Children and Young Persons (Scotland) Act 1937, which police officers and prosecutors have all dealt with, refers to the "likelihood" of some sort of psychological harm.

Officers look for wellbeing concerns on a daily basis. Over the past 10 years, the getting it right for every child approach has involved making a holistic assessment of a child and the potential for harm. That is something that police officers do on a day-to-day basis and are well equipped to do.

Police Scotland introduced a domestic abuse questionnaire last year. In every domestic abuse incident, the victim is asked a series of questions—there are 26 questions, with some sub-categories—in an attempt to establish, more holistically, the circumstances of their life. For example, they are asked whether the perpetrator has every hurt a pet or animal, and whether he has ever used weapons or objects. They are asked whether financial harm has been done to them and whether they are dependent on the person for money or something else, and they are asked whether there are mental health problems and whether there have been suicide attempts—they are asked about all the risk factors that can provide the officer with more knowledge with which to make an assessment about harm.

As John Finnie suggested, the first responding officer might not get it right on every occasion, but that is why we have built in a series of checks and balances. For every domestic abuse case or incident that is reported, as well as a questionnaire form, a domestic abuse concern form is raised. If there is a child in the house, a child concern form is raised as well, to comply with GIRFEC.

Those forms are checked by the supervisory officer, so I suppose that we are talking about belt and braces, and before the officer finishes for duty that day, they are submitted to the divisional concern hub. That happens in each of the 13 divisions. The hubs look holistically at all the domestic abuse and child and adult concern forms that are submitted. They look at other concern forms that we might have and try to pick up on information patterns or escalations.

That approach is belt, braces and stay-up trousers, I suppose. Three different assessments are being made as to what an incident actually looks like and what the implications for the victim are. After that, there could be a referral to the domestic abuse liaison officer, and, with the person's consent, there will be referrals to support and advocacy services. The domestic abuse liaison officer may visit, along with support services. The case might be referred to the multi-agency tasking and co-ordinating meeting, which looks at perpetrators, as John Finnie said; that bit is about looking at what is happening now and looking backwards, and gathering evidence from a range of individuals to see exactly the coercive behaviour that is involved.

The difficulty at the moment in being able to have a holistic perspective on someone's abusive behaviour is that, when we investigate—as Anne Marie Hicks clearly said—we might have to charge for single incidents and single offences. I know that this is a new bill, but what is in it is not anything new. Police officers are well equipped. I agree with Calum Steele that we need to do more; we have plans in place to do more and we will do more. Some comments have been made about there being too many hurdles. With the bill, together with good guidance and explanatory notes, we can overcome those hurdles.

The Convener: It has been helpful for you to put coercive behaviour in context and tell us how you look at the various pointers.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I will expand the discussion a bit and ask about the impact of domestic abuse on children. We have received quite a few written submissions that say that the statutory aggravator in relation to children might not be wide enough in scope. I note that COPFS is very supportive of the bill generally and of the statutory aggravation. Should the aggravator be more specific to protect children in cases where, say, a child is being used as a pawn or is being subjected to hearing the abuse from another room?

Anne Marie Hicks: The aggravation is a very positive step in increasing the visibility of children in the process. It is an area that we and the police considered carefully while working on our joint protocol, which was launched less than two months ago. As part of that process, we consulted children's stakeholders. A recurring element of feedback from children and those who represent them has been the need for children to be more visible in the process, so we introduced provision to ensure that children are spoken to when an incident occurs to find out from them what happened, and provision for things such as special measures, obtaining children's views and joint investigative interviewing.

Having an aggravation—something that allows a sentencer to enhance a sentence—is a positive move. At the moment, if an incident such as an assault were to occur in front of a child, I would expect a sheriff to comment on that and perhaps to take it into account. However, there is no formal mechanism for doing that or for increasing sentences, and it is important that we have that.

10:30

The terms of where the aggravation applies are quite wide ranging and capture most situations, including directing behaviour at a child, which could be any manner of behaviour or abuse; making use of children to perpetrate abuse on the victim, which we hear about quite a lot; and allowing children to see, hear or otherwise be

present during an incident. Those factors could truly aggravate a sentence and could lead a sentencer to say that the accused had in some way acted in the knowledge that children were affected and that there was a degree of deliberateness in their conduct.

We have had discussions with children's stakeholders about the development of the bill and I fully accept that they would like it to go further and to have an offence of domestic abuse involving a child. They have very compelling points to make about the harm to children, and I would in no way say that everything in the bill captures all the harm that is ever done to children in domestic abuse situations. The harm can be wide ranging and long lasting and can affect them in many ways. This is about reflecting on an accused's conduct and capturing what a sentence could truly be enhanced for. If the offence of domestic abuse is for partners or ex-partners, it is problematic to have an offence of domestic abuse involving a child. There are difficulties with that.

I am reassured by wider moves that have been made. Lesley Boal referred to the section 12 offence in the 1937 act and there have been concerns expressed in a number of quarters about that, so I am pleased that there will be consultation on that and on how we fully capture other harms that are done to children. There could be further developments down the line, but what we have now is a positive step forward.

Detective Chief Superintendent Boal: Having been the lead for child protection for Police Scotland for the past three years, I am acutely aware of the devastating impact that domestic abuse can have on children. If I am honest, when I first took over the domestic abuse work a few weeks ago, my initial thought was that there should be a separate offence for when a perpetrator uses a child as a proxy. I quite agree about having an aggravator for when there is a child in the household, but I initially thought that there could be another section to cover when the perpetrator's intention is to use the child to further the coercive control of his partner or ex-partner. However, I absolutely understand the reason and the rationale for the bill. It is designed to capture the nature and dynamics of the relationship or ex-relationship. I am fully aware—as I have been lobbying for it for some time—of the need to change section 12 of the 1937 act and I am aware that the Scottish Government is looking at that in depth.

Rona Mackay: Are you of the opinion that, at some time in the future, it should be a separate offence?

Detective Chief Superintendent Boal: Absolutely. It definitely should be a separate offence. On whether it should be in this bill or in the new proposed legislation that is being designed specifically for children, on balance I think that it would probably be best to wait until the other bill is developed a bit more, as the wording will be quite complex and tricky. I am very happy that the aggravation is in place and we strongly support that.

Calum Steele: My view is similar to that of Lesley Boal. In many ways, there is a need for the aggravation when children are utilised as pawns in abusive relationships, so it is more than right and proper that that particular kind of aggravating behaviour is recognised and made known to the courts. Although adults can be more robust, regardless of the circumstances in which they find themselves, the effects on children, who are at the very outset of their lives, can be much longer lived.

Mary Fee (West Scotland) (Lab): What are your views on the inclusion of other types of family abuse? We have had suggestions that abuse by an adult child of a parent should be included. Do you share that view, or should that type of abuse be picked up by other legislation?

Anne Marie Hicks: I do not share that view. In England and Wales, the definition of domestic abuse has been widened to include familial abuse, whether that is abuse between siblings, abuse of the elderly or abuse by parents of children. There were perhaps good reasons for that—I was not privy to the discussion—but I am convinced that we should maintain our definition and the scope of the bill. There are a number of reasons for that. We have a national definition of domestic abuse that is widely shared and worked with by a number of agencies. That definition is based on the gendered approach and the acknowledgement of the inequalities in violence against women. When 80 per cent of our domestic incidents still involve abuse of women by men, I would be very reluctant for us to move away from that definition, which refers to partners and ex-partners.

The Crown Office and Procurator Fiscal Service definition, which we share with the police through the joint protocol and which has been in place since before 2004, refers to partners and ex-partners. The definition is also mirrored in criminal and civil legislation, in the Domestic Abuse (Scotland) Act 2011 and the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. It would be difficult to move away from the definition, and it would not be the right thing to do, given the steps that have been taken over a number of years to increase public awareness of domestic abuse and what it is. We have to acknowledge that domestic abuse involves unique dynamics, and there is a large research and evidence base to support that.

That is not to say that there are not other types of abuse of individuals that have similar characteristics and can also be heinous, and it is

not to say that those things are any less serious. However, if we call everything domestic abuse, there is a danger that we dilute it and lose the focus of what we are doing. Suddenly, it might become less important and people might not understand what we are dealing with. We are not saying that, if there is harm in another situation, we should not address that, but the focus on domestic abuse should remain firmly on partners and ex-partners.

Mary Fee: That is very helpful. Lesley, do you want to comment?

Detective Chief Superintendent Boal: I cannot add anything to that. We absolutely support the current position that the bill is about domestic abuse between partners and ex-partners.

Calum Steele: Similarly, I concur with Anne Marie Hicks. That in no way diminishes the fact that, where adult children abuse their parents in whatever shape or form, that is a serious issue. However, there has to be a complete distinction between that and domestic abuse as we currently know it.

Mary Fee: I will ask Calum Steele about something in his submission that gave me food for thought. You say:

"the apparent policy approach to domestic abuse is one geared almost exclusively towards punishment."

With a lot of other crime, although not all of it, we talk about rehabilitation, reforming and changing behaviours. The Government has talked a lot about early intervention and working with offenders. In relation to domestic abuse, and as the bill progresses, do we need to think more about how we deal with people who commit such crimes and how we change their behaviour? With domestic abuse, none of us wants repeat offenders or an escalation of the behaviour.

Calum Steele: We did not make the observation to detract from the issues that the bill tries to address. I cannot think of any such legislation that does not have at its core punishment in some way, shape or form, whether that is imprisonment, fines or whatever. The comment was more a general observation that, as a nation, we seem to be dealing with the issue almost exclusively through the punishment arena rather than through the approach that we take in other areas. For example, on driver behaviour, we try to introduce some form of rehabilitation and awareness of behaviours that are wrong.

That issue is hugely distinct and separate from the bill that is before us. No matter what the behaviour is and no matter how bad it is, we cannot think that the only way to deal with it is through punishment, because that would be fundamentally at odds with the message that we send in a variety of other areas.

Anne Marie Hicks: I do not agree that our approach is about punishment. From the Crown's perspective, the driving force is protecting the public and preventing future harm. The national strategy "Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls" recognises the importance of having appropriate laws and robust and effective enforcement and prosecution. The bill will be another tool in the toolbox to help us to prevent harm. Although there is a punishment aspect to it, punishing offenders is not the driver for it.

Detective Chief Superintendent Boal: In 2016-17, Police Scotland recorded just under 58,500 domestic abuse incidents, of which 49 per cent resulted in one or more crimes being recorded. We know from the crime and justice survey that just under 20 per cent of domestic abuse incidents are reported to the police and we know, from research that support agencies have done, the time that it takes for somebody to first disclose domestic abuse.

Calum Steele is probably correct in what he said about legislation and enforcement. We need a long-term national campaign to prevent domestic abuse that challenges social norms and highlights to potential victims, perpetrators and bystanders the legislation and its enforcement. That is exactly what the equally safe strategy is working to achieve. An awful lot of work is going on; legislation and enforcement are only one important part of the whole prevention strategy.

Mary Fee: There have been a number of public information broadcasts and awareness-raising campaigns on domestic violence. As the legislation is implemented, do you think that there should be a longer-term strategy?

Detective Chief Superintendent Boal: I do. It might be a 10-year strategy, which has to cover all the component parts. Bystanders are really important in challenging social norms, and information has to be provided consistently rather than sporadically. I see the strategy as being like a golden thread; people will learn through osmosis. The strategy has to be well thought out and has to cover all the component parts of domestic abuse.

Mary Fee: Societal change takes a long time, so we need a long-term strategy.

Douglas Ross (Highlands and Islands) (Con): I will follow up John Finnie's question. Mr Steele, you said back in November that couples could no longer have a row without one of them leaving in handcuffs if the police were called. Do you stand by that statement and do you think that that approach will continue under the bill?

Calum Steele: For complete accuracy, I think that I said that things had almost got to the stage where that was the case.

On where we are, I do not think that things are as extreme as they once were. It is right to identify that such concerns were raised not just by me on behalf of police officers but by defence agents and others, too. I do not think that those concerns exist to the same extent. In truth, the approaches to the awareness of domestic violence have caused a ripple through Scotland.

10:45

The former chief constable Sir Stephen House was strong in the focus and emphasis that he put on the issue during his time with the former Strathclyde Police, and it took a while in Police Scotland for the rigour that was applied to catch up with and meet what was a fairly universal standard. Officers in some areas were still working towards what had by then been a long-developed understanding of the process for dealing with domestic abuse, which had matured during Sir Stephen House's time, particularly at Strathclyde Police, but they eventually caught up in the rest of Scotland.

I still think that, on occasion, there is a danger that what someone has described as ordinary domestic friction can result in unnecessary intervention by the police. That is always a difficult situation. I know about and have direct, second-hand and third-hand experience of such matters; my members have articulated to me a series of circumstances and events in which, when we understand the background, it is difficult to understand why someone had to be arrested and leave the family home in handcuffs.

For example, I am aware of a situation in which one partner had mental difficulties, and the other partner phoned the police because they were aware that there was likely to be disorder in the house that evening, which sure enough was what happened. The police came along and the partner with the mental difficulties ended up leaving in the proverbial handcuffs. Subsequently, that person appeared from custody and, under their bail conditions, they were not allowed to return home, which meant that they had to find temporary accommodation. However, none of the temporary accommodation would allow that individual to keep the pet that was the only source of comfort to them. As I understand it, that case did not proceed.

There will always be such horrific individual examples, but I do not think that that should in any way suggest that the Scottish Police Federation is anything other than supportive of a strong and robust approach to domestic violence. However, on occasions when, with the best of intentions, we get things wrong—or are seen as getting them wrong—it is important that the service supports the officers who have made those decisions and that we say sorry if we have to.

Douglas Ross: Does Lesley Boal from Police Scotland recognise what Calum Steele just described? Does Police Scotland accept that the scenarios that he outlined occasionally happen and might continue to happen under the bill?

Detective Chief Superintendent Boal: I do not want to comment on the specific incident that Calum Steele mentioned, because I have no knowledge of it.

Douglas Ross: If the federation is saying that that is what officers are telling it, do you on behalf of Police Scotland accept that that sort of thing is happening?

Detective Chief Superintendent Boal: The guidance that Police Scotland provides to officers has never said anything other than that they should investigate in order to obtain a sufficiency of evidence. When there is such a sufficiency, the individual may be arrested and reported to the procurator fiscal.

I appreciate that there might have been misunderstandings when Police Scotland began, but the domestic abuse task force and the domestic abuse co-ordination unit have been doing significant work to provide guidance and aid understanding. Each division in Police Scotland has a domestic abuse forum where local policing officers from divisions meet to discuss difficulties, misunderstandings and how policy, practice and standard operating procedures can be adapted to particular circumstances or difficulties.

That work is on-going, but there is probably more guidance and more of an opportunity for liaison, providing support and having interaction on domestic abuse than there is in any other area of policing. Officers decide whether to arrest when faced with a particular situation, and they should make such decisions only if there is a sufficiency of evidence.

Douglas Ross: I will move on. I have a quote to put to Anne Marie Hicks that is similar to the one that Ben Macpherson asked her about. Her submission says:

> "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."

In her answer to Ben Macpherson, Anne Marie Hicks said that we need to have sound laws and effective enforcement. Does that indicate that, at the moment, we do not have sound laws and effective enforcement?

That leads me on to Lesley Boal's comment that what is in the bill is not anything new. I am struggling to understand how, on the one hand, the Crown Office says that the new legislation will encourage people to report domestic violence and coercive behaviour but, on the other hand, Police Scotland says that the legislation is nothing new.

Anne Marie Hicks: First, I would not read into what I said to Mr Macpherson the slant that you have put on my comment. In no circumstances am I saying that we do not have sound laws at the moment. The laws and enforcement that we have in place are robust and effective. We are talking about legislating for something new and something additional. That is not saying that we do not have sound laws; rather, we are saying that we recognise that there are other harms that are perhaps not captured, so there is a need to legislate.

Douglas Ross: Do you understand that my query is to do with Police Scotland saying that the bill is nothing new? We have legislation in place, under which the police could charge someone. That would have to involve separate bits of legislation, but the legislation is there to charge someone with committing such behaviour. You are saying that, because of the new legislation, people will be encouraged to act, but Police Scotland says that it is not new and that we already have it.

Anne Marie Hicks: No. I think that Lesley Boal was saying that the legislation is not new in the sense that it is not the case that we have never dealt with the concept of coercive control and never heard about controlling behaviour, which would mean that the bill was somehow a completely new departure. We are not at ground zero; we have all seen such behaviour. We hear about controlling behaviour in the statements for many of the cases that we get.

I set up and ran for a number of years the domestic abuse unit in Glasgow. Before we even knew from the research and the typologies about coercive control or intimate terrorism, we talked about such behaviour as a power-and-control domestic or as a bad-time-in-a-relationship domestic. We saw those cases coming through. We understand those issues.

As Lesley Boal set out, the police do a risk assessment when evidence of control comes in. People will not say, "Oh my goodness—this is a completely new concept I've never heard about." Instead, there will be a new law to enforce that will help us to take action against coercive control. Coercive control is not a new concept. We see its impact day and daily through the distress that victims are in.

The Convener: Lesley Boal set out in quite a lot of detail the consideration of the context, such as whether there had been actions—for example, abuse of an animal—that were pointers that might have indicated that such behaviour was likely to happen. However, coercive behaviour has not been covered in the law.

Detective Chief Superintendent Boal: Absolutely. I am sorry if what I was trying to explain has been misinterpreted. My point is not that the concept is new or that we have never tried to identify the behaviour before. It is not new for police officers to assess the harm that could be caused. However, the bill is a new piece of legislation.

I agree with Anne Marie Hicks that there is a gap in the legislation at the moment. A lot of the behaviour, which is quite horrific, has to be addressed as a breach of the peace at best. My point related to Calum Steele's position that the legislation will be new for police officers. My position is that we understand coercive control and that police officers have been able to capture evidence about it during their investigations for some time.

Douglas Ross: The paragraph that I quoted from the Crown Office submission continues:

"It is expected that this"—

that is, the new legislation—

"will have a positive impact on the reporting of domestic abuse and encourage some victims to come forward where they previously would not have."

Everyone in the Parliament supports the bill, but is there a risk that, if someone who is living through what others would rightly equate to being domestic abuse genuinely believes it not to be domestic abuse, their mindset will not necessarily change just because we pass a bill in the Scottish Parliament? How do we address the concern that an individual who is living through coercive behaviour—unacceptable as that is to those of us in the Parliament and across Scotland—might not believe that the behaviour is domestic abuse? Will the legislation change the situation for those people?

Anne Marie Hicks: The legislation changes the situation for those people in a number of ways. You are absolutely right that some victims do not recognise coercive behaviour. A common syndrome of domestic abuse is that people minimise behaviour and blame themselves. They might not even recognise that they are a victim of abuse.

There is a multi-agency response to domestic abuse. If the police receive a case, they can offer the victim a referral to a support and advocacy service where one exists, to victim support—that applies for any victim of crime—or to a women's aid centre.

When a new law such as the bill is introduced, not only victims and members of the public but those who work directly with victims of domestic abuse will understand that such behaviour is being criminalised. Organisations that are working with and supporting people will be able to encourage them to go to the police whereas, at the moment, there might be no typically criminal behaviour that organisations would encourage people to report. The situation will improve because of that.

My earlier point about the stalking legislation is important. I remember that similar arguments were made when that legislation came in. People said that stalking was different, that we were criminalising non-criminal behaviour, that we were interfering in personal life too much and that people would not come forward. However, 12 times more people have been prosecuted for stalking.

The phrase, "If you build it, they will come," applies. The situation will not change overnight but, once people have confidence that something is in place that says that the conduct and behaviour that they are being subjected to are against the law, they will be encouraged to come forward. When they do, the police officers who deal with them will understand what is happening and will call that behaviour by its name, thoroughly investigate it and report it for prosecution.

The Convener: I return briefly to the robust prosecution of domestic abuse, which everyone fully supports, and to some of the anxieties about an overrigid interpretation of the law. That was raised in our inquiry into the role and purpose of the Crown Office and Procurator Fiscal Service, which all members are focused on, especially today, as we will debate our report this afternoon. At the time of our inquiry, the Lord Advocate said that he would look into the issue. I am conscious that there has been a fourth edition of the joint protocol between the police and the COPFS. Has that helped to ensure robust prosecution rather than overrigid interpretation of the law?

Anne Marie Hicks: I do not think that interpretation of the law has been overrigid. I appreciate that, at times, there have been comments and perceptions to that effect. We operate to presumptions for prosecutions, and there are good reasons for that. Historically, domestic abuse has not been dealt with well—it was overlooked as being just a domestic. Because of the harm that it causes to people, we have robust presumptions in place for prosecution, but they are presumptions.

Since I have been in post—it has been almost four years—training has been a big priority for me. I have introduced a considerable amount of new training for our staff, including a new accredited training programme for domestic abuse. A big focus of the training has been on the dynamics of domestic abuse and the circumstances in which people might properly rebut the presumption to prosecute. That is about looking at the bigger picture and seeing the context.

The launch of the joint protocol has been positive.

The Convener: We will pick up that point after the one-minute silence. I suspend the meeting to allow everyone to stand in preparation for that.

10:58

Meeting suspended.

11:01

On resuming—

The Convener: Thank you. We now resume our questioning. Anne Marie Hicks was answering about the fourth protocol.

Anne Marie Hicks: The joint protocol was launched at the end of March. It is the revised, fourth edition. We spent a considerable amount of time over a number of months consulting not just the Crown, the police and our internal staff but the key victim stakeholder organisations about it. We received incredible feedback from them, which helped to shape it. When we considered our approach to ensure that it was effective, we also took account of comments that were made during the committee's inquiry into the Crown Office and Procurator Fiscal Service.

We have enhanced the protocol in a number of ways. It makes absolutely clear the requirement for a sufficiency of evidence and what that means, and it sets out that cases should not be reported to the procurator fiscal without sufficient evidence. It also sets out clearly what officers are expected to report when they report a case, not only evidentially but, crucially, in terms of the background information. Over a number of years, we have recognised that, if we do not have the full picture, we cannot make appropriate decisions. Therefore, we ask for information about the risk assessment that Lesley Boal spoke about, the previous history and the dynamics of the relationship and any previous incidents involving the parties around their children and around any vulnerabilities. There is a lot of enhanced information, which is also in a new standard prosecution report template that we have introduced with the police.

There have been many improvements that will enhance the way that we deal with domestic abuse cases.

The Convener: Does that give Calum Steele more comfort?

Calum Steele: As with all things, when policies are reviewed and revised, that invariably results in improvements. We are on the fourth protocol and I suspect that it will not be the last, because every day is a school day in this job. I am fairly confident that, when we find things that we can do better, although improvements will not necessarily happen immediately, we will get there eventually and improve what we can.

The Convener: That sounds encouraging. Does Lesley Boal want to say anything?

Detective Chief Superintendent Boal: The protocol is another step forward and a part of our continuous improvement. We may need another one in the future, but we are absolutely committed to ensuring that domestic abuse is a priority in Police Scotland. It has been and continues to be a priority. We are also committed to our response to victims and to ensuring that reports that are submitted to the Crown Office and Procurator Fiscal Service are of the best quality and have the best background information, so that everybody can make the best decisions.

Oliver Mundell (Dumfriesshire) (Con): Several of the points that I planned to raise have been covered. I am sorry if I go back over some of them.

Given how novel the bill is and given the concerns that have been raised about the broad definition within it, do you think that it achieves the right balance in establishing legal certainty?

Anne Marie Hicks: I do. The relevant effects have been well defined. There is no catch-all such as we have in the stalking offence. The first part of the definition of abusive behaviour is about "violent, threatening or intimidating" behaviour, which would generally be criminal at the moment.

The relevant effects are based on consultation with key stakeholders and experts in domestic abuse, and I think that they capture the essence of what victims say about their lived experience of abuse with regard to their being made to be subordinate; being controlled, monitored and isolated; being deprived of their freedom; and suffering punishing and humiliating treatment. From the cases that we see and the cases that I have heard about, I think that that covers what we would be looking for in trying to prosecute these cases.

Oliver Mundell: Do you think that there should be a level of seriousness attached to that testimony?

Anne Marie Hicks: I think that all the cases will, by their nature, have a level of seriousness attached to them. In relation to the offence of domestic abuse, we are talking about not just a single incident but a course of behaviour that involves at least two incidents. Of course, in such a case, there are likely to be more than two incidents and people will be able to speak about a number of different behaviours, but the charge requires two incidents to be corroborated.

I do not think that you can impose an artificial threshold with regard to severity, because that is hard to judge. It is important to remember that the offence is about not impact but the perpetrator's behaviour, regardless of whether that has an impact on the victim.

Oliver Mundell: That is partly what concerns me. When we start to look at recklessness, if there is no qualification regarding the effect, it can be difficult to examine the issue. The effect can change in different circumstances and different cases. Many individuals are in relationships in which the behaviour is not what most people would consider to be normal and can be quite unpleasant, but it does not quite get to the level at which it would be considered criminal. I am thinking of a case in which both parties are involved in some of the behaviours and the relationship stops and starts at different points, with different episodes throughout it. In that relationship, behaviour that might appear reckless when a police officer takes a first look at it might not have any effect on either of the two individuals given the context of that relationship.

Anne Marie Hicks: I do not think that there should be a requirement in relation to impact. What about situations in which somebody does not recognise the impact or in which there is an impact but there is no outward adverse sign of it? It is easy to demonstrate impact in cases in which there is a physical injury, but a lot of cases involve internal harms. For example, we might be dealing with a hidden crime whereby someone is going about their day-to-day activities without people knowing that, behind closed doors, they are a victim of domestic abuse. Their children might be getting to school on time and doing well at school, and the person might be a high achiever in their working life, so nobody would know what was going on. For those reasons, I do not think that there should be a requirement regarding the visible impact of domestic abuse on someone.

Further, there are a number of safeguards in the bill. First and foremost, the legislation applies to abusive behaviour as defined in the bill. As I said, I do not think that normal friction is covered by that definition unless we classify normal friction as behaviour that is designed to humiliate, frighten, degrade and punish, and I do not think that we would do that. Another safeguard is the fact that the course of conduct must be corroborated. There is also the objective test of whether the behaviour is considered likely to cause harm, and

there is the provision regarding intention or recklessness.

The Convener: Before we leave this point, I want to ask a question about the threshold. Last week, one of our witnesses said that using the causing of fear and alarm as tests of abusive behaviour was fine but that using the causing of distress as such a test was setting the bar too low. He suggested that "distress" should be replaced with "serious distress".

Following on from what Oliver Mundell said, if someone is arguing with somebody who is calling them names and they respond by calling them names back, they might be described as being distressed but that might be just a normal argument. Might using the phrase "serious distress" set the bar higher and provide a more reliable test?

Anne Marie Hicks: I do not think that such cases would get over even the first threshold. They would not be defined as involving abusive behaviour, so they would not get to even that stage. We are not talking about one-off instances; there has to be a course of behaviour.

On the objective test of the likelihood of harm being caused, the courts are used to looking at objective tests. There are objective tests for breach of the peace and in section 38 of the 2010 act, which looks at a reasonable person test and the likelihood of harm being caused. Those are not new concepts with which the prosecutors or the courts are unfamiliar. I do not think that a qualification about there having to be severe distress would add to the bill; indeed, it could detract from it and reduce the number of behaviours that we want the legislation to cover.

The word "distress" gives courts the flexibility to ask whether there is a likelihood of harm being caused in the context and whether there is recklessness or intent to cause harm. There are sufficient safeguards. We also have in place a defence of reasonableness, and prosecutors apply a public interest test behind that. All of that would prevent the bill from criminalising normal friction.

The Convener: Is that the view of the other panellists?

Detective Chief Superintendent Boal: Yes—absolutely.

Calum Steele: Legislation does not always get it right; if it did, we would not have appeal courts and high courts. I repeat what I said at the start: most sane and sensible people would fully welcome and wholly support the intention behind the bill as published. It seems to me, from listening to the Crown Office and Procurator Fiscal Service's evidence, that the bars are not easily overcome. They are not there for the sake of ticking a box, I hope.

Oliver Mundell: That comment leads nicely on to what I was going to ask about. Given that the net has been cast wide and as much discretion as possible has been left to officers who are investigating cases and the courts further down the line, is there a risk that a lot of people who have experienced such behaviour will come forward without evidence of it, which will potentially undermine the effectiveness of the legislation? If people do not meet some of the tests, we will have made it clear that such behaviour is illegal but the legislation will not have overcome any of the problems with evidencing that behaviour, and people might feel disheartened or that pursuing their case is not worth while.

Anne Marie Hicks: The situation would not be any different from where we are at the moment. When people come forward, we have to operate according to the laws of the country and we need sufficient evidence. Currently, there will be cases in which the police are unable to report or the fiscal is unable to take proceedings because there is insufficient evidence. That can be difficult, particularly if people are absolutely convinced about the credibility of the allegation. We already have to deal with that. We have to manage people's expectations and explain carefully why we have been unable to take action.

People will be disappointed at times but, if they come forward, the police have links in place with support agencies to signpost and refer them on. I sometimes talk about prosecution and police enforcement as opportunities for interventions. It is not always about just the case in court; there are opportunities for wraparound care, including referral to appropriate support. I hope that, even if a case is unable to proceed, people will feel more supported because they have been referred to appropriate agencies. There will be more partnership working around that.

Detective Chief Superintendent Boal: I agree with Anne Marie Hicks that there are challenges. Other crimes and offences—rape, for example—are difficult and challenging to investigate because of the need for corroboration. We are not saying that we will decriminalise certain crime types because they are difficult. We undertake robust investigations and ensure, as Anne Marie Hicks said, that victims are signposted to support services, whether that is a statutory health and social care agency or a third sector organisation for advocacy and support.

If the investigation does not provide a sufficiency of evidence, it is only right that we sit down with victims and explain why there was not a sufficiency of evidence. Although it might be

disappointing, it is far better to do that than have a system in which we cannot report, investigate and prosecute individuals for what are described as horrific acts against a partner or ex-partner. There might be challenges on occasion, but that should not be a reason for not supporting the bill.

11:15

Oliver Mundell: From your experience, do you think that there are sufficient resources to enable you to take on the additional workload? When changes have been made previously, a significant number of additional people have come forward to use certain services. Is there the capacity for that at present?

Detective Chief Superintendent Boal: As I said, tackling domestic abuse is a priority for Police Scotland and it will continue to be a priority. Our consultation on the policing 2026 strategy highlighted issues about responses to adversity and situational vulnerability, and Police Scotland is looking closely at where resources are to be vired in the future.

If the bill is enacted, discussions will include how we vire resources and how we ensure that there are sufficient resources to meet the needs of victims who come forward to report the specific crime of domestic abuse. I hope that in time, with a long-term prevention strategy, the various bits of legislation that were introduced last year and this new piece of legislation, there might be some form of deterrent to individuals committing such a crime.

Oliver Mundell: Would it be fair to expect a significant increase in the number of people who come forward? Will some dedicated additional resource need to be put into the area because of that?

Detective Chief Superintendent Boal: I hope that more people will come forward. We would welcome that, and we would encourage more people to come forward.

Calum Steele: On your specific question about resource, there is no doubt that, within policing, domestic abuse is the area that gets the greatest attention. It is also, understandably, one of the greatest draws on officers' time because of the inquiries that they have to deal with and the processes and assessments that accompany reports of domestic abuse. As such, it is resource intensive. That is not a criticism; it is just the reality.

If we establish processes to encourage more victims to come forward, the pressure on those resources will only become greater. It is important to understand the holistic nature of policing. It is not just about attending to single incidents as and when they happen; there are many complexities that come up from time to time. This week alone we have elections, a particularly difficult football match to police and heightened awareness because of the current terrorist threat, with our communities expecting us to provide reassurance through patrols. We also have other crimes and offences to deal with.

Every time that something is added to the statute book, it creates additional resource and demand pressures on the service. Ultimately—I say this time and again—it is this place that has its hand on the cheque book and, when it comes to the allocation of financing to the police service, it is this place that determines how much of a priority it wants to make the tackling of domestic abuse. Simply handing that responsibility back to the service and telling the service to decide what to do and allocate accordingly is this place washing its hands of responsibility to some extent.

Anne Marie Hicks: We are absolutely committed to the bill. It was Lesley Thomson, the former Solicitor General for Scotland, who first called for it at our conference three years ago, and we are absolutely committed to it for the benefit that it will introduce. However, we acknowledge that it will be challenging, and we expect that there will be increased business and increased complexity of cases.

I am unable to be definitive at the moment because our budget after the current year is not known, but the Lord Advocate has made it clear that we will keep the situation under review and, if there is a need to ask the Scottish Government for further money to deal with it, we will do that as we do for other operational matters.

Liam McArthur (Orkney Islands) (LD): I start by reassuring Calum Steele that the parish cup tie between Birsay and Sanday this Saturday should not be too difficult to police.

I want to cover some of the ground that Oliver Mundell has just touched on in relation to definitions and thresholds. A number of colleagues alluded to the testimony that we took last week from Andrew Tickell, who expressed some distress at us repeatedly getting his name wrong. I will quote him directly. In his written submission to the committee, he said:

> "to prosecute an individual for 'abusive behaviour' under the proposed legislation, the prosecutor need only show that the accused has engaged in monitoring or controlling behaviour on more than one occasion which was likely to cause distress, whether or not any distress actually arose. While monitoring behaviour may give rise to substantial harm—even relatively minor episodes in a relationship clearly have the potential to give rise to 'distress.' To categorise this behaviour as criminally 'abusive' risks being dramatically excessive."

Is he wrong to have those concerns? What reassurance can you offer him, based on what he said to the committee last week?

Anne Marie Hicks: Andrew Tickell has looked at the bill and taken a particular view. My view is formed not just by looking at the bill but as a result of my understanding of how we actually prosecute such cases.

As I said, I do not think that very minor instances—what we might class as normal friction—would even meet the definition of "abusive behaviour" at the very first hurdle. Beyond that, we would have to see a course of conduct, and it would have to be corroborated. There would then be the objective test of likelihood of harm and, on top of that, the mens rea. Even after all that, the prosecutor would apply the public interest test, and there is no public interest in prosecuting non-abusive behaviour.

Liam McArthur: You talked about not just actual harm or the risk of harm, which as Lesley Boal said is similar to the approach taken to child protection, but instances that involve distress. To me and perhaps to other members, that is a potential issue. You describe situations in which nobody would have any difficulty with someone being prosecuted with the full force of the law. However, to apply the law in areas in which distress has not necessarily been acknowledged or has not yet been caused would seem intuitively to set the bar too low, given the priority that is attached to cracking down on domestic abuse and the fact that the bill has been introduced to plug a gap.

Anne Marie Hicks: I do not think that it sets the bar too low. We have seen examples in domestic abuse case law in which distress is mentioned. It is not mere annoyance or upset; it would tend to be something more than that.

The danger in having a focus that is all about the impact—for instance, if the victim has to show that there has been a particular impact—is that it almost takes us back to where we were a number of years ago, in which a situation is not a domestic unless there is a battered woman with visible signs of abuse. We have moved away from that, and we are in more nuanced territory now.

We have to say that there is behaviour that is wrong and that creates a likelihood of harm. That includes distress; it could also include anxiety and other aspects. The bill simply says that psychological harm can include those things; it does not say that those things could be at a very low level. The court would have to determine whether there was a likelihood of harm in a broad sense.

Liam McArthur: In response to questions from Ben Macpherson and Douglas Ross, you talked about the anticipated effect of introducing the legislation and the need to encourage people to have the confidence to come forward, given that there may be a common understanding of what constitutes harm or serious harm. The understanding of what constitutes distress and anxiety may not be a low bar in the legal sense of prosecutors taking forward a case, but in common parlance it could be quite a low bar. People may have expectations about what complaints they can bring forward, but that will not necessarily have the effect that they would expect.

Anne Marie Hicks: I genuinely do not think so. People would consider psychological harm to be more than mere upset over a situation.

I go back to the fact that a particular instance would have to meet the test for abusive behaviour, and there would have to be a course of conduct. We are talking not about trivial incidents or one-off instances but about abusive behaviour.

The courts are used to applying an objective test of likelihood of harm and have no difficulty in doing so; every day, they apply the 2010 act's test in section 38, "Threatening or abusive behaviour", which is probably the most commonly used domestic abuse offence, although there is also breach of the peace. Courts will continue to be able to apply an objective test of likelihood of harm.

We will continue to learn, through case law, about how the court interprets the provisions, but there is a danger of taking too restrictive an approach. If we say that harm must be severe, what does that mean? Do people have an understanding of what severe distress is, as opposed to distress? That feels quite subjective. Such matters are properly determined by the court, having regard to the full facts and circumstances.

Liam McArthur: It has been suggested that, if intent or recklessness must be demonstrated, there is no need for a defence of reasonableness of the behaviour, because that would be incompatible with recklessness or intent. Can you explain why we have those two strands? I do not know whether they balance one another or are mutually supportive. Intuitively, I would have thought that if we need to demonstrate recklessness or intent we do not need the reasonableness defence.

Anne Marie Hicks: We have such a defence in a lot of our legislation. For example, there are behaviours that might technically be captured under the stalking offence, but there is an opportunity for people to say why the behaviour was reasonable. I think that the explanatory notes for the bill give examples around gambling or other situations in which deliberate action, which might

appear to harm, might be taken for good reasons—

Liam McArthur: That would fall into the category of an intentional action. However, reckless behaviour is demonstrably not reasonable.

Anne Marie Hicks: Yes, and I think that most things would be captured by that. I do not have an issue with the defence of reasonableness, because I think that there should be an opening in that regard. We do not know what the scenario might be or what angle the defence might want to raise, so from the perspective of fairness it is useful to have a defence available that people can raise. I do not think that it will be engaged in every case.

Liam McArthur: Okay. Thank you.

John Finnie: I entirely agree with Mr Steele that rehabilitation is the direction in which we should be going. It is my understanding that practitioners in the field take the view that rehabilitation is inappropriate—as is mediation—when there has been coercive and abusive behaviour, because it can provide another opportunity for such behaviour to take place. Is that the panel's understanding?

Anne Marie Hicks: There are many different types of domestic abuser and there is a lot of research on the people who might and might not be open to changing their behaviour. A lot of work has been done in the context of the Caledonian system, for example. Rehabilitation is not my area of expertise, but I take your point about mediation and diversion, which will be appropriate only in limited circumstances. We would not say that such approaches will generally be appropriate in domestic abuse cases, albeit that they might be appropriate in some circumstances.

John Finnie: The term "intimate terrorism" appears in our papers. In one respect, it is probably helpful in describing the behaviour, but given its connotations it might be unhelpful. Do people readily understand what "coercive behaviour" is? They will know what that conduct is if the term is explained to them, but do you envisage difficulties with the terminology in the bill?

Anne Marie Hicks: I do not think that the term "intimate terrorism" appears in the bill. It comes from Professor Michael Johnson, from America.

John Finnie: Just for clarity, it is mentioned in the financial memorandum.

Anne Marie Hicks: Yes.

Professor Johnson was over here a couple of years ago, when he spoke to a mixed audience of police and prosecutors at a meeting that we hosted at the Scottish Prosecution College. He sets out very well the different types of domestic abuse, which go from what he calls "situational couple violence"—the bad relationship, or the bad time in a relationship, when there are situational factors that provoke the abuse—to "coercive control" and "intimate terrorism". I think that he came up with the term because many victims described feeling terrorised, often in their own homes, when they were subjected to stalking, monitoring and controlling behaviour. The term came from his research.

John Finnie: Do you see difficulties with explaining the purpose of the bill to those whom we want to benefit from it?

11:30

Anne Marie Hicks: No. My view is based on speaking to Scottish Women's Aid, and the women who SWA deals with daily talk about abuse and coercive control all the time. I think that people now have a much greater understanding of coercive control. I am sure that, if the bill is passed, there will probably be some publicity around it, as we have seen with other legislation, in order to enhance public awareness of it. However, the bill's provisions reflect women's lived experiences. I know that the committee has heard directly from some victims and I am sure that they all spoke about that. I do not think that people will misunderstand what the bill is about. The fact that the offence is described as engaging in a course of abusive behaviour means that people will be able to understand it.

John Finnie: Does it, in fact, highlight the importance of Scottish Women's Aid and other support agencies?

Anne Marie Hicks: Absolutely. Scottish Women's Aid has been campaigning for a number of years for abusive behaviour to be recognised criminally.

Detective Chief Superintendent Boal: Earlier, Calum Steele highlighted training issues. We have introduced the whole aspect of coercive control into training at the Scottish Police College. The initial probationer training now covers that aspect in its domestic abuse training and the senior leadership training and the supervisory training for newly promoted sergeants also include it. We have electronic training facilities through Moodle, to which Calum Steele referred, and two other mandatory training courses are done through Moodle: one is a domestic abuse questionnaire and risk assessment, which I mentioned earlier, and there is one on vulnerability.

In preparing for what I hope will be the enactment of the bill, we have been doing a lot of work on the specific training that all officers will

need. We have been down south and have been liaising with SafeLives, a national charity that aims to end domestic abuse, and the College of Policing on its training material for when section 76 of the Serious Crime Act 2015 was rolled out, albeit that its provisions extend beyond the bill's reference to abuse of a partner or ex-partner. We have looked at the training material on coercive controlling behaviour in domestic settings that has been developed by support groups and the College of Policing.

That all looks really positive. There is an issue about whether we deliver our own training or whether we ask support agencies to assist with the training. At the moment, we envisage the training being a whole-day course. Although it will be good to have a whole-day training course, we will also ensure that there is continued information and guidance for officers so that they absolutely understand what coercive control is and what the legislation will mean for them as front-line officers.

George Adam (Paisley) (SNP): Good morning. Excuse me if I am going over old ground and labouring a point, but I am trying to get all this right in my head. I have been concerned a number of times about what might be the use of unfortunate language, although I might just have misunderstood the language that was used. Last week we heard about low-level abuse, but to me abuse is abuse and I cannot see it in any other way; maybe that is more an issue that I have. However, Calum Steele referred to ordinary domestic friction. To me that is about, for example, someone saying "Did you bring that pint of milk I asked you to get?" and the reply being, "No, I didn't": cue a 20-minute discussion about how they could not get that pint of milk. It is quite a leap from that to controlling behaviour and abuse.

I want to get this right in my own head. Is the point of the bill not to ensure that we get the seriousness of the abuse that is going on in some households and get to a stage at which we can ensure that those who need protection are protected and that those who are causing the abuse are found out?

Anne Marie Hicks: Absolutely—I agree whole-heartedly. The bill is not about trivial or minor offending; it is about patterns of abusive behaviour, and it sets out sufficient tests, thresholds and safeguards so that we can be confident about it.

George Adam: So I have got it right, then.

The Convener: It sounds like it.

Mr Steele, do you want to say something?

Calum Steele: Yes. I understand that there is a world of difference between ordinary domestic friction and abuse, but with all possible respect to Mr Adam, his example about a pint of milk probably trivialises the issue somewhat. When relationships break down, people sometimes have a difficult time and they can be particularly horrible to each other. That does not necessarily mean that, in six months' time, with the benefit of hindsight, they would consider that any of their behaviour might have been criminal.

However, police officers might get involved at that particularly difficult time of normal domestic friction because of a breakdown of relationships. That happens. The police service is called and we find ourselves in situations where we are pawns in a domestic breakdown, rather than necessarily dealing with a situation of abuse. The allegations that arise from that can on the face of it appear to be criminal, but I suspect that, on a large number of occasions, with the passage of time, people would take the view that it is not a criminal matter.

George Adam: But you said in answer to John Finnie earlier that, when officers turn up, they can tell the difference between ordinary domestic friction and abuse. If there is an on-going scenario, nine times out of 10, you are pretty aware of the situation.

Calum Steele: That is not always the case, to be absolutely truthful. The first time that officers are called is often the first time that they are aware of an issue.

I am not in any way trying to undermine the seriousness of the issues that the bill is trying to address. However, as with all proposed legislation, it is important that we consider not just those whom the bill is intended to capture but those who might be caught unintentionally. It is important that a great deal of consideration is given to that latter element and that much attention is given to the training that will be delivered to police officers. Crucially, we must also consider the support that will be given to police officers if they end up being criticised for undertaking activities in good faith that then turn out to be subject to significant adverse comment at a later date.

Mary Fee: The bill will require the court to consider making a non-harassment order without the need for an application from the prosecution. From the information that we have, I understand that the granting of non-harassment orders is fairly infrequent. In 2015-16, 17,804 criminal cases were registered with a domestic aggravator in Scotland, but a non-harassment order was issued in only 767 criminal cases. Is there a reason why so few non-harassment orders are issued?

Anne Marie Hicks: Practice varies in the courts throughout the country. In the specialist domestic abuse courts, where sheriffs deal with domestic abuse cases day in and day out, we find

anecdotally that we are more likely to get non-harassment orders.

We promote the orders in our guidance. The new joint protocol sets out that, in all cases of domestic abuse and stalking, prosecutors will consider the appropriateness of a non-harassment order. However, not every case of domestic abuse will require such an order, and it is important that we take the victim's view. We have to recognise that, in some cases of domestic abuse, people want to reconcile, so they may not want a non-harassment order. Alternatively, the case may relate to abuse that happened in the past, so the victim may feel that an order is not necessary. We will always take the victim's views on that and there will be occasions when people do not want or require an order.

The provision requiring a non-harassment order to be considered in every case is a positive thing. An order will not necessarily be appropriate in every case and will not be granted in every case, but if it is at least given consideration by the court that will be a positive step forward and we are likely to see an increase in non-harassment orders.

Mary Fee: Is there a resourcing issue attached to non-harassment orders?

Anne Marie Hicks: No, not in terms of their granting—not that I am aware of. Obviously, breach of a non-harassment order is a criminal offence in itself, so if there is an allegation that an order has been breached there are resource implications for the police, but the granting of orders does not have resource implications.

In feedback, victims often say that the non-harassment order—if they are looking for one—is the part of the sentence that they are most interested in, because they want that protection after the court case has ended.

The Convener: Might there not be a resource implication if consideration of non-harassment orders is automatic? A background report might have to be produced for every case.

Anne Marie Hicks: In all these cases, an extra background report would not be required; the court would ask the fiscal for input about the victim's perspective. It is already in our guidance that we should obtain that information. When the police are reporting the case, they should provide us with that through the new reporting template for domestic abuse that we introduced. I do not see that there would be any change from what we are doing at the moment.

The Convener: We have not covered the provisions in paragraph 6 of the schedule on expert evidence relating to the behaviour of the complainer. That was raised in the SPF's submission, which raises interesting issues. Will Calum Steele say something on that?

Calum Steele: The COPFS's evidence this morning has gone some way in responding to that. As I understand it, the reference is to expert evidence not on what had occurred in the particular set of occasions, but on what the behaviour in its own right might amount to.

These are ultimately judicial considerations, rather than considerations for the police. However, there are potential issues in respect of how expert opinion can be formulated when it will only ever be gathered from one side of the account, unless there is a presumption that the accused will not have a right to silence—clearly that is not the case.

We put together our submission on the understanding that the provisions would be about expert evidence on the course of behaviour that was before the court. However, if I have understood the COPFS correctly this morning, the expert evidence will not be bespoke to the specific situation, but evidence on what the behaviours in their own right amount to.

Anne Marie Hicks: I should clarify two things. We would lead evidence as we would lead it now. It would be evidence from a range of witnesses and perhaps evidence from social media, telephony, closed-circuit television, neighbours, friends, family or the complainer. The evidential base will not change; we will have to look for sources of evidence.

The expert evidence provisions in the schedule relate to section 275C of the Criminal Procedure (Scotland) Act 1995 and the aim is specifically to bring domestic abuse in line with sexual offending. It is purely for the purpose of leading expert evidence to explain behaviour or statements in order to rebut negative adverse inferences about a witness's credibility and reliability. Such expert evidence is commonly used in sexual offending cases to explain why people delay in disclosing or reporting.

One reason for our contacting the Scottish Government—separately from our consideration of the bill—to ask that expert evidence provisions be widened to cover domestic abuse comes directly from our advocate deputes prosecuting in the High Court. Frequently, they tell us that in sexual offence cases they use such evidence to explain why someone remains in a relationship even though there has been dreadful sexual abuse. That evidence is generic and can almost neutralise someone's ability to draw a negative inference from certain behaviour.

There is a lot of research that shows that people do not always report incidences of abuse when they occur, but we do not have such a provision

for domestic abuse cases. The provision is purely to allow us to lead similar evidence to explain why someone may have remained in an abusive relationship and why they did not report the abuse to the police. It is not about a wider context of leading evidence more generally. The reasonable person test and the objective test at the start of the offence is something that the court will interpret, with or without expert evidence. The expert evidence provision is purely about rebutting negative inferences.

The Convener: That is helpful. Does that allay your fears, Calum?

Calum Steele: It certainly helps to explain the issue. The fact that the provision is about general behaviours and activities, rather than the specifics before the court, means that it is not problematic.

The Convener: That concludes our questioning. I thank all the witnesses for a very helpful evidence session.

I suspend the meeting to allow the witnesses to leave.

11:45

Meeting suspended.

11:47

On resuming—

Subordinate Legislation

First-tier Tribunal for Scotland (Oaths) Regulations 2017 (SSI 2017/148)

The Convener: Agenda item 2 is consideration of three negative instruments, and I refer members to paper 4.

Do members have any comments on these regulations?

John Finnie: I do, convener. I read the regulations with interest. It is not my intention to oppose them, but I had to do a double-take to see whether the year on them was indeed 2017. When I looked up the Promissory Oaths Act 1868 to check the oath of allegiance, I found that, at least in the version that is on the internet, those who take the oath have to swear to

"be faithful and bear true allegiance to Her Majesty Queen Victoria",

albeit it then refers to "her heirs and successors". It is disappointing that in a modern liberal democracy we still have this sort of thing, but I hope that those who are asked—indeed, required—to take it also take the opportunity, as a number of elected parliamentarians have done, to express that their primary obligation is to members of the public.

The Convener: Your point is noted. If there are no other comments, does the committee agree that it wishes to make no recommendation in relation to the regulations?

Members *indicated agreement.*

Act of Sederunt (Fees of Sheriff Officers) (Amendment) 2017 (SSI 2017/153)

Inquiries into Fatal Accidents and Sudden Deaths etc (Scotland) Act 2016 (Consequential Provisions) Regulations 2017 (SSI 2017/156)

The Convener: If members have no comments, does the committee agree that it wishes to make no recommendations in relation to these instruments?

Members *indicated agreement.*

Justice Sub-Committee on Policing (Report Back)

11:49

The Convener: Our final item is feedback from the Justice Sub-Committee on Policing on its meeting of 1 June 2017. There will be an opportunity for brief comments and questions following the verbal report. I refer members to paper 5, which is a note from the clerks, and I invite Mary Fee to provide the feedback.

Mary Fee: Thank you, convener. The Justice Sub-Committee on Policing met on 1 June to take evidence on the Auditor General's reports on the review of Police Scotland's i6 programme and the 2015-16 audit of the Scottish Police Authority.

The sub-committee heard that the failure of the i6 project had impacted on the ability of police officers and staff to do their jobs effectively. Given that investment in Police Scotland estate, fleet and information and communications technology is essential, we welcome Police Scotland's confirmation that it will not transfer any underspend of its capital budget to its resource budget this year. The sub-committee also received assurances that lessons have been learned, and we look forward to seeing how future ICT projects will be developed and to considering the three-year and 10-year financial plans that are to be published in June and September respectively.

At the sub-committee's next meeting on 15 June, it will hold an evidence-taking session on the use of body-worn cameras by the police. I am happy to take questions.

John Finnie: That was an accurate reflection of our meeting, but I would simply comment that Mr Leven told us that there are mechanisms to facilitate communication between groups of officers, which was not the case before. In that regard, what has happened is not impacting unduly on efficiency.

Liam McArthur: I think that John Finnie is right—and I also thank Mary Fee for her summary of what was a very useful meeting. The failure of the i6 programme has prevented the delivery of the efficiencies that underpinned the rationale for the creation of Police Scotland, but what was helpful in last week's evidence session was the reassurance that we got about the structures and practices that are now in place. I think that we now have a lot more confidence than we have had in the past that those challenges might be met, but they are not out of the woods yet.

Mary Fee: To add to the comments of John Finnie and Liam McArthur, I have to say that I was quite heartened by some of Mr Leven's evidence, and I am slightly more confident than I was before the evidence session about how things will progress.

The Convener: On that positive note, that concludes our 21st meeting in 2017. Our next meeting will be on Tuesday 13 June, when we will continue to take evidence on the Domestic Abuse (Scotland) Bill.

Meeting closed at 11:52.

Published in Edinburgh by the Scottish Parliamentary Corporate Body, the Scottish Parliament, Edinburgh, EH99 1SP

All documents are available on
the Scottish Parliament website at:

www.parliament.scot

Information on non-endorsed print suppliers
is available here:

www.parliament.scot/documents

For information on the Scottish Parliament contact
Public Information on:

Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

The Scottish Parliament
Pàrlamaid na h-Alba