

Scottish Women's Aid (SWA) is the lead organisation in Scotland working to end domestic abuse. We play a vital role in campaigning and lobbying for effective responses to domestic abuse.

Foreword

SWA very much welcome this Bill and we applaud the vision of the Scottish Government in bringing this forward. It represents a positive move towards evidencing Scotland's compliance with our domestic and international obligations in advancing women, children and young people's human rights and putting in place protections and instruments to end domestic abuse and violence against women more generally.

Specifically, it is particularly encouraging that the Bill's Policy Memorandum, at paragraph 175 underlines the Scottish Government's attention to the obligation placed on States by the European Convention on Human Rights by stating:

"Article 8 also imposes positive obligations on states to secure effective respect for the moral and physical integrity of individuals, for example by providing criminal sanctions to deter people from causing serious harm to others. The offence can be viewed as a manifestation of this positive obligation.

The Bill is not perfect. It forges new legislative ground, and we will inevitably wish to amend the Bill over the coming years as experience indicates. However, this Bill represents a significant milestone in Scottish legislative policy, and fear of unintended consequences must not return us to the status quo. We suspect no one needs reminding that domestic and sexual violence is the single biggest violation of women's and children's human rights in Scotland.

The Bill as proposed will be a lever to improve the overall justice system response to domestic abuse. More specifically, we welcome further discussions about how the new law will protect women and children during civil child contact actions and support police and housing authorities to keep women and children safe in their own homes should they choose to remain. The latter outcome would drive down homelessness in Scotland.

Article 52 of the Council of Europe's Istanbul Convention addresses Member States' obligation to ensure victims of domestic abuse are protected from immediate danger without having to vacate their homes.

Article 52 – Emergency barring orders

Parties shall take the necessary legislative or other measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk. Measures taken pursuant to this article shall give priority to the safety of victims or persons at risk. (Council of Europe, 2012, pg. 22)

Failure to provide for some version of an emergency barring order in this legislation is a critical oversight. An appropriate amendment will address a serious threat to safety for children and women and is in our view required for compliance and ratification with the Convention. In addition, any language around extraterritorial jurisdiction required for compliance with Istanbul should also be included.

Do you agree with the proposal in the Bill to create a new offence of abusive behaviour towards a person's partner or ex-partner covering both physical violence and non-physical abuse?

Yes. The new Bill will strengthen the law, improve women's and children's access to justice, reduce revictimisation, and improve capacity across criminal justice to respond appropriately to domestic abuse.

Domestic abuse is a cause and consequence of women's inequality and occurs within the context of women's poverty of time, money, power and safety.

Professor Evan Stark reframes domestic abuse as a crime against autonomy, freedom, liberty and equality:

"...coercion entails the use of force or threats to compel or dispel a particular response. In addition to causing immediate pain, injury, fear, or death, coercion can have long-term physical, behavioural, or psychological consequences... Recognition of coercive control entails defining a new 'course of conduct' crime with sanctions appropriate to the rights and liberties that are jeopardized. Such a crime will include elements such as psychological and economic abuse, along with stalking, harassment and isolation, among others. However, for a coercive control law to be effective, it must be written and implemented in a way to avoid manipulation by offenders who claim emotional abuse by victims. That said, with an effective coercive control law in hand, police can assess whether a seemingly trivial incident is an isolated event or part of the pattern typical of the most serious cases...If taken alone, many tactics used in coercive control could typify a 'bad' marriage. So it is critical to recognize that it is the combination of these tactics into a pattern of domination that comprises the offense, not the acts themselves. Front-line responders will determine appropriate interventions based on the particular combination of violence, intimidation, humiliation, isolation and control they encounter."¹

The specific offence must also recognise the impact of domestic abuse on children, and a stronger and clearer offence would create more opportunity for this impact to be addressed through greater access to justice for women and children.

Considerable work has been done in recent years to recognise children as experiencing and not just witnessing domestic abuse. Children's experiences of domestic abuse and specifically coercive control must be reflected in the wording of the offence.

¹ Stark, E (2012) Re-presenting Battered Women: Coercive Control and the Defense of Liberty. http://www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf

Do you consider that the proposed offence is needed to address a gap in the existing law which currently makes it difficult to prosecute some forms of domestic abuse?

Yes. The Bill will bridge the gap in addressing controlling behaviours not covered by existing offences and crimes, particularly those that cannot be dealt with via common assault, threatening and abusive behaviour, and stalking.

Domestic abuse is not an individual incident or occurrence. Nor does domestic abuse necessarily include physical violence, although this can be a feature. Victim-survivors have been telling us for 40 years that the harm from emotional **and** psychological abuse is the most traumatic.

This Bill, therefore offers, for the first time, a Scottish response to domestic abuse that listens to the voices of women and children.

We support an offence which is capable of addressing a wide-ranging spectrum of coercive control behaviours that reflect experiences of women, children and young people but that also allows the COPFS to retain the ability to prosecute existing offences and violent crimes, sex crimes, financial crimes and property crimes perpetrated by a partner or ex-partner against a partner or ex-partner.

Current offences on their own do not adequately take account of the “*strategic course of conduct in which violence, sexual coercion, intimidation, isolation and control are used to dominate and exploit a partner and deprive her of basic rights and resources... A Liberty Crime that is continuous gendered a pattern of oppression and is measured by entrapment.*”²

Repeated exposure to trauma exacerbates the negative impacts of abuse for women and children experiencing domestic abuse. This cumulative effect must be taken into account in framing and enforcing this offence to ensure that women get an appropriate response when reporting behaviour that the offence will cover.

In our responses to previous Scottish Government consultations on the formulation of the offence, we stated that the key elements of the offence should:

- allow the court to take into account a variety of behaviours within a course of conduct in an intimate partner relationship, behaviours that together create an environment where the woman is controlled by the perpetrator and her participation, liberty, autonomy and self-determination are obstructed;
- take into account the psychological harm on the woman and any children or young people involved and the impact on the day-to-day activities these behaviours cause, but without having to refer to an inappropriate and invasive benchmark of psychiatric diagnosis;
- reflect the role that contact with children can play in enabling perpetrators to continue to pursue a regime of abuse, and the impact that this can have, not only on women, but also on their children, through placing them at ongoing risk and preventing recovery from abuse.

² Ibid.

Do you have any views on the definition of the offence, such as the requirement for a course of behaviour, the definition of abusive behaviour, or the defence that the behaviour was reasonable in all the circumstances?

Course of behaviour- section 1(1)(a) and section 9

SWA has raised the issue that any new offence must address the cumulative effect of domestic abuse and the long-term damaging impact that this can have on women, children and young people.

The nature of the intimate relationship between perpetrators and women experiencing domestic abuse allows for the repeat abuse and victimisation does not end when the relationship ends. This is particularly evident when children are in the family.

Section 9 defines the “course of behaviour” in Section 1 as “... *behaviour on at least two occasions.*” Since the offence is intended to address the long-term consequences of repeated patterns of behaviour which form a course of abusive conduct and behaviour, it is not unreasonable to follow the convention adopted in other “course of conduct” offences such as stalking and include this requirement.

However, we would caveat this by saying that in terms of the width of the offence and it being worded to encompass abusive behaviour currently dealt with by existing statute and common law, it should be recognised that that not all crimes and offences labelled as domestic abuse will be suitable for prosecution under this offence. There is an absolute necessity to retain the ability of the COPFS to prosecute stalking, serious assaults, rape and sexual abuse under these specific existing crimes and offences, albeit with the addition of the domestic abuse aggravator.

This is particularly relevant because of the “course of conduct” requirement, in that if there is a single offence of physical abuse, sexual abuse, threats or harassment that can be prosecuted under existing statutes or common law, then that should be more appropriately used, as opposed to waiting for a second and perhaps more serious offence to occur to meet the test. Of course, it is recognised that if one of these offences has occurred, police investigations may reveal that “controlling” behaviour have also occurred, which would meet the test for the domestic abuse offence to be considered

SWA asked survivors in our services about the proposed language of the law. They queried the “timeframe” for the course of conduct and “how far back the police would look – would they go back months or years to look at control?” A number of consultees suggested that drafters of the Bill add language to make clear that the 'historic' element can refer to repeated acts/harms in *any* relationship in which the perpetrator has committed coercive control. Thus, if the perpetrator's 'pattern' extends back 30 years, this should count as part of a single course of conduct.

Mental element of the offence to be intention to cause harm, or recklessness as to harm being caused - Section 1(2) (b) (i) and (ii)

We support the wording of section 1 in relation to the mens rea of the offence and the inclusion of recklessness, in addition to intention, in causing B to suffer harm. The inclusion of “recklessness” is critical in ensuring that the offence successfully operates to include all manifestations of the abusive behaviour it is intended to address. This provision allows the court to see the behaviours – which might seem benign in other situations – as harmful in the context of a specific relationship.

What constitutes abusive behaviour- section 2

Meaning of references to behaviour- section 9

- **Section 2**

The criteria under Section 2(1) (a) are straightforward in terms of behaviour which is “violent, threatening or intimidating” directed at the woman, and we are pleased to see that section 2(2)(b) now explicitly includes behaviour directed at “a child of B.”

In relation to section 2(3) and the effects of the abusive behaviour, we are pleased to see that the Explanatory Notes, numbers 20 through to 25, offer non-exhaustive examples of the nature and wide spectrum of the effects that the abusive behaviour could have on a woman, including these particular effects, and that this is also reflected in the Bill’s Policy Memorandum, an important emphasis in terms of the considerations required under the “reasonableness test.”

Section 2(2) (b) makes clear that the list of effects is not exhaustive by stating that the perpetrator’s behaviour “... *has as its purpose or among its purposes) one or more of the relevant effects set out in subsection (3)...*”

We are aware that the Faculty of Advocates, in their response to the draft Bill, raised concerns that the “effects” were construed too widely and that “*since domestic abuse is to be defined by the effect of the behaviour, not by the conduct, mutual corroboration may arise between charges of domestic abuse where one is withholding money and the other (with a different complainer) is of serious assault or rape. These offences would potentially provide mutual corroboration because of underlying similarity of the coercive nature and effect of the behaviour and not the nature of the actual conduct. This would arguably lead to a widening of the doctrine of mutual corroboration as currently understood.*”

We disagree. The evidential requirements to prove assault and rape are quite different; since a course of conduct is needed, one incident would not be adequate for establishing a course of coercively controlling behaviour under this offence.

- **Section 9**

Similarly, the Explanatory Notes for section 9, at paragraphs 48- 50, helpfully make clear that intentional failures to communicate or perform; behaviour directed at third-party property, including pets and behaviour carried out by a third party, unwitting or **otherwise** that was directed by the perpetrator, all fall under the definition of behaviour that would be considered abusive.

We see no difficulty in applying recklessness in relation to the commission of the offence through acts of omission. The intention of the offence is to consider the “bigger picture” presented through the course of offending behaviour and how individual acts weave together to demonstrate a course of coercively controlling behaviour.

“Reasonable person” test in section 1(2)(a) and section 2(b)(ii)

Subjective tests based on a “*reasonable person’s*” perception or assessment of a situation are not always ideal for offences involving domestic abuse, given its surrounding context of stereotypical gender roles, women’s inequality, and resulting constraints on women’s human rights. SWA has some reservations that the “reasonable person” test, not a feature of proof for other crimes of abuse or violence, adds unreasonably to the burden of proof.

However, on balance we can see the utility of the test if the effect is to remove the requirement to prove specific harm. Proving harm will inevitably lead to invasions of privacy, inappropriate focus on victim rather than perpetrator behaviour, and systematic revictimisation by court processes.

We would suggest that since the defence of “reasonableness” specifically states that “...the course of behaviour was reasonable ***in the particular circumstances...***” that this wording is replicated in relation to the references to the reasonable person’s consideration of the behaviour. Therefore, section 1(2) (a) would read

(2) The further conditions are—

*(a) that a reasonable person would consider the course of behaviour, **in the particular circumstances**, to be likely to cause B to suffer physical or psychological harm...*

Similarly, section 2(b)(ii) would read

(b) behaviour directed at B, at a child of B or at another person that either—

*(i) has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3), or (ii) would be considered by a reasonable person, **in the particular circumstances**, to be likely to have one or more of the relevant effects set out in subsection (3).*

Defence on grounds of reasonableness- section 5

In our commentary on the wording of the draft offence, we were concerned that this defence was open to manipulation by abusers. It could be used against disabled women, where the abuser is the carer, or against women with health problems, particularly those with mental health conditions, and those with substance abuse problems, a doubly unfortunate result where the woman's health or substance abuse problem is a consequence of the abuse.

We have heard from women who advised that perpetrators withheld, or controlled access to medication or medical/support/health services and used the exacerbation of their health problems against them, undermining and discrediting them in the eyes of police, social work and family. Perpetrators also manipulated women's health conditions to deliberately escalate them and provoke panic attacks which made women seem out of control, a risk and a source of harm to the perpetrator.

Consultees commented that "*Their (abusers') behaviour is very subtle in front of other people,*" where they appear "*polished, and reasonable*", portraying themselves as "*the victim*" or the "*caring partner*." The outcome of this is that "*people simply do not believe that the abuse has happened to the woman.*"

Dependency on others for basic social and/or personal care can also put disabled women and girls in situations where they are at risk of domestic abuse. Their perceived 'dependency' on others means that disabled women are more likely to be perceived as asexual, and their bodies are often objectified. This can lead to 'diagnostic overshadowing', where a disabled woman or girl is either not believed when they report their abuse, or their injury is falsely diagnosed as being a result of her impairment rather than an injury caused by abuse. These attitudes held by health professionals and other service providers subject the abused woman to persistent cycles of abuse and victimisation from different persecutors.

We would also emphasise that LGBT women experience coercive control through many of the abusive behaviours we have referred to in our submission, alongside additional layers of homophobia, biphobia, or transphobia from a perpetrator and multiple forms of discrimination. These experiences exacerbate the effect of the abuse, increase isolation, and reduce opportunities to engage with the criminal justice system, all of which must be taken into account and be covered in a specific offence.

Similarly BME women experience "double discrimination" and very specific forms of coercive control from perpetrators, such as threats around their immigration status and abusive use of religious scriptures, aggravating the impact of the abuse and obstructing their opportunities to seek help through the civil and criminal justice systems.

Consequently, it is perfectly possible for a perpetrator to present as a "reasonable person" who, as the previous consultation paper stated, "*might engage in behaviour which amounts to controlling their partner which may be, in the particular circumstances of the case, reasonable, for example because they reasonably believed that their actions were necessary to protect themselves, their partner or other family members from harm.*" This is an issue, not only in relation to the perpetrator presenting this position as a defence but also in relation

to the “reasonable person” test as to whether behaviour was abusive and caused harmful effects to the woman.

The language used in the Explanatory Notes at paragraph 37, does not make a convincing case for this test and, in fact, actually raises other human rights issues around control of a person’s autonomy:

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

While it is obviously desirable to protect people looking after very unwell partners with health conditions that cause them to be distressed or behave erratically, we strongly suggest that this language be removed.

The offence is restricted to abuse between partners and ex-partners. Do you agree with this approach?

We agree that the definition of the domestic abuse offence in 1(1) (a) should be restricted to partners and ex-partners, since including other family members who experience violence within relationships contravenes the gendered analysis underpinning our *Equally Safe* strategy.

Children living in a family where there is domestic abuse are inevitably victims of that abuse. Domestic abuse therefore is a children’s rights issue, which is also why the impact of domestic abuse on children must be recognised in this offence.

The critical feature is their link with the non-abusing parent, usually the mother. Children cannot be victims of domestic abuse separate from that link with an adult victim. SWA is convinced that this Bill could and should address children as victims in this context and not link their experience to “witnessing” or other myths of what drives harm to children. The emotional, psychological, physical, financial, and sexual abuse highlighted in the broader definition of coercive control of domestic abuse applies equally well to the abuse children experience through domestic abuse.

Of particular importance, as we have stated above, is that the Bill should reflect the role that contact with children can play in enabling perpetrators to continue to pursue a regime of abuse, and the impact that this routinely has on children and non-abusing parents.

Language in the Bill should:

- Recognise that domestic abuse is simultaneous abuse of women and children in line with the Scottish Government’s own guidelines on child protection.ⁱ
- Increase the protections to women and children following the criminal justice process – we know that there can be serious consequences for the mother and child when

the child effectively “*disappears from view.*” Putting protections in place for the mother only renders the perpetrator’s behaviour toward the child effectively invisible. This “invisible” abusive parent then so often seeks inappropriate, continued post-separation contact that enables continued abuse of both mother and child, with serious consequences, including child/mother deaths.

- Recognise the context in which the child is being harmed and ensure that domestic abuse of children is taken seriously, in both the civil and criminal justice systems and more widely.
- Be consistent with research that children are victims and potentially seriously harmed and raise awareness of the child as a victim in their own right.
- Hold the perpetrator accountable for the abuse as an abusive parent as well as a partner and for effects on the most protective factor in the child’s life: the child’s relationship with the non-abusing parent.
- Increase the likelihood that a perpetrator *will* be prosecuted.
- Bring the criminal, civil and child protection responses to domestic abuse closer together – at present child protection may recognise children as victims of domestic abuse, but the criminal justice response does not effectively do so.
- Achieve the result required by international conventions.
- Send out the correct message that domestic abuse will not be tolerated as it is victimising women and children.

Aggravation in relation to a child- section 4

The aggravator introduced by section 4 of the Bill is helpful, but does not go far enough in addressing the issue. We also have concerns that stating children must “*see, hear or be present during an incident...*” does not adequately address the issue or recognise the persistent, ongoing nature of the impact of domestic abuse on a child living with domestic abuse and may have unforeseen consequences in the application of other criminal justice legislation and protection from domestic abuse towards children.

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

Finally, it will be important to ensure that that existing criminal offences continue to be robustly enforced; that the police, prosecution and courts do not view “control” as a minor or less important matter; and that the creation of a separate definition of domestic abuse does not lead to the issue being downgraded and treated less seriously across the board. Clearly, additional specialist training and guidance for criminal justice professionals and the judiciary, social work, adult and child protection professionals and courts on the nature of coercive control and the impact of this behaviour on women, children and young people will be required.

The Bill makes a number of reforms to criminal procedure, evidence and sentencing. For example, it would prohibit the accused in a domestic abuse case from personally conducting the defence. Do you agree with this prohibition?

SWA supports the proposals in the Schedule of Part 2 to the Bill as follows:

Chapter 1

- **Schedule 1(1)**

A new standard condition of bail that prohibits an accused when they are charged with domestic abuse offences from obtaining precognitions or statements from a complainer, except through a solicitor. This will apply to anyone accused of the new domestic abuse offence and also domestic abuse-related offences not prosecutable under the specific offence where the domestic abuse aggravator has been added, namely where these are a single incident and no course of conduct is involved. This is an important provision given the nature of coercive control and it would be counter-productive to allow an accused charged with domestic-abuse related offences to be able to continue to exercise control, and thus, subvert the criminal justice process, by allowing an abuser unfettered access to a woman or child. The Policy Memorandum, at paragraphs 107- 119 also cogently explains the reasoning behind this proposal.

- **Schedule (2)-(4)**

That there should be an explicit ban on the accused conducting their own defence when they are charged with domestic abuse offences and, further, that this ban should also operate in relation to domestic abuse-related offences not prosecutable under the specific offence where the domestic abuse aggravation has been added to the offence, which, again, will cover single incidents where no course of conduct is involved. Again, for the reasons given above, and drawing a parallel with the intentions of this prohibition already existing for sexual offending, as discussed in the Policy Memorandum, at paragraphs 122- 131, this is an important protection for women and children.

- **Schedule 1(5)**

That the rules providing for special provision for child witnesses under the age of 12, in terms of ensuring that the views of the child in question are taken into account by the court when deciding whether the child should give evidence in the court room in relation to certain serious offences, also operate for cases involving the new offence under section 1 of the Bill or an aggravation under section 1 of the 2016 Act.

- **Schedule 1(6)**

The introduction of permitting expert evidence relating to the behaviour of the complainer in domestic abuse cases, to provide expert opinion on the range of reactions and decision-making typical of persons traumatised by domestic abuse, i.e. on matters that may be beyond the experience of the court/jury and on which they may harbour misconceptions.

The Policy Memorandum at paragraphs 135- 146 clearly explains the positive benefits of this approach in supporting the evidence of women and children in domestic abuse cases. Given the complex and misunderstood nature and dynamics of this offending and the impact on women and children in relation to reporting and participating in criminal proceedings, this proposal is important not only for these reasons but also in terms of the “reasonable person” test and in relation to rebutting the defence of “reasonableness”

- **Schedule 1(7)**

Introducing a requirement on a court, when sentencing for a relevant offence, to have particular regard to the aim of ensuring the victim is protected from being subject of a further such offence by the convicted person.

This is a particularly welcome and laudable intention within the Bill and we note the comments within the Policy Memorandum at paragraphs 149- 154, namely that this measure will “... be a helpful indication to the court of the unique circumstances of domestic abuse cases” noting further that “ *the new domestic abuse offence is generally unlike any other offence in always requiring this direct connection between a perpetrator and a victim.*”

SWA particularly welcomes this language in the Policy Memorandum re sentencing in domestic abuse cases: “*There is a high incidence of repeat offending in domestic abuse cases with victims being targeted repeatedly. As such, the safety of the victim will be a key consideration for the court whenever they sentence for the new offence and it is considered this new requirement will ensure beyond doubt that the court has particular regard for the protection of the victim from further offending by the convicted person.*”

In addition we would like to query whether the Bill needs to contain further technical amendments to other legislation, to give effect to the prohibitions and protections set out in the Schedule, as follows:

- **Paragraph 1-3 of the Schedule**

It may be that sections 74, 76 and 78 of the 1995 Act require to be added to the list of proceedings/hearings in section 3 of the Schedule in which an accused is preventing from conducting their own defence.

- **Paragraphs 5, 6, 7 and 8 of the Schedule**

In relation to the offences set out in the following, we would enquire as to whether the section 4 aggravation requires to be explicitly included as an offence to which the various protections in these paragraphs apply, in order to ensure that children appearing as witnesses in terms of this aggravation are included. It may be that the reference in these sections to the Bill's main offence at section 1 is sufficient but we would appreciate clarification of this point. The paragraphs in question are:

- paragraph 5(2) (b)- *special measures for vulnerable witnesses*
- paragraph 6(2)(a)(ii) – *presentation of certain expert evidence*
- paragraph 7(2)- new section 210AB- *victim safety in relation to sentencing*
- paragraph 8(2)- new section 234AZA(5)- *consideration of NHO*

Similarly, it is particularly important in relation to sentencing under paragraph 7 that the reference to “victim” is construed as including children subject to the aggravation, so that they may be equally protected in terms of sentencing.

NHOs are another issue of relevance here and where the section 1 offence is committed and the section 4 aggravation triggered, children subject to the aggravation must be covered by the NHO which the court can consider under paragraph 8.

The Bill would also require the court in a domestic abuse case to consider making a non-harassment order. What are your views on this approach?

SWA supports this approach set out in Schedule 1(8).

ⁱ (2014) at para 454.