

# **The Creation of A Specific Offence of Domestic Abuse – Proposed Associated Reforms to Criminal Procedure**



# **THE CREATION OF A SPECIFIC OFFENCE OF DOMESTIC ABUSE – PROPOSED ASSOCIATED REFORMS TO CRIMINAL PROCEDURE**

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## **FOREWORD BY THE CABINET SECRETARY FOR JUSTICE**

We know that far too many people are suffering in abusive relationships.

Recent statistics shown that nearly 60,000 incidents of domestic abuse were recorded by Police Scotland in 2014/15. And we know this is an under-estimate of the true extent of domestic abuse with many cases never being reported to the police.



That is why we are going to legislate in this Parliamentary year to create a new domestic abuse offence. This offence, which was consulted upon between December 2015 and April 2016, will criminalise the complex coercive and controlling behaviour that for many victims is their experience of domestic abuse.

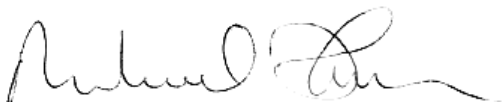
We are currently considering carefully the feedback offered including how best to ensure the offence acknowledges the impact of domestic abuse on children and this document does not discuss potential changes to the terms of the offence. Separate engagement will be undertaken as changes to the offence are considered.

In offering views on the draft offence as part of our recent consultation, we have noted many stakeholders suggested that the way in which the justice system handles domestic abuse cases needs to be modernised. Stakeholders have indicated that the protections offered to complainers in domestic abuse cases is lacking with reforms necessary to ensure our justice system operates in a modern and responsive way when dealing with domestic abuse cases.

It is of course critical that the proper administration of justice is carried out in all criminal cases and we consider the four areas included within this paper will modernise how the justice system deals with domestic abuse cases appropriately and effectively.

If you would like to offer views, please do so through the contact details at the end of this document.

While legislation can only provide some of the answers in tackling domestic abuse, I firmly believe that the reforms summarised in this paper coupled with the creation of the domestic abuse offence will help put Scotland firmly at forefront of efforts across the world to address the scourge of domestic abuse.



Michael Matheson MSP  
Cabinet Secretary for Justice  
Scottish Government  
October 2016

## PURPOSE AND OVERVIEW

- 1 The purpose of this document is to provide details of a number of reforms proposed to criminal procedure that relate to the creation of a specific offence of domestic abuse.
- 2 The Scottish Government has been exploring the creation of a specific offence of domestic abuse. We held a consultation between April and June 2015 on the principle of developing such an offence. The analysis of responses received to this consultation revealed broad support, but a range of views as to how best to develop the offence.
- 3 We therefore prepared a further consultation on the terms of a specific domestic abuse offence that was held between December 2015 and April 2016. An analysis of responses received to this second consultation was recently published. The Scottish Government is currently considering the views offered in respect of how the draft offence could be improved. This paper does not, therefore, respond specifically to those issues which are being considered separately.
- 4 However, in developing a specific offence of domestic abuse, we have also been considering whether some associated changes to criminal procedure and the law of evidence are merited to accompany the creation of the offence. Some consultees also raised the issue of whether some specific associated changes to criminal procedure were required in responding to the most recent domestic abuse offence consultation.
- 5 Our consideration was informed by views offered by stakeholders that there are clear parallels between some types of sexual offending and domestic abuse in that committal of both types of offences can often be accompanied by the exercise of control by the perpetrator over the complainer in a particularly intrusive and intimate way.
- 6 There are well-established rules of criminal procedure and evidence contained within the Criminal Procedure (Scotland) Act 1995 that relate only to certain sexual offences. This document outlines four reforms we are considering including in the forthcoming Bill, as announced by the First Minister in the Scottish Government's Programme for Government on Tuesday 6 September 2016 that will create a new domestic abuse offence.
- 7 These reforms are linked to existing provision in the area of sexual offending, but we have considered each reform on its own merits. We are proposing them as we consider they are a necessary and proportionate approach to take in respect of ensuring the creation of a domestic abuse offence is accompanied by necessary safeguards to stop the potential for further abuse of the complainer to take place through the court process and to provide courts with contextual information to assist with decision-making.

- 8 In this document, we refer to 'the accused', 'the complainer', 'the offender' and 'the victim'. These are used where the context requires it and are legal terms used in this document given the specific context of the policy under discussion.
- 9 By accused, we are referring to the person accused of committing the alleged domestic abuse offence. By complainer, we are referring to the person against whom the alleged domestic abuse offence is said to have been committed. By offender, we are referring to the person convicted of the domestic abuse offence. By victim, we are referring to the person against whom the domestic abuse offence has found to be committed.
- 10 If you would like to offer views, details of how to do so are contained in the 'What Happens Next' part of this document.

## **PROTECTION PRIOR TO AND DURING TRIAL – BAIL CONDITIONS**

### **What is proposed - summary**

- 11 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.

### **What is proposed – further detail**

- 12 The standard set of bail conditions, which are applied in all cases where an accused individual is released on bail, are listed at section 24(5) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”).
- 13 Amongst the standard conditions are requirements that the accused attends court as required, does not commit any further offences, does not interfere with witnesses or behave in a way that would cause witnesses alarm or distress, and that the accused must make himself or herself available for the purpose of enquiries or reports which would assist the court in dealing with the case.
- 14 Along with these standard conditions that apply whatever offence is alleged to have been committed, a particular standard condition applies (section 24(5)(e) of the 1995 Act) where the offence in question is one to which section 288C of the 1995 Act applies. Section 288C is a list of certain sexual offences.
- 15 The additional standard condition has the effect of prohibiting persons accused of any of the offences listed in section 288C from seeking to obtain precognitions or statements concerning the subject matter of the offence from the complainer, other than by way of a solicitor.
- 16 The reason for this existing standard condition operating in relation to certain sexual offences is to prevent an accused seeking to use the processes of the justice system to re-victimise the complainer. An accused may, for example, seek to intimidate the complainer by directly taking statements from them.
- 17 We consider that domestic abuse has a number of characteristics in common with sexual abuse. These include in particular the exercise of control in an especially intrusive and intimate way by the perpetrator over the victim. Indeed, the attempted exercise of such control is likely to be a more essential feature of domestic abuse offences than of sexual offences in general, given that the former must necessarily involve an intimate relationship between the accused and the complainer while the latter do not.
- 18 With this in mind, we consider the protection of an additional bail condition is appropriate in domestic abuse cases.
- 19 In terms of what domestic abuse cases this bail condition should apply to, we consider it should apply for anyone accused of the new domestic abuse offence.

- 20 In addition, we consider that the harm which the additional bail condition is designed to avert can take place in a wider range of cases than simply in relation to the new domestic abuse offence. For example, we consider such harm can take place where an offence is general in nature (e.g. threatening and abusive behaviour) but was committed in the context of domestic abuse.
- 21 The Abusive Behaviour and Sexual Harm (Scotland) Act 2016 includes provision (section 1) that creates a new statutory aggravation where an offence consists of abuse of a partner or ex-partner. This domestic abuse aggravator will mean that offences associated with domestic abuse, but not fitting the specific terms of the domestic abuse offence (e.g. where it consists of a single incident and there is no course of conduct) will officially be labelled as offences associated with domestic abuse.
- 22 We consider the new standard bail condition should also apply to where the domestic abuse aggravation has been added to an offence.

### **Benefit of what is proposed**

- 23 The introduction of a new standard bail condition will help reduce the likelihood of accused persons using the processes of the justice system to exert undue control and influence over the complainer, helping minimise the trauma for the complainer while still ensuring the proper administration of justice is achieved.

## **PROTECTION DURING TRIAL:**

### **ACCUSED PERSONS CONDUCTING THEIR OWN DEFENCE**

#### **What is proposed – summary**

- 24 A ban on the accused conducting their own defence when they are charged with domestic abuse offences.

#### **What is proposed – further detail**

- 25 Sections 288C, 288E and 288F of the 1995 Act contain provisions prohibiting an accused person from conducting their own defence. Section 288C imposes the prohibition in relation to certain sexual offences. Section 288D does so in relation to certain serious offences involving child witnesses under the age of 12. And section 288F gives the court a power to prohibit the accused from conducting their own defence where a vulnerable witness is to give evidence. Vulnerable witness is defined in section 271(1) of the 1995 Act to include complainers in offences involving domestic abuse.
- 26 Under these arrangements, the court must notify the accused that the hearing must be conducted by a lawyer. Section 288D of the 1995 Act provides that the court may appoint a solicitor at its own hand for this purpose. Under section 22(1)(dd) of the Legal Aid (Scotland) Act 1986, legal aid is automatically available where section 288D applies.
- 27 We consider it is appropriate to extend this ban to any accused charged with the domestic abuse offence. We consider similar considerations as noted in the proposal to prohibit the precognition/taking of statements by an accused also apply in this area.
- 28 In particular, the risk of the trial process being misused to further intimidate and control the complainer, which the existing prohibition addresses in sexual offence cases, is just as real in domestic abuse cases.
- 29 It is the case that complainers in cases arising from the new domestic abuse offence might be protected as vulnerable witnesses by existing legislation. However, this is not automatic and we consider there is a clear justification that an explicit ban should operate to avoid any doubt about an accused being able in any circumstances to conduct their own defence in domestic abuse cases.
- 30 For similar reasons as noted above, we consider the ban should also operate in relation to where the domestic abuse aggravation has been added to an offence.

#### **Benefit of what is proposed**

- 31 The introduction of an outright ban on accused persons conducting their own defence in domestic abuse cases will be to help reduce the likelihood of accused persons using the processes of the justice system to exert undue control and



influence over the complainer, help minimise the trauma for the complainer while still ensuring the proper administration of justice is achieved.

## **EXPERT EVIDENCE RELATING TO THE BEHAVIOUR OF THE COMPLAINER**

### **What is proposed – summary**

- 32 The introduction of expert evidence relating to the behaviour of the complainer in domestic abuse offence cases.

### **What is proposed – further detail**

- 33 In criminal trials, assessing a witness's credibility is considered a matter for the jury. The evidence of expert witnesses regarding normal human nature and behaviour is usually inadmissible, and evidence as to the credibility of a witness is generally not admissible unless it is also relevant to a fact in issue at the trial or is evidence of mental illness.
- 34 Section 275C of the 1995 Act was introduced to allow expert evidence to rebut any inference adverse to the complainer's credibility or reliability as a witness which might otherwise be drawn from her or his behaviour or statements after the offence was committed. This is an exception to the usual rule that the credibility or reliability of any witness is a matter for the jury. This exception operates in relation to certain sexual offences.
- 35 The exception was made because there is considerable research that demonstrates that an alleged victim of a sexual offence may respond in a number of ways and their reaction may be something with which members of a jury may be completely unfamiliar. For example, a complainer may appear very calm and not demonstrate distress, and the court or jury members may expect distress to be shown in a 'normal' reaction.
- 36 We consider the same situation can arise with domestic abuse in that the complainer may well – for example – continue to reside with the accused, give all the appearance of being in a happy relationship and may well co-operate with their partner/ex-partner in the matter of the upbringing of children during and following an offence being committed. For the court or members of a jury, such activity by the complainer could seem to undermine the credibility of the allegations they have made.
- 37 In this situation, expert evidence could demonstrate to the court/jury why actually such behaviour may be seen as an understandable reaction in the situation the complainer finds themselves in.

### **Benefit of what is proposed**

- 38 The introduction of permitting expert evidence relating to the behaviour of the complainer in domestic abuse cases would enable the court/jury to be provided with 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. This will assist the court/jury in reaching a just decision.

## **PROTECTION AFTER TRIAL:**

### **MANDATORY CONSIDERATION BY THE COURT OF IMPOSITION OF A NON-HARASSMENT ORDER UPON CONVICTION**

#### **What is proposed – summary**

- 39 The court will be required to always consider whether to impose a criminal non-harassment order following an offender being convicted of domestic abuse offences.

#### **What is proposed – further detail**

- 40 Section 234A of the 1995 Act empowers criminal courts to make non-harassment orders (NHOs). NHOs require offenders to refrain from specified conduct in relation to the victim. For example, the NHO could specify that the offender should not approach the victim's house and/or place of work.
- 41 Currently, a prosecutor is required to apply to court to consider imposing a criminal NHO following conviction. The court may make the NHO if it is satisfied on the balance of probabilities that it is appropriate to do so to protect the victim from harassment or further harassment.
- 42 In considering an application for a NHO, the court may, in certain circumstances, have regard to information provided by the prosecutor on previous misconduct by the offender towards the victim. The court will of course also consider the circumstances of the offence the offender has just been convicted of against the victim.
- 43 As noted above, there is no obligation on the court to consider making an NHO unless an application is made by a prosecutor and there is no obligation on prosecutors to make such an application. Where an application is considered by the court there is no obligation on the court to provide reasons for its decision be that whether to grant or reject the application.
- 44 We propose to strengthen the use of NHOs by requiring the court to consider whether an NHO is appropriate in every case where an offender is convicted of the new domestic abuse offence or an offence with the domestic abuse aggravation. This would remove the need for an application by the prosecutor in those cases and would ensure the protection needs of victims are always directly considered by the court.
- 45 The intention is that the court will be able to seek information about the offender, and in certain circumstances, the offender's criminal record, from the prosecutor as part of the court's consideration of the merits of making an NHO. We propose that the court should provide reasons for its decision to make or refuse to make an NHO.

#### **Benefit of what is proposed**

- 46 Requiring a court to always consider imposing a criminal NHO in all cases where an offender has been convicted of domestic abuse offences will strengthen the operation of NHOs, enhancing protection for victims and reduce the administrative burden on prosecutors.

## WHAT HAPPENS NEXT

- 47 The First Minister announced on 6 September 2016 that the Scottish Government would introduce into Parliament a Domestic Abuse Bill during the Parliamentary year 2016/17.
- 48 The Scottish Government is considering whether to include within this Bill the ancillary provisions as detailed in this document. If you would like to offer views on the proposals, please do so in one of the following ways:
- By email – Philip.lamont@gov.scot
  - By post – Philip Lamont, Room GWR, St Andrew's House, Regent Road, Edinburgh, EH1 3DG
- 49 If you consider there are other ancillary provisions that should also be considered for inclusion in the Bill, please let us know using the contact details above.
- 50 Separate from the publication of this paper, the Scottish Government is continuing to consider the feedback offered to the draft domestic abuse offence. This includes in relation to feedback suggesting that the offence requires to be strengthened to acknowledge the impact domestic abuse has on children. This document does not include details of potential changes to the offence and we will continue to engage with stakeholders over the terms of the draft offence before we introduce a Bill into Parliament in year 1 of this Parliamentary session.

Criminal Justice Division  
Scottish Government  
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