



FACULTY OF ADVOCATES

Response to Scottish Government's

Consultation on Improving Protections in the Justice System for Women and Girls

Faculty welcomes this consultation and commends the Scottish Government's evidence-based review of whether the current legal framework sufficiently protects women and girls from violence and abuse. As Scotland's independent referral Bar, with expertise in criminal prosecution and defence, human rights, and public law, the Faculty is well placed to assist constructively.

Several overarching observations inform the Faculty's responses.

First, in several important respects, Scots criminal law is better equipped than the law of England and Wales to address the harms considered in this consultation. Assault does not require proof of injury; there is no general consent defence; the Domestic Abuse (Scotland) Act 2018 provides a sophisticated course-of-conduct offence; and solemn sentencing powers are extensive. The Faculty therefore urges the Scottish Government to build on these strengths and avoid adopting cross - border solutions to issues that arise differently in Scots law.

Second, the Faculty recognises that criminal law can be a blunt tool. New offences should be introduced only where they fill a genuine legal gap and can be applied fairly and consistently. If legislation is enacted mainly for symbolic purposes this risks uncertainty, inconsistency, and unintended consequences for accused persons, victims, prosecutors, and the courts.

Third, the Faculty acknowledges the UK's positive obligations under Articles 2 and 3 ECHR to take reasonable operational and legislative steps to protect individuals from

violence. Strasbourg authorities require effective criminal provisions and enforcement. These obligations inform the Faculty's analysis throughout.

Fourth, criminal law alone cannot protect women and girls effectively. Matters beyond the legal framework, such as education, awareness-raising, well-resourced support services, and cultural change are essential.

Questionnaire

Non-Fatal Strangulation

Question 1: Do you agree with the Scottish Government view on the benefits arising from the operation of current law in relation to non-fatal strangulation?

The Faculty agrees with the Scottish Government's assessment, with supplementary observations.

Benefits identified in the Scottish Government's account of current Scots law on non-fatal strangulation:

- **Sentencing powers.** We agree that Scots law, unlike the pre-reform position in England and Wales, does not limit sentencing for non-fatal strangulation to a minor penalty where no visible injury is present. Common law assault prosecuted in the High Court may attract up to life imprisonment, whether or not injury is caused. This important distinction substantially weakens the case for a new Scottish offence modelled on England and Wales.
- **Evidential benefits of the domestic abuse offence.** We agree that the Domestic Abuse (Scotland) Act 2018 offers significant evidential advantages where strangulation forms part of a course of abusive behaviour. Corroboration applies to the course of conduct, not each individual act, which is especially valuable where abuse occurs in private. This sophisticated provision is already used in NFS cases regularly.
- **Absence of a consent defence.** This is the most significant distinction in Scots law. Unlike England and Wales, Scots law has never recognised consent as a defence to assault. The High Court of Justiciary confirmed this in *Sean Kirkup v His Majesty's Advocate* [2025] HCJAC 9, observing that choking or slapping a person would foreseeably be regarded as assault and criminal. *Kirkup* should be better understood by lawyers and the public and included in any public education programme. Articles 2 and 3 ECHR require effective deterrent provisions capable of practical enforcement. Scots law, with particular regard to

Kirkup, meets that standard. The absence of a consent defence is especially important and is consistent with, if not stronger than, the minimum standard.

Question 2: Do you agree with the Scottish Government view for better recording of criminal cases where non-fatal strangulation arises?

Yes, with clarification of the mechanism.

We agree that better recording is desirable and necessary. Reliable data is needed to assess prevalence, outcomes, under-reporting, resource needs, and the effectiveness of future interventions.

However, a **statutory aggravation** for non-fatal strangulation is not the right mechanism.

In Scots law, an aggravation must add a feature distinct from the underlying offence, such as motive, targeting, or domestic context. It cannot simply restate the conduct that constitutes the offence.

Non-fatal strangulation does not fit that model. Where strangulation *is* assault, it is the offence itself and cannot also aggravate itself.

We do support a **recording requirement**: where non-fatal strangulation formed all or part of the conduct leading to conviction, that fact should be recorded. This would generate useful data without legal incoherence.

Any recording mechanism should:

- Apply to convictions for assault, culpable and reckless conduct, attempted murder, and the domestic abuse offence where non-fatal strangulation conduct is established;
- Require specific notation on the court's record and on the Scottish Criminal Record Service entry;
- Be integrated with COPFS charging and recording systems (in a similar way as the type of weapon or classification of a drug) to enable consistent data collection;
- Be subject to annual publication in official crime statistics.

Question 3: Do you have views on how best public awareness can be improved as to the dangers of non-fatal strangulation?

Yes.

Public awareness is one of the most important practical interventions available and does not require new legislation.

Dissemination of *Kirkup*. *Kirkup* confirms that strangulation is criminal in Scotland regardless of purported consent. That principle should be communicated in plain language through the NHS, Police Scotland, schools, and domestic abuse organisations. This is particularly important in the context of sexual offending given the existence of practices described as “consensual non-consent” or BDSM and concerns that pornography may normalise choking during sex, including among young people.

School and early education programmes. Young people should learn that coercive control, intimidation, and strangulation are unacceptable in any relationship. Age-appropriate healthy-relationship education should be embedded in secondary schools.

Question 4: Do you have any other views on steps to address the dangers of non-fatal strangulation?

No.

Spiking

Question 5: Do you have views on how the offence of spiking is addressed under existing laws?

Yes.

Spiking is already criminal in Scotland: the crime of **drugging** at common law; **culpable and reckless conduct** covers reckless administration; **assault** may apply to deliberate administration; and section 11 of the Sexual Offences (Scotland) Act 2009 covers **administration for sexual purposes**.

The current framework is broadly adequate. The common law is flexible enough to cover new forms of spiking, including through vapes or food, without legislation (not limited to ‘drink spiking’ as implied in the consultation paper, pages 12 and 13) The common law basis of the

principal offence means that maximum sentencing powers are not artificially constrained and the courts are free to sentence according to the gravity of the offence.

We commend the Scottish Government's multi-agency group and national A&E guidance. Operational coordination and clear victim-facing guidance are likely to be more effective than new offences.

The existing framework also meets Articles 2 and 3 ECHR, by providing effective provisions to deter and punish serious harm.

Question 6: Do you have views on the benefits of developing a standalone spiking offence?

We do not consider a standalone spiking offence to be necessary or beneficial in Scotland.

Firstly, Scots law already criminalises spiking. Scottish common law is not limited by substance or method, so there is no legal gap to fill. Faculty considers that to develop a standalone offence of spiking would be to devote parliamentary time to criminalise that which is already criminal.

Secondly, Faculty notes that statutory consolidation risks legislative inflexibility. Common law can adapt to new substances, methods, and contexts; a statutory definition may narrow coverage unintentionally.

Thirdly, the consultation document identifies that the main concerns driving reform in England and Wales are operational: inconsistencies in practice across police forces, concerns about the number of convictions and public confidence in reporting.. Faculty is not aware of similar levels of concern in Scotland and notes what is said in the consultation document in this regard. Scotland should address any issues through training, coordination, and better data, not new legislation.

Question 7: Do you have views on (a) how public awareness can be improved as to the dangers of spiking and (b) how to encourage individuals to report a spiking offence?

No.

Statutory Aggravation – Offences Committed Against Pregnant Women

Question 8: Do you agree with a new aggravation in relation to offences committed against pregnant women by a partner or ex-partner?

Unlike non-fatal strangulation, pregnancy is a distinct factual feature separate from the underlying offence and thus can properly operate as an aggravation.

The proposal fits Scots law's existing aggravation framework, including domestic abuse, racial and religious, and child-related aggravations.

Scope: pregnancy rather than miscarriage. The aggravation should focus on pregnancy, not proof or consequences of miscarriage. Making miscarriage central would raise difficult causation issues and risk intruding unnecessarily on the complainer, particularly if that issue became a focus of the proceedings.

Limitation to domestic abuse offences. The aggravation should be confined to partners or ex-partners. The specific dynamics of domestic abuse during pregnancy justify a targeted provision.

Strict liability as to knowledge. We agree. However, we note the following observations: this may present evidential difficulties depending on how the aggravation is framed. Faculty notes that, for example, Section 1A of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, provides that, where an offence is said to be aggravated by being committed against a partner or ex-partner, there is a presumption as to the relationship. This means that, unless the matter is challenged by way of a preliminary objection, the relationship is established. It may be that any aggravation relating to pregnancy is framed in similar terms.

Where there is a challenge to the special capacity of pregnancy, the matter will need to be proved. Legislation can provide that this can be established by a single source. For cases which proceed to trial on indictment, the aggravation will require to be proved to the jury's satisfaction. While it will of course be easy in some cases to prove that there was a pregnancy, such as through birth of a child or medical records, in others there may be no records of any pregnancy. There may be cases where there is a dispute as to whether the complainer was pregnant at a particular time, bringing the timing of conception into sharp focus. The terms of any aggravation may require questions of a deeply personal nature to be put to a complainer. In cases to which Section 288C of the Criminal Procedure (Scotland)

Act 1995 applies, this may require applications to be made to the court in terms of Section 275(1) of that Act.

Faculty notes that the consultation document proposes that the aggravation would apply where the victim was pregnant at the time of the offence. It is the experience of members of Faculty that in cases where there are allegations of physical and sexual abuse, charges are drafted with a considerable latitude in time. An offence may be said to have been committed over a number of months or years, with further specification as to individual acts given as sub-heads to the overall charge. Indeed, a contravention of Section 1 of the Domestic Abuse (Scotland) Act 2018 criminalises a course of behaviour, which is said to have occurred between certain dates. It is not difficult to imagine a scenario where the overall span of a charge encompasses a period when a complainer was pregnant, but none of the individual sub-heads were said to have been committed during the course of the pregnancy. Consideration requires to be given as to whether an aggravation should apply in those circumstances and, if so, whether it should be open to the sentencer not to attribute any part of the sentence to the aggravation in those circumstances.

ECHR considerations. Article 7 requires clarity and foreseeability. Legislation and guidance should explain the strict liability model clearly, especially in ex-partner cases, where lack of knowledge may be genuine. Sentencing discretion is an important safeguard.

Transparency and data. Courts should record the aggravation and explain its sentencing impact, both for victim understanding and policy monitoring.

Prosecutorial Powers to Impose Non-Harassment Orders

Question 9: Do you agree to COPFS being given a power to make an NHO against a person when offering an alternative to prosecution?

Yes, in principle, subject to the significant structural and ECHR safeguards set out below.

Our position recognises the operational gap identified by COPFS and research evidence: victims prioritise safety, yet alternatives to prosecution currently provide no protective order. This can undermine victim protection and make diversion from prosecution less likely.

Articles 2, 3, and 14 ECHR may require effective protective measures in domestic abuse cases. The current gap should therefore be addressed.

However, legislation must include robust structural and rights-based safeguards.

Consensual character. COPFS would not impose NHOs unilaterally. The NHO would be a condition of an accepted alternative to prosecution, with prosecution remaining available if declined. That matters for Article 6, but safeguards remain necessary.

Grounds for concern:

- (i) **Risk of coercion.** Acceptance may be pressured where the alternative is prosecution. Where a case proceeds to court, solicitors and counsel are prohibited from tendering so-called ‘pleas of convenience’: where an accused person has a position which is exculpatory but advises that he or she wishes to plead guilty in order to attract a lesser sentence than would have been imposed should the matter have proceeded to trial. Alternatives to prosecution, by their very nature, encourage such a plea of convenience. While this may be an acceptable risk when the alternatives to prosecution offered are relatively modest financial penalties, or a short work order, matters may be different when the alternative is a potentially onerous NHO.

The framework should ensure acceptance is informed and voluntary. The accused must be provided with clear written notice of the terms of any NHO and the consequences of breaching the order. Provision should be made to allow the accused to have had the opportunity to take independent, funded, legal advice before accepting.

- (ii) **Purposes of sentencing.** Faculty notes that the consultation document states that giving COPFS the power to make an NHO may be particularly useful in dealing with domestic abuse cases that would otherwise be prosecuted at summary level, and which would be unlikely to result in a custodial sentence being imposed by the court if the accused were convicted. For cases prosecuted on summary complaint, the maximum length of imprisonment which a sheriff can impose is 12 months. There currently exists a statutory presumption against sentences of 12 months or less unless no other method is appropriate. Faculty notes that the Scottish Government are currently seeking views as to whether this statutory presumption should be extended to sentences of 24 months or less. This would, if legislated for, mean that the overwhelming majority of cases involving domestic abuse

prosecuted on summary complaint would be unlikely to receive a sentence of imprisonment. This would, presumably, mean that the overwhelming majority of cases could be dealt with by means of an alternative to prosecution, removing them from the court process.

Faculty notes the terms of the Scottish Sentencing Council's *Principles and Purposes of Sentencing* guideline. This provides for various purposes of sentencing in Scotland, including expressing society's concern and disapproval of the offending behaviour under consideration. Any expansion of a scheme to remove cases of domestic abuse from court by offering more lenient sentences than otherwise would have been imposed, may send a signal that authorities are treating domestic abuse less seriously than they should.

Faculty further notes that by removing cases involving domestic abuse from the court process, there would be a removal of the ability of the media to report on such cases. While Faculty notes the intention to record any NHO for use in helping assess risk for the purposes of the Disclosure Scheme for Domestic Abuse operated by Police Scotland, it may be that the first port of call for many concerned about domestic abuse is an internet search of a partner's name and locality. While media reporting of Sheriff Court proceedings may appear in any search results, the imposition of an alternative to prosecution by COPFS will not.

(ii) Article 6. Faculty notes that the offering of an NHO as an alternative to prosecution may engage an accused person's Article 6 rights. Legislation should specify the information provided, the right to be heard, and access to funded legal representation before acceptance.

(iii) Article 8. Any NHO must be proportionate, tailored to the specific risk, and no wider than necessary to protect the complainer. Faculty notes that, when an NHO is sought by the Crown following a conviction, the court is required to give the person against whom the order is sought an opportunity to make representations in response to the application. When an NHO is to be imposed by the court upon conviction, the court will likely have the benefit of the terms of a Criminal Justice Social Work Report. It will have the benefits of any submissions made on behalf of the accused. Those imposing the NHO will have the benefit of judicial training and experience. None of those benefits would appear to be open

to the Procurator Fiscals Depute who are likely to draft the terms of any NHO. Faculty considers that this leaves open the possibility of NHOs being offered, and accepted, in terms which are disproportionate and wider than is necessary to protect the complainer. Particular regard will have to be given to any arrangements relating to contact with children before any NHO is offered. Faculty considers that an accused person, or their representative, should be offered the opportunity to make representations in relation to the proposed NHO.

(iv) Article 7. NHO terms must be precise enough for the person subject to them to understand what is prohibited.

(v) Consequential prosecution. Careful consideration would be required to assess how alleged breaches of a COPFS-NHO would be managed. It is unclear whether the intention would be to amend the Protection from Harassment Act 1997 (or otherwise legislate) to allow this to constitute an offence or render the alternative to prosecution void and permit a prosecutor to reconsider whether a prosecution is in the public interest. An individual subject to a COPFS-NHO could therefore find themselves denied the benefit of the alternative to prosecution they had accepted, on the basis of an alleged breach of the NHO which is not then established. The ECHR concerns are outlined further at the Faculty's answer to question 17 below.

Question 10: Do you agree on how applications to vary or revoke an NHO made by COPFS should be handled, with court involvement suggested for any appeals?

Yes, broadly, with observations.

Applications to vary or revoke a COPFS NHO should go first to COPFS, with appeal to the court. This is proportionate and preserves judicial oversight.

However, we make the following specific observations:

Article 6 appeals. Court appeal must be genuine and accessible, with power to review the merits rather than merely supervise COPFS's decision.

Victim involvement. The complainer should be notified and allowed to make representations at both COPFS and court stages.

Standard of review. Revocation should turn on whether the NHO remains necessary to protect the complainant.

Reconciliation applications. Applications based on reconciliation should be permitted although treated cautiously, with the complainant's position independently and sensitively ascertained.

Question 11: Do you agree an NHO made by COPFS as part of an alternative to prosecution should have a maximum time period of 12 months?

Yes, but subject to the following observations:

A 12-month maximum is reasonable for prosecution-led NHOs, but it should operate as a maximum, not a default. Faculty agrees with the Scottish Government's position that where a longer period of protection is considered necessary, prosecution remains the appropriate course of action.

Online and Technology-Facilitated Harm

Question 12: Do you agree with the Scottish Government proposal for a creation offence?

Yes.

Section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 covers **disclosure and threatened disclosure**, not **creation**. A deepfake intimate image may cause serious harm even before disclosure by violating dignity, privacy, and autonomy and creating a continuing risk of sharing.

Article 8 jurisprudence recognises privacy and dignity harms regardless of publication. The law should address creation as well as disclosure.

ECHR considerations. The offence engages Article 8 on both sides. It is proportionate if consent is clearly defined, legitimate-purpose defences are included, and *mens rea* is clear.

Question 13: Do you agree with the proposal for a requesting creation offence?

Yes.

A requesting-creation offence is needed to prevent perpetrators avoiding liability by directing others, including overseas services, to create intimate images.

The legislation should also address online platforms and services that knowingly facilitate such requests, including through liability for aiding and abetting.

Question 14: Do you agree with the proposal for a new production, supply and offering to supply offence?

Yes.

We support criminalising the production, supply, and offering to supply of intimate image generators, or “nudify apps” as a necessary response to a growing harm.

Such tools substantially lower the barrier to intimate image abuse and actively enable serious abuse, particularly of women and girls.

Faculty notes there are likely to be drafting challenges in relation to production, supply and offering to supply. General-purpose AI tools can be misused for intimate image creation. Consideration will need to be given to what amounts to “principally” and what differentiates, for example, “principally” from “commonly”. The distinction matters because an imprecise threshold risks inadvertently capturing the developers of legitimate software that is capable of misuse, rather than targeting only those tools whose design purpose is the generation of non-consensual intimate images.

ECHR – Article 10 and proportionality. The proposed “solely or principally designed” test is critical. It targets harmful tools without capturing legitimate general-purpose software, provided the test is applied rigorously, appropriate defences exist, and guidance defines the offence clearly.

Question 15: Do you consider that there are any specific changes to the current criminal law that would improve how the justice system is able to respond to technology-facilitated and online harms?

Yes, with targeted observations.

The current framework is generally flexible enough for online harms. Stalking, threatening or abusive behaviour, breach of the peace, and intimate images offences under the 2016 Act can all apply online without amendment.

However, the following areas merit consideration:

Section 127 Communications Act 2003. How this fits with modern online communication remains uncertain. The Scottish Government should monitor charging practice with COPFS and consider clarification if needed. Maximum sentence applies.

Cyber-flashing. Existing offences apply.

Online coercive control. The Domestic Abuse (Scotland) Act 2018 Act is a flexible tool, capable of adequately capturing device monitoring, online stalking, and digital financial control.

Question 16: Do you have any views to offer on further steps to reduce online and technology-facilitated harm?

Yes.

Beyond criminal law:

Online Safety Act 2023. New Scottish offences should be priority offences for Ofcom regulation, combining criminal sanction with platform-level prevention.

Civil remedies. Victims often need urgent take-down and protective orders. The Government should assess whether civil remedies are accessible, affordable, and swift.

Education. Digital literacy, online safety, consent, and criminal law should be embedded in the school curriculum and kept current.

Victim support. Specialist legal and emotional support for victims of online abuse should be adequately and sustainably funded.

Industry engagement. Government should work with platforms, technology companies, and app stores to remove intimate image generators and improve reporting mechanisms.

Impact Assessments

Question 17: Do you have any views on potential impacts of the proposals in this consultation on human rights?

Yes.

Human Rights have been addressed throughout. In this section we particularly highlight the following ECHR points:

Article 2. Non-fatal strangulation could indicate a lethal domestic abuse risk. The existing framework, properly enforced and supported by recording, should meet the State's positive obligations.

Article 3. The pregnancy aggravation, COPFS NHO powers, and online harm offences all support the positive obligation to protect individuals from serious harm, including domestic abuse.

Article 6. COPFS NHO powers require clear safeguards: legal advice, the right to be heard, appeal rights, and clarity on proof, given the criminal consequences of breach.

If breach of a COPFS-NHO is to constitute a criminal offence, a particular difficulty arises. An individual who accepts an alternative to prosecution does so on the basis that they will not face prosecution for the index offence. If they are subsequently alleged to have breached the NHO, and that allegation gives rise to criminal proceedings for the breach, they may find themselves prosecuted for both the breach and the index offence. Where an individual is acquitted of the breach, but convicted of the index offence, the outcome may appear paradoxical. This is because the individual has been prosecuted and convicted of the index offence solely as a consequence of an allegation of breach that was not established to the criminal standard.

A practical issue would arise in this situation as to whether an accused person could deny a charge which related to conduct for which they accepted an alternative to prosecution. It is unclear whether the proposal, if it is to allow for the prosecution of a breach, would necessitate that an accepted offer of an alternative to prosecution represents a personal bar on the Crown from raising proceedings in relation to the index offence in the event of an alleged breach. Such an approach would allow for the alleged breach to be tested without prejudicing the accused, and may be justifiable given that, as COPFS recognises, this power will apply to a relatively low number of cases.

Alternatively, if a breach of COPFS-imposed-NHO simply renders the alternative to prosecution void and allows COPFS to reconsider prosecution of the original offence, there is a risk that the individual could face prosecution without the adequate opportunity to challenge the allegation of breach. The specific Article 6 concern is that the individual's right to a fair hearing on the factual question of whether a breach occurred may be circumvented if COPFS can simply treat the alternative to prosecution as void, on the basis of its own assessment.

The Faculty accordingly considers that the proposal should clearly set out the procedure to be followed on an allegation of breach, and that this procedure should be designed with Article 6 compliance in mind.

Article 7. The pregnancy aggravation, NHO conditions, and requesting creation offence must be clear, foreseeable, and precisely framed.

Article 8. Online harm offences protect victims' privacy and dignity while restricting the rights of others; they are only proportionate if clearly delimited and supported by appropriate defences. NHO terms must also be proportionate.

Article 14. Given the gendered nature of the harms, the ECHR assessment should address whether existing and proposed measures adequately protect women and girls, as required.

Question 18: Do you have any views on potential impacts of the proposals in this consultation on equalities and the protected characteristics set out above?

No.

Question 19: Do you have any views on potential impacts of the proposals in this consultation on children and young people as set out in the UNCRC?

Yes.

We make the following observations on children and young people:

Children affected by domestic abuse. Domestic abuse, including during pregnancy, can seriously affect children in multiple ways. Support for affected children should be assessed alongside legislative change.

Online harm. Young people are highly exposed online. Awareness campaigns should target them directly and involve schools.

Existing child protections. Existing indecent-image protections for children should remain distinct and unaffected by the new adult-focused deepfake offences.

Question 20: Do you have any views on potential impacts of the proposals in this consultation on socio-economic equality?

No.

Question 21: Do you have any views on potential impacts of the proposals in this consultation on communities on the Scottish islands?

No.

Question 22: Do you have any views on potential impacts of the proposals in this consultation on privacy and data protection?

Yes.

We make the following privacy and data protection observations:

NFS recording. Any recording system will process sensitive personal data and thus must comply with applicable legislation, in particular UK GDPR and the Data Protection Act 2018.

NHO data. COPFS NHO data, including information relevant to Police Scotland disclosure schemes, must be used only for legitimate purposes and with proper safeguards.

Intimate-image evidence. Investigators and prosecutors need clear guidance on lawful processing, storage, and disposal of intimate-image evidence.

Victim confidentiality. Additional protections may be needed for victim identities in proceedings and published records.

Question 23: Do you have any views on potential impacts of the proposals in this consultation on businesses and the third sector?

No.

Question 24: Do you have any views on potential impacts of the proposals in this consultation on consumers?

No.

Question 25: Do you have any views on potential impacts of the proposals in this consultation on the environment?

No.