

Children's Rights and Wellbeing Impact Assessment

Domestic Abuse (Scotland) Bill

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CRWIA	
Date of publication	
Executive Summary	<p>The Domestic Abuse (Scotland) Bill will introduce an offence of 'Abusive behaviour towards a partner or ex-partner'. It also provides for an associated statutory aggravation that the perpetrator, in committing the new offence, involved or affected a child, or that a child saw, heard or was present during an incident of the perpetrator's behaviour that happened as part of the course of abusive behaviour amounting to the offence.</p> <p>The offence is intended to ensure that the criminal law reflects that domestic abuse can often be a course of conduct which takes place over a sustained period of time. In addition, the course of conduct can consist of both physical violence and threats which can be prosecuted under existing laws, and psychological and emotional abuse which can be difficult to prosecute under existing laws.</p> <p>By enabling abuse of various types which takes place over a period of time to be prosecuted as a single course of conduct within the new offence, the criminal law will better reflect how victims actually experience such abuse. The Bill will also ensure that a course of conduct of entirely non-physical abuse of a person's partner or ex-partner is a criminal offence.</p> <p>The Bill provides for a statutory aggravation to the offence that the offender, in committing the offence, directed behaviour at a child, or that the person, through whose behaviour the perpetrator directs behaviour at their partner or ex-partner, is a child, or where a child sees, hears or is present during an incident of the perpetrator's behaviour that happens as part of the course of abusive behaviour amounting to the offence.</p> <p>The Bill also makes a number of associated reforms to criminal procedure, evidence and sentencing relating to the creation of an offence of domestic abuse. These reforms are:</p> <ul style="list-style-type: none">• Creating a standard bail condition prohibiting a person accused of a domestic abuse offence from conducting precognition of the complainer other than through a solicitor;• Prohibiting an accused person in a domestic abuse case from conducting his own defence in court;

- Permitting expert evidence relating to the behaviour of the complainer in domestic abuse cases;
- Applying the same rules about when a child witness under 12 may give evidence in a court room as are applied to other serious offences;
- Requiring the court to have particular regard to the safety of the victim when sentencing for domestic abuse offences; and
- Placing a duty on the court to consider whether to make a non-harassment order against a person convicted of a domestic abuse offence.

We consider that of the eight wellbeing indicators (Safe, Healthy, Achieving, Nurtured, Active, Respected, Responsible, Included – known by the acronym, SHANARRI), the policy relates to

- Safe:
- Healthy:
- Nurtured: Having a nurturing and stimulating place to live and grow.
- Included: Having help to overcome social, educational, physical and economy inequalities and being accepted as part of the community in which they live and learn.

Of the UNCRC articles, the policy relates to:

- Article 3 – Best interests of the child. That is ‘every decision and action taken relating to a child must be in their best interests’.
- Article 6(2) The right to life. That is, ‘ensure to the maximum extent possible the survival and development of the child’.
- Article 27 Adequate standard of living. That is ‘the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.’

The CRWIA process identified an issue around the extent to which the experience of children growing up in circumstances where their parent or carer is a victim of domestic abuse is reflected in the criminal law and noted that domestic abuse can often be experienced by the children of an abused partner in a very similar way to that partner.

To address this, some changes were made to the drafting of the offence, and a statutory aggravation concerning children was added. Further details are provided below.

Background

Speaking at the Crown Office and Procurator Fiscal Service's (COPFS) Domestic Abuse Conference in May 2014, the then Solicitor General, Lesley Thomson QC, called on the Scottish Parliament to consider the creation of a 'bespoke' offence of 'domestic abuse'. She stated that, in her experience of prosecuting domestic violence, the existing law does not always reflect the experience of victims of long-term domestic abuse because it focuses on specific instances of e.g. assault or threatening or abusive behaviour, rather than the long-term, repeated nature of much domestic abuse.

Between March and June 2015, the Scottish Government consulted on whether a specific offence of domestic abuse would improve the ability of the justice system to respond to this form of crime.

Analysis of responses to that consultation¹ suggested that the great majority of respondents agreed that the existing laws used to prosecute domestic abuse did not always reflect the experience of victims, especially those suffering on-going severe emotional or psychological abuse (often described as 'coercive and controlling behaviour') by their partner or ex-partner. However, there was no consensus on how such an offence could be developed with a range of views expressed by consultation respondents on how a specific offence could be crafted.

Between December 2015 and April 2016, the Scottish Government undertook a further consultation² seeking views on a specific draft offence which was published with the consultation. Responses to that consultation³ and meetings with stakeholders informed the further development of the offence which is contained in the Bill.

The offence is a general offence of 'domestic abuse' which is intended to cover the wide range of conduct that can make up a pattern of abusive behaviour within a relationship: both physical violence and threats which can be prosecuted using the existing criminal law and other behaviour amounting to psychological abuse or coercive control which either cannot be or, at least, cannot easily be possible to prosecute using

¹ www.gov.scot/Publications/2015/10/7350

² <https://consult.scotland.gov.uk/criminal-law-and-sentencing-team/criminal-offence-domestic-abuse>

³ <http://www.gov.scot/Publications/2015/10/7350/0>

	<p>existing criminal laws.</p> <p>Following the consultation, in September 2016 the Scottish Government published a paper⁴ seeking views on a number of associated reforms to criminal procedure to take account of the creation of a specific offence of domestic abuse. It reflected the fact that stakeholders had highlighted the 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.</p> <p>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. That paper sought views on whether a number of these rules should be adapted and applied in relation to the proposed new domestic abuse offence 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.</p>
<p>Scope of the CRWIA</p>	<p>The proposals were developed and their likely effect assessed using a range of evidence, including two full public consultations and a further semi-formal consultation.</p> <p>Scottish Government Criminal Justice policy officials also considered evidence from a variety of studies, reports and surveys, including:</p> <ul style="list-style-type: none"> • ‘Domestic Abuse recorded by the police in Scotland, 2015-16’⁵ • ‘Scottish Crime and Justice Survey 2014/15: Partner Abuse’⁶ (including a section outlining the findings of a questionnaire from the Growing Up in Scotland Study (GUS), a large-scale, longitudinal study of two representative cohorts of children, born in 2004/05 and 2010/11 and living in Scotland, which asked the main carers of children in the older cohort, about their experiences of partner abuse over the previous six years. • ‘Equally Safe – Consultation on reforming the criminal law to address domestic abuse and sexual offences’⁷

⁴ <http://www.gov.scot/Publications/2016/10/3259/0>

⁵ <http://www.gov.scot/Publications/2016/10/2442>

⁶ <http://www.gov.scot/Publications/2016/05/2505>

⁷ <http://www.gov.scot/Publications/2015/03/4845> An analysis of responses can be found at <http://www.gov.scot/Publications/2015/10/7350>

	<p>which sought views on the creation of a specific offence concerning domestic abuse.</p> <ul style="list-style-type: none"> • ‘A Criminal Offence of Domestic Abuse: Scottish Government Consultation Paper’⁸ which sought views on a draft offence • ‘The creation of a specific offence of Domestic Abuse and the proposed associated reforms to criminal procedure’⁹ which invited views on proposals to prevent persons accused of domestic abuse offences precognosing the complainer other than through a solicitor or conducting their own defence, to provide for introduction of expert evidence on how victims of domestic abuse may react to this crime, and to require the court to consider the imposition of a Non-Harassment Order on a person convicted of a domestic abuse offence. • Responses to that paper¹⁰.
<p>Children and young people’s views and experiences</p>	<p>Given the technical nature of the development of the drafting of the offence, and indeed of the arguments for the creation of a specific offence as opposed to relying on the existing law to prosecute domestic abuse, as well as the sensitive nature of the subject matter, direct engagement with children and young people by the Scottish Government was not considered appropriate.</p> <p>However, 3rd sector groups representing children were consulted and we met with them a number of times. We also took account of a consultation response submitted by Dr Claire Houghton of the ESRC Edinburgh University IMPACT Project, which took the views of eight young survivors of domestic abuse.</p>
<p>Key Findings</p>	<p>Context – children’s experience of domestic abuse</p> <p>There is clear evidence that domestic abuse is widespread in society. In 2015-16, 58,104 domestic abuse incidents were reported to the police and one or more crimes or offences were recorded in 51% of those domestic abuse incidents. There is evidence that much domestic abuse is not reported to the police. The Scottish Crime and Justice Survey’s Partner Abuse Module for 2014/15 found that 14% of adults (19% of women and 9% of men) report having experienced physical or psychological partner abuse since the age of 16, and 3% report having experienced partner abuse in the</p>

⁸ <http://www.gov.scot/Publications/2015/12/6973> An analysis of responses can be found at <http://www.gov.scot/Publications/2016/09/4616>

⁹ <http://www.gov.scot/Publications/2016/10/3259/0>

¹⁰ <http://www.gov.scot/Publications/2016/10/3259/downloads>

previous 12 months. Only 20% of those who experienced partner abuse in the previous 12 months said that the police came to know about the most recent incident.

That survey found that more than a third (39.4%) of those who had reported at least one incident of partner abuse in the last 12 months said that children were living in the household when the most recent incident took place, and of those who reported partner abuse in the last 12 months *and* said that there were children living in the house, nearly two thirds (63.7%) said that the children were present (in or around the house or close by) during the most recent incident and of those, three quarters (75.3%) said that the children saw or heard what happened.

Within this group, nearly a fifth (18.8%) said that children had become involved in the incident, and just over a quarter (26.0%) said that the children experienced emotional or psychological effects (such as difficulty sleeping, low self-esteem, anxiety) as a result. While the low base numbers mean that these findings should be treated with caution, they are broadly consistent with a wider body of evidence on the impact of domestic abuse on children.

There is also evidence demonstrating that growing up in an environment where domestic abuse is taking place can harm children. A study by *Mullender et al* (2000) found that the most common response amongst children was fear, which often persisted after the abuser had left, and led to sleeping difficulties and nightmares. *Holden* (2003) observed that children were likely to be intimidated by abusers, and face abuse themselves. There is also an established link between domestic abuse and physical abuse of children (World Health Organisation, 2002).

The available evidence therefore demonstrates that significant numbers of children grow up in an environment in which their parent or carer is a victim of domestic abuse, and that this can have a significant negative impact on children who experience it. A criminal offence which enables the justice system to better respond to domestic abuse, and in particular, psychological abuse and coercive control, which are extremely difficult to prosecute using the existing criminal law, has the potential to advance children's rights and wellbeing in Scotland by providing the criminal justice system with enhanced powers to intervene where abuse is occurring, enabling action to be taken to bring perpetrators of domestic abuse to justice. This should have the effect of reducing the incidence of abuse and enabling earlier and more effective intervention.

How policy takes account of the experience of children

There was broad support among respondents to the two consultations undertaken by the Scottish Government both for the principle of creating a specific criminal offence of domestic abuse and for the approach of defining the offence in terms of a course of conduct which can comprise both physical and psychological abuse.

A number of respondents to the consultation seeking views on the draft offence commented on coverage of children and young people within the draft offence. This issue was raised in particular by children's and young people's group respondents, but also by others, including by the academic and eight young survivors of domestic abuse who work together to promote the use of evidence from young survivors of gender-based violence who felt that the definition of abuse contained in the draft offence missed out the common experiences of women and children who experience abuse together.

The overall concern of most of the respondents who raised the coverage of children and young people was that, as the draft offence that was consulted on was drafted, they were largely invisible and the impact which domestic abuse has on them is not recognised. Many went on to comment on the extent to which domestic abuse impacts on children, both in terms of the sheer numbers of children affected but also in terms of the impact it can have on each individual child. Points raised included:

- Domestic violence affects extremely large numbers of children throughout Scotland and the UK. There is a considerable body of evidence as to the wide-ranging and very serious effects on children of living in homes where there is domestic violence. They include increased risk of being physically or sexually abused, higher rates of anxiety and depression, trauma symptoms and behavioural and cognitive problems.
- A child or young person can be the victim of coercive control in a range of different ways, many of which may echo the types of controls their parent/carer is being subjected to. This might include being denied access to pets, possessions, food or medical care. Equally, control over the abused parent's/carer's finances or movements is likely to affect them directly. Abusers may also seek to undermine the relationship between a child and the abused parent/carer.

Although some respondents noted that they were understanding of the rationale behind defining domestic abuse by its impact on the abused partner or ex-partner, there were nevertheless calls for the Scottish Government to do more to recognise the impact of domestic abuse on children and young people, either within the definition or elsewhere in the draft offence. This included there being need for explicit recognition of children as victims of the perpetrator's abusive behaviour - violence, threats, intimidation, psychological harm. A number of respondents also called for greater explicit recognition of how perpetrators can involve children in the commission of abuse, for example, by encouraging them to be abusive, disobey or disrespect their partner, or by asking the child to 'spy' or otherwise report on the activities of their partner.

Changes made to the draft Bill to take account of the impact of domestic abuse on children

Following the consultation, the Scottish Government met with a number of stakeholders to discuss how the draft offence could be refined to address the issues raised in consultation responses. With regards the concerns that the draft offence that was consulted upon did not reflect the harm done to children.

As a result of this further consideration, a statutory aggravation has been added to the Bill which is intended to capture the seriousness of perpetrators involving a child in the course of behaviour amounting to abuse of their partner or ex-partner or of a child seeing or hearing the abusive behaviour.

The aggravation in this Bill applies where a perpetrator directs behaviour at a child in committing the new offence. An example would be where the perpetrator directs verbally abusive behaviour at a child for the purpose of frightening or controlling their partner or ex-partner so as to make that person fearful for the safety or well-being of their child.

The aggravation also applies if the person, through whose behaviour the perpetrator directs behaviour at the partner or ex-partner, is a child. An example would be where the perpetrator encourages their partner's or ex-partner's child to 'spy' on their parent and report back to the perpetrator.

The aggravation also applies where a child sees, hears or is present during an incident of the perpetrator's behaviour that happens as part of the course of abusive behaviour

amounting to the offence. This could be an instance of physical abuse or, for example, threatening behaviour or verbal abuse. The provision is framed widely to reflect the many different forms of abuse that a child may see, hear or be present during the commission of the offence. This aspect of the aggravation is intended to reflect the harm that can be caused to children who witness or hear abuse taking place, irrespective of whether the perpetrator directly involves them in the commission of the abuse.

As a result of these discussions, amendments were made to the earlier draft version of the offence to respond to concerns that the draft offence did not reflect the fact that, where a person engages in abusive behaviour by directing behaviour at or through a third person, perpetrators were especially likely to do this by using the victim's children.

Section 2(1)(b) of the draft offence provided that "behaviour which is abusive of B" includes behaviour "directed at B **or any other person**" which has its purpose (or as one of its purposes) one or more of the effects in section 2(2) or that a reasonable person would consider would be likely to have one or more of those effects.

While it is in our view clear that 'any other person' would include B's children, it was considered useful to refer specifically B's child or children in the drafting, to draw attention to the fact that particular attention should be paid to the possibility that the perpetrator may direct behaviour at the victim's child as part of the course of abusive behaviour.

A number of consultation respondents were of the view that the offence should be widened so as to provide that the children of an abused person could be explicitly recognised as victims of domestic abuse to reflect the evidence that children growing up in an environment where their parent or carer is being abused are harmed by that abuse, or that a separate offence of 'domestic abuse of a child' should be included, to address psychologically abusive or coercive and controlling behaviour, directed towards children.

The offence is framed as one of abuse of a partner or ex-partner. As such, it does not directly extend to abuse of a child (unless the perpetrator's partner or ex-partner who is subject to the abuse is themselves a child).

Abuse of a child is already a criminal offence which can be prosecuted under the section 12 offence in the Children and Young Persons (Scotland) Act 1937. It is noted that there are concerns about the extent to which it is possible to

	<p>prosecute psychological abuse, as distinct from physical abuse or neglect, of a child using this offence and its limitations in cases where the person committing the abuse is not someone who has parental responsibilities in relation to the child.</p> <p>In March 2017, the Minister for Childcare and Early Years made a statement to Parliament outlining the next phase of work on the Scottish Government’s Child Protection Improvement Plan, in which he announced that the Government would review the terms of the offence at section 12 of the 1937 Act to ensure that it accurately reflects a modern understanding of the different ways that abuse and neglect of a child can be committed.</p> <p>It is considered that the way that the offence in this Bill has been developed to address psychological abuse and coercive control of a person’s partner or ex-partner would require considerable adaptation if it were to be considered as a template for use in dealing with psychologically abusive behaviour directed towards a child.</p> <p>The list of ‘effects’ of abusive behaviour contained within the draft offence was crafted with relationships between partners and/or ex-partners in mind. Therefore applying the list of ‘effects’ in a different context may be seen as inappropriate. For example, it might be seen as reasonable, for example, for a parent or carer to control, regulate or monitor the day-to-day activities of a child, or to punish the child for misbehaviour . That is not to say that there are not forms of control or punishment of a child which would amount to psychological abuse, but it is considered that this question is best addressed by considering the wider issue of how best to reform the existing criminal law more generally concerning abuse of a child.</p>
<p>Conclusions and Recommendations</p>	<p>The Scottish Government has found that none of the proposals impinge upon articles of the UNCRC or the indicators of wellbeing (SHANARRI) and that the Bill will not have a negative impact on children and young people.</p> <p>We consider that the impact on would be positive and that by providing the police and prosecutors with enhanced powers to address domestic abuse, there will be greater scope to enable action to be taken where domestic abuse is occurring, including, but not where the victim has children in their care.</p> <p>The statutory aggravation contained in the Bill requires the</p>

	<p>court, in sentencing an offender, to take account of the fact that a child saw or heard the abuse, or that the perpetrator directed behaviour at a child in committing the offence, or that the perpetrator made use of a child in directing behaviour at a victim. This will provide clarity as to the account taken by the courts of these factors in determining the appropriate sentence for an offender.</p> <p>We note concerns that the existing criminal law may not adequately address ‘domestic abuse of a child’ – particularly where this abuse is psychological in nature. This will be considered during the next phase of work on the Scottish Government’s Child Protection Improvement Plan, which will review the terms of the offence at section 12 of the 1937 Act to ensure that it accurately reflects a modern understanding of the different ways that abuse and neglect of a child can be committed.</p>			
<p>Monitoring and review</p>	<p>Responsible Official: Patrick Down</p> <p>Timetable: Throughout the parliamentary passage of the Bill and continuing through implementation of the provisions following Royal Assent.</p> <p>Methodology: Through continued engagement with key third sector stakeholders representing children and young people</p>			
<p>Bill - Clause</p>	<p>Aims of measure</p>	<p>Likely to impact on . .</p>	<p>Compliance with UNCRC requirements</p>	<p>Contribution to wellbeing indicators</p>
<p>Offence of abusive behaviour towards partner or ex-partner</p>	<p>To ensure that the criminal law reflects our modern understanding of domestic abuse as a course of behaviour by creating a criminal offence</p>	<p>Anyone who is a victim or perpetrator of domestic abuse, and those with a close connection to either a victim or perpetrator of abuse including, in particular, their children.</p>	<p>This policy does not impinge on any of the UNCRC articles.</p> <p>We consider that it advances:</p> <p>Article 6(2) The right to life, survival and development;</p>	<p>The policy does not impinge on any of the indicators.</p> <p>We consider that it advances:</p> <p>Safe; Healthy; Nurtured</p>
<p>Aggravation of offence in relation to a child</p>	<p>To ensure that the new offence effectively</p>	<p>Anyone who is a victim or perpetrator of domestic</p>		<p>The policy does not impinge on any of the indicators.</p>

	captures the seriousness of perpetrators involving children in domestic abuse or causing a child to hear or see abuse, by formally recording it as an aggravation to be considered when sentencing the offender.	abuse, and those with a close connection to either a victim or perpetrator of abuse including, in particular, their children.		We consider that it advances: Safe; Healthy; Nurtured; Included
Bail condition concerning precognition	To prevent an accused person seeking to further their control over an alleged victim through the justice system, specifically by approaching that person and discussing the alleged offence with the pretext of preparing a defence to the criminal case	Anyone who is a complainer or accused in a domestic abuse case.	This policy does not impinge on any of the UNCRC articles.	The policy does not impinge on any of the indicators.
Prohibition on conduct of own defence	To prevent an accused seeking to further their control over an alleged victim through the processes of the justice system by personally examining or	Anyone who is a complainer or accused in a domestic abuse case.	This policy does not impinge on any of the UNCRC articles.	The policy does not impinge on any of the indicators.

	cross-examining that person in court.			
Expert evidence relating to the behaviour of the complainer	To ensure that expert psychological or psychiatric evidence relating to behaviour or statements made by the alleged victim should be admissible in domestic abuse cases for the purpose of rebutting adverse inferences as to credibility or reliability that might otherwise be drawn from their statements or behaviour.	Anyone who is a complainer or accused in a domestic abuse case.	This policy does not impinge on any of the UNCRC articles.	The policy does not impinge on any of the indicators.
Victim safety in relation to sentencing	To improve transparency of the sentencing process by requiring the court to explain the extent to which a sentence imposed for domestic abuse offending is intended to protect the victim from further such	Anyone who is a victim or perpetrator of domestic abuse, and those with a close connection to either a victim or perpetrator of abuse including, in particular, their children.	This policy does not impinge on any of the UNCRC articles. We consider that it advances: Article 6(2) The right to life, survival and development;	The policy does not impinge on any of the indicators. We consider that it advances: Safe

	offences by the offender.			
Consideration of a non-harassment order (NHO)	To ensure protection of the victim is considered in every domestic abuse case by requiring a court always to consider whether the imposition of an NHO is required to protect the victim from further harassment.	Anyone who is a victim or perpetrator of domestic abuse, and those with a close connection to either a victim or perpetrator of abuse including, in particular, their children.	This policy does not impinge on any of the UNCRC articles. We consider that it advances: Article 6(2) The right to life, survival and development;	The policy does not impinge on any of the indicators. We consider that it advances: Safe

CRWIA Declaration

CRWIA required

CRWIA not required

Yes.

Authorisation

Policy lead

Patrick Down, Policy Officer, Criminal Justice Division

Date

5 May 2017

Deputy Director or equivalent

Willie Cowan, Deputy Director, Criminal Justice Division

Date

8 May 2017





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