

# **Criminal Offence of Domestic Abuse**

## **Analysis of Consultation Responses**

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# Executive Summary

## Introduction

Between March and June 2015, the Scottish Government consulted on whether a specific offence of domestic abuse would improve the ability of police and prosecutors to tackle domestic abuse. In September 2015, the First Minister announced that the Scottish Government would publish a draft of a specific offence to deal with those who commit psychological abuse and engage in coercive and controlling behaviour.

This second consultation sought the views of stakeholders on the draft offence that was published with the Consultation Paper. The consultation sought views both on the general principles underlying the approach taken in drafting the offence, and on a number of specific issues including the maximum penalty and the defences available to the offence.

The consultation was published on 22 December 2015 and ran until 1 April 2016. In total 59 consultation responses were received.

## Scope and general structure of the offence

The very clear majority of respondents (54 out of the 56 answering the question) were content that any specific offence of domestic or partner abuse should be drawn so as to encompass both conduct, such as threats or physical abuse, which is currently criminal, and psychological abuse and coercive control. There were a number of recurring themes to emerge from respondents' further comments including that it will be important to make clear that the offence of domestic abuse can include psychological abuse and coercive control only and that it does not need to be accompanied by physical abuse for a crime to have been committed. It was also suggested that creating an offence of this kind will send a clear message, on behalf of society, that coercive and controlling behaviour is a form of domestic abuse and that society will not tolerate this type of behaviour.

The second consultation question focused on the general structure of the offence. The draft offence provides that it is a criminal offence for a person to pursue a course of behaviour which is abusive of their partner or ex-partner and which a reasonable person would consider would be likely to cause the victim to suffer physical or psychological harm.

Comments about the concept of 'reasonableness' included that if robustly and consistently applied, the 'reasonable person' test should give victims increased confidence in the process. Avoiding making a judgement as to whether an offence has been committed based on the state of mind of the victim, or on their assessment of the impact which has resulted, was also welcomed.

However, the need to assess the likely impact of the conduct on the victim was raised and cited as one of the problems associated with reliance on an objective

test. In contrast, other respondents voiced concerns about the ‘reasonable person’ test because they saw it as being overly subjective or as possibly requiring too much interpretation. It was suggested that the focus of the offence should be on an objective measure of harm.

Many of the comments on the course of behaviour considered the relationship between a single event and repeated events of abusive behaviour. They included that the approach is consistent with both stalking and anti-social behaviour legislation. However, it was noted that there will be occasions when a one-off event is very serious and in the case of one-off physical abuse incidents might be the pivotal event that will underpin the notion of fear, an essential element in coercive controlling relationships. It was suggested that serious individual offences - such as physical or sexual assault or stalking - can and should be dealt with under other legislation, including with the addition of the domestic abuse aggravator.

Comments about the mental element of the offence tended to focus on either intent or recklessness. On intent, comments included that what the abuser intended should be irrelevant and what matters is the harm that they caused. This was seen as important to ensuring that abusers cannot justify their actions by claiming they were well-intentioned. An alternative perspective was that the intention of the abuser should be considered, including because this will allow behaviour which may otherwise seem innocuous to be taken into account.

Others commented on recklessness and generally saw it as important to ensure that all manifestations of abusive behaviour are covered. It was suggested that perpetrators abuse with a studied intent, and a great deal of thought may have gone into planning their actions. It was suggested that recklessness reflects the perpetrator’s indifference to, and lack of responsibility for, the consequences of their actions and the harm they are causing.

## **Definition of abusive behaviour & relationships to which the offence applies**

The consultation paper sets out that the first part of the non-exhaustive definition in the draft offence relating to ‘abusive behaviour’ provides that this includes behaviour directed at the victim which is “violent, threatening or intimidating”. The second part of the definition seeks to include within the offence behaviour within a relationship which is abusive because it is coercive or controlling or amounts to psychological or emotional abuse of a person’s partner or ex-partner. The third question asked respondents for comments on the definition of ‘abusive behaviour’ contained in the draft offence.

Either at this question or elsewhere in their response, a number of respondents made substantive comments about the coverage of children and young people within the draft offence. The overall concern of most of the respondents who raised the coverage of children and young people was that, as the draft offence is currently defined, they are 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.

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. Other comments focused on the definition of abusive behaviour currently set out in the draft offence (at section 2) and included being broadly supportive of the definition proposed. There was some explicit support for there being no prescriptive or exhaustive definition of what will constitute abusive behaviour, although it was suggested that it is important for the offence to clearly take account of violent, threatening and intimidating behaviour as well as coercive control and controlling behaviour.

Although the majority of respondents were broadly supportive of the definition of abusive behaviour contained in the draft offence (notwithstanding some of the suggested additions or changes outlined above), a small number of respondents had concerns. These concerns included that embodying a distinction between common couple violence and coercive control in a workable definition of a crime is extremely challenging. It was suggested that further consideration of the 'effects' in section 2(2) will be required if a robust offence that will achieve the aims of both legal certainty and protection from and criminalisation of domestic abuse is to be achieved.

The draft offence is restricted to people who are partners or ex-partners. The very great majority of those who made a clear statement on the issue supported this approach. In support of the proposed approach, it was noted that it is in line with the definition developed by the National Strategy, included in the joint working protocols between Police Scotland and the COPFS, used in the specialist domestic abuse courts and employed in other legislative provisions, such as domestic abuse interdicts.

## **Proposed defence, the maximum penalty and consideration of alternative offences**

The draft offence provides that it is a defence to the offence for a person to show that the course of behaviour was, in the particular circumstances, reasonable. In their comments on this issue, respondents sometimes noted their broad support for the principle that the evidential burden be placed on the accused to provide sufficient evidence to the court to raise an issue as to whether the defence is established. The most frequently expressed concern was that the defence as proposed is open to manipulation by abusers.

The proposed maximum penalty on conviction on indictment is 10 years' imprisonment. The majority of respondents who commented noted their agreement with the

proposed maximum penalty, including because it reflects both the seriousness of the offence and the very considerable harm it can do. In other comments, it was suggested that non-harassment orders should be a routine consideration at sentencing and that, where appropriate, perpetrator programmes should be used.

Although the majority of those commenting broadly agreed with the proposal, a small number of respondents considered the penalties for conviction on indictment are insufficient and do not reflect a response in proportion to the seriousness of the harm caused to women, children and young people.

On whether provision should be made to enable a court to convict the offender of 'alternative' offences without the need for these to be libelled in the complaint or indictment, the most frequently made comment was that provision should be made to enable a court to convict the offender of 'alternative offences'. A substantial majority of those commenting took this view. It was suggested that there may be cases where there is strong evidence of one crime being committed but weaker evidence in relation to another incident meaning the court is not satisfied that the course of conduct required for the domestic abuse offence is established. Under such circumstances, it was suggested that it will be important to secure a conviction on the offence for which the evidence is stronger.

The final consultation question asked respondents for any further comments on the draft offence. Many of the issues raised concerned how particular aspects of the proposed offence would operate. These included what will determine when the offence would be used and when behaviour which is already criminal - such as assault - would continue to be prosecuted under existing legislation.

Other comments considered self-representation by the accused. It was suggested that, given the impact of domestic abuse, it is inappropriate to permit someone accused of the offence to represent themselves in court, thereby providing a platform from which to intimidate and potentially re-traumatise a victim.

Many of the other comments focused on the resources required to identify, prosecute or otherwise implement the offence, or tackle domestic abuse more widely. This included a suggestion that consideration should be given to the capacity of the justice system to respond to domestic abuse beyond the identification of an offence.

# Introduction

This report presents an analysis of responses to the Scottish Government's consultation on a criminal offence of domestic abuse.

## Background

Between March and June 2015, the Scottish Government consulted on whether a specific offence of domestic abuse would improve the ability of police and prosecutors to tackle domestic abuse. Analysis of the consultation responses indicated strong agreement that the current law does not reflect the experience of victims and that a specific offence would improve the ability of the justice system to respond to this crime. There was, however, a range of views on how a new offence could be developed.

In the Programme for Government in September 2015, the First Minister announced that the Scottish Government would publish a draft of a specific offence to deal with those who commit psychological abuse and engage in coercive and controlling behaviour.

This second consultation sought the views of stakeholders on the draft offence that was published with the Consultation Paper. The consultation sought views both on the general principles underlying the approach taken in drafting the offence, and on a number of specific issues including the maximum penalty and the defences available to the offence.

There were 8 consultation questions. The first question was a yes/no question with opportunity to comment. The remaining seven questions asked for comment.

A copy of the consultation document can be found at:

<http://www.gov.scot/Publications/2015/12/6973>

## Overview of responses

The consultation was published on 22 December 2015 and ran until 1 April 2016. In total 59 consultation responses were received. A profile of respondents by type is set out in Table 1 below.

Table 1: Respondents by type

<b>Type of respondent</b>	
Advocacy and support groups	7
Children's and young people's groups	5
Law enforcement, legal and academic respondents	9
Local Authority, health and Multi-Agency Partnership (MAP) respondents	20
Other individuals	18
<b>TOTAL</b>	<b>59</b>

Points to note about the respondent groups are:

- The advocacy and support group category includes organisations that campaign on issues connected with violence against women and/or domestic abuse, a group that provides services to women affected by abuse, an organisation that works to reduce offending, an organisation that supports victims of crime and an organisation that campaigns on behalf of the LGBTI community.
- The children's and young people's groups category includes two children's charities, an organisation for young LGBTI people in Scotland, Scotland's Commissioner for Children and Young People and the Scottish Children's Reporter Administration.
- The law enforcement, legal and academic category contains both group and individual respondents. The four university-based respondents included two individual respondents, both of whom are staff within Law Schools of UK universities. One of these responses was made on behalf of a group of Criminal Law students. A collaborative group of several Scottish universities submitted a response. There was also a group response from an academic and eight young survivors of domestic abuse who work together to promote the use of evidence from young survivors of gender-based violence. The other group respondents in this category are the Faculty of Advocates, the Law Society of Scotland, the Sheriffs' Association and Police Scotland.
- The local authority, health and Multi-Agency Partnership (MAP) category includes nine MAPs, three local authority respondents, three health respondents, two community safety partnerships, a public protection committee, a child protection committee and a criminal justice authority.
- The 'other' individual respondents category includes a number of people (primarily but not exclusively women) with direct and very personal experience of domestic abuse.

A list of the organisations that submitted a response to the consultation is included as Annex 1 to this report. The list also includes the two individual respondents placed in the law enforcement, legal and academic category. Otherwise the names of individual respondents have not been included.

## **Structure of the report**

The remainder of this report presents a question-by-question analysis of the comments made. A small number of respondents did not make their submission on the consultation questionnaire, but submitted their comments in a statement-style format. When these responses contained a clear answer at the 'Yes/No' element of Question 1, this has been recorded. The remaining content was analysed qualitatively under the most directly relevant consultation question.

Other points to note about the analysis of further comments made are:

- As with the analysis of responses to the Equally Safe consultation, the analysis mirrors the language and terminology used by the respondents whose comments are being reported. In particular, some respondents referred specifically to domestic violence as being violence against women and girls and/or children by men.
- In particular, it sometimes uses the language of both the draft offence and of some respondents in referring to an alleged perpetrator of an offence as 'A' and an alleged victim of an offence as 'B'.
- A small number of respondents made detailed and/or very specific suggestions as to how the current draft offence should be revised. Specific re-drafting suggestions made have been included within Annex 2 to this report.
- The report seeks to avoid repetition by covering any particular issue primarily under one question. For example, a number of respondents raised the extent to which the draft offence covers children in introductory or further comments. This issue was also raised at Questions 1 and 2 but most frequently at Question 3. The main analysis of all these comments is presented under Question 3, although all comments have been taken into account.

## Scope and general structure of the offence

The consultation paper notes that the Scottish Government considered that two different broad approaches to developing the scope of the offence are possible. The first approach would be to create an offence which is specifically limited in scope to dealing with psychological abuse and coercive and controlling behaviour in a relationship which is of a kind that could not necessarily be prosecuted under the existing criminal law.

The second approach, which is that taken within the draft offence, is to provide for a general offence of domestic abuse that covers the whole 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 coercive control or psychological abuse, which it may not be possible to prosecute using the existing law.

**Question 1: Are you content that any specific offence of domestic or partner abuse should be drawn so as to encompass both conduct, such as threats or physical abuse, which is currently criminal, and psychological abuse & coercive control?**

Responses by respondent type are set out in Table 2 below.

Table 2: Responses by respondent type

Type of respondent	Yes	No	Not Answered
Advocacy and support groups	7	-	-
Children's and young people's groups	5	-	-
Law enforcement, legal and academic respondents	6	1	2
Local Authority, health and MAP respondents	18	1	1
Other individuals	18	-	-
<b>TOTAL</b>	<b>54</b>	<b>2</b>	<b>3</b>

The very clear majority of respondents (54 out of the 56 answering the question) were content that any specific offence of domestic or partner abuse should be drawn so as to encompass both conduct, such as threats or physical abuse, which is currently criminal, and psychological abuse and coercive control. This included all advocacy and support groups, children's and young people's groups and 'other' individuals. All but one of the law enforcement, legal and academic respondents

who answered the question were content, as were all but one of the local authority, health and MAP respondents who answered the question.

Either at Question 1, or in other accompanying or opening remarks, a number of respondents welcomed the Scottish Government's decision to create a specific offence of domestic abuse. There were a number of recurring themes to emerge from respondents' further comments at Question 1, including reiterating support for the offence covering a wide spectrum of coercive control behaviours.

The most frequently made points were that:

- It will be important to make clear that the offence of domestic abuse can include psychological abuse and coercive control only and that it does not need to be accompanied by physical abuse for a crime to have been committed. Local authority, health and MAP respondents were particularly likely to have highlighted this issue. It was suggested that there should be guidance for the Crown Office and Procurator Fiscal Service (COPFS) to that effect.
- Creating an offence of this kind will send a clear message, on behalf of society, that coercive and controlling behaviour is a form of domestic abuse and that society will not tolerate this type of behaviour. It was also suggested that there being an offence of domestic abuse could help to raise awareness of the increased danger people face at the point of leaving an abusive partner and this will lead to increased support for those leaving their partners or preparing to do so, and to their children.
- Creating the specific offence may also help victims understand that they are being subjected to domestic abuse and, by extension, increase reporting of that abuse. However, there was also a concern that the draft offence allows a very wide range of behaviours to be represented under one offence and in doing so may actually decrease awareness of the individual elements of the behaviour experienced by the victim and their cumulative impact.

A small number of respondents, including the local authority, health and MAP respondent who had answered that they were not content with how the draft offence is drawn noted that the health impact of abuse can be considerable and should be recognised. A specific suggestion was that the draft offence should be expanded to include physiological harms, and that in every instance where physical or psychological harm is referenced, physiological harm should also be added. Other suggested additions included setting out the whole spectrum of the damage done at section 1(c) including adding in sexual harm and economic and financial harm or loss.

Other comments about the draft offence itself included that drafting such an offence is not without difficulty. A law enforcement, legal and academic respondent highlighted the need for certainty in the law and noted the guiding principle of criminal law that no one should be punished under a law unless it is sufficiently clear and certain to enable him or her to know what conduct is forbidden before he

or she does it. They went on to suggest that the commission of such an offence will require appropriate *mens rea* and that it is essential that any offence extending beyond physical abuse or offensive behaviour currently forbidden by the criminal law should be capable of definition and explanation. Another law enforcement, legal and academic respondent was of the view that the draft offence is clear in its terminology in respect of the prohibited behaviour and that this will be helpful for courts when applying the offence.

Other comments considered the landscape within which the offence would operate and/or what will be required for any offence to be enforced effectively. Certain of these comments considered the relationship between the proposed offence and existing legislation and/or behaviour which is already criminal, and included that the approach taken must not result in a diminishing of seriousness of specific conduct, such as sexual assault or that existing offences, including sexual offences, must remain in force and should not be 'scoped in' and potentially be treated as a lesser offence or result in a lower sentence. Other comments included:

- The COPFS must be able to prosecute all offences perpetrated by a partner or ex-partner against their partner or ex-partner and that this should also apply to children, other people in the family and animals belonging to the victim.
- It may be appropriate to deal with serious instances of sexual violence or physical harm as separate charges. A law enforcement, legal and academic respondent suggested that being able to take severity into account at the sentencing stage, with the proposed maximum sentence of 10 years' imprisonment, may make this less problematic than under the model adopted in England and Wales.
- It might be preferable to allow a domestic abuse aggravator to be applied to existing offences and charge these alongside the new domestic abuse offence that covers behaviour not already covered in law.
- It is not clear how the rule of double jeopardy would interact with an offence of domestic abuse. For example, if 'A' is prosecuted for an assault, will this assault be excluded from consideration should a future charge of 'domestic abuse' be brought against A? It was suggested that to do so would appear to contravene section 1 of the Double Jeopardy (Scotland) Act 2011.
- How convictions will be recorded must be considered. In particular, if the schedule of convictions is going to read 'domestic abuse', how will a future court know whether the accused has been convicted of a breach of a peace or murder?

The second consultation question focused on the general structure of the offence. The draft offence provides that it is a criminal offence for a person to pursue a course of behaviour which is abusive of their partner or ex-partner and which a reasonable person would consider would be likely to cause the victim to suffer physical or psychological harm. It provides a non-exhaustive definition of what constitutes abusive behaviour for the purposes of the offence. A "course of

behaviour” must involve behaviour on at least two occasions. The offence is committed where a reasonable person would consider the behaviour would be likely to cause B to suffer physical or psychological harm.

The consultation paper suggests that the advantage of having a reasonable person (objective) test is that the court will not require to hear evidence relating to the reaction of the victim; in the draft offence it is immaterial whether harm was actually caused to the victim, as long as a reasonable person would consider it likely to have been caused in the particular circumstances.

**Question 2: Do you have any comments on the general structure of the offence set out above, in particular:**

- **the requirement that a reasonable person would consider the accused’s behaviour would be likely to cause the victim to suffer physical or psychological harm;**
- **the requirement for a course of behaviour consisting of behaviour on at least two occasions;**
- **the mental element of the offence to be intention to cause harm or recklessness as to harm being caused?**

In addition to, or instead of, commenting on the three specific aspects of the offence, a small number of respondents made general comments on the structure of the offence. These included broad support for the general structure of the offence.

A specific point raised by a law enforcement, legal and academic respondent was that both the reasonable person and course of conduct elements of the offence could have implications for the length of criminal trials. They noted that this could impact on court time and associated staff and accommodation resources and that they would welcome the opportunity to contribute to any financial impact assessment carried out on the introduction of the draft offence.

**The requirement that a reasonable person would consider the accused’s behaviour would be likely to cause the victim to suffer physical or psychological harm.**

Comments about this element tended to focus on the concept of ‘reasonableness’. They included that if robustly and consistently applied, the ‘reasonable person’ test should give victims increased confidence in the process. More specifically, it was suggested that perpetrators may have coerced victims into mistakenly believing their behaviours and actions are right or reasonable, and that if robustly and consistently applied, the ‘reasonable person’ test will give victims confidence that this is not the case. It was also suggested that the test would remove the burden of proof from the victim and may help ensure that victims of abuse are not required to provide evidence in court. However, it was also suggested that this approach must be kept under review to ensure it does not lead to fewer convictions.

Avoiding making a judgement as to whether an offence has been committed based on the state of mind of the victim, or on their assessment of the impact which has resulted, was also welcomed. It was suggested that not depending on the victim proving levels of distress will hopefully make it easier for those who fear they may not be believed, including when current or past substance use may be an issue. It was also noted that - as stated in the consultation paper - some victims may not show any particular reaction to the abusive behaviour and their reaction should not form part of the assessment of whether an offence has been committed.

However, it was suggested that, as currently drafted, there is a necessarily subjective element since the characteristics of the victim would have to be taken into account. The local authority, health and MAP respondent making this point suggested that if the victim is indeed particularly strong minded they would not be likely to suffer psychological harm and that this would be part of the assessment. They went on to suggest this aspect of the test is not entirely compatible with it being immaterial that the behaviour does not in fact cause the victim harm.

The need to assess the likely impact of the conduct on the victim was also raised by a law enforcement, legal and academic respondent and, in their case, cited as one of the problems associated with reliance on an objective test. They suggested that a test of the likely impact of conduct on a reasonable person is one far more readily recognised in the criminal law. Specifically, they noted that the test as currently proposed invites the fact finder to decide how a reasonable person might consider B, as an individual, is likely to be impacted. They suggested that this may necessitate some evidence being about the impact on B or about B as an individual.

A further concern raised was that the absence of a requirement to show harm to B arises in cases where B is not the instigator of the complaint, is not in fact harmed, and where B does not themselves consider the conduct abusive. The example given was that the draft offence lists the effects of abusive behaviour as including making B dependent on A, including financial dependency. They suggested that this could apply where one partner ceases paid employment to provide child care and this is combined with seeking to control spending of the non-earning party. However, if B does not consider this abusive, employing an objective test may cause difficulty.

Other respondents voiced concerns about the 'reasonable person' test because they saw it as being overly subjective or as possibly requiring too much interpretation. A children's and young people's group respondent reported that their services have experience of behaviours that may appear, at first glance, to be 'reasonable' but the impact on the victim is significant. The example given was of instances where nondescript objects intended to cause distress have been left at the victim's property. An advocacy and support group raised similar concerns, in particular around judgments being made on the basis of what a 'reasonable' response would be from someone who has never experienced abuse. This respondent went on to explain that women they had spoken to were clear that things which their partner did or said to them would probably not cause anyone else

distress but, because of the history they share with the perpetrator and the cumulative impact of the behaviour had directed at them, it does cause them harm.

Other points raised in relation to reasonableness, in this case by an advocacy and support group, included:

- It is not a feature of proof for other crimes of violence or abuse.
- It adds unreasonably to the burden of proof.
- The 'reasonable person' test would already have been met in terms of defining abusive behaviour.

It was suggested that the focus of the offence should be on an objective measure of harm. More specifically, the focus should be on: the behaviour and acts of the accused; intent to cause harm; likelihood of harm; or actual harm. The advocacy and support group raising these points called for the 'reasonable person' test to be removed from the legislation.

A law enforcement, legal and academic respondent (Police Scotland) also had concerns about the 'reasonable person' test and were of the opinion that its inclusion would significantly and negatively impact on the use of the legislation. They went on to report that many domestic abuse perpetrators are cunning, malevolent members of society who perpetuate subtle actions which may appear innocent to the casual observer but which are designed to impact significantly on their victim. They cited the case of *Behan v Procurator Fiscal, Hamilton (2013)* in support of their request to have the 'reasonable person' test removed.

Other comments focused on how any judgement around reasonableness would be made and by whom. They included that:

- In the majority of cases, first application of the reasonableness test will first sit with police officers who attend a call. What they believe to be physical or psychological harm could vary significantly, effectively creating a postcode lottery for victims.
- Personnel involved in making the judgement around reasonableness will need to be accountable.
- The 'reasonable person' requirement focuses the court's assessment on the pattern of behaviour by the perpetrator rather than the impact on the victim. This will mean that careful recording of the behaviour will be crucial to the prosecution's case. The law enforcement, legal and academic respondent raising this issue suggested that this may be achieved due to the constructive relationship between Police Scotland and the COPFS and the connection with specialist services.

Other issues raised included that members of the general public may struggle to understand the impact of different forms of domestic abuse, and especially the effect non-criminal conduct can have on a victim's psychology. It was noted that it will require juries to understand the subtle and cumulative nature of abuse and that

the threatening environment created by the perpetrator is the context for what otherwise may appear to a reasonable person to be benign, non-malignant behaviour. It was suggested there could be specific challenges associated with the public's understanding the nature of abuse within the LGBTI community and the particular impact it can have on victims. The advocacy and support group and children's and young people's group raising this issue gave examples, including: an abusive partner isolating someone from the rest of the LGBT community; or threatening to out someone; or continually addressing a trans person with the wrong pronoun. A concern was that it may be difficult for a jury which lacks experience of or insight into the LGBT community to fully understand the psychological harm these types of behaviours could cause.

Suggested changes to the draft offence or other recommendations (many of which apply more widely than just to the assessment of reasonableness) included:

- Training will be required to ensure clear and consistent application of any test. In particular, front-line police officers will need specialist training in the application of the test. Training for sheriffs and all involved on the dynamics and effects of domestic abuse on women and children was also called for.
- Professionals applying the test should be required to detail the reason for their decision, based on the law and additional guidance.
- Consideration needs to be given to educating juries as to the nature and impact of domestic abuse prior to trial, for example through the use of expert witnesses.
- The Scottish Government should work with criminal justice agencies to produce guidance, including for juries, on the impact of forms of domestic abuse that are more specific to LGBT people. An advocacy and support group noted that they would be keen to assist in the development of such guidance.
- Victims should be supported to give a full and detailed account and to ensure that a comprehensive picture of the abuse is obtained.

Other comments focused on the definition of 'behaviour', including the specific reference to physical or psychological harm. These issues are discussed further under the analysis at Question 3. A children's and young people's group respondent was concerned that an unintended consequence of defining the offence by the effects of the behaviour on the victim is to make the impact of domestic abuse on children entirely invisible in the current offence. The impact on children of the offence as currently drafted is discussed further at Question 3.

### **The requirement for a course of behaviour consisting of behaviour on at least two occasions.**

Many of the comments on the course of behaviour considered the relationship between a single event and repeated events of abusive behaviour. They included that the approach is consistent with both stalking and anti-social behaviour legislation. However, it was noted that there will be occasions when a one-off

event is very serious and in the case of one-off physical abuse incidents might be the pivotal event that will underpin the notion of fear, an essential element in coercive controlling relationships. It was suggested that serious individual offences - such as physical or sexual assault or stalking - can and should be dealt with under other legislation, including with the addition of the domestic abuse aggravator.

Other comments focused on the possible challenges around proof or on the nature and relationship to each other of the incidents of abuse. They included that psychological abuse on as few as two occasions and without corroboration may be very difficult to evidence. Respondents also highlighted some issues on which they were not clear and/or where they considered greater clarity is required. These included:

- Whether the two separate occasions need to be of the same behaviour or whether it could be at least two incidents of abusive, but potentially different, behaviour? Presenting victims may have numerous behaviours to report but evidencing any particular behaviour has happened more than once may be difficult.
- Whether there would need to be two separate reports of abusive behaviour, or would it be possible to report multiple behaviours on one occasion?
- Whether there would be a timeframe over which the incidents will need to have occurred? In particular, how far back will the police or prosecutors be able to go if looking for evidence of controlling behaviours?
- Whether previous convictions would or would not be considered? The law enforcement, legal or academic respondent posing this question thought it plausible that an individual may, for example, have been prosecuted and convicted for assault but then go on to commit a subsequent act. They questioned whether the first incident would be 'counted' as one of the incidents for the purposes of establishing a course of behaviour. If this is the intention, they questioned how this can be reconciled with the Criminal Procedure (Scotland) Act 1995.

In terms of the course of conduct, a law enforcement, legal and academic respondent commented that the repeated behaviour must relate to the same victim and suggested that this leaves a gap where, for example, behaviour includes a single incident of abusive behaviour committed against an ex-partner of the accused and an incident against a current partner. An advocacy and support group respondent also highlighted this issue. They explained that a number of those contributing to their consultation response had suggested that the 'historic' element should include repeated acts/harms in *any* relationship in which the perpetrator has committed coercive control.

Other comments included that it will be important for the police to seek and record evidence of psychological abuse when responding to other incidents. This will help with evidencing a course of conduct for future prosecution.

## **The mental element of the offence to be intention to cause harm or recklessness as to harm being caused?**

Comments about this part of the draft legislation tended to focus on either intent or recklessness. Considering both these issues together, a law enforcement, legal and academic respondent noted that the adoption of either intention or recklessness as the mental element of an offence is common in criminal law. However, this respondent did highlight a possible problem in respect of the *actus reus* (the physical act of the crime), where the stated effects of behaviour are very widely defined and may encompass behaviours that one would not expect to be criminalised. Their concern was that the inclusion of recklessness would mean that there would not be the legal certainty that is sought.

On intent, other comments included that what the abuser intended should be irrelevant and what matters is the harm that they caused. This was seen as important to ensuring that abusers cannot justify their actions by claiming they were well-intentioned. An alternative perspective was that the intention of the abuser should be considered, including because this will allow behaviour which may otherwise seem innocuous to be taken into account. One suggestion was that it may be easier to prove that the intention was to control rather than to cause harm.

Others commented on recklessness and generally saw it as important to ensure that all manifestations of abusive behaviour are covered. It was suggested that perpetrators abuse with a studied intent, and a great deal of thought may have gone into planning their actions. However, they also abuse with complete disregard to the consequences of their actions. The advocacy and support group amongst those raising this issue suggested that recklessness reflects the perpetrator's indifference to, and lack of responsibility for, the consequences of their actions and the harm they are causing. Other comments on 'recklessness' included:

- Many perpetrators will argue that they did not intend to cause the harm and therefore a recklessness alternative will avoid the offence failing. Including recklessness decreases their opportunity to dismiss, deflect and minimise their behaviour.
- There should be a caveat to recklessness where it could be assumed that the perpetrator lacks capacity to understand the results of their behaviour. Recklessness should be intentional and by a person who is assessed to be of full capacity.
- A further definition of reckless behaviour will be required.

However, two law enforcement, legal and academic respondents did raise some specific concerns in relation to recklessness. These were that:

- By its nature, the behaviour within the draft offence and identified in the consultation paper is intentional. The proposed Sections 1(1)(c)(ii) and 1(2) each create extreme difficulty in defining or advising upon the point at which behaviour ceases to form part of the occasional disharmony that arises in

every relationship and becomes behaviour that should attract the attention of the state by way of prosecution.

- In section 3(1)(b), liability can arise from an omission. The risk of uncertainty is exacerbated when the *mens rea* for committing the offence by omission includes recklessness. For example, failure to provide money to a dependent spouse, thus perhaps controlling their access to sufficient food, can easily be recognised as abusive behaviour causing harm. However, it is rather harder to envisage a situation where criminal liability should properly be attributed for a failure to say something. There is a concern as to whether the definition is sufficiently clear, accessible and foreseeable to meet the requirement for legal certainty.

## Definition of abusive behaviour & relationships the offence applies to

The consultation paper sets out that the first part of the non-exhaustive definition in the draft offence relating to 'abusive behaviour' provides that this includes behaviour directed at the victim which is violent, threatening or intimidating. Behaviour of this kind can generally already be prosecuted. However, in individual cases, it may be that the prosecution considers it most appropriate to libel both conduct of this kind and other abusive conduct in a single charge as it is best seen as forming part of a pattern amounting to abuse of that person's partner.

The second part of the definition seeks to include within the offence behaviour within a relationship which is abusive because it is coercive or controlling or amounts to psychological or emotional abuse of a person's partner or ex-partner.

The intent with this approach is to bring within the scope of the offence coercive or controlling behaviour which may not fall within the definition of any existing criminal offence; it will always be for a court to determine whether particular behaviour falls within the terms of the offence based on the specific facts and circumstances of a case.

**Question 3: Do you have any comments on the definition of 'abusive behaviour' contained in the draft offence?**

### Children and young people

Either at Question 3 or elsewhere in their response, a number of respondents made substantive comments about the 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. They felt that the definition of abuse as currently included only tells half the story and misses out the common experiences of women and children who experience abuse together.

Very much in line with this view, the overall concern of most of the respondents who raised the coverage of children and young people was that, as the draft offence is currently defined, they are 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 mother is being subjected to. This might include being denied access to pets, possessions, food or medical care. Equally, control over their mother's finances or movements is likely to affect them directly. Abusers may also seek to undermine the relationship between a child and their mother.

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.

Specific suggestions as to how greater recognition could be given to children and young people included directly referencing them within section 2(1)(b) of the draft offence. This section currently refers to '*behaviour directed at B or any other person*'. The suggested alternative tended to be along the lines of '*behaviour directed at B, at B's child or children, or at any other person*'.

Other suggestions included covering the impact on children in the list of abusive behaviours within the definition. Specific suggestions included:

- Manipulating children. For example, the use of post-separation contact visits to 'interrogate' children about what is going on in their home.
- Directly threatening and demeaning children.
- Threatening to remove children or have them removed, including threats to make reports to social services or making malicious reports to social services.
- Undermining and interfering with the ability to care for any children or young people in their care.
- Disrupting the family's financial stability, including by withholding financial resources which help support children. For example, not paying maintenance or paying it late particularly around holiday times.
- Otherwise significantly impacting on family functioning, including housing, education stability and caring services.

Conducting a children's rights impact assessment on the draft bill was also suggested, to allow a full exploration of the bill in the context of the wider child protection system, which recognises that living with domestic abuse constitutes a significant risk of harm to children.

Finally, it was suggested that there may be a case for creating another section to the legislation which deals specifically with children. The advocacy and support group respondent which made this proposal included a suggested draft of this section. This draft has been included in full within Annex 2 to this report. Similarly, a children's and young people's group respondent suggested that there may be merit in considering two distinct offences: abusive behaviour towards a partner; and abusive behaviour towards a family member in the context of domestic abuse. They also suggested that this could be achieved by having a new section 2, but that it would only be an offence if it was also related to abusive behaviour towards a partner or ex-partner.

### **Other comments on the definition of abusive behaviour**

Although comments at Question 3 tended to focus on the description of what constitutes abuse set out in section 2 of the draft offence, some respondents also commented on the wording at section 1(1)(b). The most frequently made suggestion (either at Question 3 or as referenced earlier at Question 1) was that the definition of abuse ought to be expanded beyond physical or psychological harm. Other types of harm or abuse which respondents thought should be added included sexual violence, abuse or exploitation, emotional abuse and financial abuse or exploitation.

Other comments focused on the definition of abusive behaviour currently set out in the draft offence (at section 2) and included being broadly supportive of the definition proposed. More specifically, it was suggested that the 'abusive behaviour' term is useful in dispensing with the complexities surrounding the terms 'coercion' and 'control'. There was some explicit support for there being no prescriptive or exhaustive definition of what will constitute abusive behaviour, although it was suggested that it is important for the offence to clearly take account of violent, threatening and intimidating behaviour as well as coercive control and controlling behaviour. It was also suggested that it would be helpful if the legislation acknowledged the difficulties of drawing up an exhaustive list of behaviours and made it clear that this allows all behaviours which a reasonable person would consider abusive to be taken into account.

An advocacy and support group respondent raised an issue with the phrasing of section 2(1)(a) and suggested that, as currently worded, it leaves a gap in the definition of abusive behaviour. More specifically, they suggested that by referring to behaviour that is 'violent, threatening or intimidating' it effectively excludes abusive behaviour by not specifically naming it. They suggested that behaviour which is '*abusive*' and specifically '*sexually abusive*' should be directly referenced. They also suggested that this section must make provision for behaviour that is '*controlling or degrading*' since the exercise of control need not be done in a way that is immediately violent or threatening.

There was a small number of suggestions as to changes in the terminology, both within the definition and more widely. These were:

- All references to sexual violence within the legislation to be amended to sexual abuse. The law enforcement, legal or academic respondent making this suggestion felt this would ensure consistency and ensure the offence captures all acts of sexual abuse and not only those which contain an element of violence.
- Section 2 uses the word '*effects*' as opposed to '*harms*', which is the terminology used in section 1. '*Harm*' should be used throughout, followed by '*by the accused directly or through third parties.*'

On a general point, it was suggested that the effects of abuse in section 2 should be more explicit in terms of reflecting the deprivation of rights, autonomy and the manipulating and restriction of choices, health and wellbeing. Specific suggestions as to additional elements to be included within the definition included:

- Threats to anyone the victim cares for, including threats to remove children or to harm children or other relatives.
- Limiting liberties and freedoms. The focus would be on reduction in daily function and activity due to demands by the perpetrator that any reasonable person would see as restrictive.
- Different forms of intimate partner violence, such as sexual violence.
- Behaviours related to sexual coercion and pressure which may not fall within existing legislative definitions of assault. For example, reproductive and sexual coercion involving sabotaging or preventing the use of contraception, pressure to continue an unwanted pregnancy or to undergo terminations of pregnancy.
- Sexual exploitation, including making someone engage in prostitution or pornography.
- Making someone feel uncomfortable about their gender identity or sexual orientation.
- Being forced to behave in a way they otherwise would not, for example being forced to shoplift.
- Harm, or threats of harm, to pets or other animals.
- Destroying property and possessions, including targeting of particular items of property that hold emotional or practical importance to the victim.
- Financial abuse, including withholding access to money or running up debts in the victim's name.
- Withholding access to other things in order to cause harm, such as access to health services, medication, bathroom facilities etc.
- Giving drugs and/or alcohol to develop a dependence in order to control, and then using this as part of the abuse. This should include withdrawal of supply of substances.
- Cyber abuse, such as abusive posts, revenge porn threats or demands of instant pictures as a form of surveillance.

- ‘Gas lighting’ behaviours, aimed at making the woman doubt her sanity.<sup>1</sup>
- The use of a third party (e.g. other family members) to sustain or perpetrate abusive behaviour.
- A catch all clause, that allows for behaviour outwith the specified examples, but which a reasonable person would find abusive.

There was also a small number of queries about the intended meaning of parts of the current description. These were:

- Section 2(1) attempts to provide categories of behaviours to encapsulate the perpetrator’s purpose, with section 2(2) addressing the consequences of such behaviours. Why is there a need to prove the behaviour had as its purpose (or one of its purposes) one or more of the listed effects on a victim?
- At section 3(1)(a): ‘*saying or otherwise communicating something as well as doing something*’. Does this mean that the perpetrator would have to communicate something as well as do it?

Otherwise, it was noted that ‘and/or’ has not been inserted between the behaviour criteria at 2(1)(a) (*behaviour directed at B that is violent, threatening or intimidating*), and 2(1)(b) (*behaviour directed at B or any other person*). An advocacy and support group was amongst those raising this issue. They felt that that this means it is unclear whether the woman would have to experience one or more of the abusive behaviours under 2(1)(a); a combination of 2(1)(a) behaviour and 2(1)(b) behaviour; or behaviour under 2(1)(b) only. They also noted their concern that women could have to ‘to jump through several hoops’ to prove the offence. They were one of the respondents who went on to recommend the insertion of ‘or’ or ‘and/or’ between 2(1)(a) and 2(1)(b).

In terms of other factors that may need to be taken into account when taking the draft legislation forward and/or at implementation stage, the following issues were highlighted:

- How will the offending of repeat offenders of sexual offences be monitored if prosecuted through this offence? How it can be ensured that Sex Offender Notification requirements are triggered?
- There may be behaviour which some ethnic and cultural groups consider acceptable within the family or community but which may contravene the legislation as proposed.
- Any guidance accompanying the legislation could include a longer list of the types of behaviours which might be considered abusive. In particular, guidance for criminal justice agencies covering how LGBT-specific forms of domestic abuse would be covered by the legislation would be welcome.

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<sup>1</sup> Gas lighting is manipulating a victim into doubting their own sanity and memory. The abusive behaviour might include an abuser denying that previous abusive incidents ever occurred or staging events with the intention of disorientating the victim.

- Training and information will be required for those in the criminal justice system to understand the gendered nature of domestic abuse against men and how it manifests.

Although the majority of respondents were broadly supportive of the definition of abusive behaviour contained in the draft offence (notwithstanding some of the suggested additions or changes outlined above), one of the law enforcement, legal or academic respondents had considerable concerns. These concerns followed on from their comments at Question 2 on the employment of an objective test.

They noted that the official definition of domestic abuse in Scotland contains behaviours that are not criminalised but are evidenced as being common in abusive relationships. They acknowledged that the draft offence attempts to criminalise those actions that make up the individual components of domestic abuse, when they occur against a background of coercive control. However, they considered that the approach adopted in section 2 of the draft offence does not achieve this. This respondent re-stated the position they had set out in their response to the Equally Safe consultation, namely that embodying a distinction between common couple violence and coercive control in a workable definition of a crime is extremely challenging. They also suggested that further consideration of the 'effects' in section 2(2) will be required if a robust offence that will achieve the aims of both legal certainty and protection from and criminalisation of domestic abuse is to be achieved.

The consultation then moved on to consider the relationships to which the offence should apply. The draft offence is restricted to people who are partners or ex-partners. The consultation paper suggests there is a particular dynamic to abuse of a person's partner or ex-partner. It notes that the approach to describing the relationships caught by the offence is that which has been used in the Domestic Abuse (Scotland) Act 2011 and in the provision for a domestic abuse aggravation contained in the Abusive Behaviour and Sexual Harm (Scotland) Bill.

**Question 4: Do you have any comments on the relationships the offence should apply to?**

In their comments at question 4, a number of respondents began by noting their agreement with the offence only applying to people who have been or are in an intimate relationship. The very great majority of those who made a clear statement on the issue supported the offence being restricted to people who are partners or ex-partners.

Some of these respondents went on to note that the offence should cover couples in a relationship which has not been sexually intimate. Other suggestions included that those in short term relationships, who do not cohabit or who have relationships through social media should be included or considered for inclusion. It was also suggested that the term 'partner' may need to be defined, as it may have different meaning to different people.

In support of the proposed approach, it was noted that it is in line with the definition developed by the National Strategy<sup>2</sup>, included in the joint working protocols between Police Scotland and the COPFS, used in the specialist domestic abuse courts and employed in other legislative provisions, such as domestic abuse interdicts. It was further suggested that an offence that seeks to include all forms of relationships where abusive behaviour is used may become unwieldy. The law enforcement, legal and academic respondent raising this issue went on to suggest that it seems pragmatic to apply the current understandings of domestic abuse in Scotland to ensure successful application of a new offence.

However, and as at Question 3 above, the issue of whether the offence should be extended to cover children was raised by some respondents. They included a law enforcement, legal and academic respondent who suggested that, as it stands, the definition to include 'intimate personal relationship' could easily extend to children. They noted that it is clear from the consultation paper that this is not the intention of the legislation but suggested that the drafting of the offence does not exclude it. Those who suggested the offence should be extended to cover children and young people raised very similar issues to those discussed at Question 3. In particular, they suggested that:

- Children need to be named as victims of domestic abuse. This could perhaps be done by explicitly linking children to domestic/partner abuse so it remains distinct from child abuse.
- The offence should apply to children and young people affected by parental or carers' abuse.

Also with reference to children, two children's and young people's groups focused on how any offence could apply to children or young people accused of domestic abuse. It was noted that there is no age restriction on the offence and it was reported that there is considerable research evidence to suggest that patterns of violence in intimate relationships can begin early and are impacting on large numbers of young people's teenage relationships. They asked that the Scottish Government pay particular attention to the issue of how children and young people accused of domestic abuse will be treated in relation to any new offence created.

In particular, they raised a concern that the new offence could result in increased criminal prosecution of young people through the adult court system and suggested that any new offence should be accompanied by clear guidance regarding young people accused of the offence being diverted via the children's hearing system, in all but the most serious cases. It was also suggested that consideration needs to be given to how any law would interact with child protection procedures and other legislation such as the GIRFEC provisions in the Children and Young People (Scotland) Act 2014.

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<sup>2</sup> <http://www.gov.scot/resource/doc/158940/0043185.pdf>

Otherwise, it was suggested that the offence should apply to:

- Other family relationships. In particular, it was suggested that while the law already offers opportunities to prosecute where a parent harms a child, it is very difficult to obtain a prosecution of adults harming adults, including harm by adult children and carers.
- 'Honour' based abuse, which it was suggested is a form of domestic abuse and a controlling mechanism sometimes used by immediate and extended family members on women who are considered to have brought shame on themselves, their family and the community.
- Where there is a dynamic of an abusive relationship between a couple – and the parent of the perpetrator supports their child (often their son) in the abuse. Also, where other family members, such as in-laws, are involved in or cover up the abuse.

On a point of information, a law enforcement, legal or academic respondent reiterated their view that there does not seem to be any obvious reason why behaviour that is criminal when engaged in by a partner towards a partner or ex-partner should not also be criminal when engaged in by an adult towards another adult within the same household. They noted that while some such people fall under the provisions of the Adult Support and Protection (Scotland) Act 2007, others may not, and suggested that it is not immediately clear why only certain persons complaining of intimidating and controlling behaviour are to be afforded this statutory protection.

## Proposed defence, the maximum penalty and consideration of alternative offences

Questions 5, 6 and 7 covered the proposed defence for the offence, the maximum penalty which conviction of the offence could attract and alternative offences for which the court might convict the accused if it is satisfied that the accused committed that offence.

The draft offence provides that it is a defence to the offence for a person to show that the course of behaviour was, in the particular circumstances, reasonable. The consultation paper notes that it is not suggested that it would ever be reasonable for a person to be abusive towards their partner or ex-partner. However, it suggests that there may be circumstances where a person might engage in behaviour which amounts to controlling their partner which may be, in the particular circumstances of the case, reasonable. The draft offence provides that there is an evidential burden placed on the accused to provide sufficient evidence to the court to raise an issue as to whether the defence is established. If that is done, it is for the prosecutor to prove beyond reasonable doubt that the defence is not established.

### **Question 5: Do you have any comments on the proposed defence to the offence?**

In their comments at Question 5, respondents sometimes noted their broad support for the principle that the evidential burden be placed on the accused to provide sufficient evidence to the court to raise an issue as to whether the defence is established. Others referred back to issues they had raised about the test of reasonableness under Question 2, with some respondents questioning whether the proposed defence is necessary or appropriate. The most frequently expressed concern was that the defence as proposed is open to manipulation by abusers. In particular, it was suggested that it could be used against:

- Women with disabilities, where the abuser is the carer.
- Women with health problems, including those with mental health conditions.
- Women with substance abuse problems.

In terms of the types of behaviour which the defence could be used to justify, the following were suggested:

- Withholding or controlling access to medication or health services.
- Denying access to support services, for example by preventing a women attending appointments.

Issues raised around how the defence might operate included:

- Given the nature of the issues that the accused could cite in their defence, there were concerns that an unintended consequence of the provision as currently drafted could be the disclosure of private, sensitive evidence in court. It was suggested that consideration be given to whether the disclosure of such evidence in court could be used to discredit the complainer /or contribute to the secondary victimisation of the complainer. It was also suggested that in any case it is hard to envisage a circumstance under which the behaviour described by the offence could be considered reasonable and that the reference to that effect should be removed or amended to better safeguard victims.
- If someone's defence is that they were seeking to protect themselves or their partner or ex-partner from harm, then it is likely that the victim would be deemed an adult in need of support and protection under the Adult Support and Protection (Scotland) Act 2007. Given this, it was suggested that the test would be one of adult with capacity, rather than a defence, and that the procurator fiscal should need to take capacity into account before prosecuting.

A small number of respondents raised specific points of law concerning the proposed defence. These included:

- Conventional jurisprudence makes it clear that the presumption of innocence requires that a legal burden on the accused be an evidential one only, as is clear from the terms of sections 1(3) and (4) read together. However, the draft wording is unwieldy and seems to suggest that the prosecution has the opportunity, after closing its case, to adduce further evidence to prove the contrary.
- The intention is to create an evidential burden only on the accused which requires them to 'put the fact in issue'. Thereafter the Crown must discharge its legal burden of proof beyond reasonable doubt. The expression 'sufficient evidence' is commonly used to mean 'corroborated evidence' but the requirement for corroboration does not ordinarily apply to evidential burdens on an accused. The law enforcement, legal and academic respondent highlighting this issue suggested that the word 'sufficient' be deleted.
- The justification for there being a statutory defence is that there may be circumstances in which an accused reasonably believed his actions to be necessary to protect himself or others. If this is the rationale, the draft defence does not appear to meet it, as the rationale appears to be based on partly subjective rather than entirely objective considerations. An alternative would be that the defence be available in circumstances where the accused reasonably believed that his conduct was necessary for the protection of himself or others. Consideration should also be given to expanding section 1(3) of the draft offence to include that it is a defence for a person to show that he reasonably believed the behaviour was necessary in the particular circumstances in order to protect himself or others, from harm.

The consultation then moved on to consider the proposed maximum penalty for the offence. The proposal is that the maximum penalty on conviction on indictment is 10 years' imprisonment. This reflects the fact that it may be appropriate to try the most serious cases of abuse in the High Court. By way of general comparison, the maximum penalty for the offences of threatening or abusive behaviour and stalking is 5 years' imprisonment, but the consultation paper notes that Scottish Government considers that in cases of domestic abuse, which may involve a course of conduct over a long period of time, potentially involving serious abuse, the maximum penalty should reflect the fact it may be more serious than for offences of threatening or abusive behaviour.

**Question 6: Do you have any comments on the proposed maximum penalty for the offence?**

The majority of respondents who commented noted their agreement with the proposed maximum penalty, including because it reflects both the seriousness of the offence and the very considerable harm it can do. In other comments, respondents made the following suggestions:

- Non-harassment orders should be a routine consideration at sentencing. It was suggested that an extra sub clause should be added to the legislation to that effect.
- Restitution to the victim and children in the form of payment for damages should be added to possible penalties.
- Where appropriate, perpetrator programmes should be used. However, it was suggested this should be in addition to the custodial sentence and not be used to reduce the sentence. Two local authority, health or MAP respondents reported that there are currently no specific programmes in custody for domestic abuse perpetrators, so there is no prospect of individuals being able to address this form of offending behaviour during either a short or a long prison sentence.
- The maximum penalty is appropriate for summary cases, but on indictment the court should not be limited to 10 years. In particular, if there has been a complaint of a sexual offence that is of a higher tariff, this offence should be libelled separately (with a domestic abuse aggravation), in addition to the domestic abuse offence.

Although the majority of those commenting broadly agreed with the proposal, a small number of respondents considered the penalties for conviction on indictment are insufficient and do not reflect a response in proportion to the seriousness of the harm caused to women, children and young people. It was noted that the Human Trafficking and Exploitation (Scotland) Bill [As Passed] proposes the maximum penalty for the offence on conviction on indictment be imprisonment for life or a fine (or both). It was suggested that an equivalent sentencing option is considered for inclusion in this offence.

A small number of other respondents felt that the rationale for the upper limit is not clear. Further issues raised by these respondents included:

- The example given in the consultation paper suggests that, at its most serious, domestic abuse is twice as serious as stalking, which carries a 5 year maximum penalty. However, stalking can also have long term and devastating consequences, so the rationale does not follow. If the legislation is to introduce a maximum penalty of ten years, the rationale for this must be transparent and logical.
- Recent changes to early release via the Prisoners (Control of Release) (Scotland) Act 2015 has significantly shortened the statutory supervision period in the community post-release for many long term prisoners released on licence. This means a prisoner being liberated from a 10 year sentence may no longer qualify for automatic early release, but that early release would previously been accompanied by considerable statutory supervision by criminal justice social work, and the possibility of a return to custody whilst on licence. Under the new legislation (depending on the sentence) a long term prisoner may only be supervised on licence for 6 months in the community.

The consultation paper notes that a number of existing offences operate so that an accused can be convicted of a different offence even though the accused has not been charged with that other offence. The Scottish Government proposes to make provision for a list of alternative offences for which the court may convict the accused if it is satisfied that the accused committed that offence. The consultation paper notes that the range of alternative offences for which it might potentially be appropriate to convict an accused person charged with domestic abuse is potentially very extensive, and that is probably not possible to create an entirely exhaustive list. However, they consider that there may be a case for including those alternative offences most likely to be relevant to ensure that a prosecution does not fail because that alternative offence was not libelled in the complaint or indictment.

**Question 7: Do you have a view on whether provision should be made to enable a court to convict the offender of 'alternative' offences without the need for these to be libelled in the complaint or indictment? If so, what offences do you think should be included as 'alternative offences'?**

The most frequently made comment was that provision should be made to enable a court to convict the offender of 'alternative offences'. A substantial majority of those commenting took this view. It was suggested that there may be cases where there is strong evidence of one crime being committed but weaker evidence in relation to another incident meaning the court is not satisfied that the course of conduct required for the domestic abuse offence is established. Under such circumstances, it was suggested that it will be important to secure a conviction on the offence for which the evidence is stronger. Other comments included that this approach could be the catalyst to start the process of changing behaviour for certain individuals.

A number of respondents suggested offences or types of offences which should be included as alternative offences. The suggestions were:

- Physical assaults.
- Sexual assaults, including offences under the Sexual Offences (Scotland) Act 2009.
- Stalking.
- Abduction.
- Threatening or abusive behaviour.
- Harassment.
- Breach of a non-harassment order or a domestic abuse interdict.
- Breach of the peace.
- Reckless conduct.
- Extortion.
- Fraud.
- Telecommunication offences, including threatening or offensive communications.
- Theft.
- Robbery.
- Vandalism.
- Malicious damage, including where property is damaged as a direct result of ongoing abusive behaviour in a current or previous relationship.
- Slavery (currently section 47 Criminal Justice and Licensing (Scotland) Act 2010 but repealed by Human Trafficking and Exploitation (Scotland) Act 2015 (date to be appointed) and to be replaced by section 4 Human Trafficking and Exploitation (Scotland) Act 2015).
- Attempts to defeat or pervert the course of justice.

However, a number of respondents also suggested that it should be made clear that any list of offences is not exhaustive. Another suggestion was that alternative offences might be '*any other offences as defined in criminal law*'. A possible drawback identified was whether the alternative offence would carry the same possible maximum penalty available under the domestic abuse offence. It was also suggested that the nature of the offending would not be obvious, unless provision was made for the domestic abuse aggravator to be attached to any alternative offence.

Again, a small number of respondents raised specific points of law concerning the proposed provision. These were:

- There is a potential difficulty with giving an accused fair notice of the charges against them. The provision of a large list could be challenged as failing to give the requisite degree of certainty to an accused and be an infringement of their right to a fair trial. However, a counter to that would be that in having a statutory list the accused will have fair notice, and not providing a list would be more susceptible to challenge.
- If the intention is to make provision for cases in which the court is satisfied that the accused engaged in corroborated conduct on at least one occasion which constitutes a distinct criminal offence, but is not satisfied that the accused engaged in such conduct on more than one occasion and therefore cannot convict of a contravention of the domestic abuse offence, then it is unnecessary to include any specific alternative for common law alternatives as in terms of the Criminal Procedure (Scotland) Act 1995 Schedule 3 para. 12. It would, however be necessary for provision to be made for any statutory alternative such as threatening and abusive behaviour contrary to section 38 of the Criminal Justice and Licensing (Scotland) Act 2010.
- The law permits conviction for alternative offences - these are either specified in statute or are implicit within the common law. At this stage, given the potential for behaviour to be criminal both at common law and under other statute, it is difficult to see how a statutory alternative could be identified.

Although the clear majority of those commenting agreed that provision should be made to enable a court to convict the offender of 'alternative' offences without the need for these to be libelled in the complaint or indictment, one respondent clearly disagreed. This respondent suggested that before the indictment is drawn up, consideration should be given as to whether any of the forms of the behaviour should be listed as individual offences alongside the charge for domestic abuse.

## Further comments

The final consultation question asked respondents for any further comments on the draft offence.

<b>Question 8: Do you have any other comments on the draft offence attached to this consultation?</b>
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In their further comments, some respondents re-stated views expressed elsewhere within their consultation response. The focus of the analysis presented here is on issues which have not otherwise been covered within this report.

Some comments considered or raised questions about how particular aspects of how the proposed offence would operate. These included:

- What will determine when the offence would be used as opposed to existing criminal behaviour, particularly serious offending, being prosecuted separately, possibly with a domestic abuse aggravator attached? For example, if violent behaviour includes sexual violence would that be charged under this offence or under the Sexual Offences Act? Would an additional dynamic be included to recognise the intimate partner/domestic abuse aspect of the sexual violence?
- There have been concerns about a rise in female perpetration linked to counter-allegations or dual reports of domestic abuse. Careful consideration of these issues is required in relation to the draft offence proposed. On one hand, the draft offence may address some of these issues by adopting a less incident-based approach in favour of one that recognises a course of conduct and the dynamics of coercive control. On the other hand, increasing the range of behaviours that constitute the offence of domestic abuse could inadvertently draw more individuals into the criminal justice system.
- How will the offence allow perpetrators committing serious crimes which merit the higher end of the sentencing scale for this offence to be identified? This will be particularly important in monitoring the offending history of repeat and serial offenders and the necessity of ensuring that this offence triggers the Sex Offender Notification requirements. More generally, how would the offence interact with other public protection processes.

The issue of corroboration was also raised. Two local authority, health or MAP respondents suggested that, given the current law on corroboration, consideration could be given to making specific provision in relation to its application to this new offence. In particular, it was suggested that if it is to be necessary to find corroborative evidence for each discrete incident in the course of conduct, then this may make it difficult to investigate or prosecute this offence. One of these respondents went on to suggest that there may be a case for stating that in a course of behaviour at least one relevant incident requires to be corroborated but other incidents could be evidenced from a single source. Another suggestion was

that it could be provided that credible evidence from a single source to two instances of conduct could be deemed to be sufficient.

A law enforcement, legal or academic respondent noted that charges involving abuse and sexual violence against current and/or former partners commonly rely for proof on the rule of mutual corroboration. However, they were concerned that, as 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. They suggested this would arguably lead to a widening of the doctrine of mutual corroboration as currently understood.

Other comments considered self-representation by the accused. It was suggested that, given the impact of domestic abuse, it is inappropriate to permit someone accused of the offence to represent themselves in court, thereby providing a platform from which to intimidate and potentially re-traumatise a victim. A specific suggestion was that the offence should contain an equivalent provision to section 6 of the Vulnerable (Witnesses) Scotland Act 2004, amending section 288(F) of the Criminal Procedure (Scotland) Act 1995, prohibiting the abuser from carrying out the personal conduct of his defence in relation to the domestic abuse offence.

It was also suggested that the creation of this new offence places renewed emphasis on the need to improve protections for child witnesses to ensure that children are not further traumatised by criminal justice process. A children's and young people's group raising this issue noted that children may be involved in the adult criminal justice system through cases of domestic abuse, as well as child maltreatment and abuse. They suggested that a specific offence of domestic abuse in the law will likely increase this and preventing secondary victimisation of children (and women) throughout the legal process must be regarded as a priority. They recommended that implementation of any new offence takes place in tandem with a clear commitment to progress reform of the criminal justice system, towards a multi-disciplinary and wholly child-centred system, as called for by Lord Carloway and elaborated through the Scottish Court and Tribunal Service's Evidence and Procedure review.

Many of the other comments focused on the resources required to identify, prosecute or otherwise implement the offence, or tackle domestic abuse more widely. This included a suggestion that consideration should be given to the capacity of the justice system to respond to domestic abuse beyond the identification of an offence. In particular, it was suggested that criminal justice services must be adequately resourced and equipped to deal with any increased workload if delays are to be avoided. Specific suggestions included:

- There should be an awareness campaign to promote the change to the public.

- Guidance will be required to ensure that LGBT people's experience of domestic abuse is not overlooked. In particular, the Scottish Government needs to clearly articulate within guidance how gender based violence, including domestic abuse specifically, can affect LGBT people.
- Appropriate resources will need to be available to ensure that key stakeholders receive training on any legislation to be introduced. Specific suggestions included support or training or in the new offence for police officers, Procurator Fiscals and Sheriffs.
- The Scottish Government should consider the resource implications for advocacy services, Women's Aid groups and other domestic abuse services.
- There is a huge shortage of abuse recovery services for children and their families in Scotland. This Bill could be an opportunity to address this issue by recognising that those who have experienced domestic abuse need access to specialist services. The Scottish Government should map and develop a clear understanding of what services are available across Scotland, as a first step toward ensuring recovery services are consistently available across the country.
- Consideration should be given to the support of effective perpetrator programmes to ensure that there are appropriate interventions to address offending behaviour.

Other issues identified as requiring consideration were:

- Changes to the content and procedure of risk assessment. It was noted that risk assessment and the Multi Agency Risk Assessment Conference procedure currently defines and focuses on women who are high-risk mainly as a consequence of physical abuse. How will control be covered and assessed where there is evidence of numerous and persistent controlling behaviours but little or no physical abuse present or reported?
- Monitoring of the implementation of the Act to assess its success in the prosecution of psychological abuse and controlling behaviour, and in particular whether there are any prosecutions where there is no evidence of physical or sexual violence.
- The links between the civil and criminal justice systems and proceedings. In particular, avoiding the civil legal system, and particularly child contact proceedings, being used against women to continue and further the abuse of them and their children.
- How a similar legislative approach might be adopted for familial relationships.

## Respondents by type

Type of respondent
<b>Advocacy and support groups</b>
Abused Men In Scotland
Ross-shire Women's Aid
Sacro
Scottish Women's Aid
Scottish Women's Convention
Stonewall Scotland
Victim Support Scotland
<b>Children's and young people's groups</b>
Children 1st
Children and Young People's Commissioner Scotland
LGBT Youth Scotland
NSPCC
Scottish Children's Reporter Administration
<b>Law enforcement, legal and academic respondents</b>
ESRC/Edinburgh University IMPACT project - Dr C Houghton and 8 young survivors of domestic abuse
(Dr) Mo Egan for and on behalf of Criminal Law and Evidence Students at Abertay University
Police Scotland
Scottish Courts and Tribunals Service
Sheriffs' Association
The Faculty of Advocates
The Law Society of Scotland
The Scottish Centre for Crime and Justice Research
(Ms) Vanessa Bettinson (of De Montfort University, Leicester)

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**Local Authority, health and MAP respondents**

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Aberdeen City Council Community Safety Partnership

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Aberdeenshire Council, Adult Services

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(The) City of Edinburgh Council

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Clackmannanshire and Stirling Child Protection Committee

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Clackmannanshire Violence Against Women Partnership and Falkirk Gender Based Violence Partnership

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Community Safety Glasgow

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Dumfries and Galloway Domestic Abuse and Violence Against Women Partnership

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Dundee Violence Against Women Partnership

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East Ayrshire Violence Against Women Partnership

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East Lothian and Midlothian Public Protection Committee

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Forensic Faculty of the Royal College of Psychiatrists

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Highland Violence Against Women Partnership

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Inverclyde Violence Against Women Multi Agency Partnership

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NHS Greater Glasgow and Clyde

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NHS Health Scotland

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North Ayrshire Violence Against Women Partnership

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North Lanarkshire's Violence Against Women Working Group

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Scottish Borders Violence Against Women Partnership

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South Lanarkshire Council

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South West Scotland Community Justice Authority (on behalf of Scotland's Community Justice Authorities)

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## Draft offence – suggested amendments

The text in shaded rows is the draft offence as proposed by the Scottish Government, with respondents' suggested amendments underneath. Formatting is as in the individual consultation response.

The suggested wording for an additional offence of *Domestic abuse offence against children and young people* is included at the end of this annex.

1 Abusive behaviour in relation to partner or ex-partner	Respondent proposing amendment
<b>Course of coercive abusive behaviour in relation to partner or ex-partner</b>	Scottish Women's Aid
<p>(1) A person ("A") commits an offence if</p> <ul style="list-style-type: none"> <li>(a) A engages in a course of behaviour which is abusive of A's partner or ex-partner ("B"),</li> <li>(b) a reasonable person would consider that the course of behaviour would be likely to cause B to suffer physical or psychological harm, and</li> <li>(c) either <ul style="list-style-type: none"> <li>(i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or</li> <li>(ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.</li> </ul> </li> </ul>	
<p>section 1 (1) (b), that a reasonable person would consider the accused's behaviour would be likely to cause harm should be removed from clause 1. (This particular section is also included in section 2 (b) (ii). The repetition would require prosecutors to satisfy the test twice, which would lead to complications and confusion. The section should remain in section 2.)</p>	Community Safety Glasgow
...the intention should include "to exert or attempt to exert undue control over an intimate partner".	Individual respondent
in bullet point 3 it may be better to say ...harm and/or recklessness as to harm being caused?	North Lanarkshire's Violence Against Women Working Group

The wording “ <i>sexual and economic/financial harm</i> ” should be added to section 1(c)(i) and (ii) along with section 1(2).	Ross-shire Women’s Aid
<p>s.(1)(a) Delete “a course of”</p> <p>s.(1)(b) Just “suffer harm” as opposed to “suffer physical or psychological harm” or widen it to “suffer physical, sexual, psychological, emotional or financial harm”</p> <p>s.(1)(c) Delete “physical or psychological” as above</p>	Scottish Children’s Reporter Administration
<p>(1) A person (“A”) commits an offence if— (a) A engages in a course of behaviour which is abusive of A’s partner or expartner (“B”),</p> <p>(b) <del>A reasonable person would consider that the course of behaviour would be likely to cause B to suffer physical or psychological harm</del>, and</p> <p>(c) Either—</p> <p>(i) A intends by the course of behaviour to cause B to suffer physical, <del>or</del> psychological, <b>sexual and/or economic/financial</b> harm, or (ii) A is reckless as to whether the course of behaviour causes B to suffer physical <del>or,</del> <b>psychological, sexual and/or economic/financial</b> harm.</p>	Scottish Women’s Aid
It may be better to say “harm and/or recklessness as to the harm being caused”.	South Lanarkshire Council
(2) It is immaterial for the purposes of subsection (1) that the course of behaviour does not in fact cause B physical or psychological harm.	
(2) It is immaterial for the purposes of subsection (1) that the course of behaviour does not in fact cause B physical <del>or,</del> psychological, <b>sexual and/or economic/financial</b> harm.	Scottish Women’s Aid
(3) In proceedings for an offence under subsection (1) it is a defence for a person to show that the course of behaviour was, in the particular circumstances, reasonable.	
<p>We suggest that a preferable wording might be –</p> <p>“(3) In proceedings for an offence under subsection (1) it is a defence for a person to adduce sufficient evidence to raise an issue as to whether the course of behaviour was, in the particular circumstances, reasonable, and for that evidence to leave the court or jury with a reasonable doubt as to their guilt.”</p>	The Law Society of Scotland

<p>(4) That is shown if</p> <p>(a) sufficient evidence is adduced to raise an issue as to whether it is the case, and</p> <p>(b) the prosecution does not prove the contrary beyond reasonable doubt.</p>	
<p>For clarity section 1(4) should refer to section 1 (3) for example “The defence in subsection (3) above will be shown if”</p>	<p>Clackmannanshire and Stirling Child Protection Committee</p>
<p>For clarity section 1(4) should refer to section 1 (3) for example “The defence in subsection (3) above will be shown if”</p>	<p>Clackmannanshire Violence Against Women Partnership and Falkirk Gender Based Violence Partnership</p>
<p>In section 1(4)(a), the Faculty recommends the word "sufficient" be deleted.</p>	<p>The Faculty of Advocates</p>
<p>(5) A person who commits an offence under subsection (1) is liable –</p> <p>(a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both)</p> <p>(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or a fine (or both).,</p>	
<p>(c) <b><i>(1) On conviction of an offence under subsection (1), a court must consider whether it would also be appropriate to a) impose a statutory aggravation under section 234(A) of the Criminal Procedure (Scotland) 1995 Act and b) to make a non-harassment order under section 234(A) of the Criminal Procedure (Scotland) 1995 Act and b) , or some other protective order, against the offender, requiring the offender to refrain from such conduct in relation to the victim as may be specified in the order for such period (which includes an indeterminate period) as may be so specified, in addition to any other disposal which may be made in relation to the offence.</i></b></p> <p><b><i>(ii) The court may, if it is satisfied on a balance of probabilities that it is appropriate to do so in order to protect the victim from further harassment, make a non-harassment order.</i></b></p> <p><b><i>(iii) Where a court declines to make such an order, the court must— (a) state its reasons for the opinion that such an order would not be appropriate, and (b) have those reasons entered in the record of the proceedings</i></b></p> <p><b><i>(d) In proceedings to which this section applies, the accused is prohibited from conducting his defence in person at the trial and in any victim statement proof relating to any offence to which the trial relates</i></b></p>	<p>Scottish Women’s Aid</p>

<p><b>2 What constitutes abusive behaviour for purposes of section 1</b></p>	
<p>s.2 Start with “abusive behaviour” is any behaviour which involves physical, sexual, psychological, emotional or financial abuse of another person.</p>	<p>Scottish Children’s Reporter Administration</p>
<p>(1) For the purposes of section 1, behaviour which is abusive of B includes, in particular -</p> <p>(a) behaviour directed at B that is violent, threatening or intimidating,</p> <p>(b) behaviour directed at B or any other person—</p> <p>(i) that has as its purpose (or as one of its purposes) one or more of the effects mentioned in subsection (2), or</p> <p>(ii) that a reasonable person would consider would be likely to have one or more of those effects.</p>	
<p>Incorporating these changes are listed below in bold type.</p> <p>2. (1) For the purposes of section 1, behaviour which is abusive of B includes, add here <b>‘but is not limited to’</b>, in particular—</p> <p>(a) behaviour directed at B that is violent, threatening or intimidating add here <b>‘or sexually abusive’</b></p> <p>(b) behaviour directed at B or any other person, add here – <b>‘including children’</b></p> <p>ii) that a reasonable person would consider would be likely to have one or more of those effects add here <b>‘on B’</b></p> <p>Add sub para <b>(c) Behaviour directed at pets, other animals or property</b></p> <p>Add sub para <b>(d) Any other behaviour that a reasonable person would be likely to consider abusive.</b></p>	<p>Community Safety Glasgow</p>
<p><b>Section 2(1)</b></p> <p>Inclusion of <i>‘but not limited to’</i> and <i>‘sexually abusive’</i> in Section 2(1) to read:  <i>‘For the purposes of section 1, behaviour which is abusive of B includes, in particular, but is not limited to –</i>  <i>(a) behaviour directed at B that is violent, threatening, sexually abusive or intimidating’</i></p> <p>Inclusion of <i>‘(including children), animals and property’</i> in Section 2(1)(b) to read:  <i>‘Behaviour directed at B or any other person (including children), animals and property’.</i></p>	<p>Police Scotland</p>
<p>s.2(1) After “includes”, insert “but is not restricted to”</p>	<p>Scottish Children’s Reporter Administration</p>

<p>(1) For the purposes of section 1, behaviour which is abusive of B includes, in particular—</p> <p>(a) Behaviour directed at B that is <b>abusive</b>, violent, threatening <del>or</del> intimidating, <b>controlling or degrading</b></p> <p>(b) behaviour directed at B, <b>directed at pets, property (personal or business) of B or any other person, including children and young people of the family.</b>”</p> <p>Or any other person—</p> <p>(i) that has as its purpose (or as one of its purposes) one or more of the effects mentioned in subsection (2), or</p> <p>(ii) That a reasonable person would consider would be likely to have one or more of those effects <b>on B and/or a child or young person of the relationship/family.</b></p>	<p>Scottish Women’s Aid</p>
<p>I would suggest adding ‘and/or’ after s. 2(1)(a):</p> <p>For the purposes of section 1, behaviour which is abusive of B includes, in particular</p> <p>a) Behaviour directed at B that is violent, threatening or intimidating, AND/OR</p> <p>b) Behaviour directed at B or any other person – etc</p>	<p>(Ms) Vanessa Bettinson (of De Montfort University, Leicester)</p>
<p>(2) Those effects are –</p> <p>(a) making B dependent on, or subordinate to, A,</p> <p>(b) making B isolated from friends, relatives or other sources of support,</p> <p>(c) controlling, regulating or monitoring the day-to-day activities of B,</p> <p>(d) making B feel frightened, humiliated or degraded, or</p> <p>(e) punishing B.</p>	
<p>Add sub para 2 (2) <b>(f) restricting B’s autonomy or choices that a reasonable person would enjoy</b></p> <p>Add sub para 2 (2) <b>(g) undermining B’s self-worth, value, health and well-being.</b></p> <p>Add sub para 2 (2) <b>(h) Interferes with B's ability to care for any children's in B's care, or significantly impacts family functioning including causing disruption of financial stability, housing, education, stability and caring."</b></p>	<p>Community Safety Glasgow</p>
<p><b>Section 2(2)</b></p> <p>Inclusion of an additional effect under subsection 2(2)f to read:</p> <p><i>‘Undermining the self-worth, autonomy, health and wellbeing of B’</i></p>	<p>Police Scotland</p>
<p>s.2(2) Include “exploiting B’s resources and capacities for personal gain, depriving B of their ability to be independent, and to escape from a relationship”</p>	<p>Scottish Children’s Reporter Administration</p>

<p>(2) Those effects <b>are— include, but are not limited to-</b></p> <ul style="list-style-type: none"> <li>(a) Making B dependent on, or subordinate to, A,</li> <li>(B) making B isolated from friends, relatives or other sources of support,</li> <li>(c) Controlling, regulating or monitoring the day-to-day activities of B,</li> <li>(d) Making B feel frightened, humiliated or degraded, or</li> <li>(e) Punishing B</li> <li>(f) <b>Arbitrarily depriving B of rights, resources or liberty</b></li> <li>(g) <b>Restricting B's freedom, choices and autonomy that B should reasonably expect to enjoy</b></li> <li>(h) <b>Manipulating and undermining B's self-efficacy, self-confidence, health &amp; wellbeing</b></li> <li><b>(I) undermining and interfering with B's ability to care for any children or young person in B's care</b></li> <li><b>(j) Significantly impacting s family functioning including causing disruption of financial stability, housing, education stability and caring services."</b></li> </ul>	<p>Scottish Women's Aid</p>
<p><b>3 Interpretation</b></p>	
<p>s.3 Include a definition of "harm" – "includes physical, sexual, psychological, emotional or financial harm.</p>	<p>Scottish Children's Reporter Administration</p>
<p>(1) Section 1(1) applies to behaviour of any kind including, in particular –</p> <ul style="list-style-type: none"> <li>(a) saying or otherwise communicating something as well as doing something,</li> <li>(b) failing to say or otherwise communicate, or do, something (but only where that failure is intentional).</li> </ul>	
<p>section 3 (1) (b) has the caveat "but only where that failure is intentional". However, in section 1 (1) (c) both intentionality and recklessness is outlined. The caveat in section 3 (1) (b) should therefore cover both intention and recklessness.</p>	<p>Community Safety Glasgow</p>
<p>(2) In section 1(1) and (2), "psychological harm" includes fear, alarm and distress.</p>	
<p>In section 3 Interpretation, sub section (2) should be adjusted to ensure psychological harm is not limited to causing fear, alarm and distress. There are other psychological harms that could be lost without this inclusion as follows</p> <p>3 (2) In section 1 (1) and (2) "psychological harm" includes, but is not exclusively, fear, alarm and distress</p>	<p>Community Safety Glasgow</p>

<p>(3) For the purposes of section 1 -</p> <p>(a) a course of behaviour involves behaviour on at least two occasions,</p> <p>(b) a person is A's partner if they are -</p> <p>(i) spouses or civil partners of each other,</p> <p>(ii) living together as if spouses or civil partners of each other, or</p> <p>(iii) in an intimate personal relationship with each other, and the reference to A's ex-partner is to be construed accordingly.</p>	
<p>Delete s.3(3)(a)</p>	<p>Scottish Children's Reporter Administration</p>
<p>(4) The reference in section 2(1)(a) to violent behaviour includes sexual violence as well as physical violence.</p>	
<p>(4) The reference in section 2(1) (a) to violent <b>and abusive</b> behaviour includes sexual violence <b>and abuse</b> as well as physical violence <b>and abuse</b>.</p>	<p>Scottish Women's Aid</p>

## Possible wording of domestic abuse offence against children and young people proposed by Scottish Women's Aid

### 1 Course of coercive abusive behaviour in relation to a child or young person of the family or relationship

- (1) A person ("A") commits an offence if—
- (a) A engages in a course of behaviour which is abusive of **a child or young person of the family or relationship between A and A's partner or ex-partner**
- ("B"),**
- (b) ~~a reasonable person would consider that the course of behaviour would be likely to cause B to suffer physical or psychological harm~~, and
  - (c) either—
    - (i) A intends by the course of behaviour to **cause the child or young person to** suffer physical, ~~or~~ psychological, **sexual and/or economic/financial** harm, or
    - (ii) A is reckless as to whether the course of behaviour causes **a child or young person of the family or relationship** suffer physical ~~or~~, **psychological, sexual and/or economic/financial** harm.
- (2) It is immaterial for the purposes of subsection (1) that the course of behaviour does not in fact cause **the child or young person physical or**, psychological, **sexual and/or economic/financial** harm.
- (3) In proceedings for an offence under subsection (1) it is a defence for a person to show that the course of behaviour was, in the particular circumstances, reasonable.
- (4) That is shown if—
- (a) sufficient evidence is adduced to raise an issue as to whether it is the case, and (b) the prosecution does not prove the contrary beyond reasonable doubt.
- (5) A person who commits an offence under subsection (1) is liable— (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both),
- (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or a fine (or both).
  - (c) ***(1) On conviction of an offence under subsection (1), a court must consider whether it would also be appropriate to a) impose a statutory aggravation under section 234(A) of the Criminal Procedure (Scotland) 1995 Act and b) to make a non-harassment order under section 234(A) of the Criminal Procedure (Scotland) 1995 Act and b), or some other protective order, against the offender, requiring the offender to refrain from such conduct in relation to the victim as may be specified in the order for such period (which includes an indeterminate period) as may be so specified, in addition to any other disposal which may be made in relation to the offence.***
    - (ii) the court may, if it is satisfied on a balance of probabilities that it is appropriate to do so in order to protect the victim from further harassment, make a non-harassment order.***
    - (iii) Where a court declines to make such an order, the court must— (a) state its reasons for the opinion that such an order would not be appropriate, and (b) have those reasons entered in the record of the proceedings***
  - (d) ***In proceedings to which this section applies, the accused is prohibited from conducting his defence in person at the trial and in any victim statement proof relating to any offence to which the trial relates.***

## 2 What constitutes abusive behaviour for purposes of section 1

- (1) For the purposes of section 1, behaviour which is **abusive of a child or young person of the family or relationship** includes, in particular—
- (a) behaviour directed at the **child or young person B** that is **abusive**, violent, threatening ~~or~~ intimidating, **controlling or degrading**
  - (b) behaviour directed at **child or young person or their property or pets** (i) that has as its purpose (or as one of its purposes) one or more of the effects mentioned in subsection (2), or
    - (ii) that a reasonable person would consider would be likely to have one or more of those effects **a child or young person of the relationship/family.**
- (2) Those effects **are— include, but are not limited to-**
- (a) making **the child or young person** dependent on, or subordinate to, A, (b) making **the child or young person** isolated from friends, relatives or other sources of support,
  - (c) controlling, regulating or monitoring the day-to-day activities of **the child or young person** ,
  - (d) making **the child or young person** feel frightened, humiliated or degraded, or
  - (e) punishing **the child or young person**
  - (f) **arbitrarily depriving the child or young person of rights, resources or liberty**
  - (g) **restricting the freedom, choices and autonomy that the child or young person should reasonably expect to enjoy**
  - (h) **manipulating and undermining the child or young person 's self-efficacy, self-confidence, health & wellbeing**
  - (i) **significantly impacting on the child or young person' s family functioning including causing disruption of financial stability, housing, education stability and caring services."**

## 3 Interpretation

- (1) Section 1(1) applies to behaviour of any kind including, in particular—
- (a) saying or otherwise communicating something as well as doing something, (b) failing to say or otherwise communicate, or do, something (but only where that failure is intentional).
- (2) In section 1(1) and (2), "psychological harm" includes fear, alarm and distress.
- (3) For the purposes of section 1—
- (a) a course of behaviour involves behaviour on at least two occasions,
  - (b) **a child or young person of the family or relationship between A and A's partner or ex-partner ("B") will apply where A and B** are— (i) spouses or civil partners of each other,
    - (ii) living together as if spouses or civil partners of each other, or
    - (iii) in an intimate personal relationship with each other,
- and the reference to A's ex-partner is to be construed accordingly.
- (4) The reference in section 2(1) (a) to violent **and abusive** behaviour includes sexual violence **and abuse** as well as physical violence **and abuse**.



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