

# Corporate Policy and Strategy Committee

10am, Tuesday, 12 April 2016

## Consultation on the Creation of a Criminal Offence of Domestic Abuse

Item number 7.10  
Report number  
Executive/routine  
Wards

### Executive Summary

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The Scottish Government consultation seeks views on the proposal to create a specific offence of domestic abuse. The proposed offence would contain within it the types of conduct that constitute domestic abuse, including some conduct, which it is currently difficult to prosecute using existing laws.

The deadline of submission for responses to the consultation is Friday 1 April 2016.

### Links

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Coalition Pledges	<a href="#">P1</a> , <a href="#">P12</a> , <a href="#">P32</a> , <a href="#">P34</a>
Council Priorities	<a href="#">CO1</a> , <a href="#">CO5</a> , <a href="#">CO10</a> , <a href="#">CO11</a> , <a href="#">CO15</a> , <a href="#">CO21</a> and <a href="#">CO26</a>
Single Outcome Agreement	<a href="#">SO1</a> , <a href="#">SO2</a> , <a href="#">SO3</a> , <a href="#">SO4</a>

## Consultation on the Creation of a Criminal Offence of Domestic Abuse

### 1. Recommendations

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It is recommended that Corporate Policy and Strategy Committee:

- 1.1 Consider and approve or amend the consultation response attached at Appendix 1. In order to meet the consultation deadline, the response was submitted in draft form, with the proviso that should Committee wish to amend the wording, a further and final response would be submitted to the Scottish Government after today's meeting.

### 2. Background

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- 2.1 A previous consultation between March and June 2015 explored whether a specific domestic abuse offence would improve the ability of the police and prosecutors to tackle domestic abuse. Responses showed that there was a broad consensus that while the existing legal framework provides some powers to investigate and prosecute, it does not recognise the particular nature and consequences of domestic abuse effectively enough. Many respondents noted that the existing legal framework focuses on individual incidents of physical violence and does not recognise that domestic abuse is often a pattern of abusive behaviour, which is sustained over time. They also suggested that the law does not recognise the coercive and controlling behaviours that are often a central part of the abuse.
- 2.2 This further consultation now seeks views on a proposed offence before it is introduced to the Scottish Parliament. The draft consultation response is attached at Appendix 1. Views of members were sought in advance of the deadline for submission and the draft reflects comments made.

### 3. Main report

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- 3.1 The draft consultation responses were circulated to senior managers and service providers in Edinburgh. The recommended responses to the consultation questions are outlined below:

#### **Scope of the offence**

- 3.2 The scope of the general offence of domestic abuse 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.

- 3.3 The draft consultation response recommends that we agree with the scope of the offence. It outlines a wide pattern of abusive behaviour, which mirrors what we know of how domestic abuse is perpetrated. However, it must be clear that any domestic abuse offence does not require the presence of physical abuse to be prosecuted.

#### **General structure of the offence**

- 3.4 The proposed offence provides a non-exhaustive definition of what constitutes abusive behaviour. 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 a person to suffer physical or psychological harm. It is committed where the accused either intends to cause the victim to suffer physical or psychological harm, or else is reckless as to whether their actions would cause such harm.
- 3.5 The draft consultation response supports the articulation of the offence in this way. The advantage of having a 'reasonable person' test is that the court will not require to hear evidence relating to the reaction of the victim; as long as a reasonable person would consider it likely to have been caused in the particular circumstances. Removal of a requirement that intent to harm is evident is also welcomed, as the accused may genuinely believe they did not intend to harm their ex/partner.

#### **Definition of abusive behaviour**

- 3.6 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 coercive or controlling behaviour, or amounts to psychological or emotional abuse of a person's ex/partner.
- 3.7 The draft consultation response welcomes the wide range of abusive behaviours included in the proposed offence, as it brings within scope coercive or controlling behaviour, which may not fall within the definition of any existing criminal offence.

#### **Relationship to which the offence applies**

- 3.8 The proposed offence is restricted to people who are partners or ex-partners, which aligns with the existing Domestic Abuse (Scotland) Act 2011 and in the provision for a domestic abuse aggravation contained in the Abusive Behaviour and Sexual Harm (Scotland) Bill.
- 3.9 The draft consultation response agrees that the offence should only apply to this group. This recognises that the dynamic differs from abuse in other relationships, such as siblings or other family relationships, many of which are already covered by existing legislation. It should also include short-term relationships, couples in a relationship, which has not been sexually intimate and those who do not cohabit. The provisions apply regardless of the gender of perpetrator or victim.

### **Defences to the offence being committed**

- 3.10 The proposed 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. This would require an evidential burden on the accused to provide sufficient evidence to the court as to whether the defence is established.
- 3.11 The draft consultation response supports this. There may be circumstances where a person may be reasonable in using controlling behaviour, for example, if they believed that their actions were necessary to protect themselves, their partner or other family members from harm.

### **Penalties**

- 3.12 It is proposed that the maximum penalty on conviction on indictment is 10 years' imprisonment, reflecting the fact that it may be appropriate to try the most serious cases of domestic abuse in the High Court.
- 3.13 This is agreed within the draft consultation response, and it is suggested that where perpetrator programmes exist, Sheriffs should ensure the penalties applied are sufficient to allow access to these.

### **Power to convict for alternative offences**

- 3.14 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. There may be cases in which the court is satisfied that the accused engaged in conduct, which constitutes a distinct criminal offence – for example, threatening and abusive behaviour or common law assault, but is not satisfied that the accused engaged in such conduct on more than one occasion and therefore cannot convict for the domestic abuse offence.
- 3.15 The consultation response recommends that this provision should be made to enable a court to convict the offender of 'alternative offences'. These should include ones already covering physical and sexual assaults, stalking, threatening behaviour and breach of the peace.

## **4. Measures of success**

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- 4.1 Scottish Government will review all submissions and is expected to develop revised proposals, legislation, regulations and guidance for implementation. Further reports will be provided to Committee as these develop.

## **5. Financial impact**

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- 5.1 There are no immediate financial implications of the response to the consultation. The full implications of any new legislation will be dependent on the final decision of the Scottish Government and the details of implementation

## 6. Equalities impact

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- 6.1 There are no direct equalities impacts arising from the response to the consultation. The impact of new legislation will be subject to an Equalities Rights Impact Assessment.

## 7. Sustainability impact

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- 7.1 There are no sustainability implications arising from this report.

## 8. Consultation and engagement

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- 8.1 At the last Edinburgh Violence Against Women Partnership, the Executive Group agreed that it will not be responding as a 'partnership', and responses will be generated by each organisation. The draft consultation response for the City of Edinburgh Council was circulated to relevant senior managers and service providers for comment.

## 9. Background reading/external references

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[Coordinated Community Response Model](#)

[Edinburgh's Multi-agency Domestic Abuse Policy](#)

[Equally Safe: Scotland's strategy for preventing and eradicating violence against Women and girls](#)

### **Michelle Miller**

Chief Social Work Officer

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## 10. Links

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<b>Coalition Pledges</b>	<p>P1 – Increase support for vulnerable children, including help for families so that fewer go into care</p> <p>P12 – Work with health, police and third sector agencies to expand existing and effective drug and alcohol treatment programmes</p> <p>P32 – Develop and strengthen local community links with the police</p> <p>P34 – Work with police on an anti-social behaviour unit to target persistent offenders</p>
<b>Council Priorities</b>	<p>CO1 - Our children have the best start in life, are able to make and sustain relationships and are ready to succeed</p> <p>CO5 - Our children and young people are safe from harm or fear of harm, and do not harm others within their communities</p> <p>CO10 - Improved health and reduced inequalities</p> <p>CO11 - Preventative and personalised support in place</p> <p>CO15 - The public are protected</p> <p>CO21 - Safe – Residents, visitors and businesses feel that Edinburgh is a safe city</p> <p>CO26 - The Council engages with stakeholders and works in partnership to improve services and deliver on agreed objectives</p>
<b>Single Outcome Agreement</b>	<p>SO1 - Edinburgh's citizens experience improved health and well being and reduced inequalities in health</p> <p>SO 2 - Edinburgh's children and young people enjoy their childhood and fulfil their potential</p> <p>SO 3 - Edinburgh's communities are safer and have improved physical and social fabric</p> <p>SO 4 – Edinburgh’s communities are safer and have improved physical and social fabric</p>
<b>Appendices</b>	<p>Appendix 1: Draft consultation response</p> <p>Appendix 2: Scottish Government Consultation on a criminal offence of domestic abuse</p>

## Appendix One: Draft Consultation Response

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?

Yes  No

Comments: We are content that the offence can be drawn this way and that it should reflect a pattern of abusive behaviour; however, it must be clear that any domestic abuse offence does not require the presence of physical abuse to be prosecuted.

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?

Comments: We agree with the requirements, as outlined above.

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

Comments: We welcome the wide range of abusive behaviours which are included in the draft offence.

4. Do you have any comments on the relationships the offence should apply to?

Comments: We believe that the offence should be restricted to only apply to people who have been (or who are in) an intimate relationship to reflect that this dynamic differs from abuse in other relationships. We would emphasise that this should include short term relationships, couples in a relationship which has not been sexually intimate and those who do not cohabit. The offence has been developed in relation to the evidence base on abusive intimate relationships and will give a strong message to the public about the unacceptability of this.

5. Do you have any comments on the proposed defence to the offence?

Comments: We support the defence as outlined in the proposed offence.

6. Do you have any comments on the proposed maximum penalty for the offence?

Comments: We agree with the proposed maximum penalty and note that, where perpetrator programmes exist, Sheriffs could ensure that the penalties given are sufficient to allow access to these.

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'?

Comments: We believe that provision should be made to enable a court to convict the offender of 'alternative offences' and that these should include ones already covering physical and sexual assaults, stalking, threatening behaviour, breach of the peace, etc.

8. Do you have any other comments on the draft offence attached to this consultation?

Comments: We welcome this consultation on the draft offence of domestic abuse. As a society, it is key that we move away from an incident based approach to domestic abuse and consider the wider tactics used by perpetrators and the impact this has on the lives of victims and children.



# **A criminal offence of domestic abuse**

## **Scottish Government Consultation Paper**

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

Domestic abuse can have a devastating impact for victims and for children. It damages health and wellbeing, restricts freedom and can limit individuals' potential. The *"Equally Safe – Scotland's strategy for preventing and eradication violence against women and girls"* (2014), identifies the many different forms that domestic abuse can take and the different effects such abuse can have. Along with physical violence and threats, the strategy highlights that abuse can consist of sexual and psychological harm, acts of coercion, deprivation of liberty all of which can result in the loss of an individual's dignity.

Both women and men, in all forms of relationships, can be victims of abuse. However, we also know that risk factors mean that a high proportion of incidents of domestic abuse reported to the police involve a female victim and male partner or ex-partner. As part of the challenge set by the Equally Safe strategy, the Scottish Government is determined to ensure our criminal laws reflect our modern understanding of what domestic abuse is so that those that perpetrate such abuse have no hiding place under the law and victims have confidence in knowing that the police, prosecutors and our courts have the powers they need to hold domestic abusers to account.

That is why in our Programme for Government in November 2014, we committed to consult on the principle of creating a specific offence of domestic abuse. A consultation ran between March and June 2015 and the views received to that consultation revealed broad support for the principle of having a domestic abuse offence, but no consensus on how such an offence should be developed.

In light of this, we committed in this year's Programme for Government to consult on a draft specific offence of domestic abuse. We consider the right approach is to listen to key stakeholders and others to take forward the development of such an important new offence informed by their views so that a consensus can be achieved.

This consultation includes a draft domestic abuse offence which seeks to contain within it the types of conduct that constitute domestic abuse including some types of conduct that currently may be difficult to prosecute using existing laws.

I urge all those with an interest to take the time to consider and offer your views so that the Scottish Government can seek to introduce into the Scottish Parliament a domestic abuse offence that has a broad consensus of support and that will make a real improvement in how our criminal justice system is able to respond in dealing with the scourge of domestic abuse.

**MICHAEL MATHESON MSP  
CABINET SECRETARY FOR JUSTICE**

December 2015

## **RESPONDING TO THE CONSULTATION**

We are inviting responses to this consultation by Friday 1 April 2016.

Please respond to this consultation online at <https://consult.scotland.gov.uk/criminal-law-and-sentencing-team/criminal-offence-domestic-abuse> You can save and return to your responses while the consultation is still open. Please ensure that consultation responses are submitted before the closing date of 1 April 2016.

If you are unable to respond online, please complete the Respondent Information Form (see "Handling your Response" below) to:

Patrick Down  
Criminal Law & Sentencing Team  
GWR St Andrew's House  
Edinburgh  
EH1 3DG

### **Handling your response**

If you respond using Citizen Space, you will be automatically directed to the Respondent Information Form at the start of the questionnaire. This will let us know We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public.

If you are unable to respond via Citizen Space, Please complete and return the Respondent Information Form attached to the end of this document as this will ensure that we treat your response appropriately. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

### **Next steps in the process**

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material, responses will be made available to the public at <http://consult.scotland.gov.uk> in the Scottish Government Library. You can make arrangements to view responses by contacting the Scottish Government Library on 0131 244 4552. If you use Citizen Space to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us.

### **Comments about the consultation process**

If you have any comments about how this consultation exercise has been conducted,

please send them to Patrick Down, Criminal Law & Sentencing Team, GWR St Andrew's House , Edinburgh, EH1 3DG (e-mail [reformingscriminallaw@gov.scot](mailto:reformingscriminallaw@gov.scot), tel 0131 244 4210).

### **Scottish Government consultation process**

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses.

Consultation is an essential part the policy making process. It gives us the opportunity to get your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.scotland.gov.uk>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (<http://ideas.scotland.gov.uk>).

After a consultation is closed we publish all responses where we have been given permission to do so.

Responses will be analysed Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565) and used as part of the decision making process, along with a range of other available information and evidence.

We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

## **A CRIMINAL OFFENCE OF DOMESTIC ABUSE**

### **Introduction**

1.1 Between March and June 2015, the Scottish Government consulted on whether a specific domestic abuse offence would improve the ability of the police and prosecutors to tackle domestic abuse.

1.2 Analysis of the consultation responses suggested strong agreement that the current law does not reflect the experience of victims, in particular those who are victims of on-going coercive and controlling behaviour by partners or ex-partners. However, there was no consensus on how such an offence could be developed with a range of views on how different approaches could be taken in developing a new offence.

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

1.4 We have been engaging with stakeholders to develop a specific offence of domestic abuse which is intended to improve how our justice system responds to this kind of offending. We now wish to seek views on a draft offence published with this consultation to enable the views of consultation respondents to inform the development of this offence before it is introduced into the Scottish Parliament.

### **Results of consultation seeking views on whether a specific offence should be created - overview**

2.1 The consultation *Equally Safe: Reforming the law to address domestic abuse and sexual offences*<sup>1</sup> sought views on whether the existing law provided the police and prosecutors with sufficient powers to investigate and prosecute perpetrators of domestic abuse, and, if not, whether the creation of a specific offence of domestic abuse would improve the ability of the justice system to respond to this form of criminality. It also asked consultees who supported the creation of a specific offence what behaviours which are not currently criminalised they think should be included within the scope of such an offence and whether it should be restricted to people who are partners or ex-partners, or should also cover other familial relationships.

2.2 The clear majority of respondents (93%) considered that the existing criminal law does not provide the police and prosecutors with sufficient powers to investigate and prosecute perpetrators of domestic abuse. There was a broad consensus that, while the existing legal framework does provide some powers to investigate and prosecute perpetrators of domestic abuse, it does not recognise the particular nature and consequences of domestic abuse sufficiently. In particular, many respondents noted that the existing legal framework focuses on individual incidents of physical violence and does not recognise that domestic abuse is often a pattern of abusive behaviour that is sustained over time. Many also suggested that the law does not

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<sup>1</sup> <http://www.gov.scot/Publications/2015/03/4845>

recognise the coercive and controlling behaviours that are often a central part of the abuse.

2.3 The small number of respondents who considered that the existing criminal law does provide the police and prosecutors with sufficient powers tended to suggest that the current law already covers the types of conduct that could fall within a description of domestic abuse.

2.4 There was a very strong positive correlation between considering that the existing law is not sufficient and support for legislative change. A clear majority of respondents (96%) agreed that a specific offence of domestic abuse should be created. The further comments made by those supporting the proposal raised a broad range of issues, including that: the creation of an offence will assist with raising public awareness and in educating the public as to the range, pattern and severity of behaviours that can equate to domestic abuse, and that such abuse is intolerable and an offence which society takes very seriously. It was also hoped that creating a specific offence could help bring an end to a 'victim blaming' culture in making clear the law criminalised the behaviours that equate to domestic abuse.

2.5 In framing any offence, a number of respondents referenced the work on 'Coercive Control' by Professor Evan Stark<sup>2</sup> and suggested it would provide a useful starting point for deciding which behaviours that are not currently criminalised should be covered by any offence. A number of respondents identified a range of core principles that should be applied when developing any legislation. These included that it should be:

- gender-based in line with the Scottish Government's commitment to preventing and eradicating violence against women and girls; and
- take account of the psychological harm caused by the abusive behaviour, including on children or young people.

2.6 In terms of the specific types of behaviour which should be included the most frequently made suggestions were:

- deprivation of liberty/autonomy;
- isolating an individual from friends, family and wider society;
- withholding or controlling access to resources, including money;
- psychological control and manipulation;
- threats and creation of a climate of fear, including threats towards children; and
- controlling or withholding access to health care, education or employment opportunities.

2.7 The majority of respondents (67%) thought that any specific offence of 'domestic abuse' should be restricted to people who are partners or ex-partners. Those who thought that the offence should be restricted most frequently pointed to the dynamics of an intimate partner relationship being different to that of other relationships. A number also felt it was important to keep a clear focus on domestic

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<sup>2</sup> See for example [http://www.stopvaw.org/uploads/evan\\_stark\\_article\\_final\\_100812.pdf](http://www.stopvaw.org/uploads/evan_stark_article_final_100812.pdf)

abuse within the broader understanding of gender inequality and gender-based violence and coercive control. A concern was that extending the legislation to cover other familial relationships could lead to a dilution and diminution of the understanding of and response to domestic abuse.

2.8 Respondents who thought the offence should cover all familial relationships tended to focus on the prevalence of, and need to address, all abuse that occurs within a family. Further comments included that, although there can be differences in the motivation of the perpetrator of abuse, many of the abusive techniques are similar and there can be a similar 'power dynamic'. A number of these respondents went on to comment specifically on the need to protect children.

2.9 More details of the responses received is contained in the independent analysis of responses to that consultation, which was published by the Scottish Government in October 2015 and can be viewed on the Scottish Government website at: <http://www.gov.scot/Publications/2015/10/7350/3>

## Developing a draft offence

### *Summary*

3.1 In developing a specific offence, we have paid particular attention to a point made by many respondents to the earlier consultation that while it is possible to prosecute individual incidents of, for example, assault or threatening behaviour that occur in the context of an abusive relationship under the existing law, it is not ordinarily possible to prosecute an abuser for what could be described as “coercive control” or “intimate terrorism”, i.e. continuous or recurring emotional or psychological abuse within an intimate relationship.

3.2 The exact point at which behaviour that might be considered “controlling” should result in a breach of the criminal law, or what amounts to “coercive” behaviour, are issues on which there will understandably be a range of views. While some behaviour is of a kind that any reasonable person would consider it abusive, such as assault or threats of violence, the point at which, for example, belittling comments, threats made in the heat of an argument or an unequal approach to financial decision-making can be said to amount to psychological abuse or coercive and controlling behaviour is one on which there will be a range of opinion, and which may depend on, for example, the wider context in which the behaviour occurs.

3.3 Providing for an offence of this nature in a way that has the necessary degree of legal certainty – i.e. that is sufficiently precise that the courts will be able to give effective meaning to it and clear enough to enable people to know what behaviour is unlawful - is challenging.

3.4 Most criminal offences achieve legal certainty by setting out that particular conduct constitutes a criminal offence, if accompanied by a particular mental element (e.g. intent or recklessness) on the part of the perpetrator. With domestic abuse, there is such a range of behaviours that could form part of a pattern of abuse that specifying particular conduct would be extremely difficult and it is almost inevitable that some behaviours which amount to domestic abuse would be missed out. Therefore, the approach we have taken in developing the draft offence has been to define such abuse by reference to the effects which it has or is likely to have on the victim, rather than the particular kind of conduct which the perpetrator engages in.

3.5 Terms such as “coercive control” or “coercive and controlling behaviour” are widely used in academic writing on domestic abuse. We have found that literature helpful in developing the draft offence; however, after consideration we have decided that these terms are not sufficiently precise to achieve legal certainty within a legislative context. For example, there is a degree of overlap in the ordinary dictionary meanings of “coercive” and “controlling”, and there are behaviours that we would wish to be caught by the offence that may be neither “coercive” nor “controlling” but which are certainly “abusive”.

3.6 The approach taken in the draft offence is to refer to behaviour which is “abusive” and then define that to include descriptions of the typical effects of being subjected to ongoing coercive control (see further detail below). We consider this



approach will assist the police, prosecutors and the courts to interpret and enforce the offence effectively. We also consider this approach will assist those who may be subject to domestic abuse to have confidence that the criminal law offers them protection.

### *Scope of the offence*

3.7 We considered that two different broad approaches to developing the scope of the offence are possible.

3.8 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.

3.9 The second approach, which we have taken with the draft offence that we are seeking views on in this consultation, 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.

3.10 Our reason for taking this second approach is that, where the criminal conduct in question consists of an on-going 'campaign' of abuse which may comprise physical and or sexual assaults, threats, the placing of unreasonable restrictions on the victim's day-to-day life and acts intended to humiliate or degrade the victim, we consider there is a strong case for allowing the prosecution the flexibility to treat it as all "of a piece" and enabling the entire ambit of an offender's abusive behaviour to be libelled within a single offence, where considered appropriate to do so. The alternative would require that certain aspects of a course of conduct amounting to domestic abuse *must* be libelled as separate offences because they fall outwith the scope of the 'domestic abuse' offence.

**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?**

### *General structure of the offence*

3.11 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.

3.12 The offence is committed where a reasonable person would consider the behaviour would be likely to cause B to suffer physical or psychological harm. It

should be noted that this is slightly different from the “reasonable person” test used in, for example, the offence of threatening or abusive behaviour at section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, which requires that the behaviour is of a kind that a “reasonable person” would be caused fear or alarm. Instead the test is whether a reasonable person would think that the *victim* would suffer physical or psychological harm.

3.13 We consider 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. Courts require some basis on which to decide these matters and in the absence of an objective test the court would have to take into account the subjective reaction of the victim and evidence of this would be required. A further disadvantage of a subjective approach is that where a victim is stoical and does not exhibit obvious distress (even where it would be quite reasonable for them to do so) a court may not feel able to convict.

3.14 The offence is committed where the accused either intends to cause the victim to suffer physical or psychological harm, or else is reckless as to whether their actions would cause such harm. This is intended to reflect the fact that in some abusive relationships, the accused may argue, and indeed may genuinely believe, that they did not intend to harm their partner. Where the accused’s actions are such that, irrespective of their intent, they were clearly reckless as to whether their actions would cause physical or psychological harm, the prosecution would not be required to prove that it was the accused’s *intent* to cause such harm.

**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?**

*Definition of ‘abusive behaviour’*

3.15 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 using for example, assault, threatening and abusive behaviour or breach of the peace. However, as noted above, in individual cases, it may be that the prosecution consider 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.

3.16 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. It provides that behaviour is abusive if it has as its purpose, or is likely to have the effect of:

- making a person ("B") dependent on, or subordinate to, another person ("A");
- making B isolated from friends, relatives or other sources of support;
- controlling, regulating or monitoring the day-to-day activities of B
- making B feel frightened, humiliated or degraded; or
- punishing B.

3.17 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. We do not seek here to list all the possible ways in which a person could be coerced and controlled in an abusive way; 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 and this can include behaviours that are not specifically listed above but which the court may consider "abusive", for example:

- preventing their partner from making contact with family;
- checking or controlling their partner's use of their phone or social media;
- preventing their partner from attending work/college;
- taking control of their partner's finances;
- forcing their partner to leave or change their religion;
- engaging in abusive name-calling;
- controlling access to toilet;
- making their partner eat food off the floor.

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

*Relationships to which the offence applies*

3.18 We consider that the offence should be restricted to people who are partners or ex-partners. This is because we would suggest that there is a particular dynamic to abuse of a person's partner or ex-partner which differs from violence or abuse which may occur within a family between, for example, siblings, or between parents and children, where long-standing legislation concerning child abuse can be used to prosecute parents or guardians who neglect or abuse children in their care.

3.19 We have adopted the approach to describing the relationships caught by the offence 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. We are aware that questions have been raised about the extent to which this definition applies to people who have been in relatively short-term relationships where they did not co-habit and would welcome views on whether there is a need to use a wider definition in this offence. However, if the offence is to be meaningfully focused on domestic abuse, we consider it is also important that the definition is not so wide as to effectively cover all abuse or harassment between any two people.

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

*Defences to the offence being committed*

3.20 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. While we would not suggest that it would ever be reasonable for a person to be “abusive” towards their partner or ex-partner, 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, for example because they reasonably believed that their actions were necessary to protect themselves, their partner or other family members from harm. As such, we consider it is appropriate for such a defence to be included.

3.21 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. We have chosen to provide for this within the draft offence to provide clarity about the burden of proof in establishing the defence.

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

*Penalties*

3.22 We propose that the maximum penalty on conviction on indictment is 10 years imprisonment, reflecting the fact that it may be appropriate to try the most serious cases of abuse in the High Court.

3.23 The draft offence covers a wide spectrum of offending behaviour and at the less serious end, it may be considered appropriate for prosecutors to decide to prosecute some cases in the summary court. By way of general comparison, the maximum penalty for the offences of threatening or abusive behaviour and stalking is 5 years imprisonment, but we consider 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?**

*Power to convict for alternative offences*

3.24 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.

3.25 For example, the offence of ‘stalking’ at section 39 of the Criminal Justice and Licensing (Scotland) Act 2009 provides that, if the court is not satisfied that the accused committed an offence of ‘stalking’ (which requires a course of conduct comprising at least two separate incidents), but is satisfied that the accused committed an offence of threatening and abusive behaviour, the court may convict the accused of that alternative offence.

3.26 The draft ‘domestic abuse’ offence can be seen as being similar to the offence of ‘stalking’ in that it is an offence which requires the prosecution to prove that the accused engaged in a course of conduct comprising behaviour on at least two separate instances. There may be 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 – for example, threatening and abusive behaviour or common law assault, but is not satisfied that the accused engaged in such conduct on more than one occasion and therefore cannot convict for the domestic abuse offence.

3.27 For this reason, we consider it may be appropriate 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 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 it is probably not possible to create an entirely exhaustive list. However, we 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.

3.28 We have not made provision for such a list of alternative offences in this draft offence, but would welcome views on whether it would be appropriate to do so, and if so, what offences should be included in any such list.

**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’?**

**Question 8: Do you have any other comments on the draft offence attached to this consultation?**

## **Draft offence**

### **1 Abusive behaviour in relation to partner or ex-partner**

- (1) A person (“A”) commits an offence if—
  - (a) A engages in a course of behaviour which is abusive of 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 B to suffer physical or psychological harm, or
    - (ii) A is reckless as to whether the course of behaviour causes B to suffer 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 or psychological 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).

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

- (1) For the purposes of section 1, behaviour which is abusive of B includes, in particular—
  - (a) behaviour directed at B that is violent, threatening or intimidating,
  - (b) behaviour directed at B or any other person—
    - (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.
- (2) Those effects are—
  - (a) making B dependent on, or subordinate to, A,
  - (b) making B isolated from friends, relatives or other sources of support,
  - (c) controlling, regulating or monitoring the day-to-day activities of B,
  - (d) making B feel frightened, humiliated or degraded, or

- (e) punishing B.

### **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 person is A’s partner if they 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 behaviour includes sexual violence as well as physical violence.



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