"The Creation of A Specific Offence of Domestic Abuse - Proposed Associated Reforms to Criminal Procedure"

Response by the Glasgow Bar Association

The Glasgow Bar Association ("the GBA") welcomes the opportunity to comment upon the proposals to reform four areas of the Criminal Procedure Scotland Act 1995 ("the 95 Act") as it relates to the specific offence of domestic abuse We note however that these proposals extend beyond the suggested new domestic abuse offence (pursuing a course of behaviour which is abusive to their partner or ex-partner) but would also apply when a domestic abuse aggravator has been added to an offence. Provision for a domestic abuse aggravator was made by Section 1 of The Abusive Behaviour and Sexual Harm (Scotland Act) 2016. The domestic abuse aggravator will mean that offences associated with domestic abuse, but not fitting the specific terms of the domestic abuse offence (e.g. where it consists of a single incident and there is no course of conduct) will officially be labelled as an offence associated with domestic abuse. It is observed that at present any convictions arising from domestic offences (ie involving a partner or ex-partner) will appear on a person's schedule of convictions with a "domestic" identifier attached.

1.New Standard Bail Condition

A new standard condition of bail is proposed which would prohibit an accused person, when charged with a domestic abuse offence, from obtaining precognitions or statements from a complainer except through a solicitor.

The standard conditions of bail are listed at Section 24(5) of the Criminal Procedure (Scotland Act) 1995. The standard conditions of bail include a condition that the accused offences, does not interfere with witnesses or behave in such a way which would cause alarm or distress . An additional standard condition of bail applies in sexual offence cases (as listed in section 288C of the 95 Act) which prohibits the accused from seeking to obtain precognitions or statements concerning the subject matter of the offence from the complainer, other than by way of a solicitor.

We are not aware of any significant number of domestic cases in which an accused has attempted to obtain a statement or precognition from a complainer directly and comment that the courts at present , in addition to the standard bail conditions of bail, regularly impose additional special conditions of bail which seek to prevent an accused person from contacting, approaching ,or attempting to contact or approach the complainer or other witnesses.

In respect of the cases prosecuted at present within the domestic abuse courts in Glasgow prosecutors almost invariably seek special conditions of bail designed to prevent an accused person from contacting or approaching the complainer and indeed invariably seek a condition requiring them to reside at an address separate to that of the complainer, until the

proceedings have been concluded. The court however can of course refuse such a request by the prosecutor and impose standard conditions of bail (allowing the accused and complainer to continue to have contact and on occasion continue to reside at the same address). There can be a variety of sound reasons why prohibiting contact and requiring parties to reside separately is not appropriate in a particular case (e.g. the complainer adamantly does not wish such conditions, the accused is required to assist with childcare, is required to care for a complainer who has health difficulties or simply that there has been such a passage of time between the alleged incidents and prosecution and the accused and complainer have continued to have contact - rendering such enforced separation inequitable).The GBA offer these examples to illustrate that bail conditions in domestic abuse cases prohibiting contact between the accused and the complainer are not always appropriate.

However, the GBA agrees that a new standard condition of bail prohibiting an accused person from obtaining statements or precognitions from a complainer, except through a solicitor, has merit. In cases where there may be the likelihood of an accused person using the processes of the justice system to exert undue influence and control over the complainer such a provision can assist and, given that the GBA see merit in the proposal to prevent an accused person in a domestic abuse case from conducting their own defence, it would seem appropriate that the engathering of statements or the taking of precognitions from the complainer, associated to such a trial, should be through a solicitor. Such a provision would not impact upon the situations outlined above where contact between the parties is, notwithstanding the court proceedings, continuing and would underline that the formal preparation for trial must be done by a solicitor and would underline the formality and gravity of the court process.

2. Accused Persons Conducting Their Own Defence

It is proposed that an accused person charged with a domestic abuse offence be banned from conducting their own defence.

At present Sections 288C, 288E and 288F of the 95 Act contain provisions prohibiting an accused person from conducting their own defence. Section 288C imposes the ban in relation to certain sexual offences, Section 288E does so in relation to certain serious offences involving child witnesses under the age of twelve and Section 288F empowers the court to prohibit an accused from conducting their own defence where a vulnerable witness is to give evidence. When such circumstances apply the court must notify the accused that the hearing must be conducted by a solicitor and Section 288D of the 95 Act provides that the court may appoint a solicitor for this purpose. Under Section 22(1) (dd) of the Legal Aid (Scotland) Act 1986 legal aid is automatically available where Section 288D applies. It is recognised that, at present, in certain cases prosecuted in the domestic courts, a vulnerable witness application may be granted bringing the terms of Section 288F and Section 288D into play. It is also recognised that if a new domestic abuse offence is enacted complainers under such an offence might be deemed vulnerable witnesses. The current proposal would bring uniformity of approach in all domestic abuse cases.

Whilst again we have not aware of information which would suggest a particular difficulty with accused conducting their own defence in domestic abuse cases the GBA acknowledges that in some cases there could be a risk of the accused using the trial process to intimidate the complainer and a prohibition on an accused conducting their own defence would be an appropriate continuum to the ban on an accused obtaining precognitions or statements except through a solicitor.

3.Expert Evidence relating to the Behaviour of the Complainer

It is proposed to allow the introduction of expert evidence relating to the behaviour of the complainer in domestic abuse offence cases.

At present in criminal trials assessing a witness's credibility is a matter for the jury and the evidence of expert witnesses regarding normal human nature and behaviour is usually inadmissible, and evidence as to the credibility of a witness is generally not admissible unless it is also relevant to a fact in issue at the trial. The proposal to allow expert evidence in respect of the behaviour of a complainer in a domestic case mirrors the provision introduced by Section 275C of the Criminal Procedure Scotland Act 1995 in respect of sexual offence cases (to allow expert evidence to rebut any inference adverse to the complainer's credibility or reliability as a witness which might otherwise be drawn from her or his behaviour or statements after the offence has been committed). This is an exception to the usual rule that the credibility or reliability of any witness is a matter for the jury.

We imagine that such a proposal is primarily intended to apply in solemn cases but, as stated, the proposal would also extend to summary cases. We question whether a sheriff presiding alone in summary proceedings requires the assistance of expert evidence to reach a decision on the facts and circumstances of the case before him or her and, whether a jury, bringing their collective knowledge and experience of human behaviour to a solemn case requires such expert evidence. Issues, for example, of why a complainer may have chosen to remain within a relationship during which domestic abuse is said to have occurred, can be addressed in examination in chief by a prosecutor and it is submitted that a complainer answering " I chose to remain for the sake of the children" is something which a jury might readily understand without the need for expert evidence. We also have concerns about the intended scope of such evidence. In our experience the expert evidence allowed in sexual offence cases has largely been directed to issue of delayed reporting or disclosure of sexual abuse. Indeed it is understood that in many instances the crown and defence can agree by joint minute that complainers in sexual offence cases often delay for many years disclosing such abuse. It is not clear to us the nature and extent of expertise which could be offered. We would welcome the publication of a full literature review in respect of the research conducted in this area. We also observe that the introduction of such expert evidence could significantly lengthen the trial process: not least because the admission of such expert evidence for the crown is likely to lead to applications by the defence to lead expert evidence in rebuttal. In short we question why this proposed reform is considered necessary.

4.Mandatory consideration of a Non - Harassment Order Upon Conviction

It is proposed that the court will be required to always consider whether to impose a non - harassment order following an offender being convicted of a domestic offence. Again it is noted that the proposal is such a provision would be made both for the intended new domestic offence (pursuing a course of behaviour which is abusive to a partner or ex-partner) and in respect of any domestic offence with a domestic aggravator. At present Section 234A of the Criminal Procedure Scotland Act 1995 provides that a court may make a non-harassment order if satisfied "on the balance of probabilities" it is appropriate to do so to protect the complainer from harassment. At present a prosecutor requires to make such an application. By virtue of the Criminal Justice and Licensing Scotland Act 2010, amending the terms of Section 234A of the 95 Act, it is not necessary for an accused to have been convicted of an offence which in itself involved conduct on more than one occasion. We appreciate that the proposal is not that a Sheriff or Judge must impose a non-harassment order in every case but instead that when sentencing it will be necessary to consider such an order in every case and state, if one is not imposed ,why it is not considered appropriate. Again we would welcome clarification of why such a reform is considered necessary and would welcome the publication of statistics in respect of the number of domestic cases in which the absence of an application by the prosecutor for a non-harassment order has impeded the proper disposal of the case. In our experience Sheriffs will readily ask a prosecutor, in appropriate cases if a non-harassment order is sought.

We have some concerns about how it is intended, in every case, that the prosecutor will be equipped to advise the sheriff of the full information they may require in order to reach such a decision in respect of a non-harassment order as the views of the complainer will always be an overriding consideration. Is it intended in every case, upon a prosecution being raised that every complainer will be asked their views on the imposition of a non-harassment order? At the present time prosecutors equip themselves with the necessary information before making such an application. It is envisaged that in order to reach such a decision Sheriffs may require Criminal Justice Social workers to conduct an assessment when background reports are being obtained before sentencing. One of the reasons for the proposal is to "ease the administrative burden upon prosecutors". We wonder if such burden of furnishing the court with such information will simply be passed to other personnel within the criminal justice system. We note that this proposal is made to strengthen the use of NHO and to "ensure the protection needs of victims are always directly considered by the courts". Sheriffs are already obliged to state their reason for imposing a particular sentence and it is clear to us that Sheriffs already carefully consider issues of public protection and the protection of complainers in domestic cases and indeed in every case.