



Law Society
of Scotland

Consultation Response

Scottish Government – The Creation of a Specific
Offence of Domestic Abuse – Proposed Associated
Reforms to Criminal Procedure

December 2016



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Criminal Law Committee welcomes the opportunity to consider and respond to the Scottish Governments consultation: "The Creation of a Specific Offence of Domestic Abuse: Proposed Associated Reforms to Criminal Procedure". The Committee has the following comments to put forward for consideration.

General Comments

By way of background, in June 2015 the Society provided a written response¹ to the Scottish Government Consultation titled "Equally Safe - Reforming the criminal law to address domestic abuse and sexual offences"². In March 2016, the Society provided a written response³ to the Scottish Government Consultation on "A Criminal Offence of Domestic Abuse"⁴.

During the Bill passage of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, the Society provided written and oral evidence to the Justice Committee, and written briefings to all MSPs⁵.

We make specific reference to the policy objectives of the consultation and, as previously stated, we welcome measure which helps improve how the justice system responds domestic abuse.

¹ <https://www.lawscot.org.uk/media/538818/crim-equally-safe-reforming-the-criminal-law-to-address-domestic-abuse-and-sexual-offences.pdf>

² <http://www.gov.scot/Publications/2015/03/4845>

³ <https://www.lawscot.org.uk/media/745236/consultation-response-criminal-offence-of-domestic-abuse-march-2016.pdf>

⁴ <https://consult.scotland.gov.uk/criminal-law-and-sentencing-team/criminal-offence-domestic-abuse>

⁵ [https://www.lawscot.org.uk/for-the-public/law-reform-consultations-and-bills/bills-201516/abusive-behaviour-and-sexual-harm-\(scotland\)-bill/](https://www.lawscot.org.uk/for-the-public/law-reform-consultations-and-bills/bills-201516/abusive-behaviour-and-sexual-harm-(scotland)-bill/)

Specific comments on the proposals

We should like to provide the following specific comments to the proposals as set out in the consultation paper.

Protection prior to and during Trial: Bail Conditions

We note that a new standard bail condition is proposed which prohibits an accused, when charged with domestic abuse offences, from obtaining precognitions or statements from a complainer except through a solicitor. Section 24(5) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) sets out the standard set of bail conditions applicable in all cases where an accused individual is released on bail. Where an accused individual is charged with certain sexual offences, there exists a standard bail condition preventing the accused from obtaining, other than by way of a solicitor any statement or precognition from the complainer in preparation of their defence⁶.

The Society is supportive of the proposal to introduce a similar bail condition in cases of alleged domestic abuse as it provides clarity to the existing standard bail conditions which prevent the accused from interfering with witnesses, or acting in a manner which is likely to cause a witness alarm and distress.

In cases of alleged domestic abuse, we note that prosecutors tend to seek, and that courts often grant further special conditions of bail to prevent the accused from approaching or contacting the complainer.

Protection during Trial: Accused person conducting their own defence

The proposal seeks to prohibit⁷ accused individuals from conducting their own defence case when they are charged with domestic abuse offences. We note that the prohibition already exists in circumstances related to certain sexual offences (section 288C of the 1995 Act), in certain serious offences involving child witnesses under the age of 12 years old (section 288E of the 1995 Act), or in certain cases involving vulnerable witnesses (section 288F of the 1995 Act).

⁶ Section 24(5)(e) of the 1995 Act.

⁷ At page 7 of the Scottish Government Consultation Document - “The Creation of a Specific Offence of Domestic Abuse – Proposed Associated Reforms to Criminal Procedure.”

The Society is supportive of the proposal however notes that if it is extended to cases of alleged domestic abuse, it is likely that there could be a significant increase in the number of cases⁸ where the prohibition could apply, and where courts may be required to make an appointment.

In addition, the eligibility criteria for resourcing and legal aid may require to be considered. For example, in the situation where an accused has the financial means to pay for a solicitor to conduct their defence but either has not engaged a solicitor, or having engaged a solicitor has dismissed the solicitor, or the solicitor has withdrawn and where the court is not satisfied that the accused intends to engage a solicitor, then the court may appoint a solicitor to conduct the defence case. At present under the provisions of section 288 of the 1995 Act, where legal aid is granted under a court appointment, no consideration is given to the financial means of the accused and in both solemn and summary cases legal aid accounts are paid by the Scottish Legal Aid Board on a time and line basis. We believe the proposal could have a financial impact for Legal Aid purposes and consideration may be required as to whether those fees would be met under Legal Aid without any enquiry into means.

Protection during Trial: Expert evidence relating to the behaviour of the complainer

The proposal allows for the introduction of expert evidence relating to the behaviour of the complainer in domestic abuse cases. The consultation refers to this evidence as being of use to the “court/jury”, which implies that such expert evidence could be led in a case prosecuted on summary complaint or on solemn indictment.

We question whether this provision should only apply where a case is being tried on indictment. If experts were called in a number of summary prosecutions, there would be resource implications. For example, if the Crown leads an expert relating to the behaviour of the complainer as part of the prosecution case, the solicitor acting on behalf of an accused may be required to consider instruction of an independent expert to prepare a report to lead rebuttal evidence as part of the defence case.

We note that a similar provision already exists in respect of certain sexual offences (section 275C of the 1995 Act). Section 275C allows the introduction of expert evidence to rebut any inference adverse to the complainer's credibility or reliability as a witness which might otherwise be drawn from their behavior or statements after the offence was committed. This is an exception to the general rule that the credibility or reliability of the witness is a matter for the jury (solemn) or judge (summary). Evaluation of the impact of section 275C of the 1995 Act would be welcome, in particular: the number of cases; types of cases; the types of behaviour the expert witnesses have been called to comment upon; the forum where such expert evidence was led; whether an independent expert was instructed and rebuttal evidence led in respect of the defence case.

⁸ For example, [see statistics published on the number of domestic abuse cases reported to COPFS in 2015-2016](#).

If this proposal for reform were to be adopted consideration of any resource and legal aid implications will be required, particularly if such expert evidence could be led in both summary and solemn prosecutions.

Protection after Trial: Mandatory consideration by the court of a Non-Harassment Order

The proposal seeks to introduce a mandatory requirement for the court to consider imposition of a non-harassment order (NHO) in all cases where an offender is convicted of a domestic abuse offence. This is not an automatic grant, but a requirement for the Sheriff or Judge to consider imposition of an NHO at sentencing stage and give reasons for their decision.

The Society is supportive of the proposal which could reduce administrative burden for the prosecution and provide some clarity at sentencing in terms of one available option.



For further information, please contact:

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