

# The sentencing of offences involving domestic abuse in Scotland

## Literature Review

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## Table of Contents

<b>1.0 Domestic Abuse in Scotland</b> .....	2
<b>1.1 The policy framework</b> .....	2
<b>1.2 The legal framework for responding to domestic abuse</b> .....	3
<b>1.2.1 The Criminal Justice and Licensing (Scotland) Act 2010</b> .....	3
<b>1.2.2 Abusive Behaviour and Sexual Harm (Scotland) Act 2016</b> .....	4
<b>1.2.3 Domestic Abuse (Scotland) Act 2018</b> .....	6
<b>1.2.4 Charging decisions</b> .....	9
<b>2.0 Sentencing Framework in Scotland</b> .....	12
<b>2.1 Statutory sentencing penalties</b> .....	12
<b>2.2 Proceedings</b> .....	12
<b>2.3 Penalties</b> .....	15
<b>2.4 Use of offender programmes in sentencing</b> .....	19
<b>2.5 Risk factors related to domestic abuse and homicide</b> .....	21
<b>2.6 Review of sentencing in the Scottish Court of Criminal Appeal</b> .....	24
<b>3.0 Sentencing Framework in England and Wales</b> .....	29
<b>3.1 The Serious Crime Act 2015 Section 76</b> .....	29
<b>3.2 Sentencing Domestic Abuse in England and Wales: Key Guideline Features</b> .....	31
<b>3.3 A Brief Note on Official Data and Comparisons with Scotland</b> .....	33
<b>4.0 Experiences of Domestic Abuse Complainers</b> .....	36
<b>4.1 Key Factors Impacting the Experience of Complainers in Domestic Abuse Cases in Scotland</b> .....	36
<b>4.2 Implications of the COVID-19 Pandemic on the Experience of Domestic Abuse Complainers</b> .....	42
<b>5.0 Specialised Domestic Abuse Courts</b> .....	44
<b>5.1 Specialised Domestic Abuse Courts in Scotland</b> .....	44
<b>5.2 Case Types, Convictions and Sentencing in Specialist Domestic Abuse Courts</b> ...	46
<b>5.3 Other Models of Specialist Domestic Abuse Courts</b> .....	48
<b>6.0 Public Perceptions</b> .....	50
<b>6.1 Scottish Social Attitudes Survey 2019: attitudes to violence against women</b> .....	50
<b>6.2 Sentencing Domestic Abuse Research</b> .....	51
<b>6.3 Insight from other jurisdictions</b> .....	52
<b>7.0 Conclusion and Recommendations</b> .....	54

This review is intended to provide a coherent overview of the sentencing of offences involving domestic abuse in Scotland. This review follows a period of intense legal and policy change and occurs at the time when the Scottish Sentencing Council is beginning work on sentencing guidelines for offences involving domestic abuse.

## 1.0 Domestic Abuse in Scotland

### 1.1 The policy framework

Legal and policy responses to domestic abuse in Scotland are underpinned by the 'Equally Safe' strategy, developed by the Scottish Government and COSLA<sup>1</sup>. Under this strategy, domestic abuse is situated in the broader context of gender-based violence. The definition of gender-based violence used by Equally Safe is taken from the United Nations Declaration on the Elimination of Violence Against Women<sup>2</sup>:

Gender based violence is a function of gender inequality, and an abuse of male power and privilege. It takes the form of actions that result in physical, sexual and psychological harm or suffering to women and children, or affront to their human dignity, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. It is men who predominantly carry out such violence, and women who are predominantly the victims of such violence. By referring to violence as 'gender based' this definition highlights the need to understand violence within the context of women's and girl's subordinate status in society. Such violence cannot be understood, therefore, in isolation from the norms, social structure and gender roles within the community, which greatly influence women's vulnerability to violence.<sup>3</sup>

Although this position centralises gender inequality, it is not to say that men cannot be the victims of domestic abuse:

A gendered analysis does not exclude men, but rather recognises that women and girls are disproportionately affected by particular forms of violence that they experience because they are women and girls. Many men and boys are victims of violence and abuse. Some boys experience the forms of abuse outlined already in relation to children and young people, whilst some men are victims

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<sup>1</sup> Convention of Scottish Local Authorities.

<sup>2</sup> See United Nations., 1993. *Declaration on the Elimination of Violence against Women*. Available at: <[https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.21\\_declaration%20elimination%20vaw.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.21_declaration%20elimination%20vaw.pdf)> [Last accessed 8 March 2022].

<sup>3</sup> Scottish Government., 2018. *Equally Safe: Scotland's strategy to eradicate violence against women*. Edinburgh: Scottish Government. at p 10.

of domestic abuse, rape, sexual assault, sexual exploitation and forced marriage. The prevailing societal view of what constitutes masculinity makes it difficult for men to identify themselves as experiencing abuse and can prevent them from seeking help. Gay and bisexual men and boys experience violence and abuse that also targets their sexual orientation.<sup>4</sup>

Brooks-Hay and Burman have also reiterated that the gendered approach adopted in Scotland, when considered in the broader context of patriarchy, is relevant to the experiences of lesbian, gay, bisexual, transgendered, intersex and queer individuals.<sup>5</sup>

The broad understanding of domestic abuse adopted by the Scottish Government means that conduct considered as domestic abuse could potentially fall within the definition of a number of different criminal offences.

## 1.2 The legal framework for responding to domestic abuse

### 1.2.1 The Criminal Justice and Licensing (Scotland) Act 2010

Historically, acts of domestic abuse were typically prosecuted under the common law offence of assault or breach of the peace.<sup>6</sup> The Criminal Justice and Licensing (Scotland) Act 2010, which came into force in December 2012, introduced the statutory offences of ‘threatening or abusive behaviour’<sup>7</sup> and ‘stalking’<sup>8</sup>. There had previously been objection to a specific offence of stalking in Scotland<sup>9</sup>, but it was later accepted that a distinct offence was required to capture this specific wrong. The links between stalking and domestic abuse were also recognised. The offence of stalking is committed where a person engages in a course of conduct which causes alarm.<sup>10</sup> Conduct can include following another person, contacting or attempting to contact another person, publishing material related to them, entering premises, loitering, interfering with property, giving another person something, watching or spying or acting in another way which would cause a reasonable person fear or alarm.<sup>11</sup>

Following its introduction, the offence of threatening or abusive behaviour quickly became a common vehicle through which domestic abuse was reported and prosecuted. For example, in 2011-12, 17% of the 59,847 incidents of domestic abuse recorded by the police were recorded as ‘threatening or abusive’ behaviour (44% of

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<sup>4</sup> Ibid, at p 20.

<sup>5</sup> Brooks-Hay, O. and Burman, M., 2018. Understanding, Defining and Measuring Domestic Abuse. Chapter in *Domestic Abuse: Contemporary Perspectives and Innovative Practice*, Brooks-Hay, O., Burman, M. and McFeely, C. (eds). Edinburgh: Dunedin. at p 12.

<sup>6</sup> Connelly, C., 2008. Domestic Abuse. *Scottish Criminal Law* (May) 642.

<sup>7</sup> Section 38.

<sup>8</sup> Section 39.

<sup>9</sup> House of Commons Library., 1996. *Stalking, harassment and the Protection form harassment Bill*. Research Paper 96/115. London: House of Commons. at p 26.

<sup>10</sup> Section 39(2).

<sup>11</sup> Section 39(6).

these incidents were recorded as assault).<sup>12</sup> The offence of threatening or abusive is committed where:

- (a) A behaves in a threatening or abusive manner,
- (b) the behaviour would be likely to cause a reasonable person to suffer fear or alarm, and
- (c) A intends by the behaviour to cause fear or alarm or is reckless as to whether the behaviour would cause fear or alarm.<sup>13</sup>

This offence can be committed by way of a single act or course of conduct.<sup>14</sup> It is a defence that the behaviour in question was reasonable.<sup>15</sup>

## 1.2.2 Abusive Behaviour and Sexual Harm (Scotland) Act 2016

Further legal development came through the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. This Act provides an aggravation to existing offences where the offence relates to the abuse of a partner or ex-partner. For the purposes of the Act, a person is considered to be a partner or ex-partner if they were spouses or civil partners, living together as if spouses or civil partners, or in an intimate personal relationship with one another.<sup>16</sup> An offence is considered to be aggravated if:

- (a) the person intends to cause the partner or ex-partner to suffer physical or psychological harm,
- or
- (b) in the case only of an offence committed against the partner or ex-partner, the person is reckless as to causing the partner or ex-partner to suffer physical or psychological harm.<sup>17</sup>

It is irrelevant for the purposes of proving the statutory aggravation whether or not the victim does in fact suffer physical or psychological harm. However, the presence of harm will be a factor considered by the court during sentencing. Under section 1(5) of the 2016 Act, the court must:

- (a) *state on conviction that the offence is aggravated as described in subsection (1)(a),*

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<sup>12</sup> Scottish Government., 2012. *Domestic Abuse Recorded by the Police in Scotland 2010-11 and 2011-12*. Edinburgh: Scottish Government Statistician Group. at p 5.

<sup>13</sup> Section 38(1).

<sup>14</sup> Section 38(3)(b).

<sup>15</sup> Section 38(2).

<sup>16</sup> Section 1(6).

<sup>17</sup> Section 1(2).

- (b) *record the conviction in a way that shows that the offence is so aggravated,*
- (c) *take the aggravation into account in determining the appropriate sentence, and*
- (d) *state—*
  - (i) *where the sentence imposed in respect of the offence is different from that which the court would have imposed if the offence were not so aggravated, the extent of and the reasons for that difference, or*
  - (ii) *otherwise, the reasons for there being no such difference.*

The issue of whether any difference made to a sentence by an aggravation should be recorded and stated has been a matter of wider debate. For example, in considering hate crime legislation, it was noted that:

Others, including some legal bodies, argued that sentencing was already a complex process and that disaggregating sentences was not always realistic or helpful and potentially left sentences open to criticism or appeal. This reflected some disquiet about this requirement which had been expressed to the review at an earlier stage by some sheriffs who explained that a sentence is often being adjusted in a number of different directions to take account of, for example, a guilty plea or backdating. They argued that, particularly where other such factors are at play or where the aggravation is at a relatively low level, the overall difference in sentence might be small. Determining a sentence was ultimately a matter of judgement and an overly mathematical approach was not consistent with that. It was not therefore clear what is to be gained from spelling out the precise difference in sentence, and the process in doing so might become misunderstood. Separately, some sheriffs indicated that there was an absence of guidance on the appropriate amount by which to increase the sentence.<sup>18</sup>

The review on hate crime recommended that “there should no longer be an express requirement to state the extent to which the sentence imposed is different from what would have been imposed in the absence of the aggravation.”<sup>19</sup>

In light of these possible challenges, case law has clarified how the provision to state the difference ought to operate:

*Although the exercise may be somewhat artificial in some, particularly severe, cases, the statute envisages the court either:*

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<sup>18</sup> Scottish Government., 2018. *Independent Review of Hate Crime Legislation in Scotland: Final Report*. Available at: <<https://www.gov.scot/publications/independent-review-hate-crime-legislation-scotland-final-report/>> [Accessed 8 March 2022]. at para 3.62.

<sup>19</sup> *Ibid*, at p 30.

- (i) *contemplating what sentence might have been imposed for a similar crime in a non-domestic setting and then increasing it to take account of the aggravation; or*
- (ii) *explaining why it is not doing so.*<sup>20</sup>

Comparisons can be made with the position as it relates to “sentence discounts.”<sup>21</sup> However, a notable difference is that there is little approximating the broad guidance around section 196 which has emerged in a series of cases, including *Gemmell v HM Advocate* which suggests various possible sentence adjustments.<sup>22</sup>

### 1.2.3 Domestic Abuse (Scotland) Act 2018

On 1 April 2019, the Domestic Abuse (Scotland) Act 2018 came into force in Scotland. Section 1 of the Act provides the specific offence of abusive behaviour towards a partner or ex-partner. This offence is committed if:

- (a) the person (“A”) engages in a course of behaviour which is abusive of A’s partner or ex-partner (“B”), and
  - (b) both of the further conditions are met.
- (2) The further conditions are—
- (a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,
  - (b) that 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.
- (3) In the further conditions, the references to psychological harm include fear, alarm and distress.

In respect of section 1 of the Act, corroboration is not required for each separate incident specified in the libel.<sup>23</sup>

Section 2 of the Act provides further guidance on what constitutes abusive behaviour, noting that it includes (in particular):

<sup>20</sup> *Rizzo (Keith) v HM Advocate* 2020 S.C.C.R. 397. Rizzo, who had a history of domestic abuse, was convicted of the murder of his partner, Neomi Smith.

<sup>21</sup> Criminal Procedure (Scotland) Act 1995, section 196.

<sup>22</sup> 2012 J.C. 223.

<sup>23</sup> *Procurator Fiscal, Livingston v H(J)* [2021] WLUK 173.

- (2) 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, at a child of B or at another person that either—
    - (i) has as its purpose (or among its purposes) one or more of the relevant effects set out in subsection (3), or
    - (ii) would be considered by a reasonable person to be likely to have one or more of the relevant effects set out in subsection (3).
- (3) The relevant effects are of—
- (a) making B dependent on, or subordinate to, A,
  - (b) isolating B from friends, relatives or other sources of support,
  - (c) controlling, regulating or monitoring B's day-to-day activities,
  - (d) depriving B of, or restricting B's, freedom of action,
  - (e) frightening, humiliating, degrading or punishing B.

The meaning of partner or ex-partner adopted by the 2018 Act is the same as the understanding adopted by the Abusive Behaviour and Sexual Harm Act 2016: Spouses or civil partners, those living together as if spouses or civil partners, and those in an intimate personal relationship.<sup>24</sup> The existence of the relationship will be taken to as established unless challenged.<sup>25</sup>

Section 4(3) of the 2018 Act specifically enables evidence to be led of harms actually suffered or the effects actually had upon a victim.

Under section 5 of the Act, it is an aggravation that the commission of the offence is directed at a child or that a child is used in the behaviour directed towards the complainer.<sup>26</sup>

The Act contains a defence that the behaviour in question was reasonable in the circumstances.<sup>27</sup> In the explanatory notes which accompany the Act, it is provided that this defence may apply:

[W]here, for example, the accused acted in order to protect the household finances where their partner is suffering from a gambling addiction, or to prevent their partner from associating with certain persons or frequenting certain places

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<sup>24</sup> Section 11(2).

<sup>25</sup> Section 7(1).

<sup>26</sup> Section 5(2).

<sup>27</sup> Section 6.



if they are recovering from alcohol or drug addiction, or to restrict the freedom of movement of a partner who is suffering from dementia.<sup>28</sup>

The offences of stalking and threatening or abusive behaviour are both competent alternatives to a charge under section 1 of the 2018 Act.<sup>29</sup> A charge of threatening or abusive behaviour (section 38) does not require a course of conduct like a charge under section 1 of the 2018 Act. Therefore, if in proceedings for a section 1 offence under the 2018 Act, a course of conduct is not proven, but at least one occasion of threatening or abusive behaviour is proven, then a conviction under section 38 is possible. In such circumstances, a section 1 aggravation under the 2016 Act may be attached.

In terms of section 39 stalking offences, unlike offences under the 2018 Act, these do not require the victim to have been a partner or ex-partner. While there is, a presumption in section 7 of the 2018 Act that the victim is a partner or ex-partner, this is rebuttable. Therefore, where the relationship between the victim and the offender is not established, a section 39 offence may still be applicable.

Where there is a conviction under the 2018 Act, the court must consider whether a non-harassment order is also necessary.<sup>30</sup> Where such an order is not made, the court is required to make clear its justification for that decision.<sup>31</sup>

Unusually, the 2018 Act imposes a reporting requirement on Scottish Ministers.<sup>32</sup> This report must provide information on proceedings, convictions and the use of non-harassment orders for offences under section 1 of the 2018 Act and section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.

The Scottish approach to criminalising domestic abuse has been well received. CEO of Scottish Women's Aid, Marsha Scott has noted that Scotland has been an "early adopter of Evan Stark's critique of the 'violent incident' model of domestic abuse and his paradigm of coercive control."<sup>33</sup> For her, framing an offence around a course of behaviour, rather than an incident, is innovative, especially when doing so alongside a reasonable person test and *mens rea* which includes recklessness.<sup>34</sup> She concludes by commenting that the Act's implementation "heralds a new stage in which Scotland has the opportunity to transform institutional responses and demonstrate the difference legislation can make in the lives of the Scottish people."<sup>35</sup> Vanessa Bettison

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<sup>28</sup> Note 42.

<sup>29</sup> Section 8(2).

<sup>30</sup> Criminal Procedure (Scotland) Act 1995, section 234AZA(4).

<sup>31</sup> *Ibid.*

<sup>32</sup> Section 14.

<sup>33</sup> Scott, M., 2020. The Making of the New 'Gold Standard': The Domestic Abuse (Scotland) Act 2018. Chapter in *Criminalising Coercive Control*, M. McMahon and P. McGorrey, (eds), Singapore: Springer. at p 179.

<sup>34</sup> *Ibid.*, at p 185.

<sup>35</sup> *Ibid.*, at pp 191-192.

likewise considers the Scottish model to be the “superior model”<sup>36</sup> of those offered across the UK (and Tasmania which she also includes in her comparative evaluation) on the basis that no hierarchy is created by Scottish legislation between physical, sexual and psychological abuse; they are all placed on an equal footing. Bettison also observes that Scottish and Tasmanian offences have greater preventive capacity than others, with there being no need for actual harm.<sup>37</sup>

### 1.2.4 Charging decisions

The 2018 Act aims to provide a more appropriate remedy to the problems presented by certain cases of domestic abuse and better recognise the nature of the conduct. In 2020-2021, 4.7% of all reported cases with a domestic abuse identifier were reported under the 2018 Act.<sup>38</sup> However, other offences (beyond the 2018 Act) remain relevant to the majority of incidents with a domestic abuse identifier. In practice, some offences will more commonly be associated with domestic abuse identifiers than others.

*The most common types of offences reported in 2020-21 with a domestic abuse identifier were breach of the peace type offences (31%, includes threatening and abusive behaviour and stalking offences), common assault (25%) and crimes against public justice (22%, includes bail offences).<sup>39</sup>*

Other offences that may incur a domestic abuse identifier are various sexual offences under the Sexual Offences (Scotland) Act 2009; offences relating to the non-consensual disclosure of intimate images or videos;<sup>40</sup> and homicide.

‘Crimes against public justice’ and ‘vandalism etc’ also account for significant volumes of offences with the domestic abuse identifier. However, when interpreting these figures, it should be noted that the Crown Office and Procurator Fiscal Service (COPFS) reports charges and that a single person may be subject to several charges. Indeed, the COPFS system from which these figures are derived is intended to meet

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<sup>36</sup> Bettinson, V., 2020. A Comparative Evaluation of Offences: Criminalising Abusive Behaviour in England, Wales, Scotland, Ireland and Tasmania. Chapter in *Criminalising Coercive Control*, M. McMahon and P. McGorrey, (eds), Singapore: Springer. at p 214.

<sup>37</sup> Ibid, at p 207.

<sup>38</sup> Crown Office and Procurator Fiscal Service., 2021. *Domestic Abuse and Stalking Charges in Scotland, 2020-21*. Available at: <<https://www.copfs.gov.uk/media-site-news-from-copfs/1976-domestic-abuse-and-stalking-charges-in-scotland-2020-21>> [Last accessed 8 March 2022]. at p 10.

<sup>39</sup> Ibid, at p 4.

<sup>40</sup> Section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 introduced the offence of disclosing, or threatening to disclose, an intimate photograph or film. The maximum sentence on conviction at summary level is 12 months or a fine not exceeding the statutory maximum (or both), and on conviction on indictment imprisonment for a term not exceeding 5 years or a fine (or both). The sentence options are greater than those under the Communications Act 2003. The conduct covered by this offence is sometimes more commonly (though arguably less accurately) referred to as “revenge porn” in the media. For a critique of the ‘revenge porn’ terminology see McGlynn, C. and Radley, E., 2017. Image-Based Sexual Abuse. 37 *Oxford Journal of Legal Studies* 534-561.

needs in the processing of criminal cases, rather than for statistical analysis. Accordingly, the figures noted above must be understood in this light.

Certain offences may account for a smaller number of domestic abuse incidents overall, but a higher proportion of those offences may be associated with domestic abuse. For example, stalking offences can relate to those who are not and never have been partners. However, that being said, stalking offences are commonly committed against partners or ex-partners. Indeed, most stalking offences in 2020-21 were categorised as instances of domestic abuse by COPFS:

*In 2020-21, 1,045 stalking charges under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010 were reported to COPFS. Of these, 592 (57 percent) were identified as domestic abuse.<sup>41</sup>*

A general indication of the variety of domestic abuse offences *not* charged under the 2018 Act is provided by COPFS. In 2020-21 there were 33,425 offences with a domestic abuse identifier reported to COPFS.<sup>42</sup> For the purposes of reporting, COPFS break down these offences into about 30 categories. The conduct captured in these categories is varied, including homicide; rape and attempted rape; urinating; and shoplifting. Moreover, some of these almost 30 categories are themselves rather broad and capable of capturing a wide range of conduct: for example, 'other miscellaneous offences' and 'other'.

For the purposes of a report on sentencing for domestic abuse incidents, this variation precludes simple broad generalisations. This variety is not unique to Scotland. For instance, in an examination of domestic crimes in New South Wales it was found that:

*Domestic violence appears before the courts in many forms, from the most serious assaults to property damage and offensive language. The penalties received for these offences are equally diverse. The factors which influence whether a domestic violence-related assault offender will be sentenced to prison generally reflect the severity of the offence and the criminal history of the offender.<sup>43</sup>*

If there is a common theme to note in Scotland, it is that the presence of domestic abuse as an element of an offence can increase a sentence from whatever it might otherwise have been. This increase to a sentence has a statutory basis. Offences relating to an intimate partner or ex-partner that are not charged under the 2018 Act can be aggravated by the 2016 Act. Indeed, of the 33,425 offences with a domestic

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<sup>41</sup> Ibid, at p 12.

<sup>42</sup> Crown Office and Procurator Fiscal Service., 2021. (n 38) at Table 3.

<sup>43</sup> Ringland, C. and Fitzgerald, J., 2010. *Factors Which Influence the Sentencing of Domestic Violence Offenders*. Crime and Justice Statistics Brief 48.

abuse identifier reported to COPFS, 27,658 carried a statutory aggravator and the vast majority were prosecuted through the courts.<sup>44</sup>

It is clear is that domestic abuse encompasses various and complex types of offending behaviour. Domestic abuse incidents encompass a wide variety of conduct from physical violence to non-physical conduct such as coercive and controlling behaviour. Therefore, while all domestic abuse incidents are a serious matter, some domestic abuse cases are more serious than others in terms of harm caused to victims and the culpability of the offender.<sup>45</sup> The harms perpetrated against victims are equally diverse and range from the physical to the psychological and can be substantial and long-lasting.<sup>46</sup> Although harm is not a prerequisite for an offence to be aggravated by domestic abuse<sup>47</sup>, it may be an important factor in sentencing that the courts must consider alongside the culpability of the offender.

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<sup>44</sup> Crown Office and Procurator Fiscal Service., 2021. (n 38) at Table 4.

<sup>45</sup> Harm and culpability being two factors a court may consider when passing sentence.

<sup>46</sup> Office for National Statistics., 2021. *The Lasting Impact of Violence Against Women and Girls*.

Available at:

<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/thelastingimpactofviolenceagainstwomenandgirls/2021-11-24>> [Accessed 8 March 2022].

<sup>47</sup> For various offences it is not necessary that the victim is harmed, distressed, etc. Instead, a so-called objective test is applied whereby the relevant consideration is whether the conduct would be likely to cause a reasonable person to suffer the defined ill effect (e.g. fear or alarm in the case of section 38).

## 2.0 Sentencing Framework in Scotland

### 2.1 Statutory sentencing penalties

A person who commits an offence under section 1 of the Domestic Abuse (Scotland) Act is liable to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both) when convicted under summary procedure.<sup>48</sup> Where there is a conviction under indictment, they are liable for a term not exceeding 14 years' imprisonment or a fine (or both).<sup>49</sup>

These penalties are significantly higher than those provided for under section 38 or 39 of the Criminal Justice and Licensing (Scotland) Act 2010. Those convicted on indictment are liable to imprisonment for a term not exceeding five years or a fine (or both)<sup>50</sup> and those convicted under summary procedure are liable to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or both)<sup>51</sup>. The penalties available to the offence of stalking under section 39 of the Act are the same as those available for a conviction under section 38.<sup>52</sup>

### 2.2 Proceedings

The following section will present data relating to proceedings and convictions; however, it should be noted that domestic abuse remains a highly under-reported crime and remains one of the most under-reported crimes.<sup>53</sup> Recording problems also relate to crime surveys such as the Scottish Crime and Justice Survey given that many of the behaviours which amount to 'coercive control' are not in and of themselves criminal.<sup>54</sup>

In 2020-21, 33,425 charges were reported to COPFS with a domestic abuse identifier.<sup>55</sup> This represents a 9% increase since 2019-20 and the highest number of since 2015-16.<sup>56</sup> 1, 581 of the charges were reported under the Domestic Abuse (Scotland) Act 2018 (4.7%)<sup>57</sup> and 83% of all domestic abuse charges reported contained a statutory aggravation under the Abusive Behaviour and Sexual Harm (Scotland) Act 2016.<sup>58</sup>

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<sup>48</sup> Section 9(a).

<sup>49</sup> Section 9(b).

<sup>50</sup> Section 38(4)(a).

<sup>51</sup> Section 38(4)(b).

<sup>52</sup> Section 39(7).

<sup>53</sup> Brooks-Hay, O. and Burman, M., 2018. (n 5) at p.15.

<sup>54</sup> Ibid, at p 16. Brooks-Hay and Burman use the example of restricting clothing choice.

<sup>55</sup> Crown Office and Procurator Fiscal Service., 2021. (n 38) at p 1.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid, at p 10.

<sup>58</sup> Ibid, at p 4.

Where there is a decision to prosecute, most charges are prosecuted at sheriff summary level.<sup>59</sup> Table 1 below shows the number of domestic abuse charges received by COPFS between 2013 and 2021 and how each charge was proceeded with:

**Table 1: Domestic abuse charges and proceedings<sup>60</sup>**

Year	Total charges	Court	Direct Measure <sup>61</sup>	No action	No decision	Reporter <sup>62</sup>
2013-14	36,552	31,179	624	3,974	749	26
2014-15	36,667	31,373	733	3,900	638	23
2015-16	34,420	29,556	825	3,280	723	36
2016-17	30,630	26,157	1,381	2,412	661	19
2017-18	30,481	27,073	763	2,007	623	15
2018-19	29,054	26,138	545	1,640	699	32
2019-20	30,718	28,234	530	1,501	402	51
2020-21	33,425	30,727	640	1,392	620	46

Table 2 below shows the same figures for those cases reported under the Domestic Abuse (Scotland) Act 2018 specifically:

**Table 2: Charges and proceedings under the 2018 Act<sup>63</sup>**

Year	Total charges	Court	Direct Measure	No action	No decision	Reporter
2019-20	1,065	1,022	6	16	18	3
2020-21	1,581	1,496	13	28	41	3

As the COPFS report notes, the introduction of the 2018 Act has an impact on the number of stalking charges reported since if an offence contains a course of conduct of domestic abuse, it can now be reported under section 1 of the 2018 rather than

<sup>59</sup> Ibid, at p 3.

<sup>60</sup> Ibid, at p 2 Table 1.

<sup>61</sup> Direct measures include fiscal fines, fiscal compensation orders, fiscal work orders, warning letters and referral to diversion from prosecution schemes. In their report, COPFS clarify “The direct measures figures include charges which were not actioned, but where the accused was given a direct measure in respect of other charges within the same case. In some cases, the charges which were given a direct measure will have included details from the charges which were not actioned.” Ibid, at p 15.

<sup>62</sup> This refers to charges where the accused is a child or young person, and they have been referred to the Scottish Children’s Reporter.

<sup>63</sup> Crown Office and Procurator Fiscal Service., 2021. (n 38), at p 11 Table 7.

under section 39 of the Criminal Justice and Licensing (Scotland) Act 2010. Figures relating to stalking charges are provided in Table 3 below:

**Table 3: Stalking charges<sup>64</sup>**

Year	Total charges	Charges with a domestic abuse identifier	Charges without a domestic abuse identifier	Percentage of charges with a domestic abuse identifies
2013-14	912	623	289	68%
2014-15	1,456	975	481	67%
2015-16	1,657	1,114	543	67%
2016-17	1,510	1,044	466	69%
2017-18	1,558	1,120	438	72%
2018-19	1,415	1,015	400	72%
2019-20	1,160	751	409	65%
2020-21	1,045	592	453	57%

Justice Analytical Services provided the following additional data relating to those prosecuted with a domestic aggravation:

**Table 4: People prosecuted with a domestic aggravation recorded against the main charge, by result and disposal, 2010-11 to 2019-20**

	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
<b>Total prosecuted</b>	10,047	10,506	10,910	13,596	15,633	15,517	13,212	11,881	11,077	11,156
<b>Total guilty</b>	8,566	8,877	9,292	11,077	12,441	12,376	10,836	9,885	9,205	9,355
<b>Conviction rate</b>	85%	84%	85%	81%	80%	80%	82%	83%	83%	84%

**Table 5: People prosecuted with a domestic aggravation of which also statutory recorded against the main charge, by result, 2017-18 to 2019-20**

	2017-18	2018-19	2019-20
Total prosecuted	5,192	9,332	9,707
Total guilty	4,327	7,751	8,120
Conviction rate	83%	83%	84%

These figures would suggest that conviction rates are analogous with other crimes and offences. However, rules of evidence may still cause difficulty for those cases

<sup>64</sup> Ibid, at p 12 Table 8.

which do go to trial. In *Spinks v Harrower*<sup>65</sup>, it was held on appeal that where there were separate incidents of assault, the normal requirement of corroboration applied to each incident. In convicting Spinks, the sheriff accepted that there was no corroboration for some assaults but that it was legitimate to treat these assaults as a course of conduct involving the abuse of a partner in a domestic context. Cairns has recently discussed the ‘natural connection’ between the Moorov doctrine and the Domestic Abuse (Scotland) Act 2018, arguing that the current direction of reform of the Moorov doctrine has the potential to assist with prosecutions under the Act, but that deeply engrained attitudes and gender stereotypes may nevertheless limit the benefit of such development of the doctrine.<sup>66</sup>

Separate data for proceedings and convictions is not available for the specialised domestic abuse courts running in Scotland.<sup>67</sup>

## 2.3 Penalties

The Scottish Government report that in 2019-20, 246 people were proceeded against under the Domestic Abuse (Scotland) Act 2018. Of this, 206 were convicted, 32 were acquitted and three were found not proven.<sup>68</sup> Five cases were deserted.<sup>69</sup> This is recorded as a conviction rate of 84% which is lower than the conviction rate for all crimes (85%) but higher than sexual crimes (71%) which face similar issues in terms of sufficiency of evidence.<sup>70</sup>

Of those convicted under the Act, four were female (1.9%) and 202 were male (98.1%).<sup>71</sup>

In 2019-20, of the 10,701 convictions with aggravators, 9,355 were aggravated by domestic abuse (87.4%) and 8,120 included a domestic abuse statutory aggravator (75.9%).<sup>72</sup> This is significantly higher than any other aggravator. For context, the next

<sup>65</sup> 2018 J.C. 177.

<sup>66</sup> Cairns, I., 2020. The Moorov doctrine and coercive control: Proving a ‘course of behaviour’ under s. 1 of the Domestic Abuse (Scotland) Act 2018. 24(4) *International Journal of Evidence and Proof* 396-417.

<sup>67</sup> This was confirmed through personal communications with the Scottish Courts and Tribunal Service in February 2022.

<sup>68</sup> Scottish Government., 2021. *Criminal Proceedings in Scotland, 2019-20*. Available at: <<https://www.gov.scot/publications/criminal-proceedings-scotland-2019-20/pages/11/>> [Accessed 17 November 2021]. at Table 2(a).

<sup>69</sup> Ibid.

<sup>70</sup> Ibid, at Table 4(c).

<sup>71</sup> Ibid, at Tables 6(a) and 6(b).

<sup>72</sup> Ibid, calculated from Table 13. The footnote accompanying Table 13 clarifies that in terms of ‘aggravator’: “Each crime/offence may have one or more aggravator codes associated with it. A crime/offence will be counted under each aggravator code associated with it. e.g. A homicide with a ‘racial’ and ‘religious’ aggravator will appear once in the racial aggravator column and once under the religious aggravator column”.



highest category is race, accounting for 595 of all convictions with an aggravator (5.6%).

The main penalties for those convicted under the 2018 Act were as follows:

**Figure 1: Main penalty for those convicted under the 2018 Act in 2019-20<sup>73</sup>**

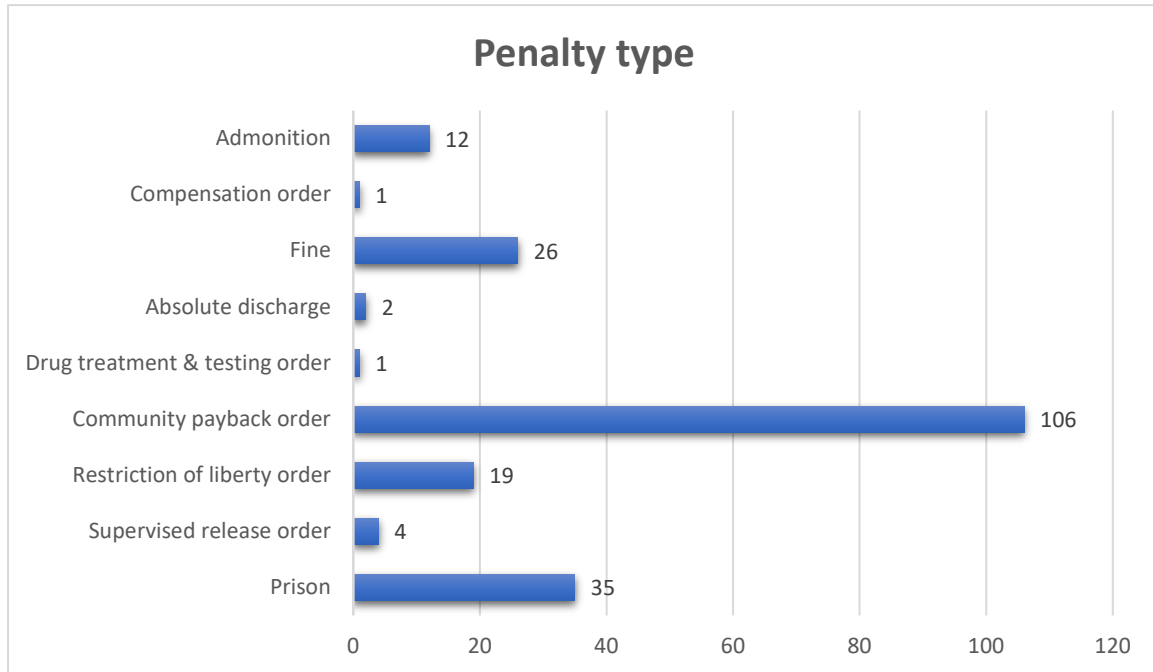


Figure 1 shows that the main penalty for those convicted under the 2018 Act is a community payback order. The use of community-based disposals in the context of domestic abuse is controversial: In 2013, the Independent Police Complaints Commission (IPCC) stated explicitly that such measures should not be used in domestic abuse cases.<sup>74</sup> Although it should be noted that community-based disposals can be diverse and can be punitive<sup>75</sup> they may also involve participation in an offender programme, as discussed below.

<sup>73</sup> Ibid, at Table 8(a).

<sup>74</sup> Independent Police Complaints Commission (IPCC), 2013. *Mrs Susan Anne Forster: The Appropriateness of Restorative Justice in a Domestic Abuse Case*. Independent Investigation National Learning Report, cited by Westmarland, N., Jonson, K. and McGlynn, C., 2014. Under the Radar: The Widespread Use of 'Out of Court Resolutions' in Policing Domestic Violence and Abuse in the United Kingdom. 58(1) *British Journal of Criminology* 1-16 at p 4.

<sup>75</sup> Community-based disposals have been increasingly used in Scotland. For a recent discussion of judicial views of this trend, see Scottish Sentencing Council., 2021. *Judicial perspectives of community-based disposals*. Edinburgh: Scottish Sentencing Council. Available at: <https://www.scottishsentencingcouncil.org.uk/media/2165/20211028-judicial-perspectives-of-community-based-disposals-ssc-issues-paper.pdf> [Accessed 22 March 2022]

Table 6 below provides further detail on sentence length for those receiving a custodial sentence for convictions under the 2018 Act:

**Table 6: Sentence length for those receiving custodial sentences in 2019-20<sup>76</sup>**

Sentence length	Number of people receiving sentence
Up to 3 months	3
3-6 months	9
6 months-1 year	13
1-2 years	9
2-4 years	3
Over 4 years	0
Life	0

The average length of a custodial sentence under the 2018 Act was 363 days.

Justice Analytical Services provided the following additional data relating to disposals for those prosecuted with a domestic aggravation:

**Table 7: People prosecuted with a domestic aggravation of which also statutory recorded against the main charge, by result and disposal, 2017-18 to 2019-20**

	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20
<b>Total prosecuted</b>	10,047	10,506	10,910	13,596	15,633	15,517	13,212	11,881	11,077	11,156
<b>Total guilty</b>	8,566	8,877	9,292	11,077	12,441	12,376	10,836	9,885	9,205	9,355
<b>Conviction rate</b>	85%	84%	85%	81%	80%	80%	82%	83%	83%	84%
<b>Of which received:</b>										
<b>Custody</b>	1,018 (12%)	1,107 (12%)	1,227 (13%)	1,464 (13%)	1,565 (13%)	1,692 (14%)	1,475 (14%)	1,426 (14%)	1,447 (16%)	1,333 (14%)
<b>Community sentence</b>	1,774 (21%)	2,252 (25%)	2,487 (27%)	3,120 (28%)	3,515 (28%)	3,552 (29%)	3,393 (31%)	3,302 (33%)	3,005 (33%)	3,407 (36%)
<b>Monetary</b>	2,747 (32%)	2,685 (30%)	2,510 (27%)	2,939 (27%)	3,119 (25%)	2,898 (23%)	2,489 (23%)	2,133 (22%)	2,004 (22%)	1,990 (21%)
<b>Other</b>	3,027 (35%)	2,833 (32%)	3,068 (33%)	3,554 (32%)	4,242 (34%)	4,234 (34%)	3,479 (32%)	3,042 (31%)	2,749 (30%)	2,625 (28%)

<sup>76</sup> Scottish Government., 2021. (n 68) at Table 10(a).

**Table 8: People prosecuted with a domestic aggravation of which also statutory recorded against the main charge, by result and disposal, 2017-18 to 2019-20**

	2017-18	2018-19	2019-20
<b>Total prosecuted</b>	5,192	9,332	9,707
<b>Total guilty</b>	4,327	7,751	8,120
<b>Conviction rate</b>	83%	83%	84%
<b>Of which received:</b>			
<b>Custody</b>	666 (15%)	1,189 (15%)	1,122 (14%)
<b>Community sentence</b>	1,689 (39%)	2,633 (34%)	2,967 (37%)
<b>Monetary</b>	1,083 (25%)	1,694 (22%)	1,746 (22%)
<b>Other</b>	889 (21%)	2,235 (29%)	2,285 (28%)

As suggested, another consequence of being convicted under the Domestic Abuse (Scotland) Act 2018 or convicted of an offence aggravated by the Abusive Behaviour and Sexual Harm (Scotland) Act 2016, is that a non-harassment order may be imposed on the offender. Given that non-harassment orders have been formally incorporated into the criminal law landscape in this way, more non-harassment orders have now been issued by the Scottish courts. This trend is in keeping with other jurisdictions, notably England and Wales, where similar 'hybridisation'<sup>77</sup> has occurred in terms of legal responses to domestic abuse. Table 9 below shows the number of non-harassment orders issued by the Scottish courts under the Criminal Procedure (Scotland) Act 1995 and Protection from Harassment Act 1997.

<sup>77</sup> Bates, L. and Hester, M., 2020. No longer a civil matter? The design and use of protection orders for domestic violence in England and Wales. 42(2) *Journal of Social Welfare and Family Law* 133-153.

**Table 9: Non-harassment orders issued under the Criminal Procedure (Scotland) Act 1995 and Protection from Harassment Act 1997 between 2010 and 2022.**<sup>78</sup>

Financial Year	All Courts
2010-11	50
2011-12	101
2012-13	183
2013-14	383
2014-15	640
2015-16	938
2016-17	1,032
2017-18	1,299
2018-19	1,306
2019-20	1,948
2020-21	2,081
<b>TOTAL</b>	<b>9,911</b>

## 2.4 Use of offender programmes in sentencing

Programmes aimed at the rehabilitation of offenders are now common across criminal justice systems. In Scotland, such programmes are accredited by the Scottish Accreditation Panel for Offender Programmes (SAPOP). In the 1980s and 1990s, a number of Domestic Violence Perpetrator Programmes were developed in Scotland. In 2004, the Caledonian System was developed for men convicted of domestic abuse. This combines a court-ordered system and works with the whole family as well as multiple agencies involved with the family. The System is made up of a men's programme, women's service and children's service. The men's programme consists of a minimum of 14 one-to-one preparation and motivation sessions, a 26-weekly three-hour session group work stage and post-group work one-to-one stage delivered over two years.

<sup>78</sup> Data provided by the Scottish Courts and Tribunal Service, March 2022. These figures refer only to non-harassment orders from criminal courts and that the data excludes non-harassment orders from civil proceedings. The figures are also at individual charge level and so may not correspond with other official data release under a main charge approach.

In 2016, the System was evaluated by the Scottish Government.<sup>79</sup> One of the limitations of the study, which is recognised, is that it does not include the views of those who have disengaged from the programme. The study also cites work by Kelly and Westmarland which warns that some women may no longer be in a relationship with the men involved in the programme and so are not in a position to assess any change which may have taken place.<sup>80</sup> Women were included in the study, but their views were not triangulated with the accounts given by the men included in the evaluation. As such, there are methodological limitations of the evaluation as a whole. However, its findings are still of interest. Key findings indicated that those who completed the programme were a lower risk to partners and children, but- perhaps unsurprisingly- the psychometric data included also suggested that men had a greater tendency to exaggerate positives about themselves by the end of the programme. Those men included in the study reported greater understanding of appropriate behaviour in relationships and felt that the programme equipped them with skills to better control their behaviour and reactions. Women's views were more mixed, with some reporting that they no longer had contact with their ex-partner and so were not in a position to evaluate any change in behaviour.

Use of the programmes between 2010 and 2016 is indicated by the following data:

**Table 10: Number of men recorded in monitoring data as starting the Men's Programme, mid-September 2010 to April 2016<sup>81</sup>**

Hub	Number of men
Lothian & Borders	282
Dumfries and Galloway	83
Forth Valley	170
Aberdeen	241
Ayrshire	165
<b>Total</b>	<b>941</b>

44% of men who used the programme were aged between 25-34<sup>82</sup> and 98% of those men were white<sup>83</sup>. Most of the men in the programme were identified as low risk.<sup>84</sup>

<sup>79</sup> Scottish Government., 2016. *Caledonian System Evaluation: Analysis of a programme for tackling domestic abuse in Scotland*. Edinburgh: Scottish Government.

<sup>80</sup> Kelly, L. and Westmarland, N., 2015. *Domestic Violence Perpetrator Programmes: steps towards change*. Durham University/London Metropolitan University.

<sup>81</sup> Scottish Government., 2016. (n 79) at appendix C Table C.1.

<sup>82</sup> Ibid, at Table C.3.

<sup>83</sup> Ibid, at Table C.4.

<sup>84</sup> Ibid, at Figure C.1. One of the tools used to assess risk in this context is the CAADA-DASH Risk Identification Checklist (RiC). Available at: <https://www.safershetland.com/assets/files/RIC%20Without%20Guidance.pdf> [Accessed 22 March 2022].

A long evaluation was proposed as part of the project's recommendations. More or advanced training was recommended as well as access to other services' databases. Overall, the programme was regarded highly by participants, staff and stakeholders in Scotland.

As part of this research, the Scottish Government's Justice Analytical Services, Scottish Courts and Tribunal Service and Community Justice Scotland were contacted to see if up-to-date data was available on the use of these systems, but this data was not available. Elsewhere, research has shown that perpetrator programmes can high levels of attrition, estimated at between 15 and 58 per cent<sup>85</sup> and that there tends to only be a small reduction in violence afterwards. Monckton Smith et al. suggest that this may be due to the characteristics which predict serial abuse in men<sup>86</sup>: Abusers tend to score highly for psychopathy and narcissistic personality traits, with some studies suggesting this may be between 15 and 30% of abusers.<sup>87</sup> Monckton Smith et al. comment that:

Abusers should not be considered as 'ordinary blokes' who just lost control. These men may be suffering from various dysfunctions that place them on a psychopathic or psychotic spectrum; equally, they may be unable to deal with rejection or other life challenges for many societal, cultural and socio-structural reasons; they may have depression or other mental health issues, attachment disorders or substance abuse problems.<sup>88</sup>

## 2.5 Risk factors related to domestic abuse and homicide

For women, one of the biggest risks associated with domestic abuse is homicide. Indeed, women's experiences of homicide are inextricably linked with their experiences of domestic abuse, and it has long been recognised that where there is coercive control and stalking, there is a higher likelihood that homicide will result.<sup>89</sup> Between 2011-12 and 2020-21, 151 women were the victim of homicide<sup>90</sup> in Scotland. In 41.1% of these cases, the accused was her partner or ex-partner.<sup>91</sup> This was the single largest relationship between victim and accused. These figures are in keeping with international statistics on homicide which demonstrate that that the largest single relationship between women killed and those accused of their killing is partner or ex-

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<sup>85</sup> Monckton Smith, J., Williams, A., and Mullane, F., 2014. *Domestic Abuse, Homicide and Gender: Strategies for Policy and Practice*. London: Palgrave MacMillan. Citing Jewell and Wormith at p 47.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid, at p 57.

<sup>88</sup> Ibid, at p 144.

<sup>89</sup> Monckton Smith, J., 2021. *In Control: Dangerous Relationships and How They End in Murder*. London: Bloomsbury Publishing.

<sup>90</sup> Scottish Government., 2021. *Homicide in Scotland 2020-2021*. Edinburgh: Scottish Government. Calculated from Table 8.

<sup>91</sup> Ibid.

partner.<sup>92</sup> The UN's *Global Study on Homicide* found that globally more than a third of the 87,000 women killed in 2017 were killed by an intimate or former partner.<sup>93</sup>

Studies on intimate partner violence have suggested that some differences exist between men who commit lethal violence and those who commit non-lethal violence. Those who committed lethal violence tended to have more conventional backgrounds.<sup>94</sup> Non-lethal abusers' backgrounds resembled those of other criminal offenders in terms of previous convictions, alcohol use and employment. Citing the work of Dobash and Dobash, Liem and Koenraadt note that non-lethal abusers were more likely to come from troubled homes with alcoholic and abusive fathers, while lethal abusers were more likely to come from households where their mother was homemaker and their father had a skilled or white-collar job.<sup>95</sup> Those who killed their intimate partners were less likely to be drunk at the time of the event. Dobash and et al. have also pointed to the risk factors of sexual assault, strangulation and the use of an instrument or knife in the context of lethal violence. Monckton Smith et al. have also identified strangulation assault as very high risk for future homicide, with their research finding that in the past, such assaults have not been taken seriously, even in cases where victims have lost consciousness.<sup>96</sup> However, the biggest trigger for fatal violence has been reported as separation.<sup>97</sup>

For Monckton Smith, domestic homicides are the most predictable form of homicide, following an eight-stage pattern<sup>98</sup>:

1. A history of control of stalking (where there are convictions and/or allegations)
2. An early relationship marked by intense commitment (e.g., moving in together after a very short period of time).
3. A relationship dominated by control.
4. A trigger event which challenges this control (e.g., separation, ill health, financial problems or threats).
5. Escalation in control or the advent of stalking.
6. A change in thinking or focus (e.g., how they are going to deal with the loss of control).
7. Planning a homicide.
8. Homicide and/or suicide.

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<sup>92</sup> United Nations Office on Drugs and Crime., 2018. *Global Study on Homicide: Gender related killing of women and girls*. Vienna: United Nations Office on Drugs and Crime; Walklate, S., Fitz-Gibbon, K., McCulloch, J., Maher, J., 2019. *Towards a Global Femicide Index: Counting the Costs*. Milton: Routledge.

<sup>93</sup> United Nations Office on Drugs and Crime., 2018. (n 92).

<sup>94</sup> Liem, M. and Koenraadt, F., 2018. *Domestic Homicide: Patterns and Dynamics*. London: Routledge. at p 72.

<sup>95</sup> Ibid.

<sup>96</sup> Monckton Smith, J., Williams, A., and Mullane, F., 2014. (n 85) at p 151.

<sup>97</sup> Ibid at p 58; Stark, E., 2007. *Coercive Control: How Men Entrap Women in Their Personal Life*. Oxford: Oxford University Press.

<sup>98</sup> Monckton Smith, J., 2021. (n 89).

In keeping with her framework which draws upon Stark's theory of coercive control, Monckton Smith emphasises that patterns are more helpful than specific incidents and identifying motivation is more helpful than identifying actions.

Where there is progression through stages 3-5, separation can be very difficult and dangerous. Where there is progression to stages 5-7, an attempt on the victim's life becomes more likely. However, the journey through these stages is not inevitable: there are opportunities for agencies to intervene as long as these stages are properly recognised and assessed; myths and misunderstandings about domestic abuse can be highly dangerous to victims of domestic abuse and any risk assessment which takes place.

There are several risk assessment tools available for those who may be in dangerous relationships. Those most prevalent in the Western world are: Danger Assessment (DA), the Spousal Assault Risk Assessment (SARA), The Brief Spousal Assault Form for the Evaluation of Risk (B-SAFER) and the Domestic Abuse Stalking and Harassment Questionnaire (DASH).<sup>99</sup> DASH- developed in the UK- is similar to DA, containing a yes/no questionnaire to risk factors associated with intimate partner homicide.<sup>100</sup>

Multi-agency risk assessment conferences (Marac) are a common safeguarding tool employed in Scotland.<sup>101</sup> These are local meetings undertaken to discuss those at risk of serious harm or murder as a result of domestic abuse and the criterion for referral is: visible high risk (as assessed on the DASH checklist), personal judgment, potential for escalation and a repeat referral within 12 months of the last referral to Marac. They operate in 26 out of 32 Scottish local authorities and 60% of those undertaken are chaired by Police Scotland (40% have a multi-agency chair).<sup>102</sup> However, there is currently no Scottish Government funding provided for Marac and no statutory obligation for them to take place.<sup>103</sup>

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<sup>99</sup> Liem, M. and Koenraadt, F., 2018. (n 94) at p 161.

<sup>100</sup> Ibid.

<sup>101</sup> Multi-Agency Public Protection Arrangements (MAPPA) are also used to assess and manage the risk posed for certain categories of offender such as sex offenders who are subject to notification requirements under the Sexual Offences Act 2003; mentally disordered restricted patients; offenders who are as posing a risk of serious harm by reason of their conviction, as per section 10 of the Management of Offenders etc. (Scotland) Act 2005.

<sup>102</sup> SafeLives. *Toolkit for Marac in Scotland*. at p 6. Available at: <  
<https://safelives.org.uk/sites/default/files/resources/SafeLives'%20Marac%20Toolkit%20e2%80%93%20Scottish%20Version.pdf>> [Accessed 19 November 2021].

<sup>103</sup> Ibid.



## 2.6 Review of sentencing in the Scottish Court of Criminal Appeal

Legal responses to domestic abuse have changed significantly in Scotland over the last forty years<sup>104</sup> and with this has come increased knowledge and understanding of the dangers associated with domestic abuse. A review of the sentencing in the Scottish Court of Criminal Appeal reflects this changing landscape.

For example, in 1990, in *Pearson*, 15 months' imprisonment was substituted for a sentence of 18 months' probation on the basis that the case was a domestic matter, the parties were now divorced, and the assault was "completely out of character".<sup>105</sup> *Pearson* had been convicted of assaulting his wife with a knife and causing permanent disfigurement. In the course of exercising his right of access to his children, he discovered that his wife, from whom he was separated, was associating with another man. Therefore, one of the obvious changes which has taken place is the move from treating domestic abuse as a mitigatory factor, to the clear focus on treating it as an aggravating factor.

Twenty years later, in *B v HM Advocate*, the language of "domestic abuse" was used by the court in their assessment, demonstrating increased awareness of the phenomenon.<sup>106</sup> However, the decision demonstrates a continued misunderstanding of the risk to women and children that is associated with domestic abuse. Here, custodial sentences of two, three, and five months' imprisonment were substituted with 240 hours of community service. B was convicted of the assault of his partner and of breaching his bail conditions. The behaviour in question included a threat to self-harm with a knife in front of their 10-year old son.<sup>107</sup> It was recognised that custodial sentences are appropriate disposals for repeated incidents of domestic abuse committed in breach of court orders but that a community order was also appropriate as a direct alternative to custody. It was held that it was in the best interests of the child that he resume contact with his father and "this was a matter of some importance which the court was bound to consider when determining the appropriate sentence." This attitude has changed, as discussion of more recent cases below will illustrate, in line with the increased awareness of the evidence which points to the risk posed to children by those who commit domestic abuse.

In the later case of *Robertson v Dunn*, where the offender was convicted of assault and threatening or abusive behaviour- offences committed whilst subject to bail

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<sup>104</sup> McPherson, R., 2021. Legal change and legal inertia: understanding and contextualising Scottish cases in which women kill their abusers. 5(2) *Journal of Gender-Based Violence* 289-306.

<sup>105</sup> *Pearson v HM Advocate* 1990 S.C.C.R. 125.

<sup>106</sup> *B v HM Advocate* [2010] HCJAC 154.

<sup>107</sup> Although threats to self-harm may be indicative of a mental disorder (which may itself mitigate sentence), it can also be used as part of coercive control, and such threats have been linked with increased risk of femicide to female victims. For discussion see, Jonson, H., Eriksson, L., Mazerolle, P., and Wortley, R., 2019. Intimate Femicide: The Role of Coercive Control. 14(1) *Feminist Criminology* 3-23.

conditions- the court refused an appeal against the custodial sentences imposed and noted that it was important to “consider the appellant’s record of offending against his former partner with particular reference to crimes of violence” as well as the complete disregard for consequences that the offender had shown by committing further crime whilst subject to bail conditions.<sup>108</sup>

Failure to comply with bail conditions was also feature of *Kennaway*<sup>109</sup>, where the offender appealed against an extended sentence of seven years (five years’ imprisonment with two years extension) in respect of 12 separate convictions (11 of which related to his behaviour towards his female ex-partner her friends and her new partner). It was argued that the sheriff had approached the imposition of an extended sentence in a manner which was inconsistent with section 210A of the Criminal Procedure (Scotland) Act.<sup>110</sup> It was held that the custodial element imposed was excessive in view of the circumstances (good behaviour in prison, general good character, no previous convictions and a willingness to undertake rehabilitation courses).<sup>111</sup> His sentence was reduced to 4 years and 6 months’ imprisonment, despite the risk assessment tool indicating a high risk of further domestically aggravated offending.<sup>112</sup>

The recent, unreported, case of *HM Advocate v Harkins* demonstrates sentencing at the opposite end of the spectrum. Here, Harkins was convicted of domestic abuse against four women. Lady Rae imposed an extended sentence of 17 years, with a custodial part of 12 years and a further 5 years post release supervision. During sentencing, she commented:

It seems to me that, at times, you gained pleasure from abusing your victims. The pain, suffering and lasting damage caused to all of your victims, all as detailed in the victim impact statements, cannot adequately be summarized in this short sentence statement.

You take no responsibility for the crimes you have committed and thus have expressed no remorse whatsoever. You see yourself as the victim. Having regard to your attitude and having heard the evidence in this case, it is not unreasonable to infer that you are a man who believes he is entitled to treat women in the manner disclosed in the indictment which, disturbingly, spans a period in excess of 12 years.

I am of the view that you are a serious risk to women who may enter a relationship with you and accordingly I must consider whether I should impose

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<sup>108</sup> 2016 S.L.T. (Sh Ct) 51.

<sup>109</sup> *Kennaway v HM Advocate* 2019 S.L.T. 391.

<sup>110</sup> Section 210A provides guidance on extended sentences for sex, violent and terrorist offenders.

<sup>111</sup> *Ibid*, at para 15.

<sup>112</sup> *Ibid*, at para 12.

a sentence which would afford some measure of protection to the public once you have been released from prison.<sup>113</sup>

*W(G) v HM Advocate* considered the scope of non-harassment orders in sentencing cases involving domestic abuse.<sup>114</sup> The offender had pled guilty to four charges of assault and threatening or abusive behaviour towards his wife and son. He was imprisoned for two years, and a non-harassment order was also put in place. This ordered him not to contact his wife or children or enter their home for a period of three years. It was against this order that he appealed. It was submitted that section 234AZA(3) imposed a different test when the court was considering whether children should be included in a non-harassment order and it was argued that the views of the children had not been fully investigated here. The appellant intended to raise civil proceedings for contact and argued that would be the most appropriate forum in which to decide whether contact should be allowed.<sup>115</sup> The trial Sheriff had recognised that children's views about continued contact were likely to be conflicted, stating that:

It was necessary to try to remove from them the burden of carrying any responsibility for the decision as to whether they should have contact with the appellant for an appropriate period of time.<sup>116</sup>

In refusing the appeal, it was held that the Sheriff's concerns about recognising the children's experiences and alleviating them of the burden of decision-making were not relevant and that he had not asked himself whether the appropriateness threshold had been crossed.<sup>117</sup> However, had this question had been asked, the test would have been satisfied.<sup>118</sup>

Those who experience coercive control at the hands of an abusive partner will often experience sexual assault and rape<sup>119</sup>, meaning that convictions for domestic abuse may also be accompanied by convictions under the Sexual Offences (Scotland) Act 2009 and notification requirements under the Sexual Offences Act 2003. The recent case of *HM Advocate v Davies* is an example of this. Tobias was convicted of domestic abuse and rape and sentence to eight years' imprisonment and a two-year extended sentence. The court also made non-harassment orders for indefinite periods in respect of both complainers and Davies was made subject to the notification requirement in Part II of the Sexual Offences Act 2003 for an indefinite period.<sup>120</sup>

In some cases involving domestic abuse the court has considered the need for an Order for Lifelong Restriction (OLR). OLRs were introduced by the Criminal Justice

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<sup>113</sup> Sentencing statement of *HM Advocate v Craig Harkins*, 2020. Available on request from the Scottish Judiciary.

<sup>114</sup> [2021] HCJAC 47.

<sup>115</sup> *Ibid*, at para 13.

<sup>116</sup> *Ibid*, at para 16.

<sup>117</sup> *Ibid*, at para 24.

<sup>118</sup> *Ibid*, at para 25.

<sup>119</sup> Stark, E., 2007. (n 97).

<sup>120</sup> Sentencing statement of *HM Advocate v Tobias Davies*, 2021. Available on request from the Scottish Judiciary.

(Scotland) Act 2003. An OLR is an indeterminate sentence which can be imposed by the High Court on those convicted of serious violent or sexual offences. Such orders allow for intensive, potentially lifelong supervision of offenders who are considered particularly high risk.<sup>121</sup> The court must impose an OLR where the nature or circumstances of the offence are such that serious risk is posed to the public when the offender is not in custody. This is in keeping with principal aim of an OLR: protection of the public. Much like a life sentence, when an OLR is passed, the court must set a punishment part which will be the minimum period of time that the offender must spend in prison before being considered for release. Thereafter, a person subject to an OLR will only be released on licence (parole) following an assessment of the risks posed by the offender to the community. If an offender released into the community commits further crime when subject to an OLR, they can be returned to prison immediately.<sup>122</sup> Where an OLR is imposed, the offender is also subject to a risk management plan (RMP) for life.<sup>123</sup>

One such case in which an OLR was considered was *Laird v HM Advocate*.<sup>124</sup> Here, Laird was convicted of physical and sexual abuse of five former female partners (all of whom were vulnerable due to their age or other factors). He appealed against the imposition of an OLR. This appeal was refused. Two risk assessment reports assessed Laird as medium risk, whereas a third assessed him as posing a high risk. Dr Baird, who considered Laird to be high risk, noted that his potential for change was limited and that he demonstrated personality characteristics which were psychopathic (a capacity to manipulate, deceptiveness and an ability to disarm). It was held that the judge was entitled to take the view that the criteria for an OLR was met. It was noted that where there were no previous convictions, as was the case here, and no treatment programmes had previously been entered into, there can be a difficulty in assessing the potential responsiveness to treatment.<sup>125</sup>

More recently, the court considered the need for an OLR in *B(A) v HM Advocate*.<sup>126</sup> Here the accused was convicted of 11 charges including assault, abduction, threatening or abusive behaviour and stalking. An OLR was imposed. Risk assessments were provided by two consultant forensic psychologists, one of whom considered that the offender posed a high risk, and the other who considered him to be medium risk. It was agreed by both experts that the offender presented with signs of antisocial and borderline personality disorder combined with narcissistic and psychopathic traits. The judge concluded that his behaviour indicated “a propensity

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<sup>121</sup> See Criminal Procedure (Scotland) Act 1995, ss 210B-G.

<sup>122</sup> OLRs are managed by the Risk Management Authority (RMA). For further information see: <https://www.rma.scot/order-for-lifelong-restriction/olr-faq/> [Accessed 10 January 2021].

<sup>123</sup> The Parole Board has a statutory duty to have regard to the RMP when taking decisions about parole or licence conditions. A breach of licence conditions is sufficient to warrant recall (that breach does not have to amount to an offence). OLR offenders are also subject to multi-agency public protective arrangements (MAPPA). It should be noted that the relationship between the licence and the RMP has not entirely been resolved

<sup>124</sup> 2015 S.C.C.R. 434.

<sup>125</sup> *Ibid*, at para 12.

<sup>126</sup> [2021] HCJAC 43.

seriously to endanger the lives and the physical or psychological wellbeing of the public at large” as per section 210E of the Criminal Procedure (Scotland) Act 1995. His appeal against the imposition of an OLR was dismissed. It was held that it was legitimate for the judge to take into account allegations not proved in assessing patterns of offending and that he was entitled to find that the risk criteria for an OLR had been met. It was further observed that there was no need to establish that a person was an “exceptional offender” before an OLR could be passed.<sup>127</sup>

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<sup>127</sup> The language of “exceptional offender” was used in *Ferguson v HM Advocate* 2014 S.L.T. 431 which was referenced in *B(A) v HM Advocate*.

### 3.0 Sentencing Framework in England and Wales

Whilst Scotland has its own legal system, it shares many similarities in terms of legal structures, sentencing options, etc with England and Wales. England and Wales have a general guideline for sentencing offences involving domestic abuse. This general guideline can be read alongside other material (e.g. offence specific guidelines) to provide support for judges in passing sentence. The experience of England and Wales criminalising controlling or coercive behaviour is worth special attention since it has informed the Scottish approach to criminalisation and development of the Domestic Abuse (Scotland) Act 2018.

It is worth noting from the outset that statistics from England and Wales are in keeping with the international evidence base which shows that domestic abuse is gendered. Most domestic abuse incidents in England and Wales involve female victims and male perpetrators: In April 2020 to March 2021 92% of defendants were male and 76% of victims were female.<sup>128</sup>

#### 3.1 The Serious Crime Act 2015 Section 76

The Serious Crime Act 2015 section 76 is worth considering given its relationship with the Scottish 2018 Act.<sup>129</sup> This 2015 Act created an offence of 'controlling or coercive behaviour in an intimate or family relationship'. The section 76 offence is similar to the Scottish domestic abuse offence in several ways. For example, in Scotland there requires to be a course of conduct. Similarly, the English and Welsh offence requires "repeatedly or continuously" engaging in conduct that is "coercive or controlling."

However, it should be noted that even in relatively similar jurisdictions there can be differences between offences that are important to consider. There are two key differences between the offence in England and Wales and Scotland. Firstly, the English and Welsh offence requires proof of a "serious effect" whereas the Scottish offence does not depend upon the harm caused to the victim.

In terms of sentencing maxima, in Scotland, the maximum sentence for a section 1 offence on summary conviction is imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum (or both). On conviction on indictment, the maximum sentence is imprisonment for a term not exceeding 14 years or a fine

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<sup>128</sup> Office for National Statistics., 2021. *Dataset: Domestic abuse and the criminal justice system*. Available at:

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/domesticabuseandthecriminaljusticesystemappendixables> [Accessed 8 March 2022].

<sup>129</sup> There are also similarities to the Irish offence under the Domestic Violence Act 2018 (IR), section 39. For an overview of interpretational and evidential elements see *Criminalising Coercive Control*, M. McMahon and P. McGorrey, (eds), Singapore: Springer, 2020; Bettinson, V., and Robson, J., 2020. Prosecuting Coercive Control: Reforming Storytelling in the Courtroom. 12 *Criminal Law Review* 1107-1126.

(or both). In England and Wales for a section 76 offence, on summary conviction, the maximum sentence is imprisonment for a term not exceeding 6 months, or a fine, or both. The maximum sentence on conviction on indictment is imprisonment for a term not exceeding five years, or a fine, or both. Of course, what sentences are actually passed in practice in Scottish courts for this offence is a different question from the statutory maximum. However, at least in theory, the sentencing options vary between the jurisdictions.

More recently, additional civil measures have been introduced in England and Wales through the Domestic Abuse Act 2021. This Act introduced domestic abuse protection notices and domestic abuse protection orders<sup>130</sup> (breach of which are criminal offences) and requires the appointment of a Domestic Abuse Commissioner. The Act introduced a wider definition of domestic abuse than has operated previously in statutory form. Under section 1 of the Act, behaviour is abusive if it consists of: physical or sexual abuse; violent or threatening behaviour; controlling or coercive behaviour; economic abuse; psychological, emotional or other abuse. It does not matter whether the behaviour consists of a single incident or a course of conduct.<sup>131</sup> Domestic abuse can be carried out where A and B are over 16 and personally connected to one another.<sup>132</sup> It is further provided that:

For the purposes of this Act, two people are “personally connected” to each other if any of the following applies—

- (a) they are, or have been, married to each other;
- (b) they are, or have been, civil partners of each other;
- (c) they have agreed to marry one another (whether or not the agreement has been terminated);
- (d) they have entered into a civil partnership agreement (whether or not the agreement has been terminated);
- (e) they are, or have been, in an intimate personal relationship with each other;
- (f) they each have, or there has been a time when they each have had, a parental relationship in relation to the same child (see subsection (2));
- (g) they are relatives.<sup>133</sup>

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<sup>130</sup> Domestic Abuse Notices and Domestic Abuse Protection Orders have also been introduced in Scotland through the Domestic Abuse (Protection) (Scotland) Act 2021.

<sup>131</sup> Section 1(3).

<sup>132</sup> Section 1(2).

<sup>133</sup> Section 2(1).

The Act amends the definition of ‘personally connected’ previously provided by section 76 of the Serious Crime Act 2015.<sup>134</sup> It also creates the offence of strangulation or suffocation.<sup>135</sup> This offence is constituted where:

- A person (“A”) commits an offence if—
- (a) A intentionally strangles another person (“B”), or
  - (b) A does any other act to B that—
    - (i) affects B’s ability to breathe, and
    - (ii) constitutes battery of B.<sup>136</sup>

As is the case in Scotland, domestic abuse conduct in England and Wales is varied and can be captured by a variety of criminal prohibitions. Therefore, again, it is difficult to identify the *typical* sentence for domestic abuse.

### 3.2 Sentencing Domestic Abuse in England and Wales: Key Guideline Features

England and Wales have had a guideline issuing body for a considerable time. This has afforded the jurisdiction an opportunity to consider domestic abuse guidance more than once. Previously, the Sentencing Guidelines Council<sup>137</sup> guidance was that:

*As a starting point for sentence, offences committed in a domestic context should be regarded as being no less serious than offences committed in a non- domestic context.*<sup>138</sup>

In part, the aim was to counter an “enduring legacy of trivialisation and ineffectiveness at various stages in the criminal justice process when it comes to responding to domestic violence.”<sup>139</sup> Thus, according to the 2006 guidance, that an offence entailed domestic abuse should not have been considered a mitigating factor.

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<sup>134</sup> Section 68.

<sup>135</sup> Serious Crime Act 2015, section 75A.

<sup>136</sup> Section 75A(1).

<sup>137</sup> This body preceded the current English and Welsh Sentencing Council.

<sup>138</sup> Sentencing Council of England and Wales., 2006. *Definitive Guideline - Overarching Principles: Domestic Violence*. Available at: <[https://www.sentencingcouncil.org.uk/wp-content/uploads/web\\_domestic\\_violence.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/web_domestic_violence.pdf)> [Accessed 8 March 2022]. at para 2.1

<sup>139</sup> Bettinson, V. and Dingwall, G., 2012. Applying Generic Sentencing Aims in Domestic Violence Cases in England and Wales. 40 *International Journal of Law, Crime and Justice* 242-254.



The English and Welsh Sentencing Council now has a definitive guideline covering the overarching principles for domestic abuse that goes further.<sup>140</sup> This guideline has been effective from 24 May 2018. One critical point of the current guideline is that it functions to position domestic abuse as being more serious than comparable non-domestic abuse offences:

*The domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security<sup>141</sup> that normally exists between people in an intimate or family relationship... Domestic abuse offences are regarded as particularly serious within the criminal justice system.*

Indeed, in issuing the guideline, the Sentencing Council expressly noted that the “new guideline brings a distinct change in emphasis in relation to seriousness.”<sup>142</sup> In doing so, the guideline highlights various aspects of domestic abuse that serve to increase the seriousness of offending.

Similar to Scotland, domestic abuse in England and Wales can cover a wide ambit of conduct including controlling or coercive behaviour, assault, etc. The Council suggests reliance on the broad (non-statutory) government definition of domestic abuse found within the statutory guidance framework for the controlling or coercive behaviour offence<sup>143</sup> and the 2021 Act.

Accordingly, the appropriate sentence for domestic abuse may vary considerably as the conduct involved covers a “range of violent and/or controlling or coercive behaviour.” Notably, there is emphasis on non-physical as well as physical harms.

Unlike the offence specific guidelines, the domestic abuse guideline does not specify starting points or sentence ranges. Instead, it provides general principles and guidance. For example, the domestic abuse guideline provides an indication of pertinent mitigating and aggravating factors for courts to consider. The guideline also settles or restates some potential key points that may have been debated. For instance, the guidance clarifies that “offences involving serious violence, or where the emotional/psychological harm caused is severe, will warrant a custodial sentence in

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<sup>140</sup> Sentencing Council of England and Wales., 2018. *Overarching Principles: Domestic Abuse*. Available at: <<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/domestic-abuse/>> [Accessed 8 March 2022].

<sup>141</sup> Abuse of trust and abuse of power were aggravating factors under the 2006 guideline.

<sup>142</sup> Press release accompanying the 2018 guideline, available at: <<https://www.sentencingcouncil.org.uk/news/item/sentencing-council-publishes-new-guideline-on-domestic-abuse/>> [Accessed 9 March 2022].

<sup>143</sup> UK Government., 2015. *Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework*. Available at: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/482528/Controlling\\_or\\_coercive\\_behaviour\\_-\\_statutory\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf)> [Accessed 8 March 2022]. at p 22.

the majority of cases.”<sup>144</sup> Additionally, the guideline states that, except in “rare circumstances”, provocation is not a mitigating factor.<sup>145</sup> Given that previously emotional/psychological harm may not have been fully appreciated and the contentious role provocation has played in domestic abuse cases in the past, formal statements such as this are significant.<sup>146</sup>

When it comes to passing a sentence, the English and Welsh domestic abuse guideline works in tandem with other offence specific guidelines - offence specific guidelines cover most offences in England and Wales. Aiding in this, the offence specific guidelines are in a standard format.<sup>147</sup> This format is consistent throughout offence specific guidelines meaning it is predictable where, for example, aggravating and mitigating factors will be considered in the process. Therefore, the domestic abuse guideline can serve to supplement the relevant offence specific guideline.

In sum, to the extent that the current guideline emphasises the seriousness of domestic abuse, it functions in a loosely similar way to the Scottish section 1 aggravation under the 2016 Act (noted above). However, the English and Welsh guideline goes much further in providing principles and key guidance for sentencers.

### 3.3 A Brief Note on Official Data and Comparisons with Scotland

Both Scotland and England and Wales provide some general figures pertaining to domestic abuse. For instance, in England and Wales, the Ministry of Justice publishes information on sentences for controlling or coercive behaviour offences. Table 11 below shows the criminal justice outcomes for engaging in controlling or coercive behaviour in England and Wales:

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<sup>144</sup> Note that England and Wales have a sentencing option known as a “Suspended Sentence Order” that is technically a custodial sentence. Therefore, guidance to this effect in Scotland could have different effects. For example, while most convictions for section 76 offences resulted in immediate imprisonment, still about 25% received a suspended custodial sentence.

<sup>145</sup> The contentious role of provocation in domestic abuse has a long history that we cannot explore here.

<sup>146</sup> We cannot explore the contentious history of provocation in domestic abuse cases here. However, we can note how the 2018 guidelines diverges significantly from the 2006 SGC guideline in this regard.

<sup>147</sup> Roberts, J.V., 2013. Sentencing Guidelines in England and Wales: Recent Developments and Emerging Issues. 76(1) *Law & Contemporary Problems* 1-25.

**Table 10: Criminal justice outcomes for engaging in controlling or coercive behaviour in an intimate or family relationship, England and Wales, year ending December 2020<sup>148</sup>**

Outcome	Number All	Number Females	Number Males	Number Unknown
Proceedings	706	17	682	7
Convictions	374	7	364	3
Sentenced	367	7	360	0
Immediate custody	246 (67%)	3	243	0
Suspended sentence	78 (21%)	3	75	0
Community sentence	31 (8%)	1	30	0
Fine	1 (<1%)	0	1	0
Absolute discharge	0	0	0	0
Conditional discharge	1 (<1%)	0	1	0
Compensation	0	0	0	0
Otherwise dealt with	10 (3%)	0	10	0

While data such as this can serve a range of functions in terms of understanding domestic abuse, it should be noted that domestic violence and abuse data in England and Wales uses a different definition than that used in Scotland.<sup>149</sup> Additionally, some offences may be defined differently and this may affect the nature of the conduct captured in complex ways not evident from the official data.<sup>150</sup> Moreover, it should be noted that one sentencing option in England and Wales is the Suspended Sentence Order, which is notionally a custodial sentence. Therefore, it may be preferable to draw a distinction between custodial sentences that are suspended and custodial sentences of immediate imprisonment.

<sup>148</sup> Full document available at:

<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/domesticabuseandthecriminaljusticesystemappendixtables>> [Accessed 9 March 2022].

<sup>149</sup> Scottish Government., 2021. *Domestic Abuse Recorded by the Police in Scotland, 2020-21*. Available at: <<https://www.gov.scot/publications/domestic-abuse-recorded-police-scotland-2020-21/documents/>> [Accessed 8 March 2022]. at section 5.11.

<sup>150</sup> For example, in England and Wales coercive or controlling behaviour offences may be committed against more than current or ex-partners.

Consequently, simple direct comparisons between Scotland and England and Wales using public figures pose several challenges. This does not mean comparisons should not be sought. Indeed, to the extent that jurisdictions may draw on neighbour's practices, comparative work is invaluable to learn from.<sup>151</sup> However, in drawing comparisons in the absence of research sources with a shared methodology, definition etc then caution should be exercised.

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<sup>151</sup> For example, there are links between the English and Welsh controlling or coercive behaviour offence and the Scottish equivalent (section 1 of the 2018 Act). The development of the Scottish offence was informed by the experience in England and Wales.

## 4.0 Experiences of Domestic Abuse Complainers

For decades, the experience of complainers in domestic abuse cases in Scotland has been a political, legal and policing priority generating countless reports, policies, strategies and avenues for research. This activity has generated a small but growing body of literature that consistently highlights the issues which most affect complainers who have experienced domestic abuse in Scotland, and which have been improved (or not) over those decades.<sup>152</sup> This includes a small but valuable core of research on South Asian and Sikh complainers who have experienced domestic abuse, and the factors which intersect to produce their distinctive experiences in the criminal justice system.

### 4.1 Key Factors Impacting the Experience of Complainers in Domestic Abuse Cases in Scotland

The available evidence on the experience of complainers in domestic abuse cases in Scotland indicates that the process of contacting the police, making a statement, engaging in the civil and criminal justice systems, and dealing with the aftermath of the abuse and the legal process, can generate a high level of fear, anxiety and apprehension in complainers.<sup>153</sup> These emotions are heightened by a number of factors including:

- **A lack of awareness amongst complainers about the support available** from police and other agencies,<sup>154</sup> often exacerbated by digital exclusion and social isolation. This is especially heightened for South Asian women who may face additional barriers including language difficulties, an insecure immigration status and/or the fear of deportation, a fear or misapprehension about the willingness and ability of the police to assist, a lack of knowledge about human rights in Scotland including the rights of non-citizens to access justice, and a lack of access to information outside the home including being unaware of police telephone contact numbers.<sup>155</sup>

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<sup>152</sup> Commenting on integrated domestic abuse courts, a 2019 Scottish report noted: “Very few studies include qualitative analyses of victim experience, and there are no identified studies which have produced longitudinal outcomes for victims or perpetrators”, Scottish Government., 2019. *Evidence on the Effectiveness of Integrated Domestic Abuse Courts*. Scottish Government Crime and Justice Social Research. at p 24. This remains the case in 2022.

<sup>153</sup> Forbes, E., 2022. *Victims' Experiences of the Criminal Justice Response to Domestic Abuse*. Bingley: Emerald Publishing. at p 100.

<sup>154</sup> Ibid, at pp 80-4.

<sup>155</sup> McLaughlin, E., Wheate, R., and McGowan, M., 2018. *A confident approach in responding to the needs of domestically abused South Asian women – Laying the foundations for Police Scotland 2026 Strategy*. Scottish Institute for Policing Research. at pp 4-6.

- Past, present and future **threats to the safety** of the complainer and her children,<sup>156</sup> with mixed evidence in relation to the effectiveness of criminal and civil measures (e.g. interdicts, non-harassment and exclusion orders) in stopping or preventing abuse.<sup>157</sup> Research indicates that, for South Asian women, the sense of threat can extend to pressure from the extended family to withdraw from engagement with the legal system, which may include all forms of abuse from extended family members.<sup>158</sup> Extended family members are not eligible to be prosecuted under the current domestic abuse legislation<sup>159</sup> in Scotland<sup>160</sup> despite research from Scotland and abroad showing their involvement in the domestic abuse of women (e.g. 47% of respondents to recent research about domestic abuse in the UK Sikh community reported being abused by more than one perpetrator.<sup>161</sup>) This provides some complainers who have experienced domestic abuse with a lesser degree of legal protection in the criminal law based on their relationship status.<sup>162</sup> This is particularly relevant to South Asian women.<sup>163</sup> The available evidence supports concerns expressed about the safety and protection of complainers / victims before, during, at the end of, and even after the legal conclusion of a case.<sup>164</sup>
- In some South Asian communities, **the role of family honour** and the pressure to conform to family norms and coercive control rather than engage with the criminal justice system. Women who fail to conform to this pressure are subject to shame, criticism, ostracism, and potentially, further harm.<sup>165</sup> In this context, 'leaving domestic abuse' is often also akin to leaving the community.<sup>166</sup> It has also been found that Sikh complainers may tend to seek social, community or informal

<sup>156</sup> Forbes, E., 2022. (n 153) at p 77.

<sup>157</sup> Brooks, O., Burman M., Lombard N., McIvor, G., Stevenson-Hasgings, L., and Kyle, D., 2014. *Violence Against Women: Effective Interventions and Practices with Perpetrators: A Literature Review*. Scottish Centre for Crime and Justice Research. at pp 21-2.

<sup>158</sup> McLaughlin, E. 2016. *South Asian Immigrant Women & Domestic Abuse in Scotland: An uncertain legal status and no recourse to public funds*. PhD, Glasgow Caledonian University; McLaughlin, E., Wheate, R., and McGowan, M., 2018. (n 155) at pp 6-7.

<sup>159</sup> Domestic Abuse (Scotland) Act 2018, section 1.

<sup>160</sup> Cairns, I. C. M., 2017. What Counts as 'Domestic'? Family Relationships and the Proposed Criminalisation of Domestic Abuse in Scotland. 21(2) *Edinburgh Law Review* 262-268.

<sup>161</sup> Sikh Women's Aid., 2021. *From Her, Kings are Born: Impact and Prevalence of Domestic and Sexual Violence in the Sikh/Punjabi Community*. Available at:

[https://www.sikhwomensaid.org.uk/files/Sikh Womens Aid From Her Kings Are Born.pdf](https://www.sikhwomensaid.org.uk/files/Sikh_Womens_Aid_From_Her_Kings_Are_Born.pdf)

[Accessed 8 March 2022]. at p 15 and p 29.

<sup>162</sup> Cairns, I. C. M., 2017. (n 160) at p 266.

<sup>163</sup> McLaughlin, E., 2016. (n 158) at pp 167-70; McLaughlin, E., Wheate, R., and McGowan, M., 2018. (n 155) at pp 8-10.

<sup>164</sup> Forbes, E., 2022. (n 153) at p 130, p 134 and p 137. Reid-Howie Associates., 2007. *Evaluation of the Pilot Domestic Abuse Court*. Edinburgh: Scottish Executive. at p 77.

<sup>165</sup> McLaughlin, E., 2016. (n 158) at pp 163-5; McLaughlin, E., Wheate, R., and McGowan, M., 2018. (n 155) at pp 6-7.

<sup>166</sup> Ashbrook Research and Consultancy Ltd., 2021. *Study into the Impact of COVID-19 on Gender-Based Domestic Violence in Scotland and India*. Report commissioned by Glasgow Kelvin College. at p 20.

support rather than engaging with the formal mechanisms of the state, police, and courts to stop abuse.<sup>167</sup> The experience of South Asian complainers who do *not* find respite within the family or community in Scotland or abroad, can then be exacerbated by a lack of access to financial security caused by visa conditions and immigration laws (e.g. No Recourse to Public Funds, welfare, benefits and housing, as well as legal prohibitions on undertaking paid work), and by a lack of experience in work outside the home.<sup>168</sup>

- **Ongoing abusive behaviour** by the accused during the process, ranging from behaviours sometimes, wrongly, thought to be ‘trivial’ (e.g. coughing during the complainer’s evidence, sitting close by the complainer in civil proceedings, sending ‘messages’ to the complainer including damaging her property) to more obviously serious behaviours (e.g. breaching non-harassment orders or bail conditions, verbally or physically threatening the complainer, and subjecting children to emotional abuse).<sup>169</sup> Complainers, including South Asian victims of domestic abuse, also may experience ongoing abuse from the accused’s family and community, especially where the abuse appears to be condoned in the country of origin.<sup>170</sup> The period post-court has long been identified as a time of particular vulnerability for complainers and their children, who may be experiencing continuing abuse or harassment without again involving the authorities.<sup>171</sup>
- The **need for complainers to disclose highly private details** about themselves and their family, including matters of a sexual, emotional, financial, medical and personal nature.<sup>172</sup> The need to repeat this information to numerous strangers, including in the presence of court reporters and defence agents, over lengthy periods of time, and to provide it in a comprehensive, accurate and ‘persuasive’ manner despite the traumatic content and circumstances.<sup>173</sup> This is especially difficult for South Asian complainers, where long-standing traditional and cultural mores may predicate against disclosing ‘private’ information about the family.<sup>174</sup>
- The **nature, extent, duration and range of abuse** suffered. Where complainers have been subjected to long periods of abuse including physical, sexual, financial, psychological, coercive control and honour-based violence and abuse, it can be difficult for them to express this within the confines of the criminal justice process. Recent evidence also suggests that Sikh complainers suffer abuse 1.5 times longer than those in the white community before seeking help, increasing the extent,

<sup>167</sup> Sikh Women's Aid., 2021. (n 161) at p 18.

<sup>168</sup> McLaughlin, E., 2016. (n 158) at pp 288-300.

<sup>169</sup> Forbes, E., 2022. (n 153) at pp 113-8

<sup>170</sup> McLaughlin, E., Wheate, R., and McGowan, M., 2018. (n 155) at p 37.

<sup>171</sup> Reid-Howie Associates., 2007. (n 164); Scottish Government., 2019. (n 152) at p 18, p 31, p 42 and p 63.

<sup>172</sup> Forbes, E., 2022. (n 153) at p 2.

<sup>173</sup> Ibid, at pp 85-6.

<sup>174</sup> McLaughlin, E., Wheate, R., and McGowan, M., 2018. (n 155) at p 6.

duration and range of the abuse that needs to be reported.<sup>175</sup> Furthermore, complainers often do not understand the significance of the initial statement taken by police, and the fact that they may not get the chance to revisit, revise or clarify the statement.<sup>176</sup> The fact that these statements are deliberately taken as near in time to the abusive event(s) as possible (so as to provide the best, most credible legal evidence), means that complainers are in crisis mode when providing the statement; not ideal conditions under which they can be comprehensive, accurate and effusive.<sup>177</sup> Again this difficulty is heightened for South Asian complainers, who often experience additional language and cultural barriers that impede the ease of their communication in this context.<sup>178</sup>

- The need for **co-ordinated and well-resourced inter-agency support** for complainers and their children throughout the process, including in the aftermath of sentencing.<sup>179</sup> The research, including the most recent empirical data in Scotland, shows that the support needs to range from basic information about the legal process and progress of the complainer's case, to the provision of safe and comfortable waiting areas and/or childcare for complainers and their children, to the organisation of appropriate interpreter services for complainers who do not speak English.<sup>180</sup> Multi-lingual and culturally appropriate services at all stages of the process facilitate greater engagement by complainers,<sup>181</sup> although some studies have noted that complainers do not necessarily need police officers from their own culture or gender in order to be satisfied with the police response to domestic abuse in Scotland.<sup>182</sup> Some research indicates that cultural distrust of the police within South Asian communities can lead to domestic abuse not being reported, with complainers instead opting for informal support services amongst family or friends, or reporting directly to domestic abuse services without involving the police or the legal system at all.<sup>183</sup>
- The **economic effects** of pursuing legal action against a domestic abuser, including having been prevented/discouraged from entering the job market; lacking the confidence or skills to do so; lacking the financial resources to attend training, interviews or workplaces and to access childcare; lacking of access to workplaces with flexible arrangements; overcoming the historical income disparity between

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<sup>175</sup> Sikh Women's Aid., 2021. (n 161) at p 18.

<sup>176</sup> Forbes, E., 2022. (n 153) at pp 78-80.

<sup>177</sup> Ibid, at pp 76-7 and p 80.

<sup>178</sup> McLaughlin, E., Wheate, R., and McGowan, M., 2018. (n 155) at p 5.

<sup>179</sup> Connelly, C., 2008. *Handling Domestic Abuse Cases: A Toolkit to Aid the Development of Specialist Approaches to Domestic Abuse. Report for the Scottish Government.* at p 4.

<sup>180</sup> Forbes, E., 2022. (n 153) at p 105.

<sup>181</sup> Sikh Women's Aid., 2021. (n 161) at p 39.

<sup>182</sup> McLaughlin, E., Wheate, R., and McGowan, M., 2018. (n 155) at p 7.

<sup>183</sup> Sikh Women's Aid., 2021. (n 161) at p 39.



men and women (especially in some South Asian communities<sup>184</sup>); and accessing affordable and safe housing.<sup>185</sup>

- The **concomitant roles of the criminal and civil justice processes**, where complainers may be afforded special measures (such as intermediaries or giving evidence behind a screen in the criminal trial) and physical protection through bail conditions or orders set down by the criminal courts, and yet at the same time be required to attend civil proceedings where the alleged perpetrator is in the same waiting room and then sat directly across a table facing the complainer. The practical effect of this is to negate any sense of protection the complainer may have felt as a result of the criminal justice system measures.<sup>186</sup> The research indicates that the limitations of non-harassment orders, and complainers' lack of awareness about civil remedies are both areas which could be improved so as to improve the satisfaction, safety and protection of complainers.<sup>187</sup>
- The need for **procedural justice through the provision of timely, consistent and relevant information**<sup>188</sup> about the court process in general (e.g. the procedural steps before, during and after a trial); the progress of the complainer's case (e.g. explanations about adjournments, and longer delays between key legal events); the significance and implications of particular processes (e.g. the initial statement to police is unlikely to be revisited afterwards) and events (e.g. bail hearings, sentencing reports); the range of possible outcomes (including that most matters do *not* go to trial and many offenders are *not* sentenced to imprisonment); the legal rules (e.g. the difference between civil and criminal proceedings, the role of the sheriff in adversarial settings); and the rules of evidence (e.g. the different standards of proof in civil and criminal matters, the practicalities of being cross-examined on irrelevant and upsetting matters without objection by the prosecution or interference by the sheriff, the availability of some special measures in criminal proceedings, but the lack of these in civil proceedings until the point of proof).
- A **lack of agency** experienced by complainers because they feel unable to make informed choices (due to the nature of the abuse, the lack of information about the legal process, and the resultant unpredictability of events thereafter); they often continue to experience abuse and coercive control by the accused even after reporting abuse to the police and instigating proceedings; and they report that their voice is 'lost' in the process because the institutional mechanisms of the state response to domestic abuse can be disempowering.<sup>189</sup> Here the role of the judiciary is crucial in ensuring that the tone of the court, the pace of proceedings,

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<sup>184</sup> McLaughlin, E., 2016. (n 158) at pp 211-4.

<sup>185</sup> Ashbrook Research and Consultancy Ltd., 2021. (n 166) at p 48 and p 67.

<sup>186</sup> Forbes, E., 2022. (n 153) at pp 110-3.

<sup>187</sup> Reid-Howie Associates., 2007. (n 164) at p 18, p 31, p 42, and p 63.

<sup>188</sup> Forbes, E., 2022. (n 153) at pp 87-91.

<sup>189</sup> Ibid, at pp 91-5.

and the effect of non-compliance by the accused (e.g. in response to bail, orders, and sentences), support the view that domestic abuse is being taken seriously.<sup>190</sup>

- The role of **plea bargaining** and the practical effect of reducing the number of charges and amount of evidence that goes before the court.<sup>191</sup> The gap between the abuse experienced by the complainer and what is evidenced before the court can lead to a perception by complainers that sentences are not commensurate with their lived experience. As noted by a support worker “I think it was a good outcome for what ended up in court, but not for what actually happened”.<sup>192</sup> Some complainers report feeling unheard, unrepresented, and unprotected by the court and sentencing process in domestic abuse cases in Scotland.<sup>193</sup>

The factors laid out above can constitute barriers to women reporting domestic abuse and have a negative impact on their experience in domestic abuse cases in Scotland (although such factors are not unique to Scotland).

Despite the significant difficulties outlined above, research nevertheless indicates that there is a positive link between appropriate responses to complainers, improving the level of engagement of complainers in the justice process<sup>194</sup> and the perception of the appropriateness of the sentence for domestic abuse cases. This is reflected in more recent research where complainers report that despite the difficulties, engaging with the criminal justice process may be ‘worth it’ for the temporary protections it offers through bail conditions and sentencing, which limit the offender’s contact with complainers and their children.<sup>195</sup> Complainers also report seeing the value in stepping forward to encourage future sufferers of domestic abuse to seek help, and the value of having their abuser’s conduct ‘on record’, even if the sentence does not match what the complainer felt was appropriate.<sup>196</sup> Looking at the experiences of complainers in domestic abuse cases in Scotland however, the research suggests that complainers’ overall experience of the criminal justice system leaves many feeling that for them and their children, it was enormously risky, costly, stressful, embarrassing, drawn-out, ineffective and not entirely ‘worth it’.<sup>197</sup>

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<sup>190</sup> Connelly, C., 2008. (n 179) at p 5; Forbes, E., 2022. (n 153) at chapter 5.

<sup>191</sup> Forbes, E., 2022. (n 153) at pp 106-9 and chapter 5. For an overview of plea bargaining see, Gormley, J., McPherson, R., and Tata, C., 2020. *Sentence Discounting: Sentencing and Plea Decision Making*. Edinburgh: Scottish Sentencing Council.

<sup>192</sup> Ibid, at p 133.

<sup>193</sup> Ibid, at p 118.

<sup>194</sup> Brooks, O., Burman M., Lombard N., Mclvor, G., Stevenson-Hasgings, L., and Kyle, D., 2014. (n 157) at p 4.

<sup>195</sup> Forbes, E., 2022. (n 153) at p 136 and p 141.

<sup>196</sup> Ibid, at p 136 and p 141.

<sup>197</sup> Ibid, at pp 141-3.

In terms of the specific research on South Asian complainers in domestic abuse cases in Scotland, what is available suggests that their interactions with police result in positive experiences and greater confidence in their security and safety:

“They took my historical abuse really seriously. I thought there was nothing that could be done...” and “I have the police to help me. I feel more confident. Before I didn’t know, now that I am involved with the police my confidence is up.”<sup>198</sup>

This has been more broadly reflected in recent research on Scotland, where empirical data gathered from a range of support agencies, policy/strategic organisations, and victim-survivors made it “overwhelmingly clear that there was a significant degree of positivity about the response of the Scottish Government to the potential and actual implications of the pandemic on gender-based domestic abuse. Indeed, this was couched within the broader belief that the Scottish Government has been very proactive in this regard over many years and has put in place legislation, policies and strategies through time which aim to tackle issues pertinent to gender-based domestic abuse and domestic abuse against children and young people.”<sup>199</sup>

## 4.2 Implications of the COVID-19 Pandemic on the Experience of Domestic Abuse Complainers

It is noted that recent research strongly suggests the prevalence of domestic abuse in Scotland and the rest of the UK has risen during the COVID-19 pandemic, in terms of both frequency and intensity.<sup>200</sup> Support agencies report an increase in demand for help-line advice, housing, refuge, counselling, legal aid, mental health and other health support services, although this has not necessarily been reflected in increased reporting to police, specific statistics in this regard are limited, and the experiences of complainers are yet to be fully documented. At minimum, recent research suggests that the factors outlined above (i.e. pre-pandemic) have had a heightened impact during the ongoing lockdowns in Scotland, and have been intensified by the concomitant social isolation and reduced access to support services, information and education; digital exclusion (e.g. limited access to private spaces, and to technology including through which support agencies could be accessed); the enduring close proximity of people confined to the household, increasing the opportunity for scrutiny and surveillance of complainers by perpetrators; economic pressures of job-loss, furlough, increased dependence on benefits; culture of at-home alcohol consumption; limited capacity of police cells and growing delays in court processes; school closures impacting on the ability of children to access safe spaces; and the reduced opportunity for bystander engagement (e.g. taxi drivers, hairdressers, teachers, doctors).<sup>201</sup>

<sup>198</sup> McLaughlin, E., Wheate, R., and McGowan, M., 2018. (n 155) at p 8.

<sup>199</sup> Ashbrook Research and Consultancy Ltd., 2021. (n 166) at p 40.

<sup>200</sup> Ibid, at p 9. Sikh Women's Aid., 2021. (n 161) at p 18.

<sup>201</sup> Ashbrook Research and Consultancy Ltd., 2021. (n 166) at pp 12-4.

These factors are heightened for Sikh complainers, who are considered to have been at additional risk of abuse during the COVID-19 pandemic.<sup>202</sup>

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<sup>202</sup> Sikh Women's Aid., 2021. (n 161) at p 18.

## 5.0 Specialised Domestic Abuse Courts

Over the last thirty years, there has been increased use of specialised courts internationally. Such courts often adopt the principle of problem-solving courts for specific issues such as drug related crime, youth crime or domestic abuse. Specialised domestic abuse courts have been implemented in the US and in England and Wales. They have also been a significant part of the Scottish landscape.

### 5.1 Specialised Domestic Abuse Courts in Scotland

In Scotland, a specialist domestic abuse court was first trialled in 2004, under the auspices of the Glasgow Sheriff Court. A variety of court models were considered, and a range of organisations were consulted, resulting in the designation of a specific court to hear all stages of summary domestic abuse cases including first appearance custody cases, intermediate diets, trials, reviews, and deferred sentences. The court involved new *procedures* rather than a new jurisdiction; the new court had the powers available to other sheriffs in summary courts and the role of sheriffs in the Domestic Abuse Court remains very similar to their role in other sheriff courts, but they hear only domestic abuse cases.

The court was trialled initially only for a designated geographic area of Glasgow, but additional specialist domestic abuse courts were also trialled in Edinburgh (2012) and Livingston (2012). Domestic abuse “cluster courts” in Ayr, Dunfermline, Falkirk, and the Scottish Borders, facilitate the streamlined timetabling of domestic abuse cases, but do not universally provide many of the other key features of the “specialist” domestic abuse courts (including specially trained judiciary and prosecutors; and support agencies having face-to-face contact with complainers, following-through each case from start to finish, and playing an advocacy role directly with the court on behalf of complainers).<sup>203</sup>

Although there is a lack of consensus and research as to which model of domestic abuse court is most ‘effective’,<sup>204</sup> there is some commonality of aims in domestic abuse courts across jurisdictions in the UK and abroad.<sup>205</sup> In line with similar approaches utilised in other jurisdictions, the specialist domestic abuse courts in Scotland are intended to:<sup>206</sup>

- Increase effectiveness and efficiency in domestic abuse cases, including the speed of the response to domestic abuse

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<sup>203</sup> Source., 2018. *How are Scotland’s domestic abuse courts working?* Available at:

<<https://sourcenews.scot/how-are-scotlands-domestic-abuse-courts-working/>> [Accessed 7 March 2022];

Forbes, E., 2022. (n 151) at p 83.

<sup>204</sup> Brooks, O., Burman M., Lombard N., McIvor, G., Stevenson-Hasgings, L., and Kyle, D., 2014. (n 157) at p 5.

<sup>205</sup> Scottish Government., 2019. (n 152) at p.3.

<sup>206</sup> Reid-Howie Associates., 2007. (n 164); Scottish Government., 2019. (n 152) at pp 1-3.

- Increase victim and witness participation and satisfaction
- Improve co-ordination of information across the criminal justice system
- Reduce attrition and withdrawal rates
- Reduce repeat victimisation and recidivism
- Increase offender accountability
- Emphasise the seriousness of domestic abuse and the need for an increase in the severity of domestic abuse sentences
- Increase convictions rates
- Improve victim safety
- Improve judicial and legal knowledge in domestic abuse cases through specialist training
- Improve victim advocacy and support service visibility, accessibility and co-ordination
- Improve liaison between agencies and support services
- Improve the consistency of outcomes
- Improve the efficiency of court processes

compared with the general criminal, civil and family court models.

The primary means of examining whether and how these objectives have been attained in Scotland's specialist and clustered Domestic Abuse Courts remains the Pilot Domestic Abuse Court Evaluation<sup>207</sup> which was conducted in 2007. Data beyond the Pilot Evaluation is sparse. There is virtually no evidence in the public domain about the performance and operation of specialist domestic abuse courts established in Edinburgh and Livingston, and the cluster courts in Ayr, Dunfermline, Falkirk, and the Scottish Borders.<sup>208</sup>

The Pilot Evaluation complainers in domestic abuse cases were reported to have an improved likelihood of participation, and a more positive experience in the specialist domestic abuse court than in the traditional courts in Scotland. High levels of satisfaction were reported by complainers (and witnesses) in the Pilot Evaluation in relation to the emphasis on safety, risk assessment, safety planning, provision of information, provision of independent support at all stages, and the expertise of the specialist support organisation (ASSIST).<sup>209</sup> Indeed, complainers' experience was markedly improved by the availability of a single point of contact for support (ASSIST), and for contact with other organisations.<sup>210</sup> In particular, the importance of providing complainers with information about processes, support, and the progress of their

<sup>207</sup> Henceforth 'the Pilot Evaluation'.

<sup>208</sup> Source., 2018. (n 203)

<sup>209</sup> Reid-Howie Associates., 2007. (n 164), at iii and iv.

<sup>210</sup> Ibid, at pp 46-7. In particular, the importance consistently of providing complainers with information about processes, support, and the progress of their individual case was a key finding of the Pilot Evaluation and subsequent commentary.<sup>210</sup> The need to recognise the unique requirements of ethnic minority communities was also evident in the Pilot Evaluation, especially where the complainers' first language is not English.<sup>210</sup> This has also been reflected in later studies looking at other aspects of the criminal justice system in relation to domestic abuse and South Asian communities.

individual case was a key finding of the Pilot Evaluation and subsequent commentary.<sup>211</sup> The need to recognise the unique requirements of ethnic minority communities was also evident in the Pilot Evaluation, especially where the complainer's first language is not English.<sup>212</sup> This has also been reflected in later studies looking at other aspects of the criminal justice system in relation to domestic abuse and South Asian communities.<sup>213</sup>

The Pilot Evaluation also reported positively on the benefit of having judges, sheriffs, police and prosecutors with specialist training about domestic abuse. For example, sheriffs in the pilot domestic abuse court were observed specifically taking account of complainers' safety, and that of their children, improving complainers' sense of safety and protection. Ways in which sheriffs demonstrated this included explicitly taking safety and protection into account, as well taking the time to explain their decisions and the implications of those decisions for the complainers and their children.<sup>214</sup>

Where in the Pilot Evaluation gaps were reported in relation to the resources available to complainers, and in relation to the provision of services to alleged offenders (e.g. the availability of the CHANGE programme) this negatively impacted on complainers' satisfaction. 215

## 5.2 Case Types, Convictions and Sentencing in Specialist Domestic Abuse Courts

The Pilot Evaluation noted that good practice would require the adoption of a "shared understanding of the appropriate response to domestic abuse",<sup>216</sup> including the need for sheriffs to deliver consistent sentencing reflecting the seriousness and criminality of domestic abuse.<sup>217</sup>

The cases heard in the Pilot Evaluation Court tended to be breach of the peace (almost 75% of cases), and assault (almost 50% of cases), with half of the alleged offenders facing two or more charges.<sup>218</sup> The conviction rate in the Pilot Evaluation was 86% compared to 77% for the traditional court,<sup>219</sup> with the rate of guilty pleas at 81% in the domestic abuse court compared with 73% in the comparison courts.<sup>220</sup> Conviction rates vary in 'integrated' domestic violence courts which use a "one family, one judge" model to deal with all criminal and civil matters for that family (such as those in New

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<sup>211</sup> E.g. Forbes, E. 2022. (n 153) at chapter 6.

<sup>212</sup> Reid-Howie Associates., 2007. (n 164) at p 33.

<sup>213</sup> McLaughlin, E. 2016. (n 158); McLaughlin, E., Wheate, R., and McGowan, M., 2018. (n 155); Sikh Women's Aid., 2021. (n 161) .

<sup>214</sup> Reid-Howie Associates., 2007. (n 164) at p 51.

<sup>215</sup> Ibid, at iii and iv.

<sup>216</sup> Ibid, at vii

<sup>217</sup> Ibid, at viii

<sup>218</sup> Ibid, at p 30.

<sup>219</sup> Ibid, at iii and p 39.

<sup>220</sup> Ibid, at p 33.

York, Vermont and Idaho), with some research showing higher or similar/equal conviction rates compared with the traditional court process, and others reporting lower conviction rates. Likewise, the available data on recidivism from cases heard in integrated domestic violence courts is varied, showing higher, equal and lower rates of recidivism compared with traditional court processes.<sup>221</sup> The Scottish experience in the specialist domestic abuse court indicates higher rates of guilty pleas at the first hearing, at or before the intermediate diet, and overall.<sup>222</sup> The Pilot Evaluation noted that a practical effect of the higher rate of guilty pleas prior to the intermediate diet (and indeed, overall) in the specialist domestic abuse court, was that fewer complainers were required to attend court or give evidence. This had a positive impact on complainers and also lowered the rate of attrition (i.e. cases not called, or cases deserted and not re-listed) in the specialist domestic abuse court compared with the traditional courts.<sup>223</sup>

The Pilot Evaluation indicated that the sentencing in this court differed from sentences for domestic abuse handed down in the regular courts in several important ways. The specialised domestic abuse court favoured probation (34%, whereas the figure is 16% in the comparison court)) ahead of admonishment (28%), imprisonment (18%), fines (18%, whereas the figure is 43% in the comparison courts) or Community Service Orders (4%), and the probations tended to involve greater use of conditions (such as participation in alcohol or drug counselling, the CHANGE programme, or unpaid work).<sup>224</sup> The emphasis on probation in the Domestic Abuse Court reflected well in measures of complainers' satisfaction, with the highest level of satisfaction with disposals amongst complainers being with the use of probation (approximately 75% of respondent complainers).<sup>225</sup> Custodial sentences handed down in the Pilot Domestic Abuse Court were also slightly longer than in the comparison courts (83% being over one month, compared with 64% in the comparison court).<sup>226</sup>

Research on the effect of domestic abuse perpetrator programmes in Scotland is not extensive.<sup>227</sup> It suggests that where offenders are compelled to attend by a court mandate, the primary element required for rehabilitation (a desire to engage and change) is overshadowed by the perpetrator being forced to attend.<sup>228</sup>

Where complainers in the Pilot Evaluation expressed negative views of the sheriff, this tended to be in relation to the disposal decided by the sheriff, and 'improvements to

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<sup>221</sup> Scottish Government., 2019. (n 152) at pp 30-31.

<sup>222</sup> Reid-Howie Associates., 2007. (n 164) at p 47.

<sup>223</sup> Ibid, at p 47.

<sup>224</sup> Ibid, at iii and pp 39-40.

<sup>225</sup> Ibid, at p 41.

<sup>226</sup> Ibid, at p 41.

<sup>227</sup> For a discussion of relevant literature in this area see, Ministry of Justice., 2013. *Transforming Rehabilitation: a summary of evidence of reducing reoffending*. Available at: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/243718/evidence-reduce-reoffending.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243718/evidence-reduce-reoffending.pdf)> [Accessed 22 March 2022].

<sup>228</sup> Brooks, O., Burman, M., Lombard, N., Mclvor, G., Stevenson-Hasgings, L., and Kyle, D., 2014. (n 157) at p 6.



disposals' was one of the suggestions made by complainers in the evaluation.<sup>229</sup> The choice of disposal, alongside some aspects of procedural justice (a lack of communication, the role of negotiation in altering charges, and the presentation of the case in the court) were cited as problems for a small number of complainers.<sup>230</sup> The use of probation generated the highest level of satisfaction from complainers (approximately 75%), based on the reasoning that the perpetrator 'might get help or have time to consider their behaviour'. Imprisonment, in comparison, drew mixed views from complainers, though it was considered by some to properly reflect the seriousness of domestic abuse.<sup>231</sup> Victims in the specialist Domestic Abuse Court also expressed concerns that plea bargaining changed or removed charges which were important to them, and that offenders who received admonitions were "getting away with it".<sup>232</sup> Likewise, where inappropriate assertions about domestic abuse were made in court (e.g. by defence agents), complainers' experiences would have been improved by a robust challenge by the prosecution or greater intervention by the Sheriff.<sup>233</sup>

### 5.3 Other Models of Specialist Domestic Abuse Courts

Research suggests that specialised domestic violence courts are often the pre-cursor to integrated domestic abuse courts of the 'one family, one judge' model.<sup>234</sup> Integrated domestic abuse courts can, however, arise in other ways. For instance, after a review of the English family courts found that the adversarial process could harm and re-traumatise domestic abuse victims and their children by exacerbating the conflict between parents,<sup>235</sup> an Integrated Domestic Abuse Court Pilot was established to consider family, civil and criminal matters in a single forum.<sup>236</sup> Such integrated courts hear all aspects of a case for each family (for example divorce, separation, contact, residency, domestic abuse, harassment, assault, sexual assault). Examples of such courts in Canada, the USA and England have been studied and found to vary considerably in their objectives, eligibility requirements and longevity.<sup>237</sup> In the English integrated domestic abuse court pilot, the four main drivers were the lack of inter-agency co-ordination and engagement between the police, civil, family and criminal law justice systems; the resource constraints on all courts exacerbated by increasing demand and the increase in unrepresented appearances; a perceived pro-contact

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<sup>229</sup> Reid-Howie Associates., 2007. (n 164) at pp 38-9.

<sup>230</sup> Ibid, at p 44.

<sup>231</sup> Ibid, at p 41.

<sup>232</sup> Ibid, at p 49.

<sup>233</sup> Ibid, at p 64. Forbes, E., 2022. (n 153) at pp 106-8.

<sup>234</sup> Scottish Government., 2019. (n 152) at p 13.

<sup>235</sup> Hunter, R., Burton, M., and Trinder, L., 2020. *Assessing Risk of Harm to Children and Parents in Private Law Children Cases. Ministry of Justice Final Report.* at pp 3-8.

<sup>236</sup> Centre for Justice Innovation., 2020. *Integrated Domestic Abuse Court: Evidence and Practice Briefing.* at p 1.

<sup>237</sup> Scottish Government., 2019. (n 152).

culture in the family courts the effect of which was to minimise the significance of domestic abuse; the inequalities exacerbated by the adversarial system particularly evident in cases of domestic abuse.<sup>238</sup>

Likewise, other models where the judicial role includes active monitoring of the perpetrator after the delivery of a sentence and swiftly responding to any breaches (so-called ‘problem-solving courts’), also appear to have a positive effect on victims’ experiences and on the frequency of re-offending. Although the literature evaluating the full range of domestic abuse court-types is limited and mainly derived from empirical data gathered from outside Scotland,<sup>239</sup> it suggests that dedicated domestic abuse courts can improve complainers’ experience and satisfaction compared with the traditional court model where criminal and civil matters are separately considered.<sup>240</sup>

In Scotland, the Pilot Evaluation reported mixed views from participants as to whether the court should have been able to hear both criminal and civil matters (the latter including custody, contact, residence, interdicts etc.). Consensus appeared to arise from the view that sheriffs needed to be made aware of relevant issues which related to their summary domestic abuse cases, especially where children were involved.<sup>241</sup>

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<sup>238</sup> Centre for Justice Innovation., 2020. (n 236) at p 3.

<sup>239</sup> Connelly, C., 2008. (n 179) at p 15.

<sup>240</sup> Centre for Justice Innovation (2020). (n 236) at p 9.

<sup>241</sup> Reid-Howie Associates., 2007. (n 164) at p 18.

## 6.0 Public Perceptions

Following longstanding criticisms over inaction, injustice, and human rights abuses<sup>242</sup>, policy and public attitudes towards domestic abuse in several Anglo-American countries have undergone significant change – especially in the last few decades.<sup>243</sup> The general trend has been towards recognising domestic abuse as a serious matter and one where the intervention of criminal law is warranted.<sup>244</sup> As such, there have been various national<sup>245</sup> and international instruments seeking to address violence against women, which includes domestic abuse.<sup>246</sup> However, some argue these developments have been slow and not as comprehensive as might have been desirable.<sup>247</sup>

Effectively addressing the serious issue of domestic abuse remains an important challenge. Understanding public attitudes can play a role in addressing this issue. The main recent source on public attitudes of relevance here is the Scottish Social Attitudes Survey. Though this does not focus on sentencing specifically, it does provide some more general insights.

### 6.1 Scottish Social Attitudes Survey 2019: attitudes to violence against women

Between 30 August 2019 and 18 March 2020, social research institute, ScotCen, conducted research that included public attitudes to domestic abuse in Scotland. The methodology involved the extensive use of scenarios/vignettes with the aim being to

<sup>242</sup> Dobash, R.E., and Dobash R.P., 2011. Evaluating Criminal Justice Interventions for Domestic Violence. 46 *Crime & Delinquency* 252; Capers, I.B., 2011. Home is where the crime is. 109 *Michigan Law Review* 979.

<sup>243</sup> Carlson, B., and Worden A.P. 2001. *Public Opinion about Domestic Violence*. Washington: US Dept. of Justice. Available at: <<https://www.ojp.gov/pdffiles1/nij/grants/198319.pdf>>. [Accessed 28 February 2022].

<sup>244</sup> Some insight on attitudes may be derived from recent data such as the Crime Survey for England and Wales. Reference might also be had to older data such as the results from the 2009 Ipsos Mori survey data that suggested one in seven accepted violence in some situations such as “nagging.” (see <http://www.homeoffice.gov.uk/documents/violence-against-women-poll?view=Binary> and Willis, P. and Laura O’Malley, L., 2009. Violence in the Home - Governmental Initiative or Governmental Gimmick? 191 *Criminal Lawyer* 4).

<sup>245</sup> Brooks, O., Burman, M., Lombard, N., Mclvor, G., Stevenson-Hasgings, L., and Kyle, D., 2014. (n 157).

<sup>246</sup> For example, the 1993 Declaration on the Elimination of Violence against Women and the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence.

<sup>247</sup> Manjoo, R., 2015. *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences. Addendum: Mission to the United Kingdom of Great Britain and Northern Ireland*. Available at: <<https://evaw-global-database.unwomen.org/-/media/files/un%20women/vaw/country%20report/europe/united%20kingdom%20of%20great%20britain%20and%20northern%20ireland/united%20kingdom%20of%20great%20britain%20and%20northern%20ireland%20srvaw.pdf?vs=3603>>. [Accessed 28 February 2022].

capture attitudes to behaviours.<sup>248</sup> In total, 959 respondents answered questions in a self-completion survey. Although the research did not specifically address views about sentencing for domestic abuse, it did explore pertinent questions for present purposes such as perceptions of the wrongfulness and harms of some types of domestic abuse conduct. While the wide range of conduct that may constitute domestic abuse (physical behaviours, verbal behaviours, coercive and controlling behaviours, etc) means not every eventuality could be examined, the research does provide important insights.

The research suggests widespread disapproval of domestic abuse in Scotland and that disapproval has increased in recent years.<sup>249</sup> Some types of domestic abuse conduct were associated with greater perceived harm. For example, in terms of coercive control scenarios, financial control was most likely to be considered “very seriously wrong.”<sup>250</sup>

However, the research also shows that public attitudes to the diverse range of domestic abuse conduct can vary between subgroups. For example, in terms of coercive control, younger respondents were found to be somewhat less disapproving of an “excessive monitoring scenario” of a partner via multiple text messages – perhaps due to the greater use of mobile technology and the normalisation of greater connectedness via technology among this group.<sup>251</sup>

Other groups examined in the study showed some differences of opinion in other regards. Moreover, in scenarios, there were found to be some differences in public perceptions when the genders of the perpetrator and victim were reversed (e.g. with regard to verbal abuse). For instance, there were some differences between subgroups in attitudes to the level of harm done to male victims of verbal abuse compared to female victims.

Taken together, this research provides valuable insights into the complexity of public attitudes towards domestic abuse. Where it is most limited for our purposes is that it does not indicate public perceptions about sentences for domestic abuse offences.

## 6.2 Sentencing Domestic Abuse Research

In terms of sentencing for domestic abuse, the diversity of the conduct precludes overly broad generalisations. Consequently, research such as that noted above

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<sup>248</sup> Reid, S., Elliott, C., Hinchcliffe, S., Knudsen, L., Montagu, I., Rutherford, L., Scholes A., and Shields, J., 2020. *Scottish Social Attitudes Survey 2019: Attitudes to Violence against Women in Scotland*. Available at: <<https://dera.ioe.ac.uk/37003/1/scottish-social-attitudes-survey-2019-attitudes-violence-against-women-scotland.pdf>> [Accessed 8 March 2022]. at p 4.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid, at pp 44-45.

<sup>251</sup> Ibid, at p 47.

cannot cover all scenarios.<sup>252</sup> Limited research has explored attitudes to sentencing for particular types of offences and how the presence or absence of a context of domestic abuse may affect this. We also noted victims' perspectives earlier.

One example is research carried out by Horstman et al. This work compared perceptions of sentencing for domestic violence assault with non-domestic violence assault using vignettes<sup>253</sup>. Participants were recruited undergraduate students in Australia. This research has a number of limitations for present purposes compared to the Scottish Social Attitudes Survey noted above. Firstly, it did not focus specifically on Scotland. Secondly, it used a small sample size. Thirdly, by relying on students as participants, the research was less representative than research randomly sampling the general population. However, the research did directly address questions concerning perceptions of domestic abuse sentencing in the context of violence. The research suggested that students considered domestic violence less serious than non-domestic violence. Yet, due to the different methodologies and focuses between the ScotGen research and this Australian research (e.g. the questions and scenarios used are different) only limited comparisons are possible.

In sum, there is a knowledge gap concerning the public's attitudes to sentencing for domestic abuse. While there is strong evidence that the public believe such conduct to be wrong and harmful, the evidence base concerning punishment is less substantial. The main study noted here is the Scottish Social Attitudes Survey. This speaks to a number of pertinent matters (e.g. the perceived wrongfulness and harmfulness of certain abusive behaviours). However, while the survey is valuable, it is less able to suggest public views on sentencing for domestic abuse offences.

### 6.3 Insight from other jurisdictions

There are several informative studies of public opinions from other jurisdictions that may provide insights relevant to Scotland in certain regards. For example, there is more general research on public opinions of sentencing not specific to domestic abuse.<sup>254</sup> There is also research on attitudes to domestic abuse, but not sentencing specifically, that may suggest areas where public communication is needed.<sup>255</sup>

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<sup>252</sup> There is also some research in other jurisdictions that has sought to analyse judicial perspectives. For example, Fradella, H.F., and Fischer, R.G., 2010. Factors Impacting Sentence Severity of Intimate Partner Violence Offenders and Justification for the Types of Sentences Imposed by Mock Judges. 34 *Law & Psychology Review* 25.

<sup>253</sup> Horstman, N.J., Bond, C.E.W., and Eriksson, L., 2021. Sentencing Domestic Violence Offenders: A Vignette Study of Public Perceptions. 36 *Journal of Interpersonal Violence* 21-22.

<sup>254</sup> Marsh, N., McKay, E., Pelly, C., and Cereda, S., 2019. *Public Knowledge of and Confidence in the Criminal Justice System and Sentencing—A Report for the Sentencing Council*. London: Sentencing Council. Available at: <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Public-Knowledge-of-and-Confidence-in-the-Criminal-Justice-System-and-Sentencing.pdf>> [Accessed 8 March 2022].

<sup>255</sup> For example, there may be a tendency to blame victims of domestic to some extent and a “defensive position” concerning definitions of domestic abuse among some. See Stanley, N., Fell, B.,

While a body of research studies can be collated, there can be methodological issues when attempting to draw comparisons between studies. In one meta-analysis of European research, a challenge encountered was that comparisons between studies are difficult. This analysis examined 40 surveys in 19 countries that reflected the responses of around 85,000 European citizens. It was found that:

*The same attitudinal topics are typically addressed with a variety of questions and formats, different samples, and with different definitions of violence. Different questions addressing the same issues in different countries clearly limit the possibility of comparing the information on relevant aspects regarding attitudes towards violence against women across countries (and its evolution over time).* <sup>256</sup>

The authors stressed that “it is important to note that when the same issues are framed with different questions, the responses can provide quite different images.”<sup>257</sup> Thus, even within a single jurisdiction, different methodologies or questions can frustrate simple direct comparisons.

Relatedly, the same meta-analysis also found challenges when seeking to make comparisons across countries. With one exception, “no questions addressing attitudes towards violence against women used in the surveys included in this review were based on selected instruments with adequate reliability and validity, or tested cross-culturally.”<sup>258</sup> Indeed, cultural attitudes to domestic abuse, as the Scottish Social Attitudes Survey suggests, can vary between groups even with a jurisdiction.

This is not to say that the evidence from other countries is irrelevant to Scotland. Yet, findings between studies (especially between isolated studies conducted in different jurisdictions with different methodologies) need to be approached with caution.

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Miller, P., and Thomson, G., 2012. Men’s Talk: Men’s Understandings of Violence against Women and Motivations for Change. 18 *Violence Against Women* 1300-1318 at p 1314. There is also research from other jurisdictions (e.g. Johnson, I.M., and Sigler, R.T., 1995. Community Attitudes: A Study of Definitions and Punishment of Spouse Abusers and Child Abusers. 23 *Journal of Criminal Justice* 477-487).

<sup>256</sup> Gracia, E., and Lila, M., 2015. *Attitudes towards Violence against Women in the EU*. Directorate-General for Justice and Consumers (European Commission) Available at: <<https://op.europa.eu/s/vEeo>> [Accessed 8 March 2022]. at p 105.

<sup>257</sup> Ibid, at p 105.

<sup>258</sup> Ibid, at p 106.

## 7.0 Conclusion and Recommendations

This report follows an exceptional period: COVID-19 has led to unprecedented disruption of criminal processes and social life. Associated periods of “lockdown” have dramatically affected domestic abuse: enhancing proximity between abusers and victims; increasing isolation from support structures; and posing challenges for reporting and policing throughout the UK.<sup>259</sup> The Domestic Abuse (Scotland) Act 2018 represented a dramatic legal development and is still relatively new. It has been introduced at a time of increased global awareness of domestic abuse.

Therefore, there have been a number of significant developments occurring at once and the full effects are not yet immediately apparent. Will crimes that decreased or increased return to pre-pandemic levels? What might emerge about events that occurred behind closed doors during the national COVID-19 lockdown? Will there be permanent changes to certain behaviours? How will the legal process itself operate in practice post-pandemic as courts work to clear backlogs, etc? These are just some of the unknowns as society currently sits in a state of flux in what remains tempestuous times. The report to Scottish Ministers on the 2018 Act will illuminate some of these issues. We have also provided further recommendations below:

### Guidance related to domestic abuse aggravations

It is recommended that guidance or guidelines on the operation of section 1 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016 would be helpful. Whether or not guidance seeks to replicate or alter existing practice, it should be informed by existing practices.

In devising such guidance, or creating a guideline, one step may be to analyse existing sentencing judgments and the stated difference to a sentence by virtue of section 1 therein. While many of these decisions are not published, they should be accessible in a variety of ways: identifying cases with a section 1 aggravator should be straightforward for the Scottish Court’s and Tribunals Service (SCTS). This would allow relevant cases to be identified and filtered for the purposes of research. Such research could help to further elucidate the general principles and circumstances operating in decision making for the purposes of section 1.<sup>260</sup>

However, if this potential research entailed a qualitative component, then it is likely the volume of cases with a section 1 aggravation will need to be considered in the

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<sup>259</sup> Ivandic, R., Kirchmaier, T., and Linton, B. 2020. *Changing Patterns of Domestic Abuse during Covid-19 Lockdown*. Available at: <<https://cep.lse.ac.uk/pubs/download/dp1729.pdf>> [Accessed 8 March 2022] at p 52. See also Her Majesty’s Inspectorate of Constabulary and Fire & Rescue Services, 2021. *Review of Policing Domestic Abuse during the Pandemic - 2021*. Available at: <<https://www.justiceinspectorates.gov.uk/hmicfrs/publications/review-of-policing-domestic-abuse-during-pandemic/>>. [Accessed 28 February 2022].

<sup>260</sup> For example, offences under section 1 of the 2018 Act may be aggravated where a child is involved. This may also be a factor for section 1 aggravations under the 2016 Act (albeit not one specified in statutory form).

methodology. For example, it may be decided to qualitatively explore a random sample of cases with a section 1 aggravator within a certain timeframe, to stratify the sample based on offence type, etc. Such an approach (possibility combined with judicial interviews etc) could identify the effects of the sentence aggravation in certain scenarios and prove useful for understanding practice and for informing the creation of guidance for the complex range of domestic abuse effects.

### **Further research and data on the use of specialised domestic abuse courts**

It is recommended that a re-examination of the critical features noted in the Domestic Abuse Pilot Court Evaluation 2007 is conducted in order to evaluate how these have been met and maintained and how they could be improved or implemented across courts in Scotland.

It is also recommended that separate data be collected on proceedings and convictions from domestic abuse matters so that this can be compared with existing data relating to proceedings and convictions.

### **Public perceptions research**

Moving forward, further research on public perceptions of the law and sentencing surrounding domestic abuse would be especially useful since this is currently lacking. Much remains unknown about how, and if, the public understand the landscape of criminal offences and what their views are on sentencing, particularly given the maximum sentence which is allowable for a conviction under section 1 of the Domestic Abuse (Scotland) Act 2018 and the frequent use of community-based disposals in practice.



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