GENDER JUSTICE ADVOCATES AND THE MAKING OF THE DOMESTIC ABUSE (SCOTLAND) ACT 2018

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Introduction

In February 2018, the Scottish Parliament passed the Domestic Abuse (Scotland) Bill 2018, called the “new gold standard” for domestic abuse law by Professor Evan Stark, author of the seminal book Coercive Control: How Men Entrap Women in Everyday Life (2007). After the vote, parliamentarians in the Debating Chamber gave a standing ovation to the domestic abuse survivors and advocates sitting in the public gallery. For the first time, Scotland had a specific offence defining and criminalising domestic abuse. The definitions in the law were framed by feminist theory and informed by extensive engagement with children and women survivors of domestic abuse.

The feminist political and social discourse that produced the Act rested on decades of feminist activism and the Women’s Aid movement in Scotland (see Speaking Out – 40 Years of the Women’s Aid Movement in Scotland, 2018). The savvy politicking from an established feminist infrastructure (i.e., feminist organisations supported by strong relationships between feminists inside and outside government and Parliament) injected the powerful stories of survivors into policymaking and changed policy processes.

The development and passage of the new law offers a template for progressive feminist domestic abuse policy specifically and violence against women more generally. This chapter examines the gendering of the policy process in the two decades preceding the law’s passage. The chapter discusses the importance of gender infrastructure and feminist civil society, the notable features of the law, and the impact of an unprecedented engagement by officials with victim-survivors and their advocates in the law’s development and passage.

Gender justice

Women and men and girls and boys live very different lives. Any analysis, research, policy, or legislation can be said to be ‘gender competent’ when it reflects that principle. Familiarity with the dynamics of gender in our gendered world enables the development of policy and laws that disrupt the unequal distribution of power, prosperity, and safety in our families, communities, and institutions and promote social justice. Gender competence is thus required for activists,
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governments, and state institutions to develop and deliver policy and practice that sees oppression, understands how it works, and then dismantles it.

The interaction of feminist activists, policy machineries within government, and legislatures is complex (Mackay, 2015). Gender justice advocates seek to advance women’s equality and rights both by influencing specific policy outcomes and by transforming the institutions in which policy and law are made. If legislatures and governments are currently gendered, then a possibility exists for what Karen Beckwith (2005) describes as “regender[ing],” by which process these institutions can be reoriented to the realisation of women’s equality.

The work of feminist gender justice advocates is predicated on the notion that inequalities persist between the sexes and that the unequal distribution of power, resources, and safety fundamentally shapes the lives of women and girls. There are emblematic issues for women’s equality and rights and usually include women’s representation in political and public life, anti-discrimination law (e.g., the US Civil Rights Act of 1964 and the UK Equality Act of 2010), and access to justice, violence against women, participation in the labour market and the gender pay gap, publicly funded childcare, maternity and parental leave, abortion and reproductive justice, and divorce and family law.

The interaction of all these elements of women’s inequality acts as a feeder system for how and why men practice domestic abuse and women and children experience (and resist) it. Men’s privileged position enables abuse, and children’s and women’s relative poverty of power and money form the constraints on women’s space for action that enforce abuse. This is Scotland’s ‘causal story’ and a critical feature of the feminist argument that women’s inequality is the cause and consequence of violence against women. (See Bacchi, 1999 for helpful discussion of problem definition and causal stories.) It is no accident that the Scottish Government’s Violence Against Women and Girls department is located in the government’s Equality Unit.

A feminist theory of change

In one of the most systematic and wide-ranging analyses of the impact of state responses to the call for gender justice, Htun and Weldon (2018) mapped and analysed gender equality-promoting policies (including legislation) in 70 countries at four points in time between 1975 and 2005. The authors found a high level of variability in the types of gender equality policy adopted across countries.

Although all gender justice advocacy challenges existing cultural and social norms, Htun and Weldon conclude that feminist actors have been more effective in challenging dominant discourses relating to women’s ‘status.’ Status here includes violence against women and the creation of gender quotas for elected bodies and boardrooms, rather than on what the authors delineate as ‘gender-class’ issues such as the gendered division of labour. In other words, challenging how the system works has been more successful than confronting the structure of the system itself.

In some policy areas the work of gender justice advocates has been decisive in enabling shifts. Htun and Weldon find that, with regard to the global development of policies on violence against women from 1975 to 2005, “the autonomous mobilization of feminists in domestic and transnational contexts – not Left parties, women in parliament, or national wealth – is the critical factor accounting for policy change” (p. 29). It is feminist activism, more than any other single factor, that has introduced and improved policy on violence against women. Echoing Htun and Weldon’s analysis, Cavaghan (2017, p. 27) points out that the “single most significant factor [in the uptake of gender mainstreaming] was the presence and participation of transnational women’s NGOs
arguing the relevance of gender/women’s interests across a range of policy areas,” including violence against women.

Making policy work for women in Scotland

Scotland, like many European nations and states, requires its public bodies – including the Scottish Government – to mainstream a gendered analysis within policymaking and legislating. The gender equality duty (GED) came into force in 2007 and placed a range of reporting, equal pay, and gender impact assessment requirements on public bodies. Subsequent legislation in the UK Parliament moved coverage of the GED into an omnibus Equality Act 2010, thus removing the focus on gender and replacing it with an integrated public sector equality duty (PSED).

The duties have acted as a hook on which to hang the advocacy work of feminist civil society organisations in Scotland. Burman and Johnstone (2015, p. 45) observed that devolution [of powers to Scotland from the UK Government in 1999] led to new principles and accountability mechanisms, more gender balance in political institutions and significant new opportunities for women’s groups to shape and inform the policy and legislative process.

The authors conclude that this context of newness “rendered Scotland particularly receptive to the gender equality duty, which in turn accelerated the progress of legal and policy reform” despite “low levels of awareness of the duty and its underlying principles” (p. 45).

The 20 years since devolution in Scotland have seen gender justice advocates “animated by the possibility of newness,” as the Scottish Parliament was reconvened with gender-sensitive features as diverse as a creche, a standing Equal Opportunities Committee, and almost 40% female parliamentarians (Ritch, 2019, p. 337). This sense of the possible was refreshed during the debate about Scottish independence between 2012 and 2014, as women’s organisations entered “a bold period of imagining those [new] powers and institutions as shaped, directed, and delivering to meet the needs of women and girls, as well as boys and men” (Ritch, 2019, p. 337).

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In the devolution settlement agreed with the Westminster government prior to the re-opening of the Scottish Parliament in 1999, the latter held ‘devolved’ authority for policy and law relating to violence against women in all areas with a few exceptions that intersected with matters reserved to Westminster (chiefly immigration issues). Policing and the criminal and civil justice system are distinctively autonomous Scottish institutions. Some examples of distinctly Scottish initiatives include the establishment of a specialist domestic abuse court in 2004, the promotion of national training strategies, the creation of a National Domestic Abuse Taskforce within Police Scotland in 2013, and, most significant, the development of the Equally Safe strategy on violence against women and girls (VAWG) (Scottish Government, 2015).

A critical enabler for the innovative policy and practice work was Scotland’s sustained investment in feminist ‘strategic intermediaries’ in civil society – the women’s sector NGOs and, specifically, Scottish Women’s Aid (SWA). (‘Strategic intermediaries’ are defined thus by Scottish Government: “These bodies play an important role in the policymaking process by supporting and engaging communities, and informing understanding of the issues experienced by equality groups. In a number of cases they also provide support to frontline services” [www.
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Scottish Women’s Aid is an explicitly feminist domestic abuse umbrella organisation with 36 member services around Scotland.) As Htun and Weldon (2018) demonstrated, investment in feminist civil society delivered effective and innovative policy advocacy and a progressive policymaking collaboration with government.

In this context, an appetite was growing in civil society for legislative reform to match the progressive VAWG strategy and give it teeth. At the time, Scotland had no specific offence of domestic abuse. A number of other offences, most often breach of the peace or threatening or abusive behaviour, were in place. Domestic abuse law and national (VAWG) policy developed in parallel but often non-congruent processes that allowed for different definitions of domestic abuse in national strategies, policing, and prosecution.

The definition of domestic abuse in policy documents was from the beginning linked to UN documents such as the 1993 Declaration on the Elimination of Violence Against Women and was gendered. Domestic abuse was restricted to partners and ex-partners. The following definition was agreed by the Scottish Partnership on Domestic Abuse in 2000:

Domestic abuse can be perpetrated by partners or ex-partners and can include physical abuse (assault and physical attack involving a range of behaviour), sexual abuse (acts which degrade and humiliate women and are perpetrated against their will, including rape) and mental and emotional abuse (such as threats, verbal abuse, withholding money and other types of controlling behaviour such as isolation from family or friends). Children are witness to and subjected to much of this abuse; there is a correlation between domestic abuse and the mental, physical and sexual abuse of children.

Domestic abuse is associated with broader inequalities in society, is part of a range of behaviours constituting male abuse of power, and is linked to other forms of male violence, such as rape and child abuse. Domestic abuse occurs in all social groups, is not caused by stress, unemployment, poverty, alcohol or mental illness, nor by the women who experience the abuse (Scottish Centre for Crime and Justice Research, 2015).

The definition covered a broad range of harms and linked abuse with broad social inequalities. Although a similar definition was adopted by police and prosecution officials (the Crown Office Procurator Fiscal Service of Scotland), it would take 18 years for the criminal law to give effect to this definition.

Despite Scotland’s reliable cross-party consensus on violence against women policy, activists were concerned that debate over a new law would endanger Scotland’s existing definition and reignite debates about the role of gender in domestic settings (Scott, 2006). However, commitment to the gendered analysis of domestic abuse had solidified over the ten years since the first domestic abuse policy, and the need for a specific offence was strongly supported by the evidence from a 30-year, 70-country study:

Regardless of national context, attempts to address violence against women under the rubric of more general laws against violence or assault have generally been unsuccessful. . . . Obtaining an effective response from the law enforcement bureaucracy has generally required both legal reform and training of law enforcement officials from police officers to judges.

(Weldon, 2002, p. 13)
Early adoption of Stark's theory of coercive control in Scotland

Evan Stark’s 2007 critique of the ‘violent-incident’ model of domestic violence and his paradigm of coercive control were taken up in Scotland as early as 2006–7. The women’s sector was the first and strongest advocate for challenging the old paradigm. In April 2006, the Women’s Support Project in Glasgow brought Stark to Scotland to present at a seminar, and in September 2007, just as Stark’s (2007) book was being published, Scottish Women’s Aid (an explicitly feminist women’s rights organisation and Scotland’s national domestic abuse service and policy advocacy organisation) brought Stark to Edinburgh for the organisation’s annual national conference. That appearance by Professor Stark was the first of many, including three months at the University of Edinburgh as the Leverhulme Visiting Professor in 2013.

Both academics and practitioners were keenly aware that the ‘domestic violence’ described in various laws bore little resemblance to its reality in women’s and children’s lives. Survivors’ accounts of their experiences over the 40-plus years of the Women’s Aid movement in Scotland eloquently described the trauma and harm caused by domestic abuse generally and emotional/psychological violence specifically (Speaking Out – 40 Years of the Women’s Aid Movement in Scotland, 2018). Stark’s (2007) critique of existing constructions of domestic violence highlighted three ‘myths’ in the dogma:

1. That domestic violence occurs as discrete incidents of physical violence (rather than as a 24/7 ongoing pattern of coercion and control that is sometimes enforced by physical violence).
2. That domestic violence is ‘domestic,’ and occurs only in the home where a perpetrator and victim live together (whereas health and criminal justice data indicate that in many cases perpetrators are no longer living with their partners when victims come to the attention of services, and that separation does not bring safety).
3. That the most salient aspect of the ‘violence’ is physical assault (however, physical violence, when present, is most often used instrumentally to enforce the perpetrator’s control, along with other acts of humiliation, coercion, degradation, and threats to children, other family members and pets; rather than only physical violence, domestic abuse is a violation of the victim’s human rights, a liberty crime).

Stark’s critique was translated for officials and politicians through survivors’ accounts of their own experiences. In turn, these accounts were to form the backbone of Scotland’s new law.

Gender (a)symmetry

While SWA highlighted Stark’s gendered coercive control paradigm in its policy work, the gender symmetry debate raged in academia. Many academics, police, and practitioners argued that domestic abuse was primarily male-perpetrated (Dobash, Dobash, Wilson, & Daly, 1992), but others (Straus, 1999) claimed that women were as violent as men in intimate relationships. Adoption of the new, intrinsically gendered coercive control paradigm, depended on a resolution of this debate in policy circles. The Scottish Government commissioned research (Gadd, Farrall, Dallimore, & Lombard, 2002) and sponsored academic debates, hoping to establish a policy consensus.

Meanwhile, SWA and sister organisations were making the case for asymmetry and defending the gendering of policy in Scotland. Reframing the gender asymmetry debate was critical to progress on developing law to match Scotland’s policy documents (Lombard & Whiting,
The Domestic Abuse (Scotland) Act 2018 (2018). In addition to Stark’s work on coercive control, campaigners’ arguments were supported robustly by the publication of Michael Johnson’s (2008) work. Johnson argued that discussions of gender symmetry in domestic abuse often conflated a number of distinct phenomena:

- Intimate terrorism (involving violence and control), experienced predominantly by women and perpetrated predominantly by men.
- Violent resistance, perpetrated mostly by women with mostly male victims.
- Mutual violent control.
- Situational couple violence, largely gender symmetrical.

Like Stark, Johnson highlighted the role of power and control in violence between partners and ex-partners and demonstrated that failing to distinguish among these different phenomena produced ostensibly contradictory findings in the literature.

Johnson’s analysis had particular resonance in the criminal justice system and especially the prosecution service (COPFS), which needed to understand the growing number of cases going through Scotland’s courts. In particular, Johnson’s analysis explained why official figures, which conflated situational couple violence (one-off incidents of violence) with intimate terrorism, had significant numbers of female perpetrators. Separating those one-off incidents from the course-of-conduct offence of intimate terrorism allowed a very different picture of offending to emerge. In 2015 the COPFS invited Johnson to speak to attendees at its Prosecution College, and references to ‘situational couple violence’ can be found in numerous COPFS (2014) speeches and protocols.

Gender justice advocates used the theoretical and empirical evidence offered by Stark and Johnson to challenge government and justice agencies, calling for improved foundations for policy and practice. The advocates’ power to influence change derived from their status as strategic intermediaries and their growing voice as the ‘content experts’ on domestic abuse in Scotland. The perception by officials and parliamentarians that the sector’s expertise reflected both traditional academic evidence and practice-based, survivor-informed evidence, would be critical in the debates of a new law.

The road to a specific offence

In early 2015, after a number of years of advocacy by the women’s sector and growing interest in policy change from the Crown Office, the Scottish Government consulted on whether a specific offence was needed. Officials’ questions included the extent to which existing laws were adequate and whether a new specific offence concerning domestic abuse should be introduced. Responses reflected strong agreement (93%) that current laws were not adequate and that a specific offence would be an improvement (96%). A majority of respondents (67%) thought that any specific offence of ‘domestic abuse’ should be restricted to people who are partners or ex-partners, supporting the case made by the women’s sector that domestic abuse was an intrinsically gendered form of abuse (Scottish Government, 2015).

In September 2015, the government’s Programme for Government committed to publishing a draft of a specific offence. During the drafting period, members of the Government’s Bill Team corresponded regularly with policy experts in SWA and other victims service organisations. SWA offered to test proposed language with survivors, service users, and staff working directly with women and children. Scottish Women’s Aid ran focus groups to gather survivors’ expert input, and the Bill Team responded by making language changes in the draft Bill.
Survivors were particularly keen that explicit references be made to constraints on their autonomy. Section 2 of the Bill describes what constitutes abusive behaviour. This section, and the related explanatory notes, are peppered with phrases from service users and advocates, including “regulating day-to-day activities” and “restricting freedom of action.” The explanatory note for this section is one of a number that use language that came from consultation with survivors:

Section 2(3)(b) provides that behaviour which has the effect of isolating the victim from friends, relatives or other sources of support can be considered to have a relevant effect. This could include, for example, controlling the victim’s movements or access to their phone or other forms of communication, not allowing visits from or to the victim’s friends or family, or deliberately failing to pass on messages from friends or family.

In December 2015, the draft law was released for consultation, and on 17 March 2017 Cabinet Secretary for Justice Michael Matheson, Member of the Scottish Parliament (MSP), introduced the Bill. The Justice Committee conducted a number of public evidence sessions, and a subgroup of the Committee held private sessions with survivors (who were supported by a number of victim support agencies, including SWA and one of its member services, Shakti Women’s Aid). The significant impact of these meetings with survivors was reflected in Michael Matheson reading out statements from two of them (one of whom was in the public gallery) during the final debate on the Bill. Matheson concluded debate on the Bill by noting that “the very heart of this legislation is the voices of those women who have experienced domestic abuse” (Wilson & Hutchison, 2018).

The Bill was amended as it passed through Parliament. Amendments included:

- New language to provide for extraterritorial jurisdiction to comply with the Council of Europe’s Convention on Action Against Violence Against Women and Domestic Abuse (the ‘Istanbul Convention’), which the Scottish Government has committed to (Westminster Parliament has signed but not yet ratified this Convention).
- New elements added to the section dealing with aggravation involving children.
- Changes to the drafting regarding non-harassment orders. The original Bill included provisions requiring courts to consider making non-harassment orders when sentencing for the offence of domestic abuse. Amendments extended consideration of the making of these orders to also cover children, and created a presumption in favour of making such orders.

The Domestic Abuse (Scotland) Act 2018 was passed in February 2018 with an implementation date to be announced once plans were in place.

**Notable elements of the Act**

The new law is notable in a number of ways. The law focuses on the behaviour of the perpetrator rather than that of the victim, requires a course of behaviour rather than a discrete incident, uses human rights language (autonomy, freedom from fear and coercion), and reflects what women and children account.
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Course of behaviour

Moving away from constructing domestic abuse as an incident to a pattern of behaviour is one of the central tenets of the new offence in Scotland. The elements of the offence are contained in section 1:

1. Abusive behaviour towards partner or ex-partner

(1) A person commits an offence 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.

A course of behaviour, defined in section 10(4) of the Act, “involves behaviour on at least two occasions.” Additionally, “psychological harm” expressly includes “fear, alarm and distress” (s 1(3)).

The offence is committed against a partner or ex-partner: “partner” is defined in section 11 to include spouses, civil partners, parties living together as if spouses of each other, and persons in an intimate relationship; an ex-partner is a person who had previously been in such a relationship.

The Act provides that prosecution must demonstrate either that the defendant intended to harm the victim, or that they were “reckless” about potential harm. These two legal constructions were especially welcome to those who were familiar with victim-survivor stories, which typically are filled with details that would lead a “reasonable person” to understand that harm was an expected outcome of the offender’s course of behaviour.

The Act describes in some detail (extensive but “not exhaustive”) what constitutes abusive behaviour. This section of the Act reflected consultation with survivors, sometimes using their words to describe the offence.

Abusive behaviour

What constitutes abusive behaviour is non-exhaustively defined in section 2.
2. What constitutes abusive behaviour

(1) Subsections (2) to (4) elaborate on section 1(1) as to A’s behaviour.

(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.

(4) In subsection (2) –

(a) in paragraph (a), the reference to violent behaviour includes sexual violence as well as physical violence,
(b) in paragraph (b), the reference to a child is to a person who is under 18 years of age.

‘Violent’ behaviour directed at B is not restricted to physical violence and includes sexual violence (s 2(4)) as well as behaviour that has a “relevant effect.” The Explanatory Notes prepared by the Scottish Government provide numerous examples of relevant abusive behaviours and effects. For example, the notes indicate that behaviour which makes a victim dependent on, or subordinate to, a perpetrator can be considered to have a relevant effect under section 2(3) (a) where such behaviour prevents the victim from having access to money, forces the victim to leave their job, takes charge of household decision-making to the exclusion of the victim, or treats the victim as a domestic slave.

‘Is the behaviour harmful?’ versus ‘How much did she suffer?’

The new law shifts the focus of prosecution from evidence of injury experienced by the victim to evidence of perpetration. Indeed, prosecutors need not prove that the victim actually did suffer harm or experience any relevant effect (although such evidence may be presented). Instead, the prosecution must establish that a reasonable person would consider that the course of behaviour would be likely to cause physical and/or psychological harm to the victim (taking into account the particular characteristics of the victim).

4. Evidence of impact on victim

(1) The commission of an offence under section 1(1) does not depend on the course of behaviour actually causing B to suffer harm of the sort mentioned in section 1(2).

(2) The operation of section 2(2)(b) does not depend on behaviour directed at someone actually having on B any of the relevant effects set out in section 2(3).
(3) Nothing done by or mentioned in subsection (1) or (2) prevents evidence from being led in proceedings for an offence under section 1(1) about (as the case may be) –

(a) harm actually suffered by B as a result of the course of behaviour, or
(b) effects actually had on B of behaviour directed at someone.

Shifting the focus from the victim and onto the offending behaviour opens up the possibility for dramatically changing victims’ experiences, especially in court. Notions of ‘deserving victims,’ questions about ‘why didn’t she just leave,’ and the relentless pressure to present in court as traumatised and broken have made testifying a necessary evil at best, and a form of re-victimisation at worst. Although courts will interpret and implement these provisions in their own ways, this framing of the offence offers hope to victims and their supporters that a trial might be harder on the accused than on the victim, which Shakespeare might refer to as a “consummation devoutly to be wished.”

**Children are not ‘witnesses’ but victims**

The new Act reframes the experience of children and young people living with domestic violence, constructing them as experiencing the abuse rather than merely witnessing it. This is achieved through section 5 of the Act, which deals with “aggravation in relation to a child.”

Prior to passage of the new Act, victim advocates, children’s rights organisations, and researchers had begun to challenge the notion that children who are not direct targets experience domestic violence merely as ‘witnesses’; that is, that the harm that a child experiences is solely a consequence of witnessing incidents of violence directed at the non-offending parent (the mother in the vast majority of cases), rather than a product of the child’s own experience of control and coercion (Callaghan, Alexander, Sixsmith, & Chiara Fellin, 2018; Katz, 2015, 2016; Morrison, 2015; Morrison & Tisdall, 2013; Morrison & Wasoff, 2012).

Moreover, linked to increasing evidence that separation from an abusive ex-partner does not bring safety for adult victims is the widespread acknowledgement of the continuation of abuse through child contact arrangements. The most visible evidence of harm to children was in the context of court-ordered contact with the offending parent. Scottish Women’s Aid, the Centre for Research on Families and Relationships at the University of Edinburgh, and the office of the Commissioner for Children and Young People in Scotland (CCYPS) collaborated on numerous pieces of work in an effort to generate change.

The CCYPS commissioned two pieces of research: one investigated child contact proceedings, and recommended that a common definition of domestic abuse be adopted and that service providers receive more extensive training in relation to children affected by domestic abuse and contact (Morrison & Tisdall, 2013; Mackay, 2013). Scottish Women’s Aid led on a joint participation project with the Children and Young People’s Commission in Scotland – Power Up/Power Down – that focused specifically on how the views of children were treated in contact disputes (Scottish Women’s Aid, Power Up/Power Down: Changing the Story, Hearing Children and Young People’s Voices. https://womensaid.scot/project/power-up-power-down). The study involved 27 children and young people aged between 6 and 17 years old. A series of sessions explored themes of power, children’s rights, making their voices heard in court, and how to improve the experience and outcomes for children affected by domestic abuse in family court actions relating to contact decisions.

During the consultation process prior to launch of the new Act, a new coalition of children’s charities and women’s charities was formed, and the coalition delivered a powerful voice for
children. The primary concern of this coalition was the gap between criminal and civil proceedings. Sheriffs and judges often had no information about the behaviour of the offending parent when making contact decisions. Advocates believed that creating a status for children as co-victim with the non-offending parent would improve the likelihood that abusive behaviours discussed in criminal cases would be considered relevant in linked civil cases where child contact discussions were being made. This was a step too far for the drafters of the Bill, and the language in the first version of the Bill reflected this:

5. Aggravation in relation to a child

(1) This subsection applies where it is, in proceedings for an offence under section 1(1) –
   (a) specified in the complaint or libelled in the indictment that the offence is aggravated by reason of involving a child, and
   (b) proved that the offence is so aggravated.

(2) The offence is so aggravated if –
   (a) at any time in the commission of the offence –
      (i) A directs behaviour at a child, or
      (ii) A makes use of a child in directing behaviour at B.
   (b) a child sees or hears, or is present during, an incident of behaviour that A directs at B as part of the course of behaviour.

Ministers, Members of the Scottish Parliament, and government officials were lobbied extensively to change this language, replacing it with language that provided children with co-victim status. The government retained the original language but offered a subsequent amendment that was a significant improvement. The final language, negotiated with the powerful coalition of children’s and women’s organisations, included the following additional subsections.

5. Aggravation in relation to a child

(3) The offence is so aggravated if a child sees or hears, or is present during, an incident of behaviour that A directs at B as part of the course of behaviour.

(4) The offence is so aggravated if a reasonable person would consider the course of behaviour, or an incident of A’s behaviour that forms part of the course of behaviour, to be likely to adversely affect a child usually residing with A or B (or both).

(5) For it to be proved that the offence is so aggravated, there does not need to be evidence that a child –
   (a) has ever had any –
      (i) awareness of A’s behaviour, or
      (ii) understanding of the nature of A’s behaviour, or
   (b) has ever been adversely affected by A’s behaviour.
When aggravation in relation to a child is established, the court must note this when stating and recording the conviction and must take the matter into account when imposing sentence (s 7).

The future

On 20 March 2017, the new Domestic Abuse Bill was announced by First Minister Nicola Sturgeon. Cabinet Secretary for Justice Michael Matheson commented that, in his experience, development of the Bill had involved “an unprecedented amount of engagement with stakeholders”; the First Minister replied, “That’s how the best laws are made” (personal communication). Just over a year later, the Domestic Abuse (Scotland) 2018 Act passed virtually unanimously and, as mentioned, was hailed by Professor Evan Stark as “a new gold standard.”

Mirroring Stark’s concept of “coercive control” and Johnson’s “intimate terrorism,” the new law frames domestic abuse as a crime that violates basic human rights to autonomy, to lives free from fear and coercion, to space for action denied women for so long by the constraints of patriarchy and women’s inequality. For the first time in Scotland, domestic abuse legislation is congruent with national policy as expressed in government documents. For the first time Scotland has domestic abuse legislation that offers an opportunity to operationalise what has become the mantra of the Women’s Aid movement in Scotland – that domestic abuse is a cause and consequence of women’s inequality.

A number of problems remain. For example, the divide between civil and criminal cases is not addressed sufficiently in this legislation. However, the language in section 5 (dealing with aggravation in relation to a child) does remove the requirement for children to witness abuse and acknowledges that a reasonable person might assume that if children are in a family where abuse occurs, they are victims. This is a positive development. The Government launched a significant consultation on the Children (Scotland) Act 1995, which looks specifically at provisions in existing law relating to court decisions about child contact (Scottish Government, 2018b). Children’s and women’s charities continue to coordinate consistent messages to officials that this is a critical issue and that positive developments are expected in any forthcoming legislation. Inadequate application of the child aggravator raises the spectre that perpetrators will use the absence of an aggravator as demonstration that the criminal court established that the offence did not harm children in the family and that contact is therefore safe.

Another problem not addressed in the Act was the issue of emergency orders. During the progress of the Domestic Abuse Bill through Parliament, Scottish Women’s Aid urged the Justice Committee to instruct the government to include emergency barring orders (EBOs) in the new law. Various forms of EBOs are in place across Europe, and they are required for compliance with Article 52 of the Council of Europe’s Istanbul Convention which requires parties to the convention to have in place:

measures to ensure that the competent authorities are granted the power to order, in situations of immediate danger, a perpetrator of domestic violence to vacate the residence of the victim or person at risk for a sufficient period of time and to prohibit the perpetrator from entering the residence of or contacting the victim or person at risk.

These orders empower authorities (usually police) to immediately remove a suspected perpetrator of abuse from the family home, enabling victims to stay in their own homes. Women and children

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forced to leave their homes because of domestic abuse are the third largest source of homelessness applications in Scotland, and robust short-term orders protecting their right to stay would reduce harm as well as serve natural justice. The Government responded to this call for amendment with a commitment to launch a consultation process in parallel with the review of the Children (Scotland) 1995 Act. The consultation was launched (Scottish Government, 2018a), and First Minister Nicola Sturgeon announced in October 2019 that EBO legislation would be introduced in the current legislative session (www.gov.scot/news/protecting-people-from-domestic-abuse).

Gender justice advocates continue to argue that policy and programmes that lack gender competence are simply incompetent, ineffective, and costly. The policy landscape in Scotland has shifted profoundly as a consequence of the new Act. The salience of gender, the influence and expertise of survivors and advocates, and early moves to reflect children’s human rights in the State’s response to domestic abuse are milestones delivered by the development, debate, and discourse surrounding the Act. Implementation of the Act 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.

Critical findings

- Policy advocacy by feminist non-governmental organisations (NGOs) can produce ‘gold standard’ domestic abuse legislation that rests on a sound gendered analysis. This analysis reflects the profoundly different lives of women and men and reveals the inextricable link between systemic and structural sexism and the dynamics and prevalence of coercive control and domestic abuse.
- The voices and views of children and women with experience of domestic abuse tell powerful stories that can shape progressive legislation to criminalise coercive control and domestic abuse.
- Government investment in feminist civil society can establish a gender infrastructure that enables progressive influencing on policy makers by gender justice advocates.

Implications for policy, practice, and research

- Gender justice advocates can improve law and policymaking when their infrastructure is resourced adequately and sustainably.
- Linking domestic abuse with the other elements of women’s and children’s inequality supports development of gender-competent policy and law that reflects the intrinsically gendered nature of domestic abuse and other forms of gender-based violence.
- Alliances between women’s rights and children’s rights organisations can provide a powerful influence on policy and law to criminalise coercive control.
- When resourced and supported properly, feminist non-governmental organisations (NGOs) can support survivors’ voices to be heard and heeded in law making.
- Governments interested in improving violence against women policy must invest in their local gender infrastructure generally and feminist NGOs working with survivors in particular.

References


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