JH/00/22/A

The Scottish Parliament

JUSTICE AND HOME AFFAIRS COMMITTEE

AGENDA

22nd Meeting, 2000 (Session 1)

Tuesday 13 June 2000

The Committee will meet at 9.30 am in Committee Room 1, Committee Chambers, George IV Bridge, Edinburgh.

1. **Vulnerable and intimidated witnesses:** The Committee will take evidence on the proposals to improve protection for witnesses in cases involving allegations of rape from—

   Sandy Brindlay, Legal Affairs Spokesperson, Scottish Rape Crisis Network;

   Law Society of Scotland;

   Mr Peter Beaton, Head of Civil Justice and International Division, Justice Department Courts Group, Barbara Brown, Head of Evidence and Civil Justice Branch, Gerald Byrne, Police Division, Scottish Executive, Dr Alastair Brown, Crown Office.

2. **Petition:** The Committee will consider the following petition—

   PE200 by Mr Andrew Watt

3. **Future Business:** The Committee will consider its future programme.

4. **Stalking and harassment (in private):** The Committee will consider a draft response by Pauline McNeill to the Stalking and Harassment Consultation.

5. **Bail, Judicial Appointments etc. (Scotland) Bill (in private):** The Committee will consider a revised draft Stage 1 report.

Andrew Mylne
Clerk to the Committee, Tel 85206

The following papers are attached for this meeting:

Agenda item 1	
Written evidence given to the Equal Opportunities Committee by the Scottish Rape Crisis Network on Service Provision and the Criminal Justice System	JH/00/22/4
Copy of email from Zero Tolerance Trust	JH/00/22/11
Agenda item 2	
Note by the Clerk on PE200 (copy of petition attached)	JH/00/22/7
Agenda item 3	
Forward Programme June – July 2000	JH/00/22/9
Agenda item 4	
Draft letter to the Minister for Justice (private paper)	JH/00/22/1
Response to the Scottish Executive by the Law Society of Scotland	JH/00/22/3
Response to the Scottish Executive by Scottish Police Federation	JH/00/22/6
Response to the Scottish Executive by Scottish Women's Aid	JH/00/22/12
Article from SCOLAG Journal (May 2000) by Alison Paterson of Victim Support Scotland, 'Stalking – what is it, what to do?'	JH/00/22/8
Agenda item 5	
Revised draft Stage 1 report on the Bail, Judicial Appointments etc. (Scotland) Bill (private paper)	JH/00/22/2

Papers not circulated:

Agenda item 1

Members may wish to consult the Official Report of the 7th meeting of the Equal Opportunities Committee on 14th March (cols 473-508) when the Committee took evidence from the Rape Crisis Centre, SAY Women and the Zero Tolerance Trust on violence against women.

Members may also wish to consult the note by the clerk on vulnerable and intimidated witnesses circulated for the 21st meeting of the Committee on 7 June (JH/00/21/9)

Agenda item 5

The Official Report of the 21st meeting of the Justice and Home Affairs Committee will be published on Monday 12 June. The Official Report of the 19th meeting of the Subordinate Legislation Committee at which it considered the Regulation of Investigatory Powers (Scotland) Bill and the Bail, Judicial Appointments etc (Scotland) Bill is published on Friday 9 June.

JUSTICE AND HOME AFFAIRS COMMITTEE

Papers for information circulated for the 22nd meeting

Reply from the Law Society of Scotland on the Insolvency Bill	JH/00/22/5
Supplementary Executive Note on the draft Scotland Act 1998 (Modifications of Schedule 4) Order 2000 [**Note:** Committee members are asked to contact Scott Barrie with any comments prior to the Finance Committee meeting on 13 June.]	JH/00/22/10
Written answer to PQ S1W-4594 regarding prison populations and extract from the Press and Journal regarding drugs rehabilitation services in prisons	
Minutes of the 21st Meeting	JH/00/21/M

Note: The Convener has been sent supporting documents in relation to petition PE124 (on contact rights for grandparents) by Grandparents Apart Self-Help Group, one consisting of a number of "case histories", the other consisting of a summary of research by the Department of Psychology at Goldsmiths College, London, on the emotional effects of loss of contact by grandparents. Copies of these documents may be obtained from the Clerks.

Members should have received direct by e-mail a submission from the Law Society of Scotland on the European Commission Green Paper on Legal Aid. Alternatively, copies are available from the Clerks.

JUSTICE AND HOME AFFAIRS COMMITTEE

Vulnerable and intimidated witnesses

Memorandum by the Scottish Rape Crisis Network

Note (by the Clerk): This paper was originally provided as evidence to the Equal Opportunities Committee on 14th March 2000

Service Provision and the Criminal Justice System

Prepared by
Cara Gillespie (Edinburgh Rape Crisis Centre)
Sandy Brindley (Strathclyde Rape Crisis Centre)

The Scottish Rape Crisis Network

Scottish Rape Crisis Centres provide support to women and girls who have experienced any form of sexual violence. Women ask for support in relation to childhood abuse, rape as an adult, domestic abuse, sexual assault, sexual harassment at work, and a range of other issues.

Our services are **free**. This means that we support some of the most socially excluded women in Scotland. Over 50% of the women who contacted us in 1999 were benefit dependent. Women are socially excluded because of their experiences of violence.

- Sexual violence has direct effects on the physical health, mental health, education, employment and social participation of women.
- Sexual violence shatters self-esteem and confidence, and compounds the effects of other existing socially excluding factors.
- Sexual violence isolates and alienates women and girls, often making them feel marked out as 'less than' other members of their families and communities.

Women who come to us are often also excluded through poverty, through lack of educational and employment opportunities, through disability, through race, and a range of other factors.

Our services are **confidential**. Many women would not use our support if this was not the case. We offer them a safe space to explore their feelings and to look at their options. We help women to begin to take some control back in their lives, to make decisions about their future, and to improve their quality of life.

Section 1: Prevalence and Nature of Violence against Women and Girls

1. Scottish Rape Crisis Centres dealt with over 6000 calls from women in 1998. Over the past 20 years approximately 30,000 women have been supported by Rape Crisis Centres in Scotland. The numbers of new women contacting us increase each year.

2. A 1997 survey of 1,000 12-18 year olds by The Dundee Young Women's Project showed that 133 had experienced sexual violence. The Scottish Executive figure, based on current rates of reporting, is 2 out of every 1,000.

3. The most common age of first abuse of women using Dundee Rape Crisis Centre last year was 0-9 years old. More than 50% of callers to all centres first experienced abuse before they were 16.

4. An average of only 20% of women using Rape Crisis Services last year had reported their abuse to the Police. There were 1,979 reports to the police in Scotland of sexual assaults in 1998. 212 of these cases made it to court. There were 135 guilty verdicts and only 59 custodial sentences. These reporting, conviction and sentencing rates are far lower than any other form of violent crime.

5. Approximately 90% of women and girls contacting us were abused by someone known to them. Only 2% reported abuse by women, and this was most often in cases where there were multiple abusers.

Service Provision and Resources

There are nine Rape Crisis Centres in Scotland. We provided a service to over 3000 women in 1999.
All are struggling to provide vital services under immense financial pressure. No one centre has an annual turnover of more than £100,000, yet all are covering huge geographical areas.

- Edinburgh Rape Crisis Centre (which also provides an unfunded service to the Lothians and Borders) was forced to freeze one paid post last year, and will need to make one further redundancy this year.
- Aberdeen Rape Crisis have no funding for paid staff, and receive only £2,500 from the Local Authority each year.
- Ayr Rape Crisis desperately need to move as their premises are cramped and unsuitable. They can't afford to.
- Since local authority reorganisation, Strathclyde Rape Crisis have been funded by nine different councils. This requires valuable worker time to be diverted from direct work to service the different application, monitoring and reporting requirements of each funder.
- The Women's Rape and Abuse Centre in Dundee receives only £4,000 from the Council. Their SIP core funding (£48,000) is time limited for three years.
- Similarly Dumfries and Galloway Rape Crisis (covering the whole South West), receives only £1,800 from the Council. Their core funding (only £22,000) is from the Unemployed Voluntary Action Fund (UVAF) and will expire next year.
- The newest Rape Crisis Centre in Perth is still being run on an entirely voluntary basis.

Funding Issues

1. There is no statutory provision for adult women who have experienced or are currently experiencing violence, unless they become homeless as a result of abuse. Although most Centres receive some financial support from local authorities, this is always fragile because of the absence of relevant statute recognising our client group as vulnerable.

2. Service provision is patchy and inconsistent across Scotland. Some Rape Crisis Centre's are partly supported by local authorities, some by independent funding bodies and Trusts, and many areas have no service provision at all i.e. Highland region.

3. Non-statutory funding bodies do not prioritise our service users, only two Trusts in Britain identify women as a group they want to support work with. This forces Centre's to 'jump through hoops' to fit women into other funding criteria.

4. Because of our resource constraints we cannot provide a service to all the women who want our help. Women are regularly met with an answering machine when they make their first contact. A trial monitoring survey, carried out in 1998, showed that only 1 in 10 women get through first time. Waiting times for face to face support can be long, and waiting lists may be closed because of demand. This situation is demoralising and unacceptable for women needing help.

5. Women have increasingly higher expectations that services are there for them, as do referring agencies and friends and families who contact us on behalf of women. There have been various high profile Government awareness-raising campaigns in recent years, the launch of the Domestic Abuse Service Development Fund, as well as increasing media coverage of the issues. For example while a rape story-line was running on 'Brookside' last year there was a significant increase in calls to our Centres. Rape Crisis Centres cannot 'fill the gap' between raised public expectations and overstretched services with no increase in resources.

Effects of Violence against Women and Girls

Women may experience some of the following effects:

Physical Effects:

- Sexually transmitted infections. These may often go undetected and untreated, compounding their effects.
- Pregnancy. Abuse is still not widely recognised as a factor in the prevalence of teenage pregnancies.
- Pain from physical violence. This may be lifelong, particularly if fractures etc. go untreated.
- Gynaecological problems. These include scarring and difficulties with having children. Again, the severity of problems is compounded if they are left untreated.

Many of the above problems do not receive adequate medical attention for a variety of reasons. This may be because a girl or woman is prevented by the abuser from seeking treatment, for fear of repercussions. A woman or girl may feel too ashamed to ask for help, or may be fearful of medical procedures as a result of abuse. Medical staff may also misdiagnose the source of problems, and therefore the effectiveness of treatment is lessened.

Mental and Emotional Effects:

- Depression
- Anxiety/ Panic Attacks
- Agoraphobia
- Obsessive compulsive disorders

- Memory loss/ Memory confusion/ Flashbacks
- Post traumatic stress disorder
- Difficulty sleeping, disturbed sleep/ nightmares
- Eating disorders
- Self- harming behaviour including cutting and poisoning.
- Alcohol/ drug problems
- Fear
- Guilt and self-blame
- Low self-esteem, lack of self-confidence
- Easily provoked anger
- Emotional 'shutdown', coldness etc.

Social Effects:

- Needing to move house, change phone number and/or change job
- Inability to maintain friendships
- Isolation
- Fear of retribution from attacker and/ or his friends and family if the assault was reported or disclosed
- Need to have company or to be alone
- Distrust of men or strangers
- Relationship breakdown
- Not being believed by police/family/friends, rejection by own friends and/ or family for disclosing

All of these effects cost our health and social services a great deal of money every year. The only research on this issue of which we are aware, carried out by Greater Glasgow Health Board in 1995, demonstrates this. The research suggested that domestic violence *alone* accounted for an annual cost to Greater Glasgow of £17.2 million. Productivity losses accounted for £4.8 million of these costs. [1]

There are severe implications of abuse for the quality of women's lives. Recovery is possible, but not always. Many experience suffering, in a number of ways, for the rest of their lives.

Our experience shows us that if a woman can access the support she wants and needs, at the time she needs it, her opportunities for healing are greatly increased.

We ask the members of this Committee to use whatever means are at their disposal to make sure that support is there for women who need it, and help to create a truly civil society in Scotland.

Section 2: Rape and the Criminal Justice System

Introduction

In the past year, only 22% of women and girls contacting our Rape Crisis Centre who had experienced a rape or sexual assault reported the incident to the police. Recent

[1] "The Economic Implications of Domestic Violence in Greater Glasgow", Denise Young, Health Economist, Greater Glasgow Health Board.

studies have put the level of reporting in rape cases at as low as 10%. Given the trauma experienced by women going through the criminal justice proceedings, which can often represent a process of secondary violation for women, and the fact that only 9% of reported rapes lead to a conviction, the decision by women who have been raped not to report the incident to the police is both understandable, and logical.

Reporting to the police

There have been significant improvements in recent years with regard to how the police handle complaints of rape and sexual assault, with the establishment of specialist units to deal with sexual crimes. Where current good practice is followed, women have few complaints about their treatment by the police. Unfortunately, good practice is not always followed. We are aware, for example, of cases where women and girls are threatened with charges of 'wasting police time' if they try to retract their statement; and of incidents where some police officers seem to be continuing to approach sexual assault investigations with a view to proving whether a woman is lying or not, as opposed to investigating a crime (as happens in all other cases). Women still do not have the right to be examined by a female police surgeon immediately after being raped or sexually assaulted; within Strathclyde police there are only two female police casualty surgeons, meaning that the large majority of women have no option but to be examined by a male doctor.

We believe further action could be taken to alleviate as far as possible the distressing nature of making a complaint of sexual assault.

Recommendations made in the 1998 **CoSLA Guidance on Preparing and Implementing a Multi-agency Strategy to Tackle Violence Against Women** included:

- ensuring the provision of appropriate training, with input from Rape Crisis Centres, to all officers on dealing with crimes of sexual violence against women
- ensuring that guidelines issued by the Scottish Office in 1985 are followed with regard to the need for women making complaints of sexual assault to be treated tactfully and sympathetically, and that in depth questioning of a personal nature be avoided
- putting in place structures which ensure that women are kept informed of the progress of investigations
- notifying women when/if the perpetrator is released on bail
- encouraging the availability of female police surgeons to carry out medical examinations

To date, very little progress has been made on these recommendations.

The Legal System

Perhaps as a result of the publicity surrounding changes in police procedures, and increased awareness around sexual violence brought about by the campaigning work of organisations like Rape Crisis Centres, and Zero Tolerance, more and more women are reporting rapes and sexual assaults to the police. There has been, however, no reciprocal response within the legal system to ensure that women who have been raped have access to justice.

Definition of rape

The common law definition of rape is " the carnal knowledge of a female person by a male person obtained by overcoming her will", carnal knowledge being penetration of a woman's vagina by a man's penis. This definition does not reflect the reality of most women's experience, in that it excludes anal rape, oral rape and forced penetration by objects. Under our legal system, a woman who is raped while sleeping, or who has drunk 'to excess' **cannot have charges of rape brought against her attacker** – the charge brought in these circumstances would be clandestine injury or indecent assault.

Information and representation

A woman who has made a complaint of rape or sexual assault is a witness for the prosecution. She does not, therefore, have any representation within the legal process, no right to information, and no control over proceedings. For example, a plea bargain may be agreed by the Crown and the defence lawyer, reducing a rape charge to one of indecent assault, without consultation with the woman who has experienced the rape – she may not even find out about a reduced charge until she goes to court.

There are no clear structures in place for keeping women informed of the progress of the complaint. Most cases take a year to come to court, during which time women report feeling very powerless and uninformed. If the Procurator Fiscal decides not to proceed with taking a case to court, not only is the woman not entitled to be given reasons for this, she may not even be informed of the decision.

While the defendant has a lawyer representing his interests, with whom he will have met on numerous occasions, a woman who has been raped has no one within the legal system or court case specifically representing her interests – the prosecution's role is to represent the 'interests of justice', which in practice may or may not coincide with the interests of the woman. When called to give evidence, a woman is unlikely to have met the Advocate Depute representing the prosecution prior to the court case.

The use of sexual history evidence in rape & sexual assault cases

One of the main difficulties women report about the legal processes, and one of the common reasons cited by women contacting Rape Crisis for not reporting to the police, is how women are treated in court. Many of the feelings of violation women report experiencing during court cases are caused by the questioning by the defence, more specifically the use of sexual history and sexual character 'evidence' which is used to discredit the woman who has been raped. Although there is existing legislation limiting the introduction of sexual history and sexual character evidence within sexual assault trials (which was introduced in Scotland in 1986), research into the effectiveness of the legislation found that women were asked questions concerning their sexual conduct in about half of sexual offence trials. The researchers **(Brown, Burman & Jamieson, 1992)** found that sexual history and sexual character evidence was still used without reference to the legislation, and that there was a danger that neither the prosecution nor the presiding judge/sheriff will enforce the legislation, each seeing it as a responsibility of the other. They also

found that the legislation failed to address the need to control subtle character attacks, used by defence lawyers to attempt to discredit the credibility of the woman in the jury's eyes.

Rape Crisis Centres have found that, following the implementation of the legislation, women are still contacting us telling of ordeals in court during rape trials where sexual history and sexual character evidence is still being used to discredit them.

Summary

Rape Crisis Centres in Scotland believe that urgent review must be given to the response of the criminal justice system to women who have been raped or sexually assaulted. A conviction rate of 9% in rape trials gives a clear message to women and girls who have experienced sexual violence that their experience will not be treated seriously within our legal system. It also confirms to rapists, or potential rapists, that rape is a 'high reward, low risk' crime, in that it is very unlikely that they will receive any judicial retribution for their actions. Unless significant changes are made within our legal system, more and more women will continue not to report their experiences of rape and sexual assault, on the valid judgement that the Scottish Criminal Justice system does not provide justice or protection for women who have been raped.

Recommendations

As part of a review of the response of the Scottish Criminal Justice system to complaints of rape and sexual assault, we would like to see consideration given to the following issues:

- The reviewing of the current common law definition of rape to make it more representative of women's experiences;
- The implementation of the recommendations contained within the **CoSLA guidance of 1998** relating to police investigation of complaints of sexual assault;
- The establishment of clear structures of communication between the criminal justice system – at all levels – and a woman complainer of a sexual crime, to ensure she is kept informed throughout the criminal justice proceedings;
- The implementation of the recommendations contained in the research **(Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials, 1992)** into the effectiveness of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985,s.36 relating to the introduction of sexual history and sexual character evidence;
- The introduction of specifically trained prosecutors to prosecute complaints of sexual crimes, who are enabled both build up expertise in these cases, and to meet with the complainer prior to the court case. The latter point is viewed as essential in ensuring the prosecution has as strong a case as possible.

JH/00/22/11

JUSTICE AND HOME AFFAIRS COMMITTEE

Vulnerable and intimidated witnesses

Copy of e-mail from Zero Tolerance Trust

Further to our telephone conversation yesterday, I am writing to confirm that the Zero Tolerance Trust will be unable to present evidence to the Justice Committee as requested.

We welcome the Justice Committee's interest in this important area and regret that we are unable to present evidence due to other work commitments. We would, however, like to take this opportunity to draw the Committee members' attention to the position that women's organisations currently find themselves in.

We obviously welcome the priority that the Parliament has given to violence against women and the recognition of the skills and expertise of specialist organisations like ourselves. However, we find ourselves in a difficult position as we are increasingly being asked to provide our expertise through attendance at meetings, seminars and committees. We have calculated that in the last two months, approximately six days of staff time has been spent on responding to Parliament/Scottish Executive business. This time commitment presents us with difficulties as the Zero Tolerance Trust receives no funding from the Scottish Executive. We know that other women's organisations are in a similar position to ourselves.

We wish to make it clear that we fully support the Executive, the committees, and MSP's in their efforts to take action to address violence against women. We would, however, appreciate some thought as to how the Parliament can make effective use of the expertise of organisations like ourselves without placing additional resource and financial pressures on us.

Evelyn Gillan
Co-Director

7 June 2000

JH/00/22/7

JUSTICE AND HOME AFFAIRS COMMITTEE

Petition PE200 by Andrew Watt

Note by the Assistant Clerk

Background

This petition calls for the Parliament to review the working methods of the Scottish Legal Aid Board "particularly in relation to collection and reimbursement of compensation monies collected". The petition is supported by Patricia Ferguson MSP.

The petition is prompted by the petitioner's own difficulties in obtaining compensation. It appears that the Board does not release monies collected on behalf of those awarded compensation until the full amount, including interest and expenses, has been received.

At its meeting on 26 April, the Committee considered its future work programme and a list of subjects for possible inquiry. The Committee agreed that the first priority, when time became available, was to consider legal aid in relation to access to justice.

Procedure

The Standing Orders make clear that, where the Public Petitions Committee (PPC) refers a petition to another committee it is for that committee then to take "such action as they consider appropriate" (Rule 15.6.2(a)). The Committee need not undertake any substantive investigation of the petition, or it may conduct an inquiry if it chooses.

Options

Although this petition relates to a particular case, there is general issue which could be addressed by the Committee. The Committee may regard the petition as sufficiently different to the previous petitions relating to legal aid to write to the Board now asking for clarification of current working practices in relation to the reimbursement of compensation. Depending on the response from the Board, the Committee could consider whether to recommend changes to those practices.

Alternatively, although the petition relates more to the working practices of the Board than with the provision of legal aid, the Committee could simply decide to deal with the concerns raised in the petition when it initiates an investigation into legal aid and access to justice in due course.

9 June 2000 FIONA GROVES

JH/00/22/9

JUSTICE AND HOME AFFAIRS COMMITTEE

Forward Programme June – July 2000

Note: some of the details below are provisional at this stage

Wednesday 14 June
Stage 1 debate on the Regulation of Investigatory Powers (Scotland) Bill (in the Parliament)

Wednesday 21 June
Regulation of Investigatory Powers (Scotland) Bill – Stage 2

Thursday 22 June
Stage 1 debate on the Bail, Judicial Appointments etc. (Scotland) Bill (in the Parliament)

Tuesday 27 June (am, plus pm if required)
Regulation of Investigatory Powers (Scotland) Bill – Stage 2 (if required)
Bail, Judicial Appointments etc. (Scotland) Bill – Stage 2

Wednesday 28 June (additional meeting if required)
Bail, Judicial Appointments etc. (Scotland) Bill – Stage 2

Tuesday 4 July
Bail, Judicial Appointments etc. (Scotland) Bill – Stage 2 (if required)
Report by Michael Matheson on judicial appointments

Week Beginning 10 July:
Summer Recess begins

Note: the meeting slot on 28 June is new and was not included in previous future programmes. It has been made available as a result of a decision by the Parliamentary Bureau to cancel Chamber business that morning, a decision that was taken in order to allow the Committee to complete Stage 2 of the Bail, Judicial Appointments etc. Bill more quickly than might otherwise have been possible.

JH/00/22/3

JUSTICE AND HOME AFFAIRS COMMITTEE

Consultation on Stalking and Harassment Consultation

Memorandum to the Scottish Executive by the Law Society of Scotland

Introduction.

The Criminal Law Committee of the Law Society of Scotland welcomes the opportunity of commenting on the Scottish Executive's consultation document, "Stalking and Harassment". The Committee endorses the Executive's efforts to examine ways to support the victims of crime and ensure that the criminal justice system is adequately equipped to deal with those offenders who persistently place others in a state of fear and alarm.

Before answering in detail the questions posed in the consultation document, it is perhaps worthwhile outlining the policy adopted by the Committee in relation to this issue. In doing so, the Committee will consider the approach favoured both in relation to the civil and criminal law in this area.

Criminal law.

As has been observed in the consultation document, behaviour, which could be categorised as stalking and harassment has traditionally been prosecuted at common law as a breach of the peace or the crime of threats. In the Committee's view, the flexibility and simplicity of this approach has much to offer and the Committee would favour the retention of the common law in this area over proposals to create a new statutory offence.

The Committee has reached this conclusion after consideration of the following factors:-

(a) Proof of the mental element of the crime.

The crime of breach of the peace is committed if an accused person intentionally acts in the manner described in the charge and that conduct is such that it causes or is likely to cause another fear and alarm. It is not necessary for the prosecutor to show that the accused person intended to place the victim in a state of fear and alarm. In some cases, the victim may be unaffected. It is sufficient if the prosecutor proves that the conduct described could have resulted in a disturbance or caused alarm. In the case of Young-v-Heatly 1959 JC 66, Lord Justice Clerk Clyde stated:

> "…it is not essential…that witnesses should be produced who speak of being alarmed or annoyed…if the nature of the conduct

> giving rise to the offence [is] so flagrant as to entitle the court to draw the necessary inference from the conduct itself."

This approach may be favoured in these cases over the approach adopted in England, where to prove the statutory offence of "putting people in fear of violence" under the Protection from Harassment Act 1997, the prosecutor is required to show that the alleged perpetrator knew or ought to know that the course of conduct would cause the other person to fear for his or her safety on each occasion. The requirement to prove the specific mental element for the English offence therefore places a greater burden on the prosecuting authorities. It could be argued, therefore, that the simplicity of the common law offence of breach of the peace offers greater protection to victims of these crimes.

(b) Defining conduct categorised as stalking and harassment.

The consultation document correctly acknowledges that one of the difficulties of legislating in this area is the question of defining the new statutory provision. Paragraph 45 of the consultation document states;

> "Any definition would have to be drawn very generally if it were not to exclude a wide range of behaviour – experience suggests that stalkers use a variety of means to harass their victims and would be likely to find ways to circumvent any narrowly defined statutory offence."

This is not a problem with breach of the peace, which has been used to prosecute the whole spectrum of behaviour. In the case of Montgomery-v-McLeod 1977 SLT(N) 77, the Lord Justice General stated, " There is no limit to the kind of conduct which may give rise to a charge of breach of the peace. All that is required is … some conduct such as to excite the reasonable apprehension…or create disturbance and alarm to the lieges…" Provided the conduct is deliberate and could have resulted in fear and alarm, therefore, the crime is complete. There is little chance that conviction could be avoided because of a strict interpretation of the parameters of the crime.

(c) A single incident or a course of conduct.

It is true that the nature of stalking and harassment means that one incident may be part of a series of such incidents and the victim may rightly be concerned about his or her personal safety. However, it may also be the case that although there have been a number of such incidents, in law there may only be sufficient evidence to proceed on the basis of one charge involving one incident.

In terms of the common law, such conduct could competently be prosecuted as a breach of the peace. In these circumstances, the victim will be assured that

action has been taken, albeit to this limited extent and the courts can seek to address the problem of the offending behaviour, if the offence is proved.

It is hoped that in this way, intervention by the criminal justice system will be effective and will not only act as a deterrent to future criminal behaviour but will also provide any treatment, education and support which may be necessary to prevent the recurrence of such acts.

In England and Wales, however, it would appear that little could be done in situations where the conduct complained of, can only be established on the basis of one incident. To commence proceedings under the Protection from Harassment Act 1997, there would have to be at least two incidents on the face of the complaint. This test is therefore more stringent than that which would be adopted by the Procurator Fiscal when considering a police report at present. The victim in such situations would therefore appear to have greater protection under Scots common law than is available under statute in England and Wales.

(d) Sentencing.

It is also interesting to note that the statutory provisions in force in England and Wales carry a less severe punishment than that potentially available in Scotland. The offence of "harassment" under the Protection from Harassment Act 1997 carries a maximum sentence of six months, whilst the related offence of "putting people in fear of violence" carries a maximum sentence of five years.

As a breach of the peace is a common law offence, there is no maximum sentence prescribed. Instead the maximum sentence is governed by the sentencing powers of the forum in which it is raised. Accordingly, if the breach of the peace is prosecuted in the High Court, for example, the maximum sentence will be life imprisonment. In the Committee's view, therefore, there are sufficient safeguards available to ensure that the victim and the wider community are adequately protected from those convicted of this behaviour.

For these reasons, the Committee is in favour of the retention of the common law and believes that any perceived benefit to the criminal justice system in adopting a statutory based system would be more presentational than substantive.

Civil Law.

Last year, the Society's Family Law Committee responded to the Scottish Office consultation paper, "Improving Scottish Family Law" and commented specifically on the question of extending the scope of matrimonial interdicts in line with the proposal of the Scottish Law Commission. The Committee took the view that notwithstanding the Protection form Harassment Act 1997, there is a need to extend the scope of these interdicts and therefore welcomes the Executive's proposal to introduce the concept of the "domestic interdict".

The Committee also advocated that the power of arrest should endure for 5 years from the grant of the perpetual interdict, with provision to apply for further extensions if required. Although the specific period of five years has not been accepted by the Executive, the Committee acknowledges that the Executive is proposing an extension of 3 years even where the divorce has been granted.

It would appear, therefore, that the civil law is being improved and amended in positive ways to respond to the concerns of victims.

The Existing Law.

Are there inadequacies in the current law?

If so, what are they?

To what extent do any such legal inadequacies account for perceived problems in dealing with stalking/harassment?

The Committee is of the view that any inadequacies in the current law may be more perceived than real and stem from the application of the law rather than the law itself. Public perception may be that the crime of breach of the peace is restricted to minor offences, commonly dealt with by the inferior courts. Whilst many of these offences can be prosecuted in this manner, it should be noted that a breach of the peace can be prosecuted on indictment, in proceedings before a sheriff and jury or even at High Court level. The Committee is of the view that there is a need to convey this message to the public and consideration should be given as to how best to raise public awareness in this area.

If the common law is to be retained, the public must be satisfied that cases involving stalking and harassment will be treated with the care and attention that they deserve from the outset.

The police are central to this process. In the vast majority of cases, the witness's first experience of the justice system will be contact with the police. Victims of crime occupy a particularly sensitive position in the justice system and the cause of justice will suffer if that witness is not treated with respect and understanding. It is important, therefore, at this initial stage that the witness is dealt with compassionately, particularly as in many of these cases, the witness with fall into the vulnerable category.

It must be acknowledged that significant progress has been made to improve the way in which victims, such as those subject to domestic violence are treated. Further efforts could, however, be made.

It is essential that the reporting officer familiarises him- or herself with the full facts of the case and any pattern of offending behaviour which there has been in

the past or appears to be developing. If there is a background to the alleged incident, this must be accurately reported so that the procurator fiscal has as much information as possible when making a decision whether to prosecute and if so, in which forum.

If the police report is compiled in this manner, then the Crown ought to be aware of all relevant factors to enable them to determine the appropriate mode of prosecution. Given that there are issues of public policy in this area, consideration could be given by the Crown Office to issuing guidelines on the appropriate level of prosecution. This should reduce the likelihood of regional variation and lead to greater standardisation in the prosecution policy.

After a witness has given a statement to the police, he or she should be kept informed of progress in the investigation of the case and the prosecution of the alleged offender. This should not depend on the witness seeking information. In particular, efforts should be made by the prosecution service to advise victims if the accused has been released on bail subject to special conditions not to approach or contact that witness. This would ensure that any breach of the order is reported to the authorities promptly, thus offering greater protection to the victim.

At all times, however, both the police and the Procurator Fiscal Service should bear in mind the interests of justice and the need for fairness in the trial process so that no information should be imparted which is unnecessary and which might taint the fact finding aspect of the court's function.

Another criticism which may be levelled at the current law in this area is the approach to sentencing. It is clear that there is public concern about conduct of this kind and the public will require to be satisfied that cases involving stalking and harassment will be dealt with severely and consistently by the courts.

Each case must be assessed on its own merits, and judges will have to take account of the circumstances particular to the case before them. However, even taking account of these factors, there can still be a divergence of approach in sentencing procedure. There is a view that regular training on this topic to ensure consistency would be beneficial.

It is of some assistance that judges are bound to call for Social Enquiry Reports (SER) and Community Service Assessments (CSA) before imposing a custodial sentence if the offender has never been sentenced to imprisonment before (section 204 of the Criminal Procedure (Scotland) Act 1995) or if the offender is under 21 years of age (section 207 of the Criminal Procedure (Scotland) Act 1995).

The importance of these reports, particularly in cases of stalking and harassment, cannot be overstated as they contain essential background

information, which may not have come out during the course of a trial or if a plea has been tendered, in the Crown's narration. These reports will also address the offender's attitude to the commission of the crime and any element of remorse felt. At this stage, the judge can also consider whether there are any underlying reasons for the commission of the offence. Consideration should be given as to whether there is, for example, any evidence of mental disorder, or of an addiction to alcohol or drugs.

If there is a suggestion that such a factor contributed to the commission of the offence, then the judge could structure the sentence in such a way as to help address this problem. This approach attempts to balance the public policy aspect of punishment for crime with human rights and rehabilitation considerations.

In cases involving stalking and harassment, there may be a psychiatric issue, which requires detailed consideration. It may be that the three or four week period which is traditionally set aside for the preparation of these reports is inadequate and that a longer period of detention and observation will be required to provide the court with an accurate diagnosis of the condition of the offender and the potential risk posed to the victim and the wider community. There may be merit, therefore, in extending the period of this part of the procedure in certain circumstances to ensure that <u>all</u> accurate and relevant information is available before a decision is taken as to the most appropriate form of disposal.

The Executive should, however, not lose sight of the fact that the criminal justice system has a number of competing interests to balance. In cases involving stalking and harassment, there are undoubtedly public policy considerations which have been identified, however, there are also human rights issues, which have to be addressed.

It must be recognised that when a judge imposes a custodial sentence, he or she does so not only to punish but also to reform and hopefully rehabilitate the offender, so that after the relevant part of the sentence has been completed, that individual will be able to return to the community and effectively contribute towards it. Custodial sentences are designed as an avenue of last resort and should only be imposed when no other form of disposal is appropriate,

The Committee believes that greater emphasis should be placed on developing positive community disposals. Arrangements such as counselling could be put in place so that the offender can focus on the root of the offending problem. The Committee is of the view that public protection would be enhanced if such measures were adopted because their aim would be to strengthen the concept of rehabilitation.

<u>Changes to Current Practice.</u>

Is adequate advice and guidance available on the remedies for someone who fears they are being stalked?

As has been outlined above, the police may often be the first contact a victim has with the justice system and it is essential therefore, that police officers are aware of the potential remedies available, both of a criminal and civil nature, if only to direct the person to the most appropriate service provider.

Consideration could be given to raising awareness of the civil remedies available and in particular of the availability of the Non-Harassment Order under the Protection from Harassment Act 1997.

Are there non-legislative changes in the ways in which such cases are dealt with by the criminal justice system which could address victims' concerns and minimise the risk to them?

The Committee has considered this in dealing with the inadequacies of the existing law. Improved communication throughout the process and a full awareness of the background and circumstances of the case are essential to increasing public confidence in the system.

Is there scope for more training, awareness-raising, and improved procedures in identifying behaviour that constitutes harassment?

Yes. See above.

Police Procedure.

Are there adequate communication systems between and within police forces, so that victims of harassment can be easily identified?

Are there adequate communication systems between police and Procurators Fiscal within and across geographical boundaries?

The Committee does not have sufficient information in relation to the communication systems operative between police forces themselves; and police forces and the Procurator Fiscal Service, to make detailed comment. However, it is important to stress that if the communication system is to operate effectively, all relevant information should be recorded and up-dated on a regular basis.

Are there any changes to police training or procedure that might be made to ensure timely police intervention when necessary?

The Committee has no comment to make in relation to this question.

Changes to the Current Law.

Should we require disclosure of any available information on previous convictions for offences involving the same victim?

It is axiomatic that a sentencing court should have before it such information as is required to enable it to arrive at a proper disposal of the case. Such a disposal will of course take into account the fact that the accused has previous convictions and those which are analogous to the offence before the court will have a direct bearing on the sentence imposed. Section 101(7) of the Criminal Procedure (Scotland) Act 1995 makes specific provision for having regard to previous convictions in deciding on disposal.

The Committee is of the view that both the fact and the nature of the previous conviction should be taken into account and favours the approach adopted by the Court of Criminal Appeal in Riley-v-HMA 1999 SCCR 644, in this regard. The disclosure and examination of the detailed evidence which led to the previous conviction would not, however, be authorised, as this could easily lead to disputes between the Crown and the accused as to precisely what occurred.

The Committee would envisage information being made available as to the general nature of the charge to which the conviction relates, the name of the victim and such other information as would be detailed in a full extract of the conviction. This would bring to the court's attention the general flavour of the previous conviction without going behind the conviction in any way to enquire into the circumstances which led to it. The accused should of course be given notice that the Crown intends to proceed in this way following upon conviction, so as to allow full opportunity for challenge, where appropriate.

Another consideration in cases of stalking and harassment is to highlight in the schedule of previous convictions which is laid before the court and served upon the accused person, the fact that the breach of the peace relates to an incident of harassment. This could be noted in the print-out provided by the Scottish Criminal Records Office (SCRO) in the same way as other aggravated offences are recorded. The schedule would, for example, disclose an offence of breach of the peace (harassment). It would then be clear from the schedule that the offence is analogous to the matter before the court and it would be a matter for the judge to seek additional information as to the identity of the complainer in that case, if he or she considered that to be appropriate. Aggravations of other offences, such as assault to sever injury and theft by housebreaking are recorded in this way already and accordingly, the Committee would favour an extension of this policy to these particular offences. The Committee understands that the Lord President has set up a Working Group to look at this issue.

Should we require obligatory non-harassment orders (NHOs) in certain circumstances?

No. the Committee is of the view that each case should be considered on its own merits and that the imposition of a NHO should be a matter for the discretion of the judge concerned.

Should we increase police powers of arrest in relation to harassment?

If the common law approach is maintained, there should be no need to increase police powers of arrest. A police officer can arrest without warrant any person whom he or she reasonably believes has committed an offence punishable by imprisonment. As has been outlined above, the breach of the peace is an offence punishable by imprisonment and so, the right to arrest without warrant is available.

Should we reduce the burden of proof in cases of alleged harassment?

No. In the criminal context, there may be danger in any attempt to reduce the burden of proof. The consequences of conviction in a criminal court for any offence may be severe and far-reaching, resulting in loss of livelihood or even liberty. It is therefore appropriate that the Crown has the burden of proving the case to the standard of beyond reasonable doubt. It is also important that the integrity of the criminal justice system is protected from prosecutions based on malicious allegations made by one witness. The importance of the principle of corroboration should not be undermined in any way, and any departure from this may have implications in terms of European Convention of Human Rights.

Information on Previous Convictions.

Do these judgements point to the need to change the present law?

The Committee has addressed this issue in the comments made above.

Should the cort be required in any case where the prosecution seeks a non-harassment order, to take into account any available informantion on previous convictions for offences involving the same victim?

Yes. Subject to what has been stated above in regard to the extent of information which should be disclosed to the court, the Committee agrees that previous convictions for offences involving the same victim should be capable of being taken into account when the prosecution seeks a non-harassment order. The narrow interpretation which has been adopted by the courts in applying the Protection from Harassment Act 1997 highlights the difficulties which can be experienced when a statutory approach is favoured to the common law.

Obligatory Non-Harassment Orders.

Should this be changed to a new statutory duty on the court to make an NHO in any such case, unless it is felt that it is not in the interests of justiceso to do?

The Committee would not favour the introduction of mandatory NHOs as this may lack flexibility. Provision could, however, be made for the court to make such an order ex proprio motu. This would leave the matter entirely to the discretion of the judge involved, who could take into account all the facts and circumstances of the case and would not have to rely on the Crown making an application for an order.

Additional Powers of Arrest.

Should we introduce a power of arrest without warrant for suspicion of breaching an NHO?

The Committee would not endorse the introduction of a power of arrest without warrant on the basis of mere suspicion that a person has breached an NHO. The Committee is of the view that an officer must have reasonable grounds to believe that an offence punishable by imprisonment is being committed before the arrest without warrant may be justified.

It is, however, generally accepted that arrest without warrant can already be justified if the officer has grounds for believing that it is necessary to prevent injury to others and accordingly, the extension proposed may not be necessary.

A New Statutory Offence.

How would any new offence be defined?

The Committee would refer to the comments made in this regard in the introductory comments.

What difference would it make in practice?

Would the benefits be substantive or presentational?

As has been highlighted, the Committee has difficulty in seeing the merit of creating a separate statutory offence. Indeed, it may only add to the problems which may be perceived to exist at present without addressing any of these issues. Any benefit would, in the Committee's view, be presentational rather than substantive.

Where does the balance of advantage lie between flexible common law and statute?

The Committee believes that this question is concisely answered in paragraph 45 of the consultation document and endorses much of what is stated there. The case for creating a new statutory offence is not clear-cut. The common law at present offers flexibility to deal effectively with a whole range of offending behaviour and in the Committee's view, offers greater protection for victims of crime. For these reasons, therefore, the Committee would favour the retention of the common law.

JH/00/22/6

JUSTICE AND HOME AFFAIRS COMMITTEE

Consultation on Stalking and Harassment Consultation

Memorandum to the Scottish Executive by the Scottish Police Federation

Summary of Options

Rely on existing law:

Are there inadequacies in the current law?

SPF believes that current law is not inadequate. It considers that, properly applied by the police, the Crown and the Courts, the common law offences of Breach of the Peace and Threats are adequate to cater for all types of Stalking or Harassment. We also have in place the provisions of the Protection from Harassment Act 1997 which strengthens both the civil and criminal law.

From an operational police officer's point of view, these offences are well known, understood and recognised and this would not necessarily be the case with a new and specific statute. This is very important because in the often highly charged atmosphere at the scene of an ongoing or recently concluded incident it is vital that a police officer is clear about what he or she is doing and why. These common law offences also have the advantage of being extremely flexible with the potential to encapsulate a wide range of conduct which would be impossible to define in full. The effect on the victim is at least as important as the offending conduct.

One disadvantage in continuing to use the current charge of Breach of the Peace lies in Courts, prior to sentencing, identifying the nature of previous convictions of Breach of the Peace. The Scottish Criminal Records Office have been seeking to record different categories of Breach of the Peace with a view to informing sentencing authorities of previous similar offences but further information regarding the victims of such charges would be beneficial. Currently Procurators Fiscal can find out this information and inform the court when moving for sentence. This is not often done, however, particularly if the previous offence occurred in another jurisdiction.

Changes to current practice:

Is adequate advice and guidance available on the remedies for someone who fears they are being stalked?

There is little doubt that both the Police service and Government could enhance the public awareness and possible remedies available to victims of this type of crime.

Are there non-legislative changes in the way such cases are dealt with by the criminal justice system that could address victims' concerns and minimise the risk to them?
Is there scope for more training, awareness-raising, and improved procedures in identifying behaviour which constitutes harassment?

SPF is not expert on the amount and quality of training given to police officers either centrally or locally. However, from comments received from our members across the country there is the perception at least that in this area as in many others training is inadequate.

While not wishing to make this an opportunity to repeat our well aired complaints it is nevertheless a fact that, as police officer numbers and resources reduce and as police workloads increase, training is cut back both formally and informally.

In relation to formal training, national training at the Scottish Police College undoubtedly includes training on Breach of the Peace and this will cover Stalking and Harassment to some extent. All Forces will follow up on national training through local training courses and again this subject matter will almost certainly be addressed. In this way it is true to say that all police officers will receive some training on Stalking and Harassment in their first two years in the police.

In our view the problems begin after the two-year probationary period where formal training is sporadic. Some Force's use 'intranet sites' where officers can self-train but others have no such facilities. They rely on individual officers keeping abreast of new legislation and Force procedures through their own efforts.

Informal or 'on-the-job' training hopefully begins with experienced officers advising less experienced officers on how to recognise important signs and how to investigate the many and varied circumstances which can constitute Stalking or Harassment. These experienced officers will also advise junior colleagues on the specialist departments within the Force that should be advised or brought into the case and on advice that should be given to victims. General crime prevention advice and advice on the facilities available within the Force should present no difficulties but advice on other agencies and groups will only be as good as that provided by the Force to individual officers. This informal training and the experience gained in this way is invaluable and arguably the only way that produces fully competent officers. Reading or being told about specific incidents is no substitute for being there and being responsible for dealing with actual incidents.

However, the ability of the experienced officer, the extent to which he or she has kept abreast of developments and the time available to him or her to attend to a call relative to Stalking or Harassment, all dictate the quality of service provided to the victim and the quality of training provided to the junior officer. In addition, all too often, this 'tutor constable' procedure is cut far short of the two year probationary period due to a lack of police officers. As a result, inexperienced officers are left working on their own to deal with sometimes complex family

situations as is often the case in Stalking and Harassment cases or with seemingly trivial events which could be part of a bigger picture.

The specialist departments within Forces have advised us that relatively inexperienced officers fresh from national and local training are better than many experienced officers at making appropriate referrals to them. This indicates to us that there is a need for refresher training for more experienced officers on this and other areas of police work.

The cost of making provision for this is has recently been estimated by the ACPOS Personnel and Training Standing Committee. To provide one day of training for all police and support staff in Scotland would involve an abstraction from normal duties amounting to approximately 20,000 working days at a cost of over £3m.

Are there adequate communication systems between divisional and force areas so that victims of harassment can be easily identified?
Are there adequate communication systems between police and Procurators Fiscal within and across relevant geographical boundaries?

SPF believes there is always scope for improved communications both within Forces and between Forces and other agencies. Some of our members believe that communication between the police and Procurators Fiscal could be improved and cite pressure of work on both sides as the main cause of insufficient communication. SPF is aware that some Forces have databases containing details of domestic violence victims but is not aware of any similar databases for victims of Stalking or Harassment. SPF would support the creation of an Offenders Register for Stalking and Harassment and if such information were held at SCRO or PNC then it would be accessible across Scotland.

Should we require disclosure of any available information on previous convictions for offences involving the same victim?

To the end.

SPF sees merit in many of these suggestions from the victim's perspective in that they might lead to easier convictions and greater protection. The police service would have no difficulty in operating under any of the proposed changed conditions. However, some fundamental legal principles are at stake and, as always, a balance has to be struck between the interests of victims and those accused of offences.

The main question lies in the merits or otherwise of creating a particular statutory offence or relying on the common law provisions. In the view of the Scottish Police Federation the degree of seriousness of stalking and harassment offences can vary to a very great extent It would be difficult to encompass this range within the definition and range of penalties without being so general as to render the statute as all encompassing in its terms as is the common law charge of Breach of the Peace. This is the basis of our view that the common law is adequate in scope and penalty but its method of application in these cases

requires to be addressed by the Police, the Crown prosecuting authorities and the Courts.

We are of the view that properly framed charges of Breach of the Peace which include a proper narrative of the nature of the crime are unlikely to fall foul of the E.C.H.R.

In conclusion, SPF recognises the upset and trauma that Stalking and Harassment can cause the victim. In a perfect world where all parts of the criminal justice system were fully resourced and trained and had the time to dedicate to each complaint of this nature then the service we could provide to victims would undoubtedly be better than is currently the case. Within current restrictions on resources, training and time, we believe that raising awareness through all parts of the criminal justice system would be of most benefit.

JH/00/22/5

JUSTICE AND HOME AFFAIRS COMMITTEE

Response from Mrs Anne Keenan Deputy Director of the Law Society of Scotland regarding the Insolvency Bill

Note by the Acting Senior Assistant Clerk: At its meeting on 22 May, the Committee considered a letter and memorandum from the Deputy Minister for Justice on the Insolvency Bill. The Committee agreed to seek further information from the Law Society of Scotland. The response is attached below:

The Insolvency Solicitors Committee of the Law Society of Scotland has had the opportunity of considering the Insolvency Bill [H.L.] and in general terms welcomes the proposed changes to insolvency law.

The Committee had a number of general concerns about the drafting of the Bill and highlighted these in a letter to Westminster at the time of Second Reading. The Bill is scheduled to enter Committee Stage in the House of Lords on 15th June and amendments have been sent to Peers, for their consideration.

In relation to Clause 13 specifically, the Insolvency Solicitors Committee welcomed the recognition of the importance of the UNCITRAL model law on cross-border insolvency, which is implicit in the introduction of this Clause. The Committee believes that the Bill represents a good opportunity to facilitate the introduction of the model law and to allow the Secretary of State the flexibility to do so by regulation.

The UNCITRAL model law is the product of many years of consultation at an international level, in an attempt to promote co-operation between courts exercising insolvency jurisdiction. It would, in the Committee's view, therefore appear to be appropriate for one set of regulations governing its introduction to be applicable in the UK. It is anticipated that the UNCITRAL will have a major impact in the area of corporate insolvency. This, as you will be aware, is an area reserved to the Westminster Parliament in terms of Schedule 5 of the Scotland Act 1998. Accordingly, there may be merit in having these provisions dealt with uniformly by the Westminster Parliament, rather than by a series of regulations dealing with devolved and reserved areas.

Although the Committee favours dealing with this Clause on a UK basis, the Scots perspective should of course still be represented. The Committee has commented in a briefing note to an amendment proposed to Clause 13 that full account does not appear to have been taken of the devolution settlement in the drafting of this Clause.

As has been noted, Clause 13 allows the Secretary of State to make regulations for the purpose of giving effect to the model law, provided that the agreement of the Lord Chancellor has been obtained. The Committee believes that the Clause should be amended to provide for consultation with the Advocate General for Scotland, as the appropriate Law Officer, so that account can be taken of the Scottish dimension.

If this amendment were to be successful and this provision were placed on the face of the Bill, the Committee would be satisfied that Scots law in this area would be protected and could still be developed in a uniform manner with that of England and Wales.

The Society would like to emphasise that the Committee is impressed by the UNCITRAL proposal and feels that it seeks to create more certainty in international insolvencies after the problems experienced in the light of BCCI and Maxwell.

JH/00/22/10

JUSTICE AND HOME AFFAIRS COMMITTEE

The Draft Scotland Act 1998 (Modifications of Schedule 4) Order 2000

Supplementary Executive Note

What does Schedule 4 to the Scotland Act do?

The Scottish Parliament cannot modify, or confer power by subordinate legislation to modify, the law on reserved matters. The "law on reserved matters" is defined in Schedule 4. An exception is made for rules of Scots private or criminal law, so long as these are not "special to a reserved matter" or appear in a list in paragraph 2(3).

Does the Order in Council transfer any more powers to the Scottish Parliament?

No. This Order is not concerned with the transfer of powers. No powers are transferred to the Scottish Parliament; neither are any powers removed. The Scottish Parliament does not have the powers to legislate in relation to pensions matters, except for the limited power to amend Scots private law, except for the limited power to amend Scots private law e.g. in relation to what constitutes "matrimonial property". Most pensions arrangements are already part of the law on reserved matters that cannot be modified, because they are listed in para 2(3). The Order simply clarifies the existing provision in Schedule 4.

Why is the Order in Council required?

It is necessary to modify Schedule 4 to the Scotland Act 1998. This can be achieved by an Order in Council under section 30(2) of the Act, which requires the approval of both Houses of Parliament and the Scottish Parliament.

Why is it necessary to modify Schedule 4?

As it stands, paragraph 2 of Schedule 4 to the Scotland Act is incomplete. It does not cover all pension arrangements or the State Earnings Related Pension Scheme (SERPS) for pension sharing purposes. It is essential to clarify the agreed policy intention and put beyond doubt that the paragraph includes not only occupational and personal pension arrangements but <u>all</u> pension arrangements and the sharing of state scheme pension rights.

Why was the necessary change not made during the Bill's passage?

Pensions on divorce policy was only being developed when the Scotland Act was before Parliament. It was, therefore, difficult to draft a provision which would sufficiently cover the developing policy and separate it from family law which is devolved to the Scottish Parliament. Ministers agreed that any necessary changes could be introduced at a later date.

Why was the amendment not made through the Welfare Reform and Pensions Act 1999?

In principle the Scotland Act could have been amended by the Welfare Reform and Pensions Act. However, the normal expectation is that a modification of the powers

of the Parliament such as this should be subject to the agreement of the Scottish Parliament. Therefore, the vehicle for modifications to Schedule 4 of the Scotland Act is an Order under section 30(2) of that Act, which is subject to affirmative resolution in both Parliaments.

Why has the Draft Order in Council not been tabled before now?

The pension sharing on divorce provisions in the Welfare Reform and Pensions Act 1999 will come into force on 1 December 2000. The Welfare Reform and Pensions Act 1999 (Commencement No. 4) Order 2000, which provides for the coming into force of those provisions, was made in April 2000. It therefore seems to be an appropriate time to lay this draft Order in Council.

What happens after the order has been made?

The likelihood is that nothing will happen. Pension sharing will only be possible in any action for divorce which is commenced on or after 1 December 2000. The modifications to the Scotland Act will have been made before the pension sharing legislation comes into force.

Pension sharing on divorce

What is pension sharing?

If a couple divorces or their marriage is annulled, the courts already have the power to offset pension rights against other assets. The courts can also order a private pension scheme to pay part of a pension lump sum from one spouse to the other at the time the pension comes into payment, e.g. on the retirement of the pension member.

This type of court order – usually referred to as an "earmarking" order - was provided in 1996, but has been little used. It does not allow a clean break and the ex-spouse will lose the intended retirement income if the spouse with pension rights dies first.

From 1 December 2000, the Welfare Reform and Pensions Act 1999 will allow pension rights to be shared at the time of divorce or nullity.

This new option will allow pension rights to be treated in a way which ensures the fairest overall settlement when a marriage ends.

Pension sharing will provide greater scope for divorcing couples to achieve "clean-break" settlements and a more secure retirement income for those receiving a share of pension rights.

Does Pension Sharing reflect Scots law?

The provisions in the Welfare Reform and Pensions Act 1999 reflect the differences in matrimonial law in the different jurisdictions (England & Wales, Scotland and Northern Ireland).

The provisions keep the impact of the differences between the jurisdictions to a minimum consistent with the differences in procedures and substantive law.

Pension sharing will be made available in Scotland from the same date [December 2000] as in other parts of the United Kingdom.

Matrimonial Law in Scotland

The key difference in substantive law in Scotland is the concept of "matrimonial property".

In Scotland, only the pension rights accrued during the marriage will form part of the matrimonial property to be shared. The proportion of the pension rights to be shared will relate to the duration of the marriage. This reflects how other assets, which would form the matrimonial property, would be divided on divorce.

Method of valuation in Scotland

As for the rest of the UK, the method of valuing the pension benefits will be the Cash Equivalent Transfer Value (CETV). It is a valuation with which the pensions industry is familiar.

The CETV is the method already prescribed in each of the jurisdictions for pension earmarking. Its use in pension sharing will provide consistency.

Negotiated settlements

Parties who divorce in Scotland can make a *Minute of Agreement* to settle as many issues as possible before asking the court to grant divorce. This allows the parties to reach their own decisions (with legal advice) about matters such as the division of assets. Pension sharing in Scotland will be possible through a *Minute of Agreement*.

To ensure the agreement is valid and meets the information requirements of the pensions industry, regulations will prescribe the format of the pension sharing provision to be contained in a *Minute of Agreement*.

Pension earmarking under section 167 of the Pensions Act 1995

The pension earmarking regulations made under section 167 of the Pensions Act 1995 came into effect in Scotland on 19 August 1996. The option of earmarking will remain for those who would wish to use it.

EXECUTIVE SECRETARIAT
8 June 2000

JH/00/21/M

The Scottish Parliament

JUSTICE AND HOME AFFAIRS COMMITTEE

MINUTES

21st Meeting, 2000 (Session 1)

Wednesday 7 June 2000

Present:

Scott Barrie
Phil Gallie
Gordon Jackson (Deputy Convener)
Maureen Macmillan
Mrs Lyndsay McIntosh
Euan Robson
Roseanna Cunningham (Convener)
Christine Grahame
Kate MacLean
Mr Michael Matheson
Pauline McNeill

Also in attendance were Johann Lamont and Mr Gil Paterson

The meeting opened at 9.35am.

1. **Meeting in private:** The Committee agreed to consider a revised draft Stage 1 report on the Bail, Judicial Appointments etc. (Scotland) Bill and a draft response to the Stalking and Harassment consultation in private at its next meeting.

2. **Item in Private:** The Committee agreed to consider a revised draft Stage 1 report on the Regulation of Investigatory Powers (Scotland) Bill (item 6 on the agenda) in private.

3. **Stalking and harassment:** Pauline McNeill reported on meetings she had had in relation to the issues raised in the Scottish Executive consultation paper. The Committee then took evidence from—

   Alison Paterson, Director, and David McKenna, Assistant Director, Victim Support Scotland.

4. **Vulnerable and intimidated witnesses:** The Committee took evidence on the proposals to improve protection for witnesses in cases involving allegations of rape from—

   Alison Paterson, Director, and David McKenna, Assistant Director, Victim Support Scotland.

5. **Petitions:** The Committee considered the following petitions—

PE111 by Frank Harvey: The Committee agreed to defer consideration of this petition pending the publication in the autumn of research sponsored by the Department of Environment, Transport and the Regions (DETR) into the application of road traffic legislation by the police, prosecutors and courts.

PE124 by Grandparents Apart Self-Help: The Committee agreed to defer consideration of this petition pending the publication of the Executive's White Paper on the reform of family law.

PE176 by Mr J McMillan: The Committee agreed to write to the petitioner informing him that it intends to conduct an inquiry into self-regulation in due course and that he will have an opportunity then to submit his views. The Committee also agreed to bring to the attention of the petitioner the work of the Equal Opportunities Committee on police complaints in relation to the Macpherson report on the Stephen Lawrence case.

6. **Subordinate legislation:** The Committee considered the following draft affirmative instrument—

   The Scotland Act 1998 (Modifications of Schedule 4) Order 2000

   The Committee agreed to seek clarification of the effect of the draft instrument from the Executive, and that Scott Barrie would attend on behalf of the Committee the debate on the draft instrument at next week's meeting of the Finance Committee.

7. **Regulation of Investigatory Powers (Scotland) Bill (in private):** The Committee considered a revised draft Stage 1 report. The report was agreed to, subject to various changes.

8. **Bail, Judicial Appointments etc. (Scotland) Bill (in private):** The Committee considered a draft Stage 1 report. Various changes were agreed to.

The meeting closed at 12.21 pm.

Andrew Mylne
Clerk to the Committee

JH/00/22/12

STALKING AND HARASSMENT

A CONSULTATION DOCUMENT

RESPONSE BY SCOTTISH WOMEN'S AID
JUNE 2000

GENERAL POINTS

SWA welcomes this review and the opportunity to provide comment. We wish to make some general points at the outset of our response as we believe any reforms must be considered against the background of what is already known about stalking.

Prevalence of Stalking

Stalking is a serious social problem of unknown scale. Little research has been undertaken in the U.K. and none in Scotland on the prevalence and impact. No data exists in Scotland about those who stalk and harass nor the experiences of their victims. This has led to the introduction of uninformed and ineffective legal remedies and, in our opinion the need for the present review.

In the USA research indicates that out of all women murdered each year one in six was stalked by the murderer prior to being killed and it has been estimated that 5% of women in the USA will be victims of stalking at some time in their lives.[1,2] A 1998 US report puts the figure higher at 8% and estimates that over one million women are stalked each year.[3] A recent study in England found that 20% of a random sample of 80 women had experienced stalking.[4] This was borne out by a telephone survey carried out in England in 1997 where 19% of the women participating stated they had actually experienced stalking and 25% of those interviewed stated they knew someone who had been stalked.[5] A study undertaken last year by Leicester University confirmed the existence of high prevalence rates of stalking: out of a sample of 348 women, 24% reported experiencing at least one incident of stalking.[6]

There are no comparative figures available in Scotland, but even without such data it is reasonable to assume prevalence rates similar to that in the studies undertaken furth of Scotland. Clearly comparative research is urgently required and we recommend the Scottish Executive commission this immediately.

Nature of Stalking

At the severe end of the spectrum stalking can result in death. At the perceived less serious end stalking takes the form of seemingly innocuous acts, which, in isolation would not necessarily be regarded as criminal behaviour. But it is the persistent, repeated, unwanted, uninvited, intrusive and controlling nature of stalking which, in the words of one woman, results in a kind of "living death": afraid to answer the 'phone, fearful of opening the mail, afraid to leave the house after dark, never opening the curtains, keeping the lights off so he won't know you're in, constantly checking over your shoulder if you are out, being humiliated and compromised in work and social situations Looked at as a whole, the series of apparent minor events take on an entirely different nature altogether.

It must also be recognised, in law and in societal terms, that stalkers are invariably someone whom the victim knows: frequently a former partner. In one study for instance, 22% of the women who had experienced stalking described part of the campaign of harassment as a refusal to accept that a prior relationship was over.[6]

In order to provide effective intervention in the face of such campaigns of fear and control it is vital to acknowledge, in both substantive and presentational terms that we all have an absolute right to live free from unwanted and gross intrusions into our personal lives. Stalking by definition occurs as a corollary of multiple and diverse forms of harassment i.e. a course of conduct. The law does not currently reflect this.

Links with domestic abuse

We very much welcome the Scottish Executive's acknowledgement (at para. 6) that many stalkers are the former partners of women they have abused. Whilst there are no prevalence figures for the incidence of stalking in Scotland, the prevalence of domestic abuse is well-documented: one in four women experience domestic abuse.[7] We know that many women who experience domestic abuse continue to be harassed and stalked once they have left the abuser. Separation and its aftermath is recognised as a particularly dangerous period for women and their children, with an increased risk of femicide.[8] Many women are pursued relentlessly even once they have relocated elsewhere, and tragically, are murdered despite possessing protective orders. In the ten year period 1989 - 1998 57% of the female homicides in Scotland were committed by the woman's partner: both former and current, and 82% of the women murdered in this period were killed by someone they knew.[9]

The prevalence of stalking and harassment in relation to domestic abuse is reflected in the need for protective orders such as matrimonial interdicts; we also know that many of the non-harassment orders (NHOs) sought in the civil courts are sought by women against their former partners and we know of one obtained by a child against her father. Any proposed reforms to the current anti-stalking measures in Scotland must therefore take account of the links with domestic abuse.

Solutions

We do not agree with the view stated in the paper that the current difficulties in responding to the problem of stalking are complex, neither in legal nor in practical terms. The obstacles to effective intervention are self-evident and could be easily remedied by the introduction of a new statutory offence.

What is complex in our opinion is the crime of stalking itself. It does not lend itself easily to simple definition. The range of behaviours and multiple forms of harassment which occur: from malicious telephone calls to moving house to be nearer the victim to death threats and actual physical harm make it impossible to state explicitly and definitively what stalking is. However, it is the repeated and unwanted nature of stalking that provides the key to effective responses: regardless of how apparently ordinary or seemingly trivial a single incident is perceived, if looked at in the context of a campaign, or as part of a series of events takes on an entirely different perspective.

Currently, the law does not take adequate cognisance of this, instead looking at incidents in isolation: this has led to a poor response from the criminal justice system and a misunderstanding of the effect of such campaigns of harassment on the victims. Changes must be implemented to overcome the present inadequacies, changes informed by the experience of those who are stalked and which take account of the nature and prevalence of this crime. We believe this will ensure both protection for victims and the prevention of further crimes. Our views on how to achieve this are set out below.

RELYING ON EXISTING LAW

SWA does not believe reliance on the current provisions to be a viable option; this review is being carried out because of the acknowledged failings of the anti-stalking measures available in Scotland. We have indicated in our proposals for change what we believe to be the current inadequacies and how they might be overcome.

OPTIONS FOR CHANGE

1. A NEW STATUTORY OFFENCE

This is SWA's preferred option for change. We believe the introduction of a new statutory offence of stalking would have far-reaching consequences and provide the solution to the current problems as well as improving the practice response.
In 1996, on the same day the Home Office consultation on stalking was issued, the (then) Lord Advocate stated, in a written answer that: *the common law of Scotland is adequate to deal with the menace of stalking.*[1] Clearly, since then, and despite the enactment of s.s. 8-12 of the Protection from Harassment Act 1997, this has not proved to be the case.

Breach of the Peace

Breach of the peace offers flexibility and generality in terms of responding to harassment activity. Prosecutions can currently be brought under this head in respect of harassment for a wide range of behaviours often having what appears to be the same effect as a breach of the peace i.e. alarm, fear, upset etc. However, breach of the peace can be distinguished substantially from harassment by considering the target of the conduct: the targets of breach of the peace being the lieges i.e. citizens in general. In comparison, the target of harassment is the same, single victim in each instance. Breach of the peace does not, therefore, adequately convey the pattern of repeat intrusions into the victim's life by the same perpetrator, nor the ongoing fear experienced, rather, it treats the activity as a one-off isolated incident. Breach of the peace is generally committed in a spontaneous and unplanned context, often as a

reaction to environmental or circumstantial factors. In this respect, harassment is quite distinct. SWA contends that this distinction must be made clear in law: the only way of achieving this is in statute.

Defining a new offence

A new statutory offence of stalking must be widely defined given the diverse and multiple forms it can take. Too narrow a definition would obviously leave room for "legitimate" acts of harassment not actionable in criminal terms and thus leave victims unprotected.

We are not suggesting, however, that the stalking offence be as widely drawn as breach of the peace- obviously there is no point in duplicating what is already in place. What does require to be explicitly defined is the nature and impact of stalking which would have the effect of legally distinguishing the two separate offences. As with breach of the peace, the effect of the harassment activity must be a primary factor. We believe it is possible to encompass all the relevant elements which differentiate stalking from breach of the peace in a single definition. For instance, the activity can be defined as:

> **a series of actions directed at one individual by another which, taken as a whole amount to unwanted persistent personal harassment causing fear, alarm and distress.....**

Something along these lines allows for inclusion of the diverse and sometimes bizarre range of harassment activities, takes account of the requirement of repeated intentional action targeted at the same victim and explicitly creates an offence which reflects the reality of criminal harassment. The impact of a breach of the peace on a victim is not analogous with the impact of criminal harassment, therefore the two must, and can, be separated out.

Advantages of a new offence

In our view the creation of a new offence would address many of the current inadequacies and provide additional benefits. It would provide clarity for all concerned - from victim, to police through to sheriff, and simplify what is currently an unnecessarily convoluted and ineffective process. It would also remove the need to introduce alternative onerous measures which would further complicate the process such as tagging all offences in order to prove course of conduct requirements at later stages of the process, tampering with burdens of proof and reforming the current law on previous convictions. Our views on the impact of a new statutory offence follow.

- **Effect on Police Response**

Stalking in Scotland is not a crime per se. The police, therefore, have no jurisdiction to intervene in criminal harassment unless it takes the form of an alternative actionable

offence such as breach of the peace, or the harassment is contravening an existing NHO. A new offence, defined appropriately, would allow police action to be taken at an earlier stage of the harassment (depending on how "course of conduct" or "series of action" is defined, but potentially, as at present where harassment had occurred on at least two occasions). This would allow for intervention before actual physical or more serious harm occurred. Most of us are aware of the horrific case of Marilyn McKenna where, despite repeated call outs, the police were unable to take action against her stalker although over twenty separate incidents of harassment were complained of. A statutory offence would leave no room for ambiguity about the activity of the perpetrator. Where corroboration existed as to the course of conduct or series of events the police would be immediately obliged to intervene where an offence had been committed and there would be no possibility of minimising the harassment as currently happens with breach of the peace. Given the nature of harassment, corroboration may, on occasion, present difficulties, but recent cases suggest otherwise and this will depend on the actual form it takes. We see no need, indeed no benefit nor possible legal mechanism, for altering the burden of proof in such cases.

- **Effect on Court Practice**

Early interception in criminal harassment by the police will simplify the subsequent criminal justice process. Where corroboration has provided the basis for a charge the complaint will be libelled explicitly as stalking. We anticipate this would remove prosecutorial discretion to downgrade, divert or "no pro" a charge for stalking given the gravity of the offence. Where conviction ensues the sentencing can be tailored to the more serious and specific crime of harassment rather than as now, where sentence is very often for breach of the peace and therefore not always appropriate or effective.

- **Effect on Non-Harassment Orders**

Where there is a need for enhanced protection on top of the court disposal i.e. in the form of a NHO, a statutory offence of stalking would remove the current obstacles to obtaining the order in a criminal trial.

Since the decision in McGlennan v MacKinnon,1998 the ability of the criminal courts to provide this additional protection to individuals who have been stalked has been greatly restricted. The current requirement for grant of a NHO is extremely difficult to satisfy: two separate averments of harassment must be libelled in a complaint This onerous condition would no longer be necessary if a statutory offence of stalking was introduced. In the MacKinnon case for instance, if the conviction had been for stalking, this, by definition, would have comprised a course of conduct and a NHO would have been granted when moved for. The previous convictions would have been irrelevant, except insofar as they influenced the disposal. A statutory offence therefore, would exclude the need to look behind previous convictions. Moreover, in relation to serial stalkers the history of their offending pattern would be available to the court from the previous convictions which would contain precise charges of stalking rather than alternative offences which give no clue as to the nature of the offending behaviour. As the law stands at present, this would not assist in accessing NHOs, it would, nevertheless greatly influence sentencing.

- **Effect on Victims**

It is vital to consider the application of the current provisions in relation to the victims of stalking and the improvements which a statutory offence would bring to their experience.

Individuals who have experienced harassment are often shocked to learn that the stalking they have suffered is not, in name, a crime. A prosecution for breach of the peace does not reflect their experience, indeed it tends to minimise and trivialise the conduct they have endured and this is in turn reflected in the inadequate sentences given to their stalker.

Further, because of the problems associated with obtaining a NHO in a criminal trial many victims are denied the additional protection of the order, often in the face of clear opinion from both police and prosecutor that this is needed. An alternative route to securing a NHO is by way of civil litigation. This places the burden of crime prevention and protection entirely on the victim. Having been offended against, the victim must instruct a solicitor and finance a civil action to obtain protection which the state failed to provide. We know that the cost of seeking civil protective orders is beyond the means of many litigants and the high levels of contributions payable by litigants on low or medium incomes who are actually granted legal aid is a major deterrent to accessing protection[1]. Given that the cost of obtaining an order is around £1200 we do not view this as a reasonable alternative to the state providing protection.

In Scots law stalking is defined, not as a crime, but as a specific delict under civil law. Stalking is not a "nuisance" or civil wrong which can be likened, for instance, to the inconvenience of a neighbour's overhanging tree. It is criminal activity: this at least is acknowledged to a degree by the creation of the new offence of breach of the NHO. But whilst the law recognises the seriousness of breaching an order of court it fails to recognise the seriousness of the conduct which led to the need for the order in the first place and in so doing, fails to recognise the impact of the crime on the victim.

In our view civil remedies are neither an appropriate, nor adequate response to stalking. NHOs must not be regarded as a solution in themselves, but as an additional protective measure forming part of the state's sanction of prosecution and punishment. No other criminal activity requires the individual offended against to seek and purchase protection. Intervention in a course of harassment or stalking must come primarily from the criminal justice agencies to meet the needs of those stalked. SWA believes the introduction of an explicit statutory offence will facilitate the response required to meet the needs of victims.

- **Effect on stalkers and societal consequences**

For some stalkers, arrest, prosecution and conviction (depending on the sentence) will be a deterrent to future offending. Being labelled as a "stalker" has a great deal more

impact than "being done for breach of the peace" carrying as it does a different stigma altogether. A statutory offence will, therefore, contribute to some extent in the prevention of this crime.

A specific offence will also bring about attitudinal change, raising social awareness and, potentially, increasing levels of awareness and understanding in the justice system. The current social unacceptability of drink-driving in Scotland and the corresponding harsh response from the justice system is an analogy worth making. As a society we are working towards the same level of intolerance of domestic abuse. Anti-social, harmful conduct which impacts on the personal safety and lives of Scotland's citizens, such as stalking, must be treated similarly. Public perception of the incidence of stalking remains, on the whole, in the realm of sensational celebrity cases. It is the responsibility of government to inform the public of their rights and to prescribe forms of behaviour which undermine those rights. In our opinion the reluctance to state specifically in statut, that unwanted intrusion into others personal lives (whatever form it may take) is prohibited and punishable under criminal law, perpetuates the prevailing attitude that harassment is a nuisance rather than the serious and harmful conduct it actually is.

SWA believes the introduction of a statutory offence of stalking will bring many advantages not least simplicity in process as well as clarity and certainty for both perpetrator and victim about the response. It will also do what the current provisions cannot- meet the Scottish Executive's aims of protection and prevention.

2. CHANGES TO CURRENT LAW

SWA agrees that changes to the existing law could improve its current application. We have reservations, however, as to whether the changes suggested would do enough and also whether such modifications would simply add to the current difficulties and complicate matters unnecessarily.

Previous Convictions

As we stated previously, the identity of the target of harassment is a crucial element in understanding the nature of stalking. Whilst putting this information to the court at conviction might have some bearing or influence on the disposal and as such is helpful in arriving at appropriate disposal it will not improve access to the NHO. MacKinnon quite clearly restricts the NHO to cases where a course of conduct is averred in the offence under consideration; the previous convictions cannot be used to form the necessary conduct.

Riley provides little assistance either despite allowing details about previous convictions to be put to the court where appropriate to assist the court in making a suitable disposal: a NHO is not a disposal.

Two possible options arise from the current difficulties:

- **Amend the provisions of the Protection from Harassment Act 1997 to allow previous convictions to come into a definition of course of conduct and, at the same time, amend the law on previous convictions to allow the courts to look behind the charge, and in addition ensure all offences relating to harassment are tagged as such and so, can be libelled as such in a complaint.**

  OR

- **Introduce a statutory offence of stalking which, by definition, would comprise a course of conduct and therefore meet the requirement for grant of a NHO.**

SWA favours the latter option.

Obligatory Non-Harassment Orders

SWA would support measures to introduce automatic orders in some cases of stalking. The order could form part of the disposal in this way and strengthen the response as well as reinforce the position of the victim. In some American states this is the norm where the harmful impact of stalking is well recognised. We also believe such a measure would be a very effective deterrent to repeat offending and so satisfy the crime prevention objective. It may not be appropriate in all cases to attach an order and a mechanism or formula for triggering the automatic imposition of an order would have to be arrived at to ensure no human rights implications arose and therefore undermined what could be a very valuable measure.

Powers of arrest in relation to non-harassment orders

SWA agrees that a power of arrest without warrant should be given to the police where they reasonably suspect a breach of a NHO has occurred. We envisage no difficulty in terms of infringing the rights of the subject of the order as this is current accepted practice in respect of interdicts with power of arrest. At present the lack of police power to arrest without warrant has rendered the NHO ineffectual and we are aware of Police concerns about their inability to intervene rapidly where required. As with cases of domestic abuse corroboration is not always immediately available, therefore a power of arrest would provide some respite for the victim and ensure her immediate safety was paramount.

Increased powers of arrest in relation to harassment

The safety and protection of the target of the stalking must always be a police priority and increasing the power of arrest in respect of an incident would provide immediate relief. However, the relief would of course only be temporary and is not a replacement for appropriate and effective disposal on conviction.

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Stalking – What is it, what to do?

As the Executive consults on stalking and harassment, **Alison Paterson** of *Victim Support Scotland* says we don't have a definition of the problem let alone an adequate legal response.

In the opening paragraphs of its current consultation document, the Scottish Executive asks just what we mean by stalking or harassment. Their answer is that "[g]enerally, stalking and harassment means intentional behaviour involving more than one incident, which causes fear, upset or annoyance to its victim". Brief reference is then made to the *repeated* nature of the behaviour causing real alarm to victims, with recognition, in paragraph 27 that stalking behaviour can result in murder.

It is not until paragraph 45 that we find further reference to the nature and scope of the conduct and then only in terms of the legal challenges presented by the fact that "experience suggests that stalkers use a variety of means to harass their victims and would be likely to find ways to circumvent any narrowly defined offence."

The reality of stalking

So what kind of conduct constitutes the "variety of means" so exercising policy makers and devastating victims? In June 1996, at the time of the Home Office consultation on stalking Victim Support Scotland (VSS) conducted a Scottish survey of services' contact with victims of stalking and harassment. The following extracts give a snapshot of the experiences and dilemmas facing victims.

"Young woman being pestered by her ex - continual invasion of her life - taxis, carry out food sent to her address. Fire brigade, police called - carried on for four years."

"Neighbour following female whenever she went out, phoning while husband was at work, leaving flowers on doorstep."

"Fellow worker constantly following and phoning victim."

"Loitering outside victim's home, appearing at workplace, making complaints to victim's employer, vandalism to property."

"Perpetrator lives in neighbouring flat - copied her actions: if he heard her climb the stairs, or flush the toilet, he did same. Followed her, rubbed himself against adjoining wall while making moaning noises. Shouted through letterbox. Threatened her."

"Former partner won't take no for an answer - threatening calls, wilful fire raising."

'The man who was the victim was very seriously affected, as were his children. The stalker was his ex wife's new partner - the victim had custody of the children."

And what of the impact on the victims' lives and their attitude to involving the authorities?

"Both victims were afraid to tell their partners as they felt they would be extremely violent towards the stalker. Both moved out of the area to get away from the harassment."

"All of the victims were concerned for their personal safety, particularly as they felt the police were unable to protect them."

"She has already changed address and her phone number had been changed several times. Now reluctant to give her number even to friends."

"Victims given no protection after case sentence or help from other agencies."

"Length of time to bring case to court does not help victim."

"She was not keen to press charges as the publicity would have upset her."

"Victims wait too long before going to the police and the effects build up to such an extent that it takes more time to get back to normal."

Classifications

The revealing use of the phrase in the consultation: "*experience suggests* that stalkers use a variety of means" (emphasis added) highlights the lack of solid research into stalking in the UK. In June 1996, the then Lord Advocate, Lord Mackay of Drumnadoon wrote to VSS: "You suggest conducting an investigation into the nature and scope of stalking in Scotland, not only for the purpose of obtaining information, but also with the intention of signalling that the government does take the matter seriously."

To our knowledge, no independent research has yet been conducted. Police monitoring procedures are still in their infancy. We still have to look to the USA for a more in-depth analysis of the nature of stalking, where academics and FBI researchers have tentatively divided stalkers into four types:

- Simple obsessional stalkers are thought to be the most common. They have a previous relationship with the victim and are generally immature, unable to maintain relationships, jealous and insecure.
- The "love obsessional" is the second category: they are persistent and fantasise that they are in a relationship with the victim. When reality clashes with this, they may take drastic action to get noticed. This type characterises many high profile celebrity stalking cases.
- Erotomania normally affects women who believe their victim knows and loves them. These people exhibit a wide range of mental problems.
- The last category is the false victimisation stalker who believes he is the victim and may report the person with whom he is obsessed to the police for stalking him. This kind of stalker (who is often the same sex as his victim) worships his victim and will even begin to imitate them.

Legal responses

It was the celebrity strewn state of California which pioneered US legislation on stalking. In 1990 stalking became recognised as a crime in its own right and since then

a series of amendments have tightened the definition and sealed any loopholes. The Los Angeles Threat Management Unit has led the way in applying knowledge of stalking behaviour to the prosecution and protection process. Many States, including California, have introduced laws which allow stalking to be classified as a misdemeanour or a felony, depending on how serious the threat is.

At home, the Protection of Harassment Act 1997 was introduced after years of campaigning by victim groups and individuals across the UK, for tougher penalties and improved protection (see "The Protection from Harassment Act 1997" 1998 *SCOLAG* 5). The Act did *not* create an offence of harassment in Scotland as it did in England: in Scotland the Act created a specific delict in civil law and in addition allows the court in particular circumstances to issue a Non-Harassment Order in the exercise of its civil or criminal jurisdiction, breach of which is a criminal offence.

The prevailing view of the Scottish legal establishment has remained that the common law offence of breach of the peace adequately covers the wide range of behaviour involved in stalking and allows for flexibility in sentencing. Improved protection to victims and tougher penalties for offenders were to be achieved by the potential imposition of a non-harassment order, the breach of which is punishable on indictment by up to five years imprisonment.

Lack of teeth

Within months of introduction of the new Act an Appeal Court in February 1998 exposed the law's lack of teeth in protecting victims, ruling that previous convictions for similar conduct against the victim could not be taken into account: to prove harassment sufficient for an order, a course of conduct on at least two occasions relating to the *current* offence must be proved.

Against this background, the Justice Minister is posing a number of long overdue questions, both about the effectiveness of the current legislation and of criminal justice practice and policy in prosecuting stalkers and protecting victims.

For some key issues, such as whether previous convictions against the same victim should be taken into account in proving a course of conduct, there is only one responsible, common sense answer: of course.

The fundamental issue of whether a new statutory offence of stalking or harassment would result in better protection for victims cannot be evaluated without first assessing weaknesses in application of the existing law and procedures. And the evidence on current practice shows up a system which tends to collude with the predicament of the stalking victim, often plagued by self doubt. It is one of the most difficult problems for a victim - deciding just when they have a problem.

As Mitzi Vorachek of the Houston Area Women's Centre says "Women are brought up to be polite, so they often ignore the instincts that warn them they are in a dangerous situation. They wonder, when is the line crossed? Is it telephone calls 20 times a day? Fifty times a day? Following you in a car? Camping on your doorstep?"

We must ensure that the criminal justice system's response does not increase that self doubt and insecurity. If the flexibility and alleged 'teeth' of breach of the peace is to be put into practice in a way which increases public confidence and protects victims, many good practice issues must now be addressed:

- awareness training for criminal justice professionals, including the judiciary on the nature, scope and effects of stalking;
- case monitoring;
- a UK database of cases to be developed to enable the police to predict how a situation might develop;
- specialist police officers;
- greater use of technology to protect victims;
- immediate powers of arrest in the breach of a NHO; increased prosecution of stalking cases in the High Court.

Victim Support Scotland's local call rate number is 0845 603 9213 Monday-Fridays. Evenings and weekends, use the UK Supportline on 0845 30 30 900

ScoLAG
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The Police Complaints System
Is Change Necessary?

29th June 2000
5.30pm to 7.30pm
(Registration and coffee from 5pm)

Quaker Meeting House
Victoria Terrace
Edinburgh.

Speakers (to be confirmed)
Tom Wood, Assistant Chief Constable Lothian and Borders Police
Professor Neil Walker, Aberdeen University
Raj Jandoo, Advocate, Member of Scottish Executive Lawrence Inquiry Unit.

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Press and Journal

Appeal for rehabilitation to stamp out drugs in prisons

by **Paul Gallagher**

AN APPEAL has been made to the Scottish Executive to use rehabilitation to help stamp out drugs in jails, in the wake of last week's riot at Glenochil Prison.

Drugs seizures are thought to have sparked the seven-and-a-half hour disturbance, in which 25 prisoners barricaded themselves in their wing and trashed cells.

The Scottish Prison Service is to investigate the siege, which came to a peaceful end early on Friday.

A motion has been tabled by Mid Scotland and Fife MSP Nick Johnston expressing dismay at the unrest. It calls upon the Parliament to press the Executive for measures which will eradicate drugs from Scottish prisons.

Mr Johnston said early intervention on inmates' drug problems and moves to stamp out smuggling should be key strategies.

"A high proportion of people currently given custodial sentences in Scotland have a drug problem," he said.

"Greater steps must be taken to prevent illegal substances getting into prisons, with minimum sentences for those caught smuggling drugs.

"Prison closures and reduction in the number of prison officers adds to the problem of rehabilitating prisoners. Prison staff must be given training and the resources to be able to counsel prisoners on admission to prison.

"This would identify early those with drug problems, allowing faster and better rehabilitation. Rehabilitation of drug users must become a major weapon in the fight against crime and prison unrest."

Meanwhile, Scottish Executive figures have revealed that Aberdeen, Inverness and Perth prisons were among the Scottish jails which were over their capacity last year.

Aberdeen had an average daily prisoner population of 181 in 1998-99, with a design capacity of 163 on March 26 last year. Perth had 477 inmates in a prison designed for 436 and Inverness had 122 prisoners in accommodation for 107. Polmont jail was also overcrowded, with 443 prisoners in a building with a capacity of 422.

■ **Nick Johnston**
...dismayed at unrest

The most overpopulated prison in Scotland was Barlinnie in Glasgow, which was running at nearly 20% over capacity, with 1,124 prisoners in buildings with room for 943.

Of the jails operating below capacity, Castle Huntly near Dundee had the highest rate of unoccupied spaces. The average population of the 150-capacity prison was 106, 29% below full occupancy.

And Glenochil, which has Scotland's second-largest prison capacity after Barlinnie, was also substantially underpopulated, with an average of 573 out of 670 places filled.

Scotland's only women's prison, Cornton Vale near Stirling, had 180 of its 217 spaces occupied.

Other below-capacity jails included Friarton near Perth (77 places out of 90 filled), Noranside in Forfar (102 out of 135) and Peterhead (297 out of 305).

The national figures showed that Scottish prisons had a total of 6,491 places and had an average daily population of 6,029 – just over 7% below capacity.

The statistics were given by Justice Minister Jim Wallace in reply to a question by Central Scotland MSP Alex Neil, who asked for details of the capacity and average number of prisoners in jails for which figures were available.

A SPS spokeswoman said the service had no control over prison population, but she added: "We are not experiencing overcrowding at a number of prisons and this is pleasing. It provides a better regime for the prisoners and makes the estate easier to manage."

Alex Neil (Central Scotland) (SNP): To ask the Scottish Executive whether it will provide details of the capacity of and average number of prisoners detained in each prison during the last twelve months for which figures are available.

(S1W-4594)

Mr Jim Wallace: The details requested are in the table below.

Prisons	Design Capacity at 26 March 1999	Average Daily Prisoner Population 1998-99[1]
Aberdeen	163	181
Barlinnie	943	1,124
Castle Huntly	150	106
Cornton Vale	217	180
Dumfries	150	137
Dungavel	135	113
Edinburgh	637	731
Friarton	90	77
Glenochil	670	573
Greenock	233	236
Inverness	107	122
Kilmarnock	500	*1
Longriggend	176	158
Low Moss	396	362
Noranside	135	102
Penninghame	98	89
Perth	436	477
Peterhead (inc. Unit)	305	297
Polmont	422	443
Shotts (inc. Unit)	474	467
Shotts NIC	54	48
Legalised Police Cells		1
TOTAL	6,491	6,029

* HMP Kilmarnock opened in March 1999, the first intake of prisoners was on 25 March.

Notes:

1. These figures are published in the *Scottish Prison Service Annual Report and Accounts* for 1998-99 which was laid before the Scottish Parliament by the Scottish Ministers in July 1999.