



# Reforming the Landscape for Women who Kill their Abusers in Scotland

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## Abstract

Using Scotland as a case study, this paper identifies key areas in which there could be potential reform for women who kill their abusive partners. The study focuses on two particular areas: the use of specialised courts and the use of expert evidence on coercive control. The paper concludes that there exist multiple avenues of reform with the potential to improve women's experiences of the criminal justice system. However, for these to be utilised, there must be clear recognition that cases of this type are domestic abuse cases. As such, they should be considered firmly within current national domestic abuse policy rather than continuing to sit outside existing frameworks.

**Keywords:** Domestic abuse; expert evidence; Scotland; specialised domestic abuse courts.

## Introduction

Scotland's approach towards drafting a domestic abuse offence has resulted in increased attention on the jurisdiction, with the *Domestic Abuse (Scotland) Act 2018* being held in high regard internationally (Bettinson 2020; Weiner 2023). The Act follows a plethora of change in Scotland related to the criminalisation of domestic abuse, policing, court procedure and civil protection orders. However, such change has not been replicated to address issues related to intimate partner homicide and there continues to be an omission of women who kill their abusers from existing law and policy on domestic abuse (McPherson 2021). Setting out the current landscape in Scotland, this paper identifies areas in which there could be potential reform for women who kill their abusive partners. The study focuses on two main areas: the use of specialised courts and the use of expert evidence on coercive control. These areas have been selected for extended discussion given their recent significance within the United Kingdom (UK). The use of expert evidence on coercive control was considered in the case of *Rv Challen (2019)* and, following the publication of the Victims, Witnesses, and Justice Reform (Scotland) Bill, there has been renewed focus on the use of specialist courts in Scotland. However, the sites of potential reform in this area are wide and far-reaching, covering criminal law, procedure and the law of evidence. Some additional areas for reform are highlighted, emphasising the multiple ways in which women's experiences of the criminal justice system could be improved. Such improvements would ensure that women themselves were suitably supported through the process, that their experiences of domestic abuse were properly understood and that this was reflected in disposal and outcome.

The potential avenues for reform discussed in this paper are not mutually exclusive; they could operate independently or in conjunction with one another. There is no single answer to remedying the injustices experienced by women who kill following abuse. Although some areas of reform are likely to have a positive impact on all cases of this type, often *exactly* what is required will be dependent on the facts of the case. As such, the issue of women's access to justice in this context can be described as one of feminism's "wicked problems" (Lake 2014).<sup>1</sup> Although Scotland is used as a case study, many of the problems women face are experienced internationally and are linked to women's broader inequality. That said, in a jurisdiction that has been



praised for its legal responses to domestic abuse, it is especially important to consider the ways in which women are being failed when they go on to kill abusers and the opportunities that exist to make improvements for these types of domestic abuse cases.

### Legal Responses to Domestic Abuse in Scotland

Internationally recognised as a good example of the criminalisation of coercive control (Cairns and Callander 2022),<sup>2</sup> the *Domestic Abuse (Scotland) Act 2018* introduced the offence of “Abusive Behaviour Towards Partner or Ex Partner” (s. 1). A course of conduct offence, it covers both physical and psychological abuse and can be carried out either intentionally or recklessly.

Although this legislation has been the subject of much attention internationally, criminalisation of domestic abuse in Scotland is much broader than charges available under the *Domestic Abuse (Scotland) Act 2018*. The *Abusive Behaviour and Sexual Harm (Scotland) Act 2016* introduced an aggravation to existing offences involving the abuse of a partner or ex-partner (s 1). This aggravation can be applied to *any* existing common law or statutory offences. This means that conduct recorded as ‘domestic abuse’ in Scotland covers an extremely wide range of behaviours, from homicide through to drug-related offences (McPherson, Gormley and Wheate 2022). This feature is not unique to the Scottish landscape but does have obvious implications for sentencing and reviews of sentencing in cases involving domestic abuse. The wide scope of behaviors included can make it difficult for comparison to be made between sentences passed and for trends to be observed (McPherson, Gormley and Wheate 2022; Ringland and Fitzgerald 2010).

In keeping with other jurisdictions, Scotland has experienced a “hybridisation” (Bates and Hester 2020) of legal responses to domestic abuse. Since 2001, there have been numerous developments which have strengthened civil protection orders by criminalising the breach of such orders (McPherson 2022b). Change in this area stemmed from recognition of the ineffective nature of civil protection orders when breached (Connelly and Cavanagh 2007). The use of civil protection orders in criminal proceedings has also changed. Under the *Criminal Procedure (Scotland) Act 1995*, s. 234AZA, it is now the case that, where there is a conviction under the *Domestic Abuse (Scotland) Act 2018* or a conviction aggravated by the *Abusive Behaviour and Sexual Harm (Scotland) Act 2016*, the court must consider whether a non-harassment order should be imposed and explain why such an order will not be made, if that is to be the case.<sup>3</sup> Non-harassment orders are civil protection orders, introduced in the UK by the *Protection for Harassment Act 1997*, and have long been available as a private law response to domestic abuse and other unwanted behaviour. Where such an order is sought privately, there is no requirement for a criminal conviction to be present. There is no standard drafting of the order, meaning it can be tailored to specific circumstances, but typically it prevents contact in all forms (sometimes with exceptions relating to contact involving children). The use of non-harassment orders by criminal courts in their sentencing of domestic abuse cases has led to a significant increase in the number of non-harassment orders passed.<sup>4</sup> This brings certain challenges to the justice system in terms of implications for child contact, the differing approach between children’s views adopted in criminal and family law, and women’s agency (since an order can be imposed even when this is against the complainer’s wishes) (McPherson 2022b). At the time of writing, these issues are yet to be resolved. Despite this, non-harassment orders can be an effective tool in responding to domestic abuse, particularly post-separation abuse which poses particular dangers to women (Monckton Smith 2021). They also allow the police to take action over ostensibly innocuous behaviour which may form part of the abuse but which is not otherwise criminalised. For example, in the recent case of *Walker v Procurator Fiscal (Dunoon) (2022)*, a conviction under the *Domestic Abuse (Scotland) Act 2018* was quashed on the basis that the conduct could not be considered as being directed towards the female complainer. The conduct in question consisted of loitering outside the school of the couple’s child post-separation, following a court’s decision that contact between the child and their father should only take place within a contact centre. Whilst it was held that such behaviour would not constitute an offence under the Act, had a non-harassment order been in place, it may well have constituted a breach of such an order and, hence, been criminalised.

Where there is a domestic homicide in Scotland, Police will undertake an internal review (known as a ‘previous contact review’) which will identify previous reports and/or convictions for domestic abuse. However, as will be discussed below, there may be evidential barriers to some evidence of this nature being put before the court at trial. Therefore, the developments in Scots law that might benefit women as complainers of male-perpetrated domestic abuse do not automatically translate to an improved experience for those who kill following domestic abuse.

## Homicide in Scotland

In terms of the legal framework, ‘homicide’ is not a crime in Scots law but is the umbrella term often used to describe the two forms of criminal homicide recognised under common law: murder or culpable homicide.<sup>5</sup> Each offence is constituted by an *actus reus* (the positive act or omission that comprises the offence) and concurrent *mens rea* (mental element). Both murder and culpable homicide involve the same *actus reus* (the destruction of life) but can be distinguished on the basis of *mens rea*. For murder, the *mens rea* can either be ‘wicked intention’ or ‘wicked recklessness’ (*Drury v HM Advocate (2001)*). There is no single definition of culpable homicide in Scots law and the comparable offence in other jurisdictions would be that of manslaughter. Culpable homicide can be established either where the *mens rea* for murder is lacking or where there has been the successful application of a partial defence. There are two recognised partial defences to murder in Scots law: provocation and diminished responsibility.<sup>6</sup> A conviction for murder brings with it a mandatory life sentence (*Criminal Procedure (Scotland) Act 1995*, s. 205). There is no minimum or maximum sentence for a conviction of culpable homicide. In practice, it is an offence which offers a wide range of sentencing options, but typically sentences do not exceed 10 years’ imprisonment.<sup>7</sup> Where a guilty plea is tendered at an early opportunity, the accused will usually benefit from a ‘sentence discount’ of up to one third of their sentence.<sup>8</sup> As such, there are incentives to pleading guilty, especially to the offer of a reduced charge of culpable homicide. Homicide cases are heard before the High Court of Justiciary. This is the most senior court in Scotland, acting as both a trial court and court of appeal. It holds exclusive jurisdiction for the prosecution of murder, rape and treason and, in practice, deals with other serious offences. Figure 1 illustrates the criminal justice process for a person accused of a homicide in Scotland.



**Figure 1. The criminal justice process for a person accused of a homicide in Scotland**

Scotland is a jurisdiction within the UK with a population of approximately 5.5 million and homicide rates analogous to the rest of the UK (Office for National Statistics 2023; Scottish Government 2021). Homicide trends in Scotland follow international patterns, particularly in relation to intimate partner homicide. Women are killed most often by male partners or ex-partners and they rarely kill, but when they do, it is likely to be their male partner or ex-partner (Scottish Government 2021: Table 10). Between 2012–13 and 2021–22, 61 men killed their female partner or ex-partner and 17 women killed their male partner or ex-partner (Scottish Government 2021: Table 10).<sup>9</sup> Analysis of Scottish homicide cases in which women have killed has indicated that, in keeping with international research on women who kill (Chan 2011; Swatt and Phil He 2006), most women who kill their partners in Scotland do so against a background of male-perpetrated domestic abuse (McPherson 2021). Also, in common with international trends, most cases in which women kill their abusers in Scotland do not go to trial due to a guilty plea to culpable homicide being accepted by the Crown (McPherson 2021).

Because most cases do not go to trial, there is limited legal authority on cases of this type. As such, much of what is known about this type of homicide has come from information on unreported cases such as media reports and sentencing statements (McPherson 2022a). The two most ‘high profile’ cases in which women who have killed their abusers have gone to trial and later appealed against convictions for murder (*Galbraith v HM Advocate* (2002); *Graham v HM Advocate* (2018)) have both focused on diminished responsibility and included reference to battered woman syndrome (BWS) (see below).

### Specialised Domestic Abuse Courts

Since the 1990s, many jurisdictions have adopted specialised domestic abuse courts (often called domestic violence courts). These have developed in recognition of the fact that traditional courts often have very little understanding of the dynamics of domestic abuse and that this lack of understanding “affects both their decisions as well as their perception of crime” (Pinchevsky 2017: 753). These courts better respond to male-perpetrated domestic abuse against women in criminal law and in family law where actions relating to child contact may involve allegations of abuse. They have not been used in the context of homicide, although elsewhere I have suggested there does exist scope—in theory—to extend the use of specialised domestic abuse courts to cases in which women kill their abusers, to assist women’s access to self-defence (McPherson 2023). The impact of such reform would go beyond cases in which there might be a claim to self-defence, and even those smaller number of cases which go to trial; it would be likely to have a positive impact in all cases of this nature. This suggestion will be explored in more detail below, with reference to the existing landscape.

#### *Current Landscape*

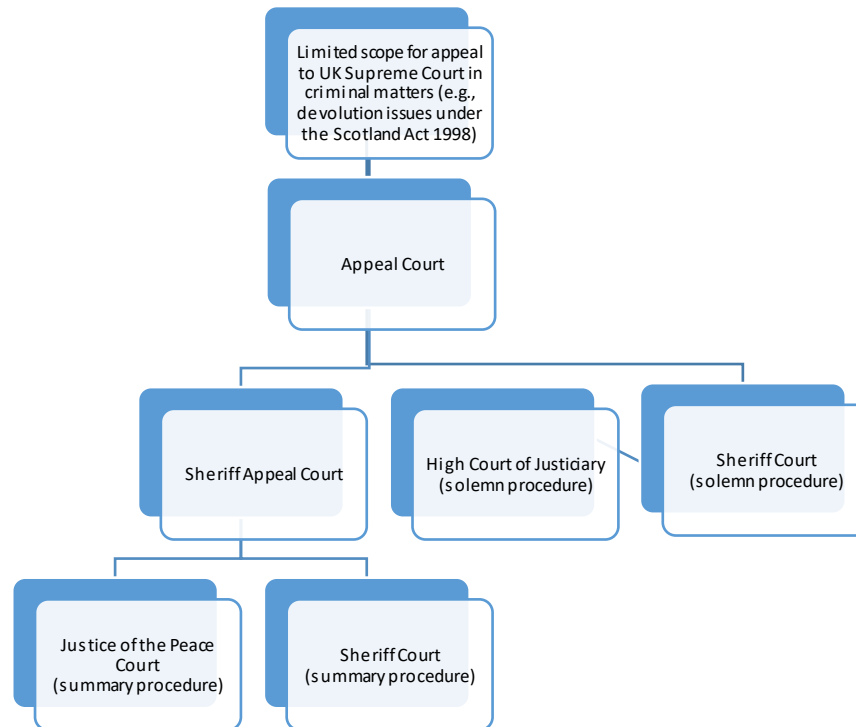
Scotland has a history of offering a specialist criminal justice response to matters related to violence against women and girls, implemented at sheriff court level. Sheriff courts have jurisdiction over both civil and criminal matters. Criminal matters can be heard in the sheriff court under solemn procedure (i.e., with a jury) or summary procedure (heard by a single sheriff). The maximum penalty that can be administered by a sheriff court in summary matters is 12 months’ imprisonment or a fine up to the value of £10,000 (*Criminal Procedure (Scotland) Act 1995*, s. 5). For solemn matters, the maximum penalty is five years’ imprisonment and an unlimited fine (*Criminal Procedure (Scotland) Act 1995*, s. 3). A sheriff has the option of remitting a case to the High Court of Justiciary in any diet in proceedings on indictment (i.e., under solemn procedure) where they consider that the competent sentence they can impose is inadequate (*Criminal Procedure (Scotland) Act 1995*, s. 195). At the time of writing, there are 39 sheriff courts sitting across six sheriffdoms (districts) in Scotland.

In 2004, a specialist domestic abuse court was piloted at Glasgow Sheriff Court (Scotland’s busiest court) (Scottish Courts and Tribunals Service News 2014). Initial evaluation of the pilot concluded that the specialist court had particular benefits for complainers (Reid-Howie Associates 2007).<sup>10</sup> Specialist domestic abuse courts were then introduced in Edinburgh and Livingston in 2012.

Separately, ‘cluster’ domestic abuse courts were developed in Ayr, Dunfermline, Falkirk and the Scottish Borders. At the time of writing, domestic abuse appears to be the only matter dealt with by way of cluster courts in Scotland. Where a court ‘clusters’ it simply schedules cases of the same type in the same court (‘streamlined timetabling’) before the same sheriff. This invites the factfinder to have more experience of the offence type. However, cluster courts do not provide many of the key features of specialist domestic abuse courts. These include specially trained judiciary and prosecutors and domestic abuse support agencies who communicate directly with the court on behalf of complainers (McPherson, Gormley and Wheate 2022).

The specialist and cluster courts that exist in Scotland do not have additional powers. They operate in the same way and under the same criminal procedure as all other sheriff courts in Scotland and any appeals arising from the courts would be dealt with in the normal manner: the Sheriff Appeal Court for appeals arising from cases heard under summary procedure and the appeal

court for appeals arising from cases heard under solemn procedure. See Figure 2 for further explanation of the appeal structure of Scottish criminal courts.



**Figure 2. Appeal structure in Scottish criminal cases**

It would now appear that the commitment to specialist domestic abuse courts has stalled in Scotland since there has been no further expansion of specialist courts and there is no longer a specialist court offered in Edinburgh. The current landscape is three-tiered: (i) full specialist courts, (ii) cluster courts and (iii) no specialism. Although the legal framework, sentencing powers and appeal structure of all are the same, the support offered to complainers is variable. Therefore, as a starting point for future reform, Scotland needs to recommit to specialist courts for the prosecution of domestic abuse matters. This is especially important given both the existing empirical evidence in support of domestic abuse courts and research highlighting women's poor and inconsistent experiences of the criminal justice system in the context of domestic abuse (Forbes 2022; Houghton et al. 2023; Lombard and Proctor 2022).

The use of specialised domestic abuse courts in cases where women kill their abusers is not, therefore, a matter of simply extending existing practice. It would need to be accompanied by a recommitment to the previous model of specialism adopted in Scotland or, at the very least, the adoption of a consistent approach across the jurisdiction. Additional problems would also arise in such a refocusing of cases against women; by situating such cases in specialist domestic abuse courts, there may be an underlying assumption that domestic abuse is a factor in the killing. Such an assumption, and the perceived advantage it would give to women accused of killing their partners (and perceived disadvantage to men accused of killing their female partners if such cases were to also be heard in this setting), would likely give rise to resistance from prosecutors and defence agents. This has been evidenced in Scotland recently in the context of proposals relating to specialist courts for sexual offence cases. However, given the gendered nature of homicide and relevance of intimate partner abuse to women's experiences of homicide (as both victims and perpetrators), specialised domestic abuse courts could be framed to limit anticipated objections. This may include the naming of such courts ('domestic homicide courts' rather than 'domestic abuse courts', for example).

### ***Specialism in the High Court of Justiciary***

Specialist courts have become a national talking point in Scotland following the publication of the Victims, Witnesses, and Justice Reform (Scotland) Bill (ss. 37–39, 65). The Bill has proposed a specialist response to sexual offences which includes dedicated courts and juryless trials.

The pilot scheme proposes to focus on single complainer rape cases on the basis that concern over jury decision-making is most “acute” in these cases (Scottish Government 2023). The Bill does not specify further criteria for cases to become involved in the pilot, how long the pilot would run or the desired sample size required to compare single judge trials and those heard before a jury (Scottish Government 2023).

The Bill has been met with significant resistance from those working in criminal defence (BBC News 2023) and it remains to be seen whether the ‘pilot scheme’ will take place in the format proposed. However, if implemented, this will be the first time that the High Court of Justiciary will have engaged in a specialised approach.

The resistance to specialism in sexual offences perhaps gives some indication of potential attitude towards reform of homicide cases. Yet, the current landscape is one in which domestic abuse cases receive inconsistent treatment: (1) at the level of sheriff courts as a result of the three-tiered approach to specialism and (2) the support offered to complainers of domestic abuse—particularly in matters heard before the sheriff court—and the experience of women who injure or kill in response to their ongoing abuse and move through the system as an accused. Such inconsistency is not the hallmark of an effective justice system. Adopting the specialist model in solemn procedure in the High Court of Justiciary for cases of this type would be a natural extension of existing prosecutorial policy (Crown Office and Procurator Fiscal Service 2021)<sup>11</sup> which is facilitated in practice through training and partnership agreements.<sup>12</sup>

It would be beneficial for all intimate partner homicide cases (including those in which both women and men kill their male and female partners, respectively) to be heard in such a specialist court and not only those cases in which a woman killed following abuse. This change could be achieved through legislation, as with sexual offences, or it could simply be achieved by having dedicated judges and advocate deputes, in keeping with the model adopted at sheriff courts. Although the judiciary and advocate deputes prosecuting at High Court level already receive training on issues related to violence against women, knowledge and understanding could be deepened. This would be particularly beneficial for the accused in this context to receive assistance from domestic abuse support agencies, in the way that she would if she was the complainer in a domestic abuse case. An extension of existing partnership agreements with groups such as ASSIST and EDDACS (support and advocacy services already used in Scottish courts) could also facilitate women’s access to these agencies and would not necessarily need to be prescribed by law.

Specialism would not be a panacea for the issues that women who kill their abusers face, particularly pre-trial barriers such as consulting with all-male legal teams, disclosing intimate details of abuse, not being able to evidence abuse and operating in a system which incentivises trial avoidance (McPherson 2021). However, it would be a procedural reform which would be in keeping with existing approaches to the prosecution of violence against women in Scotland and one which has the potential to offer benefits to vulnerable accused. Prosecutors engaged in plea negotiations would have high levels of training related to domestic abuse. Thus, the accused could potentially be recognised as a survivor of domestic abuse and offered agency support in the way she would if travelling through the criminal justice system as a complainer. This support would not include legal advice and would not risk prejudging the outcome of proceedings; the woman could be offered support as a vulnerable participant from the outset. These benefits should not be underestimated.

### **Expert Evidence on Coercive Control**

In this section, attention will be paid to the use of expert evidence on coercive control in cases where women kill following abuse. Much of the discussion around the use of expert evidence relates to experts cited at trial. However, it should be recognised from the outset that the use of expert evidence has application in pre-trial stages and may inform a prosecutor’s decision about whether or not to accept a plea or even drop proceedings altogether. In Scots law, expert evidence is used routinely in cases involving a plea based on mental incapacity (acquittal on the basis of mental disorder or diminished responsibility). It is not routinely used in cases involving self-defence and provocation. It has been used in the context of coercion, but in this case, the evidence—provided by a chartered psychologist—regarded the fact that the accused was assessed “as borderline mentally handicapped, being in the bottom 4 per cent of the general population in terms of intelligence, and as being in the top 10 per cent of the population so far as compliance was concerned” (*Cochrane v HM Advocate* (2001): 655).

The use of expert witnesses to speak to the issue of coercive control on the basis of self-defence (and therefore an acquittal) is something that has been considered internationally (Henaghan, Short and Gulliver 2022). In other jurisdictions, Professor Evan Stark has provided courts with evidence about the nature and effects of domestic abuse on women who go on to kill their partners (Sheehy 2018).<sup>13</sup> His participation in *R v Craig* (2008) has been discussed by Sheehy. Here, Craig claimed self-defence whilst also leading psychiatric evidence to establish the lack of mens rea for murder, on the basis of her mental abuse. Sheehy notes that Craig’s “counsel hoped this evidence could give voice to her unarticulated fear of death or serious bodily harm,

demonstrate that her fear was ‘reasonable’ ... and show that [the deceased’s] exercise of coercive control left [Craig] no other means of escape than to kill him or to leave [her son] to his fate with his father” (Sheehy 2018: 101). The trial judge did not allow the issue of self-defence to be considered by the jury and Craig was convicted of manslaughter. Her subsequent appeal against conviction was refused.

Such evidence has not been accepted by UK courts, despite recent efforts. In the English case of *R v Challen (2019)*, Challen’s defence team commissioned reports on the issue of coercive control from Stark, Professor Mariane Hester and forensic psychotherapist and psychiatrist, Dr Gwen Adshead. Although Challen’s appeal was successful (in the sense that her conviction for murder was quashed and substituted for one of manslaughter, resulting in her immediate release from prison) and evidence from Adshead was accepted, the Appeal Court did not accept Stark’s evidence on the basis that “the relevance of the coercive control theory, where a defendant suffers from a mental disorder, is well within Dr Adshead’s competence and expertise” (*R v Challen (2019)* 10). Dr Adshead thereafter provided the court with evidence relating to the defendant’s psychological condition. Whilst this evidence was contextualised by reference to the coercive control Challen had suffered, the evidence itself was not specifically on coercive control.

At the time of writing, it would not appear that similar attempts have been made to put evidence of coercive control before the Scottish courts. In the context of cases where women have killed, the admission of expert testimony has been the subject of judicial discussion and decision-making. Specifically, expert evidence of BWS has been led from psychologists as part of the effort to establish that the accused was suffering from the abnormality of mind required for the partial defence of diminished responsibility. In *Galbraith v HM Advocate (2002)*, the court allowed for psychological evidence to be led on BWS as part of a diminished responsibility plea. In *Graham v HM Advocate (2018)*, where diminished responsibility was not accepted, the Scottish Court of Criminal Appeal appeared to limit the admissibility of evidence from psychologists on the issue of ‘battered person syndrome’ where drug and/or alcohol addiction was also apparent. It was suggested that in future, where there is a combination of both, expert evidence must be provided by someone with medical training, such as a psychiatrist. However, were such a development to occur, it may risk further pathologisation of women in this context (Weare 2013).

The conservative nature of the Scottish legal profession (Cowan, Kennedy and Munro 2019: 19-36), coupled with a historical reluctance to hear from experts (*Carraher v HM Advocate (1946)*; Keane 2019; Maher 2015), might suggest that attempts to put expert evidence on the issue of coercive control before the courts would be unsuccessful in practice, especially in the context of self-defence, where expert evidence is not routine. Such evidence would likely form part of a mental incapacity defence, and psychologists and/or psychiatrists speaking to mental health conditions would be suitably placed to comment on issues of domestic abuse and coercive control, as in *R v Challen (2019)*. The novelty of such evidence may also pose problems in the jurisdiction. The Scottish Court of Criminal Appeal has previously rejected the use of ‘case linkage analysis’ evidence on the basis that this was a new and emerging field that lacked the necessary number of peer reviewed studies (*Young v HM Advocate (2014)*).<sup>14</sup> However, unlike case linkage analysis, the theory of coercive control is relatively well established within the UK and has been influential in the development of offences introduced to criminalise domestic abuse. There is a plethora of highly regarded peer-reviewed journals which recognise theories such as Stark’s (2007) as well as the typologies of violence offered by Johnson (2008). As such, scope exists for such an avenue to be explored and it is a strategy which has existing feminist support (Tyson 2020). Indeed, the benefits of this for women who kill (and those women who respond to domestic abuse using non-fatal violence) are clear. This would help to move the legal framework away from the current medicalised model which pathologises women through syndrome evidence and denies their agency (thereby limiting their access to full defences such as self-defence which would result in an acquittal<sup>15</sup>). As Tyson recognises:

The particular value of expert evidence of coercive control as a framework for establishing a claim of self-defence is that it can provide social framework evidence that helps judges and juries to understand the dynamics of coercive control and the defendant’s mental state (including the reasonableness of her conduct) within the broader context and realities of abused women’s lives. (2020: 83)

Sheehy similarly emphasises that coercive control as a theory “highlights the abuser’s strategies and behaviours rather than focusing on whether the woman suffers from a ‘syndrome’ or is a ‘real’ or deserving victim” (2018: 108). Ultimately, the incorporation of expert evidence on coercive control would increase legal and societal awareness of the phenomenon, whilst focusing less on physical acts of violence. Parallel consideration should be given to the bigger issue of the existing framework of criminal defences and the context in which such evidence is advanced (i.e., should this be put forward in the context of a lack of capacity defence or in defences used in response to threat?). Furthermore, there are some legal and practical issues which would need to be considered relating to the use of expert evidence more generally. These are set out below.

### ***The Admission of Expert Evidence in Scots Law***

As with most jurisdictions, Scots law allows for expert evidence in cases that require specialist knowledge ‘beyond the ken’ of the average juror. Specifically, under Scots law, the position regarding expert witnesses is that such evidence is admissible if necessary to assist the court in its task, provided that the witness possesses the necessary knowledge and experience,<sup>16</sup> that the presentation and assessment of their evidence is impartial, and that there exists a reliable body of knowledge or experience underpinning the discipline to which the expert is affiliated (*Kennedy v Cordia (2016)*).<sup>17</sup> An expert cannot “usurp the functions” of the court (*Davie v Magistrates of Edinburgh (1953): 40*) and is not there to provide a view on the ultimate issues before the court (in criminal trials, the guilt or innocence and, in cases which involve a defence, whether that defence has been established). There must exist a clear distinction between the expert’s role as a guide through a specialist area and the role of the judge or jury as trier of fact.

The general position is that an expert may not give evidence about ordinary matters of human nature and behaviour. There has been significant development of what is considered an ordinary matter of human nature in the context of sexual offences. In *HM Advocate v Grimmond (2002)*, the Crown wished to lead evidence from a clinical psychologist that it was common for child victims of sexual abuse to disclose their experiences in stages. It was argued by the Crown that this was a highly specialist area, generally not within public knowledge. This application was rejected by the Court that concluded such evidence did not require expert evidence, and would pertain to the credibility of the complainer—a matter which is for the fact finder to determine:

[I]n the present case, there is no suggestion that either of the children who are the complainers in this case is other than an ordinary and normal child. That being so, it appears to me that the assessment of their credibility is exclusively a matter for the jury, taking into account their experience and knowledge of human nature and affairs. (*Grimmond v HM Advocate (2002): para 7*)

Following *Grimmond v HM Advocate (2002)*, the *Criminal Procedure (Scotland) Act 1995*<sup>18</sup> was amended to allow for the admission of expert psychological or psychiatric evidence relating to any behavior or statement of a complainer in sexual offences or domestic abuse offences to rebut adverse inferences to their credibility on the basis of this behavior:

(2) Expert psychological or psychiatric evidence relating to any subsequent behaviour or statement of the complainer is admissible for the purpose of rebutting any inference adverse to the complainer’s credibility or reliability as a witness which might otherwise be drawn from the behaviour or statement. (*Criminal Procedure (Scotland) Act 1995, s. 275C(2)*)

Subsequent caselaw has suggested that this statutory provision has effectively reversed the common law position set out in *Grimmond v HM Advocate (2002)* (*CJW v HM Advocate (2013)*). However, although this provision applies to cases involving abuse of a partner or ex-partner, it is limited to cases in which the accused is the perpetrator of such abuse. It would have no application in cases where a woman who has experienced domestic abuse becomes an accused as a result of their experiences. As such, further development of the law would be required.

### ***Developing the Existing Law***

There are several ways in which the law could be developed in practice to extend to domestic abuse cases in which women who have experienced abuse are brought before the court as an accused, rather than complainer. First, the Scottish Law Commission could consider the issue in isolation or the Scottish Parliament could legislate on the matter as with section 275C of the *Criminal Procedure (Scotland) Act 1995*. Alternatively, it could be left to the courts to develop the law. However, as Maher recognises in relation to this third option:

... this approach can provide only occasional and piecemeal answers and requires full citation of the extensive case-law and literature on reliability [which] are very wide-ranging and draw upon disciplines beyond the law. (2015: 10)

One recent example of the law in this area developing through the courts can be seen in *Begum v HM Advocate 2020*. Here, it was held that it is a matter at the judge’s discretion whether expert reports on the cause of brain hemorrhage in babies should be given to the jury but that this is ultimately something which can be considered entirely reasonable, having regard to whether it would assist the jury in following the testimony and reaching their verdict, whilst adhering to the requirement of fairness.

Legal change is also more likely to be accepted where there exists a robust evidence base for the need of such expertise, i.e., that misunderstandings regarding coercive control are commonplace and this is not a matter within the existing knowledge of the fact-finder. Research has found that feminist legal reform requires more evidence than other types of law reform, suggesting such an evidence base might be essential before reform could be considered (McNamara et al. 2021). Although an evidence



base exists for the jury misconceptions related to sexual offences (Leverick 2020), research has not examined juror misconceptions related to domestic abuse in the UK. Similarly, there is a lack of research on public perceptions of domestic abuse in Scotland.<sup>19</sup> As such, more might have to be done to evidence the need for such expertise so the Scottish courts do not to follow the decision-making in *R v Challen (2019)* and reject specific expertise on coercive control on the basis that it can be provided by medical professionals. Specifically, there may have to be more developed research on jurors' understandings of domestic abuse. Despite the work to be done in this area, there does exist potential to test other contexts in which this evidence can be led. This may include leading evidence from sociologists or criminologists on coercive control and its effects in cases involving claims of self-defence, provocation and coercion, and in cases involving non-fatal violence or other offending by women subject to domestic abuse.

### ***Identification of Experts***

In terms of identifying experts, the current position is that the Law Society of Scotland provide a (non-exhaustive) database of expert witnesses (Law Society of Scotland n.d.).<sup>20</sup> Experts are categorised by area and an 'expert profile' is provided which includes the type of work in which they specialise, their contact information and the number of reports that they have been engaged in previously (this type of experience is often valued by practitioners when looking to instruct an expert). There are a number of private agencies/consultants offering experts in a number of areas, some of whom market themselves as 'domestic abuse' expert witnesses. It is common for psychologists or psychiatrists to provide evidence in cases involving domestic abuse. For example, in *B(A) v HM Advocate (2021)*, reports were accepted from two forensic psychologists on the risks for an offender who had engaged in domestic abuse against two ex-partners. Although not a Scottish case, *M v F, S (2022)* also demonstrates how experts on domestic abuse can be used, whilst also highlighting the importance of considering the broader framework related to expert evidence in advance. The case, heard before the Family Court in England and Wales, concerned an application to relocate a child (S). The Court accepted evidence from an academic psychologist (Dr X), specialising in forensic psychology, with expertise in domestic abuse and forced marriage in South Asian communities, but commented:

Dr X's explanation of how coercion can operate powerfully but insidiously in communities or households which operate in line with collectivist honour cultures, and where the concepts of shame and honour hold power, was important and helpful in understanding the mother's experiences in this case .... Through careful scrutiny of Dr X's CV and report I was able to ascertain that Dr X's expertise was as an academic not a practitioner. As such, they are not registered with the HCPC [Health and Care Professions Council] a ... it is unclear from my reading of the Practice Direction, current guidance issued by the BPS and Family Justice Council or from the HCPC website whether or not registration is required where an expert in forensic psychology who is primarily an academic rather than a practitioner psychologist carries out expert work that involves assessment of individual parties. Dr X evidently does not think this is required. Clarification would be useful (*M v F, S (2022)*: paras 42–44).<sup>21</sup>

Limiting the pool of experts that could be used in such cases to those who are registered health care professionals, especially in a small jurisdiction such as Scotland, is likely to cause delays. This has adverse impacts for those involved in the criminal justice system. For an accused person, it could also mean additional time in prison, if they have been remanded before trial—something that is more likely in the context of a homicide (*Criminal Procedure (Scotland) Act 1995*, s. 23C(2)). As such, there would be benefits to allowing academics and agency workers to provide evidence on coercive control specifically, provided their credentials satisfied the legal test required for experts. A service could be developed for this specifically, but consideration would need to be given as to whether this would need to be independent from service provision which offers counselling/guidance to those who are experiencing or have experienced domestic abuse.<sup>22</sup> The nature of the evidence being presented would inform who was considered best to provide it and this may not be the same in every case.

### ***Funding Experts***

The issue of how such experts would be funded would also need to be given consideration. Accused persons will automatically benefit from legal aid in cases where they are charged with murder or culpable homicide due to the seriousness of the charges (Scottish Legal Aid Board n.d.b). Legal aid in Scotland is currently managed by the Scottish Legal Aid Board (SLAB). In some cases, they will provide funding for the use of an expert. When determining whether a witness is an expert, they advise that a witness may be deemed an expert where: they are consulted to give an opinion on a matter arising in litigation, they have professional skills or qualifications which make such an opinion valuable and they would not have been involved as a witness in the case had one of the parties not specifically asked them to give such an opinion (Scottish Legal Aid Board n.d.c). Someone with skills and expertise in their field may be cited and give evidence, but they do not need sanction from the SLAB if the evidence provided is factual not opinion.

If a witness is deemed to be an 'expert witness' who wishes to provide opinion evidence, then prior authorisation must be sought before they are employed. SLAB must be provided with the name of the proposed witness, their hourly rate and why

they are required (Scottish Legal Aid Board n.d.a).<sup>23</sup> The current categories of experts commonly funded by SLAB in criminal cases are: pathologists, drug experts, psychologists, psychiatrists and forensic accountants. General practitioners and hospital doctors are not classed as experts but can, and do, give evidence about patients. Because they are not classed as experts, there is no need to seek prior permission before citing them as witnesses. Similarly, there are categories of ‘inquiry agents’ (private investigators) who report on facts as they find them as a result of their investigations. These are not treated as experts but may require prior approval.<sup>24</sup> Therefore, the use of academics or agency workers in this context would have to be recognised by SLAB to avoid a barrier to justice for those who did not have the financial resources to pay for an expert on domestic abuse. Cost would also have to be carefully considered and might require a persistent attitude from the defence agent, as Keane’s reflections on appointing experts indicates:

... it is common to have sanction refused initially only to have it granted when multiple reconsideration requests have been submitted. This process often entails a negotiation of sorts between the solicitor and the prospective instructed expert as the board, in refusing sanction, will often state that the price quoted for the work by the expert is too high. The board also commonly asks for a detailed breakdown of the quote provided by the expert, including a specification of the anticipated time involved in preparatory work, travel and the actual writing of the report and other matters. The board will often also ask the solicitor to provide alternative quotes for the expert analysis considered if the quote provided exceeds a certain level of expenditure (approximately £800) or involves unusual work. (Keane 2019: 56)

As such, the issue of extending the use of experts is both a matter of law and practice. Experts would need to be recognised as such by both the courts and justice agencies, such as the Scottish Legal Aid Board.

### Other Areas of Potential Reform

The scope of other potential reform is far reaching. Some additional areas will be explored briefly below: jury directions, character evidence, sentencing and criminal defences.

#### *Jury Directions*

In other work, I have referenced the possibility of employing jury directions on domestic abuse in cases where women kill following abuse and seek to rely on self-defence (McPherson 2023). Reform of this type would be in keeping with changes that have already been made to trials involving sexual offences in Scotland. The *Abusive Behaviour and Sexual Harm (Scotland) Act 2016* introduced to the *Criminal Procedure (Scotland) Act 1995*, s. 288DA, which holds that in a trial where:

1 (a) evidence is given which suggests that the person against whom the offence is alleged to have been committed—  
(i) did not tell, or delayed in telling, anyone, or a particular person, about the offence, or  
(ii) did not report, or delayed in reporting, the offence to any investigating agency, or a particular investigating agency,

or

(b) a question is asked, or a statement is made, with a view to eliciting, or drawing attention to, evidence of that nature.

(2) In charging the jury, the judge must advise that—

(a) there can be good reasons why a person against whom a sexual offence is committed may not tell others about it or report it to an investigating agency, or may delay in doing either of those things, and  
(b) this does not, therefore, necessarily indicate that an allegation is false.

Before the introduction of the Act, Callander noted the importance of the form of jury directions. Relying on the work of Temkin in the context of sexual assault, she highlighted that jury directions have been shown to be effective where they are clear, unambiguous and simple in terms of syntax and vocabulary (Callander 2016). Again, relying on the work of Temkin, she noted the risk that jury directions, if executed poorly, can counterproductively highlight the false belief they are trying to challenge (Callander 2016).

These provisions appear to be operating routinely in the Scottish courts without any known controversy. Similar direction could be provided in cases where women are accused of an offence but raise a defence based on a domestic abuse context. Such directions could address the question of why women do not leave abusive relationships and the very real danger posed to them by their intimate partners or ex-partners (with reference to homicide statistics and the context of femicide). This could be incorporated into existing directions set out in the *Jury Manual*—the guide provided to judges to assist them in their charges to juries (Judicial Institute for Scotland n.d.). As with the extension of specialised courts, such reform may have implications for

a broader range of cases than those in which self-defence can be explored. Of course, jury directions will only impact the small number of cases which go to trial. Furthermore, an evidence base does not currently exist related to jury misconceptions on domestic abuse or women's experiences as accused in murder trials equivalent to that which exists for sexual offence trials. As such, it is likely that more work would be required to support the need for such specific directions in this context.

### ***Character Evidence***

Other potential sites of reform of the law of evidence could be considered, such as abolishing restrictions related to leading character evidence on the deceased and leading evidence on past abuse. Under Scots law, specific acts of alleged past violence by the deceased towards the accused cannot be admitted into evidence (*Brady v HM Advocate (1986)*; *HM Advocate v Fletcher (1846)*). In *HM Advocate v Kay (1970)* it was alleged that the accused murdered her husband and acted with "previous malice" towards him (68). She relied on the defence of self-defence and was allowed to lead evidence of previous acts of violence against her by the deceased, on the basis of her position that her previous actions were also carried out in self-defence. In practice, the Crown will rarely allege previous malice and ill will so the significance of *HM Advocate v Kay (1970)* remains limited in Scots law.

In one research study on cases in which women kill following abuse, 30 Scottish lawyers with experience of cases of this type were interviewed. All participants were of the view that, due to its relevance, such evidence could be led (even if this involved the use of 'tactics' such as indirect witness questioning). Lawyers included in the research did not perceive current restrictions on the leading of character evidence to be a problem and this did not influence their decision about whether or not to go to trial in cases of this type (McPherson 2013: 133–134).<sup>25</sup> This suggests that there is tension between law in theory and in practice in this area.

Were there to be reform of current law relating to character evidence, careful consideration would need to be given to potential unintended consequences for the accused. In particular, it would need to ensure that the accused continues to benefit from existing protections which prohibit their previous convictions from being placed before the court in most instances (currently enshrined in *Criminal Procedure (Scotland) Act 1995*, s. 101(1)). Recent research carried out in the UK by the Centre for Women's Justice found that the overwhelming majority of women in their study who had killed their abusive partners or ex-partners had no previous convictions (Centre for Women's Justice 2021: 120). However, there are cases in which it would be problematic for a women's previous 'bad' character to be placed before the court. Such 'bad' character evidence, especially that relating to previous convictions, has been shown to have an influence on juries' decision-making (Lloyd-Bostock 2000).

### ***Sentencing***

Sentencing reform could also be considered. Clare Wade KC's recent review of sentencing in domestic homicide cases in England and Wales has highlighted several areas in which the law is not operating effectively (2023). Although focusing on femicide, her review recognises implications for domestic homicide involving women who kill abusers. There are key differences in current sentencing practices between Scotland and the rest of the UK. However, the publication of the report should act as an impetus for such matters to be considered in Scotland, particularly given the ongoing development of Domestic Homicide Reviews and ongoing work of the Scottish Sentencing Council on cases involving domestic abuse. Existing evidence has found that, amongst women who have killed their abusive partners in Scotland, no-one has been placed on probation or admonished<sup>26</sup> since 2006 and the average custodial sentence for those convicted of culpable homicide has increased from 4.6 years (1990–2006) to 5.6 years (2007–2018) (McPherson 2021). This suggests that, paradoxically, sentencing for women who have been convicted of culpable homicide in this context has increased at a time when there has been increased legal and social recognition of domestic abuse. The Scottish Sentencing Council is a relatively new body, established in 2015. Specific sentencing guidelines are in development with a guideline on death by driving cases recently approved.<sup>27</sup> The ongoing development of sentencing guidelines in Scotland brings with it an opportunity to reflect on the sentencing of domestic homicide more broadly.

### ***Criminal Defences***

Reform of the existing criminal law has been the subject of recent consideration in Scotland. In their 10th programme, the Scottish Law Commission undertook an examination of homicide and defences to murder (2021). Specifically, the Scottish Law Commission considered the defences of self-defence, provocation, necessity and coercion and whether a new defence is required for those who kill following domestic abuse. The Scottish Law Commission appeared to reject the need for reform of self-defence, considering that it was operating effectively. However, a gendered analysis and engagement with empirical research on how the defence is operating in practice would demonstrate that women's access to self-defence is a problem (McPherson 2022c). This is not unique to Scotland, but the discussion paper missed an opportunity to engage in a gendered analysis of self-defence (Ramsay 2023), particularly given the 'strong' retreat rule which operates in the jurisdiction.<sup>28</sup>

Conclusions from the discussion paper would suggest that any new defence created in the context of domestic abuse would be likely to operate as a partial defence (Scottish Law Commission 2021: para 12.74). This is problematic for several reasons, the most important of which is that it could act as a further disincentive and barrier to women's access to self-defence. This is because such a new defence would be likely to operate as the 'custom-built' vehicle for resolving cases of this type. As a partial defence operating in a system which already disincentivises trials through sentence discounts and mandatory life sentences for murder, it would be likely that even fewer trials would take place on the basis of self-defence. Given that self-defence not only results in acquittal for the accused, but renders their actions justifiable, access to self-defence is highly significant (McPherson 2013, 2022c).

Before a decision is made regarding the introduction of a new criminal defence, more information is required about how current defences are operating in practice. The Scottish Courts and Tribunal Service do not keep a record of this which can be used for the purposes of research (they record by court appearance, rather than by accused and do not distinguish between gender) (McPherson 2022c). A full review of these cases is required in Scotland before introducing any new defences.

## Conclusion

Although there is no one simple answer to the issue of achieving justice for women who kill following abuse, the above discussion has illustrated that there are numerous sites of reform which exist in Scotland using the existing framework of criminal justice.<sup>29</sup> Some of these are more radical than others and it is unlikely that all would be enacted. However, in a jurisdiction which wishes to lead by example in terms of legal responses to domestic abuse, it is a continued failure that nothing has been done to respond to cases of this nature. The number of women who kill their abusers may be small, but these cases represent a significant group of women who kill overall. Furthermore, some of the sites of reform discussed would be beneficial in a broader context.

It should be emphasised that any and all reform implemented would also have to address pre-trial problems which have been identified as particularly problematic for women who kill their abusers. These include: consulting with all-male legal teams, consulting in open spaces in prison, facing additional expectations to 'prove' or corroborate domestic abuse, and understandings of domestic abuse amongst the legal profession/misconceptions about domestic abuse (McPherson 2021, 2013). The time has now come for Scotland to consider its responses to intimate partner homicide, acknowledging that such cases are very much a part of how we, as a society, respond to domestic abuse.

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<sup>1</sup> Calling for the application of a feminist pragmatic methodology, Lake describes feminism's wicked problems as those "characterized by intense disagreement between fragmented stakeholders, multiple and often conflicting objectives, as well as high levels of uncertainty, variability, and risk" (2014: 77).

<sup>2</sup> Concern has been raised about the fact that children cannot themselves be direct victims of domestic abuse under the Act. It should be noted, however, that children can be direct victims (i.e., the complainer) in other common law or statutory offences such as assault.

<sup>3</sup> The Crown can request the imposition of non-harassment order (NHO) at conclusion of a case and often they will have sought the complainer's view on this matter. However, the decision is ultimately for the sheriff.

<sup>4</sup> Although in cases where the sentence is one of imprisonment, it may well be that the period of imprisonment imposed will negate the need for such an order, as was commented in *HM Advocate v Kerr* (2020). Sentencing statement available on request from the Judiciary of Scotland.

<sup>5</sup> Other forms of homicide include corporate homicide and death caused by driving, but both of these are dealt with under separate (UK-wide) legislation and are recorded separately by the Scottish Government (Scottish Government 2021: Table 19).

<sup>6</sup> Provocation is a common law defence, the requirements of which are set out in *Drury v HM Advocate* (2001). Diminished responsibility is contained within section 51B of the *Criminal Procedure (Scotland) Act 1995*.

<sup>7</sup> For recent discussion of sentencing culpable homicide see: *Glass v HM Advocate* (2020) where an appeal against 10 years' imprisonment following conviction for culpable homicide was refused due to aggravating features of the offence. An unusual example of a higher sentence is the case of *HM Advocate v Riggi* (2011) where a sentence of 16 years' imprisonment (reduced from 18 years to reflect the early guilty plea) was imposed for three charges of culpable homicide related to the death of Riggi's three children. Her guilty plea to culpable homicide was accepted on the basis of diminished responsibility.

<sup>8</sup> *Criminal Procedure (Scotland) Act 1995*, s 196. The terminology of ‘sentence discount’ is not used by the 1995 Act but was adopted by the court in *Du Plooy v HM Advocate (2005)*.

<sup>9</sup> During the same period, a further three men killed male partners or ex-partners and a further one woman killed her female partner.

<sup>10</sup> In 2019, the Scottish Government published a report on the use of integrated domestic abuse courts for criminal and civil matters (‘one family, one judge’) (Scottish Government 2019), such as those piloted elsewhere in the UK (Hester, Pearce and Westmarland 2008). At the time of writing, it would appear that this model is not going to be implemented, despite research that has highlighted the problems and tensions which exist between criminal law and private law court processes in the context of domestic abuse and child contact decisions (Burman et al. 2023).

<sup>11</sup> The Lord Advocate (the senior Scottish law officer in charge of criminal prosecutions) has committed to the Crown Office and Procurator Fiscal Service having a renewed focus on cases involving domestic abuse.

<sup>12</sup> Such as those that exist between advocacy service ASSIST and the Scottish Courts and Tribunal Service.

<sup>13</sup> *R v Craig (2008)* was the first case in which evidence of coercive control was led in Canada in a case where a woman killed an abusive partner and pled self-defence.

<sup>14</sup> Case linkage analysis is a process whereby cases are associated with one another as a result of their features, such as the behaviour of the person who carried out the offence. The implication of such analysis is that the same offender has committed the linked cases.

<sup>15</sup> Whilst necessity and coercion are considered full defences in Scots law, it is unclear whether they operate in the context of murder. Automatism is also a full defence, although it is put before the courts very rarely. Acquittal on the basis of mental disorder (*Criminal Procedure (Scotland) Act 1995*, s 51A) also operates as a full defence, but may give rise to medical disposals. For further discussion of defences and their operation in the jurisdiction, see McPherson (2022a).

<sup>16</sup> An expert’s credentials should be established before their opinion is admitted. Normally, those experts allowed to offer their opinion in Scottish courts belong to a profession or a branch of the sciences. Their expertise might be evidenced through their qualifications, experience and/or professional recognition (such as academic publications). Normally, it is for the person calling the witness to establish the expertise of the witness. Although experts are commonly psychologists or psychiatrists, in the past, police officers have been allowed to give evidence in other cases such as those involving drugs (see: *Davie v Magistrates of Edinburgh (1953)*).

<sup>17</sup> Although Kennedy was a civil matter relating to personal injury, the test set out by the Supreme Court for the admission of expert testimony has since been adopted by the Appeal Court in Scottish criminal matters.

<sup>18</sup> The *Criminal Procedure (Scotland) Act 1995* is the largest single criminal law and criminal procedure statute in Scotland and covers a wide range of legal and procedural issues.

<sup>19</sup> The Scottish Government has conducted research on social attitudes to domestic abuse more generally Scottish Government (2020). Elsewhere, Herzog has conducted studies in Israel on public perceptions of cases where women kill following abuse (Herzog 2004, 2006).

<sup>20</sup> It is not required that experts are taken from this list.

<sup>21</sup> The Health and Care Professions Council is a statutory regulator of professionals in the UK.

<sup>22</sup> This may not necessarily be required; in other jurisdictions there has been greater recognition of the role of support services as experts and this could be developed in Scotland.

<sup>23</sup> Where the cost of the work exceeds £800, a comparative quote must be provided.

<sup>24</sup> If associated costs run to more than £2000.

<sup>25</sup> This view was in keeping with that of leading Scots law of evidence scholar, Fiona Raitt (2013: para 12-27 to 12-28 at 213–214).

<sup>26</sup> A warning not to offend again.

<sup>27</sup> At the time of writing, other guidelines in place relate to the sentencing of young people, the sentencing process and principles and purpose of sentencing. Scottish Sentencing Council guidelines for the sentencing of rape are expected in 2024.

<sup>28</sup> Elsewhere in the UK, a convincing case has been made for the need to reform the current law of self-defence (Centre for Women’s Justice 2021). Whilst there are similarities between UK jurisdictions, the particular point advocated for by the Centre for Women’s Justice does not have the same application in Scotland, not least because the law of self-defence continues to operate on a common law basis.

<sup>29</sup> Although the limitations of using the existing legal framework for feminist reform is recognised (see: Smart 1989).

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