

The Legal Framework Addressing Violence Against Women in Scotland and the Influence of CEDAW

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Report Summary

This report provides an overview of the current legal and policy situation of violence against women (VAW) in Scotland and evaluates the influence of CEDAW on this framework. Methods of research included review and analysis of a variety of primary and secondary sources. Sources included Scottish legislation and policies pertaining to VAW, reports submitted by Scottish and UK NGOs as well as international legal documents such as the Concluding Observations of the CEDAW Committee to the United Kingdom. The team of researchers also conducted first-hand interviews with legal practitioners, women's rights advocates and members of NGOs. The interviews were conducted to enhance the understanding of how legislation and policies operate in practice and to ascertain the status given to CEDAW by those working in the area of VAW.

The report finds that Scotland has been relatively progressive and consistent in legislating to tackle VAW. Renewed pledges in 2015 for resources and funding by the current Scottish Government are a further indicator of such dedication. The need to attain gender equality is a recurring aspiration within the Government's policies and is recognised as the primary solution to VAW. Furthermore, the Government's adoption of a wide definition of domestic abuse and its commitment to eradicating it through a multi-agency approach has also been welcomed.

Despite Scotland's commendable efforts in developing legislation and policies to prevent and address VAW, action on the ground has been slower. Women's rights advocates and practitioners believe that the policies are well intentioned but do not translate into measurable solutions or actions for survivors of domestic or sexual violence. The restrictions of powers in Scotland, as a result of being a devolved country within the United Kingdom, have also had a significant impact on how the country is able to interact with international conventions. The awareness of CEDAW is low amongst those who do not work with women's rights or within the Government. The researchers found that CEDAW operated as an aspirational but remote framework and there was little confidence that the Optional Protocol (OP) did, or could, function as a viable legal remedy for women. Those working in criminal justice were much less likely to cite awareness of CEDAW or welcome it as a potential framework that might operate in Scotland and the researchers found little support for incorporating CEDAW into domestic legislation.

Overall, the research paints a varied picture of VAW law and policy in Scotland. There is a solid legal framework but this appears to fall short when implemented. Many Government documents directly reference UN definitions of VAW, although it appeared these were used to highlight that Scotland was at the international forefront and is aware of international policy, rather than suggested as a remedy. The researchers could find no reference to the CEDAW OP as a viable remedy for victims in Scotland within the policy documents. NGOs and agencies working directly with women experiencing violence often responded that despite impressive commitments from Government, obstacles facing women remain. Many cited lack of funding as

the main problem that hindered their work. Many NGOs and grassroots organisations either operate as charities or receive direct funding from Government. In times of Government spending cuts, many of these front-line services are being squeezed. As these are frontline services for victims of VAW, many respondents found this difficult to reconcile with the Government's rhetoric on the issue.

1. Introduction

Scotland is a semi-autonomous region of the United Kingdom (UK) with a population of just over five million people. As of 2013, 51% of the Scottish population was female.¹ As part of the UK, Scotland is part of the European Union.

The modern Scottish legal regime is unusual. Scotland was an independent nation until 1707, before becoming part of the UK² and so the constitutional settlement guaranteed the continuation and independence of the Scottish legal system.³ The Scottish courts continued to apply and interpret Scots law allowing it to remain, particularly in criminal law, distinct from English law. In 1999 a devolved Scottish parliament and government was created with the power to legislate for Scotland and to act on certain 'devolved' matters.⁴

1.1 The Scottish Framework on Violence Against Women

The Scottish framework on violence against women (VAW) takes a multi-agency approach. In 2002 the Scottish Parliament debated the issue of VAW and then convened a 'National Group to Address Violence Against Women'.⁵ Since then VAW has been dealt with as a 'unified policy area' by the Government.⁶ In 2014 it published a National Strategy for preventing and eradicating VAW.⁷ This strategy references the 1995 Beijing Platform of Action as well as CEDAW and fully commits Scotland to meeting the benchmarks of both, although it does not draw on international practice or reference any recommendations from the CEDAW Committee. In 2014 the Scottish Human Rights Commission published Scotland's National Action Plan for Human Rights first annual report.⁸ This commits to 'improving Scotland's approach to addressing VAW through a new strategy and action plan that does more to protect women's rights in practice.'⁹ In addition to government agencies, services are provided by NGOs that provide front-line services to women such as advice, advocacy, refuge and support.¹⁰

¹ The Scottish Government. (2011) *Summary Demographics*, available:

<http://www.gov.scot/Topics/People/Equality/Equalities/PopulationMigration>.

² The parliaments of Scotland and England passed legislation (the Acts of Union 1707) that dissolved both parliaments and created the united parliament of the United Kingdom based in London.

³ *The Act of Union 1707*, (Art. XIX), (Art. XX), (Art. XXI), (Art. XVIII).

⁴ The Scottish Parliament can legislate on any matter that is not explicitly 'reserved' to the UK Parliament. See *Scotland Act* (1998) and (2012).

⁵ Scottish Government. (2002). *National Group to Address Violence Against Women*, available:

<http://www.gov.scot/Topics/People/Equality/violence-women/DomAbuseDelivPlan>.

⁶ Engender (2014) *Scottish NGO briefing for UN Special Rapporteur on Violence Against Women*, available: www.engender.org.uk

⁷ Scottish Government (2014) *Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls*, available: <http://www.gov.scot/Resource/0045/00454152.pdf>

⁸ Scottish Human Rights Commission (2014) *Scottish National Action Plan for Human Rights (SNAP) first annual report*, available: <http://www.scottishhumanrights.com/application/resources/documents/SNAP/SNAPpdfWeb.pdf>

⁹ *Ibid.*

¹⁰ Including Rape Crisis, Victim Support, Women's Aid, Engender, Legal Services Agency.

1.2 The International Legal Framework

The UK signed CEDAW in July 1981, and ratified it in April 1986, although it entered a number of reservations¹¹ the extent of which was criticised by the CEDAW Committee.¹² The UK Government has also refused to incorporate CEDAW into domestic law¹³ despite being urged to do so by the Committee.¹⁴ The UK acceded to the CEDAW OP in December 2004 but to date there have been only 2 instances of UK groups or individuals making use of its complaints procedure.¹⁵ This may be in part due to the lack of visibility of CEDAW among the British public and in the UK Government itself. Indeed the Committee has urged the UK to initiate awareness programs and training on the Convention¹⁶ while the UK Government itself acknowledges that procedures provided by the OP are not widely known or utilised within the UK.¹⁷

1.2.1 CEDAW and Scotland

The Equality and Human Rights Commission (EHRC) is tasked with implementing the UK's CEDAW obligations. The UK's seventh periodic report was submitted in 2011 and it notes that the UK Parliament has pursued legislative developments in some areas, while in others the devolved administrations have legislated.¹⁸ In its shadow report submission to the CEDAW Committee in 2013, the EHRC acknowledged that there was no unified national strategy for implementation of CEDAW and that this could give rise to 'geographical inconsistencies which could hamper overall national progress on the realisation of rights guaranteed by CEDAW – for example, by giving rise to local difference in the availability of VAW support services.'¹⁹

There is a Scottish CEDAW shadow report forum that also submits reports to the Committee and provides a more thorough picture of the situation in Scotland. The 'End Violence Against Women Coalition' has produced research into the issue of VAW in the UK as a whole and it laments the lack of a unified approach across the UK. The authors note that Scotland has a

¹¹ United Nations (2000-2009) *Declarations, Reservations and Objections to CEDAW*, available:

<http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>

¹² Most significant is the UK's reservation to Article 1 of CEDAW, which states that the UK regards that the Convention does not impose a requirement to repeal or modify any existing laws, regulations, customs or practises which provide for women to be treated more favourably than men.

¹³ In response to the Committee's 2008 observations the UK replied that it: 'rejects this recommendation on the basis that such an approach would create a separate, parallel regime within the Equality Bill.' See further Government Equality Office 'Response by the United Kingdom (UK) and Northern Ireland (NI) to Select Recommendations of the United Nations Committee on the Elimination of All Forms Of Discrimination Against Women following the Examination of the UK and NI's 5th and 6th Periodic Reports on July 10 2008' (July 2009) para 5.

¹⁴ See concluding observations of 1999 (A/54/38/Rev.1, part two, paras. 278–318) and CEDAW Committee Concluding Observations *Fifth and Sixth Periodic Reports United Kingdom of Great Britain and Northern Ireland* Part of A/63/38 para 248 ff.

¹⁵ *Salgado v UK* (CEDAW/C/37/D/11/2006, 22 January 2007) and *NSF v UK* (CEDAW/C/38/D/10/2005, 12 June 2007). Both were declared inadmissible; the first on grounds that the events occurred prior to the UK's accession to the OP and that the complainant had not exhausted local remedies, the second on the grounds that the complainant had not exhausted local remedies.

¹⁶ CEDAW Committee Concluding Observations *Fifth and Sixth Periodic Reports United Kingdom of Great Britain and Northern Ireland* Part of A/63/38 para. 262.

¹⁷ *Ibid.*

¹⁸ Government Equalities Office (2011) *UK's 7th Periodic Convention on the Elimination of all forms of Discrimination Against Women Report*, p.64.

¹⁹ Equality and Human Rights Commission (2013) *Shadow Report 1 on the Submission on the Seventh Periodic Report of the United Kingdom to the United Nations Committee on the Elimination of all forms of Discrimination Against Women*, p.1.

much more progressive and integrated approach than the rest of the UK and even suggest that the UK Government benefits from the Scottish provisions in order to claim compliance with its CEDAW obligations that it otherwise would not.²⁰ They also find there is a lack of acknowledgement of the innovative and unique approach pursued in Scotland, perhaps because this would reflect negatively on other regions of the UK.

1.3 Regional Legal Framework

In 1998 the UK government enacted legislation that incorporated the European Convention on Human Rights (ECHR) into UK law.²¹ As such, individuals can now rely on the ECHR in legal proceedings before domestic courts and courts in Scotland are obliged to interpret legislation in such a way as to give effect to the ECHR. Although the ECHR does not explicitly refer to violence against women it has been interpreted progressively and since 2007 the European Court of Human Rights has heard a number of cases relating to domestic violence.²² Any person, NGO or group of individuals claiming to be the victim of a violation may make an application before the court.²³

To complement the ECHR, the Council of Europe has drafted a convention to combat violence against women. The UK became a signatory to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (The Istanbul Treaty) in 2012. However, as the Convention has not yet been ratified, it is not legally binding within the UK.

While some have suggested that the incorporation of the ECHR serves as a precedent for the incorporation of CEDAW, the UK Government's reluctance to incorporate the Convention is one that is based on indifference towards it and towards international conventions in general. Sandra Fredman suggests that many government officials as well as legal professionals do not perceive CEDAW as including 'hard-edged rights, which could be used to take matters further than existing domestic law.'²⁴ A telling illustration of this indifference is the fact that the Government has never nominated a UK representative to sit on the CEDAW Committee. However, it has been consistent in nominating representatives for the Human Rights Council. There is a distinct governmental indifference and complacency towards all international conventions, in this CEDAW is not unique. As will be explored throughout this report, the UK and Scotland approach policies and legislation from a local and then national standpoint before considering an international one.

²⁰ Coy, Lovett and Kelly, (2008) *Realising Rights, Fulfilling Obligations: A Template for an Integrated Strategy on Violence Against Women for the UK*, London: End Violence Against Women Coalition, p.21.

²¹ *The Human Rights Act 1998*. The Convention was drafted by the Council of Europe, a regional organisation that promotes human rights, democracy and the rule of law in Europe and is often considered a European Bill of Rights. The convention is enforced by the European Court of Human Rights, which serves as a final appeal court in respect of Convention violations.

²² *Kontrova v. Slovakia* (App no. 7510/04) 24 September 2007; *Bevacqua and S v. Bulgaria* (App no. 71127/01) 12 September 2008; *Opuz v. Turkey* (App no. 33401/02) 9 September 2009; *E.S. and Others v. Slovakia* (App no. 8227/04) 15 December 2009; *A v. Croatia* (App no. 55164/08) 14 October 2010; *N. v. Sweden* (App no. 23505/09) 20 July 2010; *E.M. v. Romania* (App No. 43994/05) 30 October 2012; *Valiulienė v. Lithuania* (App no. 33234/07) 26 March 2013; *Y.C. v. the United Kingdom* (App no. 4547/10) 13 March 2012; *Rumor v. Italy* (App. No.72964/10) 27 May 2014; *B. v. the Republic of Moldova* (App no. 61382/09); *Mudric v. the Republic of Moldova* (App no. 74839/10) 16 July 2013; *N.A. v. the Republic of Moldova* (App no. 13424/06), 24 September 2013; *T.M. and C.M. v. the Republic of Moldova*, (App no. 26608/11) 28 January 2014.

²³ Article 34 ECHR

²⁴ Fredman, s (2013) 'CEDAW in the UK', in Hellum, A. and Sinding Aasen, H. (ed.) *Women's Human Rights, CEDAW in International, Regional and National Law*. Cambridge University Press, pp. p511-530.

1.4 Domestic Legal Regime

The VAW framework is predominantly implemented through the Scottish criminal justice system but also draws on wider international human rights obligations as well as on remedies offered through the civil legal process. This legal framework includes specific provisions for tackling issues such as stalking,²⁵ prostitution,²⁶ harassment,²⁷ forced marriage,²⁸ human trafficking,²⁹ and female genital mutilation.³⁰ However this report focusses on the most common forms of violence against women in Scotland: sexual violence and domestic abuse.

2. Domestic Violence Against Women: Domestic Abuse in Scotland

Historically, domestic abuse was socially accepted in many cultures, justified in customs and traditions, and condoned by law, and Scotland was no exception. 'Wife-beating' was considered a private matter and Scottish wives were not regarded as competent or credible witnesses in the court of law.³¹ The advent of second wave feminism and tireless campaigning saw the first women's refuges created in the 1970s and this helped women find the courage to seek assistance and report abuse as well as make the issue one of public concern.

Domestic abuse in Scotland is dealt with by the criminal justice system. However, currently in Scots Law there is no bespoke crime of domestic abuse although there have been moves towards adopting a tailored approach to crimes pertaining to VAW and the Solicitor General (the deputy adviser to the Scottish Government on criminal law matters) has given her support to the development of such a crime.³²

2.1 Policy

Domestic abuse is an issue that consecutive Scottish governments have sought to address through the introduction of progressive law and policy. The Scottish Government made domestic abuse a national priority in 2000³³ and since then has put in place various strategies to

²⁵ *Criminal Justice and Licensing (Scotland) Act 2010*, s39

²⁶ *The Prostitution (Public Places) (Scotland) Act 2007*. This criminalises those who engage the services of prostitutes. Although this legislation is aimed at protecting women from exploitation it is controversial as it is argued that it will force vulnerable women to take more risks in order to secure clients.

²⁷ *Criminal Justice and Licensing (Scotland) Act 2010*, s38. This makes threatening and abusive behaviour a criminal offence.

²⁸ *Anti-social Behaviour, Crime and Policing Act 2014*, s122. This makes forcing someone into marriage a criminal offence. Additionally the *Forced Marriage etc. (Protection and Jurisdiction) (Scotland) Act 2011* provides a specific civil remedy for those threatened with forced marriage and those already in such a marriage.

²⁹ *The Human Trafficking and Exploitation (Scotland) SP Bill (2015)* is currently before Parliament.

³⁰ *The Female Genital Mutilation (Scotland) Act 2005* re-enacted the Prohibition of *Female Circumcision Act 1985* and extended protection by making it a criminal offence to have FGM carried out either in Scotland or abroad by giving those offences extra-territorial powers.

³¹ Hughes, A (2010) 'The 'non-criminal' class: wife-beating in Scotland (c.1800-1949)', *Crime, History, and Societies*, 14(2), pp. p31-54 [Online]. Available: <http://readinglists.glasgow.ac.uk/items/8C81CA7A-203F-11A5-039C-359C1F4AAF65.html>

³² "Domestic abuse is in my view another area in which specialist legislation has a role to play...it would help victims by acknowledging the true impact and consequences of all types of abuse behaviours, including non-violent tactics of control and abuse." Speech by Thomson, L. Solicitor General for Scotland, COPFS Domestic abuse conference. May 2014.

³³ Scottish Executive (2000) *National Strategy to Address Domestic Abuse in Scotland*, Edinburgh: Scottish Executive.

tackle the issue of VAW.³⁴ Figures of domestic abuse incidences in Scotland are increasing. The most recent statistics show 60,080 incidents of domestic abuse recorded by police in 2012-2013³⁵. While this might reflect that victims are simply more willing to come forward, it clearly highlights that this is a prevalent issue in Scotland.

The definition of domestic abuse as found in Scotland's national strategy states:

Domestic abuse (as gender-based abuse), can be perpetrated by partners or ex- partners and can include physical abuse (assault and physical attack involving a range of behaviour), sexual abuse (acts which degrade and humiliate women and are perpetrated against their will, including rape) and mental and emotional abuse (such as threats, verbal abuse, racial abuse, withholding money and other types of controlling behaviour such as isolation from family or friends).³⁶

As well as holding the government accountable for tackling the issue, this strategy places a requirement on local authorities and health boards to establish partnerships. Its three key objectives are: prevention of the risk of violence, protection of victims and potential victims, and the provision of services. This strategy also endorses a broad definition of VAW and cites the definition contained within the 1993 UN Declaration on Violence Against Women.³⁷ It also endorses a gendered approach of VAW which is linked to the structural inequality that women face and recognises that domestic abuse is predominately perpetrated against women by men.³⁸

Key to Scotland's progressive approach has been the input of non-governmental organisations (NGOs) which have played a pivotal role in shaping government strategy. This influence can be seen in the Government's adoption of a gendered approach in its definition of abuse³⁹ and its move away from the term 'domestic violence' toward the term 'domestic abuse', which is favoured for encompassing a wider spectrum of acts, including psychological and emotional abuse.⁴⁰ Yet, while there is reference to UN definitions of VAW and to international treaties in these policies, these appear to be merely cursory. The domestic approach to tackling VAW is grounded on local approaches and initiatives and there is no reference to international strategies.

³⁴ Scottish Executive: (2003) *Preventing Domestic Abuse: A National Strategy*, Edinburgh: (2009) *Safer Lives: Changed Lives: A Shared Approach to Tackling Violence Against Women in Scotland*, (2014) *Equally Safe: Scotland's strategy for preventing and eradicating violence against women and girls*.

³⁵ Police Scotland (2013) *Domestic abuse statistics 2012-13*, Available at: www.gov.scot/Publications/2013/10/2411.

³⁶ Scottish Executive: (2003) *Preventing Domestic Abuse: A National Strategy*, p.3.

³⁷ *Ibid* p.16

³⁸ *Ibid* p.3.

³⁹ The Scottish Government acknowledges that domestic abuse is predominately perpetrated by men against women and reflects an entrenched patriarchy. However it concedes that there is a lobby calling for recognition that men are increasingly victims of violence perpetrated by women, see *Preventing Domestic Abuse: A National Strategy*, p.2. However the Scottish Government acknowledges differences between partner violence, where both parties use violence, and domestic abuse, where one party (usually the man) consistently uses violence against the other and so domestic abuse reflects a gender specific element.

⁴⁰ Scottish Executive: (2003) *Preventing Domestic Abuse: A National Strategy*.

2.2 Law

2.2.1 Criminal Law

The prosecution of domestic abuse has developed as an aggravated crime. Therefore should the victim of a crime suffer at the hands of an accused who is their partner or former partner, the police will record that crime as domestically aggravated. As such domestic abuse is used by the Crown Office and Procurator Fiscal Service (COPFS)⁴¹ in Scotland as a catch-all category that allows almost any crime to be recorded as domestic abuse, although the most common domestically aggravated crimes are breach of the peace⁴² and assault.⁴³ The joint protocol between Police Scotland and COPFS, commits the police to treating all incidents of domestic abuse as high priority.⁴⁴ The Protocol sets out a presumption that all cases in which there is sufficient corroborative evidence of a crime will be reported to the Procurator Fiscal and there is also a presumption that, save in exceptional circumstances, the perpetrators will be detained in custody pending appearance at court.⁴⁵

One practical difficulty in the prosecution of domestic abuse in Scots Law is the scale of offending. In order to try and address the multitude of incidents there are now two specialist domestic abuse courts, situated in Glasgow and Edinburgh, which are staffed by specially trained prosecutors and Sheriffs.⁴⁶ The researchers found that interviewed respondents considered these courts to have been generally successful, at not only improving women's experiences of the justice process, but also reducing the likelihood of them seeking to withdraw from the prosecution, which has ultimately led to more perpetrators being held to account. Ideally cases should go to trial within 6-8 weeks. However with the current wait times of 7-8 months for trial in Glasgow that benefit is disappearing.⁴⁷

In November 2014 'Clare's law',⁴⁸ which was previously introduced throughout England and Wales,⁴⁹ was piloted in Aberdeen and Ayrshire.⁵⁰ This is a scheme that allows the police to disclose whether a woman's partner has a history of domestic abuse. However this scheme has

⁴¹ Scotland's public prosecution service is known as the COPFS and the Procurator Fiscal is the term used for the public prosecutor.

⁴² Breach of the peace is a common law crime in Scots law that can encompass almost any behaviour if it amounts to 'conduct severe enough to cause alarm to ordinary people and threaten serious disturbance to the community', *Smith v Donnelly* 2001 SLT 1007, Para 17. The court further stated, Para 17, 'a comprehensive definition which would cover all possible circumstances is neither possible nor desirable.' This approach was confirmed by a court of five judges in *Jones v Carnegie* 2004 SLT 609.

⁴³ COPFS (2014) *Domestic abuse charges reported 2013/14*.

⁴⁴ Police Scotland. (2012) *Joint protocol between Police Scotland and Crown Office Procurator Fiscal Service: In partnership challenging domestic abuse*.

⁴⁵ *Ibid*. See also Connelly, C. (2008) *Handling Domestic Abuse Cases: A Toolkit to Aid the Development of Specialist Approaches to Cases of Domestic Abuse*, Edinburgh: Scottish Government Report.

⁴⁶ Judges in the Scottish lower courts are referred to as Sheriffs.

⁴⁷ Engender (2014) *Scottish NGO briefing for UN Special Rapporteur on Violence Against Women*.

⁴⁸ Named after Clare Wood, who was murdered in 2009 by her abusive ex-partner, who had a previous history of violence against women of which she was unaware.

⁴⁹ The Domestic Violence Disclosure Scheme began for all of England and Wales on 8th March 2014, for more background information see Strickland (2013) *Clare's Law: the Domestic Violence Disclosure Scheme*, London: House of Commons Library Note.

⁵⁰ Disclosure Scheme for Domestic Abuse Scotland, and the pilot will run for 6 months, additional information available: <http://www.scotland.police.uk/contact-us/disclosure-scheme-for-domestic-abuse-scotland>

been subject to some criticism.⁵¹ Many respondents felt that it was too soon to comment on whether this scheme would protect women.

2.2.2 Civil Law

Those experiencing abuse can apply for court orders to protect them. The most common measures used are interdicts,⁵² 'exclusion orders'⁵³ and, more rarely, non-harassment orders.⁵⁴ As interdict is a civil remedy the victim is required to take the step of raising court action and it does not take effect until the perpetrator is made aware of it.

Previously, interdicts were seen as an ineffective means of dealing with domestic abuse as they required the victim to petition the court and then repetition if the order was breached.⁵⁵ This was remedied by the Scottish Government in the Protection from Abuse (Scotland) Act 2001, which provided for attachment of a 'Power of Arrest' to the interdict.⁵⁶ This gives the police powers to arrest and detain the person in breach of the interdict without a warrant, and without the need for that person to have committed a separate criminal offence.⁵⁷ An interdict with powers of arrest can be imposed on the partner of any victim, irrespective of the status of their relationship and can be granted based on one incident alone.⁵⁸

2.3 Areas for Change

2.3.1 Holistic Approach

The fragmented structure of the legal system in Scotland was highlighted as a barrier facing women. Due to the need for both criminal and civil remedies it has been suggested by the experts we interviewed, that Scotland implement a combined court that could deal with cases as a whole and would result in a far more holistic approach.

2.3.2 Contact with Children

Even in cases of domestic abuse there is still a presumption in favour of contact with the violent parent. Engender report that despite specific legislation requiring Sheriffs to consider children's safety when determining contact or residence applications⁵⁹ there is still a failure to give due

⁵¹ Home Office (2012) *Domestic Violence Disclosure Scheme – A Consultation: Summary of Responses*, Available: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157807/consultation-responses.pdf

⁵² *Domestic Abuse (Scotland) Act 2011*. s.3(2) Where claimants seek an interdict against a current or former partner the court has the power to grant a 'domestic abuse interdict'. If the claimant requests a 'power of arrest' attachment to the interdict this ensures that should the subject of the interdict breach its terms then they have committed a criminal offence.

⁵³ This order will exclude the offender from the shared home of the couple, it can be sought by victims who are married, s.4 *Matrimonial Homes Family Protection (Scotland) Act 1981*, in a civil partnership, s.104 *Civil Partnership Act 2004*, or a cohabiting relationship. s.18 *Matrimonial Homes Family Protection (Scotland) Act 1981*, notably the order for cohabiting couples is limited in duration to six months.

⁵⁴ s.8 (5) (b) (ii) *Protection from Harassment Act 1997*, crucially, this order requires 'a course of conduct which amounts to harassment', s.8 (1) and the legislation specifies that this 'must involve conduct on at least two occasions', s.8 (3). Breach of a non-harassment order carries the possible sanction of a maximum sentence of five years imprisonment or an unlimited fine, s.9.

⁵⁵ Cavanagh, K. Connolly, C. Scoular, J. (2003) *An Evaluation of Protection from Abuse (Scotland) Act 2001*, Edinburgh: Scottish Executive social research.

⁵⁶ *Protection from Abuse Scotland Act 2001* s.1 (1)

⁵⁷ *ibid* s.4 (1)

⁵⁸ *Domestic Abuse (Scotland) Act 2011*

⁵⁹ *Children (Scotland) Act 1995* s. 11(7), as amended by *Family Law (Scotland) Act 2006* s.24 cites domestic abuse as a factor to be considered when determining child contact applications.

consideration to the existence of domestic abuse 'since family lawyers and sheriffs may have limited understanding of the dynamics of domestic abuse.'⁶⁰ This results in women being obliged to enter into unsafe and inappropriate contact arrangements. Research from England suggests that in cases where ex partners apply to the courts for contact with the children it is rare for this to be denied.⁶¹ It also suggests that in many instances men use the child contact as a way of perpetrating further abuse against their former partners.⁶²

2.3.3 Access to Justice

Research has suggested that the cost of civil proceedings⁶³ has proved problematic for those victims of domestic abuse who are ineligible for legal aid.⁶⁴ As a consequence of this there exists an, 'imbalance between the access to justice afforded to the perpetrator and that available to the victim.'⁶⁵ The first Scottish Women's Rights Centre was recently launched in April 2015. The centre is a partnership between Rape Crisis Scotland, the Legal Services Agency and the University of Strathclyde Law Clinic. It is a national service and its aim is to address an unmet legal need in Scotland, in the form of free legal advice and civil representation for any woman who has been a victim of gender-based violence. It is partly funded by the Scottish Government, with the aim of creating a community of pro-bono lawyers all over the country who will represent women for free.

2.3.4 Welfare Cuts

Many organisations providing frontline services to victims of domestic abuse have highlighted that one of the biggest threats to their work is lack of funding.⁶⁶ Reductions in Government spending have affected organisations that are directly or indirectly funded by central or local government.⁶⁷ As well as Government austerity affecting the ability of organisations to provide services to victims, many organisations cite cuts to welfare as a further obstacle in tackling domestic abuse. Women leaving abusive relationships require financial support and suitable housing yet there is a lack of suitable housing due to the 'bedroom tax'⁶⁸ and domestic abuse is one of the leading causes of homelessness in Scotland and is causing bottlenecks in refuge accommodation.⁶⁹

⁶⁰ Engender (2014) *Scottish NGO briefing for UN Special Rapporteur on Violence Against Women*. Available: <http://www.engender.org.uk/content/publications/UNSR-briefing-final---March-2014---External.pdf>

⁶¹ Radford, L., Sayer, S. & AMICA (1999) *Unreasonable fears? Child Contact in the Context of Domestic Violence: A Survey of Mother's Perceptions of Harm*, Bristol: Women's Aid Federation of England.

⁶² *Ibid* p.2

⁶³ A straightforward undefended interdict in the Sheriff Court currently costs around £800.

⁶⁴ Civil legal aid in Scotland is assessed on the basis of both a 'means test', based on the applicant's income and capital, and a 'merits test', based on the case itself. Scoular, Connelly and Cavanagh identify access to justice as a significant issue for victims of domestic abuse and observe, at Para 6.72, that, 'Solicitors spoke of the increasing difficulty securing legal aid and the high levels of contributions required from clients. It was thought to be extremely difficult to access financial aid for anyone not on the full spectrum of benefits.' Scoular, Connelly and Cavanagh (2001) *An Evaluation of the Protection from Abuse (Scotland) Act 2001*, Edinburgh: Scottish Executive Social Research 2003.

⁶⁵ Hough, R. (2010) *SPICe Briefing, Domestic Abuse (Scotland) Bill*, Scottish Parliament. P10.

⁶⁶ *Ibid*. p.8

⁶⁷ Women's Aid (2014) *Funding Survey 2014*, Available: <http://www.scottishwomensaid.org.uk/publications-resources/resource/funding-survey-2014?back=node%2F6%3Fsort%3Ddate-desc%26filter%5B2%5D%3D2%26filter%5B3%5D%3D3>.

⁶⁸ The UK Government introduced a measure that aimed to encourage social housing tenants to move to smaller properties. Where a property was deemed to have more bedrooms than was considered necessary for the size of the family then the family's housing benefit would be reduced. This has been commonly referred to as the 'bedroom tax'.

⁶⁹ Scottish Women's Aid (2012) *Measuring the impact of funding cuts on domestic abuse services for women and children in Scotland*.

3. Sexual Violence Against Women: Rape and Sexual Assault in Scotland

3.1 Policy

The past 10 years have seen major reforms to the law regarding sexual violence in Scotland. The Scottish Law Commission (SLC), 'Report on Rape and Other Sexual Offences'⁷⁰ was the result of a comprehensive review into the law relating to rape and sexual offences.⁷¹ The report set out various principles which the commission had, 'identified as appropriate sources of guidance for the task of reforming the law on sexual offences.'⁷² These principles included: clarity of the law,⁷³ respect for sexual autonomy⁷⁴ and the protective principle.⁷⁵ In addition to this, the report emphasised the importance of the European Convention on Human Rights to the regulation of sexual violence, stating that, 'the Convention is also of importance as a statement of the basic values of the law on sexual offences.'⁷⁶ Despite significant efforts to combat VAW, Scotland has one of the lowest conviction rates of rape in Europe of around 3%.⁷⁷

3.1.1 Police Force Restructuring

Scotland's police force (Police Scotland) has stated that, '[t]he investigation of rape was identified as a key priority of Police Scotland at its inception'.⁷⁸ In the past the police have been heavily criticised for their handling of rape complaints. Research into the investigation of sexual assault in Scotland by Chambers and Millar in 1983 highlighted that police were aggressively questioning women based on the assumption that they were lying.⁷⁹ This research signalled a 'significant policy shift' in the handling of rape complaints.⁸⁰ In recent years, Police Scotland has established a National Rape Task Force (NRTF),⁸¹ and 'Rape Investigation Units' (staffed by specially trained officers) across Scotland. The stated aims of the taskforce include improving the quality of rape investigation and the quality of specialist support to women across Scotland.⁸² The NRTF has sought to enhance police partnerships with the COPFS and victim support agencies and therefore, 'develop a more holistic, effective service.'⁸³ Another recent initiative is the 'We Can Stop It' poster campaign, which is aimed at the perpetrators of rape and challenging entrenched attitudes.⁸⁴

⁷⁰ Scottish Law Commission Report No 209, December 2007.

⁷¹ The report was initiated by a reference from the Scottish Government, see Para 1.1, at 1

⁷² *Ibid*, Para 1.22, at 7

⁷³ *Ibid*, Para 1.24, at 7

⁷⁴ *Ibid*, Paras 1.25-1.27, at 8

⁷⁵ *Ibid*, Para 1.28, at 8

⁷⁶ *Ibid*, Para 1.31, at 9

⁷⁷ Rape Crisis Scotland (2010) *The Contested 3% Rape Conviction Rate in Scotland- what's the real story?*, Available: <http://www.rapecrisisscotland.org.uk/blog/the-contested-3-conviction-rate-for-rape-in-scotland-what-is-the-real-story/>

⁷⁸ Scottish Police Authority (2014) *Police Scotland's Response to Rape*, Selkirk: Para 1.1, at 1.

⁷⁹ Lily Greenan (2004) *Violence Against Women, A literature review*, Edinburgh: Scottish Executive.

⁸⁰ *Ibid* at p.4

⁸¹ Police Scotland (2015) *Help for victims of sexual crime*, Available: <http://www.scotland.police.uk/keep-safe/advice-for-victims-of-crime/sexual-crimes/help-for-victims-of-sexual-crime/>

⁸² Scottish Police Authority (2014) *Police Scotland's Response to Rape*, Selkirk: Para 1.3, at 1

⁸³ *Ibid*, Para 1.4, at 1

⁸⁴ Police Scotland (2014) 'We Can Stop It': *Rape awareness*, Available: <http://www.scotland.police.uk/whats-happening/campaigns/2014/we-can-stop-it-rape-awareness>.

3.2 Law

3.2.1 *The Sexual Offences (Scotland) Act 2009*

Previously rape was a common law offence and the historical definition limited rape to only those acts involving penile penetration of the vagina.⁸⁵ Furthermore it was considered that force was required to overcome the victim's will. Following a controversial directed acquittal of an accused where there was no evidence of force, the Scottish Government asked the High Court of Justiciary to clarify the law on rape. The Court confirmed that the law had been misapplied and that there was no requirement for force to be used.⁸⁶ Consequently, the Sexual Offences (Scotland) Act 2009 was introduced as an attempt by the Scottish Government to modernise and reform the law governing rape and other sexual offences following the SLC report, 'Rape and other Sexual Offences'.⁸⁷ This report highlighted that the law was 'a fragmented mixture of common law and statute law and is far from clear to ordinary members of the public'⁸⁸. Therefore, codification of the law was needed to provide clarity.

Significantly, the 2009 Act introduced a broader, statutory definition of rape that encompasses non-consensual vaginal, anal or oral penetration.⁸⁹ This had the effect of making the crime of rape gender neutral where previously it could only be perpetrated against a woman. The 2009 Act also provides definitions for a variety of other sexual offences.⁹⁰ Furthermore, the SLC's report highlighted the lack of clarity regarding the definition of consent.⁹¹ The 2009 Act defined consent as 'free agreement',⁹² and provides a non-exhaustive list of factual circumstances in which conduct takes place without such free agreement such as when an individual is under the influence of alcohol or other substances.⁹³ The legislation also states that consent can be withdrawn at any stage before or during conduct.⁹⁴

3.2.2 'Rape Shield' Legislation

There have been attempts to restrict the use of 'sexual history' and 'sexual character' evidence of the victim in rape (and other sexual offence) trials, through the enactment of 'rape shield' legislation since the mid-1980s.⁹⁵ Research questioned the effectiveness of the initial statutory

⁸⁵ Other forms of sexual penetration were considered sexual assault, see for example *Barbour v HM Advocate* 1982 SCCR 195.

⁸⁶ Lord Advocate's Reference No.1 of 2001.

⁸⁷ Scottish Government (2007) *The Scottish Law Commission Report on Rape and Sexual Offences*, Edinburgh: Scottish Executive and Scottish Government (2007) *Report No.209*, Edinburgh: The Scottish Law Commission

⁸⁸ Scottish Law Commission (2007) *Report on Rape and Other Sexual Offences*, Edinburgh.

⁸⁹ s.1 (1) *Sexual Offences (Scotland) Act 2009*, the statutory definition is also gender-neutral to the extent that it includes the possibility of male victims.

⁹⁰ These include: sexual assault (s.3), sexual assault by penetration (s.2), sexual coercion (s.4), coercing a person into being present during a sexual activity (s.5), coercing a person into looking at a sexual image (s.6), communicating indecently (s.7), sexual exposure (s.8) and voyeurism (s.9).

⁹¹ Rape Crisis Scotland (2010) *Online guide to the Sexual Offences (Scotland) Act 2009*, Available at: [http://www.rapecrisisscotland.org.uk/workspace/publications/Outline-guide-to-SOSA-2009-Nov-2010- 2 .pd](http://www.rapecrisisscotland.org.uk/workspace/publications/Outline-guide-to-SOSA-2009-Nov-2010-2_.pd)

⁹² *Sexual Offences (Scotland) Act 2009*, s.12

⁹³ *ibid* s.13 (2), specifies the following circumstances: (a) incapacity through the effect of alcohol or 'any other substance', (b) when violence, or threats of violence are used, (c) where there is unlawful detention, (d) where there is deception as to 'the nature or purpose of the conduct', (e) where there is deception as to identity by the accused and (f) where 'agreement' is given by another person. In addition, s.14 (2) states, 'A person is incapable, while asleep or unconscious, of consenting to any conduct.'

⁹⁴ *Ibid* s.15 (3)

⁹⁵ *ibid* s.36 *Law Reform (Miscellaneous Provisions) (Scotland) Act 1985* inserted provisions into the *Criminal Procedure (Scotland) Act 1975*. The restrictions were slightly expanded in s.274-275 *Criminal Procedure (Scotland) Act 1995*.

provisions⁹⁶ and the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002⁹⁷ introduced reforms seeking to further restrict the use of such evidence. However, subsequent research⁹⁸ has shown that the 2002 Act actually resulted in an increase in the number of trials in which sexual history and character evidence was introduced.⁹⁹ Indeed, writing subsequently, one of the report authors, Michele Burman commented that, 'the 2002 Act has had an unanticipated and perverse outcome, increasing the presence of sexual history and character evidence rather than limiting it.'¹⁰⁰

3.2.3 The Corroborative Evidence Rule

Corroboration is a rule of evidence unique to Scots law that requires two separate and independent sources of evidence in order to prove an essential fact of the crime.¹⁰¹ The application of this rule has proved particularly problematic for securing convictions in cases of rape and other sexual offences,¹⁰² because these offences are often perpetrated in private, making it difficult for prosecutors to satisfy this requirement.¹⁰³ The Lord Advocate¹⁰⁴ has commented that the rule may be open to challenge at the European Court of Human Rights if a complainant's case does not progress due to the high barrier posed by the rule.¹⁰⁵ However, those against the abolition have warned that the removal of the rule may lead to more emphasis being placed on witness testimony and could lead to further trauma for victims.¹⁰⁶ In response to the United Kingdom Supreme Court decision *Cadder v HM Advocate*¹⁰⁷ the Scottish Government initiated the 'Carloway Review'¹⁰⁸ into key elements of Scottish criminal law and practice, including the corroborative evidence rule.¹⁰⁹ This Review recommended that the rule

⁹⁶ Brown, B. Burman, M. and Jamieson, J. (1992) *Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials*, Edinburgh: Scottish Office Central Research Unit; Brown, B. Burman, M. and Jamieson, J. (1993) *Sex Crimes on Trial: Sexual History and Sexual Character Evidence in Scottish Sexual Offence Trials*, Edinburgh: Edinburgh University Press; and Burman, M. Jamieson, J. Nicholson with F. Cartmel (2005) *The Law of Evidence in Sexual Offence Trials: Base Line Study*, Edinburgh: Scottish Executive Crime and Criminal Justice Research Series.

⁹⁷ s.7-8 *Sexual Offences (Procedure and Evidence) (Scotland) Act 2002* amend s.274 and 275 *Criminal Procedure (Scotland) Act 1995*

⁹⁸ Burman, M. Jamieson, J. Nicholson & Brooks (2007) *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study*, Scottish Government Social Research.

⁹⁹ *Ibid*, Para 3.29, at 41, states that 72% of sexual offence trials in the study involved an application to introduce such evidence, compared to 21% in the 3 years prior to the implementation of the 2002 Act. The report further observes, Para 3.17, at 37, that, 'applications were rarely refused in full by the court.'

¹⁰⁰ Burman, M. (2009) *Evidencing Sexual Assault: Women in the Witness Box*, *The Journal of Community and Criminal Justice* Vol. 56(4) (2009) 1, p.16.

¹⁰¹ The rule has its roots in the work of the institutional writers, see e.g. Hume, 'Commentaries on the Law of Scotland Regarding Crimes', Volume II, at 385

¹⁰² Estimates vary however it is thought that between 3%-6% of all reported rapes end in conviction. See Burman (2009) p.3.

¹⁰³ Scottish Government (2012) *Reforming Scots Criminal Law and Practice: The Carloway Report - Consultation*, Edinburgh.

¹⁰⁴ The Chief Legal Officer of the Scottish Government and Chief Prosecutor.

¹⁰⁵ Lucy Adams, Herald Scotland (2012) *Rape victims 'let down' by rights ruling*. Available at: <http://www.heraldsotland.com/mobile/news/crime-courts/rape-victims-let-down-by-rights-ruling.16655209>

¹⁰⁶ Carloway Review Consultation Workshops, page 6, available: www.gov.scot/resource/doc/925/0117202.doc

¹⁰⁷ 2010 UKSC 42, this judgment, following the judgment in *Salduz v Turkey* (2008) 49 EHRR 421, held that the procedure whereby statements made when suspects were interviewed by the police without a lawyer present were considered admissible evidence amounted to a breach of those suspect rights under Art.6 ECHR.

¹⁰⁸ Lord Carloway (2011) *The Carloway Review: Report and Recommendations*, November 2011, available: <http://www.gov.scot/Resource/Doc/925/0122808.pdf>

¹⁰⁹ *Ibid*, at 13, the terms of reference of the review are set out; including (c) relating to the requirement for corroboration.

be abolished¹¹⁰ and the Scottish Government subsequently brought forward legislation which would give effect to this recommendation.¹¹¹ Advocacy groups representing victims of sexual violence, have welcomed the proposal¹¹² on the basis that removing corroboration would help improve poor conviction rates for rape and sexual offences,¹¹³ while in 2013 the CEDAW Committee also called for this rule to be scrapped.¹¹⁴

However, this view has not been shared by the Scottish legal establishment,¹¹⁵ which has instead emphasised that changes to the law would likely result in the breach of the ECHR Art.6 rights of the accused.¹¹⁶ In light of such opposition, the proposed abolition of the rule has recently been shelved by the Scottish Government following the publication of Lord Bonomy's 'Post-Corroboration Safeguards Review'.¹¹⁷ This failure to remove a controversial feature of the criminal legal system, which is often cited as a barrier to securing sexual offences convictions, demonstrates the difficulty faced by those lobbying to reform the Scottish legal system and place women at its heart. The biggest difficulty appears to be that corroboration is at the heart of the legal system and so is required in all trials. While its removal would arguably assist victims of rape and sexual assault it has been extensively argued that this would weaken the safeguards in Scots law and so might result in wrongful convictions thereby breaching the human rights of the accused.¹¹⁸

3.3 Areas for Change

3.3.1 Independent Legal Representation for Victims

The Victim and Witnesses (Scotland) Act 2014 introduced increased protection for victims within the criminal justice system,¹¹⁹ but this fell short of independent legal representation for victims, as had been advocated for by some NGOs.¹²⁰

¹¹⁰ *Ibid*, Para 4.0.14, at 68, 'the requirement for corroboration, which has existed since time immemorial, should be abolished in favour of a qualitative assessment of evidence.'

¹¹¹ s.57 of the *Criminal Justice (Scotland) Bill*, which was introduced in June 2013. However, the Justice Committee Report on the Bill, available: http://www.scottish.parliament.uk/S4_JusticeCommittee/Reports/juR-14-03w.pdf, did not accept the proposal for the abolition of corroboration, Para 412, at 76.

¹¹² In response to the Carloway Review, the Scottish Government launched a consultation process inviting responses from the public on the report's recommendations. A list of non-confidential responses can be found at <http://www.gov.scot/Publications/2012/12/4338/0>, see e.g. the response of Rape Crisis Scotland, available at <http://www.gov.scot/Resource/0041/00411080.pdf>

¹¹³ Fawcett and Mulholland 'Reforming Scots Law and Practice, The Carloway Report, An Analysis of Consultation Responses' Scottish Government Social Research 2012, provides a summary of those non-confidential responses, available at <http://www.gov.scot/Resource/0041/00410913.pdf>. Paras 10.21-10.26, at 73, set out the benefits for victims identified by the respondents to the consultation.

¹¹⁴ CEDAW Committee 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' CEDAW/C/GBR/CO/7, paras. 26 and 27.

¹¹⁵ *Ibid*, Paras 10.3-10.6, at 69, the majority of responders disagreed with the Review's findings that corroboration should be abolished.

¹¹⁶ *Ibid*, Paras 10.12-1.20, at 71, the authors note that a common theme among respondents who argued against the removal of corroboration was that they felt the rule protected against miscarriages of justice and increased the likelihood of a fair trial.

¹¹⁷ Lord Bonomy (2015) *The post-corroboration safeguards review*, Edinburgh: Scottish Government.

¹¹⁸ Chalmers, J. Leverick, F. Shaw, A. (2014) 'Post Corroboration Safeguards Review Report of the Academic Expert View' Scottish Government, Edinburgh.

¹¹⁹ s.1 (3) sets out general principles that various actors within the criminal justice system must have regard to, including, in s.1 (3) (d), 'that, in so far as it would be appropriate to do so, a victim or witness should be able to participate effectively in the investigation and proceedings.'

3.3.2 Changing Public Attitudes

Research indicates that one of the obstacles to securing rape convictions in Scotland is juror attitudes and understanding of rape.¹²¹ Rape Crisis Glasgow believes that the majority of rape survivors do not pursue legal action because of the extensive questioning and perceived 'victim blaming and shaming'.¹²² Rape Crisis Scotland have noted that 'The Scottish Government has previously given a commitment to introducing judicial directions in sexual offence trials to instruct juries that inferences should not be drawn from delayed reporting or lack of significant physical injury.'¹²³

3.3.3 Supporting Ethnic Minority Women

There is a lack of specialist services for women from ethnic minorities. In fact, experienced experts in the field have voiced concern that a very small percentage of women who report rape are from an ethnic minority background.¹²⁴ The CEDAW Committee, in its concluding observations to the UK, has consistently highlighted the need for more data and resources allocated to assisting black and minority ethnic women in the UK.¹²⁵ Organisations such as Rape Crisis Scotland are looking to bridge that gap and have developed speciality programs such as their 'Ruby Project' that works specifically with ethnic minority women.¹²⁶

What is clear from this research is that legal challenges to the manner in which the criminal justice system deals with the issue of rape, and other forms of sexual violence against women, are more likely to be framed in the context of the state's obligations under the ECHR than under other international norms. Moreover, the overwhelming sense from respondents was that the state's obligations under the ECHR were predominantly to the accused rather than the victim. As such, there appears to be a disconnect from international human rights norms that exist to further the rights of victims. NGOs and women's groups have been the main drivers of change in this area and have had more influential than international legal frameworks in this regard. Thus in the context of criminal law, particularly with regards to sexual offences there appears to be no consideration or desire to draw on international practice, nor to recast victims of sexual violence (who are predominantly) women as those in need of human rights. The respondents who worked within the criminal justice system were generally dismissive of CEDAW as a

¹²⁰ In their written submissions to the Justice Committee, on the Victims and Witnesses (Scotland) Bill, Rape Crisis Scotland, stated, at Para 5.2, that, 'It is difficult to see how this principle as set out in the bill can be meaningful for complainers of sexual offences unless they have access to legal representation.' Available at http://www.scottish.parliament.uk/S4_JusticeCommittee/Inquiries/VW9_Rape_Crisis_Scotland.pdf

¹²¹ A Scottish Government survey found that 24% of adults believed that a woman bore some responsibility if she was drunk at the time of an attack, while 27% of adults believed that a woman was partly responsible for rape if she wore revealing clothing. Although the survey also found that adults over 65 were the most likely to hold the view that women were partly responsible for rape. See TNS System Three (2008) Domestic Abuse 2007/08: Post- Campaign Evaluation Report, Edinburgh: Scottish Government Research.

¹²² Rape Crisis Glasgow Volunteer Training Guide.

¹²³ Rape Crisis Scotland, 'Briefing on the Post Corroboration Safeguards Review Consultation Paper', 2014, at 2, available: http://www.rapecrisisscotland.org.uk/workspace/uploads/files/briefing_on_the_bonomy_review_nov14-1final.pdf

¹²⁴ Interview with Rape Crisis Scotland (16/03/2015)

¹²⁵ For further detail see CEDAW Committee Concluding Observations to the United Kingdom on their third, fourth, fifth and sixth period country reports.

¹²⁶ Rape Crisis Centre Glasgow, Ruby Project, <http://www.rapecrisiscentre-glasgow.co.uk/content/ruby-project/>, 2015.

framework or mechanism that would assist in the prosecution of crimes of sexual violence in Scotland.

4. CEDAW and Scotland

The Scottish Government generally frames domestic abuse initiatives and legislation in light of CEDAW rhetoric and principles.¹²⁷ However as it is not a primary source of law in Scotland its impact remains limited. This differs from the ECHR, as the rights and obligations included therein can be relied on in domestic courts. Respondents to this research cited awareness of CEDAW but none considered it a helpful tool towards tackling VAW in Scotland. There was no mention of using the OP as a viable remedy for seeking redress to domestic abuse. Conversely, several respondents cited the Istanbul Convention as a likely future remedy, with the potential to have similar power to the ECHR.

The authors note that Scotland has a progressive and integrated approach that has been described as leading the rest of the UK. Despite this, there are some significant barriers to incorporating CEDAW into domestic law. These mainly consist of lack of political will to engage with international frameworks and being accountable to international bodies, a noticeable lack in women's policy agencies and NGOs demanding the implementation of CEDAW, and perhaps most crucially, the belief that domestic legislation is superior to the Convention.

While the option to make a direct complaint to the CEDAW Committee is available to victims and victims' organisations in Scotland, until there is greater awareness of the Convention this is unlikely to prove to be a significant remedy.¹²⁸ Although several NGOs interviewed were involved in the preparation of Shadow Reports to the Committee and the staff were highly knowledgeable on the Convention, the respondents did not feel that calling for CEDAW to be incorporated into domestic law was a worthwhile endeavour. Instead they felt that local, targeted approaches were needed.

Accordingly, it is difficult to predict the success of a new norm in addressing VAW based on the research conducted and the respondents' interviews. Overall, respondents expressed indifference towards the existence of international conventions, in particular CEDAW as viable tools for the protection of women in Scotland. While CEDAW is regarded as an important document, the research and the interviews indicate that it is not important enough to

¹²⁷ The National Strategy cites and endorses the UN General Assembly definition of violence against women. See *Preventing Domestic Abuse: A National Strategy*, p.3 and p.16. It also notes that the UN definition has been endorsed in previous policy documents. See e.g. Scottish Executive (2001) *Preventing Violence Against Women – Action Across the Scottish Executive*, Edinburgh: Scottish Executive. The strategy on shared approach to tackling violence against women states that its approach is informed by the definition developed by the National Group to Address Violence Against Women, which is based on the United Nations Declaration on the Elimination of Violence Against Women (1993). See Scottish Government (2009) *Safer Lives: Changed Lives: A Shared Approach to Tackling Violence Against Women in Scotland*, p.7.

¹²⁸ The Equalities and Human Rights Commission, one of the UK's National Human Rights Institutions, has recently produced a brochure aimed at explaining the Optional Protocol to the public and highlighting its use to NGOs. See 'A Lever for Change: Using the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women', available at http://www.equalityhumanrights.com/sites/default/files/documents/humanrights/a_lever_for_change.pdf. Engender has produced a cartoon to raise awareness of CEDAW among Scottish women. See <https://www.youtube.com/watch?v=HPJfBqoNH7Q>.

implement in its entirety. Respondents were more interested in what domestic and national remedies were available for VAW.

Additionally Scotland is faced with a lot of complexities in regards to implementation of international norms due to its position within the UK. This position will become even more complicated in the face of the recent victory of the Conservative Party in the UK general election. The Conservatives have pledged and are planning to repeal the Human Rights Act and are planning to host a referendum on whether to leave the EU within two years time. Given these circumstances, it is difficult predict any support from the UK Government for the incorporation of CEDAW into domestic law or the acknowledgement of a new norm in addressing VAW, given that the UK intends to dismantle existing human rights norms provided through the ECHR.

5. Recommendations

Scotland has made some significant progress in regards to preventing and monitoring VAW. Despite its limitation in regards to implementing international conventions, more specifically CEDAW, there are recurring themes that appear to have played key roles in the success of policies and legislations. These themes will serve as the key recommendations on the content of a treaty on VAW for it to be meaningful to the women of Scotland.

- Incorporate women's lived experiences at every stage of the policy and legislative process.
- Increase the female presence in all public and private spheres to guarantee participation of women in decision-making positions.
- Assure there is a shared understanding of violence against women and girls: the causes, risk factors and scale of the problem.
- Government departments must work directly with women who have experienced violence and can inform policy-makers.
- Develop better awareness-raising strategies that can be implemented as early as primary school.
- Documents and campaigns must use inclusive language that women can identify with and utilise themselves.
- Include the participation of women's organisations and support the actions that they carry out whenever possible.
- Put in place robust measures to capture and share data.

6. Conclusion

The review of legislation and policy of VAW provides a varied picture of Scotland's progress in regards to eradicating the phenomena. On the one hand, Scotland's policies and legislations are very progressive and ambitious. On the other, implementation of those very same policies often falls short. The newly elected First Minister of Scotland has recently pledged increased funding to tackle VAW. Despite this much needed financial support, it is difficult to ascertain if the renewed actions and pledges will ultimately result in change for women in Scotland. Scotland has some unique challenges to overcome in regards to tackling VAW. However, what is apparent through our research and national coverage is that women's rights and tackling VAW is front and centre of the national agenda. People are more engaged and aware of violence against women and a national discussion is taking place.

A significant barrier for Scotland in meeting its international obligations is its position as a devolved government in the UK. As part of the UK, Scotland is often lumped together with England, Wales and Northern Ireland when it comes to UN reporting. The difference in legal systems is rarely explained and the specific devolved legislation and policy adopted by the Scottish Government is not critiqued. Many of the recommendations of the CEDAW Committee are not specifically addressed to one particular country and it is therefore difficult to gauge Scotland's progress and standing internationally.

At the interview stage of our research we asked women who work within the Scottish legal system, with NGOs and as activists, about CEDAWs influence in Scotland. The consensus was, that while it is recognized as a significant document, their considerations follow a local-national-international order. Therefore, while its importance is recognized, it does not appear to greatly influence 'frontline' work. Some respondents observed that due to foreign affairs being reserved to the UK parliament, the Scottish Government has tended to focus on issues that are within its power to legislate for. As CEDAW is an international treaty, which the UK is party to, there is perhaps an acknowledgement that the role of the Scottish Government in achieving its implementation is limited. As such the Scottish Government appears to have adopted a local experiential model to tackling the issue of VAW, which while cognizant of, is not based on CEDAW.

Despite this, the CEDAW Committee's definition of VAW as described in General Recommendation 19, which is reflected in many Scottish and UK Government policy documents, signifying a normative policy approach by both governments who accept the issue of VAW is a universal problem and look to conform to the international regime. However, the absence of CEDAW in domestic law in Scotland means that unlike in other states it is entirely invisible within the domestic court structure and therefore can offer little redress to individual women. While the OP offers the right of individual complaint, respondents cited the preference of domestic redress as a more appropriate mechanism for victims. Where the Scottish or UK Government may be complicit in infringing women's rights, the respondents again highlighted the ECHR framework as a preferable tool for oversight. Again the ability to raise such proceedings in domestic courts was considered a preferable benefit to CEDAW's individual complaints mechanism and it was not thought that CEDAW could offer anything over and above this.