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LEGAL CHANGE AND LEGAL INERTIA: UNDERSTANDING AND CONTEXTUALISING SCOTTISH CASES IN WHICH WOMEN KILL THEIR ABUSERS

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Significant legal and policy change related to domestic abuse has been evident in Scotland over the last forty years. Despite this, no change has occurred in relation to cases in which women kill their abusers. This paper maps the significant changes which have occurred in Scotland in relation to domestic abuse, linking these to the development of the Scottish women's movement and related feminist activism. This landscape is contrasted with the inertia which has become apparent in relation to cases in which women kill their abusers. A detailed examination of the Scottish landscape is presented which includes in-depth qualitative analysis of 62 cases of this type.

Although the problems inherent to effecting change for women who kill their abusers are recognised, this paper proposes several practical changes which could be implemented to bridge the knowledge gap which has emerged in Scotland. This call to action comes at the time when the Scottish Law Commission are considering homicide and defences to murder, making it a crucial time to consider the Scottish landscape in relation to this aspect of domestic abuse.

Keywords: Domestic abuse; Scotland; women who kill their abusers; legal change

Key messages:

- There exists demarcation in Scotland between responses to domestic abuse generally and responses to cases in which women kill following domestic abuse.
- The issue of women killing their abusers must be included in formal policy dialogues surrounding domestic abuse.
- Any legal changes implemented must recognise the reality of cases of this type.

Introduction

Over the last forty years there has been significant change in how Scotland has responded to domestic abuse. Many of the changes which have occurred can be linked to the development of the Scottish women's movement and associated feminist activism. Changes occurring over the last twenty years can also be linked to the creation of the Scottish Parliament (Brooks-Hay, Burman and McFeely, 2018). Yet, despite this developing legal and political landscape, the legal response to cases in which women kill their abusers has remained unchanged and discussion about this aspect of domestic abuse has been absent at policy level.

This paper will map key developments in Scottish domestic abuse law and policy over the last forty years. It will analyse the landscape of cases in which women kill their abusive partner. Specifically, this paper will address the following research questions:

1. What changes have occurred in relation to domestic abuse law and policy in Scotland over the last forty years?
2. What factors have influenced these changes?
3. What has Scotland's approach been towards cases in which women kill their abusive partners?
4. What is currently known about the landscape of Scottish cases in which women kill their abusers?
5. What possibilities exist for reform given the current landscape?

These research questions will be answered through doctrinal and empirical analysis, specifically in-depth qualitative analysis of 62 Scottish cases in which a woman was accused of killing her abusive partner. Although it will be recognised that difficulty exists in effecting legal change for women who kill their abusers in all jurisdictions, it will nevertheless be argued that increased attention on this aspect of domestic abuse is required in Scotland. This call to action comes at the time when the Scottish Law Commission are examining criminal defences to murder as part of their ongoing 'Homicide' project, making it a crucial time to consider the Scottish landscape in relation to this aspect of domestic abuse.

Legal responses to domestic law in Scotland

A useful starting point for an examination of how the law has developed in relation to domestic abuse in Scotland over the last forty years is the Matrimonial Homes (Family Protection) (Scotland) Act 1981 which was introduced with a principal theme of providing civil remedies to domestic abuse. The Act allowed entitled spouses to be excluded from their property if it was deemed necessary for the protection of other non-entitled occupants. This meant, for the first time, that an abusive (male) property owner could be removed from the

matrimonial home. The Act introduced ‘matrimonial interdicts’ which could operate independently or in conjunction with exclusion orders. For many, these changes were hugely significant, especially when considered against the concept of *jus mariti* - the general principle that moveable property of a married woman, upon marriage, passed automatically to her husband- which had remained in operation until the second half of the 19th century. However, by the year 2000, it was recognised that re-examination of this area of law was needed. This followed increasing criticism that individuals at risk of domestic abuse were being afforded inadequate protection by the current law and that increased police protection was required (Justice Committee, 2000). The resultant Protection from Abuse (Scotland) Act 2001 allowed for a ‘power of arrest’ to be attached to interdicts which fell outside the category of matrimonial interdict, providing the police with the ability to detain, for a period of two days, those in breach of their interdict.¹ Individuals suffering abuse also became able to obtain a power of arrest without having to demonstrate any particular personal relationship to the alleged abuser. Later review (Scottish Executive, 2000) led to further legal reform which gave the police powers to arrest for a breach of a non-harassment order without a warrant² and for an interdict with a power of arrest attached to be determined a ‘domestic abuse interdict’ - breach of which was criminal offence in itself.³ Provisions were also introduced which held that harassment on just one occasion in the context of domestic abuse would be sufficient to give rise to the protections under the Protection from Harassment Act 1997. However, this was a change which merely brought Scotland into line with rest of the UK.⁴ At the point of its introduction, the Protection from Harassment Act had made harassment an offence in England and Wales, but following debate, it was decided that the common law offence of ‘breach of the peace’ obviated the need for the same specific statutory offence under Scots criminal law (House of Commons Library, 2017: 9).⁵ The resistance to change which existed was indicated within the House of Commons Research Paper, *Stalking, harassment and intimidation and the Protection from harassment Bill*:

Some commentators in Scotland have criticised proposals to create specific statutory offences concerning stalking and other similar forms of harassment for Scotland as well as England and Wales on the grounds that they represent a form of English interference in Scottish legal affairs and disregard Scotland's separate legal system and its legal traditions (House of Commons Library, 1996: 26).

Scottish Office minister, Lord James Douglas-Hamilton also made representations on behalf of the Lord Advocate⁶ at the time to the effect that the common law in Scotland provided

sufficient protection for victims of stalking in its current form (House of Commons Library, 1996).

During the same period, the Scottish criminal justice system's responses to domestic abuse were being significantly reformed. The introduction of Victim Information and Advice (VIA) offered victims of domestic abuse support through specialised groups and notably in 2005 a specialised domestic abuse court was introduced to Glasgow Sheriff Court, provided with a dedicated procurator fiscal and four sheriffs with backgrounds in family court work (Scottish Government, 2007: 1.21) as well as the establishment of a domestic abuse advocacy group (ASSIST).⁷ During this time the SWA were particularly successful at changing police protocol and culture (Scottish Women's Aid, 2017: 49). Lily Greenan recalls a meeting which took place in 2006 between the SWA and senior police figures:

I went through to Glasgow for a meeting that blew my mind because a Chief Constable of Police sat in a room with five feminists and said, 'I've got five years in this job, domestic abuse is my issue, what do you want done?'. And I was like, I said, 'Are you serious?' [laughs] and he said, 'Yeah, I'm serious.' (Scottish Women's Aid, 2017).

Substantive criminal law remained unchanged until 2010 when an offence of 'threatening or abusive behaviour' was introduced as a reaction to restrictions made to the common law offence of breach of the peace.⁸ During the period of consultation of the new offence, the problems of prosecuting domestic abuse as breach of the peace were recognised (McCallum, 2010: 14-15). Following the enactment of the 2010 Act, it quickly became apparent that this statutory public order offence was going to become the route through which a significant number of domestic abuse prosecutions would take place.⁹ Shortly afterwards, the offence of 'controlling or coercive behaviour'¹⁰ was introduced to England and Wales, but even in a landscape of 'increased criminalisation' (Chalmers and Leverick, 2013), a distinct offence of domestic abuse continued to elude Scots law. Three years later, the Domestic Abuse (Scotland) Act 2018 created a distinct (gender-neutral) offence, categorised by abusive behaviour towards a partner or ex-partner¹¹, based on Evan Stark's influential model of coercive control (2009). Marking a continued bridging between public and private law responses to domestic abuse in Scotland¹², where there is a conviction under this Act, the court must consider whether a non-harassment order is necessary for the protection of the complainant with breach of such an order being a criminal offence. For Burman, this offence aims to cover behaviour which was already criminal (i.e. physical abuse) as well as that

which might not have been covered by existing offences (psychological abuse), creating a ‘bespoke’ statutory definition of domestic abuse, as a continuing offence (Burman, 2018: 44-45).

The introduction of a distinct offence of domestic abuse has been long-awaited for many. Although much remains to be seen in terms of its implementation and interpretation in practice, it is evident that Scotland has consistently developed legal responses to domestic abuse over the last forty years, paying particular attention recently to the ways in which the subtle aspects of coercive control could be brought within the scope of the criminal law. Much of this development has been rooted in feminist activism and the development of the Scottish women’s movement during the same period.

Legal change through activism

Inspired by the establishment of the National Women’s Aid Federation in 1974 and rooted in the growing women’s liberation movement of the early 70s, Scottish Women’s Aid (SWA) was founded in 1976. SWA sought to: reject traditional patriarchal hierarchies, provide assistance to statutory agencies and public organisations on recognising the signs of domestic abuse (Scottish Women’s Aid, 2017), producing “tangible transformative change” (Scottish Women’s Aid, 2017: 53) of the political and legal landscape. Discussing the history of feminist activism in Scotland, Cowan et al. note that during the 70s “the grass-roots organising for feminist purposes became a prominent modus operandi in Scotland, as in many other jurisdictions”. They discuss the various liberation groups which emerged across Scotland during this time, but also point out that whilst “these examples might indicate a coordinated approach, the late 1970s was also a period of schism in Scottish feminism, particularly between so-called radical and socialist approaches” (2019: ch 2).

One area which became a key focus for activists during this early period was changing the property rights afforded to women under Scots law. Discussing the introduction of the resultant Matrimonial Homes (Family Protection) (Scotland) Act 1981, former CEO of SWA, Lily Greenan, notes:

the pressure to make that happen, and the work on it came from a collective of collectives, basically, of quite small groups of women around the country and this very tiny, at that time, between 1976 and 1981, very small national staff working together to achieve that change (Scottish Women’s Aid, 2017: 54).

The supplementary guide to the 1981 Act was prefaced by an introduction which offers insight into the driving forces behind the private law reforms. In it, Nichols and Meston

emphasised the length of time which was required for reform of this area to take place, especially in Scotland. They noted that elsewhere in the UK, the Matrimonial Homes Act 1967¹³ had been influenced by proposals made in 1956 by the Royal Commission on Marriage and Divorce. The Domestic Violence and Matrimonial Proceedings Act 1976, which followed shortly afterwards, was informed by the findings of a Select Committee of the House of Commons which had a remit to investigate family violence. SWA gave evidence at this Committee, conveying their frustration at ineffectual police responses to domestic abuse.¹⁴ Significantly, this Select Committee invited the Scottish Law Commission to consider making similar legal changes to Scots law. In 1978, the Scottish Law Commission responded with a consultative memorandum, before offering their own recommendations which would form the basis of the 1981 Act. As Nichols and Mester comment, the 1981 Act “brought Scots law into line with most other commonwealth and Western European countries” (1986: 2).

During the 1980s, the landscape of local government was changing throughout the UK, with the introduction of dedicated Women’s Committees. Linked to ‘Local Socialism’ and an attempt by radical Labour counsellors to redefine political affiliations for those experiencing social and political disadvantage (particularly in areas such as London and Scotland as ‘Labour heartland’) (Lieberman, 1989), these Committees offered an opportunity for the Scottish women’s movement to exert influence and raise awareness about women’s experiences of violence. The work of the Committees also led to development of new campaign groups within the feminist movement. For example, a survey conducted by Edinburgh District Council’s Women’s Committee revealed that safety was a major concern for women in the city, leading to the development of the charity group ‘Zero Tolerance’. In 1992 Zero Tolerance introduced to the city of Edinburgh a poster campaign, conceived by local activist Evelyn Gillian. Targeting issues such as child sexual abuse, rape myths and the prevalence of domestic abuse, the campaign received significant media attention and for feminist historian and activist Lesley Orr, Gillan’s “determination to force Scottish society to wake up to an inconvenient truth, birthed a revolution in attitudes” (McLaughlin, 2017).

In 1999, the establishment of the Scottish Parliament marked a significant and obvious change in Scottish politics, introducing a new model of political decision-making which would go on to provide those in the Scottish women’s movement greater opportunity to influence the policy agenda, whilst also providing Scotland with a greater capacity to legislate (Brooks-Hay, Burman and McFeely, 2018: 3). Most areas pertinent to addressing domestic abuse were devolved following the creation of the Parliament (health, housing, law,

policing and local government), meaning that there would be no need to go through Westminster Parliament in order to enact legal change. An increased focus on multi-agency responses to domestic abuse became immediately apparent (Scottish Women's Aid, 2017: 55) and in 1998 when the Convention of Scottish Local Authorities (COSLA) published guidance on developing partnerships to tackle violence against women, the influence of feminist activism was clear, but the extent of the Scottish women's movement's influence was most obvious in 2003 with the introduction of Scotland's national strategy on preventing domestic abuse (Scottish Executive, 2003: 3). Adopting a gendered definition of domestic abuse, the *National Strategy* located gender-based violence as both a cause and consequence of women's inequality:

Domestic abuse is associated with broader gender inequality, and should be understood in its historical context, whereby societies have given greater status, wealth, influence, control and power to men. It is part of a range of behaviours constituting male abuse of power and is linked to other forms of male violence.

The *National Strategy* marked a clear movement away from a narrow focus on physical violence, offering a notably broader definition than those provided in the law at that time. The Strategy also emphasised the preferred terminology of 'domestic abuse' within Scottish discourse (as opposed to terms such as 'domestic violence', 'intimate partner violence' or even the traditional 'battered wives'). Elsewhere in the UK at that time, definitions of violence against women were gender-neutral- a fact, which for Brooks-Hay et al., evidenced the more radical approach being taken towards domestic abuse policy in Scotland (Brooks-Hay, Burman and McFeely, 2018: 5). This definition would later influence how criminal law defined domestic abuse and as such was a significant step in moving legal definitions of violence away from the (male dominated) legal profession (Cowan, Kennedy and Munro, 2019: ch 2; McMillan, McKerrell and McFadyen, 2005; Siann, Raitt and Callaghan, 2001; Siann, Raitt and Rowan, 2009).

The response to women who killed their abusers

Feminist campaigners in Scotland have been clear in communicating the message that women are most likely to be killed by their male partners or ex partners, with the SWA being involved specific awareness raising campaigns on the issue. The SWA have also offered public support to a number of women who have killed their abusers in Scotland.¹⁵ Formally, however, this aspect of domestic abuse has never been included in policy dialogues or

agendas. For example, in the delivery plan offered by *Equally Safe*- the national strategy to prevent violence against women- a diverse range of plans and campaigns are included for the period 2017-21, but none refer to this aspect of domestic abuse (Scottish Government, 2017). This can be explained, in part, by the fact that most cases of this type are not subject to appeal and as such are unreported legally; many are resolved by way of a guilty plea being tendered to culpable homicide (see below). The absence of formal policy dialogue may also be linked to strategic decisions about how funding can most likely be secured.¹⁶ But such difficulties are also applicable to England and Wales where this aspect of domestic abuse has nevertheless been the subject of increased attention at the level of law and policy.

In England and Wales, specific feminist campaigning on this issues has been undertaken by groups such as the *Southall Black Sisters* and *Justice for Women* on behalf of a number of women convicted of killing their abusers – both in relation to high profile cases and cases which have received less media attention. In Scotland, the most high-profile case of this nature has been *Galbraith*.¹⁷ Campaigning in relation to Galbraith's conviction was limited. This can be explained, in part, to the unusual facts of the case- facts, which do not typically correspond with other cases where women have killed their abusers (her use of a firearm, killing her husband when he was sleeping, the premeditated nature of the killing and originally offering an untrue version of events to the police¹⁸), but as will be discussed below, *Galbraith* is far from the only case of this type.

Another striking difference across the UK landscape is the fact that domestic homicide reviews have been introduced in England and Wales as a way to provide information on the context of a domestic homicide involving someone over the age of 16 or which appears to have been preceded by domestic abuse. The completion of such a multi-agency review has been a requirement since 2011. A Home Office review of intimate partner homicides found that in 24 of 33 cases examined, the perpetrator had a history of violence and in six cases, the victim had a history of violence towards the perpetrator (Home Office, 2016). Domestic homicide reviews have not been implemented in Scotland although discussion is ongoing in Police Scotland about this.

Current methods of statistical recording in Scotland make it very difficult to ascertain which domestic homicides have been preceded by domestic abuse. The most recent Scottish homicide statistics confirm that for all homicides recorded in the last ten years, just under half (44 per cent) of the female victims aged between 16 and 70 years were killed by their partner or ex-partner (26 per cent were killed by an acquaintance, 9 per cent were killed by their son or daughter and 8 per cent were killed by a stranger) (Scottish Government, 2019a: calculated

from table 9). It can be difficult to ascertain how many partner-homicides (male and female perpetrated) result from abusive relationships. Although the Scottish Government record statistics in relation to domestic abuse, and separately homicides, these datasets do not overlap. Domestic abuse is not included as a motive for the homicide and although there is some recording of homicide in the *Domestic Abuse* release (Scottish Government, 2019b: table 2), this publication does not further distinguish between male and female accused or clarify who the perpetrator of the domestic abuse is. Currently, therefore, national statistics do not provide a clear picture on the current landscape of domestic abuse homicides in Scotland. Similar observations have been made in other jurisdictions regarding the limitations of centralised homicide data (Scott and Davies, 2002).

At the level of Scottish criminal procedure, if a woman is charged with the homicide of her partner, she will appear on a petition warrant in the Sheriff Court. Thereafter, an indictment will follow which will set down a date in the High Court for a Preliminary Hearing. In moving from the category of complainer to accused, a woman will lose the specialised knowledge of legal professionals that might have been afforded to her through the specialised Domestic Abuse Court: the specialised training of the Sheriff and procurator fiscal and the close relationship with domestic abuse advocacy group ASSIST. There may be some involvement from groups such as SWA if a woman kills her abuser, but this is not guaranteed. Although the social framework remains one of domestic abuse, the change in status (from complainer to accused) brings with it a loss of specialisation within the Scottish legal system.

Yet specialisation is every bit as necessary. It has been recognised that a female accused in this context is likely to face pre-trial problems such as consulting with an all-male legal team (Bochnak, 1981: 49; *R v Muscroft*) and consulting in prison environments (such as that in Scotland's main female prison- Cortonvale¹⁹) where private consultation rooms are limited (meaning she may have to meet with her legal team in an open plan area alongside other prisoners). These pre-trial problems can have a significant impact on a woman's ability to relay her story and ultimately provide her legal team with the necessary information to construct her defence (Bochnak 1981; Duivan 1997; Gillespie 1989; Rosen 1993, Schneider 2000; Schnieder and Jordan 1977-1978; Sheehy, 2014; Thyfault 1984, 43).

In terms of criminal defences, very little change has occurred in Scots law over the last forty years. Some minor change has been evident within the pleas of diminished responsibility as a result of *Galbraith*. Following the codification of diminished responsibility it was clarified that, although voluntary drug and/or alcohol intoxication cannot form the

basis of the defence, the influence of drugs and alcohol will not rule out diminished responsibility *per se*.²⁰ Galbraith introduced ‘Battered Woman Syndrome’ (BWS) into legal and social vernacular in Scotland (although some reference to the syndrome is evident in cases beforehand²¹). During the original trial, evidence had been led from a psychologist who noted that the accused had been suffering from post-traumatic stress disorder and learned helplessness- essentially that Kim Galbraith had been suffering from BWS. Since then, the syndrome was not subjected to legal scrutiny until the case of *Graham* when the Appeal Court has replaced the language of BWS with the terminology of ‘Battered Person’s Syndrome’ (BPS) and suggested that, moving forward, the language of BWS/BPS will be replaced with the more general terminology of post-traumatic stress disorder (a small but arguably positive development given the longstanding criticism of BWS (McPherson, 2019).

As highlighted in the introduction, the Scottish Law Commission is undertaking a review of homicide and the current stage of this review is an examination of defences to murder. The Scottish Law Commission has shown previous reluctance to engage with the more political, gendered aspects of legal defences (2004), however, in 2020 representatives from SWA met with members of the Homicide project team, discussing criminal defences and the safeguards which would be needed if a ‘domestic abuse defence’ were to be introduced. Around this time, high profile legal figures in Scotland also raised the issue of legal responses to women who kill.²² However, the formal dialogue surrounding homicide reform has not included legal responses to women who kill their abusers. This is markedly different from the comparable reform which took place in England and Wales in relation to the loss of control defence; the Law Commission had explicitly been asked to review partial defences to murder following concerns about how provocation works in domestic homicide cases (Ministry of Justice, 2010: para 37). In an international context, women’s movements have highlighted the issues surrounding women’s access to criminal defences (Schneider, 2000), especially women’s access to self-defence which holds particular significance given its status as a full defence and the number of studies which have pointed to it being the most common context in which women kill their abusers (Browne, 1987; Daly and Wilson, 1990; Gillespie, 1989; Johnstone, 2008; Ogle and Jacobs; Walker, 1989). This level of focus and attention on this aspect of domestic abuse has not been replicated in Scotland despite the number of cases which exists in which a woman has killed against a background of domestic abuse.

Methods

This research analysed 62 cases in which a female was accused of killing her abusive partner

in Scotland between 1990 and 2018. These cases were identified through legal and media reporting. Nine of the cases identified had been subject to an appeal (eight by the principal female accused and one by a male co-accused). A further five had been the subject of a published ‘sentencing statement’- comments made by the judge during sentencing (the Scottish Judiciary website publishes the sentencing statements of cases deemed to be of public interest). It has been recognised that legal reporting typically accounts for a small number of cases of this nature and as such, there exists precedent for using newspaper and media reporting to gather information about cases in which women kill (Sheehy, 2014; Gillespie, 1989). Those cases which had not been the subject of legal reporting were identified using online newspaper databases and other media publications such as BBC Scotland and STV news. ‘The Herald’ database holds information on reports from 1989. It was difficult to identify any cases before this time, hence the period of examination. Although it must be recognised that information selected for presentation by journalists is not consistent (or always reliable), the searches conducted provided a wealth of information which was otherwise unavailable.

In all of the cases included in the study, a background of domestic abuse was referred to in at least one report and/or had been accepted by the court.²³ In 14 of the cases identified, it was noted that there existed corroborative evidence of the domestic abuse. In two further cases, ex-partners of the male abuser confirmed that they had been subject to domestic abuse by the deceased. In three of the cases identified, it was reported that the female had previously attempted suicide in response to the ongoing abuse.

In all 62 cases the name of the accused and deceased were ascertainable, their relationship to one another, whether co-accused were involved, the method of killing, the location of the killing, the council area in which it happened, the progression of the case and the outcome (including sentence). The age of the female accused at the time of the homicide was reported in 61 of the 62 cases. The defence position was ascertainable in 57 of the 61 cases where proceedings continued. Materials relating to these cases were further analysed in order to ascertain whether the fatalities took place during confrontation or not.

These variables were analysed using IBM® SPSS.

Findings

The 62 cases identified accounted for 63 victims: 61 male partners or ex-partners, one female partner and one female acquaintance who was with one of the males at the time of his death. All of the alleged homicides took place in a private residence: 61.3 per cent in a home shared by the deceased and accused, 21.0 per cent in the accused’s home, 12.9 per cent in the victim’s

home and 4.8 per cent in another (named) person's home. Most of the homicides took place in the Glasgow area (27.4 per cent), with homicides occurring across 21 of the 32 council areas in Scotland. In keeping with all Scottish homicides, the main method of killing was knife (77.4 per cent). In 18 of the cases (29.0 per cent), the deceased had been killed by a single blow. In seven of the cases (11.3 per cent) it was reported that the knife has initially been presented to the accused by the deceased.

The 62 female accused identified were aged between 19 and 59 at the time of their arrest. Four of the women were identified as disabled at the time of the alleged offence.

Seven of the homicides (11.3 per cent) were found to have occurred in non-confrontational circumstances: when the abuser was sleeping (three cases), where he was voluntarily incapacitated (one case), where he was involuntarily incapacitated (one case), through fire-raising of his property whilst he was inside (one case) and where he was approached and strangled from behind (one case). In a further seven cases, it was unclear whether the fatality occurred during confrontation or not. The remaining 48 cases (77.4 per cent) involved confrontational circumstances: where the deceased was attacking the accused or where both parties were engaged in an argument or "row". Included in this group were two cases in which it was noted that the deceased was stabbed in the back during an argument. The definition of 'confrontation' adopted in this work is wider than in previous research which used case reports to ascertain whether the couple were face to face during the fatality (Maguigan, 1991-1992). In most of the cases identified in this research, it was clear the woman was facing serious violence at the time of the fatality, but it was not always clear whether both parties were face to face or whether the abuser had their back turned momentarily. Examples of the violence being faced included: death threats, throttling, being pinned down, sexual attacks, being dragged out of bed and intervening to protect a child from an attack. The findings of the case analysis support findings made elsewhere: that women are typically facing direct attacks from their male abusers at the time when they kill (Maguiagan, 1991-1992; Nourse, 2001). Only two of the cases identified involved pre-meditation and an attempt to cover up what had happened. Most women phoned emergency services and acknowledged they were responsible for what had happened.

Exactly half of the women accused of murder pled guilty to culpable homicide (50.0 per cent). In the remaining cases, 45.1 per cent progressed to trial accused of either murder or culpable homicide and in 4.8 per cent of cases the outcome was either unknown, proceedings were dropped, or a guilty plea was accepted to a non-fatal offence. Seven women were accused of the homicide alongside another person or persons. In three of those cases, the principal

female accused denied involvement in the fatality and it was later accepted that her co-accused was responsible for the homicide.

Most women accused were convicted of a homicide: 74.2 per cent were convicted of culpable homicide and 12.9 per cent were convicted of murder. Of the remaining women, 9.7 per cent were acquitted of all charges. The most common defence position advanced was one of provocation and this was advanced even in circumstances which were suggestive of self-defence:

[The accused and her husband] got into a fight in the kitchen at their home ... and he grabbed her by the throat. [The accused] claimed she could not push him off and reached out blindly, grabbing a kettle, but he ducked out of the way and she lost grip of it. Next, she tried to throw a coffee jar at him, with no effect. She said she could feel herself passing out when she picked up a knife and struck out at him. He let go and slumped to the floor. The wound, which was near the top of his left shoulder, cut the pulmonary artery. [The accused] had originally been charged with murder, but pleaded guilty to the lesser offence of culpable homicide.²⁴

[The deceased] who had already been convicted of assaulting [the accused] who was blind, began shouting at her as she lay in bed. She had been aware Legal change and legal inertia 11 of something hitting the bedside cabinet, reached down and found it was a knife, before [the deceased] pulled her from the bed, shook and hit her, and then kicked her in the stomach as she fell.

As she got up, she heard him coming at her again and she struck out with the knife.²⁵

Describing the lead-up to the tragedy, [the accused] added: ... I had my Walkman on in the kitchen and I didn't hear him come in, but felt him grab my shoulder and push his hand in my face. He had grabbed my wrists. I still had the knife that I was chopping an onion with in my hand. The struggle went from the kitchen to the hall, then the bedroom.²⁶

[The deceased] put his hands round her throat and, referring to a previous girlfriend who had committed suicide, told [the accused] she would be next. After he pulled her on to the bed, he put a pillow over her face and raped her. '[The deceased] apparently lifted a knife and she describes him as holding the blade towards himself, goading and provoking her. She grabbed the knife and stabbed him once in the chest.²⁷

Eleven women did advance positions of self-defence, three of which involved a context of rape specifically. Three of these women were acquitted on the basis of self-defence, three were convicted of murder²⁸ and the remaining five were found guilty of culpable homicide,

suggesting a partial acceptance of the defence.

Those convicted of murder faced life sentences with punishment parts ranging between ten and 19 years. Of the 46 women convicted of culpable homicide, 31 received custodial sentences ranging from one to ten years imprisonment. One woman was detained indefinitely under psychiatric care, one received a deferred sentence, three were admonished and ten were placed on probation. One sentence was unknown. Notably, no woman was admonished or placed on probation after 2006. The average length of a custodial sentence for those convicted of culpable homicide between 1990 and 2006 was 4.6 years. Between 2007 and 2018 this average increased to 5.6 years, suggesting sentencing has increased for women in this context.

Proposals for reform

The difficulty of achieving legal change in relation to domestic abuse has been recognised. McNamara et al. (2019) recently provide an overview of the ‘processes’ of change, concluding that relative to other areas of reform, domestic violence change follows decades of criminal law research and evidence pertaining to criminal justice failures, rather than pre-emptive criminalisation. For them, this suggests that, in process terms, domestic violence reform is not seen as urgent as other areas, but also that recognising complexity can obstruct change if other areas are viewed as easier to reform.

It can, of course, be questioned whether legal change – particularly legislative change- should always be the goal of feminist activism (Stubbs, 2003; Daly and Curtis-Frawley, 2006; Walklate, 2008; Burman and Brooks-Hay, 2018). Certainly warnings have been issued about over-reliance on a criminal justice system which discourages an examination of male privilege and the use of violence, and encourages a focus on the individual characteristics of offenders and victims, specific practices and procedures (Munro, 2017; Walklate, 2008). If legal change is going to be considered an effective tool for addressing the inequality which underpins domestic abuse, there must be wider engagement with those involved in the daily implementation of this reform in order for there to be understanding of, and commitment to, the ideology upon which the reform is based.

In terms of the change which has been implemented in Scotland recently- the introduction of a specific domestic abuse offence- it remains to be seen how ‘successful’ such criminalisation will be in practice. The problem of having to evidence a ‘course of conduct’ is already apparent (*Spinks*) and it would appear that there have been few, if any, convictions where the abuse in question is psychological rather than physical.

Yet, despite such reservations about law reform there are a plethora of changes which could be made in this area: the professional training delivered to solicitors could include training on domestic abuse, therefore, lessening the knowledge gap between those professionals in specialised courts and those in criminal practice generally; prisons could prioritise private consultation rooms for those remanded in relation to an intimate partner homicide; domestic homicide reviews could be introduced in Scotland and/or statistical recordings of homicide could better represent those which were preceded by domestic abuse; specific campaigns could be launched in Scotland to raise awareness about this aspect of domestic abuse. At the level of more significant legal change (likely to be met with more resistance), character evidence restrictions could be removed in order that a fuller background of domestic abuse could be presented to the court, expert evidence could be led on the issue of coercive control specifically and/or judicial directions could be introduced in cases in which women kill to dispel myths associated with domestic abuse. The requirements of defences themselves could also be reformed or reconsidered with women who kill their abusers in mind – something which is likely to be the subject of consideration by the Scottish Law Commission.

There exists, therefore, a spectrum of changes which could be implemented in this area. Enacting one alone, would move Scotland away from the landscape of inertia which has manifested itself in this aspect of domestic abuse.

Conclusion

Violence against women has been placed “squarely on the policy agenda” (Walklate, 2008: 47) – a fact which can be attributed to organised and persistent feminist activism and the work of groups such as SWA who have manoeuvred themselves into effective positions of influence. This paper has shown that whilst a great deal of contemporary focus has been placed on capturing the subtle aspects of coercive control, at the other end of the spectrum, cases in which women kill their abusers remains a neglected subject matter. The empirical work which has been presented in this paper provides insight into the landscape of cases of this nature in Scotland. Most of these cases have been unreported legally, meaning that they have avoided close scrutiny. The results presented show that Scottish cases are in keeping with the international landscape: most women kill during confrontation, using a weapon, in their home. There is a high incidence of pleading guilty to reduced charges in this context, and a lack of success with self-defence. Mapping sentences attached to culpable homicide convictions suggests that women who kill their abusers face higher sentences now than they did twenty years ago. At a time when homicide and defences to murder are under review in Scotland, it is crucial that any future proposals for change are based on the reality of cases and the existing

landscape.

Although the male dominated Scottish legal profession has previously resisted legal change, the Scottish Parliament has shown itself to be willing to engage, not only with legal change, but the structural inequality which has been faced by women historically and which has facilitated domestic abuse. The complexity of achieving justice for women who kill their abusers has long been recognised. Scotland would not be alone in finding this problem difficult to remedy, but at this point it does stand alone in not asking the question of how the law can adequately reflect the experiences of women who their abusers.

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Conflict of interest

The author declares there is no conflict of interest

¹ This was significant since definition of a matrimonial interdict excluded a wide category of people who may wish to have a power of arrest attached to an interdict against an abusive person: divorced spouses, same-sex cohabitants, non-cohabitant partners, other family members such as parents or grandparents, or neighbours of abusive people.

² As introduced by the Criminal Justice (Scotland) Act 2003.

³ Domestic Abuse (Scotland) Act 2011.

⁴ When the Protection from Harassment Act 1997 was introduced, it applied to Scotland in a limited manner through sections 8-10.

⁵ It was not until 2010, with the introduction of the Criminal Justice and Licensing (Scotland) Act that stalking was introduced as a statutory offence.

⁶ The Lord Advocate is the chief legal officer of the Scottish Government and the Crown Office, in both criminal and civil matters.

⁷ In 2012 a specialized court was introduced into Edinburgh and there are also now domestic abuse cluster courts in Ayr, Dunfermline, Falkirk, and the Scottish Borders, which schedule domestic abuse cases to be heard during the same timeframe. Calls are currently being made to roll the courts out across Scotland. For discussion see, <https://www.commonspace.scot/articles/12167/how-are-scotland-s-domestic-abuse-courts-working>

⁸ *Smith v Donnelly* 2001 SLT 1007

⁹ Criminal Justice and Licensing (Scotland) Act 2010 s 38. Initial reporting of domestic abuse following from the 2010 Act, treated the offences of ‘threatening or abusive behaviour’ and ‘breach of the peace’ separately – which emphasised that ‘threatening or abusive behaviour’ was being used frequently to respond to acts of

domestic abuse. It has been reported that of the 59,847 incidents of domestic abuse recorded in 20011-12 the most common was assault (44 per cent) and the second most common was threatening or abusive behaviour (17 per cent) (Scottish Government, 2012: 5).

¹⁰ Serious Crime Act 2015 s 76.

¹¹ The offences of stalking and threatening and abusive behavior are alternatives charges, as per s 8.

¹² As is evident, the development of civil law responses to domestic abuse increasingly relied upon the use of criminal law sanctions, creating ‘hybrid’ offences. In keeping with this development, was the Forced Marriages (Protection and Jurisdiction) (Scotland) Act 2011. Interestingly, this Act also made clear the fact that, despite its obvious influence on law and policy development, the Scottish women’s movement has not always been in control about the direction of change; the 2011 Act was introduced despite the feminist concerns which were raised over the criminalisation of forced marriage. Concerns which appear to have been borne out by the resultant fall in the number of women seeking redress from authorities.

¹³ This Act had been introduced to overturn the decision in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175. Later repealed and replaced with the Matrimonial Homes Act of 1983, for spouses, the Act had the effect that the ‘owner’ spouse could no longer evict the other without a court order. The Act did not extend to local authority tenancies under the Housing Acts (Stone, 1968).

¹⁴ Personal communication with previous director of Scottish Women’s Aid, Professor Fran Wassoff, December 2019.

¹⁵ See for example comments made in reference to the case against Margaret Lochie in 1996, ‘Killer wife is released on probation Court shows mercy to the long-suffering victim of a violent and drug-addicted husband’ *The Herald* (28 May 1996) <http://www.heraldscotland.com/sport/spl/aberdeen/killer-wife-is-released-on-probation-court-shows-mercy-to-the-long-suffering-victim-of-a-violent-and-drug-addicted-husband-1.453327> Accessed 21st Oct 2019

¹⁶ Scottish Women’s Aid and other support groups are publicly funded and depend largely on grants from the Scottish Government in order to support any legal change, for example, through training. For example, ahead of the Domestic Abuse Bill passing through Parliament, SWA received a £165,000 grant to “support improved understanding of coercive control within communities and develop bespoke training materials for Scottish Women’s Aid staff”, <https://news.gov.scot/news/funding-for-scottish-womens-aid>

¹⁷ In this case an order was sought to postpone the publication of the report of proceedings due to hostile press coverage which was anticipated to be experienced during any retrial.

¹⁸ Those who note that such killings are rarely pre-meditated are: Ewing (1987: 87), Browne,(1987: 135) and Ogle and Jacobs (2002: 44). Ewing also notes that women usually admit to carrying out such killings (at 45) as does Chan (2001: 49) and Peterson (1999: 30). Guns are used more in an American context and Browne notes that they were used in 81 per cent of cases in her study (at 140) but this runs contrary to other studies which have found that women are more likely to use cutting instruments in homicides – a fact which has been linked to their domestic role (Wolfgang, 1998: 87). In Scotland, the most common method of all homicides is use of a knife (Scottish Government, 2019a: table 7).

¹⁹ HMP & YOI Cornton Vale continues to be described by the Scottish Prison Service as a “national facility” but is one of several prisons which holds female prisoners in Scotland.

²⁰ Criminal Procedure (Scotland) Act 1995 s 51B as introduced by s 168 Criminal Justice and Licensing (Scotland) Act 2010. This clarification of the common law understanding of the plea was seen as significant enough to offer justification for putting the plea into legislative form following *Galbraith* (Scottish Law, 2004: section 3.5). Although the Scottish Law Commission considered mental condition defences in some detail, they did not engage with the (more political) gendered aspects of diminished responsibility in particular.

²¹ See for example *HM Advocate v Margaret Murray* 2000, unreported as discussed, *The Herald, Disabled Woman Jailed for Killing Husband*, 29 September 2001.

²² See for example Lady Scott’s discussion paper exploring the issue of whether the criminal law gives women who kill their abusers fair treatment, presented at the Faculty of Advocates ‘Women who kill’ event, December 2019 and University of Glasgow online event ‘Women who kill and criminal defences’, August 2020.

²³ Two further cases, not included in the study group, were identified in which the female accused claimed she had been the subject of domestic abuse but this was explicitly rejected by the court.

²⁴ The Scotsman, *Jail for drug addict who killed husband*, 27 March 2008.

²⁵ The Herald, *Blind woman who killed lover is admonished*, 29 September 2000.

²⁶ Greenock Telegraph, *Killer writes book on torment*, 3 December 2010

²⁷ The Herald, *Two years for death woman who killed rapist partner*, 28 November 2002

²⁸ This would also suggest a rejection of the woman's account of abuse although this was not specifically articulated by the court.

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