

Glasgow Caledonian University Law  
*Journal for Law and the Common Good*



Volume 1  
2023

*With thanks to the Clark Foundation for Legal Education*



Journal for Law and the Common Good

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## Introduction

*The Journal for Law and the Common Good is a student led publication which features articles written by Glasgow Caledonian University Law students. The Journal encourages students to submit original work which engages with the theme of Law and the ‘Common Good’ – the mission of GCU. Such engagement allows students to broaden their legal research skills while contributing to a bank of legal articles which collectively aim to help tackle and improve legal deficiencies.*

*This inaugural edition of the journal showcases work from 2021 GCU Law graduates, who completed their studies and journal contributions in COVID-19. We thank the authors and the editors, for their work on the Journal during this time, which presented many difficulties.*

*We also highlight the invaluable assistance afforded by those involved in the organisation of the Journal. Recognition must be given to the GCU Law department, and more specifically to the Academic Advisory Team consisting of Seonaid Stevenson-McCabe and Dr Karla Perez Portilla who collectively oversee the running of the Journal. Thanks also to Dr Tracy Kirk for her assistance in setting up the Journal before leaving GCU Law in 2021.*

*Special appreciation must also be shown to [The Clark Foundation for Legal Education](#), for making publication of *The Journal for Law and the Common Good* a reality. They have also funded the annual Law for the Common Good Lecture, and we appreciate their continued support.*

*The Student Editorial Team*

## An Analysis of the Impact of the Domestic Abuse (Scotland) Act 2018, Domestically and Internationally

**Rachel Dornan**

*This article was up to date at the time of writing (August 2021)*

In 2018 Scotland made a revolutionary attempt to align the criminal justice system with the modern-day position towards domestic abuse, by introducing the Domestic Abuse (Scotland) Act 2018.<sup>1</sup> On paper the Act is exceptional; the recognition of a course of behaviour,<sup>2</sup> the focus on the accused's conduct,<sup>3</sup> the inclusion of children<sup>4</sup> and the safeguarding mechanisms for victim's post-conviction,<sup>5</sup> are all amongst factors which have contributed to the argument that this piece of legislation is 'world-leading'.<sup>6</sup> However, we must consider how the Act works in practice, rather than merely on paper.<sup>7</sup> It is therefore critical to scrutinise the impact of this Act, both domestically and internationally, in order to ensure it is achieving its aims.

### Why There was a Need for the Act

Pre-2018 Scotland had no specific offence or statutory definition of domestic abuse.<sup>8</sup> When dealing with domestic abuse cases prosecutors tended to utilise common law crimes, typically

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<sup>1</sup> Domestic Abuse (Scotland) Act 2018 (hereinafter 'DASA' or 'the Act' or 'the 2018 Act')

<sup>2</sup> Ibid s 1(1)(a)

<sup>3</sup> Ibid s 4

<sup>4</sup> Ibid s 5

<sup>5</sup> Ibid sch 3(9)

<sup>6</sup> Chris Green, 'Scottish Parliament passes 'world leading' domestic abuse law' (*Inewscouk*, 1 February 2018) <<https://inews.co.uk/news/uk/scottish-parliament-passes-world-leading-domestic-abuse-law-122769>> accessed 4 April 2021

<sup>7</sup> Brian R Cheffins, 'Using Theory to Study Law: A Company Law Perspective' (1999) 58(1) *The Cambridge Law Journal* 197, 201

<sup>8</sup> Michele Burman and Oona Brooks-hay, 'Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control' [2018] 18(1) *Criminology & Criminal Justice* 67,71

assault<sup>9</sup> and breach of the peace.<sup>10</sup> This was thought, by Lily Greenan, Manager at Scottish Women's Aid (SWA), to be a limitation of the Scottish legal system as the law focussed “*on discrete incidents of abuse rather than the set of behaviours*” of an abuser.<sup>11</sup> This approach came to a halt in 2018, when the revolutionary DASA introduced that is now an offence for a person (A) to engage ‘*in a course of behaviour which is abusive of A’s partner or ex-partner (“B”).*’<sup>12</sup> This has moved Scotland away from its long-established specific incident approach towards domestic abuse and it ensures that we will now definitively recognise domestic abuse as a continuum.

The Act also criminalised coercive control for the first time in Scotland’s history. The decision to incorporate this within the offence was a result of efforts from academics who gained public and political support, namely Dr Marsha Scott, Chief Executive Officer of SWA<sup>13</sup> and Professor Evan Stark. Stark, who first developed the concept of coercive control in 2007,<sup>14</sup> focuses much of his work on the psychological methods of domestic abuse. These include the monitoring of one’s daily activities, deprivation of their financial access, specifications on their eating amounts, sexual activity, and access to transport.<sup>15</sup> It is clear that Stark’s work strongly influenced the drafting of the Act, as his factors are identical to those which became section

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<sup>9</sup> The Scottish Government, 'Domestic Abuse Recorded by The Police in Scotland, 2010-11 and 2011-12' (*Gov.scot*, 30 October 2012) <file:///C:/Users/User%201/Downloads/00408658%20(1).pdf> accessed 12 January 2021.

<sup>10</sup> Breach of the peace was later replaced by the ‘Threatening or abusive behaviour’ and ‘Stalking’ offences under the Criminal Justice and Licensing (Scotland) Act 2010, s (38)

<sup>11</sup> Speaking at the Crown Office and Procurator Fiscal Service Domestic Abuse Conference, 2013, <<http://www.copfs.gov.uk/component/content/article?id=742:solicitor-general-highlights-the-need-for-a-more-modern-approach-to-tackling-domestic-abuse-in-scotland>> [Accessed 14 March 2021].

<sup>12</sup> The Act s 1

<sup>13</sup> Dr Marsha Scott, The Making of the New ‘Gold Standard’: The Domestic Abuse (Scotland) Act 2018, in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control* (Springer, Singapore 2020) 179

<sup>14</sup> Evan Stark, ‘Coercive Control’ in Nancy Lombard and Lesley McMillan (eds), *Violence Against Women: Current Theory and Practice in Domestic Abuse, Sexual Violence and Exploitation* (Jessica Kingsley 2013) 17

<sup>15</sup> Evan Stark ‘Re-presenting Battered Women: Coercive Control and the Defense of Liberty’ (Ph. D Thesis, Les Presses de l’Université du Québec, 2012) 4.

2(3).<sup>16</sup> The inclusion of these examples within the Act is to make the law more accessible to the general public by helping victims of abuse to identify their circumstances with the law.

It is important to note that the Act also introduced more protections to victims of abuse. Specifically, the Act made amendments to section 234AZA of the Criminal Procedure (Scotland) Act 1995.<sup>17</sup> These amendments provided that the court must now always ‘consider’ the implementation of a non-harassment order (NHO) in every relevant case.<sup>18</sup> The decision to incorporate this within the DASA came from the legislative process of the Domestic Abuse (Scotland) Bill, after Parties such as SWA and Police Scotland<sup>19</sup> recommended that NHO’s should be a routine consideration at sentencing.<sup>20</sup>

### The Act in Practice

The Act came into force on the 1<sup>st</sup> of April 2019. Since then, we have begun to see some information arise surrounding the practical impact it has had. It is appropriate to begin with the statistical data to assess the Act’s performance on paper, then follow on by assessing the social impact of the Act, and then conclude by considering the impact that it has had outwith Scotland. This will help us understand how successful the Act has been in terms of prosecutions and the wider cultural impact.

### Statistics: Year One

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<sup>16</sup> The Act s 2(3)

<sup>17</sup> Criminal Procedure (Scotland) Act 1995

<sup>18</sup> Ibid, s 234AZA(4)(a)

<sup>19</sup> Police Scotland Response to the Scottish Government Consultation on a Criminal Offence of Domestic Abuse (Response 59404148) p.5.

<<file:///C:/Users/User%201/Downloads/Scottish%20Women's%20Aid%20.pdf>><file:///C:/Users/User%201/Downloads/Police%20Scotland.pdf> [Accessed 18 January 2021]

<sup>20</sup> Ross-shire Women’s Aid Response to the Scottish Government Consultation on a Criminal Offence of Domestic Abuse (Response 1021614978) p.5. <<file:///C:/Users/User%201/Downloads/Ross-shire%20Women%E2%80%99s%20Aid.pdf>> [Accessed 18 January 2021]

In September 2020, the Crown Office and Procurator Fiscal Service (COPFS) published their 2019-20 report on Domestic Abuse and Stalking Charges in Scotland.<sup>21</sup> There was a total of 30,718 reported charges which had a domestic abuse identifier attached,<sup>22</sup> 1,065 (3.5%)<sup>23</sup> of these were brought in relation to the Act.<sup>24</sup> Whilst this may seem like a low figure when contrasted against the overall charge reports for that year, it does demonstrate that there was a need for the legislation, and that it was used.<sup>25</sup> Of the 1,065 reports, 1,022 led to court proceedings.<sup>26</sup> That is a 96% conversion rate which is remarkable for the Act's first year. The report also provided charges related to the section 5 'child aggravator'.<sup>27</sup> It was found that out of 1,065 reports, 251 of them involved a child,<sup>28</sup> and 98% led to court proceedings.<sup>29</sup> This is a positive sign as it shows that the decision to include children within the offence was well-founded. Although these statistics are informative, they do not present conviction rates. There have been some reports suggesting that the Act has attained around 13 convictions since it came into force,<sup>30</sup> however as the legislation is only in its infancy, there has been little evidence to suggest much more.

Whilst it is challenging to fully comprehend the statistical success of the Act's first year, it can be argued that it shows police and prosecutors applied the legislation to good effect. Prior to the commencement of the Act, police officers and staff received comprehensive training on the

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<sup>21</sup> The Crown Office and Procurator Fiscal Service, 2020. *Domestic Abuse and Stalking Charges in Scotland 2019 – 2020* [online] The Crown Office and Procurator Fiscal Service, Available at: <<https://www.copfs.gov.uk/images/Documents/Statistics/Domestic%20Abuse/Domestic%20Abuse%20and%20stalking%202019-20.pdf>> [Accessed 10 March 2021]

<sup>22</sup> Ibid p.1.

<sup>23</sup> Ibid, p.1.

<sup>24</sup> Ibid, p.8.

<sup>25</sup> Ibid

<sup>26</sup> Ibid, p.8.

<sup>27</sup> The Act s 5

<sup>28</sup> Ibid

<sup>29</sup> Ibid

<sup>30</sup> BBC, 'New domestic abuse laws: More than 400 crimes recorded' (*Bbc.co.uk*, 17 August 2019) <<https://www.bbc.co.uk/news/uk-scotland-49374667>> accessed 15 March 2021.



new legislation.<sup>31</sup> The evaluation results showed that the majority of participants demonstrated a strong understanding of how coercive control is used by perpetrators (95%), and what the stages of coercive behaviour are (94%).<sup>32</sup> When considering the COPFS statistics, it is feasible to say that the training programmes were an influential factor which led to such great statistics in the Act's first year.

### Statistics: Year Two

At the time of writing, there was no up-to-date COPFS statistics for the Act's second year in practice.<sup>33</sup> Police Scotland, however, released reports on crime statistics which they recorded over each quarter (Q) of the working year. It is important to note these statistics may be subject to changes depending on factors such as case dismissals or a difference in charges.<sup>34</sup> For the period of April 1<sup>st</sup> to June 30<sup>th</sup> 2020 (Q1), the number of police recorded crimes under the Act was 363.<sup>35</sup> Comparing this with the same period in 2019, there is a 14.6% reduction.<sup>36</sup> The same trend is seen in Quarter 2 (-10.1%)<sup>37</sup> and Quarter 3 (-6.7%).<sup>38</sup> Although not official, the

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<sup>31</sup> 18,500 officers and staff received e-learning training, and a further 14,000 officers received face-to-face training. See Safelives, 'Domestic Abuse Matters (Scotland) Change Programme for Police' (*Safelives.org.uk*, August 2018) <<https://safelives.org.uk/sites/default/files/resources/DA%20Matters%20Scotland%20Trainer%20Info%20Pack%20Aug%202018.pdf>> accessed 14 March 2021.

<sup>32</sup> SafeLives, 2020. *Domestic Abuse Matters Scotland, Evaluation report* [online] SafeLives, p.6. Available at: <<https://safelives.org.uk/sites/default/files/resources/Domestic%20Abuse%20Matters%20Scotland%20-%20Evaluation%20Report.pdf>> [Accessed 15 March 2021]

<sup>33</sup> This is estimated based on the publication date of the 2019/20 COPFS Domestic abuse and stalking statistics.

<sup>34</sup> The Scottish Government, '*Criminal Proceedings in Scotland, 2017-18*' (January 2019) <file:///C:/Users/User%201/Downloads/00545592.pdf> accessed 18 March 2021 Page 89.

<sup>35</sup> Police Scotland, 2020/21. *Management Information Force Report: Quarter 1, 2020/21*. [online] Available at: < <https://www.scotland.police.uk/spa-media/zrlgmccm/force-report-q1-2020-21.pdf> > [Accessed 21 March 2021]. Page 4, Table 2.

<sup>36</sup> Ibid

<sup>37</sup> Police Scotland, 2020/21. *Management Information Force Report: Quarter 2 2020/21*. [online] Available at: <<https://www.scotland.police.uk/spa-media/0xzdkpxh/force-quarterly-bulletin-official.pdf>> [Accessed 21 March 2021] Page 4, Table 2.

<sup>38</sup> Police Scotland, 2020/21. *Management Information Force Report: Quarter 3, 2020/21*. Available at: <<https://www.scotland.police.uk/spa-media/mjffmkqe/management-information-force-report-quarter-3-2020-21.pdf>> [Accessed 21 March 2021]. Page 4.

statistics do tell us that there has been a decrease in reporting across every quarter, this is slightly concerning as the hope was to see higher prosecution rates.

At this point it is appropriate to acknowledge the impact of the COVID-19 pandemic. Scotland entered its first government enforced 'lockdown' on the 24<sup>th</sup> of March 2020, which prohibited citizens from leaving their homes except for essential trips.<sup>39</sup> The lockdown was an immediate cause for concern for victims of domestic abuse. Women's organisations expressed concern that victims would be left with little opportunity to seek help or support, and this could ultimately lead to less reporting under the Act.<sup>40</sup> It is therefore fair to suggest that the trend identified above will continue, and we will see a reduction in cases come September 2021. The Police reports should therefore be treated as an early warning sign.

With no official statistics at the time of writing, it was not possible to make general conclusions about the success of the Act's second year. The disruption of the pandemic created a major backlog in court cases,<sup>41</sup> and as a result, some cases may not be heard in court for years.<sup>42</sup> Despite the uncertainty of the pandemic, we should appreciate the value of having this offence in place during this unforeseen time as it demonstrates the progression of a societal shift in attitude regarding the impact domestic abuse can have, as well as cementing the offence in Scottish law.

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<sup>39</sup> The Scottish Parliament, 'Timeline of Coronavirus (COVID-19) in Scotland' (*SPICe-Spotlight.scot*, August 2018) <<https://spice-spotlight.scot/2021/03/19/timeline-of-coronavirus-covid-19-in-scotland/>> accessed 19 March 2021.

<sup>40</sup> *Ibid*

<sup>41</sup> David Bol, 'Domestic abuse charges at four-year high amid victims' concern over courts backlog' (*The Herald Scotland*, 8 September 2020) <<https://www.heraldscotland.com/news/18706361.domestic-abuse-charges-four-year-high-amid-victims-concern-courts-backlog/>> accessed 10 January 2021.

<sup>42</sup> *Ibid*

### The Social Impact

As statistical data is limited at the time of writing, it is helpful to turn our attention towards the social impact of the Act. It would be appropriate to explore the thoughts of SWA, as this organisation is central to the fight against domestic abuse.<sup>43</sup> On the first anniversary of the 2018 Act, SWA published their thoughts on the Act's first year in practice.<sup>44</sup>

The main positive noted was how well the legislation had been embraced at a national level. At a local level, it was noted that there were mixed reviews of the Act's usage across the 36 services in Scotland; some reported that they were thrilled by the efforts of the police and prosecutors and have obtained an NHO against the abuser, whilst others have reported that there had been no change since the Act's commencement.<sup>45</sup> SWA were not particularly concerned by this mixture of opinions as the response is said to be normal with a new piece of legislation of its scale. What did cause concern, however, was the low utilization of the child aggravator, and in response SWA vowed to make this one of their top priorities moving forward.<sup>46</sup>

### 'The Gold Standard': The Wider Impact

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<sup>43</sup> Scottish Women's Aid, 2021. *Scottish Women's Aid Annual Report 2019-20*. [online] Available at: <<https://womensaid.scot/wp-content/uploads/2021/01/SWA-Annual-Report-20192020-final.pdf>> [Accessed 16 March 2021]

<sup>44</sup> Scottish Women's Aid, 'One year of the Domestic Abuse (Scotland) Act – where are we now?' (*Womensaid.scot*, 1 April 2020) <<https://womensaid.scot/one-year-of-the-domestic-abuse-scotland-act-where-are-we-now/>> accessed 17 March 2021.

<sup>45</sup> Ibid

<sup>46</sup> Scottish Women's Aid, 'One year of the Domestic Abuse (Scotland) Act – where are we now?'

The Act has been described as the ‘*best in the world*’,<sup>47</sup> ‘*the new gold standard*’<sup>48</sup> and has therefore been said to be an inspiring piece of legislation ahead of the other UK jurisdictions.<sup>49</sup> Although it is a positive that coercive control is recognised in both the English and Welsh criminal justice system (SCA),<sup>50</sup> and the Irish criminal justice system (DVA),<sup>51</sup> there have been some difficulties highlighted in relation to their approaches.

Since the commencement of the SCA, there has been little success achieved when prosecuting cases based on coercive behaviour alone.<sup>52</sup> It is suggested the cause of this is down to caution from the prosecutors and lack of awareness from the community and the police. Similarly, as regards the DVA, there appears to be a lack of clarity surrounding what constitutes ‘coercive behaviour’ under the offence,<sup>53</sup> which has led to confusion when interpreting the law.<sup>54</sup> Vanessa Bettinson, contrasted between these models in greater detail.<sup>55</sup> Her analysis found that the Scottish model is a promising approach which should urge its neighbouring jurisdictions to

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<sup>47</sup> Community Justice Ayrshire, ‘Gender Based Violence in the Modern World’ Dr Marsha Scott, Chief Executive, Scottish Women’s Aid – Everything you wanted to know about the world’s new ‘gold standard’ Domestic Abuse (Scotland) Act 2018’ (00:23:24) (*Communityjusticeayrshireorguk*, 3 March 2020) <<https://www.communityjusticeayrshire.org.uk/2020/03/03/gender-based-violence-in-the-modern-world-dr-marsha-scott-chief-executive-scottish-womens-aid-everything-you-wanted-to-know-about-the-worlds-new-gold-standard/>> Accessed 29 March 2021.

<sup>48</sup> Dr Marsha Scott, The Making of the New ‘Gold Standard’: The Domestic Abuse (Scotland) Act 2018. in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control* (Springer, Singapore 2020) 177

<sup>49</sup> Vanessa Bettinson, A Comparative Evaluation of Offences: Criminalising Abusive Behaviour in England, Wales, Scotland, Ireland and Tasmania. in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, Singapore 2020) 197-217

<sup>50</sup> Under the Serious Crime Act 2015 s 76

<sup>51</sup> Under the Domestic Violence Act (Northern Ireland) 2018 s 39

<sup>52</sup> Patrick Cowling, ‘Domestic abuse: Majority of controlling cases dropped’ (*Bbccouk*, 4 December 2018) <<https://www.bbc.co.uk/news/uk-46429520>> accessed 20 March 2021.

<sup>53</sup> Irish Women’s Aid Submission on the Domestic Violence Bill 2017 (updated) (December 2017) Available at: <<https://www.womensaid.ie/about/policy/publications/womens-aid-submissionon-the-domestic-violence-bill-2017-december-2017-updated/>> [Accessed on 23 March 2021] 9.

<sup>54</sup> *Ibid*

<sup>55</sup> Vanessa Bettinson, A Comparative Evaluation of Offences: Criminalising Abusive Behaviour in England, Wales, Scotland, Ireland and Tasmania. in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control, Family Violence and the Criminal Law* (Springer, Singapore 2020) 197-217

engage in reform discussions.<sup>56</sup> Her analysis demonstrates that the DASA is a desirable piece of legislation which others should mirror.

### Hawaii

The Act has also been observed on the global stage. On the 15<sup>th</sup> of September 2020, Hawaii became the first US state to enact anti-coercive control legislation.<sup>57</sup> Hawaiian Professor Barbara Gerbet, one of the main researchers, declared that the Act was the main influence for the creation of the Hawaiian statute.<sup>58</sup> When comparing both laws, the components are broadly similar.<sup>59</sup> The Hawaiian legislation defines coercive behaviour as,

*'a pattern of threatening, humiliating, or intimidating actions... behaviour which seeks to take away the individuals liberty or freedom and strip away the individual's sense of self.'*<sup>60</sup>

The legislation then goes on to list examples which mirror those in the DASA, these include, isolating the victim,<sup>61</sup> monitoring the victims' daily activities,<sup>62</sup> and damaging property.<sup>63</sup> The influence the Act has had here shows how valued Scots law is internationally. It illustrates the importance of creating high standard law.

### Australia

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<sup>56</sup> Ibid, 198

<sup>57</sup> Melena Ryzik, 'What Defines Domestic Abuse? Survivors Say It's More Than Assault' (*Nytimescom*, 22 January 2021) <<https://www.nytimes.com/2021/01/22/us/cori-bush-fka-twigs-coercive-control.html>> accessed 29 March 2021.

<sup>58</sup> ACECC, 'Hawaii and California Lead the Way Signing the First Coercive Control Bills in the Americas' (*Theacecc.com*, 3 November 2020) <<https://www.theacecc.com/post/hawaii-and-california-lead-the-way-signing-the-first-coercive-control-bills-in-the-americas>> accessed 25 March 2021.

<sup>59</sup> Peter Cassidy, 'Hawaii's new domestic abuse law influenced by Scotland' (*Newsstv*, 17 September 2020) <<https://news.stv.tv/scotland/hawaiis-new-domestic-abuse-law-influenced-by-scotland?top>> accessed 1 April 2021.

<sup>60</sup> H.B. N0.245 A Bill for an Act relating to Domestic Abuse, House of Representatives Thirtieth Legislature, 2020 State of Hawaii, 2 January 2020 available at <[https://www.capitol.hawaii.gov/session2020/bills/HB2425\\_.pdf](https://www.capitol.hawaii.gov/session2020/bills/HB2425_.pdf)> s 5(1)

<sup>61</sup> Ibid s 5(1)(1)

<sup>62</sup> Ibid s 5(1)(3)

<sup>63</sup> Ibid s 5(1)(7)

Scotland has also received requests from Australian parliamentarians who want Australian law to follow suit.<sup>64</sup> In December 2020, Dr Marsha Scott spoke to an Australian Parliamentary Inquiry, where she discussed the importance of recognising coercive behaviour as part of domestic abuse.<sup>65</sup> At the time of writing, Tasmania was the only Australian state to recognise coercive control as an offence, however other states aim to follow.<sup>66</sup> Although the Australian movement was only in its early days at the time of writing, it reiterates the impact that the Act has had globally. It is truly remarkable to achieve such wide admiration from all around the world, it shows that the Act has been a positive example of domestic abuse legislation.

### Problems Which Remain

The analysis above explores how the Act has operated in practice since its commencement. SWA noted that in order to maintain efficiency, the Scottish Government should ensure competence with regards to the legislation. To have world leading legislation is incredible but to use it well in practice is the true test, which we hope to see realised in years to come. Whilst progress is clear, it would be fair to say that further work is required in order to fully benefit from the legislation.

Throughout the Bill consultation process worries were noted with regards to lack of appreciation of groups such as children and men. Since the Act's commencement, these issues have resurfaced. Although it was a major advancement to include children within the offence

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<sup>64</sup> Women's Safety NSW, 'Australian Government Looks to Scotland To Improve Domestic Violence Laws Around Coercive Control' (*Womenssafety NSW.org.au*, 8 December 2020) <<https://www.womenssafety NSW.org.au/impact/article/australian-government-looks-to-scotland-to-improve-domestic-violence-laws-around-coercive-control/>> accessed 28 March 2021.

<sup>65</sup> Emer O'Toole, 'Australia turns to Scotland for help improving domestic abuse law' (*The National.scot*, 5 December 2020) <<https://www.thenational.scot/news/18923709.australia-turns-scotland-help-improving-domestic-abuse-law/>> accessed 28 March 2021.

<sup>66</sup> Queensland and New South Wales. *Ibid*

by an aggravating factor, many remain to believe that this does not go far enough,<sup>67</sup> and others have suggested that using child abuse legislation, '*(this approach) risks moving the focus away from the particular nature of domestic abuse*'.<sup>68</sup> In the interim, other organisations suggested an increase in public awareness relating to the impact of domestic abuse on children.<sup>69</sup>

Similarly, there have been concerns that male victims of abuse have been marginalised in a system which was originally designed for females.<sup>70</sup> Although the Act is gender-neutral, meaning that it can apply to any (ex)partners regardless of their sex, during the Act's first year only 42 out of 1065 reports were made by male victims.<sup>71</sup> The reason for this disparity could be said to be due to the reluctance of males to speak out.<sup>72</sup> In 2018, it was estimated that one fifth of reported cases of domestic abuse in Scotland were male victims, however charities and support services suggest that a more accurate estimation is around 50%.<sup>73</sup> It should be recognised that the task for males goes wider than the abilities of the Act. Like children, awareness should be raised regarding the male victim, to empower more men with the confidence they require to speak out and this should result in the Act being able to work for everyone in our society.

It may therefore be positive for the Scottish Government to implement a high level of legal education and public awareness to ensure that the population are fully aware of their rights and

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<sup>67</sup> Ibid, p.57.

<sup>68</sup> Ibid

<sup>69</sup> It was recommended that media campaigns and parenting classes may be viable options in order to increase reporting under the Act. p.58.

<sup>70</sup> Coralie Wright, 'The Absent Voice of Male Domestic Abuse Victims: The Marginalisation of Men in a System Originally Designed for Women'. in Stevenson and others (eds), *The Plymouth Law & Criminal Justice Review* (2016) 340

<sup>71</sup> Ibid

<sup>72</sup> BBC News, "My abusive wife battered me over letting the cat in" (*BBC.co.uk*, 25 September 2018) <<https://www.bbc.co.uk/news/uk-scotland-45638626>> accessed 10 April 2021.

<sup>73</sup> Ibid

how to use them. It is only by educating the public – whether they are men, women, or children – that we can really say the law is working for all.

### Conclusion

Measuring the success of the Act has demonstrated the complexity of this field and has revealed that the solution to tackling domestic abuse extends beyond the realms of legislation.

Whilst statistics have shown successful utilisation of the Act during its first year in practice, the impact of the pandemic has meant that updated statistics were delayed. On a social level, the Act has made a substantial impression, both in the UK<sup>74</sup> and across the world.<sup>75</sup> On the other hand, there may be concerns that more needs to be done to protect and engage with child survivors and male survivors.

In conclusion, this research has proved that there can be no silver bullet to eradicate domestic abuse. As Burman and Brooks-Hay said: *‘Legislative change cannot on its own lead to improvements... Improving these practices – through education, training and embedding best practice and domestic abuse expertise – is likely to be more effective than the creation of new offences alone.’*<sup>76</sup>

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<sup>74</sup> Vanessa Bettinson, A Comparative Evaluation of Offences: Criminalising Abusive Behaviour in England, Wales, Scotland, Ireland and Tasmania. in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer, Singapore 2020) 197-217

<sup>75</sup> Emer O’Toole, ‘Australia turns to Scotland for help improving domestic abuse law’ (*Thenational.scot*, 5 December 2020) <<https://www.thenational.scot/news/18923709.australia-turns-scotland-help-improving-domestic-abuse-law/>> accessed 28 March 2021.

<sup>76</sup> Burman, M. and Brooks-hay, O. ‘Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control’ [2018] 18(1) *Criminology & Criminal Justice*, 78.



## Non-surgical cosmetic procedures: the necessity for regulation of non-professionals in the medical aesthetics industry in Scotland

**By Alanis Hunt**

*This article was up to date at the time of writing (August 2021)*

In an age where almost everything we do can be shared online; the prominence of social media, ‘selfies’, and the content creators behind it all have undoubtedly created a new Internet Age. At the turn of the last decade, a new type of celebrity was emerging: the ‘Influencer’. Average men and women were taking to YouTube, Instagram, and other platforms to share reviews and tutorials of beauty related products. This quickly flourished into a billion-dollar industry,<sup>77</sup> with social media propelling normal people into stardom and notoriety. The appeal of these figures appeared to stem from their relatability, compared to traditional celebrities like actors or musicians. Nonetheless, the influence these online figures have had on society at a cultural level is undeniable. With the evolution of this type of media, the expected beauty standards have also changed.

### The Impact of the ‘Influencer’

So, how has this affected the average consumer of the beauty industry? Most notably is through the increase in popularity of non-surgical cosmetic procedures.<sup>78</sup> Beauty products are no longer

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<sup>77</sup> Pamela Danziger, '6 Trends Shaping the Future Of The \$532B Beauty Business' (*Forbes*, 2019) <<https://www.forbes.com/sites/pamdanziger/2019/09/01/6-trends-shaping-the-future-of-the-532b-beauty-business/?sh=197677e8588d>> accessed 20 August 2021. <<https://www.forbes.com/sites/pamdanziger/2019/09/01/6-trends-shaping-the-future-of-the-532b-beauty-business/?sh=197677e8588d>>

<sup>78</sup> '2019 Plastic Surgery Statistics | Cosmetic Surgery in Females' (*Plasticsurgery.org*, 2019) <<https://www.plasticsurgery.org/documents/News/Statistics/2019/cosmetic-procedures-women-2019.pdf>> accessed 21 August 2021.

limited to makeup or skincare products, and it is now very common to hear popular figures discuss injectable, cosmetic treatments. Such treatments primarily consist of dermal fillers and anti-wrinkle treatments. Dermal fillers can be directly injected into the lips or face to create the appearance of fuller lips or cheeks.<sup>79</sup>

Similarly, anti-wrinkle treatments, or ‘Botox’, have a dramatic effect in reducing wrinkles by relaxing the muscles responsible for them.<sup>80</sup> These treatments are considered temporary, as the effects can wear off anywhere between six months to two years.<sup>81</sup> The recovery times of such procedures are a massive advantage for those wishing to avoid traditional and invasive surgery methods. It is understandable to see the appeal of these treatments, and when they are openly discussed, and oftentimes promoted by online figures,<sup>82</sup> we can also understand why many choose to experiment and regard this as a casual treatment as opposed to an actual medical procedure.

### Why Should We Regulate Non-Professionals?

Despite the increased popularity of these procedures across the UK, there is still no law that governs the use and possession of these injectable products. Currently, *anyone* can purchase dermal fillers without the need for a prescription, and worryingly, *anyone* can administer fillers without having any knowledge or training in medical procedures. This has led to a boom in the

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<sup>79</sup> Kristina Liu, 'Dermal Fillers: The Good, The Bad, And the Dangerous - Harvard Health Blog' (*Harvard Health Blog*, 2019) <<https://www.health.harvard.edu/blog/dermal-fillers-the-good-the-bad-and-the-dangerous-2019071517234>> accessed 21 August 2021.

<sup>80</sup> Bagus Komang Satriyasa, 'Botulinum Toxin (Botox) A For Reducing The Appearance Of Facial Wrinkles: A Literature Review Of Clinical Use And Pharmacological Aspect' (2019) 12 *Clinical, Cosmetic and Investigational Dermatology* 223, 234.

<sup>81</sup> Hyo-Jeong Ryu, Seong-Sung Kwak, Chang-Hoon Rhee & Others, 'Model-Based Prediction to Evaluate Residence Time of Hyaluronic Acid Based Dermal Fillers' (2021) 13 *Pharmaceutics* 133.

<sup>82</sup> Kat Tenbarg, 'Young influencers are being offered cheap procedures in return for promotion They say it's coming at a cost' (*NBC News*, 27 April 2022) <<https://www.nbcnews.com/tech/internet/followers-cheaper-lips-young-influencers-detail-allure-cosmetic-proced-rcna14463>> accessed 15 September 2023

medical aesthetics industry; with no control over individual qualifications and training, and as filler products can be so easily acquired, anyone can legally work in this field. The possession of prescription-only, injectable products by unauthorised persons has some consequences under UK statute, but the act of administering any of these products does not.<sup>83</sup> Herein lies the main issue: any person administering injectable treatments faces no ramifications where they are unqualified, or if they cause harm to a patient because of their inexperience and lack of medical knowledge. This has left many practitioners, professionals and many others within the healthcare field extremely concerned about the future of the profession without regulation.<sup>84</sup>

Although there is little regulation, there are many risks associated with filler procedures. The fundamental danger is the increased risk of serious harm and disfigurement to patients. When injecting fillers into the face, the risk of vascular occlusion is highly likely when performed by an under-qualified individual. This is because their awareness of facial anatomy is limited compared to most medical professionals.<sup>85</sup> Vascular occlusion occurs when filler is injected into a blood vessel and creates a blockage that can lead to necrosis of the tissue, resulting in permanent facial disfigurement.<sup>86</sup> When performed by a professional, the risk of serious complications is greatly reduced as their understanding of facial anatomy will be far greater. Furthermore, should complications arise, a medical professional has access to use the prescription-only agent that dissolves filler products (known as Hyaluronidase) when most

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<sup>83</sup> This relates to prescription-only products such as muscle-relaxing treatments. Anyone found in illegal possession of these can face prosecution as per section 62 of the Medicine Act 1968.

<sup>84</sup> All-Party Parliamentary Group on Beauty, Aesthetics and Wellbeing, 'Session 1 – Inquiry Session Into Non-Surgical Cosmetic Procedures: What Is The Concern?' (2020) <<https://baw-appg.com/wp-content/uploads/2020/08/BAW-APPG-minutes-1st-inquiry-session-what-is-the-concern.pdf>> accessed 20 August 2021.

<sup>85</sup> Sito G, Manzoni V and Sommariva R, 'Vascular Complications after Facial Filler Injection: A Literature Review and Meta-Analysis' (Vascular Complications after Facial Filler Injection: A Literature Review and Meta-analysis, 1 June 2019) &lt;<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6624005/>&gt; accessed 4 July 2023

<sup>86</sup> Martyn King, Lee Walker, Cormac Convery & Others, 'Management Of A Vascular Occlusion Associated With Cosmetic Injections' (2020) 13 Journal of Clinical and Aesthetic Dermatology 53, 54.

non-professionals may not. Nevertheless, complications in medical procedures can never be entirely ruled out but having sufficient training and understanding of these specific procedures hugely minimises the possibility of harm to patients.

Accordingly, to legislate within this realm should now be considered obligatory. This industry has become oversaturated with under-qualified individuals due to the clear gaps in the law that enable them to practice. Ultimately, many are at high risk of suffering serious, yet avoidable, harm because of this. We must consider appropriate measures to account for our complete lack of regulation to manage non-professionals in the medical aesthetics industry. This will keep prospective patients and the entire industry safe.

#### How Can Non-Professionals be Regulated?

In Scotland, medical professionals are held accountable to Healthcare Improvement Scotland (“**HIS**”). HIS is regulated by the Healthcare Improvement Scotland (Delegation of Functions) Order 2016. Being registered with HIS is only available to doctors, nurses, and dentists, whilst the industry for non-professionals remains unregulated. With practitioners being inundated with demand for treatments, it would be extremely difficult, if not impossible, to entirely ban non-professionals from practice in Scotland. Instead, statutory regulations should be introduced to ensure non-professionals can be held legally accountable if they wish to operate in this field. As the Scottish Government has the power to legislate over its own healthcare, demonstrated by the introduction and regulation of HIS, they could take a similar approach here.

In January 2020, a consultation paper from the Scottish Government was published seeking public opinion on whether non-medical professionals should be allowed to carry out procedures that penetrate the skin.<sup>87</sup> Their proposal to change the law would be to introduce an amendment

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<sup>87</sup> Scottish Government, *Regulation Of Non-Surgical Cosmetic Procedures: Consultation* (2020)

to section 44 of the Civil Government (Scotland) Act 1982 to allow non-professionals to perform non-surgical cosmetic treatments under licence. These non-professionals would be regulated by a local authority Environmental Health Officer – similar to what currently exists for tattoo studios and skin piercing businesses. The local authority would have discretion to decide if an individual is a “fit and proper person” to hold a licence. The creation of this type of subordinate legislation could begin to govern non-professionals in the industry by holding them accountable to a public body.

The Scottish Government’s proposal is not infallible, but still provides us with a solid foundation to build upon. For example, in establishing who is “fit and proper,” it must be ensured that a licensed injector is held to a higher standard than a tattooist or body piercer. The work involved for tattoos or piercings requires less medical knowledge, and any medical issues that arise with customers can, in general, be addressed quickly. Whereas if a filler procedure goes awry, unqualified practitioners do not have legal access to the prescription-only medication required to reverse the effects of the filler. This could then lead to more grievous harm by comparison. Thus, the standards expected must be higher as the risks of complications are greater with injectable treatments.

In terms of how to improve upon the Scottish Government’s proposal, the first recommendation would be to introduce a statutory duty on injectors to obtain appropriate business insurance and to record and report incidents of serious harm within the subordinate legislation. Record-keeping is considered good practice and current legal requirements ensure that professionals keep medical records for all patients.<sup>88</sup> A similar obligation on non-professionals would be

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<sup>88</sup> *Guidance On Records To Be Kept By Registered Independent Healthcare Services* (Healthcare Improvement Scotland 2019) <<http://healthcareimprovementscotland.org/his/idoc.ashx?docid=344b0333-5f8f-40fa-85de-793dca77af65&version=-1>> accessed 20 August 2021.

beneficial and encourage better documenting and reporting of incidents. Incident reports to the local authority are already a requirement for tattoo or piercing procedures; these are subject to scrutiny upon application for a licence, and for subsequent inspections.<sup>89</sup> Arguably, similar mechanisms should be implemented within licences for injectable procedures.

Another recommendation is that individuals wishing to carry out non-surgical cosmetic procedures must enrol in professional, accredited courses as part of a condition to receive a licence.<sup>90</sup> This means that non-medical professionals would have a similar level of knowledge and understanding as professionals within the industry. Importantly, this would mitigate the risks of harm arising from these procedures, as the administrator will be required to have specific understanding of facial anatomy. Failure to fulfil the course requirements could also mean failure to obtain a licence therefore meaning they would be unable to legally practice.

Local authorities should also be given the authority to strike off or formally caution non-professionals when serious harm occurs due to their negligence or inexperience. The local authority could also enforce the individual practitioner to undergo further training in order to retain their licence, with fines being administered if the individual fails to comply. The power to do this could also be given through eventual legislation.<sup>91</sup>

Additionally, anyone found to be operating without a licence could face punishment through a fine or other non-custodial punishment - as appropriate. The implementation of fines may be

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<sup>89</sup> 'Skin Piercing and Tattooing Licence | Environmental Health' (*Southlanarkshire.gov.uk*) <[https://www.southlanarkshire.gov.uk/info/200211/environmental\\_health\\_licensing/407/skin\\_piercing\\_and\\_tattooing\\_licence](https://www.southlanarkshire.gov.uk/info/200211/environmental_health_licensing/407/skin_piercing_and_tattooing_licence)> accessed 21 August 2021.

<sup>90</sup> Such courses are available through Hamilton Fraser Cosmetic Insurance who operate a recognised Training Course scheme. All of their courses are run by registered plastic surgeons and aesthetic professionals across the UK.

<sup>91</sup> This would be similar to the function of the Civic Government (Scotland) Act 1982 (Licensing of Skin Piercing and Tattooing) Order 2006

advantageous as the threat of financial burdens, and probable negative perceptions of business practices, could deter individuals from practising.

Lastly, patients should be able to easily find out whether an individual administering injectable treatments is licensed. This could be achieved through the creation of an online register led by the Scottish Government, containing details of licensed injectors as well as fully qualified medical practitioners. In the register, this difference between the types of practitioners should be noted, along with the experience and skills of each individual. As this would be available to view online, it would allow potential patients to make an informed decision over which practitioner would be most suited to them. Injectors should also be legally required to declare to patients that they are not medical professionals. This should be done verbally and in written consent forms to ensure a sound understanding of the difference between an injector versus a practitioner and that patients can understand the risks associated with this. This would allow them to make informed decisions over these procedures which puts the patient at the forefront of the decision-making and follows the principles of informed consent.<sup>92</sup>

### The Future of Non-Surgical Cosmetic Procedures

As with any proposed changes, there are naturally some limitations. Licensing provisions introduced by the Government can be either compulsory or discretionary, so local authorities may not fully implement the provisions despite the risks associated with leaving the industry unregulated. Also, there may be statutory limitations with the amount of money individuals could be fined if they are found to be in breach of regulations. This is due to restraints within devolved legislation and the powers of Scottish Government under the Scotland Act 1998. Thus, the Scottish Government must be careful when legislating in this area to ensure balance

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<sup>92</sup> *Montgomery v Lanarkshire Health Board* [2015] UKSC 11, [2015] AC 1430

between overstepping into reserved matters and ensuring uniformity in application of the regulations.

Secondly, if such guidelines were to be implemented, continued auditing of licensees would be required to ensure the scheme was running as anticipated. A trial period in some local authorities may also be necessary prior to a national rollout, to ensure any discrepancies could be accounted for before a full enactment of the law. This may prove quite costly, and some local authorities may be reluctant to do this due to budgetary constraints. Any new financial obligations are always a concern at a local government level, and increased workloads in Environmental Health departments without adequate financial provisions could render this entire proposal futile. Although, if this proposal, or another akin, is successful, the fees obtained through new fine regulations may be directly channelled back into these departments to support increased costs.

Ultimately, it cannot be understated that non-surgical cosmetic procedures should only be reserved to those with the optimum level of training. Yet, the industry of unregulated practitioners in Scotland is far too substantial to simply try to eradicate them. It is suggested that the most effective way to handle the industry in its current state, is to introduce measures that allow non-medical practitioners to continue operation with the requirement of a licence and have appropriate health and safety measures in place as close to HIS regulations as possible.

As a final observation, it should be noted that most of these recommendations would probably not even be necessary if the Medicines and Healthcare products Regulatory Agency would change the classification of dermal fillers to prescription-only. If this were the case, unqualified



individuals being able to retrieve these products would be restricted, and the wider likelihood of harm would be reduced. Regulation of the industry would still be necessary, but a change in classification would be a major step towards improving the profession and reducing the threat to public health in Scotland and the rest of the UK.

## Victims and Restorative Justice: is it effective?

**By Imaan Khan**

*This article was up to date at the time of writing (August 2021)*

This work seeks to discuss victims' experiences of restorative justice ("RJ"). RJ is a process in which victims and offenders are brought together to communicate and ascertain the effect that crime has on victim(s) and/or the community; repairing the harm caused and providing a way for parties to move forward, positively. RJ can grant the victim with an avenue to justice, by empowering them to speak and be heard, which can grant closure. Therefore, it is necessary to examine the broader picture and evaluate how victims respond to RJ, the importance of the practice for victims and how Scotland can look to further implement RJ in our justice system with victims at the forefront.

### The Impact of Crime on Victims

Studies on victimisation indicate that victims of crime suffer various consequences. Certain consequences involve property and monetary loss, alongside some victims experiencing physical or emotional injuries. Although visible physical injury regularly decreases after a short while, psychological damage following victimisation can be long-lasting. Studies show that victims of crime may feel fearful, depressed, angry, and struggle adjusting back to 'everyday life' for a long time after.<sup>1</sup> Moreover, the Scottish Crime and Justice Survey ("the Survey") from 2017/2018 evaluated the extent to which crime impacted victims. The Survey findings

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<sup>1</sup> Sam Brand & Richard Price, *The economic and social costs of crime* (Home Office Research Report, 2000) 15-30.

were consistent with prior studies, displaying that crime led to feelings of anger (45%), anxiety (23%), and fear/depression (19%)<sup>2</sup> in victims.<sup>3</sup>

The reaction to these emotional disturbances can be categorised in three stages: immediate, short-term, and long-term reactions.<sup>4</sup> Immediate reactions last for hours to days following victimisation, with victims feeling depressed, vulnerable, and anxious. After several days, these reactions transform into short-term reactions, lasting for three to eight months. In this period, victims feel anger, fear, and guilt. Victims of violence and property related crime may often feel the need to retaliate.<sup>5</sup> Arguably, this stage is the best for RJ to create a positive effect for victims, as they are most responsive to support. Lastly long-term reactions arise as fear diminishes. During this stage, victims establish defensive behaviours and alter their attitudes to 'readjust' to normal life. However, the theory that victims cope better in the last stage is problematic, as RJ providers argue that victims still experience depression and fear.<sup>6</sup>

Alongside psychological struggles, victims fear that re-victimisation will occur. In cases of property and serious crime, Smale reported that concerns of re-victimisation are extremely common in victims.<sup>7</sup> Similarly, this feeling is experienced by victims of violent crimes.<sup>8</sup> House of Commons research suggested that utilising RJ conferences between offender and victim could solve the notion of re-victimisation, by allowing open dialogue between both parties

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<sup>2</sup> These figures represent the percentage of respondents that felt these emotions.

<sup>3</sup> Scottish Government Justice Directorate, *Scottish Crime and Justice Survey 2017/18: main findings* (2019)

<sup>4</sup> Irene Frieze, Sharon Hymer & Martin Greenberg, 'Describing the crime victim: Psychological reactions to victimisation' (1987) 18 *Professional Psychology: Research and Practice* 285-320.

<sup>5</sup> *Ibid.*, 287.

<sup>6</sup> Marianne Liebmann, 'Victim-offender mediation in the United Kingdom' (2000) LUP 320-348.

<sup>7</sup> David Smale, 'Psychological effects and behavioural changes in the case of victims of serious crimes' (1984) D.C. Bureau of Justice 75-94.

<sup>8</sup> Fran Norris & Krzysztof Kaniasty, 'Psychological distress following criminal victimisation in the general population' (1994) 62 *Journal of Consulting and Clinic Psychology* 95-125.

which leaves victims feeling a sense of fairness and empowerment.<sup>9</sup> Ultimately, the fear of re-victimisation is common, but this can be effectively combatted by RJ.

### Importance of RJ to Victims and Their Experiences with the Process

As discussed in this work so far, RJ can allow victims to communicate with those who caused them harm and openly discuss the incident. Research suggests RJ is beneficial in reducing symptoms of post-traumatic stress disorder (“PTSD”).<sup>10</sup> Evidently, this shows the value of RJ, as 36.6% of crime victims suffer from PTSD after victimisation.<sup>11</sup> Thus, RJ provides victims with a route to ask offenders why they committed their actions, producing greater improvement on PTSD symptoms compared to customary justice procedures.<sup>12</sup>

Moreover, RJ plays a vital part in healing for victims in the aftermath of an offence.<sup>13</sup> Organisations like Victim Support<sup>14</sup> and the Restorative Justice Council<sup>15</sup> argue that RJ significantly helps victims that use anti-depressants or other anxiety and PTSD related medication. Also, victims who had taken time off work, or those who continually thought about the crime throughout the day felt they could move on,<sup>16</sup> highlighting how RJ can help victims in recovery. Although Victim Support and the Restorative Justice Council operate within

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<sup>9</sup> House of Commons Justice Committee, *Restorative Justice Fourth Report of Session* (2016-17, HC 164) 14-16.

<sup>10</sup> Royal Holloway University of London, ‘Does restorative justice help or harm victims?’ (8<sup>th</sup> January 2020) <<https://www.royalholloway.ac.uk/about-us/news/does-restorative-justice-help-or-harm-victims/>> accessed 13/02/21

<sup>11</sup> Office for Victims of Crimes, ‘Mental Health Issues National Crime Victims’ Rights Week’ (10<sup>th</sup> April 2005) <[https://www.ncjrs.gov/ovc\\_archives/ncvrvw/2005/pg5n.html](https://www.ncjrs.gov/ovc_archives/ncvrvw/2005/pg5n.html)> accessed 13/02/21

<sup>12</sup> Ibid

<sup>13</sup> Victim Support, ‘Restorative Justice’ <<https://www.victimsupport.org.uk/help-and-support/your-rights/restorative-justice/>> accessed 24/03/21

<sup>14</sup> Restorative Justice Council, ‘Why Victim Support approves of restorative justice’ <<https://restorativejustice.org.uk/resources/why-victim-support-approves-restorative-justice>> accessed 13/02/21

<sup>15</sup> Restorative Justice Council, ‘About Restorative justice’ <<https://restorativejustice.org.uk/about-restorative-justice#:~:text=Restorative%20justice%20gives%20victims%20the,ake%20responsibility%20and%20make%20amends.>> accessed 24/03/21

<sup>16</sup> Restorative Justice Council (n 14)

England and Wales, the evidence suggests that full implementation of RJ in Scotland could also see such benefits in helping victims recover.

One of the main reasons why victims partake in RJ is to make their offenders aware of how their actions affected them and receive an apology.<sup>17</sup> However, this can be problematic if offenders do not engage fully with the process. Some see RJ as a ‘way out’ for offenders and suggest that the reason perpetrators participate is to avoid responsibility, instead of truly meaning to make amends.<sup>18</sup> Offenders showing no empathy for their crime may make the victim ‘feel harmed again’.<sup>19</sup>

To ascertain the effectiveness of RJ for victims, participation rates of victims should be considered. Arguably, these statistics are helpful by demonstrating how many victims have willingly partaken in the process. Currently, international participation in RJ is 40% to 60%.<sup>20</sup> More domestically, in England and Wales, the participation rate is 44.2%.<sup>21</sup> In Scotland, reports published show that participation rates are 42% in the limited number of authorities that offer RJ.<sup>22</sup> This data was supported by Dutton & Whyte, finding that participation rates stood at 43%.<sup>23</sup> Clearly, these Scottish figures are in line with international participation rates, albeit at the lower end of the spectrum. Overall, these figures are promising by demonstrating that

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<sup>17</sup> Northern Ireland Office, *Evaluation of the Northern Ireland Youth Conference Service* (2005, Report No. 12)

<sup>18</sup> Sean Joyce, ‘Is restorative justice the best way of dealing with criminal offences?’ (*Stephensons*, 22<sup>nd</sup> November 2018) <<https://www.stephensons.co.uk/site/blog/criminal-justice-blog/restorative-justice-best-way-of-dealing-with-offences>> accessed 24/03/21

<sup>19</sup> Harry Mika, Mary Achilles & Others, ‘Listening to Victims – a Critique of Restorative Justice’ (2004) 68 *Federal Probation Journal* 3-5.

<sup>20</sup> John Gehm, ‘Victim-Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks’ (1998) *Western Criminology Review* 170.

<sup>21</sup> Victims’ Commissioner for England and Wales, *Victims statistics, 2014-15 to 2018-19: victims’ services restorative justice and information, advice and support* (2019) 9.

<sup>22</sup> Steve Kirkwood & Linda Macfarlane, *Restorative Justice (Diversion) Services Monitoring and Evaluation Report 2006/07* (SACRO, 2007) 15-25.

<sup>23</sup> Kathryn Dutton, *Implementing Restorative justice within an Integrated Welfare System: The Evaluation of Glasgow’s Restorative justice Service* (CJSW Briefing Paper 8, 2006) 5-13.

full implementation of RJ may lead to higher levels of participation, with more accessibility and availability of using the practice.

Despite high participation rates in RJ, it is important to also consider the satisfaction rates of these participants. Generally, satisfaction rates of victims are high, with 80%-90% of victims being satisfied with the process.<sup>24</sup> The Ministry of Justice found that 85% of victims who participated in RJ conferences with their offender were satisfied with the experience, and 80% stated they would recommend the process to other victims.<sup>25</sup> This same research also showed that face-to-face meetings between victims and offenders reduced the frequency of recidivism by 14%.<sup>26</sup> Also, 90% of victims agreed that reparation was reached.<sup>27</sup>

Although RJ is largely successful, some victims are reluctant to partake in meetings with their offender. Perhaps victims feel that RJ is not worth their time, or they are concerned for their own safety.<sup>28</sup> Safety concerns arise from victims fearing their offender or being apprehensive about the consequences of meeting them.<sup>29</sup> Also, sometimes victims do not view their participation as worthwhile, as they have 'moved on already', or the crime is 'too minor to justify participation'.<sup>30</sup>

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<sup>24</sup> Mark Umbreit, Betty Vos & Robert Coates, 'Responding to Hate Crimes through Restorative Justice Dialogue' (2006) 9 *Criminal, Social, and Restorative Justice* 15-35.

<sup>25</sup> Ministry of Justice, *Restorative Justice Action Plan for The Criminal Justice System* (2012) 1-3.

<sup>26</sup> Restorative Justice Council, 'Restorative Justice: Time for action' (2011) 1-6.

<sup>27</sup> Mark Umbreit (n 24)

<sup>28</sup> Roderick Hill, 'Restorative justice and the absent victim: Thames Valley Police' (2002) *International Review of Criminology* (2002) 270-285.

<sup>29</sup> Northern Ireland Office (n 17)

<sup>30</sup> Sue Triggs, 'Crime and Justice Research Centre on New Zealand court referred restorative justice pilot' (2005) 3-10.

However, only a small number of victims prefer their offender to be punished in the traditional sense, so RJ may be the most desirable option.<sup>31</sup> This demonstrates that the majority of victims are willing to partake in RJ and would benefit from an apology or explanation from their offender. Arguably, this means they can have a say in the outcome of the process and receive reparation. In order to ensure that participants fully benefit from the process, the Scottish Government suggest that RJ should be available to all individuals wishing to access it and all approaches taken are to be trauma informed, evidence-led, of a high standard, with victims' needs at the heart of the process.<sup>32</sup> This helps in ensuring that the needs of victims are met, and their voices are heard and central to the process.<sup>33</sup>

Nonetheless, a criticism of RJ is that it can be problematic in terms of victims' rights. RJ can be viewed as a route that offenders can use to avoid entering the criminal justice system and a way to prevent overloading courts. Diversionary roles can aid in preventing an overload of the system, by diverting offenders away from 'formal systems such as Procurator Fiscal and Courts'.<sup>34</sup> This could be seen as problematic by victims,<sup>35</sup> as offenders are the focal point of RJ through this, so it can prove difficult for crime victims to attain a sense of autonomy during the process.<sup>36</sup> Moreover, victims may feel pressured to engage in RJ when they have no desire to participate.<sup>37</sup> Furthermore, another criticism may be that RJ is often operated by services which primarily aim to work with offenders and restoring them, rather than services which

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<sup>31</sup> Steve Kirkwood and Linda MacFarlane, *Youth Justice Services Evaluation report: April 2004 – March 2005* (SACRO, 2006) 18-23.

<sup>32</sup> Scottish Government Justice Directorate, *Restorative justice: action plan* (2019) 7-10.

<sup>33</sup> Ibid

<sup>34</sup> Scottish Government, *Reducing Reoffending: Diversion from Prosecution Toolkit* (2011) 7-14.

<sup>35</sup> Ibid.

<sup>36</sup> Point Park University, 'Restorative Justice Programs Offer a New Approach to Crime and Punishment' (2016) <<https://online.pointpark.edu/criminal-justice/restorative-justice/>> accessed 21/12/2020

<sup>37</sup> Dani Gover, 'Understanding restorative justice' (*The Law Society Gazette*, 2016) <<https://www.lawgazette.co.uk/practice-points/understanding-restorative-justice/5054204.article>> accessed 24/03/21

advocate for the victims of crimes themselves.<sup>38</sup> Overall, this emphasises that RJ is not a ‘catch-all’ system, and its implementation has to be well thought-out, to work in a way which not only restores offenders but also empowers victims in their own right.

### Conclusion

To conclude, victims of crime often suffer several psychological and physical effects. Along with potential monetary loss, fear of re-victimisation can affect victims in the long term. Evidently, RJ is beneficial for victims including in seeking reparation. This reduces the psychological harms caused, empowers victims, and allows them to make amends.<sup>39</sup> Promisingly, the majority of victims who have taken part in RJ have had positive experiences with the process.<sup>40</sup> Clearly, RJ can be an advantageous tool when used in the criminal justice system. Therefore, once Scotland follows through with their intentions of fully developing RJ, it can be hoped that Scotland will also see similar positive results for victims.

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<sup>38</sup> Crime Prosecution Service, ‘Restorative Justice; The views on the victim’, < <https://www.cps.gov.uk/legal-guidance/restorative-justice>> accessed 23/03/21

<sup>39</sup> Laura Paterson, ‘Humza Yousaf: I would meet Twitter trolls who send me racist messages’ (*The Scotsman*, 2019) < <https://www.scotsman.com/news/politics/humza-yousaf-i-would-meet-twitter-trolls-who-send-me-racist-messages-1414390>> accessed 2/04/21

<sup>40</sup> Ministry of Justice (n 25)



## Evaluating the Effectiveness of Deprivation of Citizenship as a Counter-Terrorism Measure in the United Kingdom

**By Cameron McCormack**

*This article was up to date at the time of writing (August 2021)*

### Introduction

Citizenship deprivation has emerged as a controversial political issue in the United Kingdom.<sup>41</sup> On one hand, the power is considered a draconian form of punishment which serves no practical purpose,<sup>42</sup> whereas others regard it a suitable and effective mechanism which addresses those who are considered a threat to national security.<sup>43</sup> It has been described as ‘the security fallacy’ and said to be naïve to think that ‘crude medieval punishment of banishment or exile will produce any security gains.’<sup>44</sup> This article critically examines the consequences of citizenship deprivation and determines that it is an ineffective counter-terrorism measure.

Public opinion is highly supportive of citizenship deprivation amongst suspected foreign fighters - particularly in relation to the case of Shamima Begum.<sup>45</sup> Similarly, Britons supported

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<sup>41</sup> Matthew Gibney, ‘The Deprivation of Citizenship in the United Kingdom: A Brief History’ (2014) 28 *Journal of Immigration Asylum and Nationality Law* 326, 327.

<sup>42</sup> Audrey Macklin, ‘The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?’ in Rainer Bauböck (ed) *Debating Transformations of National Citizenship* (Springer, Cham, 2018) 163.

<sup>43</sup> Christian Joppke, ‘Terror and the Loss of Citizenship’ (2016) 20 *Citizenship Studies* 728.

<sup>44</sup> Liberty, *Liberty’s Second Reading Briefing on Clause 60 of the Immigration Bill in the House of Lords* (London, February 2014) <<https://www.libertyhumanrights.org.uk/wp-content/uploads/2020/02/Libertys-briefing-on-Citizenship-Deprivation-in-Clause-60-of-the-Immigration-Bill.pdf>> accessed 6<sup>th</sup> March 2021.

<sup>45</sup> Harry Carr, ‘Shamima Begum: 78% of Britons support revoking IS bride’s UK citizenship – Sky Data poll’ (*Sky News*, 20 February 2019) <<https://news.sky.com/story/shamima-begum-78-of-britons-support-revoking-is-brides-uk-citizenship-sky-data-poll-11643068>> accessed 4 November 2020

Jack Letts, known as ‘Jihadi Jack’ by the media, of being deprived of his UK citizenship in 2019.<sup>46</sup> Perhaps those with little insight to the grave consequences of the power to deprive citizenship think it is logical and appropriate to revoke this from an individual if they are considered a threat to national security. However, the consequences are rarely considered by the public as at a glance, it may seem to be an uncontroversial measure. It is only when further researching the matter that it becomes clear there are significant concerns of the effectiveness of this measure.

To assess whether this measure is effective, it is important to examine the intended objectives of the power. This article exclusively focuses on citizenship deprivation as a counter-terrorism measure. For reference, the legal objectives are to discourage terrorist activity and keep threats out of the UK; protect the integrity of citizenship and act as a sufficient punishment for terror-related activity.<sup>47</sup>

### The Concerns

There is limited research that demonstrates how effective citizenship deprivation is. Several scholars have expressed major concerns that the measure is counter-productive and argue that the power is changing citizenship itself, by making it less secure, stable and predictable.<sup>48</sup> Deprivations can lead to disaffection amongst the ‘most targeted’ populations and their communities which has the potential to lead to further radicalisation – something which the

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<sup>46</sup> Connor Ibbettson, ‘Should Jihadi Jack’s citizenship be removed?’ (*YouGov*, 22 August 2019) < <https://yougov.co.uk/topics/international/articles-reports/2019/08/22/britons-back-stripping-jihadi-jacks-citizenship>> accessed 6<sup>th</sup> March 2021.

<sup>47</sup> Sarah Wilkinson, ‘What is Prevent?’ (CPD Online College, Knowledge Base) < [What is Prevent? | Prevent duty & who is responsible \(cpdonline.co.uk\)](https://www.cpdonline.co.uk/what-is-prevent/)>

<sup>48</sup> Rainer Bauböck, ‘Whose Bad Guys are Terrorists’ in: Rainer Bauböck (ed), *Debating Transformations of National Citizenship* (Springer, Cham, 2018)

government is attempting to prevent.<sup>49</sup> Moreover, it can damage international relations and lead to the creation of statelessness. Nonetheless, the UK Government's commitment to banish suspected terrorists persists as has been illustrated in the case of Shamima Begum.

### Arbitrary Power

One key problem of citizenship deprivation relates to the role of the executive. It is often critiqued that the UK has too much authority over deprivation decisions and they can become arbitrary. Macklin argues that states should not have the authority to deprive citizenship from individuals who the state deem to be 'bad citizens.'<sup>50</sup> Thus, the UK Government having authority to deprive citizenship can be problematic if they want to get rid of 'bad' citizens.

Furthermore, Macklin raises concerns that citizenship is moving from being a human right to becoming a privilege.<sup>51</sup> For example, the general public agrees with removing citizenship after joining a terrorist organisation or carrying out terrorism-related activities. Similarly, the Home Office stated that 'citizenship is a privilege, not a right, and the Home Secretary will remove British citizenship from individuals where she feels it is conducive to the public good to so.'<sup>52</sup>

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<sup>49</sup> Tufyal Choudhury, 'The radicalisation of citizenship deprivation' (2017) 37 *Critical Social Policy* 225.

<sup>50</sup> Audrey Macklin, 'Kick-off contribution' in Audrey Macklin and Rainer Bauböck (eds), *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* (2015) Robert Schuman Centre for Advanced Studies Working Paper 2015/14 <

[https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS\\_2015\\_14.pdf?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf?sequence=1)> accessed 5<sup>th</sup> March 2021.

<sup>51</sup> *ibid.*

<sup>52</sup> ITV News, 'May: Jihadists fighting in Syria to be 'stripped of nationality'' (*ITV News*, December 2013) <

<https://www.itv.com/news/update/2013-12-22/home-office-british-citizenship-is-a-privilege-not-a-right/#:~:text=The%20Home%20Office%20has%20increased,public%20good%20to%20do%20so.%22>>

accessed 5<sup>th</sup> March 2021.

Arguably, this causes citizenship to be dependent upon performance,<sup>53</sup> a political rhetoric that is far from the truth. We have an explicit right to nationality or otherwise we would be stateless. This demonstrates that there is a clear discrepancy between the political rhetoric and the reality of human rights. It was ruled in *Trop v Dulles*:

Citizenship is not a license that expires upon misbehaviour ... deprivation of citizenship is not a weapon the government may use to express its displeasure at a citizen's conduct, however reprehensible that conduct may be.<sup>54</sup>

This was ruled in 1958 – raising the question. why does misconduct by a citizen continue to be relevant in the UK Government's assessment of depriving an individual citizenship?

The UK Government affirmed that the power would be used 'sparingly',<sup>55</sup> however, it has extensively increased in recent years. In comparison to Belgium, France and the Netherlands, the UK has made the most citizenship deprivation orders for acts linked to terrorism.<sup>56</sup> A concern was that the power would lead to a 'spill-over effect' through extensive use over a period of time and result in affecting a larger part of the population. Gibney argues that this is already visible in the UK.<sup>57</sup> It has been suggested that this substantial use of citizenship

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<sup>53</sup> ITV News, 'May: Jihadists fighting in Syria to be 'stripped of nationality'' (*ITV News*, December 2013) <<https://www.itv.com/news/update/2013-12-22/home-office-british-citizenship-is-a-privilege-not-a-right/#:~:text=The%20Home%20Office%20has%20increased,public%20good%20to%20do%20so.%22>> accessed 5<sup>th</sup> March 2021.

<sup>54</sup> *Albert L. Trop v. John Foster Dulles, Secretary of State* 356 U.S. 86 (1958), paragraph 92.

<sup>55</sup> Joint Committee on Human Rights, *Legislative Scrutiny: Immigration Bill (Second Report)* (2013-14, HL 142, HC 1120)

<sup>56</sup> Marteen Bolhuis and Joris van Wijk, 'Citizenship Deprivation as a Counterterrorism Measure in Europe; Possible Follow-Up Scenarios, Human Rights Infringements and the Effect on Counterterrorism' (2020) 22 *European Journal of Migration and Law* 338.

<sup>57</sup> Mathew Gibney, 'Beware states piercing holes into citizenship' in: Audrey Macklin and Rainer Bauböck (eds) *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* (2015) Robert Schuman Centre for Advanced Studies Working Paper 2015/14

deprivation is an example of how a state may circumscribe the rule of law to achieve their policy goals.<sup>58</sup>

### Statelessness

As mentioned, citizenship deprivation can lead to statelessness. Some take the view that this can be a proportionate response as there is no limit to the punishment that should be inflicted for certain crimes. For instance, Joppke supports this view by arguing that terror against citizens should lead to de-nationalisation, even if it results in statelessness.<sup>59</sup> Joppke believes that more sympathy must be shown to the victims, rather than concern for the perpetrator.<sup>60</sup> This view is echoed by the public sentiment that terrorists should be given endless punishment.

However, for others, statelessness is never considered to be a proportionate punishment as it carries severe consequences<sup>61</sup> and is a draconian measure. Citizen deprivation has often been compared to the death penalty, implying that it entails a 'political death'.<sup>62</sup> When an individual

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<[https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS\\_2015\\_14.pdf?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf?sequence=1)> accessed 5<sup>th</sup> March 2021.

<sup>58</sup> Daniel Kanstroom, 'Human rights for all is better than citizenship rights for some' in Mathew Gibney, 'Beware states piercing holes into citizenship' in Audrey Macklin and Rainer Bauböck (eds) *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* (2015) Robert Schuman Centre for Advanced Studies Working Paper 2015/14

<[https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS\\_2015\\_14.pdf?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf?sequence=1)> accessed 5<sup>th</sup> March 2021.

<sup>59</sup> Christian Joppke, 'Terror and the Loss of Citizenship' (2016) 20 *Citizenship Studies* 728.

<sup>60</sup> *ibid.*

<sup>61</sup> UN High Commissioner for Refugees, 'UNHCR Action to Address Statelessness: A Strategy Note' (March 2010)

<sup>62</sup> Audrey Macklin, 'Kick-off contribution' in Audrey Macklin and Rainer Bauböck (eds) *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* (2015) Robert Schuman Centre for Advanced Studies Working Paper 2015/14 <

is facing citizenship deprivation, the state where they held citizenship no longer has a duty to object if another state tortures, renders or kills them. Consequently, citizenship deprivation does not only lead to the political analogy of death but may actually lead to it.

Therefore, despite the death penalty being rarely used throughout the world,<sup>63</sup> fatalities caused by statelessness is increasing. Macklin notes that at least two former UK citizens were killed by US drone strikes following their de-nationalisation.<sup>64</sup> As a result, removing citizenship for counterterrorism purposes is arguably favoured amongst the political arena as an extreme punishment, even though as a society we may not understand its sometimes fatal implications.

### International Relations

The effectiveness of citizenship deprivation cannot be critiqued without a discussion of the impact the power has upon international relations. International cooperation is considered crucial to counterterrorism and citizenship deprivation highlights a state's main concern of protecting its own people and borders.<sup>65</sup> Citizenship deprivation of suspected terrorists whilst they are outside of the depriving country entails a major risk for the security of other states and

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[https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS\\_2015\\_14.pdf?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf?sequence=1)> accessed 5<sup>th</sup> March 2021.

<sup>63</sup> Death Penalty Information Center, 'Executions Overview: States With No Recent Executions' (24 March 2021) <<https://deathpenaltyinfo.org/executions/executions-overview/states-with-no-recent-executions>> accessed 11<sup>th</sup> March 2021.

<sup>64</sup> <sup>64</sup>Audrey Macklin, 'Kick-off contribution' in Audrey Macklin and Rainer Bauböck (eds), *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* (2015) Robert Schuman Centre for Advanced Studies Working Paper 2015/14 <[https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS\\_2015\\_14.pdf?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf?sequence=1)> accessed 5<sup>th</sup> March 2021.

<sup>65</sup> Lisa Erkander, 'Citizenship Used as an Anti-Terrorism Tool: Denationalisation and Its Consequences' (2017) Statsvetenskapliga Institutionen.

the international community at large. This concern was acknowledged as early as 2003 by the UK Newton Committee.<sup>66</sup>

In relation to this, Walker questioned, ‘is it appropriate or even lawful to ‘export’ terrorism risks to other countries, especially as they probably have less information and capability to deal with the risk?.’<sup>67</sup> Given that this concern was highlighted in 2003 and remains on the top of the agenda today, it is remarkable that the effectiveness of this measure remains unchallenged in the UK. These concerns are relevant to the Shamima Begum case as she has not only been refused entry back into the UK, but they are also relying on Bangladesh to accept Begum as a citizen. Abdul Momen, the Bangladesh Foreign Minister, stated that she would face the death penalty but ultimately states that they are not responsible for Begum. Arguably, why should moral responsibility for someone raised in the UK be passed to Bangladesh? Although on a grand scale, it is only one individual, it could quickly become an international issue by putting others’ lives at risk.

Moreover, the threat to global security continues even after the individual is removed from the depriving state.<sup>68</sup> Plotting, financing and carrying out a terrorist attack is not entirely mitigated

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<sup>66</sup> Privy Council Review Committee, ‘Anti-terrorism, Crime and Security Act Review 2001’ in Clive Walker ‘The Treatment of Foreign Terror Suspects’ (2015) 70 *Modern Law Review*: ‘seeking to deport terrorist suspects does not seem to us to be a satisfactory response, given the risk of exporting terrorism...it would not necessarily reduce the threat to British interests abroad, or make the world a safer place more generally.’

<sup>67</sup> Clive Walker, ‘Counterterrorism and Security Bill 14-15, Submission to Joint Committee on Human Rights’ (5 December 2014) <[https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/Prof\\_Clive\\_Walker\\_Submission.pdf](https://www.parliament.uk/globalassets/documents/joint-committees/human-rights/Prof_Clive_Walker_Submission.pdf)> accessed 6<sup>th</sup> March 2021. page 5.

<sup>68</sup> Elke Cloots, ‘The Legal Limits of Citizenship Deprivation as a Counterterrorism Strategy’ (2017) 23 *European Public Law* 57.

by de-nationalisation.<sup>69</sup> The Australian Security and Intelligence Organisation argue that citizenship deprivation ‘may have unintended or unforeseen adverse security outcomes – potentially including reducing one manifestation of the terrorist threat while exacerbating another.’<sup>70</sup> This point should be considered by the UK Government when using its deprivation powers, as citizenship deprivation does not effectively address the threat of foreign fighters and terrorists. From a wider perspective, it can be shown that citizenship deprivation does not always lead to positive results, Malet writes:

Arab states preventing jihadis from returning from Afghanistan in the 1990’s led to waves of foreign fighters spreading to war zones and failed states across the world. Osama bin Laden is Exhibit A of the folly of stripping a foreign fighter’s citizenship and then washing your hands assuming the individual is no longer your problem.<sup>71</sup>

Perhaps this is significant, as Osama bin Laden was considered the world’s most dangerous terrorist and continued to be even after his citizenship being revoked. Osama bin Laden was stripped of his Saudi Arabian citizenship in 1994 while living in exile in Sudan. He fled Sudan for Afghanistan in 1996 where he then declared war against the US. Thus, despite having being stripped of his citizenship, he was responsible for various catastrophic attacks around the world,

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<sup>69</sup> Lucia Zedner, ‘Citizenship Deprivation, Security and Human Rights’ (2016) 18 *European Journal of Migration and Law* 222.

<sup>70</sup> ASIO submission to the Parliamentary Joint Committee on Intelligence and Security, Review of the Australian Citizenship Act renunciation by conduct and cessation provisions. (September 2019).

<sup>71</sup> David Malet, ‘ISIS Foreign Fighters: Keep Your Enemies Closer’ (*Australian Outlook*, 25 December 2019) <[40](https://www.internationalaffairs.org.au/australianoutlook/isis-foreign-fighters-keep-enemies-closer/#:~:text=Arab%20states%20preventing%20jihadis%20from,failed%20states%20around%20the%20world.&text=Some%20countries%20argue%20that%20their,punish%20heinous%20terrorists%20is%20understandable.> accessed 11<sup>th</sup> March 2021.</a></p></div><div data-bbox=)



such as 9/11. Therefore, citizenship deprivation does not mitigate threats and can exacerbate the threat, resulting in an ineffective counter-terrorism strategy.

Further, although depriving an individual who is a threat to national security may increase the safety of the depriving state in the short term, it also has the potential to motivate the suspected individual to operate in other states who are perhaps ill-equipped to deal with it. As Feinberg rightfully points out, 'it will drive terrorists to another state.'<sup>72</sup> Thus, not only are there concerns regarding international relations, the measure is ineffective as the depriving state is not able to control or monitor the individual. It would be easier and more effective to control them from within the state, rather than in a foreign country.<sup>73</sup> Furthermore, driving foreign fighters to other states may lead them on a path to 'failed states.'<sup>74</sup> State failure is considered an essential condition for terrorist networks to function and operate within.<sup>75</sup> Therefore, citizen deprivation could be argued to create instability to itself and as a result, contribute to re-producing the threat of terrorism. This strengthens the argument that the measure is ineffective and counter-productive.

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<sup>72</sup> Myriam Feinberg, 'Terrorism Inside Out: Legislating for Humanity to Cooperate against Terrorism' (2017) 42 *North Carolina Journal of International Law* 505, 523.

<sup>73</sup> Rainer Bauböck and Vesco Paskalev, 'Cutting genuine links: a normative analysis of citizenship deprivation' (2015) 30 *Georgetown Immigration Law Journal* 47.

<sup>74</sup> Stanford Center for International Security and Cooperation, 'Examining policy responses toward failed states, civil wars' (7 October 2016) <<https://cisac.fsi.stanford.edu/news/policy-responses-examined-failed-states-civil-wars>>: 'whose political or economic system has become so weak that the government is no longer in control'

<sup>75</sup> Ulrich Schneekener, 'How Transitional Terrorists Profit from Fragile States' (2004) SWP Research Paper <[https://www.swp-berlin.org/fileadmin/contents/products/research\\_papers/2004\\_S18\\_skr\\_engl\\_ks.pdf](https://www.swp-berlin.org/fileadmin/contents/products/research_papers/2004_S18_skr_engl_ks.pdf)> accessed 6<sup>th</sup> March 2021.

In addition, Macklin argues that terrorists are often ‘homegrown’<sup>76</sup> and therefore, states should not have the ability and power to pass the responsibility by leaving dangerous individuals in the hands of another state. This is a clear and relevant concern in our society today, as demonstrated by the Begum case. It has been said that denying Begum from entering the UK could be ‘a cynical ploy to make her someone else’s responsibility.’<sup>77</sup>

Lastly, this practice of citizenship deprivation could lead to ‘a race between states as to who de-nationalises first, creating friction in international relations.’<sup>78</sup> This threatens ‘the delicate balance of States and individual rights that the international community has worked so hard to achieve’ as it will start to erode.<sup>79</sup> For example, the case of Jack Letts demonstrates the damaging effect that the measure has upon international relations. Letts was deprived of his UK citizenship in 2018 after travelling to Syria to join Islamic State. Although he is a Canadian citizen through his father, he was born and raised in Britain so is considered a ‘made-in-the-

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<sup>76</sup> Audrey Macklin, ‘On producing the alien within: A reply.’ in Audrey Macklin and Rainer Bauböck (eds) *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* (2015) Robert Schuman Centre for Advanced Studies Working Paper 2015/14  
<[https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS\\_2015\\_14.pdf?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf?sequence=1)> accessed 5<sup>th</sup> March 2021.

<sup>77</sup> BBC News, ‘Shamima Begum cannot return to UK, Supreme Court rules’ (*BBC News*, 26 February 2021)  
<<https://www.bbc.co.uk/news/uk-56209007#:~:text=Ms%20Begum%2C%202021%2C%20wants%20to,armed%20guards%20in%20northern%20Syria.&text=In%202019%2C%20the%20then%2DHome.citizenship%20on%20national%20security%20grounds>> accessed 5<sup>th</sup> March 2021.

<sup>78</sup> Tamara Laine, ‘“Passing the Buck”: Western States Race to Denationalise Foreign Terrorist Fighters’ (2017) 12 *Journal of Peacebuilding & Development* 22.

<sup>79</sup> Leslie Esbrook, ‘Citizenship unmoored: expatriations a counter-terrorism tool’ (2016) 37 *University of Pennsylvania Journal of International Law* 1273, 1307.

UK problem.’<sup>80</sup> Yet, Letts is now Canada’s sole responsibility after he was stripped of his UK citizenship. Canada did not refrain from showing anger towards the UK, stating they were ‘disappointed that the United Kingdom has taken this unilateral action to offload their responsibilities.’<sup>81</sup> Evidently, this demonstrates that citizenship deprivation is damaging to international relationships and creates tensions between States.

### Further Radicalisation

Depriving an individual of their citizenship raises grave concerns regarding further radicalisation. Often, individuals will be trapped in the conflict zone following the deprivation decision.<sup>82</sup> Although this is thought to be beneficial to the depriving state for protecting national security, it is concerning that the UK believes that this ‘medieval exile’ will be beneficial on a wider scale. This exile makes individuals more susceptible to further radicalisation and recruitment by terror-related groups. Perhaps this disincentivises the individual from renouncing participation in a terrorist group. For instance, the denationalised individual who may not pose a direct threat to their home country can change their attitudes and become a frustrated individual who views their home country as a target as it excluded them. The former head of counterterrorism at MI6 stated that foreign fighters need ‘to know that there is a place for them back at home,’<sup>83</sup> as employing such draconian and harsh measures

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<sup>80</sup> Steve Hewitt, ‘Why the UK could regret angering Canada by stripping IS suspect Jack Letts of British citizenship’ (*The Conversation*, 20 August 2019) <<https://theconversation.com/why-the-uk-could-regret-angering-canada-by-stripping-is-suspect-jack-letts-of-british-citizenship-122081>> accessed 6<sup>th</sup> March 2021.

<sup>81</sup> CBC News, ‘Canada ‘disappointed’ after U.K. reportedly strips Jihadi Jack of citizenship’ (*CBC News*, 18 August 2019) <<https://www.cbc.ca/news/world/jihadi-jack-citizenship-uk-canada-1.5251437>> accessed 6<sup>th</sup> March 2021.

<sup>82</sup> Provided that they are deprived whilst they are abroad.

<sup>83</sup> Mark Townsend, ‘Isis fighters must be allowed back into UK, says ex-MI6 chief’ (*The Guardian*, 7 September 2017) <<https://www.theguardian.com/world/2014/sep/06/richard-barrett-mi6-isis-counter-terrorism>> accessed 5<sup>th</sup> March 2021.

may assist in terrorists creating a ‘fertile context in which radicalisation can flourish’.<sup>84</sup> This is a compelling point, and also worrying to consider as an ex-serving member of the State believes that the measure is counter-productive.

### Creating Second Class Citizens

The power of citizen deprivation has been extended to British-born individuals, as well as naturalised British citizens. Citizenship cannot be revoked, however, where it renders a person stateless. Therefore, dual citizens and naturalised citizens are likely to be deprived of citizenship as they are less likely to be rendered stateless.<sup>85</sup> This has created a situation where citizenship deprivation arguably generates a group of second-class citizens.<sup>86</sup> This can further lead to the marginalisation of ethnic minorities – for example, Begum and her family. Overall, this raises concerns of further radicalisation.

A comparison that is crucial to discuss is the case of the white, middle-class terrorist Jack Letts and Shamima Begum. It took around two years for the UK to revoke Lett’s citizenship after his appeal to come home. However, Begum’s was stripped within six days of her requesting to return to the UK. Moreover, the Home Office declined to comment on the case of Letts as ‘the

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<sup>84</sup> Christophe Paulussen, ‘Countering Terrorism Through the Stripping of Citizenship: Ineffective and Counterproductive’ (*International Centre for Counter-terrorism – The Hague*, 17 October 2018) <<https://icct.nl/publication/countering-terrorism-through-the-stripping-of-citizenship-ineffective-and-counterproductive/>> accessed 5<sup>th</sup> March 2021.

<sup>85</sup> Peter Schuk, ‘Should Those Who Attack the Nation Have an Absolute Right to Remain Its Citizens?’ (2018) in Rainer Bauböck (ed) *Debating Transformations of National Citizenship* (Springer, Cham 2018) 163.

<sup>86</sup> Matthew Gibney, ‘Should Citizenship Be Conditional? The Ethics of Denationalization’ (2013) 75 *The Journal of Politics* 646, 652.

Home Office does not comment on individual cases'.<sup>87</sup> This presents a stark comparison to the almost immediate coverage on Begum. Thus, the decision to strip Begum of her citizenship undermines social cohesion. Ultimately, citizenship deprivation targets specific marginalised communities and the division of this makes it easier for terrorist groups to recruit individuals.

The two-tiered citizenship system creates an 'us versus them' environment which reinforces Islamophobic sentiment that has already built up in the UK. For example, the spread of propaganda insisting that the UK Government undermines citizens who are not 'truly British'. The UK Government would argue that citizenship deprivation prevents radicalisation, however, in this context, it is exacerbated. The case of Begum is an example of this whereby the government have banished her from her home country and, in comparison to the Jack Letts case, stokes a divide. It can be argued that this plays into the hands of terrorist groups and can in turn act as a recruitment tool, instead of doing the opposite to protect national security.

### Conclusion

This research aimed to explore whether citizenship deprivation was an effective counter-terrorism measure. Overwhelmingly, it has been demonstrated that the measure is counter-productive in response to the threat of foreign fighters. Clearly, depriving a foreign terrorist fighter of their citizenship is a deterrent to the threat.

The UK depriving Begum of her citizenship is questionable. It demonstrates the knee-jerk attitude towards combatting the foreign fighter phenomenon. Returning foreign fighters pose

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<sup>87</sup>Townsend M. 'Home Office Thwarted Return Home of ISIS Suspect Jack Letts.' *The Guardian* (2019). <https://www.theguardian.com/uk-news/2019/jun/23/jihadi-jack-letts-isis-return-home-thwarted-home-office>

greater threat in fragile and ill-equipped states that cannot handle the threat of terrorism. Further, the consequence of refusing citizenship for Begum is that she was left in a Syrian camp and exceptionally vulnerable to further radicalisation. If the UK were to take responsibility and attempt to rehabilitate or prosecute Begum, it would ultimately enable for greater security on a long-term basis. Priti Patel stated that: ‘The government will always take the strongest possible action to protect our national security and our priority remains maintaining the safety and security of our citizens.’<sup>88</sup> However, the ‘strongest possible action’ is not the most appropriate, nor effective, and this must be immediately addressed by the UK Government.

Lastly, it is difficult to understand how states can revoke citizenship on the grounds of terrorism, and at the same time be committed to respecting international obligations to prevent and suppress terrorism. In practice, citizenship adds little counter-terrorism value.<sup>89</sup> Ironically, where the Home Secretary has the power to deprive individuals of their citizenship where she feels it is conducive to the public good, it is considered a condition that is conducive to terrorism. I argue alongside Macklin, where she persuasively calls for ‘banishment...to be banished again.’<sup>90</sup> Clearly, citizenship deprivation will not make any state a safer place from terrorism concerns. Citizenship deprivation is a permanent measure which removes any

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<sup>88</sup> BBC News, ‘Shamima Begum cannot return to UK, Supreme Court rules’ (*BBC News*, 26 February 2021) <<https://www.bbc.co.uk/news/uk-56209007#:~:text=Ms%20Begum%2C%20201%2C%20wants%20to,armed%20guards%20in%20northern%20Syrria.&text=In%202019%2C%20the%20then%2DHome.citizenship%20on%20national%20security%20grounds>> accessed 5<sup>th</sup> March 2021.

<sup>89</sup> Peter J. Spiro, ‘Terrorist Expatriation: All show, No Bite, No Future’ (2018) in Rainer Bauböck (ed) *Debating Transformations of National Citizenship* (Springer, Cham 2018)

<sup>90</sup> Audrey Macklin, ‘Kick-off contribution’ in Audrey Macklin and Rainer Bauböck (eds) *The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?* (2015) Robert Schuman Centre for Advanced Studies Working Paper 2015/14 <[https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS\\_2015\\_14.pdf?sequence=1](https://cadmus.eui.eu/bitstream/handle/1814/34617/RSCAS_2015_14.pdf?sequence=1)> accessed 5<sup>th</sup> March 2021.

prospect of rehabilitation or reintegration.<sup>91</sup> Therefore, it should not be considered to be the first course of action taken by the UK Government.

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<sup>91</sup> Ibid.

## E-Conveyancing in the Face of a Pandemic

**By Zainab Muzaffar**

*This article was up to date at the time of writing (August 2021)*

On 23<sup>rd</sup> March 2020, the Scottish Government announced a lockdown due to health and wellbeing concerns of the public. On 24<sup>th</sup> March, the Keeper closed her offices in compliance with the new restrictions. This inevitably affected conveyancing practice as solicitors could neither meet clients in person for execution of important documents, nor send such documents to the Registers of Scotland (RoS) to be registered.

COVID-19 forced RoS, the Law Society of Scotland, and practitioners to adopt new practices abruptly. The fast-moving nature of the pandemic meant solicitors kept up-to-date with changes in policy and practice through the Law Society and RoS websites, as well as Scottish Government guidance.

### Technology and The Conveyancer – Altis and ARTL

Aspects of conveyancing pre-pandemic were beginning to come digitised. Altis, a cautiously designed online conveyancing platform, was launched in 2016. It aimed to provide a transparent and secure online service available to all parties involved in conveyancing transactions in Scotland. Altis Legal worked in partnership with the Law Society, Edinburgh Solicitors Property Centre, and BDP Estate Agency to test the platform with practitioners before launch.<sup>1</sup> With an abundance of user-friendly features, the platform aimed to ease and speed up the conveyancing process for all parties involved.

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<sup>1</sup> Law Society of Scotland, 'Law Society Announces Partnership to Develop E-conveyancing Platform', (28 January 2016), <<https://www.lawscot.org.uk/news-and-events/law-society-news/law-society-announces-partnership-to-develop-e-conveyancing-platform/>>, Accessed 11 March 2021



The chief executive of ESPC, Paul Hilton, commented on how Altis differed from other platforms, “Not only has it been carefully designed to be user friendly, it has the ability to greatly improve risk management, assuring all parties of a secure and supported experience”.<sup>2</sup> Registers of Scotland praised the platform, terming it a “one-stop-shop digital platform”.<sup>3</sup>

In comparison, the ARTL system was designed to be accessed and utilised by solicitors. This burdened solicitors with an extra workload, which they would usually rely on their assistants and secretaries to complete. Criticism of ARTL was not masked with much effort, with TC Young solicitors terming it an “unmitigated disaster”.<sup>4</sup> Conveyancing Direct Partner, McCormick, went so far as to state he was even aware “some Land Register officials believe that the ARTL is not fit-for-purpose”.<sup>5</sup> Despite its shortcomings, Professor Brymer commended the ground-breaking system which was introduced quite early on.<sup>6</sup> He commented that he anticipates the “other benefits it will bring when upgraded as part of the move towards Scotland having a fully digitised Land Register”.<sup>7</sup>

The ARTL system was withdrawn by RoS in March 2020 citing reasons of a customer base which has “reduced significantly” and practitioners choosing alternative methods.<sup>8</sup> The system

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<sup>2</sup> Law Society of Scotland, ‘*Society and ESPC Combine to Create E-conveyancing Platform*’, (28 January 2016), <<https://www.lawsocot.org.uk/news-and-events/legal-news/society-and-espccombine-to-create-e-conveyancing-platform/>>, Accessed 11 March 2021

<sup>3</sup> Registers of Scotland, ‘*Registers of Scotland Digital Transformation: Next Steps*’, (Scottish Government, 30 November 2016), <[www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2016/11/registers-scotland-digital-transformation-next-steps/documents/00510886-pdf/00510886-pdf/govscot%3Adocument/00510886.pdf](http://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2016/11/registers-scotland-digital-transformation-next-steps/documents/00510886-pdf/00510886-pdf/govscot%3Adocument/00510886.pdf)>, Accessed 11 March 2021

<sup>4</sup> (n 8)

<sup>5</sup> (n 20)

<sup>6</sup> *ibid*

<sup>7</sup> *Ibid*, 284

<sup>8</sup> Registers of Scotland, ARTL Withdrawal (23 March 2020), <<https://www.ros.gov.uk/services/artl>>, Accessed 26 February 2021

was not fully supported by solicitors, with most users only finding it useful in discharging standard securities.<sup>9</sup> Similarly, Altis ceased trading in February 2020.<sup>10</sup>

Unlike ARTL, Altis saw success in the Scottish conveyancing industry and Lorna Jack, chief executive of the Law Society of Scotland, remarked Altis would “introduce an online service which will help to speed up conveyancing processes as well as providing an accurate and fully accountable system, benefitting both solicitors and their clients”, as “there is appetite for this among the profession”.<sup>11</sup> There are lessons that can be learnt from both Altis and ARTL to be kept in mind together with the learnings from the pandemic as we move forward into the future of conveyancing.

### Risks in Registration

With the closure of the registers for paper registration, and major platforms ceasing their operation, the conveyancing industry came to a halt with buyers, sellers, and lenders who were at risk of facing serious personal and financial hardship should they not be able to settle on time. Therefore, the introduction of electronic registration without the need to follow-up with paper registration was vital to allow the registration of title and security to continue.

Other than financial hardships, parties also faced the risk of insolvency of the grantor of disposition. Considering that RoS was closed for registration, buyers would not be able to complete the transfer of title and effectively create the relevant real rights in their own name. However, the concept of real rights is dependent upon the need to exclude the world at large

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<sup>9</sup> Stewart Brymer, *Essays in Conveyancing and Property Law: In Honour of Professor Robert Rennie*. ‘Conveyancing: A Bright Digital Future?’ (Cambridge: Open Book Publishers, 2015) <<http://books.openedition.org/obp/2056>>, Accessed 22 February 2021

<sup>10</sup> Altis Legal, ‘Closure of Altis’, (27 February 2020), <[www.altislegal.com/](http://www.altislegal.com/)>, Accessed 10 March 2021

<sup>11</sup> (n 23)

from being able to create such a right through racing to the registers before them. With the Registers closed, that risk was reduced as not only would a buyer's right not be registered but third parties could also not register a competing right in their own interest. Hence, the "Race to the Register" was irrelevant as the winning post, RoS, was closed altogether for any and every racer.

### Response by Law Firms

Inevitably, a difficulty in getting deeds signed arose with the pandemic. International law firm CMS expressed its doubt that the "need for a wet ink signature of deeds will be dispensed with" by RoS and advised clients to remain ready for the "potential need for creative solutions when it comes to document execution".<sup>12</sup> Such solutions have seen the form of solicitors across the UK obtaining required signatures through methods such as waiting in gardens, with their clients standing on the other side of their conservatory.<sup>13</sup> Other solicitors creatively offered 'drive-by' services, where documents are passed for signing from car to car, parked in a socially distant manner.<sup>14</sup> This exemplifies the need for unusual solutions in an unprecedented time to overcome obstacles never experienced before.

Leading firms like Brodies LLP began "developing strategies in consultation with other law firms designed to mitigate such risks" and to offer advice to their clients who were in the midst

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<sup>12</sup> Allan Wernham, 'Registers of Scotland - Temporary Closure of the Application Record due to COVID-19' (CMS, 25 March 2020) <[https://www.cms-lawnow.com/ealerts/2020/03/registers-of-scotland-temporary-closure-of-the-application-record-due-to-covid19?cc\\_lang=en](https://www.cms-lawnow.com/ealerts/2020/03/registers-of-scotland-temporary-closure-of-the-application-record-due-to-covid19?cc_lang=en)> Accessed 07 March 2021

<sup>13</sup> Laura Walkley, 'Signing Wills during the COVID-19 crisis' (TWM Solicitors, 29 April 2020) <<https://www.twmsolicitors.com/news-and-blogs/signing-wills-during-the-covid-19-crisis/>> Accessed 07 March 2021; Stephen Myers, 'Witnessing of wills and LPA services go digital', Myers & Co Solicitors, August 2020, <<https://www.myerssolicitors.co.uk/witnessing-of-wills-and-lpa-services-go-digital/>> Accessed 08 March 2021; The Law Society of Northern Ireland, 'Guidance on the execution of wills during the COVID-19 crisis' <<https://www.lawsoc-ni.org/guidance-on-the-execution-of-wills-during-the-covid-19-crisis-1>> Accessed 08 March 2021

<sup>14</sup> Sabah Babar, 'Signing your Will during a pandemic', Walker Solicitors, 16 September 2020, <<https://www.walkersolicitors.com/2020/09/signing-will-pandemic.html>> Accessed 8 March 2021

of completing property transactions.<sup>15</sup> Firms offered support to effectively weigh clients' options:

1. Completing a transaction and taking the risks which follow a delayed registration of their title and the lender's security; or
2. Delaying completion of the transaction which gives rise to financial and personal detriment as well as increasing the risk of the transaction falling through.

Other firms, such as Burness Paull LLP, advised their clients to consider use of counterpart signatures<sup>16</sup> wherever possible to conclude property transactions in the time that it took for legislation allowing electronic document registration to come into force.<sup>17</sup> Despite the various solutions and advice law firms offered clients, the importance of primary legislation regulating electronic document registration prevailed.

### Coronavirus Act – A Breath of Relief

The Coronavirus (Scotland) Act 2020 was the Scottish Government's first attempt to introduce major legislation to address the disruption caused by the pandemic. The Act was rushed into force on 07 April 2020. The Keeper was delegated the power to accept electronic copies of deeds in relation to both the Land Register and Sasines Register. Paragraphs 11 to 14 of schedule 7 of the Act modified the 2012<sup>18</sup> and 1868<sup>19</sup> Acts for as long as the 2020 Act remains in force, to allow registration in the Land Register and recording in the Register of Sasines to

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<sup>15</sup> Ian Smith, 'Coronavirus (Scotland) Act 2020: Impacts on real estate', Brodies LLP, 15 April 2020, <<https://brodies.com/insights/real-estate/coronavirus-scotland-act-2020-impacts-on-real-estate/>> Accessed 09 March 2021

<sup>16</sup> The Legal Writings (Counterparts and Delivery) (Scotland) Act 2015 provides documents can be executed in counterpart with each party to a document signing a separate, but identical copy of a document. There is no need for a clause permitting counterpart execution to be included in the document.

<sup>17</sup> Laura Hay, 'COVID-19: signing in counterpart & electronic documents' (*Burness Paull LLP*, 26 March 2020) <<https://www.burnesspaull.com/insights-and-events/news/covid-19-signing-in-counterpart-and-electronic-documents>> Accessed 09 March 2021

<sup>18</sup> S.21, Land Registration etc. (Scotland) Act 2012

<sup>19</sup> S.6A, Land Registers (Scotland) Act 1868

be accepted through electronic means - in the form of a copy of the paper deed. The copies of the deeds are submitted, whereas the principal copies of the deeds are still to be delivered to solicitors who confirm receipt.<sup>20</sup>

### Digital Submission Service – A Story of Success

To complement these new provisions, the RoS introduced the Digital Submission Service (DSS) on 27<sup>th</sup> April 2020.<sup>21</sup> The service allowed submission of electronic copies of paper deeds for registration and was extended to Sasines applications from 16<sup>th</sup> July 2020.<sup>22</sup> Thereafter, a new practice of simply uploading scanned copies of signed deeds emerged. With no need for the dispositions to be posted as the registers were closed. Emailing scanned copies was sufficient to allow registration of title.<sup>23</sup> Only in first registrations was there a need for extensive scanning of deeds, such as burden writs, as first registrations are more complicated than transfers of registered land. Hence, registration of title is arguably easier than ever before for conveyancing practitioners as DSS mirrors the preceding paper process, except everything which would be put into an envelope and posted to RoS was now submitted online using the DSS eForms and the final deeds were scanned and uploaded.<sup>24</sup>

### Extension of Advance Notice Periods

Paragraphs 15 to 19 of Schedule 7 of the 2020 Act modified Section 58 of the 2012 Act to extend the effective period of an advanced notice from 35 days to 10 days after “the day on

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<sup>20</sup> Paragraph 12, Schedule 7 Coronavirus (Scotland) Act 2020 Act provides, “submission by electronic means of a copy of the deed is sufficient evidence of the original for the purposes of accepting an application for registration”.

<sup>21</sup> Registers of Scotland, ‘Introduction of digital submissions service (27 April 2020) <<https://www.ros.gov.uk/coronavirus-covid-19/updates/introduction-of-digital-submissions-service>> Accessed 10 March 2021

<sup>22</sup> Registers of Scotland, ‘Sasine Submissions’ (15 July 2020) <<https://www.ros.gov.uk/coronavirus-covid-19/information-for-legal-professionals/sasine-submissions>> Accessed 10 March 2021

<sup>23</sup> Registers of Scotland, Land register submissions (12 February 2021) <<https://www.ros.gov.uk/coronavirus-covid-19/information-for-legal-professionals/land-register-submissions>> Accessed 09 March 2021

<sup>24</sup> *ibid*

which the Keeper declares the application record fully open for the making of entries”.<sup>25</sup> The RoS suggested such a reform as “this offers the highest level of legal certainty for applicants”.<sup>26</sup>

With 108 applications for digital submission of advance notices on its first day, the service was a success as soon as it went live on 7 April 2020.<sup>27</sup> The reasons for this range from the need to provide clients with legal protection, to the ease with which solicitors can upload an advance notice using the DSS. On 31 August 2020, the Keeper blogged that the RoS had received 59,691 submissions for advance notices using the DSS.<sup>28</sup> Owing to the large volume of applications and positive feedback from users, the Keeper commented that the DSS “reinforces for me how working collaboratively can help us achieve great things”.<sup>29</sup>

The Register of Sasines and Land Register re-opened fully on 1 March 2021. This date was vital for practitioners as it meant that advance notices which were automatically extended under section 8 of the 2020 Act would expire ten days later, on 11 March 2021. The protection offered for the notified deed in that period would need to be replaced by an application for registration of a deed by midnight on 10 March 2021. As such, the application record would receive the application for registration before the expiration of the protected period which would be whichever date is later – midnight on 11 March 2021 or until the statutory 35 day period would run out on the live advance notice.<sup>30</sup>

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<sup>25</sup> Paragraph 19(a) Schedule 7, Coronavirus (Scotland) Act 2020

<sup>26</sup> Law Society of Scotland, ‘*Registers Seek Advance Notice Solution to COVID-19 Closure*’, 26 March 2020, <<https://www.lawscot.org.uk/news-and-events/legal-news/registers-seeks-advance-notice-solution-to-covid-19-closure/>> Accessed 10 March 2021

<sup>27</sup> Registers of Scotland, ‘*Advance notice digital submissions now live*’, (27 April 2020) <<https://www.ros.gov.uk/coronavirus-covid-19/updates/digital-submissions-now-live>>, Accessed 09 March 2021

<sup>28</sup> Jennifer Henderson, ‘*Customers welcome digital solutions*’, The Registers of Scotland Blog, 31 August 2020, <<https://insideros.blog/2020/08/31/customers-welcome-digital-solutions/>>, Accessed 08 March 2021

<sup>29</sup> *ibid*

<sup>30</sup> Registers of Scotland, ‘*Re-opening the application record*’, (03 December 2020) <<https://www.ros.gov.uk/coronavirus-covid-19/updates/re-opening-the-application-record>>, Accessed 9 March 2021

### A New Generation of Clients with Technological Needs

A survey by ESPC found that buyers and sellers believe the conveyancing process can lack communication and transparency between the client and solicitors.<sup>31</sup> It is therefore crucial that lessons learnt through platforms such as Altis and ARTL, and the changes made during the pandemic, are carried forward into the future of conveyancing.

For example, the importance of features which allow clients to log onto the software to get updates on the process, such as was provided on Altis, is clear. Altis offered clients an insight into the progress of their purchase or sale even if the solicitor only shows a checklist or latest update notification on the portal. Hill, at Altis, commented on the feature, “it just gives a little bit of comfort to the client, but you’re not giving away too much information that would lead to lots of phone calls that you don’t want. It’s just a different way of working”.<sup>32</sup> The newer generations often place importance on digital accessibility and such additions to communication would be valued and allow them peace of mind in dealings which they can find frustrating and stressful.

With the anticipation of a fully digital land registration system, the traditional paper applications may not return for the long-term. If scanned copies can be accepted for land registration in the pandemic, why not after the pandemic? Of course, there are certain requirements of writing for such transactions, however the pandemic showed that mere emailed or uploaded scanned copies of documents are sufficient for land registration. The ease with which solicitors dealt with documents is undeniable.

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<sup>31</sup> Jaime Hill, ‘A Way to Make Impact’, (2017), 62(11) The Journal of the Law Society of Scotland <<https://www.lawscot.org.uk/members/journal/issues/vol-62-issue-11/a-way-to-make-an-impact/>>, Accessed 10 March 2021

<sup>32</sup>Peter Nicholson, ‘Platform Party’, (2017), 62(03) The Journal of the Law Society of Scotland <<https://www.lawscot.org.uk/members/journal/issues/vol-62-issue-03/platform-party/>>, Accessed 10 March 2021

The unthinkable has already happened. Solicitors have registered title to land without any paper follow-up to RoS. But can this continue? If such practice was legally allowed and encouraged for the common good of the property industry to function in the pandemic, should solicitors be required to return to paper applications? The more sensible way forward would be to continue in such practice and RoS have seemingly embraced this change for the foreseeable future. The introduction of the fully electronic platform for land registration has been adopted by RoS and unprecedented practices continue.