

## **Centre for Women's Justice – supplementary feedback on draft Statutory Guidance for the Domestic Abuse Bill:**

### **Submission 2 - criminalisation of survivors**

**1 February 2021**

#### **About the Centre for Women's Justice (CWJ)**

1. CWJ is a lawyer-led charity focused on challenging failings and discrimination against women in the criminal justice system. We carry out strategic litigation and work closely with frontline women's sector organisations on identifying and finding legal tools to challenge police and prosecution failings around violence against women and girls (VAWG).
2. Over the past thirty years CWJ's director, Harriet Wistrich, has been at the forefront of challenging convictions of women who have killed their abusive partner while subject to coercive control and other forms of domestic abuse. Through our legal advice and casework service, we also regularly receive referrals from women facing prosecution for a wide range of alleged offending resulting from their experience of domestic abuse and other forms of VAWG and exploitation.

#### **Background to this submission**

3. This second submission supplements our earlier feedback dated 7 September 2020, in which we commented on the criminal justice system sections of the draft Statutory Guidance (paragraphs 176 to 208). We will also be making a separate, third submission today on a discrete point relating to the enforcement of protection orders. In the present submission we specifically focus on improvements needed in the draft statutory guidance to help ensure survivors involved in alleged offending are protected from abuse and not stigmatised, and that police and prosecution practices in these circumstances uphold survivors' rights and serve the public interest.
4. As well as challenging inappropriate prosecutions in individual cases, we have been working with the Prison Reform Trust (PRT) and others to call for a new statutory defence and an amendment to the law on self-defence to be added to the Domestic Abuse Bill<sup>1</sup> for those whose offending is driven by their experience of domestic abuse<sup>2</sup>. This would address gaps in legal protection for survivors, strengthen recognition of the links between victimisation and offending and deter inappropriate

---

<sup>1</sup> These proposals were developed by PRT in collaboration with CWJ and others, as part of PRT's Transforming Lives programme to reduce women's imprisonment. Since that programme ended in November 2020, CWJ have taken over the lead on this work by agreement with PRT.

<sup>2</sup> For more information go to: [www.centreforwomensjustice.org.uk/dabill](http://www.centreforwomensjustice.org.uk/dabill)

prosecutions. We have also called for a comprehensive policy framework to be introduced to protect survivors in these circumstances and ensure the public interest is served, drawing on learning from equivalent work to protect victims of trafficking who are suspects or defendants in criminal proceedings.

5. Our proposals are supported by the Victims' Commissioner, the designate Domestic Abuse Commissioner and other legal experts and domestic abuse organisations (see full list here: [www.centreforwomensjustice.org.uk/dabill](http://www.centreforwomensjustice.org.uk/dabill)). The proposals are currently opposed by the government, which has however committed to monitoring the effectiveness of existing defences and keeping under review the need for statutory reform.
6. We have recently undertaken a major piece of research considering the barriers to justice for women who kill their abuser, which is due to be published in February 2021. Although the focus of that research is on the small number of women who kill, it also sheds light on the criminal justice system's ability to deliver justice more widely for those who offend due to their experience of abuse. We will forward a copy of the report upon publication.

## Executive Summary

7. The draft statutory guidance helpfully acknowledges the '*strong links between women's experience of domestic abuse and coercive relationships, and their offending*' and the fact that a large majority of women who offend or are in prison are victims of domestic abuse (para 107). It also notes the complicating factor of problematic substance use which can become a coping mechanism for survivors, and the difficulties still experienced by first responders in correctly identifying the primary aggressor in the case of counter-allegations – particularly where substance use is a factor for the survivor (para 108).
8. However there is barely any further reference to this complex topic beyond these brief introductory paragraphs, and there is no guidance as to how knowledge of the links between abuse and women's alleged offending should inform and influence practice by the Police, Crown Prosecution Service (CPS), courts and other agencies in order to protect survivors and ensure the public interest is served in these cases.
9. A further reference to survivors involved in alleged offending comes under the National Statement of Expectations (para 232), which provides that local areas should set out strategies and services that '*respond to the needs of diverse groups including those with complex needs, BME, LGBTQ+, disabled, young (16-18) and older victims, male victims, those with insecure immigration status, offenders, and children of victims*'. While this is welcome advice, no guidance is offered as to how such strategies and services should be developed, the considerations to be taken into account and the challenges and barriers that these diverse groups face – including women involved in alleged offending - and there are no references to useful resources such as the Female Offender Strategy<sup>3</sup> and accompanying guidance<sup>4</sup>, and the cross-government concordat on women in the criminal justice system<sup>5</sup>.

---

<sup>3</sup> [Ministry of Justice \(2018\) Female Offender Strategy](#)

<sup>4</sup> Ministry of Justice (2018) Managing vulnerability: Women – Fact Pack, London: MoJ; Ministry of Justice (2018) A Whole System Approach for Female Offenders: Emerging evidence, London: MoJ. Both available at: <https://www.gov.uk/government/publications/female-offender-strategy>

<sup>5</sup> [Ministry of Justice \(2021\) Concordat on Women in or at risk of contact with the Criminal Justice System](#)

10. The guidance needs to be expanded to explain how knowledge of the links between women's experience of abuse and their offending should inform and influence improvements in practice both within and outside the criminal justice process. The overarching statement of principles which we have recommended should be included in the statutory guidance (see our submission of 7 September) should include clear expectations for survivors involved in alleged offending to receive equal protection from abuse, and for police and prosecution practices to be improved so that they consistently serve the public interest in these cases.

## **International law**

11. The guidance should refer to the international legal framework, including the provisions of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), to which the United Kingdom is a signatory.<sup>6</sup> These require the government to ensure that women in the criminal justice system who have experienced violence are identified, treated appropriately and receive the right support, and that they have their experience taken into account in sentencing decisions.
12. The Bangkok Rules require sufficient resources to be available for suitable community alternatives to custody, and the UN Special Rapporteur on Violence Against Women recommended in 2015 that the UK government should "ensure that women's histories of victimization and abuse are taken into consideration when making decisions about incarceration, especially for non-violent crimes".<sup>7</sup> Also of relevance are the provisions of Convention on the Elimination of all forms of Discrimination against Women<sup>8</sup> and the Istanbul Convention<sup>9</sup>. Despite these legal safeguards, it nonetheless remains common practice for limited, if any, consideration to be given to women's experiences of abuse in criminal justice proceedings. In many cases, the abuse will not even be disclosed until late on in proceedings, or indeed until after women have been convicted and sentenced.<sup>10</sup>

## **Why the statutory guidance needs to cover this in more detail**

13. Even in the absence of new statutory defences, there is a clear potential for improvements in the response of statutory agencies both within and outside the criminal justice system to survivors who are involved in alleged offending. The statutory guidance is an essential tool to help achieve this.
14. Sally Challen's successful appeal against her murder conviction in 2019 highlighted the devastating impact of coercive relationships and the lack of legal protection for survivors of domestic abuse who are driven to offend.<sup>11</sup> However, while there is some public recognition of the links between domestic abuse and women's offending, this has not yet translated into changes in practice on the ground, and true understanding of these links remains limited for many people. The guidance could

---

<sup>6</sup> [The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders \(the Bangkok Rules\)](#)

<sup>7</sup> Office of the High Commissioner for Human Rights (Manjoo, R. (2014) Special Rapporteur on Violence Against Women country mission

<sup>8</sup> See the recommendations of the CEDAW committee's March 2019 Concluding Observations on the eighth periodic report of the United Kingdom of Great Britain and Northern Ireland relating to resourcing of the Female Offender Strategy and protection of women from gender-based violence. ([CEDAW/C/GBR/CO/8](#))

<sup>9</sup> [The Council of Europe Convention on preventing and combating violence against women and domestic violence](#)

<sup>10</sup> Sakande, N. (2019) [Righting Wrongs: What Are the Barriers Faced by Women Seeking to Overturn Unsafe Convictions or Unfair Sentences in the Court of Appeal](#) (Criminal Division)

<sup>11</sup> Challen, D. (2019) 'My mother, Sally Challen, was branded a cold-blooded killer. At last, she has justice', The Guardian, available at <http://bit.ly/SallyChallen>

helpfully provide more information and examples to illustrate these links and encourage better understanding in this area.

15. Government ministers have repeatedly expressed their ambition for the Domestic Abuse Bill to increase public understanding of domestic abuse and thereby help improve the experience of survivors accused of offending which results from their experience of abuse.<sup>12</sup> The statutory guidance accompanying the Bill should reflect this ambition by giving this topic substantive coverage and setting out clearly the government's expectations for both improved awareness and resulting changes in practice.
16. The wide range of offences which can result from women's experience of abuse has been highlighted in research by PRT, including:<sup>13</sup>
  - Handling stolen goods under threat of violence by a partner.
  - Possession of a controlled substance belonging to an abusive partner.
  - Use of force against an abusive partner or ex-partner.
  - Failure to ensure school attendance for fear of meeting abusive ex-partner.
17. Our own case work has made us aware of disturbing inconsistencies in practice by the Police and CPS when deciding whether to arrest or pursue charges against survivors alleged to have offended in the context of domestic abuse and other forms of VAWG and exploitation, or indeed whether to threaten prosecution. This inconsistency is implicitly recognised in paragraph 107 of the draft guidance.
18. Based on referrals received by CWJ for legal advice in the last two years, we have identified the following broad types of case in which survivors have been accused of offences resulting from their experience of domestic abuse, other forms of VAWG and exploitation. We will be happy to provide further information in due course where possible, subject to client consent:
- 18.1 **Counter-allegations:** A number of our referrals involve the familiar scenario in which a survivor has been accused of an assault offence where they were in fact acting in self-defence against their abuser and/or in reaction to abuse, and/or where their abuser's account of events is preferred to theirs.

College of Policing Authorised Professional Practice (APP) includes helpful guidance on identifying the primary perpetrator in the event of counter-allegations,<sup>14</sup> with a linked section on dual arrests providing: '*Officers should avoid dual arrests, especially if there are children present, but this is not always possible.*' Documents provided to CWJ by some police forces in response to Freedom of Information Act requests indicate that local police force guidance is inconsistent in relation to counter-allegations and dual arrest. While some forces have good guidance in place, other guidance runs contrary to the APP provisions.

CPS legal guidance on domestic abuse also includes a helpful section on self-defence and counter-allegations.<sup>15</sup> However despite the existence of these guidance

---

<sup>12</sup> See for example the comments of Victoria Atkins MP during the Bill's Committee Stage debate in the House of Commons: Hansard, 17 June 2020, Column 471.

<sup>13</sup> See: Prison Reform Trust (2017) *There's a reason we're in trouble: Domestic abuse as a driver to women's offending*. London: PRT and Criminal Bar Association of England and Wales (2017) *Defences available for women defendants who are victims/survivors of domestic abuse*. London: CBA

<sup>14</sup> Available at the following link – see para 3.5: <https://www.app.college.police.uk/app-content/major-investigation-and-public-protection/domestic-abuse/first-response/#determining-the-primary-perpetrator-and-dealing-with-counter-allegations>

<sup>15</sup> Available at: <https://www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors>

documents, the referrals we have received make clear that practice on the ground is inconsistent to say the least.

- 18.2 **Offending under coercion/duress:** We have received a number of referrals concerning survivors whose alleged offence took place under duress/coercion from their abuser. We are also aware of anecdotal reports from other sources of alleged offending taking place under duress of circumstance, for example where financial abuse leads women to shoplift for essential items. As has been set out elsewhere by both PRT and CWJ, current defences in these circumstances are ineffective.<sup>16</sup> However, in many cases public interest considerations could nonetheless properly lead to a decision not to prosecute. In practice, all too often, this does not occur.
- 18.3 **Allegedly false allegations:** CPS guidance is available for cases in which prosecution is being considered in relation to apparently false allegations of rape and other sexual offences. The guidance states, '*Prosecutions for these offences in the situations above will be extremely rare and by their very nature they will be complex and require sensitive handling.*'<sup>17</sup> However referrals we have received suggest this guidance is not consistently followed in practice. A number of our referrals involve cases in which a survivor has been prosecuted or threatened with prosecution for wasting police time or perverting the course of justice, having made allegations of abuse or sexual assault which have not been believed.

There are many reasons why such allegations may not be found credible in the context of applying the evidential test, which requires a realistic prospect of conviction at the very high criminal standard. In many instances, as is well documented, this may include a culture of disbelief and failure to recognise the impact of abuse which may lead survivors to give inconsistent accounts.

However, even in cases where there may be apparent reasons to prefer the alleged abuser's version of events, unless there is evidence of malicious intent, it appears inappropriate to threaten or pursue prosecution. Doing so inevitably has a dampening effect on survivors' willingness to come forward. In at least one case known to us, the threat of prosecution has led a survivor to withdraw allegations she had made in good faith.

- 18.4 **Police officer perpetrators of domestic abuse:** We continue to be made aware of cases in which a police officer perpetrator appears to have abused his powers or contacts within the police in order to criminalise the survivor. These cases should be seen in the wider context of failures by forces to properly investigate allegations made against their officers. This is the subject of a super-complaint by CWJ, submitted in March 2020 and currently under consideration.<sup>18</sup>
- 18.5 **Survivors added to an indictment to help secure conviction of perpetrator:** We are aware of cases in which survivors of grooming and sexual exploitation have either been charged or added to an indictment as co-conspirators, in an apparent attempt to increase the chances of securing a conviction against their perpetrator. This is despite having previously been assured that they would be treated as a victim or witness.

---

<sup>16</sup> See for example: [Prison Reform Trust \(2017\) There's a reason we're in trouble: Domestic abuse as a driver to women's offending](#), London: PRT and Criminal Bar Association of England and Wales (2017) [Defences available for women defendants who are victims/survivors of domestic abuse](#), London: CBA; [Centre for Women's Justice \(2021\) Domestic Abuse Bill - legal protection for survivors who offend due to abuse](#)

<sup>17</sup> Available at: <https://www.cps.gov.uk/legal-guidance/false-allegations-rape-and-or-domestic-abuse-see-guidance-charging-perverting-course>

<sup>18</sup> [HM Inspectorate of Police and Fire & Rescue Services \(2020\) Police super-complaints: force response to police perpetrated domestic abuse](#)



- 18.6 **Criminalisation resulting from childhood sexual or criminal exploitation:** CWJ has been supporting and promoting a successful legal challenge brought by our director, of the operation of the disclosure and barring scheme with respect to women who were prostituted as teenagers and acquired numerous criminal convictions for soliciting and loitering.<sup>19</sup> This year our director represented the same women in a case to challenge the retention of their criminal records until they reach the age of 100 years.<sup>20</sup> We have established a project at CWJ to assist other women affected by their historic criminalisation that resulted in the continued retention and disclosure of criminal records that had resulted from their sexual and criminal exploitation. While such offences are now less likely to be prosecuted due to changes in the law, including the Modern Slavery Act 2015, the long-term negative impact of a criminal record endures as an injustice and hardship for women who should instead receive protection as victims and survivors.
19. Helpful Police and CPS guidance exists in relation to at least some of these case types, as referred to above. However, it is not being followed consistently. In our experience, pre-trial representations to the CPS that it is not in the public interest to proceed with a prosecution are often refused without a substantive response to the issues raised. In such circumstances there is no legal avenue to challenge the decision to prosecute, other than to make submissions on abuse of process within the criminal proceedings. However the public interest considerations may not give rise to an abuse of process argument.
20. Where an alleged offence is committed in the context of domestic abuse and other forms of VAWG, we find that the extent to which this is taken into account depends on the individual prosecutor. In many cases women may plead guilty, not realising that their experience of domestic abuse could be a reason not to be prosecuted under the CPS's public interest test. Despite government guidance for the police and local agencies working with women in contact with the criminal justice system,<sup>21</sup> the police and CPS may not apply the public interest test properly even if the abuse is known about. Many criminal defence solicitors, working under pressure on fixed fees, do not make pre-trial representations on the application of the public interest test on behalf of their clients. There is often no consideration given to this aspect of the prosecution.
21. Research by the Howard League for Penal Reform for the All Party Parliamentary Group on Women in the Penal System highlights the prevalence of arrests of women for violent offences committed in the context of domestic abuse, only for them later to be released without charge (in other words, cases in which they should not have been arrested at all).<sup>22</sup> In some cases an arrest of a survivor, even where there is no remand in custody and the case is dropped some weeks later, can have far-reaching impacts on child custody decisions, housing and other aspects of a survivor's life following relationship breakdown.
22. By contrast, in cases involving defendants who are victims of trafficking, Section 45 and the surrounding policy framework requires proactive, early case management

---

<sup>19</sup> R (QSA & ors) v Secretary of State for the Home Department [2018] EWHC 639 (Admin)

<sup>20</sup> See CWJ press release, 18 January 2021: [‘Women prostituted as teenagers to challenge the retention of their criminal records till they reach 100 years’](#)

<sup>21</sup> Ministry of Justice (2018) Managing vulnerability: Women – Fact Pack, London: MoJ; Ministry of Justice (2018) A Whole System Approach for Female Offenders: Emerging evidence, London: MoJ. Both available at: <https://www.gov.uk/government/publications/female-offender-strategy>

<sup>22</sup> APPG on Women in the Penal System (2020) Arresting the entry of women into the criminal justice system: Briefing Two

and allows all agencies to become more adept at recognising and responding to circumstances which should indicate there is no public interest in prosecuting a case, or where the statutory defence should apply. This means that prosecutors, magistrates, judges and legal advocates increasingly understand how exploitation in this context can lead to offending and are taking this into account. This provides a helpful model which should inform the development of this statutory guidance.

### **What the guidance should include**

23. This statutory guidance should mark a starting point for developing a comprehensive policy framework to support improved criminal justice responses to those who offend as a result of their experience of domestic abuse, with a view to ensuring they are protected from abuse and not stigmatised, that their rights are upheld, and that the public interest is served in decision making throughout the criminal justice process.
24. This work must be informed by close joint working with women's specialist services in the community, with specific consideration given to the additional challenges that can be faced by certain groups of women, including BME women, foreign national women and those with disabilities. Training and guidance materials should be commissioned from specialist women's and BME women's frontline services with expertise in gender-based violence. Learning should be drawn from models of good practice, such as London's domestic abuse courts, to develop specialist approaches with women defendants.<sup>23</sup> Helpful learning may also be drawn from training and guidance relating to the treatment of suspects and defendants who are potential victims of trafficking.<sup>24</sup>
25. Our forthcoming research on women who kill their abuser will make a range of recommendations for reforms, many of which are relevant to inform the expansion of the statutory guidance. Further, as recommended by PRT in 2017, we agree that:<sup>25</sup>
  - 25.1 The police, prosecutors, probation services and the courts should adopt the practice of routine enquiry as to whether women's offending took place in the context of domestic abuse, at each stage of the criminal justice process, to ensure informed decision making. This work must be supported by training about barriers to disclosure. Resources must be provided to ensure a surrounding framework of available support is in place to protect survivors who make a disclosure.
  - 25.2 Police guidance and training must include a specific focus on the links between domestic abuse and some women's offending. Police forces should work with the CPS and local domestic abuse specialist services, and where possible enable co-location of domestic abuse specialists in police stations.
  - 25.3 Police triage and diversion schemes for women involved in low level offending should not automatically exclude women accused of domestic abuse offences, but instead should allow for a nuanced approach given the difficulties faced in identifying the primary aggressor.

---

<sup>23</sup> [Advance \(2020\) A Place To Go Like This: breaking the cycle of harm for mothers involved in offending who are survivors of domestic abuse, and their children \(see recommendation 17, page 39; and appendix\)](#)

<sup>24</sup> See for example: College of Policing (2020) [Authorised Professional Practice – Major Investigation and Public Protection: Modern Slavery – Key Responsibilities](#)

<sup>25</sup> Prison Reform Trust (2017) There's a reason we're in trouble: Domestic abuse as a driver to women's offending

- 25.4 The CPS should work with specialist domestic abuse agencies to develop guidance, training and monitoring to ensure that women whose alleged offending may be driven by domestic abuse are identified, and that the public interest is applied appropriately when deciding whether to prosecute. The public interest may well be better served by their diversion into support services.
- 25.5 The Judicial College should review the availability and effectiveness of information and training for the judiciary in this area, including judicial directions regarding the treatment of women defendants affected by domestic abuse.
- 25.6 HM Prisons and Probation Service and Ministry of Justice should work with women's prison governors, probation services and community agencies to ensure that there are programmes of information and support funded for women affected by domestic abuse, including victim support services, both in prison and on release.
- 25.7 The Ministry of Justice should work with the Ministry of Housing Communities and Local Government, local authorities and the voluntary sector to ensure that women leaving prison are provided with safe accommodation with appropriate support, including specialist refuge accommodation where this is needed.
- 26. It is also essential for children's social care services and other statutory agencies to receive training and guidance to combat the unfair stigmatisation of survivors involved in alleged offending, particularly in relation to their care of, or contact with, their children. This has been the subject of recommendations in recent research by Advance<sup>26</sup> and in Lord Farmer's government-commissioned review of the importance of maintaining family relationships for women in the criminal justice system<sup>27</sup>.

## Conclusion

- 27. The statutory guidance must be revised to set out clear expectations for statutory agencies to improve their response to survivors involved in alleged offending and to offer resources to support improvements in practice. The guidance should explain in more detail how abuse and alleged offending can be linked. It should then set out what standards of practice are expected, and the principles on which these should be based. Guidance should also be offered on how improvements may be implemented. This should be done through a combination of guidance within the document itself and reference to existing policies and guidance documents. This content should be developed in consultation with lawyers and VAWG organisations with expertise in working with survivors, including those led by and for minority groups. This work should mark a starting point in developing a comprehensive policy framework to improve practice in this area.

**For further information, contact Katy Swaine Williams (Consultant, CWJ):**

[k.swilliams@centreforwomensjustice.org.uk](mailto:k.swilliams@centreforwomensjustice.org.uk)

---

<sup>26</sup> [Advance \(2020\) A Place To Go Like This: breaking the cycle of harm for mothers involved in offending who are survivors of domestic abuse, and their children \(see recommendation 17, page 39; and appendix\)](#)

<sup>27</sup> [Ministry of Justice \(2019\) The Importance of Strengthening Female Offenders' Family and other Relationships to Prevent Reoffending and Reduce Intergenerational Crime](#)