

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from Scottish Women's Aid

Foreword

Scottish Women's Aid ("SWA") is the lead organisation in Scotland working towards the prevention of domestic abuse. We play a vital role in campaigning and lobbying for effective responses to domestic abuse.

We provide advice, information, training and publications to members and non-members. Our members are local Women's Aid groups which provide specialist services, including safe refuge accommodation, information and support to women, children and young people.

An important aspect of our work is ensuring that women and children with experience of domestic abuse get both the services they need, and an appropriate response and support from, local Women's Aid groups, agencies they are likely to contact and from the civil and criminal justice systems.

Introduction

SWA welcomes the opportunity to comment on the Criminal Justice (Scotland) Bill. We welcome the removal of the requirement for corroboration but have grave concerns about the operation of the proposals on investigation liberation and liberation on undertakings.

We would comment that the provisions of this Bill cannot be developed in isolation from the provisions of the Victims and Witnesses (Scotland) Bill also before the Committee. The latter seeks to strengthen support for victims and witnesses and also comply with, and implement, the requirements of the EU Directive establishing minimum standards on the rights, support and protection of victims of crime ("the EU Directive"),¹ which came into force on 15th November 2012. The UK as a Member State, and thus, the Scottish Government too, has 3 years to translate the requirements into law/procedure or ensure that existing law and procedure complies.

Specifically, certain proposals under this Bill in sections 3, 14-17 and 19-22 dealing with liberation of suspects and accused persons have to be compliant, and cross-referenced with general principles set out in the Victims and Witnesses (Scotland) Bill, which confer certain rights and protections on victims and witnesses and place duties on bodies such as Police Scotland and the Lord Advocate.

Section 1 (3) of the Victims and Witnesses (Scotland) Bill states that these principles are

(a) that a victim or witness should be able to obtain information about what is happening in the investigation or proceedings,

¹ DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 - establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA"
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>

(b) that the safety of a victim or witness should be ensured during and after the investigation and proceedings,

(c) that a victim or witness should have access to appropriate support during and after the investigation and proceedings,

(d) that, in so far as it would be appropriate to do so, a victim or witness should be 25 able to participate effectively in the investigation and proceedings.

The rights of the suspect/accused have to be balanced with those of the victim, a position supported by the EU Directive on victims, Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the ECHR”) and Article 47 of the Charter of Fundamental Rights of the European Union, which gives the victim a right to an effective remedy and to a fair trial. In considering the accused’s rights under Articles 5 and 6 of the Convention, the rights of victims of crime must also be considered, specifically

- Article 2- Right to life, liberty and security of person which has been interpreted to refer to a state’s obligation to protect through an effective system for the prevention, investigation and prosecution of crime
- Article 3- Prohibition of torture- in relation to victims, breaches occasioned by a failure of police procedure/investigation or a failure to prosecute
- Article 8- Right to respect for Private and Family Life
- ,Article 13- Right to an effective remedy, including that there be a proper investigation of alleged crime

It is important that the proposals contained within this Bill are implemented correctly, to protect and improve the experience of women, children and young people experiencing domestic abuse who become involved with the criminal justice system as a result of such abuse.

Section 3- Information to be given on arrest

When a constable arrests a person (or as soon afterwards as is reasonably practicable), they must inform that person of the general nature of the offence in respect of which the person is arrested and of the reason for the arrest. However, there is no requirement for the complainant to be so informed and the section must state this.

Women, children and young people experiencing domestic abuse, as complainants, must be made aware of what the police investigation and any resultant prosecution will focus on. Identifying the offence as involving domestic abuse will name the behaviour and make it clear to the abuser and complainant that the abuser’s behaviour is recognised as such by the criminal justice system, which also means that the provisions of the Joint Protocol between the police and the Crown on the investigation and prosecution of domestic abuse, currently under revision, (“the DA Protocol”)² will be invoked and must be followed by police and prosecution.

This is also important in relation to the police investigation and their work in evidence gathering and risk assessment in relation to domestic abuse, particularly

² “In Partnership, Challenging Domestic Abuse”

http://www.acpos.police.uk/Documents/Policies/CRIME_ACPOS-COPFSDomesticAbuseJointProtocolV3_Dec%2008.pdf

since it is proposed that suspects may be released on investigative liberation or undertakings by the police.

It will provide clarity for complainers in relation to the eventual charges brought and situations where either the prosecution proceeds in a different direction or no prosecution is taken, particularly given the rights that victims have under the EU Directive to receive information on the proceedings generally and to challenge decisions.

Further, providing women, children and young people who have experienced offences involving domestic abuse with information to this effect will both allow them to access both targeted and specialised support provided by Women's Aid groups and also signpost and passport them to specific domestic abuse-advocacy court support.

Investigative Liberation

Section 14- Release on conditions

Section 15- Conditions ceasing to apply

Section 16- Modification or removal of conditions

Section 17- Review of conditions

SWA has concerns about the operation of the proposals on investigation liberation in relation to the risk posed to complainers in cases involving domestic abuse and how this is assessed. Police Scotland share some of these concerns and we would urge the Committee to seek their views and observations on these matters

Section 14- Release on conditions

There is no requirement in this section that the complainer be notified of the suspect's release on investigative liberation, and, more importantly, whether or not this is subject to conditions and what these are. There is also no provision for the complainer to comment on whether any condition(s) is appropriate and sufficient for their protection.

In consideration of the latter, the second important point is how the appropriate constable (Inspector or above) assesses whether or not to impose a condition and whether a condition is necessary and proportionate. This test refers to "*proper conduct of investigation*" only and there is no wording to indicate that this encompasses the protection of victims and witnesses and consideration of the risk that the suspect poses to them. It will be necessary to gather the views of the victim in relation to this liberation, given the rights of victims under the EU Directive to obtain information.

Further, since the perpetrator has not been charged with any crime, we understand that this precludes the recording of these conditions on certain police databases, which means that a system will have to be created to allow circulation of details of special conditions within, and across, Police Scotland Divisions.

Section 16- Modification or removal of conditions

Our comments on section 15 also apply here. Section 16 does not provide that the victim is to be informed and consulted before any modification or removal of a

condition; how their views and safety are to be taken into account or how they are able to challenge decisions to modify or remove conditions; nor does it provide that a condition can be increased if not adequate to protect victim/witness.

The section also does not contain any provision for the procurator fiscal to be consulted and make representations before the police take a decision to modify or remove a condition.

Section 17- Review of conditions

This allows the suspect, at any time, to apply to the sheriff to have the condition reviewed and requires that the sheriff must give the procurator fiscal an opportunity to make representations.

Again, there is no duty to inform the victim and take their views and safety into account before a decision is made.

This section poses a particular problem to women, children and young people experiencing domestic abuse as it may interfere with the accurate assessment of the risk that the abuser poses and therefore, how they are supported and their engagement with the Multi-Agency Risk Assessment Conferences ("MARAC"). There is no mechanism for them to challenge the suspect's application to have a condition reviewed or provision for the Fiscal to seek the imposition of a more onerous condition if those already in place are not adequate to protect the victim and/or witnesses. This is an issue of concern where offences involving domestic abuse are involved given the risk that abusers pose to women, children and young people.

The legislation, therefore, should explicitly state that an assessment must be carried out on the risk posed to the victim by the suspect not being detained. It is therefore crucial that the Lord Advocate continues to specify, through Lord Advocate's Guidelines and the DA Protocol, that domestic abuse is a special case in these circumstances and that a detailed risk assessment must be carried out in every domestic abuse case where release from detention is considered.

Police Liberation

Section 19- Liberation by police

Section 20- Release on undertaking

Section 21- Modification of undertaking

Section 22 Review of undertaking

These sections represent a widening of the existing police powers to liberate an accused on an undertaking to appear in court on a specified date, sometimes referred to colloquially as 'police bail'. We would reiterate the comments made in relation to sections 14-17 above on the risk posed to complainers in cases involving domestic abuse and how this is assessed. However, the issues are more serious here because the accused will be at liberty for a much longer period of time, and so the imposition of appropriate and adequate conditions and the maintenance of these until the court date are of high importance.

Again, we would urge the Committee to seek the views and observations of Police Scotland on these matters.

Sections 19 and 20

Sections 19 and 20 allow the police to liberate the accused with or without conditions, such conditions being “...*necessary and proportionate for the purpose of ensuring that the person does not obstruct the course of justice in relation to the offence...*” It is not clear whether this wording includes protection of witnesses and an assessment of any risk that the accused poses or that it would specifically prohibit interfering with witnesses, as per section 25 (5) (c) of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act.”)

Again, the section does not provide the following: that victims be informed of the release of the accused and the nature of the conditions; that their views be taken of the risk that the accused poses and whether the conditions will be adequate; how these matters are taken into account in determining decisions to liberate and how victims can challenge conditions or seek the imposition of more appropriate and adequate protection.

As we have stated above, the legislation should explicitly state that an assessment must be carried out on the risk posed to the victim by the suspect not being detained. In this regard, a detailed risk assessment must be carried out in every domestic abuse case where release from detention is considered.

Sections 21 and 22

These sections are of particular concern. Section 21 allows the Fiscal to modify, remove, or alter any condition imposed under section 20 but section 21(2) specifically provides that any alteration to a condition in an undertaking should not make a condition more onerous on the accused. This prohibition is likely to compromise the safety of women, children and young people experiencing domestic abuse in situations where either the risk posed by the abuser was not adequately assessed at the time the original conditions were imposed or the conditions require to be enhanced to cover additional areas or a change in circumstances of complainers. This prohibition, therefore, should be removed from the section.

We recognise that the accused must sign the undertaking and therefore, would have to agree to the imposition of a more onerous condition. However, since the Fiscal is obliged to give the accused notice of any application under this section, it is possible to amend section 22 so that it also allows the accused to be heard by the sheriff where the Fiscal gives notice of an intention to impose a more onerous condition.

Under section 21(3), an undertaking will expire at the end of the day on which the accused is required to appear in court. There is potential for delays in the court process to be a problem here. If the case calls in court, and for any reason has to be continued at another date, we understand that the Fiscal would ask the Sheriff to reinstate the conditions. However, if the case does not call, it appears that the conditions fall and the accused would no longer be subject to any restrictions, a matter which requires further investigation.

Section 22 provides that the accused may apply to the sheriff to have the condition reviewed and that the sheriff must give the procurator fiscal an opportunity to make representations. Again, there is no duty to inform the victim and take their views and safety into account before a decision is made; no mechanism for them to challenge the suspect's application to have a condition reviewed; no provision for the Fiscal to consider a risk assessment and no details as to the process by which the Sheriff will obtain the views of the victim as to the efficacy of any review.

We have serious concerns about the exercise of this power in relation to domestic abuse incidents as it constitutes a departure from the agreed procedure set out in the DA Protocol. While the police can currently liberate on an undertaking, this is a power used in limited circumstances and not routinely for domestic abuse, since, as a consequence of the Lord Advocate's Guidelines and the DA Protocol, most domestic abuse cases result in custody if there is sufficient evidence to charge. There is already a problem with accused persons released on bail committing further offences and this would be exacerbated by the numbers likely to be afforded temporary release.

Detaining abusers

- gives them a very specific message in terms of the unacceptability and criminal consequences of their current and future offending behaviour
- gives women breathing space
- gives police and Fiscals a longer and better opportunity to properly risk assess in terms of release on bail and bail conditions.

It is therefore crucial that the Lord Advocate continues to specify, through Lord Advocate's Guidelines and the DA Protocol, that domestic abuse is a special case in these circumstances and that a detailed risk assessment must be carried out in every domestic abuse case where release from detention is considered.

A further issue is how this process would be administered in terms of advising victims of the suspect's liberation, a matter of significant importance in domestic abuse cases where the woman must be told as soon as possible that the abuser is being released and returning home. This is usually done by the police or VIA, where appropriate, but it is not clear how the police could continue to carry out this function in the face of increased numbers.

We would draw the Committee's attention to the Scottish Government-commissioned research³ on the use of undertakings in summary criminal proceedings, the findings of which support our concerns, namely:-

- The biggest issue is that offenders released on undertakings felt that they had not been arrested "*on a bad charge*" and that the offence was minor and a lesser offence. There is a concern that abusers will begin to regard, or further regard in some cases, incidents involving domestic abuse as a "lesser offence" which is completely inappropriate.

³³ Summary Justice Reform: Undertakings Evaluation: Scottish Government; Edinburgh 2012
<http://www.scotland.gov.uk/Resource/0038/00388998.pdf>

- Concerns amongst police that they were not able to devote adequate time into a decision on whether to release an accused on an undertaking. This means that a proper risk assessment for domestic abuse offenders may not be done, especially for those who are perceived as “first time” offenders.
- Generally, undertakings were not said to be pro-actively policed. Police officers reported that there were not enough resources to monitor compliance with undertakings conditions as effectively and adequately as the monitoring done on bail conditions. Undertakings conditions would only be pro-actively policed if the accused was reported for another offence while on an undertaking.
- A notable increase in the number of convictions for breach of undertakings in the period since April 2006 both nationally and in each of the case study areas, possibly due to increased use of undertakings for more complex offences.
- Factors cited as a reason to release someone on an undertaking were cell capacity or whether the accused had a medical condition. There is therefore a substantial concern that abusers who pose a risk would be inappropriately released simply because there was no room for them.

Section 51- Abolition of requirement for constable to charge

Paragraph 37 of the Policy Memorandum states that “*The existing requirement that the police must charge a person upon arrest and prior to reporting the person to the procurator fiscal is removed.*”

In terms of the right to information that will be given to victims of crime under the new EU Directive, complainers will have a right to information on decisions made by the police in relation to any incident reported to them. This will include access to information and an explanation as to why a suspect was not charged, a particular charge was proffered and a report not sent to the Fiscal. Either this Bill or the Victims and Witnesses (Scotland) Bill will also require to set out a procedure whereby a complainer can challenge the basis of any police decision not to report to the Fiscal or not to charge a suspect.

If the decision on charging is delayed until a report is sent to the Fiscal, this will result in uncertainty for the victims as to whether proceedings are to be taken and the basis on which this will happen. There will be additional issues relating to protection for complainers and witnesses and accurate assessment of risk that the accused presents if there is no clarity and early determination of the severity of the offence committed.

To ensure consistency across Police Scotland, the Lord Advocate will require to issue guidance defining and containing the exercise of police discretion on how and when police will charge and/or report to the Fiscal because this discretion cannot be unfettered. In particular, this guidance must refer to the instructions in the DA Protocol on the investigation and reporting of offences involving domestic abuse to the Fiscal and the presumption that these will be reported where the evidence is sufficient to do so.

These instructions should be contained in the Police Scotland Domestic Abuse Toolkit, an operational guidance document for all officers on the practical elements of policing domestic abuse.

Section 57- Corroboration

SWA welcomes the move to abolish the requirement for corroboration. We support Lord Carloway's view that evidence should be reviewed based on its quality rather than quantity and that lack of corroboration in itself should not be a barrier to justice. Courts should have the opportunity to consider cases that previously would not have come before them solely due to a binary rule of counting evidence.

This is not to say that if corroborating evidence exists that it should not be gathered and submitted to the Crown, a position that should be supported by guidelines from the Lord Advocate, as referred to in the Report at paragraph 7.3.2, on page 288, viz "*... It would also not detract from the need for the police to follow up all reasonable lines of investigation, including detecting corroboration if it can reasonably be found.*" A more robust evidence- gathering culture and process to inform and support prosecution decisions is required, with the police being instructed to carry out a thorough investigation. For domestic abuse, it is important that the DA Protocol remains resolute on the obligations on police and the COPFS in terms of securing the best possible quality and variety of evidence to support a prosecution for crimes involving domestic abuse

There has been concern raised in some quarters that removal of the requirement for corroboration would result in an increase in miscarriages of justice. Firstly, there is no evidence to suggest that that this is an issue in other jurisdictions that do not have this requirement. Most importantly, the requirement to prove "*beyond reasonable doubt*" that the offence took place is a significant protection against wrongful conviction.

In relation to domestic abuse, changing to a requirement for an adequate quality, and not simply quantity, of evidence will:-

- Address the issue of domestic abuse cases not going forward due to technicalities, or cases collapsing, both of which deter women from seeking redress through the criminal law
- Redress the balance where ,currently, a very persuasive and credible witness with no other evidence is being disadvantaged; this refers to women who have all the hallmarks of exposure to prolonged domestic abuse and have come forward for the first time to be heard, only to be told that there is not enough evidence for the case to be heard, that there is no corroboration
- Serve as both a preventative and punitive measure in terms of awareness of the criminal justice response to domestic abuse; by allowing greater numbers of women to come forward, there is more scope for perpetrators to be brought before the court and they, the public at large and women, children and young people experiencing domestic abuse will be aware of this fact.

We are clear that the removal of the requirement for corroboration as an access to justice reform in order to allow more cases to come to court is not the same as securing more convictions, nor should it be regarded as such. Convictions are the

sole preserve of the judge or jury and it is of vital importance that this independent consideration of the evidence continues.

Further support for the removal of the requirement for corroboration has come from the United Nations. The UN Committee on the Elimination of Discrimination against Women (“CEDAW”) has published its Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland, which called for the “*burdensome requirements of corroboration*” in sexual offence cases in Scotland to be removed.

CEDAW said the Scots criminal law requirement for corroboration “impedes” the prosecution of rape and other sexual violence cases, commenting, “*The committee is concerned that, following the findings of the Carloway Review of criminal law and practice in Scotland, the burdensome requirements of corroboration impede the prosecution of rape and other sexual violence cases... The committee urges the State party to consider implementing the recommendations of the Carloway Review regarding the removal of the corroboration requirement in criminal cases related to sexual offences...*”

Provisions on early release- sections 72 -73

Under section 16 of the Prisoners and Criminal Proceedings (Scotland) Act 1993, the court has a power to be able to punish a person who commits an offence while on early release. Section 72 provides that where the court has determined that a person was on early release at the time the offence was committed, the court must consider making an order under section 16; this power is separate and additional to the normal powers of the court to sentence the person for having committed the offence. SWA supports these proposals.

People trafficking- sections 83- 85

While we support these proposals as a useful tool to further combat human trafficking in Scotland, existing legislation, which carries up to 14 years imprisonment, should continue to be used and not ignored in favour of the simpler aggravated offence.

Legislation on human trafficking in Scotland has been criticised as being fragmented, and inconsistent with UK law and there is, currently, no legal definition of Human Trafficking within Scots Law. These matters should be further explored and it would also be useful to monitor the UK Government’s proposals to introduce a Modern Slavery Bill and how this legislation, if enacted, is implemented and the impact.

Issues not covered in the Bill

SWA support Rape Crisis’ Scotland position in relation to

- Seeking judicial direction for juries in sexual offence cases on delayed disclosure and apparent lack of physical resistance.
- Exploring the feasibility of conducting research into the factors influencing the jury’s decision making process in Scotland.
- Commissioning further research into sexual history evidence in sexual offence cases

CONCLUSION

The successful implementation of the proposals in the Bill is not solely dependent upon the legislation.

The first step is to ensure that the police are completely clear as to what standard the COPFS will apply and how it is defined. In relation to domestic abuse, advances in police evidence-gathering should be built upon, to develop further tactics and opportunities and employ a more forensic style. This will also support judicial decision-makers in cases involving domestic abuse.

The new procedures must take into account the rights given to complainers under the new EU Directive and proposed Scottish legislation for victims, in terms of their entitlement to receive information as to why a case was not reported by the police to the COPFS and/or why a case was not subsequently prosecuted.

The new system and codes of decision-making will have to be strong, well-defined and transparent, to both face challenges, and to allow any such challenges to be made, in furtherance of complainers' rights under the Directive and the ECHR.

For domestic abuse, it is important that the DA Protocol continues to clearly set out the obligations on police and the COPFS in terms of securing the best possible quality and variety of evidence to support the robust prosecution for crimes involving domestic abuse. The DA Protocol will also be the ideal vehicle for setting out to complainers in domestic abuse cases their rights under the new EU Directive and proposed Scottish legislation for victims we refer to above.

In the light of the radical changes proposed by the Bill across several areas of criminal procedure, it is important to ensure that a process of evaluation is put in place to identify and deal with, as soon as possible, any unintended consequences

Having the relevant national and local protocols and procedures in place and enforced, along with the appropriate training and partnership working with local Women's Aid groups, will help ensure that the legislation is used in a way that supports and protects women, children and young people experiencing domestic abuse. SWA welcomes the opportunity to work with the Scottish Government, the Lord Advocate and the new Police Service of Scotland in this.

Scottish Women's Aid
20 August 2013