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 Victims and Witnesses (Scotland) Bill. We support the intention and spirit of Bill as an initiative to both take forward work already in progress in Scotland relating to support for victims and witnesses and also comply with 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.

This Bill contains proposals that, if implemented correctly, would greatly 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.

We note that much of the detail of the various duties and procedures will be “fleshed out” in secondary legislation and as a general comment, we would ask that the Scottish Government give a stated commitment that they will consult with the public and victims’ organisations on the content of any such relevant secondary legislation coming after the Bill.

Section 2 - Standards of Service

This section provides that certain persons must set and publish standards in relation to the services which those bodies provide to victims and witnesses, and also set out their complaints procedure. The persons are the Lord Advocate, Scottish Ministers, the Chief Constable of the Police Service of Scotland, the Scottish Court Service and the Parole Board for Scotland.

The Bill appears to allow the prescribed organisations the power to decide these standards for themselves as there is no duty placed on them in the Bill to consult with victims and victims’ representatives. Since it is important that these standards are not seen as a mere “minimum requirement” but are recognised as being a high threshold of best practice and within this, are devised so as to be realistic in what they can achieve in terms of fulfilling victims’ expectations of what service and support they can and cannot expect to receive, it is important that victims and witnesses and those who have experience of supporting them contribute to the production of these benchmarks. Therefore, there is a need for such a duty to be stated on the face of the Bill, to the effect that the prescribed “persons” must consult and actively involve victims of crime and organisations supporting them when devising these standards. We would also like to see this matter emphasised in the Explanatory Notes.

Further, there is a need for clarity on accountability, since the Bill is silent as to how these standards will be reviewed, monitored for consistency and compliance and actually enforced in practice. It is also unclear as to how it is intended that victims of crime and the organisations supporting them can both give feedback and secure compliance. The Bill should therefore provide that the standards will be measurable and must contain a procedure that facilitates regular monitoring, evaluation and feedback of the experience of victims, witnesses and support organisations, in order to determine how the various prescribed bodies are complying with their standards. This should include a process allowing the prescribed bodies to address shortfalls or deficiencies in processes and procedures, in addition to the complaints process referred to in the Bill. In furtherance of the obligations created by the EU Directive, these standards should also contain requirements on the provision of, and attendance at, training and awareness of victims’ issues.

We recognise that obligations and mechanisms for accountability, compliance, enforcement and training may be better included in secondary legislation but would like the Explanatory Notes to clearly state that there is an expectation that these matters will be fully addressed in any standards produced.

Finally, there are additional provisions in both Article 8 (Right to access victim support services) and Article 9 (Support from victim support services) of the EU Directive, in relation to raising awareness of rights and the development and promotion of specialist services which are not in the Bill, and we would like to see these included in the list of information that the standards should cover.
Section 3 - Disclosure of information about criminal proceedings

Article 6 (Right to receive information about their case) of the EU Directive states, inter alia, “1. Member States shall ensure that victims are notified without unnecessary delay of their right to receive the following information about the criminal proceedings instituted as a result of the complaint with regard to a criminal offence suffered by the victim and that, upon request, they receive such information”, meaning that they will not be obliged to themselves actively ask for such information. However, section 3 of the Bill only refers to a right to request, not receive, information.

Section 3(4) of the Bill indicates that any request made to a “qualifying person”, namely the police, Lord Advocate and/or the Scottish Court Service for information need not be complied with if disclosure of same is considered “inappropriate”.

While this clause is likely reflecting the caveats contained within the EU Directive at paragraph 28, viz “Member States should not be obliged to provide information where disclosure of that information could affect the proper handling of a case or harm a given case or person, or if they consider it contrary to the essential interests of their security” and those in Article 6(2) (b) “... information enabling the victim to know about the state of the criminal proceedings, unless in exceptional cases the proper handling of the case may be adversely affected by such notification” it requires to be clearer as there must be a limit to the circumstances in which “qualifying persons” could use this provision not to provide information.

The Bill, firstly, should state that where disclosure is refused, a statement of reasons for non-disclosure must be provided to the applicant and that the “qualifying persons” must develop and publish guidance on how they will comply with this duty; these obligations should be explicitly referred to and emphasised in the Explanatory Notes.

In relation to the specific areas of information set out in section 3, while the Bill specifies that information on “the nature of charges libelled against a person”, can be provided, it should, in fact, go further and include the provision of information disclosing any changes to these charges during investigation and proceedings, and the reasoning behind such decisions. This type of information, particularly where the prosecution is giving consideration to downgrading the charge to a less serious offence, or has actually gone ahead and done so, is of great importance and relevance to victims and we know that this is a matter which can cause them significant distress if they are not aware it is under consideration, or, indeed, that charges have actually been amended.

We would also comment that various Articles in the EU Directive specify that a greater range of information should be available than that prescribed in the Bill, with particular reference to Articles 4 and 11, outlined in detail below. While we are aware that the Bill was developed prior to the EU Directive being issued and that the Scottish Government is discussing with Westminster how both jurisdictions will comply with the Directive, it is important that these provisions should be included in the Bill, particularly a process in relation to any decision not to prosecute.
Article 4 – Right to receive information from the first contact with a competent authority

1. Member States shall ensure that victims are offered the following information, without unnecessary delay, from their first contact with a competent authority in order to enable them to access the rights set out in this Directive...

- the type of support they can obtain and from whom, including, where relevant, basic information about access to medical support, any specialist support, including psychological support, and alternative accommodation;
- the procedures for making complaints with regard to a criminal offence and their role in connection with such procedures;
- how and under what conditions they can obtain protection, including protection measures;
- how and under what conditions they can access legal advice, legal aid and any other sort of advice;
- how and under what conditions they are entitled to interpretation and translation;
- the available procedures for making complaints where their rights are not respected by the competent authority operating within the context of criminal proceedings.

Article 11 - Rights in the event of a decision not to prosecute

- Member States shall ensure that victims, in accordance with their role in the relevant criminal justice system, have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
- Where, in accordance with national law, the role of the victim in the relevant criminal justice system will be established only after a decision to prosecute the offender has been taken, Member States shall ensure that at least the victims of serious crimes have the right to a review of a decision not to prosecute. The procedural rules for such a review shall be determined by national law.
- Member States shall ensure that victims are notified without unnecessary delay of their right to receive, and that they receive sufficient information to decide whether to request a review of any decision not to prosecute upon request.
- Where the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law, the review may be carried out by the same authority.

Section 5 - Certain sexual offences: victim’s right to specify gender of interviewer

We support this initiative but would comment that the wording may require amendment. The section will apply to various offences, including, at 5(d) “an offence consisting of domestic abuse.” This wording may be problematic because there is no specific offence of domestic abuse; domestic abuse in terms of criminal prosecution
is dealt with through offences addressing the specific nature of the criminal behaviour, ranging from breach of the peace and assault through to sexual offences and murder in the most serious cases.

For the avoidance of doubt, and to give effect to the intention of the legislation, it may be preferable to word this as “an offence involving domestic abuse.” We have raised this in preliminary discussions with the Scottish Government and are aware that they are consulting the COPFS and Police Scotland on the matter.

Since the section also states that this duty need not be complied with if it would “prejudice a criminal investigation” or it is “not reasonably practicable to do so.” Reflecting our comments in relation to section 2 above, this requires clarification and explanation in order to limit to the circumstances in which this duty need not be complied with. Therefore, the Explanatory Notes should make clear that the relevant body, presumably Police Scotland, will be expected to develop and publish guidance on how they will comply with this duty.

Section 6 - Vulnerable witnesses: main definitions

In furtherance of the intention of the EU Directive and the obligations it puts on the Scottish Government in terms of responses to particularly vulnerable categories of victims and witnesses, we fully support:

- the extension of the definition of child to children under 18
- extending the automatic right to use standard special measures to victims of sexual assault and rape, stalking, domestic abuse and trafficking.

Since the widening of access to special measures was introduced via the Vulnerable Witnesses (Scotland) Act 2004, SWA has, lobbied for those experiencing domestic abuse to have an automatic, as opposed to only discretionary, entitlement to special measures. We are informed that women are often not aware that the current discretionary option to use special measures even exists, quite apart from the fact that they have the right to ask that an application to use them be made.

Giving evidence against a partner, and for children experiencing domestic abuse, the experience of being questioned formally and giving evidence against a parent or carer, is distressing and threatening. Women who are already apprehensive about appearing in court can be further victimised and abused by the behaviour of the abuser in court and by the mere fact of his presence. These proposals will give certainty to women in that they will know that they will be able to give their evidence in a way that minimises any potential for their further victimisation or intimidation by the accused. Being aware that they will be able to give evidence without being faced by the abuser may actually be the deciding factor in whether women even report the abuse to the police and will certainly assist the Crown in supporting women as witnesses.

We would further comment that, while not essentially part of the Bill, there must be a requirement that the full range of special measures is proactively explained to women, children and young people, how they will work and what this means for the witness; vulnerable witness notices should be lodged with the court at the earliest opportunity in the proceedings and vulnerable witnesses should be given the
opportunity to visit the court and see how these operate in practice. If a child is giving evidence, then such a visit should be mandatory and the Crown, or defence, must confirm that this has been done before the trial diet starts.

This will support women, children and young people in making an informed decision whether or not they wish to use special measures and which option(s) to seek that best meet their needs and wants. We would also like to see the use of special measures actively monitored and evaluated by the victims and witnesses using them, which will be in line with the standards of service referred to Section 2.

Again, there is an issue with the terminology since the section refers to “an offence consisting of domestic abuse.” We would repeat the concerns raised in relation to this matter as it appears in Section 5 above and that the COPFS and Police Scotland should be consulted as to whether this wording would be problematic and defeat the intention of the legislation.

**Section 9 - Objections to special measures: child and deemed vulnerable witnesses**

We are concerned as to how this will work in practice, in that a routine challenge to use of special measures by witnesses in the expanded “automatic entitlement” categories may become the defence’s default position, meaning that the intention of the legislation to give “automatic entitlement” is defeated. Such challenges must only be allowed in exceptional circumstances and the legislation has to reflect this accordingly.

**Section 10 - Child witnesses**

This section amends current procedures on children giving evidence in the court, as set out in section 271B of the 1995 Act, in order to place greater emphasis on the wishes of the child. We support these proposals as they will strengthen the position of children who want to give evidence in court but are currently being required, nevertheless, by an overly prescriptive interpretation of the law, to give evidence remotely and it will further support children in giving evidence remotely.

The presumption that a child will not give evidence in court must remain as the first option for protection of children in all cases. But, this can only operate successfully if the child has their options explained to them; the child must always be told that the default position is that they will give evidence away from court **unless** the child does not want to do this, and then the child’s wishes to give evidence in court must be respected.

We would also submit that there is an issue not covered by the Bill that could be addressed in the legislation. The earlier “Making Justice Work” consultation paper asked whether the submission of Child Witness Notices should be made a compulsory part of pre-trial hearings; Thirty-one consultees agreed that it should and we would like to see this requirement included either in the Bill as an amendment to the Vulnerable Witness legislation or, alternatively, as an amendment to the Rules of Court on criminal procedure governing Vulnerable Witness applications.
Section 16 – Special measures: closed court
Section 17 - Power to prescribe further special measures

SWA support both of these provisions and would comment that the power given to Scottish Ministers under section 17 provides the ideal opportunity to give serious consideration to the matter of intermediaries as a support measure for victims in court and to begin discussions on piloting this intervention.

Section 18 - Vulnerable witnesses: civil proceedings

It is noted that the Bill will not extend the right of victims of sexual assault and rape, stalking, domestic abuse and trafficking to have the automatic right to use standard special measures in civil cases. However, SWA supports the extension of these provisions to civil proceedings, including children’s hearing proofs and appeals, and we would wish to see the Bill amended accordingly to reflect this.

The fear and intimidation felt by women experiencing domestic abuse, sexual offences, and stalking, who are engaged in civil proceedings against their abuser in some way (perhaps through an application for a protective order, child contact and/or residence proceedings, an action for civil damages or in an action establishing or challenging grounds for referrals to a Children’s Hearing, particularly since domestic abuse is now a specific ground) does not diminish simply because the proceedings are being held under civil law under civil procedure.

In fact, the safety of the complainer is more likely to be compromised during civil proceedings because their well-being and protection is not a matter that would, as a matter of course, be considered by the court as it would if the proceedings were criminal. The obligation to submit a Vulnerable Witness Application lies with the parties themselves in civil actions; issues of the complainer’s physical safety and support to give evidence do not appear to be considered by women’s solicitors as a matter of principal in relation to civil actions involving domestic abuse, and they do not appear to routinely either bring to women’s attention the fact that they can apply to use special measures or submit applications to the court.

This is an access to justice issue; ensuring that victims of victims of sexual assault and rape, stalking, domestic abuse and trafficking have this protection in civil proceedings would assist in them giving their best evidence and would support them in their engagement with the courts during civil proceedings.

Section 19 - Victim statements

We support this proposal and would also like to raise two separate issues in relation to Victim Statements that are worthy of consideration by the Justice Committee

- Why it is that children under 14 can only make a Victim Statement through a third party such as a parent or carer, and not independently as an individual in their own right; and
- Why this applies to children under 14, when children aged 12 and above are considered to be capable of instructing their own solicitor.
Section 20 - Duty to consider making compensation order

We are concerned that, as it stands, this section has the potential to cause further harm or grief to victims, due to the fact that there is no provision, either under the 1996 Act, or in this Bill, for the views of the victim to be the deciding factor as to whether the court does or does not make a compensation order against the offender.

If the intention is to make it obligatory for the court to consider making one in every case, then it is crucial that they hear the voice of the victim; if the victim does not want a compensation order made, then the court does not make one at all. In cases of domestic abuse, such orders are a way for the abuser to continue to exert a degree of control over the victim, even though the money is paid via the court and for them to continue the abuse by delaying payments, etc. The woman may have fled her abuser and want no contact whatsoever, and certainly not money, from him; this is a particular issue where the offence involves rape or sexual abuse.

Also, the court must not be able to make a compensation order instead of any other disposal- this is simply adding insult to injury, in relation to sexual offences and those involving domestic abuse, especially where the abuser deliberately does not pay. Section 249(2) of the 1996 Act states that it will not be competent for the court to make a compensation order either instead of a Community Probation Order or where it is deferring sentence, but the section does not explicitly state that the court cannot make a compensation order as an alternative to a custodial sentence. Therefore, presumably the court could do so instead of making a custodial sentence, which is wholly inappropriate and unacceptable and it is necessary that this be clarified.

Conclusion

SWA supports the introduction of the Victim and Witnesses (Scotland) Bill and the commitment and principles behind it. The introduction of the Bill and the ongoing review of the criminal justice system affords an important opportunity to explore further how the experiences of women, children and young people engaging with the criminal justice system in cases involving domestic abuse can be improved from the moment they report the abuse, whether or not that reporting results in a prosecution being taken. We look forward to working with the Scottish Government in taking this work forward.

Scottish Women’s Aid
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