Justice Committee

Victims and Witnesses (Scotland) Bill

Written submission from Action Scotland Against Stalking

Action Scotland Against Stalking welcomes the opportunity to offer feedback response to the first draft of the Victim and Witnesses (Scotland) Bill.

Introduction

Action Scotland Against Stalking is a voluntary organisation which was set up to campaign for victims of stalking to be protected through the introduction of specific anti-stalking legislation and to help progress the rights of victims within the criminal justice process.

In June 2010, the ‘Offence of Stalking’ was introduced into the Criminal Justice and Licensing (Scotland) Act 2010. Action Scotland Against Stalking quickly became a high-impact; national and international campaign. In March 2012, England and Wales introduced two new offences of stalking into the Protection of Freedoms Act, 2012, and in 2011 stalking was introduced into the Istanbul Treaty as item 34 to combat Violence Against Women and Domestic Violence.

The Scottish Governments Victim and Witnesses Bill is a welcome introduction into Scottish law as a first step towards strengthening the rights of victims to participate in the justice process as outlined and dictated by the European Directive for Victims and Witnesses.

This paper offers a review of the draft legislation to highlight areas which require further consideration and recommendations for inclusion into the Bill.

Section 2: Standards of service

This section identifies the Lord Advocate, Scottish Ministers, the Chief Constable of the Police Service of Scotland, the Scottish Court Service and the Parole Board for Scotland for being responsible for the developing and the setting of published standards of services and also the complaints procedure under which agencies who support victims must adhere.

The Bill does not include Victim Support providers as named persons nor places any responsibility or obligation on the named persons to consult with victim support providers in the development of these standards. The involvement of victim support services as named persons is central to the development and setting of published standards of service. All agencies must work in concert with one another with emphasis placed on the recommendations by victim support providers in the development, setting and evaluation standards of service and delivery.

There is no mention in the Bill how these standards will be evaluated for compliance and effectiveness. Without close involvement with victim support providers to provide on-going feedback issues such as service gaps, barriers to access; recommended
needed changes; and spotlighted successful programs and promising practices that reach and serve crime victims will fail to be identified.

It is important victim support agencies contribute to the production of standards of service and are included in the Bill as named persons.

Section 3 - Disclosure of information about criminal proceedings

Section 3 of the Bill requires further clarification to reflect more accurately the minimal standards set out by the European Directive.

**Article 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”;

**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.


Proposed inclusion to the Bill

The right to privacy and disclosure of information

1: Protecting the right to privacy and the protection from unnecessary invasive discovery requests is critical to preventing re-traumatizing to a victim who has already suffered harm.

2: Access to information for the rights of victims to apply for an application for a private prosecution in the event their case is not successfully prosecuted within a public criminal court of law.

Section 5: Certain sexual offences: Victims right to specify gender of interviewer

Sub section 4: The investigating officer need not comply with subsection (2) if

A: Complying with it would be likely to prejudice a criminal investigation
B: It would not be reasonable practical to do so.

This appears to provide a loophole for section 5 not to be applied. The Bill requires to state reasons and situations to clarify:

A: Under what circumstances would this apply?
B: When might this situation occur?

Section 18: Vulnerable witnesses and 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, being the victim of a crime within a criminal court and a pursuer within a civil court are not mutually exclusive terms. Victims require and should be afforded the same protection within civil courts proceedings as they are the criminal courts. The Bill requires to be amended to reflect this vulnerability and offer of protection. Failure to do so may prevent victims
accessing justice within the Scottish courts system. This is particularly relevant to victims of predatory crimes such as: victims of sexual assault and rape, stalking, domestic abuse and trafficking.

Section 19: Victim statements

It is proposed that children under 14 should be given the choice of making an independent Victim Impact Statement in their own right or choosing to be represented through a third party such as a parent or carer. (This conflicts with the view that children over 12 years old are capable of instructing their own lawyer)

Measures and applications

The threshold for victims of predatory crimes such as sexual offences, domestic abuse and stalking requires including all jail sentences.

Stalkers who receive jail sentences for 6 months may still pose a threat to the victim on release. The lack of an overt threat or physical violence is not an indicator of low risk.

If the sentencing is based on the nature of behaviours which may appear non-threatening or through weak or lack of evidence, it cannot be assumed they do not impose a continual threat to the victim. In all cases of stalking, rape or domestic abuse and regardless of the length of the jail term, the victim should be notified of the release of the offender.

Proposed inclusions to the Bill

1: Provide a means to protect a victim’s job or economic status when victims are subpoenaed to appear in court and during the criminal justice process

Temporary and short term work contracts have become part of the landscape for many within the workplace and as such do not fall within the remit of employment law.

Protection against employer retaliation for victims and witnesses called to testify and for victims of violent crimes and their family members who take reasonable time off to attend court proceedings or consults with the prosecutor.

Employers should be prohibited from terminating or penalising certain victims who miss work due to court appearances, meeting with procurator fiscals, support services or medical appointments. This many include requiring the prosecutors’ office to intervene with employers or creditors on request, or prohibiting employers from firing or punishing a victim from taking time off to participate in the criminal justice process.

2: Speedy return of property: To have any stolen or other personal property expeditiously returned by the courts or criminal justice agencies when no longer needed as evidence.
Victim of crime may suffer the loss of property in two ways: by theft or when property is seized and held as evidence in subsequent criminal proceedings. In most cases property is returned to its owner when it is no longer needed as evidence in a criminal prosecution. Since this often means the victim is deprived of his or her property for months or even years while the case is appealed or retried.

There requires to be specific time requirements for the return of property outlined within the Bill.

When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property of which ownership is disputed, shall be photographed and returned to the owner within a set period of time of being taken.

**Case Study:** A victim of stalking was required to submit her mobile phone as a production for the provision of evidence of contact by the perpetrator.

The phone was handed over in the August 2006 and returned in the spring/summer of 2009. The text messages could have been downloaded or photographed and the phone returned swiftly. This was not the case and the victim had no choice but to purchase a new phone and the inconvenience of a new number but was still liable for the contract payments of the seized phone. By the time the phone was returned nearly three years later it was well out of date and contract.

3: **Perpetrator residence relocation upon release or to protect the safety of victims and/or witnesses and the safety of the community.**

It is not unusual for victims of predatory crimes being forced to relocate when their perpetrator is released from jail or receives a lesser sentence but never the less may still pose a threat. This is pertinent in cases of children, elderly, domestic abuse, rape, stalking and murder.

4: **The right to a speedy trial as opposed to the term “unreasonable delays”**

This refers primarily to victims of serious crime and those identified as vulnerable witnesses. Prior to ruling on a continuance requested by a party, the court must also consider the impact of the delay on the victim.

5: **Victim characterisation within a court of law**

The term victim holds different definitions depending on the context in which it is used, who is using it and to what end. Labels can be linked to personal identities and also to larger social constructs.

As soon as a person engages within the Criminal Justice System they are automatically allocated the identity label of a victim with all its associations, connotations and attitudes. What it is deemed a person is, will usually determine how they will be treated.

We are entering into a new era where people who have experience crime have now gained a measure of recognition within the delivery of justice. This is an important
step in our history and the opportunity to foster and develop healthier attitudes and new ways of thinking. I propose ‘victims’ are referred to as the ‘aggrieved person’ within a court of law thereby fostering new attitudes and allowing them to retain some sense of dignity and respect.

**The plea bargain process**

Whether the defendant's plea to a lesser charge should be accepted.

The prosecutor should obtain the views of the victim before a disposition is final, whether this involves a plea agreement, dismissal of charges, or a pre-trial diversion of the defendant. The prosecutor will be required to certify to the court that he or she has consulted the victim before a plea can be accepted.

**Implementing victims’ rights into practice: Ensuring rights are upheld and respected**

Proposal for victims to be entitled to independent legal representation

Many victims of crime are under the impression that the Crown procurator fiscal is “their lawyer” and is obligated to act on their behalf. The first and primary legal obligation of a procurator fiscal is to represent and present the case and not to the victim per se. Victims are not represented within a court of law. Since victims interests are not the same as those of the prosecutor, they will ultimately become subordinated to those of the defendant during the trial process. Without a robust mechanism to ensure the protection of victims’ rights within the justice process there is an inherent risk that victims of crime will remain oppressive burdened by a system that was designed to protect them.

The next step for a maturing victim’s right bill is ensuring it is enforced within the courts. The two main barriers to victims’ rights compliance are structural procedural problems that prevent challenges to rights violations; and the lack of legal advocates for crime victims.

It is essential victims’ rights are not compromised but protected from the structures and workings of the Criminal Justice System.

One mechanism which would help overcome these barriers would be through the provision of an independent legal body allowing victims the right to be represented by counsel of their choice. This would ensure the victims' are able to exercise their rights and any adverse ruling against a victim in any context involving these rights can be appealed to a higher court by victims through their own counsel. They would serve as the pivotal point for the victim. In essence, emerging delivery systems should augment, rather than interfere or collide with existing services and judicial processes.

Scotland like the rest of the UK is suffering from financial crisis with services being squeezed more and more. Consideration must also be given to the enforcement of these rights and the already over stretched duties of Crown Office Procurator Fiscals.
A recent report highlights what deems to be “serious concerns and unacceptable practices in Scotland’s prosecution service” (Glasgow Herald August 17th 2012).

- Fiscals do not have time to prepare for court cases
- Lost evidence and the citing of unnecessary witnesses and failure of making the correct request for productions
- Fiscals with very few exceptions did not read the full statements before court but cherry picked the ones they would read in full
- Fiscals are not preparing thoroughly for summary cases “failing to view CCTV evidence and read witnessed statements due to time constraints

Drawing from research studies and the experience of many victims in those countries which already provide strong protections for victims, the enactment of legislation is not enough and for many, victims’ rights have remained paper promises that have never been honoured or fully enforced.

I have proposed other potential scenarios experienced across a range of other jurisdiction where rights have been enacted but not be legally enforced.

This again substantiates the proposal for independent legal representation. The protection of victims’ rights is costly, but they are indispensable to ensure the success and legitimacy of the criminal justice service in years to come. It might prove to be a cost saving benefit in the long run.

1.1 Many judges ignore victims’ rights because they assume victims have no real “standing” within the adversarial criminal justice process.

1.2 Where victims do not have their own lawyer, judges have an added incentive to give little weight to the victim because unrepresented victims may not even know they have rights.

1.3 Judges hold the potential to work from the assumption that victims have no real “standing” to do anything about it if their rights are violated.

1.4 Judges and prosecutors and those working within the criminal justice system may be resistant to change. Attitudes are strongly embedded into criminal justice discourse.
1.5 To ensure systemic efficiency, courts might simply refuse to give any meaningful weight to victims interests.

1.6 The right of an appeal by a victim may be weakened and victims may not have the skills and resources to challenge the decision.

1.7 The right to challenge any violation of rights places another burden on victims who may already be highly vulnerable and suffering from the impact of the crime.

1.8 Prosecutors may not take appropriate steps to deter defence lawyers from violating victims’ rights in order to preserve the rights of the defender.
1.9 Well-intentioned prosecutors with heavy caseloads have little incentive to spend time and resources filing interlocutory appeals on issues that will not significantly affect the integrity of the criminal case.

1.10 While victims have access to victim advocacy workers they are not professionally skilled lawyers and hold no legal authority. They can provide support, but victim or indeed any citizen of the state should be expected to participate in a court of law without the choice of being legally represented.

For vulnerable victims and victims of serious crimes such as rape, stalking, domestic violence, fear of the criminal justice system is well founded. Most members of the public are familiar with horror stories and the most recent concerning Frances Andrade and the brutal and humiliating cross-examination conducted by the defence counsel.

Of course, a defendant must be entitled to confront witnesses. The court trial is sometimes the first opportunity that a defence lawyer has to hear the victim's story.

There is acceptance that an in depth and often intense questioning and cross examination is often called for in order to expose any discrepancies or lies. However, there is a difference between the establishment of the facts and excessive badgering of a victim. Vulnerable victims or those suffering from post-traumatic stress disorder could quite easily be sent over the edge by an excessive and aggressive line of questioning.

Regardless, and whatever one's view of defence counsel conduct, it is clear that even those who initially felt well prepared to face the onslaught are sometimes left shocked and shaken.

Testifying is difficult enough for victims because they are forced to relive traumatic events. Striking a balance is never easy, but there is the potential for judges and procurator fiscals to decide not interfere with aggressive trial tactics for fear of interfering with a defendant's due process rights.

The law is not, nor should it be, an "all or nothing" approach and balancing the rights of the defendant and the rights of victims should not be viewed in mutually exclusive terms.

There will be times when the two will conflict. Independent legal representation of the victim will ensure these seemingly incongruent rights can be balanced so that one set of rights is not compromised by the other.

Independent legal representation is an important precedent which should enhance the system of representation for victims. This provision could be limited to victims of serious crime and those deemed as vulnerable witnesses as part of an integrated and comprehensive array of services.

**Conclusion**

ASAS supports the introduction of the Victim and Witnesses (Scotland) Bill and the commitment and principles behind it. The introduction of the Bill and the on-going
review of the criminal justice system affords an important opportunity to explore further how the experiences of victims of crime are afforded protected rights to engaging within the criminal justice process. I am willing to give oral evidence if called to do so and look forward to working with the Scottish Government in taking this work forward.

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