

Victims, Witnesses and Justice Reform (Scotland) Bill

Scottish Women's Aid Stage 3 Briefing

Scottish Women's Aid welcomed the Bill as an opportunity to reform the criminal, and civil justice system through streamlining and improving existing procedures and introducing new processes.

As the Bill process moves toward Stage 3 consideration, this paper highlights those parts of the Bill that we consider positive and helpful, along with supportive amendments and also draws your attention to those provisions about which we have concerns, due to their potential to negatively impact on women, children and young people experiencing domestic abuse, and any concerning omissions from the Bill.

SWA's previous submission to the Committee can be found in the link below¹

1) Bill provisions we consider positive and helpful and any positive amendments -

- Bill provisions removing the not-proven verdict
- Bill provisions creating a Sexual Offences Court, provision of independent legal representation and anonymity for complainers in sexual offence cases
- Sharon Dowe's amendment number 3 – "Circumstances in which non-harassment order must be considered by court"
- Jamie Green's amendment number 39 "Victim Statements in Solemn Proceedings and Sharon Dowe's connected amendment number 104 "Reading of victim statement in court"
- Audrey Nicol's amendment number 83- "Provision of transcript of record of trial to certain complainers"
- Sharon Dowe's amendment 101- "Victims' right to be informed of decision not to prosecute"
- Russell Findlay's amendment number 102- "Victim's right to information about plea agreements, etc"
- Russell Findlay's amendment number 108- "Allocation of business in civil and criminal proceedings" and Maggie Chapman's connected amendment number 152- "Review in relation to connected proceedings"
- Maggie Chapman's amendment number 150- "Report on Non-Harassment Orders"
- Rona Mackay's amendment 151 – "Offences relating to protective orders made outwith Scotland"

2) Bill provisions causing concern and omissions from the Bill

- Provisions creating the Victims and Witnesses Commissioner
- Provisions on special measures in civil cases
- Omission of provision providing for specialist training on domestic abuse for specialist Sexual Offence Court

¹ <https://womensaid.scot/wp-content/uploads/2023/11/Victims-Witnesses-SWA-Sept-2023.pdf>

PROVISIONS IN THE BILL WE SUPPORT

The removal of the not-proven verdict

- SWA supports the Bill's removal of the not-proven verdict in solemn criminal trials and that Scotland should change to a two- verdict system. This is a much-needed reform as this verdict is not understood by juries and, around crimes of gender-based violence, which mainly affect women, appears to be used disproportionately in rape and attempted rape cases. Abolition will bring clarity to all those involved, particularly victims of crime
- The arguments in favour of retaining the not proven verdict, specifically that it "*acts as a safeguard against wrongful conviction*" are not convincing and work to deny justice to complainers. The Scottish criminal justice system will still retain numerous other safeguards against miscarriages of justice, including the presumption of innocence, the fact that the Scottish system does not allow for hung juries and retrials, so if the jury does not agree to convict, the accused person must be acquitted, and the burden of proof on the Crown to prove guilt beyond reasonable doubt. We do not consider that the removal of the not proven verdict will impact on these, or indeed, any of the other safeguards.
- Similarly, tying this into reform of the jury is inappropriate. While we strongly support the retention of the 15-person jury, **we have concerns around, and do not support, the change to the jury majority needed for conviction.**

The creation of a Sexual Offences Court, provision of independent legal representation and anonymity for complainers in sexual offence cases

- These provisions represent important reforms working toward delivering a better experience for complainers in sexual offence cases. This court would enhance and encourage the development of systems, practices and policies through a "trauma-informed lens" to the benefit of, not only, complainers in safeguarding their welfare, but also that of judiciary, court staff and specialist practitioners. It is vital that victim-survivors are meaningfully engaged, consulted and are extensively involved in these reforms, particularly the co-production in the Court's design.
- As noted above, we support the provision of anonymity for complainers in sexual offence cases **and ask that this be broadened to include complainers in domestic abuse and stalking cases.**

Sharon Dowe's amendment 3 - Circumstances in which non-harassment order must be considered by court

This seeks to close a gap by extending the provisions around the presumption of the court making Non Harassment Orders ("NHOs") in the Domestic Abuse (Scotland) Act 2018 to provide a similar presumption for the making of a NHOs in sexual offence cases. There have been recent issues raised by complainers in cases of rape and sexual assault where NHOs were not made for their protection, despite being badly needed, and for these reasons, we fully support this amendment.

Jamie Green's amendment 39- "Victim Statements in Solemn Proceedings" and Sharon Dowe's amendment 104 - "Reading of victim statement in court"

- In relation to Bill's commitment to promote and extend trauma-based practice, SWA would draw MSP's attention to the fact that there has been no meaningful progress in reforming the Victim Statement Scheme since the Scottish Government's consultation in 2019. SWA supported the consultation option

that would, not only, extend eligibility to all solemn proceedings but also include a list of prescribed offences that would be eligible for a Victim Statement, even if the offences were tried as summary proceedings.

- Currently, offences under the 2018 legislation, those attracting the domestic abuse aggravator under the 2016 Act, the intimate image abuse offence under the same 2016 legislation, the stalking offence, offences relating to forced marriage and breach of a FMPO are not covered. This means, that in solemn proceedings, women experiencing domestic abuse are not being given the opportunity to give and have a Victim Statement considered by the court.
- Given the considerable volume of court business, in particular summary proceedings, relating to domestic abuse and the fact that the 2018 legislation imposes a duty on the court to consider the safety of the victim(s) when sentencing, including the presumption in favour of making an NHO, it is important, in terms of advancing trauma based practice, that the court be aware of the impact of the domestic abuse on women, children and young people, before sentencing. **Therefore, given the gap in protection and the fact that this process needs urgent attention and reform, particularly supporting women's agency and their right to make a statement personally, we support amendments 39 and 104.**

Audrey Nicol's amendment 83- "Provision of transcript of record of trial to certain complainers"

SWA supports this important amendment that will allow complainers in serious sexual offence cases to obtain transcripts of the trial proceedings without cost to themselves.

Sharon Dowey's amendment 101- "Victims' right to be informed of decision not to prosecute."

We support this amendment placing a duty on prosecutors to advise victims of decisions not to prosecute, which we hope will also cover COPFS decisions to halt ongoing proceedings, where the victim has not otherwise declined to receive this information. Such information is important to women experiencing domestic abuse but, clearly, the successful operation of this amendment relies on ensuring good communication with the victim as to their views on this issue and appreciation that they can change their mind.

Russell Findlay's amendment 102- "Victim's right to information about plea agreements, etc"

We support this amendment placing a duty on prosecutors to advise victims where the COPFS has accepted a guilty plea to an amended charge and/or has accepted a not guilty plea to a charge. Albeit this will apply to solemn proceedings/proceedings on indictment, this is important information much needed by women experiencing domestic abuse who have expressed dismay about not being told about this has happened; to them, not being told that certain charges have been changed or not prosecuted means that their experience and the abuse against them has not been taken seriously and diminished. This will bring certainty to the proceedings and hopefully increase women's confidence in the system, with the proviso that it is, in due course, extended to summary proceedings, too. Again, clearly, the successful operation of the "opt out" nature of this amendment relies on ensuring good communication with the victim as to their views on this issue and appreciation that they can change their mind.

Russell Findlay's amendment 108- "Allocation of business in civil and criminal proceedings"

- SWA is concerned about the lack of provision in the Bill around the prosecution of domestic abuse, specifically around integrated domestic abuse courts.
- There is an urgent need to address how information flows between courts hearing domestic abuse- related civil cases and criminal proceedings involving the same parties. The shortcomings of the current system have been documented over and over: women, children and young people are endangered and harmed through courts making decisions without information and understanding of the context and abuse, most especially in child contact proceeding where domestic abuse is the context.
- It is important that there is an acknowledgement and support for work both exploring what Scotland would need to do to implement integrated courts *and* what else in the shorter term can be done to improve information between related criminal and civil cases. The already serious risks facing survivors signal the fundamental jeopardy to them of not fixing the system which puts the responsibility to police perpetrators on survivors.
- This cross-portfolio issue between criminal and civil systems cannot be addressed adequately without the attention of the Scottish Government and the Lord President.
- We would also draw to MSPs' attention that a further discussion is also urgently needed around what can be done to reinstate specialist Domestic Abuse Courts in Scotland, and how the Scottish Courts and Tribunals Service's pilot project for virtual summary criminal trials, to be conducted in Aberdeen and Inverness Sheriff Courts, can be re-instated, noting the Virtual Trials National Project Board's recommendation of the establishment of a virtual domestic abuse summary trial court in each sheriffdom.²

We also support Amendment 152 from Maggie Chapman

SWA raised the issue of integrated courts and information exchange between civil and criminal courts in relation to domestic abuse with the Scottish Government prior to the passage of the 2018 legislation. Little progress has been made since 2017, other than commitments to more "research". Our fear is that without language in the Bill committing the Scottish Government to bring a report to Parliament by a specified date about the way forward, the impetus will be lost.

Maggie Chapman's amendment 150- "Report on Non Harassment Orders"

- Improving the courts' understanding of the need for NHOs and the duty imposed on them in relation to the imposition of NHOs in domestic abuse cases is a priority issue for SWA. Despite six years since the passage of the Domestic Abuse (Scotland) Act 2018, NHOs are still not consistently awarded by courts.
- This situation endures despite, firstly, the clear statement in paragraph 8, Chapter 4, in the Schedule to the 2018 legislation, that, when sentencing a person convicted of an offence involving domestic abuse, "... *the court **must** have particular regard to the aim of ensuring that the victim is not the subject of a further such offence committed by the convicted person.*"³ Paragraph 9 of that Chapter then builds on this duty by providing a presumption that the court **must** consider and then **must make** a NHO unless it concludes a NHO is not

² <https://www.scotcourts.gov.uk/media/310hvezus/report-to-the-lord-justice-general-virtual-summary-trials-jan-2022.pdf>

³ <https://www.legislation.gov.uk/asp/2018/5/schedule>

needed to ensure the safety of the victim and children, a decision that must be explained by the court. Therefore, granting a NHO is the default position for the court but issues around child contact, which are not always clear and explained, and court delays are often reasons given, when they are not ordered.

- Albeit the 2018 Act contained a specific reporting requirement around the operation of the first three years of the 2018 Act, it is time for serious appraisal of the use of NHOs. **We therefore support Amendment 150, requiring Scottish Ministers to specifically report annually on the use of NHOs.**

Rona Mackay's amendment 151 – “Offences relating to protective orders made outwith Scotland “

This amendment seeks to ensure enforcement of enforcement of protective orders made outwith Scotland. SWA supports this to improve the protections available to women, children and young people experiencing domestic abuse and fulfil our obligations under international instruments such as Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the “Istanbul Convention.”

PROVISIONS IN THE BILL WE DO NOT SUPPORT

Creation of the Victims and Witnesses Commissioner

We maintain our opposition to the creation of this Commissioner: this will add a layer of bureaucracy, impact on victim support service budgets and the funds could be better utilised improving services and advice to victims.

- SWA is concerned about the push to create further major reforms while legislation that could make a real difference to the lives of women, children and young people experiencing domestic abuse, languishes uncommenced. Given budget constraints, it is not the time to create this new office, and efforts should concentrate on existing measures that could make a practical difference.
- The creation of a Victims' Commissioner would not add value to the work already being done across Scotland to support victims of crime, particularly around violence against women. The role risks duplicating existing oversight, diluting specialist voices, and overlooking the importance of engagement with the VAW sector
- In addition, the very real possibility of unintended negative consequences for the VAWG sector, should a Commissioner be appointed without appropriate competence in the specialist area of domestic abuse and other forms of VAWG, are significant and threaten 20+ years of consensus building.
- There is no statutory requirement to engage with specialist services such as Women's Aid; no clear safeguards to prevent duplication or conflict with existing regulation or service delivery and no statutory obligation on the Commissioner to provide representation of specialist services on the Advisory Group.

Special measures in civil cases- the Bill provisions still do not go far enough in affording appropriate protection for women experiencing domestic abuse

- The Bill still imposes thresholds which women must meet before being regarded as vulnerable witnesses in civil cases; additionally, the Bill retains judicial discretion around victims' access to special measures meaning the

court can impose special measures of their choice on a deemed vulnerable witness and, worryingly, can still refuse their use of special measures where the court considers that this would be “*prejudicial to the proceedings*”, both inexplicable positions given the trauma-based approach to supporting victims and witnesses created by the Bill.

- In criminal proceedings, victims of domestic abuse are automatically deemed vulnerable witnesses, with automatic rights to access standard special measures. It is, therefore, only right that **all** women involved in **any** civil case where they raise domestic abuse as an issue are automatically regarded as vulnerable witnesses, without having to meet thresholds of eligibility, and are able to use standard special measures of their choice.

Bill's lack of provision of specialist training on domestic abuse for specialist Sexual Offence Court

- SWA has a concern that, while the specialist training for the judiciary, prosecutors and others involved in that Court will, rightly, predominantly focus on sexual offending, contemporaneous training on domestic abuse and connections to sexual offending will not feature. Given that the majority of sexual offending takes place in the context of a relationship, this is a serious omission.
- Although the Bill has provisions around embedding and extending trauma-based practices in civil and criminal courts, these require strengthening, with clarification on the detail of how this will happen; monitoring and enforcement processes and provision of training and domestic abuse competency will be necessary, since being trauma-informed is not the same as being domestic abuse informed.

We thank you for your consideration of the issues presented and your ongoing support for our work.

If you require further information, please do not hesitate to contact us

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