



# Centre for Women's Justice's submission to Victims' Bill consultation

3 February 2022

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## Introduction

Centre for Women's Justice (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 with frontline women's sector organisations on using legal tools to challenge police and prosecution failings around violence against women and girls. As such we have gathered significant evidence which has provided the basis for our recommendations for changes to improve the experience of victims. We have not addressed all the consultation questions, but as a member organisation of the End Violence Against Women coalition (EVAW), we endorse their more complete response to the consultation paper. This detailed submission covers four distinct areas in which CWJ has relevant expertise. Two of these are not mentioned in the consultation document, but we believe are so important that we invite the government to consider them. We set out the evidence supporting their inclusion.

## **Summary of the four areas we address**

### **A: Victims' Right to Review (Chapter 1, Questions 1, 4 and 5)**

We have identified five main problems with the VRR scheme, which are relevant to a number of questions in the consultation. In our experience the VRR scheme is not operating adequately to support victims' rights as intended. This is for two reasons: firstly, because it is not accessed by a huge proportion of victims<sup>1</sup>. Secondly, because where it is accessed, victims are not given a sufficient opportunity to participate actively, but are expected to be mere passive recipients whose only role is to make a request to trigger the process, and then leave it to the criminal justice agencies to do the rest. We have called for reforms to address five aspects of the VRR process which are not working adequately in the interests of victims:

1. Being informed of NFA decisions and the existence of the VRR scheme
2. Being informed of the reasons for an NFA decision
3. Being given the opportunity to make representations and having these taken into account in the VRR process
4. Expertise of police reviewing officers conducting VRRs
5. Timing of VRR where CPS decide to offer no evidence, to allow for a VRR to be requested before the CPS formally offers no evidence so that justice can be done in those cases where the VRR is upheld.

### **B: Independent legal advice/representation for sexual violence survivors (Chapter 4 – Improving advocacy support)**

It is widely understood that the criminal justice system is not delivering for victims in rape and other sexual offences cases at present. Based on our casework experience, we believe that one important way to address this is for sexual violence survivors to receive independent legal advice, and in some instances legal representation, alongside ISVA support. Independent legal advice is necessary both because of difficulties in the way the criminal justice system operates for victims in RASSO cases, and because of the need to build confidence for victims in these cases and to vastly improve their experience of the process.

### **C: The need for children born as a result of rape to be recognised as 'secondary victims' of crime ("Daisy's Law")**

We are supporting a campaign brought by our client, 'Daisy'<sup>2</sup> – who has also supplied her own separate response to this consultation – to introduce legislation which recognises children born of rape as 'secondary victims' of crime, and affords them rights for the first time under the Victims' Code.

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<sup>1</sup> Whilst the term 'survivor' is the preferred term in the women's sector we will use the term 'victim' within this submission as it relates to the Victim's Law consultation and is the term used within the criminal justice system.

<sup>2</sup> Daisy will not be using her full name in any campaign material, so as to avoid any risk that her birth mother (who, as a victim of rape, is entitled to lifelong anonymity) is not publicly identified.

Affording 'rape-conceived' persons this status in the Victims' Bill will, it is hoped, help counter the dearth of recognition and support currently available for children (and adults) who are born as a result of rape, for whom such a discovery can be profoundly traumatic. In addition, affording individuals born of rape their own statutory right to pursue a criminal complaint, if they wish to do so – will significantly improve the prospect of historic rape/child sexual abuse offences being recorded and investigated. It may even in prosecutions being brought – where appropriate – in cases where the pregnancy itself is/was compelling evidence of the crime.

## **D: Inappropriate criminalisation of victims of domestic abuse and other forms of VAWG**

Nearly 60% of women in prison and under community supervision in England and Wales are victims of domestic abuse. [Research](#) by CWJ and others has shown how women's offending is often directly linked to their own experience of domestic abuse, and how victims can be criminalised in a wide variety of ways. This is also reflected in cases referred to our legal advice team, and in the work of Justice for Women and our director Harriet Wistrich over many years.

The Victims' Bill consultation document does not address the treatment of victims of domestic abuse and other forms of VAWG and exploitation who are accused of an offence that arises out of their experience of abuse. This is a significant gap which we believe needs to be addressed. In our submission we are arguing for the Victims' Bill to include new [statutory defences](#) and for improvements in policy and practice to be implemented to protect victims from inappropriate criminalisation.

## **Detailed evidence based submissions**

### **A: Victim's Right to Review (VRR), Chapter 1 Questions 1, 4 and 5**

#### **The Victims' Code (Question 1)**

We strongly support the proposal to place the Victim's Code into primary legislation. A key problem is the Code's lack of teeth which means that in practice many of its provisions are simply ignored. We will focus on the part of the Victim's Code relating to No Further Action (NFA) decisions and Victim's Right to Review (VRR), which are honoured in the breach in practice, especially in domestic abuse cases. We set out below our experience of how these provisions are ignored and how they need to be strengthened. We also strongly support an oversight and enforcement mechanism which monitors and maintains standards, without relying on victims to raise complaints. In our experience most domestic abuse victims do not engage with the complaints system despite their dissatisfaction with police responses, because they have so many other more pressing demands such as disputes over children in the Family Courts and their housing situation.

We believe that the existing rights in the Victim's Code are insufficient in that the Code currently only contains rights around information and communication about an investigation, and not a substantive right to an adequate and effective investigation. Whilst victims want good communication, what they want most of all is for the police investigation to be capable of delivering justice. This is a legal requirement in those

cases where the offence meets the threshold of Articles 2, 3, 4 or 8 of the European Convention on Human Rights (see the well known Supreme Court decision in *DSD v Commissioner of Police* (2018)<sup>3</sup>). Most sexual offences, domestic abuse and modern slavery offences meet the thresholds for these Convention rights. Enshrining this substantive right within the Victim's Code would give victims a far more meaningful commitment by the criminal justice system. Most victims and their support workers are not aware of this legal duty, so including it would empower them to expect the basic minimum standards of an adequate and effective investigation. It would not extend the law as this legal duty already exists.

## **The work of Centre for Women's Justice on VRR**

CWJ provides pro bono legal advice to frontline women's services and their clients, mostly Rape Crisis Centres and domestic abuse services. Over the three years 2019 to 2021, we provided advice in 370 matters relating to Victim's Right to Review, of which 269 were police VRRs and 101 were CPS VRRs. The vast majority of these involve rape and other sexual offences, but we have also dealt with cases of domestic abuse, harassment and stalking, and modern slavery offences.

More than half of the enquiries we deal with are procedural, for example enquiries about how to obtain explanations for NFA decisions and issues around time limits for VRR requests and representations. Where we deal with the charging decision itself, CWJ input includes preparing representations in support of VRR, arranging for barristers on our panel to draft representations, referring cases to solicitors where legal aid is available, advising following VRR outcomes on the possibility of judicial review, and sending judicial review pre-action protocol letters.

We also provide training to frontline women's services on using legal tools to challenge police and prosecution failings around VAWG, which includes the Victim's Right to Review scheme. Over the last three years we provided training to 33 ISVA services and 38 domestic abuse services across England and Wales. Within these training sessions we receive feedback from support workers on their clients' experiences of receiving NFA decisions and on VRR. In our experience the use of VRR is different in domestic abuse cases to sexual violence cases, which we address further in this submission. We conducted a survey of domestic abuse support workers from across England and Wales, with 81 responses, and will refer to some of the findings below.<sup>4</sup>

Over three years we have therefore amassed a great deal of experience in every aspect of the VRR process in a high volume of cases. CWJ is uniquely positioned to comment on how the VRR process works in practice in VAWG cases.

## **Introduction – the Victim's Right to Review Scheme**

In our experience the VRR scheme is not operating adequately so as to provide the bulwark to support victims' rights that it was intended to achieve. This is for two reasons: firstly, because it is not accessed by a huge proportion of victims, for the reasons given below. Secondly, because where it is accessed, victims are not given a sufficient opportunity to participate actively, but are expected to be mere passive

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<sup>3</sup> *Commissioner of Police for the Metropolis v DSD and Another* [2018] UKSC 11

<sup>4</sup> We would be happy to provide the full findings of the survey on request.

recipients whose only role is to make a request to trigger the process, and then leave it to the criminal justice agencies to do the rest.

This assumption that victims play a passive role in the VRR process persists despite the fact that the Victim's Code includes provisions which promote victims' active participation. **There needs to be a fundamental shift to adopt an approach whereby victims are enabled to have active participation in the process** in the ways set out below, where they wish to, and subject to the limitations on sharing information with victims, also discussed below. This should be reflected both in the procedural arrangements for VRR, and in the mindsets of the police officers and prosecutors who operate it. This participation is especially important in VAWG cases because, unlike other crime-types, a significant proportion of decisions of 'insufficient evidence' are based on an assessment of the victim's perceived credibility.

We also wish to highlight at the outset that we strongly support the view of the Victim's Commissioner in her Victim's Law Policy Paper that there needs to be a fundamental shift in how victims are treated in the criminal justice system, from mere witnesses or bystanders to active participants. It is important to remember that one outcome of our adversarial system is that victims have traditionally been entirely disempowered in proceedings between the state and the defendant. This is not simply an inevitable part of the criminal process, but the product of the adversarial system adopted in the UK, which should be mitigated where possible.

We now set out five aspects of the VRR process which are not working adequately in the interests of victims at present, which are:

1. Being informed of NFA decisions and the existence of the VRR scheme
2. Being informed of the reasons for an NFA decision
3. Being given the opportunity to make representations and having these taken into account in the VRR process
4. Expertise of police reviewing officers conducting VRRs
5. Timing of VRR where CPS decide to offer no evidence

### **1. Being informed of NFA decisions and the existence of the VRR scheme**

Under the Victim's Code, victims of domestic abuse, rape and other serious sexual offences, and most other VAWG offences, are entitled to enhanced rights.

Under Paragraph 6.10 of the Victim's Code victims are entitled to be told (within 1 working day under enhanced rights):

- That an investigation has been closed with No Further Action (NFA)
- The reasons for the NFA decision
- How to get further information
- How to seek a review and make representations under the police or CPS VRR schemes
- That they have a **right** to request VRR (emphasis in the original)

**In our experience, in practice there is a wholesale disregard for these provisions in domestic abuse and sexual violence cases.**

A very large proportion of victims are simply not told about the existence of the VRR scheme when NFA decisions are made, especially in domestic abuse cases. In some parts of the country, victims in domestic abuse cases are not even routinely informed of the fact that an NFA decision has been made, and only find out that a case has been closed when support workers chase for updates.

Where victims are contacted by police officers to be informed of an NFA decision they are very often **not** told of their right to VRR. In our experience this is a far greater problem in domestic abuse cases than in sexual offences cases. This may be because many sexual offences are dealt with by specialist units, and in some forces, for example the Metropolitan Police, there is a standard letter in use to inform victims of an NFA in sexual offences cases. Also, in sexual offences cases where NFA decisions are made by the CPS, prosecutors are required to provide a letter to the victim with reasons. If the police were required to give NFA decisions in writing and to use template letters this would improve the standards of communication around NFA and ensure that victims were informed of the VRR scheme. It would also enable victims to know whether the case was closed by the police without referral to CPS, or whether the decision not to proceed with a prosecution was a CPS decision. Without this, victims do not know whether they should apply to the police or CPS VRR scheme. Our survey of domestic abuse support workers showed that by far the most common method of communication of NFA decisions by officers to victims was by phone.

In our survey of domestic abuse support workers, when asked how often officers who told victims about an NFA decision also informed them of the VRR scheme, 87% of respondents said that this was infrequent (“in less than half of cases”: 11%, “in very few cases”: 48%, “never”: 28%). In our survey, when asked whether officers contact victims or support workers to tell them that there has been an NFA decision, a sizeable proportion, 39%, said this was not happening routinely (“in less than half of cases”: 21%, “in very few cases”: 15%, “never”: 3%).

We believe that there is highly inconsistent practice around informing victims about NFA decisions and VRR between forces and between individual officers, which is unacceptable and results in a postcode lottery. The VRR scheme is not currently embedded as a standard element of the criminal justice system to which all victims can have access.

During 2021 CWJ sent Freedom of Information requests to all police forces in England and Wales seeking data on numbers of VRR requests received, outcomes and breakdowns for sexual offences and domestic abuse cases. We received an 84% response rate and the data is summarised in a table here (page 1 contains data from forces and page 2 our analysis and percentages):<sup>5</sup>

[https://docs.google.com/spreadsheets/d/1W1\\_1bfFI4XZLrjsrjZ41Nhh9q82W2ZyGz7GZ4u1H9tY/edit#gid=0](https://docs.google.com/spreadsheets/d/1W1_1bfFI4XZLrjsrjZ41Nhh9q82W2ZyGz7GZ4u1H9tY/edit#gid=0)

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<sup>5</sup> We would be happy to provide a more detailed discussion of the data and findings on request.

This data strongly supports what we hear from frontline support workers. Taking figures for 2020, requests for VRR were made in only 0.6% of those cases eligible to request VRR, across all crime types ('Outcome 15' and cases closed as not in the public interest). For sexual offences the rate was higher, but still very low, at 3.76%. Percentages are not available for domestic abuse cases, but there were fewer VRRs in terms of numbers of requests in domestic abuse cases than in sexual offences cases, despite the fact that there are roughly five times as many domestic abuse cases reported to police. Rates of VRR requests in domestic abuse cases are therefore very low indeed. There was also huge variation between forces and eleven forces said they did not hold data, and so are not monitoring their VRR schemes at all. Six years on from the introduction of the police VRR scheme, it remains peripheral to the experiences of the vast majority of victims.

## **2. Being informed of the reasons for an NFA decision**

Receiving an explanation of the specific reasons for the NFA decision in their individual case is essential to enable victims to input relevant information into the VRR process. Without this they cannot make any meaningful representations and cannot be an active participant in the VRR process.

In our experience, in both sexual offences cases and other cases, victims are routinely not given reasons for NFA. In our survey 46% of domestic abuse workers said reasons for NFA were not generally provided ("in less than half of cases": 10%, "in very few cases": 30%, "never": 6%). In our experience in sexual offences cases the victim or her support worker generally have to go back to the police after an NFA decision is received, if they wish to have reasons. Often the only reason given is simply "insufficient evidence" which is not a reason at all, but merely a statement that the evidential test in the Full Code Test is not met.

Where there is a duty to provide a letter, in CPS decisions in sexual offences cases, there is a better level of communication of reasons, and also where police NFA decisions are communicated by standard letter, as in the Metropolitan Police in sexual offences cases. However, even in these decisions the reasons given are sometimes very skimpy, for example in Metropolitan Police cases a two-page standard letter sometimes contains only a couple of lines about the facts of the individual case, and in some cases that we have seen, even this is generic information only. However, in the vast majority of VAWG cases there is simply no explanation given to a victim by the police when an NFA is communicated to her.

Furthermore, when support workers go back to police officers to ask for an explanation of the reasons for NFA, even when they directly cite the right to this under the Victim's Code, they are sometimes met with resistance. Often there is a lot of chasing and persuading before reasons are given. In some cases, officers insist that the victim is not entitled to be given any details and support workers have to repeatedly push. In several cases in which we have been involved, it was necessary to threaten judicial review before an explanation was provided. In our survey we asked how easy it was to get reasons for an NFA from the police on request and the response was overwhelmingly negative: "not very easy: 42%, "difficult": 30%, "very difficult": 21%.

There seems to be a widespread assumption amongst police officers that victims do not need to be given reasons for an NFA decision, and even that they are not entitled to them. This suggests that police officers have not been trained on the rights enshrined in the Victim's Code or on the VRR scheme. Most no doubt simply learn 'on the job' where the practices and attitudes adopted by previous generations of officers are passed on to the next.

We take this opportunity to point out that the right to be given a gist of the reasons for an NFA decision is not only a right within the Victim's Code, it is also a principle of common law fairness that applies to any decision by a public body, not just to the VRR scheme. This is that those affected by an adverse decision should have "*an opportunity to make representations ... before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both*" and "*since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer*" (case of *ex parte Doody*)<sup>6</sup>. In the context of the VRR that would mean an entitlement for victims to understand, in sufficient detail, why a decision has been taken not to prosecute so that they can make worthwhile representations in response.

We are aware that some information that influences an NFA decision cannot be shared with a victim prior to VRR because it may taint her evidence in a future trial (should one take place), such as details of accounts given by other witnesses, or details of a suspect's account in interview (though the nature of the defence can be shared, for example a dispute on consent in a sexual offence case). However, a gist can still be given that will enable the victim to understand the reasons in general terms. A balance can be struck between enabling a victim's participation and ensuring the integrity of the trial process. In many VAWG cases the reasons are based on information already known to the victim, especially matters that are considered to undermine her credibility. In such situations it is imperative that the reasons are explained so the victim can understand the decision and then respond in VRR representations.

### **3. Being given the opportunity to make representations and having these taken into account in the VRR**

#### **Opportunity to make representations**

The VRR process should facilitate active participation by a victim, if she wishes to put forward submissions in support of her request for VRR. This is especially important in sexual offences cases because a significant proportion of NFAs are based on a perception of the victim's credibility.

Often matters which are said to undermine a victim's credibility have never actually been put to her before. In her original statement or video-recorded interview, she will generally only be asked to give an account of the offence, yet the NFA decision may be based on other factors, for example that she returned to live with the suspect after the abuse, or that there is other evidence that is considered inconsistent, for example in one case we dealt with a victim was told that holiday photographs on her

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<sup>6</sup> *R v SSHD ex p Doody* [1994] 1 AC 531,560.



phone which showed her and the suspect looking happy on holiday undermined her account of an abusive relationship. It is only once an NFA decision has been made based on such assumptions, that a victim will have the opportunity for the **first time** to give a response on certain points, both on factual matters and legal matters.

On factual matters she may be able to explain how an apparent inconsistency is not in fact inconsistent, or can be understood differently in the broader circumstances. In some cases, she may have further evidence to give to address points raised for the first time in the NFA, she may be able to point to fresh witnesses who can support some aspect of her account that had not appeared relevant previously, or undermine some aspect of the suspects' claims that have been raised for the first time.

On legal matters, the VRR request is an opportunity for a victim, or those supporting her, to point to any errors in the NFA decision, such as aspects of the decision that are based on rape myths, or inconsistent with established policies, for example CPS legal guidance that it is not uncommon for victims of abuse to return to their abuser and that this should not be held against them. An error of law that frequently arises when NFA decisions are given is the incorrect application of a corroboration requirement. This was abolished by Parliament as far back as 1994 for sexual offences cases<sup>7</sup>, yet in our experience it is very commonly applied by police officers, despite clear guidance on the CPS website on this issue (see the section of our submission on the need for independent legal advice in rape and other sexual offences cases for further details).

The Administrative Court made clear that a victim should always be given a "fair opportunity" to put forward representations in support of a VRR request in *R(FNM) v DPP (2020)*<sup>8</sup>. However, in our experience many police and prosecutors operate on the assumption that the victim herself should not input into the VRR process beyond triggering a request, and do not facilitate this. For example, in some cases in which CWJ has been involved, the victim has been denied further time to put in written representations after making the initial request for VRR, on the basis that there is no need for a victim to set out their concerns, even when the three-month time limit is some way off.

The Victim's Law must enshrine the victim's right to **participation in the VRR process through written submissions if she wants to**, so that this is a fundamental aspect of the VRR scheme, rather than a victim having to persuade a police officer or prosecutor to allow her time to put in submissions. As discussed in the section on independent legal advice, if a victim wishes to seek legal advice and assistance for VRR representations she should be entitled to do so, just as any citizen is entitled to seek legal advice on an issue of law that affects them. The assumption in *FMN* and in the CPS guidance against lawyers being involved in the process should be reversed. There is no requirement for lawyers, but those victims who do wish to seek legal input should not be discouraged from doing so and deadlines should not be set which make legal input very difficult.

The current 14 days allowed in the CPS VRR scheme for written submissions makes obtaining legal input simply impractical in a great many cases because lawyers are not available to carry out work in such a short timeframe. Also, many victims are

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<sup>7</sup> s.32 Criminal Justice and Public Order Act 1994

<sup>8</sup> *R (FNM) v Director of Public Prosecutions* [2020] EWHC 870 (Admin)

hugely distressed by an NFA decision, and by the reasons, which often involve perceptions of their own credibility. It can take time for them to summon the courage to address the decision and seek assistance, and legal advice has to be provided with the appropriate sensitivity. Given that in most sexual offences cases a very long time has already passed between reporting the offence and the NFA decision (many months and in our experience, frequently around a year or even several years in some cases), an additional month would not make the procedure unjust to the accused. Where a VRR has been requested well within the three-month window for this request, if the victim subsequently asks for additional time to submit representations they should be allowed the remainder of the three-month period.

In short, the VRR procedure should be reformed to include an assumption that victims **have the right to make representations in support of their VRR request**, including the right to legal advice and assistance in this, if they wish to do so. This means establishing procedures which facilitate this, so that police and prosecutors on the ground understand this aspect of the scheme, and victims do not have to put up a fight to secure this opportunity. The new Victim's Code introduced in April 2021 makes reference for the first time to representations by victims, which is extremely welcome, but now the system needs to be set up in a way that facilitates this in practice.

Question 5b) asks whether there should be an explicit requirement for the relevant prosecutor in a case or types of cases to have met with the victim before the charging decision. In our view, **in those VAWG cases in which a negative charging decision is made on the basis of the victim's perceived credibility, the victim should be offered a meeting to clarify the factors on which the proposed NFA decision is based.** This would give an opportunity for apparent inconsistencies to be explored, and matters seen as problematic for a prosecution put to a victim so that she can give her response. As noted above, in many - if not most - sexual offences cases the factors that have been considered to undermine her account have never been put to the victim to give her a chance to explain them. Often, they amount to no more than potential future defence cross-examination points, which are not necessarily fatal to the case, and her explanations should be considered before the charging decision is made.

However, in our view there should not be a requirement for prosecutors to meet with a victim in every case before a charging decision. If the prosecutor believes that the case meets the Full Code Test this would be an unnecessary use of resources, and it is traumatic for victims to have to go over their experiences again and again. Similarly, when a prosecutor believes that the Full Code Test is not met, a victim should be offered a meeting, but should have the choice whether to attend such a meeting, given the emotional toll that such discussions can have.

Question 5b) also asks about an explicit requirement for the prosecutor to meet with the victim before the case proceeds to trial. In our view this would be very helpful, allow the victim to have a greater sense of engagement in the process, and the prosecutor to understand any concerns she may have. This can be a space in which the prosecutor can give her information in accordance with the CPS guidance on speaking to witnesses at court, to help her understand the forthcoming trial better, and enable issues around special measures to be discussed.

## **Having representations taken into account**

Our second concern regarding representations by victims in the VRR process is that very frequently it appears that they are simply disregarded by reviewing officers and prosecutors. In many VRR outcomes that CWJ has seen, the reviewing officer has simply upheld the NFA decision without any reference to points raised by the victim in representations, and without giving any indication that they have been taken into account. This includes representations where victims draw attention to the fact that key evidence has not been obtained in the investigation, or to further important evidence of which investigators were not aware, or draws attention to a breach of policy such as reliance on rape myths or error of law. In some cases that we have dealt with, representations in support of VRR have been drafted by experienced criminal barristers on CWJ's panel, sometimes running to many pages which address the facts and the law in the case in detail. VRR outcome decisions have then been received which have no regard whatsoever to the detailed legal arguments presented. In several cases over the last year CWJ has had to send judicial review pre-action letters to the police following such VRR outcome letters, and in every case this has resulted in the matter being re-opened.

In fact, there is a legal duty on the person carrying out the review to address the relevant law and provide an analysis to the victim which addresses the key issues and demonstrates that this has been done. The failure to do so in itself makes a VRR outcome decision unlawful, as in the Administrative Court's decisions in *R (Torpey) v DPP* (2019)<sup>9</sup> and *R(L) v DPP* (2020)<sup>10</sup>. Both of these recent decisions clarify the expectation that a decision-maker who makes an adverse charging decision must demonstrate that s/he has in fact considered the relevant factual and legal issues, must grapple with them and must address them when giving reasons for the decision not to prosecute.

**The Victim's Code and the police and CPS VRR schemes should be amended to make it an explicit requirement that the reviewer in a VRR should demonstrate that they have considered any points raised in a victim's VRR submissions and addressed them.** This is already a legal obligation but one that is disregarded in most cases and needs to be incorporated into the VRR scheme procedure and guidance.

## **4. Expertise of police reviewing officers conducting VRRs**

We are concerned that in some police VRRs in sexual offences cases the reviewing officer may not have the necessary expertise in conducting rape investigations and decision-making, so that the VRR may not remedy failings by the investigator and original decision maker if they also do not have the requisite expertise. This has been raised as a concern by ISVAs. Given the complexity of sexual offences, we believe that it is important for VRRs to be carried out by officers with expertise in dealing with them.

Within our FOI requests to all police forces in England and Wales we included the question "*Please confirm whether, for VRRs involving rape and serious sexual offences, there is any requirement for officers carrying out the reviews to have specialist knowledge of those types of offences.*" 26 forces provided replies to this

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<sup>9</sup> *R (Torpey) v DPP* [2019] EWHC 1804 (Admin)

<sup>10</sup> *R(L) v DPP* [2020] EWHC 1815 (Admin)

question. 14 forces said that officers conducting such reviews would be specialists, or senior officers within the same specialist team that carried out in the investigation, though this may not always be a Rape and Serious Sexual Offences (RASSO) team but could also be a more general safeguarding team. However, 12 forces gave responses that were vague and suggested that there was no requirement for specialists in RASSO cases, as the replies were generic responses about reviewing officers having a range of experience, or being investigators in serious crime, or the responses repeated the general VRR guidance on reviewers having relevant knowledge without referring specifically to RASSO cases. We are concerned that at least in a proportion of forces reviewers will not have expertise in sexual offences and that there is a post-code lottery in this aspect of the scheme.

It is well known that low charging rates in rape cases are a huge cause for concern and the Government's Rape Review 2021 pledged to significantly increase charging rates. A large majority of rape cases are closed by police following a police NFA decision without a formal referral to CPS for a charging decision.

It is also well known that a significant proportion of officers dealing with rape investigations do not have expertise in sexual offences cases. The Joint Thematic Inspection of the police and CPS response to rape by HMICFRS and CPSI published in June 2021 identified a significant problem of lack of expertise by officers investigating rape cases, especially cases dealt with outside specialist RASSO teams. It is therefore imperative that reviewers conducting VRRs in such cases do have the requisite experience, otherwise the system lets victims down twice over.

## **5. Timing of VRR where CPS decide to offer no evidence**

The CPS VRR scheme provides that when a decision to offer no evidence is made by a prosecutor, this does not trigger a right to request VRR until after Crown has formally offered no evidence. If the VRR is then upheld, there is nothing that can be done to re-instate the proceedings as the defendant has been formally acquitted and the double jeopardy rule applies.

We appreciate that there are cases where a decision to offer no evidence is made very shortly before trial, sometimes within several days, or even on the first day of trial. In these situations, we appreciate that it may not be realistic to carry out a VRR process in advance of the Crown offering no evidence. However, that is not always the case and in some cases a decision to offer no evidence is made some time in advance of trial, especially now that trials are hugely delayed due to the court backlog. In this situation there is time to provide a VRR **prior** to the CPS formally offering no evidence, so that justice can be done in those cases where the VRR is upheld. The VRR process can easily be adapted to enable this possibility where the timing allows (if necessary on an expedited basis) and there is no good reason to deprive victims of this opportunity.

It is important to remember that in such cases, especially in rape cases, the victim will already have been waiting and supporting the prosecution for several years: in many rape cases the investigation and initial decision to charge can take up to a couple of years, and then the process between charge and trial can take well over a year. During this time the victim has the stress of a future trial hanging over her, with the stress of this affecting many aspects of her life and preventing her from 'moving

on'. To then have the case dropped at such a late stage is devastating, and to pursue a VRR only to be told that the decision to drop the case was wrong, but there is nothing that can be done is doubly devastating and unjust.

We give the following two illustrations from our casework: in one case the CPS unusually agreed to allow the VRR process to proceed before formally offering no evidence in court, the decision was reversed, and the defendant was eventually convicted. In the other case the VRR took place after the CPS had offered no evidence and the VRR was then upheld and the decision found to be categorically wrong. These cases both also give an indication of the sheer length of time that such prosecutions take. In both cases the victims reported to police on the day or day after the offence. In both cases by the time the case came up for trial, three years had passed.

JB was raped whilst she was asleep on a friend's sofa following a birthday party, in 2017. The police were contacted the same day. Following forensic analysis, and a lengthy investigation, the CPS confirmed in 2019 that they would be charging the suspect with rape. Following a 'not guilty' plea, a trial date was set for March 2020, and a defence statement was served, in which the suspect claimed that he had believed that JB was awake and actively engaging in sexual intercourse with him. A week before the start of trial, JB was advised that it had been postponed by several months due to Covid-19 and would now take place in November 2020. During the months before the new trial date the defence obtained fresh expert evidence, then, a few weeks before the trial, JB was invited to a meeting where she was devastated to learn of the CPS' intention to offer no evidence at court. JB felt that the decision was wrong, and sought a VRR after the case had been concluded by CPS.

In June 2021, JB was informed that the Area Chief Crown Prosecutor had reviewed the decision and upheld the VRR request, concluding that the decision to offer no evidence had been categorically wrong. The Chief Crown Prosecutor and the Deputy Chief Crown Prosecutor have since apologised unreservedly to JB and indicated that new oversight mechanisms and trainings for prosecutors have been introduced to avoid another legal error of this kind from being made in the future. However, the suspect cannot face trial now as he has been formally acquitted.

AF was aged 18 when she was raped by a man she had gone on a first date with in April 2017. She reported this to police the next day. Her case was under investigation for two years before it was submitted to CPS in early 2019. The suspect was charged in May 2019, pleaded not guilty in Nov 2019 and trial was listed for June 2020.

In March 2020 the CPS informed the victim's ISVA that due to new information received, the case no longer met the threshold for prosecution. A prosecutor stated that they would offer no evidence and that proceedings could not be reinstated following this. Unusually, the prosecutor suggested that a VRR could be conducted before the decision to offer no evidence was finalised, though this offer was then retracted.

A solicitor and a barrister on CWJ's panel prepared legal submissions asking the CPS to give an assurance that the Crown would not proceed to formally offer no evidence until the conclusion of a VRR process, failing which judicial proceedings would be issued and an injunction sought. This was agreed by CPS and detailed submissions in support of the VRR were drafted by the lawyers. The NFA was upheld at the first-stage VRR, but then overturned at the second-stage in May 2020 by the Deputy Chief Crown Prosecutor. The trial was adjourned and the defendant was convicted and sentenced to five and a half years' imprisonment.

## **B: Independent legal advice/representation for sexual violence survivors (Chapter 4 – Improving advocacy support)**

### **Introduction**

We believe that advocacy support must extend to independent legal advice, and in some instances legal representation, to sexual violence survivors alongside ISVA support. This section of our submission relates to questions 33, 34 and 38 in that it addresses the reasons why ISVA support must be supplemented by access to independent lawyers.

The criminal justice system is not delivering for victims in rape and other sexual offences cases at present. This is widely accepted and has spawned numerous recent inquiries which have resulted in stringent criticisms and commitments for change. These include the Government's end-to-end Rape Review, the Joint Thematic Inspection of Police and CPS Response to Rape, Operation Bluestone and follow-on research in the Metropolitan Police, both identifying an investigation culture which is focused on victim credibility rather than on investigating suspects, research by the Victim's Commissioner and by the London Victim's Commissioner. Charge rates hit an all-time low of around 3% in 2019/20<sup>11</sup> and attrition rates have soared<sup>12</sup>. We shall assume that the reader is familiar with the findings of these various reports and inquiries and the serious failings identified in the approaches of police and prosecutors. Historically there has always been concern and criticism about the ability of the criminal justice system to bring offenders to justice in sexual violence cases, and the current crisis of confidence is part of a long-lasting difficulty in this area of law.

Victims express low confidence in the system and say that their experience of the process compounds the trauma of the original offence. Victims are acutely aware that the suspect / defendant has lawyers all the way through the process, whilst they do not, and they have no-one to 'fight their corner' if necessary, who is fundamentally there to see things from their perspective and represent their interests. We do not propose that every victim should have legal representation, in the way that every suspect / defendant has. But we do propose that every victim should have an accessible route by which to obtain independent legal advice if a particular problem, or question arises, and also representation in those relatively rare instances where this is required. We expand below on what this would involve.

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<sup>11</sup> End-to-end Rape Review 2021

<sup>12</sup> London Rape Review saw an increase from 58% to 65% between 2019 and 2021

Independent legal advice is therefore necessary both because of objective difficulties in the way the criminal justice system operates for victims in sexual offences cases, and because of the need to build subjective confidence for victims in these cases and to vastly improve their experience of the process.

Sexual offences cases stand out in that underlying many of the difficulties is the fact that the criminal justice response to rape and other serious sexual violence is bedevilled by deeper societal attitudes that investigators, prosecutors, judges and juries have to grapple with. The CPS legal guidance on RASSO now sets out 40 rape myths which prosecutors should beware of when making decisions. There is a range of misguided beliefs around sexual violence, and a prevailing presumption that many women make false allegations which, despite the fact that research shows the number of such cases to be tiny, undermines a large number of investigations and contributes to the unacceptably low levels of rape charging, both historically and plummeting to new levels over the past 5 years. Sexual offences cases frequently involve a massive focus on the victim's credibility and character, with privacy issues around disclosure of digital, third party materials and previous sexual history. Victims often say that they feel as if they are 'on trial' and their experience can be coloured by a sense that the criminal justice agencies are sceptical or even hostile to them.

Victims are disadvantaged in our adversarial system in that they are not parties to the proceedings, but only witnesses. The interests of the Crown do not always align with that of victims. This is particularly clear around privacy rights, such as requests for digital data from victims and third party materials about them, as well as applications around previous sexual history. However, it can arise in many other situations. The defendant has lawyers who put forward demands to police and CPS and can make applications in court. There is no countervailing pressure to consider the victim's rights and perspective and so police and prosecutors will sometimes disregard these, for example making disproportionate disclosure requests to victims.

We note that the current arrangements in the UK are not an inherent aspect of criminal justice. In the inquisitorial systems used across Europe victims are either parties to the criminal proceedings, or have significantly greater rights of participation, including access to independent state-funded lawyers. Where our adversarial system is letting victims down this should be mitigated to try to achieve more just outcomes.

### **CWJ's experience of providing independent legal advice to rape survivors**

CWJ has been providing free legal advice to ISVAs and their clients, and directly to a further smaller number of rape survivors, for over three years. Advice is provided both by our in-house lawyers and by external lawyers on our pro bono panel. We have seen a steady increase in requests for advice on a broad range of issues arising in sexual offences cases, some of which are set out below. During the three years 2019 to 2021 we received 689 legal enquiries from ISVA services (increasing from 111 in 2019, to 234 in 2020 and 344 in 2021) and dealt with further enquiries from women directly. We have received enquiries from 36 different ISVA services across the country. Demand has increased as more ISVA services have become familiar with our work. We have no doubt that there is a huge unmet need for legal advice amongst rape victims. The Northumbria pilot Sexual Violence Complainants'

Advocates Scheme also demonstrates this. Our submission is informed by our extensive experience in dealing with the legal issues raised by ISVAs and their clients.

### **Legal advice needs of victims in sexual offences cases**

Victims seek advice on a broad range of issues, and receiving such advice at various stages throughout the criminal justice process can greatly increase victims' confidence and reduce attrition. Within the hundreds of legal enquiries received by CWJ in sexual offences cases we have identified patterns in the legal issues arising, some of these representing systemic issues which arise repeatedly across different police forces:

- **Disproportionate requests for third party materials:** we have seen repeat enquiries about blanket and speculative requests for victims to consent to disclosure of third party materials. These include apparently routine requests for ISVA records, social services records, medical records including mental health records, counselling records, education records. When there is no specific factual basis for such a request it is not a reasonable line of enquiry and we believe that many such requests are unjustified credibility trawls.
- **Inappropriate intrusive requests for downloads of survivors' mobile phones and other digital data:** we have received repeat enquiries about whether requests for downloads are legitimate. Following the Court of Appeal judgment in *R v Bater-James* in June 2020 which set guidelines for such disclosure requests, we continued to receive enquiries including in cases where officers are not applying the new legal guidance, or not using the new National Police Chief's Council consent forms, with different forces taking different approaches and some officers unaware of their own force policies.
- **Requests for assistance with Victim's Right to Review (VRR):** During the three years 2019 – 2021 we received 369 enquiries relating to VRR, of which more than half related to procedural queries, for example around time limits or how to obtain an explanation for a decision to take No Further Action (NFA). During 2021 we drafted VRR representations in approximately 50 cases. In the more complex we arrange for legal submissions to be drafted pro bono by barristers on our legal panel, many of whom are criminal practitioners with extensive experience of sexual offences cases. We have identified certain patterns, the most common being an incorrect application of a corroboration requirement in police NFA decisions. (We have prepared a submission on this issue with a dossier of 20 case examples, which has been shared with Operation Bluestone and CPS). We also receive regular requests for advice on VRR outcomes and whether judicial review is a possibility. The law on challenging prosecutorial decisions by judicial review is restrictive and we give negative advice where appropriate, but positive advice where we identify errors of law or procedural errors, particularly following police NFAs. A high proportion of judicial review pre-action letters sent by both CWJ and solicitors on our panel, have resulted in investigations being re-opened, fresh VRRs and in cases being referred to CPS.



- **Issues arising during the investigation process:** we receive a very broad range of enquiries on a host of different matters that arise, the following are some examples but there are many more:
  - extreme delays, sometimes of several years, in progressing investigations, where the Article 3 ECHR duty to carry out an effective investigation is engaged, which includes promptness and reasonable expedition;
  - investigations closed without the suspect being interviewed (which also deprives the victim of access to the VRR process);
  - Inter-jurisdictional issues where offences have happened abroad and UK police will not take actions, including following the Domestic Abuse Act 2021 which introduced new jurisdiction provisions;
  - Issues surrounding potential defendant bad character evidence not being utilised, and evidence of domestic abuse as context for sexual violence;
  - victims being threatened with potential investigation for perverting the course of justice for making so-called 'false allegations';
  - advice about victims accessing data about them on police systems.
- **Re-opening investigations:** We receive requests for advice following police refusal to re-open investigations closed some years ago. If there is fresh evidence or earlier inadequate investigations or wholly unjustified decisions, then Article 3 ECHR can provide a remedy based on the investigative duty. A recent example is a refusal to re-open a case that had been closed more than a decade earlier in a rape of a young woman involving violence by her partner, where medical evidence was obtained the same day and remains available. We sent a judicial review pre-action letter which led to the police agreeing to re-open the case and refer it to CPS for a charging decision.
- **Unduly lenient sentencing referrals to the Attorney-General:** time limits for requests under this scheme are extremely tight with no power to extend therefore swift advice is essential.
- **Victims' rights in parole process:** this can include queries about a victim's submission before a Parole Board decision, and potential challenges to a move to open conditions.

We also stress the critical importance of legal advice for improving victims' experience of the criminal justice process. Receiving advice from a person who is independent and 'on your side' is hugely beneficial for the individual's sense of trust, engagement and ability to process information. Even where the advice is negative, or confirms that a police or prosecution decision cannot be challenged, it enables victims to feel that they have explored their concerns and understand their options. It can help them to accept that some aspect of the process is inevitable and the reasons why, can reduce attrition, and for some it can provide a sense of 'closure' and ability to move on. For example, we assisted a woman where there was a strong basis to believe that her young daughter had been sexually assaulted by a family

member. For reasons to do with evidence gathering during the police investigation, she was told that a prosecution was not possible. She felt distrustful of the police and deeply let down. We arranged for a criminal barrister to consider the case, who confirmed that rules of evidence made a prosecution impossible, and after careful discussion of the reasons for this in lay terms with CWJ, she said that she finally felt able to move on.

We have had feedback from ISVAs who worked jointly with us and reported that clients have found the legal input hugely beneficial emotionally, gaining a much better understanding of the reasons why certain decisions are made or outcomes reached. An example of this is where a VRR outcome is negative and the only avenue for challenge is by judicial review. This cannot be mounted on the basis of factual disputes but requires an error of law or other public law grounds. In some cases the decision is based purely on factual disputes, in others there may be public law grounds but the victim does not qualify for legal aid or does not want to pursue lengthy litigation. ISVAs report that their clients end the process in a more positive frame of mind knowing that a lawyer agrees with their perspective and understanding the obstacles to taking any further action, rather than simply being left with a frustrating reply.

### **What kind of independent legal advice and representation should be provided?**

We are not proposing that victims should be parties in the criminal proceedings or have lawyers representing them in court (apart from in certain specific pre-trial applications, see below). What we propose is that if a problem or question arises for a victim, she should be able to access a lawyer for advice on a specific issue, both during an investigation and after a charging decision. We anticipate that the kinds of problems and questions raised would be those that CWJ receives on a regular basis. We would not expect that all, or even a majority, of victims would require legal input, only some individuals from time to time.

In many cases all that will be required will be advice, and the survivor can continue to interact with the police / CPS with the support of her ISVA. In some cases, there may be a need to draft some legal submissions, for example representations in support of VRR, or a need for the lawyer to engage directly with the police, for example to negotiate the appropriate ambit of a request for third party materials. Very rarely there may be applications to the court where the victim will be entitled to be separately represented, namely applications for orders for disclosure of third party materials<sup>13</sup> or digital data. In over three years of dealing with sexual offences enquiries we have never encountered an application by CPS for an order for disclosure after a victim has declined consent, but such applications may be made from time to time.

In our experience victims seek and need legal advice on a broad range of issues, and it should not be limited to privacy or data issues. Whilst these are important, a great many enquiries we receive at CWJ relate to the VRR process, the investigation process, parole etc. Limiting legal advice to privacy rights will greatly reduce the impact of a legal advice scheme, leave a great many failings unchallenged, and will not meet the broader aim of building trust and confidence of victims in the process. It

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<sup>13</sup> See *R(TB) v CPS and South Staffordshire Healthcare Trust* [2006] EWHC 1645 (Admin)

would be a huge missed opportunity if any new advice system was limited in this way.

In our view, the legal advice needs of victims in sexual violence cases can only be met through a **bespoke role**, where independent lawyers with the relevant expertise carry out this work within a distinct scheme. This could be through salaried lawyers based within ISVA services, or other charities or law centres. It could also be made up of solicitors in private practice signed up to a specialist scheme, with its own training and funding arrangements. Using specialist lawyers who can respond swiftly to a high volume of enquiries, many of them relatively brief, is a cost-effective way to inject the necessary legal input. Ideally, they would work closely with ISVA services. Access to counsel's advice would also be required in some cases.

In our view the needs of victims in sexual offences cases cannot be met through the existing legal aid system. Solicitors at CWJ between us have many decades of experience of working in legal aid firms and we are very familiar with how they operate. The current legal aid scheme will not fill the gap that exists for the following reasons:

- There is no existing pool of solicitors with the relevant expertise in the range of areas of law and legal issues required, who routinely provide this type of advice already as part of their existing practice. The work involves a cross-over of civil and criminal law, including experience in public law challenges to state failings, Victim's Right to Review and police complaints systems, human rights law, substantive criminal law on sexual offences and relevant criminal procedure such as bad character evidence, bail and protection orders. Without specific training most solicitors currently working in criminal defence are unlikely to have the relevant range of knowledge if contacted by a victim in a sexual violence case. They would be unlikely to take a case on, but even if they did the client would be relying on a lawyer who has to go outside their usual expertise. Some solicitors' firms specialising in civil cases against public authorities have some of this expertise, but they generally limit themselves to litigation (rather than more limited requests for advice) and take on only a very small proportion of the requests they receive. Many such firms do not have any expertise in victims' rights.
- Many of the legal enquiries made by ISVAs and their clients are relatively brief procedural enquiries that solicitors in private practice simply would not take on. Often they can be resolved with a single short piece of advice, where just the administration to open a legal aid file would be greater than the legal work involved. In our experience, solicitors in legal aid firms, even if they have the relevant expertise, simply would not find it feasible or cost effective to respond to such enquiries and there would be no way to meet the demand for such advice by relying on existing firms.
- We would estimate that well over half of those we assist do not meet the financial eligibility test for legal aid. Often the process of assessing financial eligibility is lengthy and intrusive, with various financial documents required. We know of cases where clients have dropped out of the process during this assessment with solicitors. As noted above, many enquiries are relatively brief and urgent, where the legal aid assessment itself would take far longer than

the advice. A system of legal advice and representation which aims to redress the balance for victims in the criminal justice system should be free at point of receipt without means testing.

### **The benefits of collaborative working between ISVAs and lawyers**

We have seen a wide range of benefits through close engagement with ISVAs:

- ISVAs can identify legal issues and queries, as they are familiar with the criminal justice processes and can spot failings in particular cases which their clients may not be aware of or understand.
- ISVAs can relieve the burden of finding and making contact with an appropriate lawyer, streamlining the process, especially where they have an existing relationship with the relevant lawyers. Many clients will find the process of approaching a lawyer, and having to explain their situation again, which can be re-traumatising, a real disincentive to seeking legal advice. More vulnerable victims, who often face multiple disadvantage, are more likely to access legal advice if contact is made via their ISVA, as compared to more confident and articulate victims.
- ISVAs provide a trauma-informed approach, which some lawyers may not adopt, and provide emotional support for their clients through the process of obtaining legal advice. The relationship already built by the ISVA with the client is a valuable resource that can feed into the process. Those clients who view lawyers as figures of authority can be reassured by the fact that the lawyer is endorsed by their ISVA.
- ISVAs can create focused summaries building on their knowledge of the case which avoids duplication of work and allows the lawyer to focus further instructions on the specific issue of relevance. Inter-professional working is a cost-efficient method whereby lawyers can make use of information already gathered, such as chronological summaries. Taking instructions from a victim from scratch is a hugely more time-consuming process. Short procedural queries can be dealt with very quickly between ISVAs and lawyers.
- Collaboration between ISVAs and lawyers helps identify systemic issues, which enables ISVAs to identify those cases that would benefit from legal advice, and assist lawyers to consider broader strategic challenges or feed into policy work. ISVAs and lawyers can work together to raise wider issues in other forums, as CWJ has done with some ISVA services.

### **Legal advice must be provided by independent practising lawyers**

It is essential that legal advice be given by lawyers who are wholly independent of criminal justice or other state agencies. This is the only way that victims will feel that their lawyer sees the matter entirely from their perspective, with their interests at heart, and feel able to accept advice given.

Most importantly, legal advice must be given by lawyers and not by ISVAs or other non-legally qualified support workers. We are concerned about the scheme set up in

Northern Ireland following the Gillen Review which funds Victim Support to provide advice to rape victims on privacy and data requests. The ISVA role involves a range of skills, many from a therapeutic background, and ISVAs are not legally trained and cannot and should not be expected to provide legal advice. This would place wholly unrealistic and unfair demands on ISVAs.

In our experience some queries raised by ISVAs and their clients are far from straightforward and require legal analysis and research. Our legal enquiries team includes three solicitors with 14, 15 and 18 years' experience respectively and we can confirm that some of the questions posed are no simpler than those that solicitors deal with in many other situations. We frequently have to consult legislation, policies and guidelines, and consider criminal and civil procedure. In a number of enquiries received we consult with barristers on our panel before providing advice.

The legal issues raised by ISVA clients are no less complex than legal issues in any other area of law, and walk of life, and there is no reason why ISVA clients should not need an independent, qualified lawyer with specialist knowledge in the relevant field, just like any other individual in receipt of legal services. There are some repeat issues and areas in which ISVAs can develop a good working knowledge, but this needs to be backed up by access to a lawyer to discuss individual cases wherever necessary.

Achieving better outcomes for victims also requires lawyers to take a robust approach to police decisions and sometimes negotiate with police or prosecutors, for example over the reasonableness of data requests. The Northumbria scheme evaluation noted that the solicitors in the pilot were all experienced individuals willing to stand up to police officers where necessary. ISVAs are unlikely to, and cannot be expected to take a confrontational attitude, and need to preserve constructive working relationships with officers. The involvement of a lawyer, taking a separate role to the ISVA, is more likely to resolve a situation in the victim's favour. Ultimately solicitors can use the threat of judicial review as a tool, and can instruct counsel where necessary. This is an essential part of the armoury for a lawyer that an ISVA cannot wield.

A legal analysis is also essential so that errors can be identified where ISVAs may accept the approaches of criminal justice partners which are presented to them as the norm. A good example of this is our identification of the common problem of police officers incorrectly applying a corroboration requirement in rape cases, resulting in decisions to take no further action (and cases closed without being referred to CPS), which we have raised repeatedly in threats of judicial review and with Operation Bluestone.

Finally, it is essential that legal advice to survivors be provided by qualified lawyers, so that legal professional privilege applies. This is a fundamental aspect of our legal system which enables a trusting and frank exchange of information and advice. Legal advice in this context requires the same protections as in any other.

## **C: Children who are born as a result of rape should be recognised within the Victims' Bill as 'secondary victims' of crime ("Daisy's Law")**

### **Overview**

CWJ calls on the Government to introduce proposals within the Victims' Bill which recognise children born of rape as 'secondary victims' of crime, and afford them rights for the first time under the Victims' Code.

Affording 'rape-conceived' persons this status in the Victims' Bill will, it is hoped, help counter the dearth of recognition and support currently available for children (and adults) who are born as a result of rape, for whom such a discovery can be profoundly traumatic and/or can cause long lasting damage to their mental health.

In addition, affording individuals born of rape their own statutory right to pursue a criminal complaint, if they wish to do so – will significantly improve the prospect of historic rape/child sexual abuse offences being recorded and investigated. It may even result in more prosecutions being brought – where appropriate – in cases where the pregnancy itself is/was compelling evidence of the crime.

### **The scale of the problem: how many children are born as a result of rape in England & Wales?**

There is currently a concerning lack of data regarding the prevalence of rape-related pregnancies and births in this jurisdiction. This 'data gap' is in itself a further compelling reason to ensure that individuals conceived by rape are legally recognised – by law, and by all relevant public services – as secondary victims of crime.

The data that is available, however, clearly indicates that a significant number of people are born as a result of rape. For example:

- Since 2017/18, the government has collected annual data on the number of mothers who have relied on the so-called 'rape clause' when applying for benefits: a statutory exception to the 'two-child cap' rule which came into force in 2017. Government figures show that in the first three years since this policy was introduced, approximately **900 women** invoked this 'non-consensual conception' exception, to claim child tax credit for a third child. Given that this tax credit is only available where a person's third child, specifically, has been conceived in rape – and will only be claimed in circumstances where the mother needs to claim, and is eligible for, benefits – it is fair to assume that the 900 applicants who self-reported to the Department of Work & Pensions are only the tip of the iceberg.
- Some data is also available in relation to rape-related pregnancies from other developed countries (besides the UK), which may be indicative. The United States-based peer-reviewed Journal of Child Custody featured an article in 2018 entitled '*Children conceived from rape: Legislation, parental rights, and outcomes for victims*', which cited research demonstrating that approximately **5% of women in the United States who are victims of rape become**

**pregnant, and that approximately 32% of those women choose to raise their child.** Similarly, federal data from the Center for Disease Control and Prevention ('CDC') suggests that 32,000 pregnancies in the United States occur each year as a result of rape, **approximately 12,000 of which are carried to term and raised by their birth mothers.**

- When we consider what we know generally about the sheer scale of sexual violence perpetrated against women and girls in the UK (just as in other countries), it is reasonable to infer that a very large number of children will be conceived and indeed born as a result of rape. Prevalence studies in academia and in public research have consistently shown that a large percentage of women and girls living in the UK will be subjected to sexual violence in their lifetimes. The 2017 Crime Survey for England and Wales for example indicates that in a single year, **510,000 women** were victims of rape or sexual assault in this country.

### **What impact does rape have on the children who are conceived in rape?**

In the case of our client, "Daisy"<sup>14</sup> – a woman born of rape in the 1970s, who campaigned for justice for many years – the sexual abuse that led to her birth has directly and very significantly impacted on her life, from birth through to adulthood, in a number of ways, including:

- Her immediate placement in adoptive care as a baby, and the loss of any possibility of a relationship with her birth parents, given the traumatic circumstances of her conception;
- The distress caused by not knowing who her parents were throughout childhood, or the circumstances of her birth;
- The exceptionally painful discovery, as an adult, that she had been born as the result of a violent crime, and the difficulties that this caused when she sought to build a relationship with her birth mother;
- Profound difficulties in reconciling the circumstances of her birth/childhood with a positive sense of identity; attachment anxiety; sadness and anxiety around loss, rejection and familial relationships.

Taken together, these circumstances have resulted in lasting mental and emotional harm, for which Daisy has required long-term counselling. It is understandable therefore that Daisy considered herself a secondary 'victim' of the crime – and that she felt that she should have a right to seek justice against the offender who had caused her this lifelong harm. Daisy herself has responded separately to the Victims' Bill Consultation, setting out why she is passionately supporting these proposals.

Not every person conceived in rape will have exactly the same experience as Daisy. Some, for example, will have been raised by their birth mother, but this can carry its own significant challenges, for both mother and child. Unsurprisingly, we are aware of some reports that children born of rape are at risk of harm during childhood due to poor parent-child relationships, discrimination and stigmatisation, and identity

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<sup>14</sup> A summary of Daisy's case is provided as a 'post-script' at the end of this section. Please note that Daisy will not be using her full name in any campaign material, so as to avoid any risk that her birth mother (who, as a victim of rape, is entitled to lifelong anonymity) is not publicly identified.

issues<sup>15</sup>; and that they are also more likely to suffer from severe psychological disorders, the most common of which are Post Traumatic Stress Disorder, depression, and anxiety<sup>16</sup>. It appears that some researchers who have examined the impact of rape conception on children have specifically concluded that such children must be perceived as 'secondary rape victims' and that this should always inform research and clinical practice in this area<sup>17</sup>.

It is unsurprising in these circumstances too if some rape-conceived persons, like Daisy, feel that it is enormously important for them personally to see their birth father brought to justice for the harm that they have suffered. The fact that there is currently no mechanism at all for rape-conceived persons – because they themselves are not recognised as victims – to access justice if their birth mother cannot (or is unwilling to) support a prosecution, can further aggravate the harm that has been caused.

### **The necessity of recognising rape-conceived persons as potential complainants in criminal investigations**

When our client Daisy first tried to report her birth father's historic rape of her mother to the police, she was told that she had no legal right to pursue such a complaint, and that there was nothing further the police could do to bring the offender to justice.

This, she was told, is because persons born as a result of rape are not currently recognised within the Victims' Code as victims of crime. Therefore, if a rape-conceived person decides to make a complaint, as Daisy did, about the rape to the police – hoping to assist the police in identifying a suspect, with the benefit of their own DNA – their complaint is unlikely to be investigated, still less prosecuted. Indeed, their allegation may **even** be 'no-crimed'.

Nor does a rape-conceived person who complains to the police have any legal right to request reasons for, or a review of, the decision not to investigate further, since they are not entitled to any of the rights set out in the Victims' Code.

Evidence of a pregnancy, and the DNA of a child, may in some cases be sufficient evidence to mount a prosecution in circumstances where, for example, the direct (or 'primary') victim of the rape was a child at the time that she fell pregnant, and cannot therefore legally have consented to intercourse. This means that if the primary victim of the rape is not available to support a prosecution – for example because she is now deceased, or it is not possible to trace her – it may in some instances be possible to secure a conviction based solely on a complaint pursued by the direct victim's rape-conceived son or daughter. Indeed, in these circumstances, the child – given the information and DNA evidence they are able to provide – is the only 'victim' or complainant left who is capable of supporting a prosecution, and is likely to be a central witness in any potential trial.

Yet in practice, as Daisy's experience demonstrates, police forces are currently unlikely to take **any** action if a rape-conceived person does come forward to make a complaint, volunteering their DNA. Given that they are not defined in law as a victim,

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<sup>15</sup> Elisa van Ee, Rolf J. Kleber, *Growing Up Under a Shadow: Key Issues in Research on and Treatment of Children Born of Rape*, [Child Abuse Review](#), Volume 22, Issue 6, p. 386-397

<sup>16</sup> See for example [Far From the Tree](#) by US psychologist [Andrew Solomon](#).

<sup>17</sup> Elisa van Ee, Rolf J. Kleber, *ibid*.



they are likely to be informed by the police that they cannot pursue a complaint in their own right, and that that is an end to the matter.

Clearly, it is unlikely to be possible to identify and prosecute offenders – absent evidence from the ‘direct’ victim of the rape – in **all** cases. However, where it is documented for example that a child has been conceived to a mother who is well under the legal age of consent, by an adult, and where the child is willing to provide their DNA and support a prosecution, it is clearly important that the offence is at least recorded and investigated, with a view to deciding whether to prosecute. What is more, a criminal investigation into one historic allegation of rape that resulted in pregnancy may even help uncover (and/or disrupt) offences committed by the same perpetrator towards other children.

Daisy’s case is not an isolated one. The case of Tasnim Lowe and her mother, for example, reported last year in the *Mirror*<sup>18</sup>, perfectly illustrates the need for rape-conceived persons to be recognised as potential (secondary) complainants, absent direct evidence from the direct victim of the sexual abuse. Ms Lowe’s birth mother became pregnant with her when she was just 14 years old, and was then tragically murdered by the man who had groomed and impregnated her. Although Ms Lowe’s birth father has been prosecuted in connection with the murders, he has never been prosecuted in connection with a single sexual offence in connection with his victim’s abuse. Consequently, he will not be required to sign onto the Sex Offenders’ Register when he is released, and could pose a risk to other children.

The need for increased use of so-called ‘evidence-led’ prosecutions of crimes relating to child sexual abuse – where direct victims themselves are unable to give evidence themselves at court, but a prosecution can be built on the other incriminating evidence that is available – is clear. In March 2021, the think-tank Centre for Social Justice published ‘*Unsafe Children: Driving up our country’s response to child sexual abuse and exploitation*’, a report analysing the horrifying scale of child sexual abuse within the UK, and calling for a range of reforms and practical measures designed to tackle the problem. The report followed an investigation chaired by Secretary of State for Health and Social Care Sajid Javid, and supported by a range of experts in the field. The report concluded that to ensure a more robust response to offending against children, law enforcement authorities **must** undertake more proactive investigations; and that they **must** be more willing to explore the possibility of so-called ‘victimless’, or evidence-led prosecutions, in child sexual abuse cases where (as often happens) the victim of the abuse is reluctant or unable to attend court. The report specifically notes, in fact, that this may be a key important option to consider in ‘**cases of a child conceived in CSA**’ [emphasis added].

Furthermore, the 2021 report recommended specifically that children conceived in abuse:

*‘should also be considered secondary victims who deserve support and recognition. They could be crucial in pursuing prosecutions against their fathers should their mothers not wish to. Government should also establish the extent to which they are able to access victim/survivor services and*

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<sup>18</sup> <https://www.mirror.co.uk/news/uk-news/sex-predator-who-killed-teen-20796475>

*consider how best to ensure this access can be enhanced, **for example by recognising these children as victims in the upcoming Victims' Law.***  
[emphasis added]

We agree with Centre for Social Justice that formally recognising children conceived in rape as victims of crime is a vital step in improving the state's response to child sexual abuse. It has the potential to achieve real practical, as well as symbolic, change. If rape-conceived persons had a clear statutory right to make a complaint to the police in relation to the crime – and (accordingly) access to the rights enshrined within the Victims' Code – it is hoped that this would also lead to improved training and guidance for police and prosecutors on the ground, better equipping them to consider evidence-based prosecutions in cases where rape-induced pregnancies come to light.

Even in the many cases where a prosecution may not be evidentially viable, the fact that a rape-conceived person has a statutory right to pursue a complaint is more likely to result in their disclosure being, at the very least, properly recorded and crimed. This is a valuable outcome in itself, particularly if the same suspect later comes to the police's attention again as a possible serial offender. Any records that the police hold of allegations made against that suspect previously which have resulted in 'non-convictions' might serve as vital intelligence, or even evidence, when attempting to bring him to justice for further crimes.

### **How would the law ensure that there is a fair balance between the interests and rights of both mother and child?**

In cases where the 'direct' victim of the rape is still alive and traceable, it may be that her opposition to the prosecution (if applicable) will be a factor for the Crown Prosecution Service to take into account in weighing whether there is sufficient evidence for, and indeed public interest in, a prosecution. It is of course important that the 'primary' victim feels that she has agency and choice when approached about a historic, traumatic crime of this nature that she herself has not pursued: her wishes must of course be balanced with those of her child.

Under the Code for Crown Prosecutors, Crown Prosecutors are already required to consider whether there is sufficient public interest in a prosecution before making any charging decision, taking into account a range of factors for and against. It would also be open to the Director of Public Prosecutions to introduce new bespoke guidance specifically addressing the approach to be taken to evidential and public interest tests when considering charges arising from a rape-conceived person's complaint – much as he has done, in the past, in respect of other challenging areas of crime.

If there are specific concerns that the primary victim will suffer harm or unnecessary distress if a prosecution is pursued, the Crown Prosecution Service will always have the discretion, in other words, not to prosecute.

Conversely, in cases where the primary victim is alive and essentially neutral to the prospect of a prosecution, but simply has compelling reasons not to give evidence at trial, it may still be possible – and indeed firmly in the public interest – to pursue an evidence-led prosecution, with the rape-conceived complainant as a key witness. We

suggest that in such circumstances the primary victim's explicit consent to an evidence-led prosecution which proceeds without their evidence could, and should, always be obtained.

These are not dissimilar to the kinds of considerations that are taken into account when the Crown Prosecution Service decides whether to proceed with a 'victimless' or 'evidence-led' prosecution in a context of domestic abuse, so there is no reason to believe that they would not be properly and sensitively considered in this context, too.

### **Wider recognition and improved support for rape-conceived children**

In some ways, the position of rape-conceived children is not dissimilar from that of children who grow up witnessing one of their parents suffering from domestic abuse – and the latter **are** now recognised in law as victims of crime.

Section 3 of the Domestic Abuse Act 2021 provides that a child who witnesses and/or experience the effects of domestic abuse, and who is related to the adult being abused and/or the perpetrator, should be recognised as a **secondary victim** of that domestic abuse.

A factsheet published by the government about the Domestic Abuse Bill provides important insight into the rationale behind affording children of abusive partnerships this status:

- *'Part 1 of the Act provides that a child who sees or hears, or experiences the effects of, domestic abuse and is related to the person being abused or the perpetrator is also to be regarded as a victim of domestic abuse. **This will help to ensure that locally commissioned services consider and address the needs of children affected by domestic abuse.***
- *'Recognising the impact of domestic abuse on children **will ensure that domestic abuse is properly understood and that in seeking to tackle this abhorrent crime and provide support services to survivors and their children.***

The Statutory Guidance on the Domestic Abuse Act 2021, published on the 19<sup>th</sup> October 2021, notes that 'harm' in this context can include the impact on children's development (paragraph 82) – much in the same way that the fact of being conceived in rape can impact, in myriad ways, on the upbringing that a child will have, even before they discover that the distressing circumstances of their birth.

Likewise, the Statutory Guidance recognises at paragraphs 193 and 195 that:

*Providing support to both children and the non-abusive parent is essential and the child's voice should always be considered. There should be a focus on the importance of joint and parallel work for victims, including children and a range of services to sensitively address and overcome the harm domestic abuse has caused to the non-abusive parent-child relationship. This should also include appropriate access to relevant services for the perpetrator alongside clear accountability that the perpetrator is responsible for the harm caused.'*

*...Children and young people should be offered support based on their individual needs, with a range of interventions, so that each child is able to access the specialised help they require. This could include: access to psychoeducational support, therapeutic services (for example counselling) or specialist children's workers.'*

When these provisions of the Domestic Abuse Bill were debated in the House of Lords, it was widely accepted that children who witness domestic abuse were 'hidden victims' of abuse, deprived of adequate understanding and support, and would remain so unless and until they were properly recognised in law as victims in their own right<sup>19</sup>. Particular concerns were expressed about the indirect impact of abuse on children's mental health, as well as their physical and mental development.

Significantly, a number of Peers noted that the trauma caused to children who actually born of or into an abusive relationship might well begin long before the child is even capable of seeing and understanding that abuse – possibly even before their birth. Baroness Stroud for example, whose comments were supported by others, cited evidence that exposure to domestic abuse between the point of conception and the age of two is associated with adverse outcomes including poor mental and physical health, lower academic achievement and impaired social development – and that a mother's emotional state following abuse can even have a direct influence on foetal development by altering the environment in the womb.

All of this was linked back to the imperative on Government to legislate to ensure that the needs of these 'hidden victims' could be recognised and met, in terms of service provision.

It is clear from the research we have cited, from Daisy's account, and from the accounts of other rape-conceived persons who have spoken out publicly about their experiences, that they too are absolutely 'hidden victims' of a crime, who are likely to be profoundly affected by the abusive context of their conception and their birth, in ways that are not dissimilar from the range of harms discussed above. The practical and psychological consequences of rape conception for the wellbeing and development of children – persisting well into adulthood – are likely to be **very** significant, and cannot merely be dismissed as collateral damage. It is important as a matter of principle that they are recognised as additional victims of this devastating crime and treated with the dignity that is, or should be, afforded by this status.

This legal recognition will be an essential tool in ensuring greater awareness and understanding of rape conception and its impact, on both mothers and children – in much the same way that the Domestic Abuse 2021 sought to improve public understanding of the complex consequences of domestic abuse on families. What is more, placing the 'victim rights' of rape-conceived persons on a statutory footing will also enable and ensure that locally commissioned services are addressing their needs. This may be particularly, although not exclusively, essential in circumstances where the rape-conceived person is **still a child** under the age of 18 when they discover the circumstances of their birth, and is in need of (for example)

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<sup>19</sup> <https://hansard.parliament.uk/Lords/2021-01-05/debates/1384371F-73F4-40BC-A44A-B0358CF839B6/DomesticAbuseBill?highlight=domestic%20abuse%20act%202021#contribution-A52B6C44-0E9D-4B5B-8D70-88D897A5CCDE>

psychoeducational or therapeutic support, and/or a specialist support worker who understands their needs.

Joint support is also frequently needed by mothers and their children in these challenging circumstances – where, for example, a mother has chosen to raise the child despite the circumstances of their birth – in much the same way that some commissioned services provide joint support for family members affected by domestic abuse.

We note, in fact, that the Government has – very recently – expressed its own concern at the devastating harm suffered, worldwide, by children who learn that they have been born of sexual violence. As recently as November 2021, the UK Government proudly endorsed an international ‘Call to Action’ to ‘*ensure the rights and wellbeing of children born of sexual violence in conflict*<sup>20</sup>. In announcing its endorsement of that Call to Action, the Foreign Commonwealth and Development Office expressly recognised that “*children born of sexual violence are also falling through the cracks, deeply affected by the circumstances of their birth and facing distinct obstacles to thrive and pursue their dreams throughout their lives.*” The FCDO’s Policy Paper goes on to state:

***We stress that [children born of sexual violence] are rights holders in their own capacity...***

*Recognising the need for concerted efforts at the global, regional, national and local level to support the realisation of the rights of children born of sexual violence in conflict, we commit to developing a Platform of Action that will promote the rights and well-being of these children without discrimination or stigma.*

The commitments that the Government has made as part of this Call to Action include the provision of opportunities for children born of sexual violence, and their mothers, to participate meaningfully in discussions and debates affecting them; and encouraging child-sensitive approaches to sustainable development that children born of sexual violence amongst the most vulnerable and at risk of being left behind<sup>21</sup>.

We recognise that these policy commitments are limited specifically to children born overseas in conflict settings; and that children born in wartime, whose mothers may have been subjected to sexual violence in the context of horrific war crimes perpetrated against their families and communities will, of course, suffer additional harm and trauma. We understand that there are particular and distinct issues of trauma and stigma suffered by the mothers and their children born in these circumstances. However, there are also many parallels for children born of rape in domestic settings. Given that the fundamental issue which this Call to Action seeks to address is not violence in conflict per se, but the discrimination, stigma, and lack of support endured by children conceived in rape – and the survivors who give birth to them – we consider that to reject the legislative proposals we have set out in this

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<sup>20</sup> <https://www.gov.uk/government/publications/ensuring-the-rights-and-wellbeing-of-children-born-of-sexual-violence-in-conflict-call-to-action/call-to-action-to-ensure-the-rights-and-wellbeing-of-children-born-of-sexual-violence-in-conflict>

<sup>21</sup> All references are to the FCDO Policy Paper above.

response would be illogical and inconsistent with the UK's stated commitment to protecting children conceived in sexual violence worldwide.

### **Proposed legislative clauses**

For all the reasons we have set out above, we propose as a minimum that the Victims' Bill introduces clauses to the effect:

- i. That persons 'conceived by' (or 'born as a result of') rape are henceforth to be recognised as victims, or 'secondary' victims, of crime;
- ii. That, as such, they are entitled to the rights set out in the Victims' Code; and
- iii. That statutory authorities have a duty to ensure appropriate services are available that meet the support needs of (a) women who fall pregnant following rape, and (b) children/adults who are affected by the discovery that they have been born in rape.

### **Postscript: About our client, 'Daisy'**

Daisy\* is a woman who discovered in the 1990s that she had been born as a result of a rape. As a child growing up in the 1970s and 80s, she was raised by an adoptive family, shielded from the truth about the circumstances of her birth. After turning 18, however, she requested her adoption file, hoping to learn more about her birth family – and was horrified to learn that her birth mother had become pregnant with her at just 13 years of age. It was even documented who the 'father' was: a 29-year-old man who, according to the records, had allegedly forced himself on his 13-year-old victim, but had denied paternity when confronted by the police. No criminal action had been taken against him at the time for his heinous offence.

Over the years that followed, Daisy established contact with her birth mother, and campaigned for her birth 'father' to be brought to justice, offering her DNA as evidence that could be used to prove the prosecution case. The man responsible – a man named Carvel Bennett, now in his 70s – was eventually convicted in 2020, with the benefit of evidence from both Daisy and her birth mother, and sentenced to 11 years' imprisonment. The case attracted a significant amount of media coverage.

Daisy's campaign for justice was praised at the sentencing hearing by the trial judge, who also observed in his Sentencing Remarks that she too was a 'victim', in many respects, of the abuse that had resulted in her birth. Her case raises a number of issues, including whether individuals who are conceived of rape should be regarded as secondary victims and complainants in their own right – recognising the terrible impact that such a discovery will inevitably have on those who discover the circumstances of their birth, as well as the importance of their evidence, potentially, to any criminal prosecution.

\*Further information can be found about her Daisy's case from the following news reports:

<https://www.centreforwomensjustice.org.uk/new-blog-1/forgotten-victims>

<https://www.birminghammail.co.uk/news/midlands-news/he-smiled-knew-who-was-21244320>

<https://news.sky.com/story/carvel-bennett-rapist-jailed-after-victims-daughter-wins-justice-decades-later-12371859>

<https://www.theguardian.com/uk-news/2021/aug/03/rapist-jailed-fight-justice-daughter-born-following-attack-carvel-bennett>

<https://www.mirror.co.uk/news/uk-news/breaking-rapist-brought-justice-daughter-24676384>

<https://www.bbc.co.uk/news/uk-58073015>

<https://www.bbc.co.uk/news/uk-england-birmingham-58269677>

<https://www.dailymail.co.uk/news/article-9855191/Daughter-helps-convict-elderly-father-46-years-raped-mother-13.html>

## **D: Inappropriate criminalisation of victims of domestic abuse and other forms of VAWG**

### **CWJ's work in this area**

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. CWJ recently undertook a major piece of research considering the barriers to justice for women who kill their abuser.<sup>22</sup> 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. 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.

### **Introduction**

The Victims' Bill consultation document does not address the treatment of victims of domestic abuse and other forms of VAWG and exploitation who are accused of an offence that arises out of their experience of abuse. There is widespread evidence of unjust treatment of victims in these circumstances, and a need for new statutory defences and improvements in policy and practice to address this. This section of our submission summarises the evidence and recommended reforms in this area.

### **Our recommendations**

In light of the evidence set out in this submission, we hope the Victims' Bill and surrounding policy framework will:

1. Introduce law reforms to provide effective defences for those whose offending results from their experience of domestic abuse.

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<sup>22</sup> [Centre for Women's Justice \(2021\) Women who kill: how the state criminalises women we might otherwise be burying](#)

2. Establish as a strategic priority the protection and non-prosecution of victims of domestic abuse and other forms of VAWG (subject to exceptions in line with the public interest), as is the case for victims of trafficking.
3. Establish a mechanism to expunge criminal records that arise from crimes committed as a consequence of coercion and abuse, or at least to filter them from mandatory disclosure.
4. Set out plans to implement reforms in practice throughout the criminal justice process in order to achieve the following outcomes:
  - (a) **Identification of victims:** Suspects/defendants who are potential victims of domestic abuse and other forms of VAWG are identified as such at the earliest possible stage in proceedings.
  - (b) **Protection of victims:** Once identified, victim suspects/defendants are protected from abuse, effectively referred to support services, have their rights upheld as victims, and are not stigmatised.
  - (c) **CJS competency and accountability for considering contextual abuse:** Criminal justice practitioners at every stage of the process (police, CPS, judges, magistrates, juries, prisons and probation) have access to the necessary guidance, tools, processes and expertise to enable them to take proper account of the abuse suffered by victim suspects/defendants/offenders and its relationship to any alleged offending, and are accountable for doing so.
  - (d) **Accessible procedural safeguards:** Effective procedural safeguards are accessible to enable victim suspects/defendants to give their best evidence about contextual domestic abuse at the police station and in court.
5. Ensure disaggregated data collection to improve understanding of the criminalisation of women who are victims of domestic abuse and other forms of VAWG, including intersectional discrimination based on race, religion or immigration status.

### **How victims of domestic abuse and other forms of VAWG are criminalised**

In 2017 the then Home Office Minister for Crime, Safeguarding and Vulnerability [said](#) that there needed to be ‘*a root and branch review of how women are treated in the criminal justice system when they themselves are victims of abuse*’.<sup>23</sup> Yet criminal law and practice still fail to protect those whose experience of abuse drives them to offend.

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<sup>23</sup> [Prison Reform Trust \(2017\) There's a reason we're in trouble: Domestic abuse as a driver to women's offending](#)



Nearly 60% of women in prison and under community supervision in England and Wales are victims of domestic abuse.<sup>24</sup> Of 173 women screened at HMP Drake Hall, 64% reported a history indicative of brain injury and for most this was caused by domestic violence.<sup>25</sup> Research by the Prison Reform Trust and others has shown how women's offending is often directly linked to their own experience of domestic abuse.<sup>26</sup> At a recent CWJ roundtable event, frontline domestic abuse practitioners told us it is common for women to be accused of offences arising from their experience of domestic abuse, and it is routine for this not to be taken into account:

*This is happening to women all the time.*

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 victims of domestic abuse who are driven to offend.<sup>27</sup> The ways in which victims may be criminalised are wide-ranging.<sup>28</sup> This may result from their use of force against their abuser in self-defence, or from being coerced by their abuser into committing crimes such as theft, fraud, handling of stolen goods and possession of controlled substances. Male perpetrators of domestic abuse may use the criminal justice system as an additional means of exerting power, while for some women, physical retaliation may be part of an attempt to survive their victimisation.<sup>29</sup> Police officer perpetrators of abuse may use their powers or contacts to criminalise their victims.<sup>30</sup>

Most women convicted under the law of joint enterprise are convicted in relation to serious violent offences despite not having taken part in any violence, and often despite being marginal to the violent event or not even present at the scene. These women are constructed as the facilitators of violence and severely punished, often without taking account of the context of domestic abuse which they were experiencing at the time, and the impact of this on their actions or omissions.<sup>31</sup>

The anonymised case studies included at the end of this submission come from CWJ's recent case files and illustrate the variety of ways in which victims can be inappropriately criminalised. These cases involve decisions made by the police, CPS and/or courts that fail to take proper account of contextual domestic abuse and/or sexual violence. Some cases involve victim defendants pleading guilty. Most cases arise from allegations of harassment or assault made against the victims by their abuser, or coerced offending. Two cases (Najma and Sophie) arise from the

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<sup>24</sup> Ministry of Justice (2018) Female Offender Strategy, London: MoJ. This is likely to be an underestimate because many women fear disclosing abuse. (Gelsthorpe, L., Sharpe, G., and Roberts, J. (2007) Provision for Women offenders in the community London: Fawcett Society)

<sup>25</sup> [The Disabilities Trust \(2019\) Making the link: Female offending and brain injury, London: The Disabilities Trust](#)

<sup>26</sup> [Prison Reform Trust \(2017\) There's a reason we're in trouble: Domestic abuse as a driver to women's offending, London: PRT](#)

<sup>27</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>

<sup>28</sup> [Prison Reform Trust \(2017\) There's a reason we're in trouble: Domestic abuse as a driver to women's offending](#)

<sup>29</sup> [Jo Roberts \(2019\) 'It was do or die': how women's offending can occur as a by-product of attempting to survive domestic abuse Journal of Gender-Based Violence, vol 3 no 3, pp. 283–302. See also: Marianne Hester \(2009\) Who does what to whom? Gender and Domestic Violence Perpetrators, July 2009, European Journal of Criminology, 10\(5\)](#)

<sup>30</sup> [HM Inspectorate of Police and Fire & Rescue Services \(2020\) Police super-complaints: force response to police perpetrated domestic abuse](#)

<sup>31</sup> [Clarke, B. and Chadwick, K. \(2020\) Stories of Injustice: The criminalisation of women convicted under joint enterprise laws](#)

victims' interaction with police while their allegations against their perpetrators were being investigated. The cases fall into seven categories:

- 1. Counter-allegations of assault offences in context of domestic abuse** - decisions to prosecute/caution despite evidence of contextual abuse
- 2. Counter-allegations of harassment/NMO breach/assault in context of domestic abuse and sexual violence** - family court granting of NMO and decisions to prosecute for NMO breach/harassment/assault despite evidence of contextual abuse
- 3. Counter-allegations of assault in context of rape** - decision to charge despite evidence of rape
- 4. Interaction with police following experience of VAWG** - decision to imprison victim exhibiting distress
- 5. Allegedly false allegations** - threat of arrest leads victim to withdraw sexual assault allegation
- 6. Police officer perpetrators** - criminalisation of victims of police office perpetrators for alleged harassment and/or assault, and entrapment into driving offence
- 7. Coerced offending** - decision to prosecute despite knowledge of contextual abuse

## **Police and CPS guidance and practice**

Recent research 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>32</sup> This echoes Marianne Hester's study which found that women were three times more likely to be arrested than their male partners in cases involving counter-allegations, often for violence used to protect themselves from further harm from their abuser.<sup>33</sup>

Where counter-allegations arise, there is a need for detailed guidance for all police forces on how to establish who is the primary aggressor. Where police get it wrong and arrest the true victim this has significant long-term ramifications, even when the case against her is closed soon after. It means that in future she will not call the

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<sup>32</sup> [APPG on Women in the Penal System \(2020\) Arresting the entry of women into the criminal justice system: Briefing Two](#)

<sup>33</sup> Hester, M. (2012) Portrayal of Women as Intimate Partner Domestic Violence Perpetrators, Bristol: University of Bristol in association with the Northern Rock Foundation. Professor Hester studied the following three sample groups: (1) All women recorded by the police as sole domestic violence perpetrator in a heterosexual relationship (N=32); (2) a random sample of sole male perpetrators; and (3) a random sample involving 32 cases where both partners were recorded at some time as perpetrator. These different sets of cases were then compared to assess differences and similarities in the rate of arrest where allegations were made. Analysis showed that an arrest was three times more likely to follow where the allegations were made against a woman, than where they were made against a man.

police and is left effectively unprotected, while the fact of the arrest can have far-reaching impacts on child custody decisions, housing and other aspects of a survivor's life following relationship breakdown.

College of Policing Authorised Professional Practice (APP) includes guidance on identifying the primary perpetrator in the event of counter-allegations,<sup>34</sup> with a linked section advising against making dual arrests where possible. However 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. Some local police force guidance runs contrary to the APP provisions, and many police forces do not address the issue in their policies and procedures on domestic abuse. CPS legal guidance on domestic abuse includes a section on self-defence and counter-allegations.<sup>35</sup> However despite the existence of these guidance documents, the referrals we have received make clear that practice on the ground is inconsistent.

CPS legal guidance on identifying Controlling or Coercive Behaviour<sup>36</sup>, and the Home Office Statutory Guidance Framework on Controlling or Coercive Behaviour<sup>37</sup> both list relevant behaviour of the perpetrator as potentially including:

*Forcing the victim to take part in criminal activity such as shoplifting, neglect or abuse of children to encourage self-blame and prevent disclosure to authorities.*

Not only is this is not matched by a statutory defence for such coerced offending, but there is also no Police or CPS guidance on ensuring decisions to arrest or prosecute take account of contextual abuse and coercion. Beyond background information for criminal justice agencies about working with women involved in offending<sup>38</sup>, there is no specific Police or CPS guidance on the need to consider contextual domestic abuse in relation to offences other than counter-allegations of use of force. This should nonetheless be considered when assessing the evidence of an offence having been committed by the victim, and the public interest in their arrest or prosecution, yet published evidence and CWJ's casework experience make clear that this frequently does not occur.

By contrast, in cases involving defendants who are victims of trafficking, Section 45 of the Modern Slavery Act 2015 and the surrounding policy framework requires proactive, early case management 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.

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<sup>34</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>35</sup> Available at: <https://www.cps.gov.uk/legal-guidance/domestic-abuse-guidelines-prosecutors>

<sup>36</sup> [CPS Legal Guidance on Domestic Abuse, Controlling or Coercive Behaviour in an Intimate or Family Relationship \(reviewed 30 June 2017\)](#)

<sup>37</sup> [Home Office \(2015\) Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework](#), p.4

<sup>38</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>

This means that magistrates, judges and legal advocates increasingly understand how exploitation in this context can lead to offending and are taking this into account.

Domestic abuse training for police and prosecutors needs to address the public interest test. Although the police are not supposed to close cases themselves on the basis of the public interest test, they can gather and put forward evidence that is relevant to that, and it would be helpful for them to understand the bigger picture.

There is also a need for training to address the fact that it is extremely difficult for most survivors of VAWG to speak about their abuse. This means that, even where the abuse is relevant to their alleged offending, disclosures may be limited initially, and survivors need to be given the space and opportunity to expand upon any abuse they mention. This is particularly necessary because the usual dynamic in the criminal justice process is that suspects put forward their accounts and claims to the best of their ability, and police and prosecutors treat these with scepticism. This is the reverse of the approach required to assist a survivor of abuse to open up and disclose abuse. Only a conscious process based on understanding of barriers to disclosing abuse can reverse the usual dynamic within the criminal justice process and provide the opportunity for survivors to provide accounts that shed light on their true circumstances. An approach modelled on the process followed in relation to potential victims of trafficking could address this.

### **Challenging inappropriate prosecutions**

Where there is an inappropriate prosecution, this is difficult to challenge. 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. Defence solicitors under considerable pressure with limited resources may not even attempt the argument, and women may plead guilty in order to avoid the trauma of a trial and the risk of a harsher sentence if they are convicted.

### **Courts, sentencing, appeals and parole**

As CWJ's recent research shows, there are multiple barriers throughout criminal justice proceedings which prevent women defendants' experiences of VAWG being taken properly into account.<sup>39</sup> Although this research concerns the very small number of women who kill their abusers, its learning is relevant to the many other cases in which women's alleged offending is linked to their experience of domestic abuse and other forms of VAWG. These barriers include:

- (a) Criminal defence lawyers' limited understanding of VAWG, including coercive control, and how this should inform the defence; and a lack of time, skills and resources which means defence lawyers fail to build trust, fail to enable full disclosure of abuse and fail to fully investigate the abusive context.
- (b) Late disclosure of abuse is common, particularly in cases of coercive control. The problem of a victim identifying the perpetrator's behaviour as abusive and

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<sup>39</sup> [Centre for Women's Justice \(2021\) Women who kill: how the state criminalises women we might otherwise be burying](#)

making a disclosure can be exacerbated for women from non-White backgrounds, where controlling, abusive and violent behaviours may intersect with other cultural factors, creating greater complexity and isolation for victims.

- (c) Giving evidence in court is traumatic for many women and some may decline to do so, or stop giving evidence during trial, with highly negative consequences for their defence. Where women are able to disclose abuse, and where this is explored expertly in court, this leads to more positive outcomes. However, even where it is disclosed, it is often not explored effectively in court.
- (d) Judges' understanding of VAWG is crucial to the outcome of a case – including for instructing the jury, deciding what evidence is admissible, determining the sentence, and generally controlling the way a case is conducted – but it is often lacking.
- (e) In cases of women who kill their abuser, memory issues may arise due to traumatic amnesia or the effect of substances. In an adversarial legal system, the inability to remember crucial events can be construed as a strategy – namely, that women remember only what is useful to their case – and that the defendant is malingering. However, post-traumatic stress disorder arising from previous violence can cause dissociation which leads to loss genuine of memory of traumatic moments.
- (f) Counter-allegations of abuse are frequently used to discredit women defendants, although they may have been acting in self-defence. Police failings to identify the primary aggressor in domestic abuse incidents exacerbate this problem.
- (g) Commonly held myths and stereotypes about how a victim of abuse should behave are present in many cases and are believed not just by jurors, but by advocates and judges. Such stereotyping can be particularly harmful when combined with misconceptions based on class, race or culture.
- (h) The use of legal and illegal substances is a common coping strategy for women experiencing abuse or other forms of trauma. This can be a factor both in women's presentation at trial and in relation to consideration of the context of the incident for which they face charges.
- (i) Further issues were identified in relation to:
  - Reluctance to admit evidence from experts on VAWG or on the cultural context of abuse
  - Upward trends in sentencing of women who kill their abusers
  - Inadequacies in the appeal process for women whose offending resulted from abuse
  - Barriers to parole for women whose offending resulted from abuse

- Rising levels of recall of women to prison and lack of appropriate community support.

Women also face barriers to moving forward in their lives where they are left with a criminal record.

### **Black, Asian and minoritised women**

The Female Offender Strategy acknowledges the overrepresentation of Black, Asian and minoritised women in the criminal justice system.<sup>40</sup> These women face a double disadvantage in the criminal justice context, including poor provision of services to meet their basic needs.<sup>41</sup> Hibiscus Initiatives' recent research reveals how Black women experience racial discrimination in the criminal justice process, and points to barriers to disclosing contextual abuse:<sup>42</sup>

*When I was arrested... I told the police about ... the abuse my estranged husband had inflicted on us, I have a child in a wheelchair, I had been in a refuge before... When you are telling them these things, you are being open and honest, but they look at you as if you are saying all these things for sympathy.*

Pragna Patel has described how proper consideration of contextual abuse in criminal justice proceedings can be hampered for Black, Asian and minoritised women, partly due to cultural constraints creating barriers to disclosure of abuse, as well as cultural and racial stereotypes applied by criminal justice decision makers.<sup>43</sup> At a recent CWJ roundtable event, frontline practitioners working with women involved in the criminal justice system highlighted some of the barriers to disclosure:

*Many times if they do [disclose abuse] and they take that risk, that sort of slander and social stigma can also be transfer on to their children especially if they have female children.*

Frontline domestic abuse practitioners working in services led by and for Black, Asian and minoritised women also discussed failings by the Police and other criminal justice agencies in interpreting signs of abuse:

*There was a case where there was serious coercive controlling behaviour. Police quoted uncomfortable living conditions in the Police notification, and it wasn't uncomfortable living conditions it was serious coercive controlling behaviour.*

In research by Muslim Hands with 60 Muslim women in prison, 79% of women reported experiencing domestic abuse, with abusive and controlling experiences

<sup>40</sup> Ministry of Justice (2018) [Female Offender Strategy](#), p.13

<sup>41</sup> Prison Reform Trust (2017) [Counted Out: Black, Asian and minority ethnic women in the criminal justice system](#); Agenda/Women in Prison (2017) [Double disadvantage: the experiences of Black, Asian and Minority Ethnic women in the criminal justice system](#); Ministry of Justice (2017) [The Lammy Review: an independent review into the treatment of, and outcomes for, Black, Asian and minority ethnic individuals in the criminal justice system](#)

<sup>42</sup> Hibiscus Initiatives (2021) Black women's experiences of the criminal justice system

<sup>43</sup> [Centre for Women's Justice \(2021\) Women who kill: how the state criminalises women we might otherwise be burying. Appendices](#)

being linked to the offence in some cases.<sup>44</sup> Commenting on her earlier study of the experiences of Muslim women in prison, Sofia Buncy has noted:<sup>45</sup>

*There were strong elements of coercion and/or manipulation behind the criminality of Muslim women, where some had been groomed into committing crimes. Examples of this were covering for the crimes of male family members or being charged with wider family crimes. Emotional blackmail was key and there was a strong sense that a Muslim woman must 'self-sacrifice' and think of the greater good by 'doing the right thing'.*

*What was more worrying was that many women disclosed suffering blackmail, violence and sexual abuse for long periods of time leading up to their crime. What silences their disclosure about this is fear of worsening the situation that they are already in, fear of rejection, further violence or potential to be ostracised or incur a far worse fate.*

Barriers to disclosure can also create challenges on release from prison, where women may not wish to return to abusive households but may not feel able to disclose their fears.<sup>46</sup>

The recently published Tackling Double Disadvantage 10-point Action Plan sets out the need for criminal justice staff to receive specialist training on culture, ethnicity, race, faith, gender and anti-racism to meet the multiple and intersecting needs of Black, Asian, minoritised and migrant women, and resources to understand the rights of women with language barriers<sup>47</sup> – an issue that was also highlighted by practitioners at the CWJ roundtable:

*We are working with a woman from a South Asian background where issues of poor interpreting have been raised in her case which has had a huge impact on her case... Our client is capable of masking her disability and that is further masked by all of her testimony at trial having been given through an interpreter.*

The Double Disadvantage Action Plan calls for the Ministry of Justice to collect and publish disaggregated data on gender-based violence and its links with Black, Asian, minoritised and migrant women's pathways into the criminal justice system.

## **Migrant women and trafficked women**

The Female Offender Strategy recognises the 'unique challenges' for migrant women. Migrant women are over-represented in prison receptions particularly amongst those held on remand.<sup>48</sup> They are likely to receive poor levels of support

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<sup>44</sup> [Muslim Hands \(2018\) \(In\)visibility. Female. Muslim. Imprisoned.](#)

<sup>45</sup> Comments by Sofia Buncy reported in [Prison Reform Trust \(2017\) 'There's a reason we're in trouble': Domestic abuse as a driver to women's offending.](#) See also: [Buncy, S. and Ahmed, I. \(2014\) Muslim Women in Prison. Second Chance Fresh Horizons: A study into the needs and experiences of Muslim women at HMP & YO1 New Hall and Askham Grange prisons during custody and post-release. A project of Huddersfield Pakistani Community Alliance in partnership with Khidmat Centres](#)

<sup>46</sup> [Khidmat Centres \(2019\) Sisters in Desistance: Community-Based Solutions for Muslim Women Post-Prison](#)

<sup>47</sup> [Hibiscus Initiatives \(2022\) Tackling Double Disadvantage: Ending inequality for Black, Asian, minoritised and migrant women – 10-point action plan for change](#)

<sup>48</sup> [Robson, M. \(2022\) A suspect population? An examination of bail decision making for foreign national women in criminal courts in England and Wales](#)

while facing the risk of deportation, lack of recourse to public funds and consequent vulnerability to poverty, homelessness, coercion and abuse.<sup>49</sup> The Domestic Abuse Act 2021 excludes migrant women from protection, leaving them more vulnerable to abuse and with significant barriers to disclosure.<sup>50</sup> The [Step Up Migrant Women](#) campaign continues to call for the implementation of safe-reporting mechanisms and an end to data-sharing policies when victims with insecure immigration status report abuse, explaining:

*Insecure immigration status is often a tool of control used by perpetrators to abuse their partners and threaten them with deportation. This situation puts migrant women in a vulnerable position: they fear the abuser and also fear asking for help.*

Imkaan's [Vital Statistics report](#) shows that 92% of migrant women have reported threats of deportation from the perpetrator and the Latin American Women's Rights Service's [Right to be Believed report](#) records almost 6 in 10 women surveyed having received threats of deportation from abusers.

The Tackling Double Disadvantage 10-point Action Plan echoes the need to end information-sharing between police and immigration control to prevent migrant women being made more vulnerable to criminalization, and calls on the Ministry of Justice and Home Office to ensure the Nationality and Borders Bill does not criminalise or impose any unfair treatment on migrant women who are victims of trafficking, modern slavery, or domestic abuse.<sup>51</sup> Under current government proposals, the Nationality and Borders Bill would significantly limit the rights of refugees, including an increased risk of criminalization. These provisions are likely to have a particularly severe impact on refugees who are victims of abuse and exploitation.<sup>52</sup>

The Female Offender Strategy makes no reference to the experiences of trafficked women in the criminal justice system, who remain at risk of inappropriate criminalisation – including British as well as foreign national women. This is a significant gap which requires focused attention at national and local level.<sup>53</sup>

## **Young women and care leavers**

Research by Agenda and the Alliance for Youth Justice (AYJ) reveals how young women's experiences of violence, abuse and exploitation can drive them into the criminal justice system, where they find themselves punished for survival strategies and their response to trauma, and have limited access to specialist support despite

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<sup>49</sup> Prison Reform Trust (2018) [Still No Way Out: Foreign national women in the criminal justice system](#); Benedict, S. (2020) ['Just no future at the moment': Examining the barriers to community resettlement for foreign national women](#) and see HM Inspectorate of Prisons (2020) [Thematic report by HM Inspectorate of Prisons: Minority ethnic prisoners' experiences of rehabilitation and release planning](#)

<sup>50</sup> [Refuge press statement, 29 April 2021, 'Domestic Abuse Bill receives Royal Assent'](#)

<sup>51</sup> [Hibiscus Initiatives \(2022\) Tackling Double Disadvantage: Ending inequality for Black, Asian, minoritised and migrant women – 10-point action plan for change](#)

<sup>52</sup> [Joint Council for the Welfare of Immigrants \(2021\) Evidence to the Human Rights Committee on the Nationality and Borders Bill](#)

<sup>53</sup> Prison Reform Trust (2018) [Still No Way Out: Foreign national women in the criminal justice system](#), London: PRT and Hales, L. & Gelsthorpe, L. (2012) [The criminalization of migrant women](#), Cambridge: University of Cambridge



extreme levels of need.<sup>54</sup> Care experienced young women may be more vulnerable to violence and abuse, and less able to access support.<sup>55</sup>

Provisions in the Police Crime Sentencing and Courts Bill to introduce a Serious Violence Reduction Order threaten to exacerbate the risk of unjust criminalisation of women and girls who are victims of domestic abuse and other forms of VAWG and exploitation, particularly younger women and girls, and Black, Asian and minoritised women and girls, as highlighted by Agenda:<sup>56</sup>

*The proposed terms of a Serious Violence Reduction Order (SVRO) mean that women and girls who are judged to have “ought to have known” someone in their company was in possession of a bladed article or offensive weapon could potentially face two years’ imprisonment for a breach of the order’s terms. This is a regressive policy, ignoring not only the Government’s own wisdom about the risks of making SVROs too broad, but also the legal precedent against equivocating possible foresight of an offence with intent to assist that offence.*

## Ineffective defences

In her discussion of the defences of self-defence, the ‘householder defence’ and duress, Susan Edwards uses the term “demasculinising” to describe ‘the growing momentum for change which recognises the specificity of the problem of violence against women, the gender unevenness in the law and the impact of gendered assumptions and calls for the creation of new offences and reform to existing defences in order that women may be better protected and defended’.<sup>57</sup> Below, we give our own account of the problems with existing defences and our proposed statutory reforms.

## Coerced offending

The introduction of the offence of controlling or coercive behaviour in [Section 76 of the Serious Crime Act 2015](#) recognised the consequences of domestic abuse as a pattern of behaviour over time. Yet the criminal law still does not provide an effective defence for those who commit offences as a result of such abuse. [The common law defence of duress](#) ‘remains largely inaccessible to abused women’,<sup>58</sup> because:<sup>59</sup>

- It does not reflect the complexities of domestic abuse and does not recognise psychological, sexual or financial abuse.
- For the defence of duress to succeed, the threat of physical harm must be imminent. This fails to recognise the ‘*typically entrenched, unpredictable and random*’ nature of domestic abuse.<sup>60</sup>

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<sup>54</sup> [Agenda & Alliance for Youth Justice \(2021\) ‘I wanted to be heard’: Young women in the criminal justice system at risk of violence, abuse and exploitation](#)

<sup>55</sup> [Agenda & Alliance for Youth Justice \(2021\) Falling through the gaps: young women transitioning to the adult justice system](#)

<sup>56</sup> [Agenda \(2021\) House of Lords Briefing for Committee Stage of the Police, Crime, Sentencing and Courts Bill](#)

<sup>57</sup> Edwards, S. (2022) ‘“Demasculinising” the defences of self-defence, the “householder” defence and duress’, *Crim. L.R.* 2022, 2, 111-129

<sup>58</sup> [Edwards, S. \(2019\) The Journal of Criminal Law 2019, Vol. 83\(6\) 450–472, p. 462](#)

<sup>59</sup> See: [Criminal Bar Association of England and Wales \(2017\) Defences available for women defendants who are victims/survivors of domestic abuse](#) and Loveless, J. (2010) ‘Domestic Violence, Coercion and Duress’, *Criminal Law Review*, pages 93-108

<sup>60</sup> Loveless, J. (2010) ‘Domestic Violence, Coercion and Duress’, *Criminal Law Review*, pages 93-108

- The defendant must establish ‘relevant characteristics’ including ‘battered woman syndrome’ and ‘learned helplessness’ - outdated concepts which pathologise women rather than offering an effective defence for the actual circumstances. They require the production of medical evidence which is not practicable in many cases.

### Self-defence

The common law defence of self-defence is very difficult to establish in cases of use of force by a survivor of domestic abuse against their abusive partner or former partner, where a jury may well conclude that the response was disproportionate without taking account of the long history of abuse.<sup>61</sup> As Susan Edwards explains:<sup>62</sup>

*...fear of being abused by a domestic abuser (experienced largely by women) is not always understood, considered reasonable or within common sense knowledge, and is often contested as insufficient to excuse violent defensive conduct.*

In 2004, the Law Commission explained how the law of self-defence had been criticised for failing to assist ‘[t]he abused child, or adult, who fears further physical abuse at the hands of a serial abuser, who perceives no prospect of escape and who is well aware that there is such a physical mismatch that to respond directly and proportionately to an attack or an imminent attack will be futile and dangerous. Such a person, who uses disproportionate force...is unassisted by the law of self-defence...’ In this way, the objective requirement of reasonableness applied to the amount of force used in response to an attack, or threat of attack, fails adequately to reflect cases in which a gross discrepancy in physical strength may force the person being abused to defend themselves with a weapon, which may be considered excessive.<sup>63</sup>

Lawyers see self-defence as a “risky” defence in cases involving women who have killed their abuser, and women often submit a guilty plea to a lesser charge of manslaughter, even where self-defence has merit, in order to avoid the high stakes of going to trial, the trauma of cross-examination, being potentially convicted of murder, and receiving a longer sentence if they fail.<sup>64</sup>

### Proposed new statutory defences

In order to address these gaps in the law, we proposed new statutory defences to be included in the Domestic Abuse Act 2021. These were developed in collaboration with domestic abuse and legal experts including the Victims’ Commissioner, Domestic Abuse Commissioner and Criminal Bar Association. The proposals were passed in the House of Lords but subsequently fell in the Commons due to the government’s opposition. They are amendments 37, 38 and 83 in this [marshalled list](#).

<sup>61</sup> Howes, S. et al (2021) Women who kill: why self-defence rarely works for women who kill their abuser, The Criminal Law Review, Issue 11 2021 pp.945-97

<sup>62</sup> Edwards, S. (2019) *The Journal of Criminal Law* 2019, Vol. 83(6) 450–472, ‘Recognising the Role of the Emotion of Fear in Offences and Defences’ p.461.

<sup>63</sup> Law Commission (2004) [Partial defences to murder: Final Report](#), pp.77-78

<sup>64</sup> Howes, S. et al (2021) Women who kill: why self-defence rarely works for women who kill their abuser, The Criminal Law Review, Issue 11 2021 pp.945-97, p.957

### **Coercion defence proposal**

We propose a new statutory defence for survivors whose offending is driven by their experience of domestic abuse, adapted from the defence in [Section 45](#) of the Modern Slavery Act 2015 for victims of human trafficking or modern slavery who are coerced into offending. This requires proactive, early case management and allows all agencies to become more adept at recognising and responding to circumstances which indicate there is no public interest in prosecuting a case, or where the statutory defence is likely to apply. The proposed new defence would be available to men and women and would need to be supported by a CPS policy and judicial directions.

#### **Case study - YS<sup>65</sup>**

YS is charged with driving whilst disqualified, driving with excess alcohol, driving without insurance and dangerous driving. An officer noticed a vehicle with its brake lights permanently illuminated and swerving from side to side. He activated the siren, indicating for the vehicle to stop. The vehicle did not stop, and a chase continued for five minutes. In the driving seat was a woman, YS.

YS explained she had been dragged from her home partially dressed by her partner, forced to drive, and that he threatened to kill her if she did not drive on. The partner was screaming at her throughout, punching her in the ribs and trying to grab the steering wheel.

The police stop this vehicle and YS is prosecuted. Despite running duress, and despite her being viewed as credible, she is convicted. Her conviction was upheld on appeal to the High Court.

### **Self-defence proposal**

Nicola Wake highlights the similarities between victims of domestic abuse who offend and the householder protecting themselves from an intruder, and argues that the disparity in protection cannot be justified.<sup>66</sup> To address this, we propose an amendment to the law on self-defence modelled on the provisions for householders in Section 76 of the Criminal Justice and Immigration Act 2008. This would allow victims acting in self-defence against their abuser the same protection that is currently available to householders who act in self-defence against an intruder in the home.<sup>67</sup> Although the householder defence has been found to be of only marginal benefit in law, it would be useful to see research on whether it has an impact on decisions to prosecute.<sup>68</sup>

#### **Case study - Ioanna<sup>69</sup>**

Ioanna was convicted for attacking her abusive partner with a knife, having been subject to long-term coercion and control by him. When he became threatening during an argument at home, she grabbed a knife lying nearby in the kitchen and

<sup>65</sup> Case study provided by Paramjit Ahluwalia of Lamb Building, taken from factual matrix within R v YS [2017] EWHC 2839

<sup>66</sup> Wake, N. (2013) '[Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian perspectives](#)' (2013) 77(5) JCL 433–57

<sup>67</sup> See amendment 37 in [House of Lords \(2021\) Domestic Abuse Bill: Marshalled list of motions to be moved on consideration of Commons disagreement, amendments in lieu and reasons](#)

<sup>68</sup> Howes, S et al (2021) Women who kill: why self-defence rarely works for women who kill their abuser, Criminal Law Review Issue 11 2021

<sup>69</sup> Case study provided by Women in Prison. Ioanna is not her real name.

raised it towards him. He tried to catch the knife and in the process received a small cut on his finger. He contacted the police. Ioanna received a community order.

### **Response to our proposals**

Of 31 criminal defence lawyers responding to a survey by the Prison Reform Trust in 2020, more than two-thirds believed that our self-defence proposal would provide a more effective defence in this context than the current law, while three-quarters considered that our Section 45 proposal would be more effective than the law of duress, where offending results from domestic abuse.<sup>70</sup> The proposals have widespread support from domestic abuse and legal experts, and received significant parliamentary support during the passage of the Domestic Abuse Bill.

The government-commissioned [independent review of sentencing](#) in domestic homicide cases includes consideration of the use of current defences (including partial defences) to charges of murder when used by domestic abuse victims who kill their abuser, including any differences in terms of case outcomes arising from the use of these defences, when compared with charges of murder where the victim has not been an abuser. We hope this will prove to be a step towards government recognition of the need for law reform to ensure effective defences are potentially available in any case where a victim is accused of offending arising out of their experience of abuse, subject to appropriate exceptions in line with the public interest.

### **Criminal records resulting from childhood sexual or criminal exploitation**

CWJ has been supporting and promoting a successful legal challenge brought by Harriet Wistrich, 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>71</sup> Last year Harriet represented the same women in an ultimately unsuccessful case to challenge the retention of their criminal records until they reach the age of 100 years.<sup>72</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 very rarely prosecuted due to changes in policing guidance and the introduction of a new defence under 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. We have asked the Inquiry to recommend:

- that children and young women who were convicted of offences contrary to section 1, Street Offences Act 1959 and other relevant prostitution related

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<sup>70</sup> PRT conducted a short survey of criminal defence lawyers in Summer 2020 to seek their views on the adequacy of defences available to individuals who offend due to their experience of domestic abuse, including coercion. Further details are available from CWJ on request.

<sup>71</sup> R (QSA & ors) v Secretary of State for the Home Department [2018] EWHC 639 (Admin)

<sup>72</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’](#)

offences should have these records removed from their criminal records and from the Police National Computer; and

- the introduction of a process for expunging the criminal records of those of children/ young adults whose crimes occur in the context of having been sexually exploited.<sup>73</sup>

Whilst the focus of our work has been primarily on criminal convictions for prostitution type offences, the impact of the retention and disclosure of criminal records arising from coercion in domestic abuse is also very damaging and should benefit from a mechanism to remove those records, which are essentially a record of abuse.

## Conclusion

The government recognises the links between domestic abuse and women's offending and wishes '*to help female offenders and women at risk of offending to identify their abuse earlier and receive the support that they need to reduce their chances of reoffending*'.<sup>74</sup> The government has advocated a whole system approach to women's offending through its 2018 Female Offender Strategy<sup>75</sup> and accompanying guidance<sup>76</sup>, and the cross-government concordat on women in the criminal justice system published in January 2021<sup>77</sup>. All these documents, as well as the Victims' Strategy published in 2018,<sup>78</sup> make reference to the links between women's offending and their experience of domestic abuse and the need for survivors involved in offending to be identified as survivors and to receive support. This has not been followed up with effective action. Some limited investment has been made in services specifically aimed at women involved in offending who are survivors of domestic abuse. As the National Audit Office has recently pointed out<sup>79</sup>, significantly greater investment is needed to make sure adequate services are available throughout the country.<sup>80</sup>

The government's 2019 domestic abuse consultation response acknowledges coercive control as a cause of women's offending,<sup>81</sup> as does the statutory guidance framework and CPS legal guidance on coercive and controlling behaviour.<sup>82</sup> Successive police inspectorate reports and police and CPS guidance all recognise the ongoing challenge faced by the police and prosecutors in dealing with counter-allegations and identifying the primary aggressor. However the

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<sup>73</sup> [Centre for Women's Justice \(2021\) Before the Independent Inquiry into Child Sexual Abuse: Inquiry into Institutional Responses to the Sexual Exploitation of Children by Organised Networks \(CSEN\) – Written Closing Submissions by the Centre for Women's Justice](#), p.79

<sup>74</sup> HM Government (2019) Transforming the response to domestic abuse: Consultation response and draft Bill. See also: Ministry of Justice (2018) Female Offender Strategy, London: Ministry of Justice

<sup>75</sup> [Ministry of Justice \(2018\) Female Offender Strategy](#)

<sup>76</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>77</sup> [Ministry of Justice \(2021\) Concordat on Women in or at risk of contact with the Criminal Justice System](#)

<sup>78</sup> [HM Government \(2018\) Victims Strategy](#)

<sup>79</sup> [National Audit Office \(2022\) Improving outcomes for women in the criminal justice system](#)

<sup>80</sup> [UK Women's Budget Group \(2020\) The Case for Sustainable Funding for Women's Centres](#).

<sup>81</sup> [HM Government \(2019\) Transforming the Response to Domestic Abuse Consultation Response and Draft Bill](#)

<sup>82</sup> [CPS Legal Guidance on Domestic Abuse, Controlling or Coercive Behaviour in an Intimate or Family Relationship \(reviewed 30 June 2017\); Home Office \(2015\) Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework](#), p.4.

government has so far failed to modernise the law, and put in place a surrounding policy framework, to protect victims of domestic abuse and other forms of VAWG from inappropriate criminalisation. This contrasts with the government's recognition – quite rightly - that victims of trafficking should not be penalised for alleged offending that results from their exploitation (subject to some exceptions), and the introduction of legislation and a surrounding policy framework to achieve this, as well as the additional protection given to householders who use force against an intruder. We refer to our recommendations above and hope to see this disparity addressed by the Victims' Bill and its surrounding policy framework.

## **Criminalisation case summaries**

The following case studies have been taken from legal enquiries received by CWJ in the last two years, with permission from the women involved. All names have been changed.

### **1. Counter-allegations of assault offences - decisions to prosecute/caution despite evidence of contextual domestic abuse**

**Maia:** migrant woman with two young children, convicted of assault offences against her husband in response to his allegations against her, despite third party evidence (including MARAC) of his prolonged physical and emotional abuse of her, including use of her immigration status as a means of control. Separated from her young children due to strict bail conditions following arrest. Conviction overturned on appeal. No action taken against husband.

**Rose:** woman convicted of assault offence and given conditional discharge following counter-allegation by her partner, despite evidence of abusive relationship. Magistrate refused to hear evidence about the abusive relationship or about the injuries Rose had suffered and concluded that an earlier assault on Rose by her partner had led her to attack him later out of anger.

**Yasmin:** student cautioned for alleged assault following her partner's counter-allegation against her, despite evidence that she had been strangled by him. Police refusal to quash the caution because they believed she had committed a domestic violence incident, which the law regards as more serious. Caution quashed by court upon judicial review, with judge stating that Yasmin was clearly the victim and not the perpetrator of domestic violence and therefore the rules on domestic violence offences did not apply, and it was also not in the public interest to caution her.

**Sarah:** woman with young child arrested and placed on bail conditions for six months for counter-allegation of assault against her partner, despite evidence of his violent assault on her. Decision apparently influenced by evidence of a murder charge against Sarah several years earlier, which resulted in Sarah's acquittal on grounds of self-defence. Case against Sarah subsequently dropped. Case against her ex-partner reopened following threat of judicial review proceedings.

## **2. Counter-allegations of harassment/NMO breach/assault in context of domestic abuse and sexual violence - family court granting of NMO and decisions to prosecute for NMO breach/harassment/assault despite evidence of contextual abuse**

**Nina:** rape victim prosecuted for alleged breach of Non-Molestation Order which her abusive ex-partner had obtained against her in the family court following her allegation that he had raped her. Prosecution later dropped due to lack of evidence. Proceedings against perpetrator dropped and later reopened. Victim engaged in family court proceedings to remove NMO against her and put in place NMO against perpetrator.

## **3. Counter-allegations of assault in context of rape - decision to charge despite evidence of rape**

**Emma:** rape victim charged with ABH following her assailant's counter-allegation against her relating to a scratch on his head. The perpetrator had locked Emma in his apartment, raped her and hidden her shoes so that she could not leave. The scratch to his head was caused by a tussle over an iPad that took place during the incident. When Emma let it go, due to the force he was using to pull it towards him, it smacked him in the face. After she reported him for rape, he made a counter-allegation that she had assaulted him.

## **4. Interaction with police following experience of VAWG - decision to imprison victim exhibiting distress**

**Najma:** stalking victim arrested and detained by the police overnight after she showed frustration with the police for apparently not taking her case seriously. Najma had been stalked by her ex-partner and he had been arrested and placed on pre-charge bail conditions. He breached the conditions several times but the police took no action. The police asked for Najma's phone to download data, and subsequently lost it. They did not ask her ex-partner for his phone. Najma was arrested and detained after she attended the police station to give a further statement and they refused to take it. She appeared in court the following morning and the prosecutor and judge agreed that they did not know why she had been arrested. She was released from custody and is currently bringing a claim against the police for false imprisonment.

## **5. Allegedly false allegations - threat of arrest leads victim to withdraw sexual assault allegation**

**Edie:** Edie was a professional working for a local authority who was sexually assaulted by a colleague during a social event. She reported this to her employer, an investigation took place and the colleague was dismissed. A few months later she reported the rape to the police. Several weeks after that, she was called in for a meeting at which the police they effectively threatened Edie with arrest for making a false allegation, saying, "You don't have a criminal record and we'd like to keep it that way". Frightened by this, and concerned about her career, Edie decided to withdraw her allegations, and the case was closed.

## **6. Police officer perpetrators - criminalisation of victims of police officer perpetrators for alleged harassment and/or assault, and entrapment into driving offence**

**Debbie:** Debbie reported her police officer ex-partner for emotional and physical abuse but no action was taken. Two years later, after she had contacted her ex-partner's new girlfriend, she was contacted by an officer from her ex-partner's force informing her that she must attend for an interview on allegations of harassment. She explained that she could not travel back to that area due to mental health difficulties. A year later she was asked to attend her local force to be interviewed as a suspect and went with a solicitor. A further year passed before she was told that the case would be closed with no charges brought against her.

**Sophie:** Sophie repeatedly reported abuse by her partner who was a former police officer. Having had an inadequate response, she sent a large number of emails and made a lot of phone calls to complain about this. She was sent from pillar to post, each time told to contact someone else, then had to chase over and over, as no-one returned her calls, which is why there were so many. She became upset at times, and police staff would put the phone down on her. Sophie was subsequently charged with persistently using a public communications network to cause annoyance/inconvenience/anxiety contrary to s.127 Communications Act 2003. Sophie pleaded guilty on the advice of a defence solicitor who did not advise her properly. She was given a conditional discharge and a restraining order under Protection from Harassment Act not to contact the police apart from in an emergency. She was then convicted of two breaches of the restraining order. She has now instructed a new solicitor to try to appeal her conviction.

**Margaret:** Margaret was arrested approximately eight times as a result of the actions of her police officer husband in the context of bitter disputes in the Family Court. On many occasions she was released without charge, but she ended up with several convictions and a caution. One day during an argument she called 999. Police officers attended and allowed her husband to leave with their baby daughter. Shortly after this Margaret was served with a non-molestation order that her husband had obtained on false allegations that she had been violent to him. She sent him a text message begging him to let her see her daughter. She was arrested for this and given a caution for breaching the order.

The following month Margaret was arrested and charged with three counts of assault on the basis of her husband's false claim that she had slapped and kicked him. She was convicted of all three in the Magistrates Court after a trial where it was her word against his. He said in court that he was a police officer and could not lie or he would lose his job. She was also found guilty of four breaches of the order for sending pleading messages about the baby. She was sentenced to 18 months' probation.

Margaret's husband then offered to reconcile, and she was so desperate to be with her daughter that she agreed. They lived together for another two years before separating again. After their separation the daughter remained with Margaret but spent time with her father. One night Margaret was staying over at a friend's house with her daughter after a party and had been drinking. Her husband rang to say that he wanted to have their daughter, but she refused. He insisted that she bring the child to him immediately or he would send the police round. Margaret succumbed to



the pressure and drove the child over. When she arrived at his house a police officer was waiting, breathalysed her and arrested her. She was charged with drink driving, and pleaded guilty on the advice of a solicitor who does not appear to have considered arguments about entrapment.

### **7. Coerced offending - decision to prosecute despite knowledge of contextual abuse**

**Naomi:** Naomi was prosecuted by her local authority for animal welfare offences despite a wealth of third party evidence of contextual abuse and coercive control. Naomi pleaded guilty in order to avoid the trauma of appearing in court alongside her abuser as a co-defendant, because she needed to look after her young daughter, and in order to avoid the risk of imprisonment.

**Centre for Women's Justice**  
**3 February 2022**