



CWJ submission to Domestic Abuse Bill Committee 22 May 2020

The need for changes to pre-charge bail

About Centre for Women's Justice

1. 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 conduct strategic litigation and provide training to frontline women's services across England and Wales on legal remedies available to victims.

Summary

2. Changes to the law on pre-charge bail which came into force in April 2017¹ have had a devastating effect on protection for women who report domestic abuse, stalking, harassment and sexual offences. Since April 2017 suspects are very frequently 'released under investigation' (RUI) without any bail conditions in place which would prohibit contact with the victim. In the first three months of the new law the use of bail conditions in domestic abuse cases dropped by 65%.²
3. CWJ proposes four amendments to the Domestic Abuse Bill to remedy the problems created by the 2017 Act and improve the effectiveness of pre-charge bail in domestic abuse situations. Three would have a wide-ranging impact on the use of bail and the fourth would correct a glaring injustice in the 2017 Act. Amendments 1, 2 and 4 reflect recommendations by the Joint Parliamentary Committee on the Draft Domestic Abuse Bill in its June 2019 report.³
4. The amendments are summarised here and the proposed wording for each is set out below:
 - 1) Reverse the presumption against the use of bail in the 2017 Act for domestic abuse and cases and introduce a prior risk assessment and consultation with victims and suspects before the initial bail decision.
 - 2) Extend the initial bail period from 28 days to three months.
 - 3) Where pre-charge bail conditions are breached, require the police to issue a Domestic Abuse Protection Notice (DAPN) and apply for a Domestic Abuse Protection Order (DAPO).⁴
 - 4) Where after the initial bail period bail cannot be extended because the police have not conducted the investigation diligently and expeditiously, require the police to issue a DAPN and apply for a DAPO.

¹ In the Policing and Crime Act 2017

² HMICFRS Progress Report on Domestic Abuse of February 2019

<https://www.justiceinspectorates.gov.uk/hmicfrs/wp-content/uploads/the-police-response-to-domestic-abuse-an-update-report.pdf>

³ See pages 32-35 <https://publications.parliament.uk/pa/jt201719/jtselect/jtddab/2075/2075.pdf>

⁴ Both introduced in the Domestic Abuse Bill, clauses 19 to 46

The need for change

5. Frontline women's services across the country report that women feel unprotected, fearful and vulnerable where there are no bail conditions. Some have suffered harassment and assault by ex-partners. In Sunderland a woman was murdered after her husband was released without bail conditions and given the keys to her home.⁵ In some cases suspects are contacting victims and applying emotional pressure, leading victims to drop their support for a prosecution. There is evidence that attrition rates in domestic abuse are rising.⁶
6. In March 2019 CWJ submitted a detailed police super-complaint⁷ about pre-charge bail, which is currently still under investigation by HM Inspectorate of Constabulary, Fire & Rescue Services. Our super-complaint report contains detailed accounts from frontline women's services and case studies.⁸ This included accounts that even some victims deemed 'high risk' and referred to MARACs⁹ have no bail conditions in place.
7. Concerns about the problems in the bail regime, and inappropriate use of RUI in place of bail, mounted during 2019, so that in December the Home Office announced a review of pre-charge bail. In February 2020 the Home Office published detailed proposals for a replacement pre-charge bail regime, and launched a public consultation due to close on 29 May 2020.¹⁰ CWJ is broadly in favour of the proposals and our amendments are drafted to be almost entirely consistent with them. Our amendments 3 and 4 are not within the published Home Office consultation document, however they emerged as options during our meetings with the Home Office review team, who looked on them favourably.
8. In light of the widespread acknowledgment of the need to change the existing pre-charge bail regime, we will not dwell further on the current difficulties, but focus this submission on our proposed amendments.
9. However, at the outset we wish to highlight the importance of consultation with women's and victims' organisations, and the fact that none of these organisations contributed to the consultation process for the 2017 Act, nor were their views sought.¹¹ There was a focus on the experiences of a number of high-profile suspects (Paul Gambaccini, who gave evidence to the Commons Home Affairs Select Committee¹² and journalists who were on bail for a year or two during the

⁵ Kay Martin, killed on 20 September 2018 <https://www.bbc.co.uk/news/uk-england-tyne-49437513>

⁶ In January 2019 *The Independent* newspaper reported Home Office figures for the year ending September 2018 showing a sharp rise in the proportion of cases recorded as "victim does not support action", increasing to 42% for violence, 35% of rapes and 29% of sexual offences. In the West Midlands this category of domestic abuse cases rose from 30% in 2014/15 to 58% in 2019 <https://www.birminghammail.co.uk/news/midlands-news/revealed-huge-number-violent-domestic-17701014>

⁷Police super-complaints were introduced in November 2018 to deal with systemic issues in policing that appear to be significantly harming the interests of the public <https://www.justiceinspectors.gov.uk/hmicfrs/police-forces/working-with-others/super-complaints/>

⁸ See pages 11 to 27

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/797419/Super-complaint_report_FINAL.PDF

⁹ Multi-Agency Risk Assessment Conferences that deal exclusively with high risk domestic abuse cases and bring together relevant agencies, eg. police, housing, mental health and local domestic abuse services.

¹⁰https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879759/20191127_ConDoc_PCB_May.pdf

¹¹ See list of organisations on final page of the summary of consultation responses:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/418226/150323_P_re-Charge_Bail_-_Responses___Proposals.pdf

¹²Paul Gambaccini described being on bail for a year during an investigation into historic sex abuse, which was subsequently dropped <https://www.bbc.co.uk/news/uk-31720761>

police investigation into the 'phone-hacking scandal') without a counterbalance. We fully support the removal of indefinite bail without judicial oversight. However, the introduction of a 28 initial bail period with onerous extension requirements swung the pendulum too far in the other direction.

10. In response to the proposals that led to the 2017 Act, policing bodies expressed concern that the bureaucratic burden created by numerous bail extensions that have to be authorised by senior officers was unworkable.¹³ This has proved to be the case and appears to have created a strong incentive for the police to avoid bail and use RUI in its place. Any system that replaces the existing arrangements must address the bottlenecks created by the current regime (hence our amendment no.2).

Why not wait for the outcome of the Home Office bail review?

11. Over three years have now passed since the change in the law in 2017, and the precipitous drop in use of bail in domestic abuse cases was recorded as long ago as June 2017. CWJ's super-complaint was lodged in March 2019, documenting long-standing problems for victims, and its completion is still some way off. The Domestic Abuse Bill was first formally announced by Theresa May in 2017 and has been delayed twice due to general elections. Almost a year has passed since the Joint Parliamentary Committee on the Bill made strong recommendations on bail in June 2019. Addressing this issue has been characterised by delay at every step. Had the Domestic Abuse Bill progressed in 2017, when it was halted by the snap general election, the problems arising from the 2017 Act could have been nipped in the bud. Domestic abuse victims have been suffering the results of the political turmoil of the last three years.
12. Whilst we support most of the proposals in the Home Office bail review, given the current political uncertainties and fresh priorities created by coronavirus we cannot have any confidence in whether and when any new measures will be in place. We are informed that a new Police Powers Bill is planned for the end of 2020. However, economic turmoil resulting from lockdown and Brexit may well delay issues that otherwise would receive urgent attention from Government. Ordinarily we would have been content to wait, however we currently face unprecedented political uncertainty.
13. The Domestic Abuse Bill presents a real opportunity to reverse the serious errors in the 2017 Act, and to integrate the bail and DAPO regimes. It can ensure that protections are in place for victims of domestic abuse and if, at a later date, reforms are extended to others, a Police Powers Bill can streamline the two sets of provisions. As the amendments we seek in the current Bill largely reflect the proposals in the Home Office review this should be relatively straight-forward.

¹³ See responses of policing bodies in summary of consultation responses, at note 11

The proposed amendments¹⁴

Amendment 1 - threshold for use of bail

14. The 2017 Act is weighed heavily towards the rights of suspects, and introduced a presumption against the use of bail, unless it is “necessary and proportionate”. We propose reversing that presumption in domestic abuse and sexual offences cases. This was recommended by the Joint Parliamentary Committee on the Bill in their June 2019 report,¹⁵ though the Home Office review proposes that the presumption be removed, rather than reversed.¹⁶
15. We also propose a duty for officers to identify what is “necessary and proportionate” through a risk-based approach focused on victims’ needs, with prior consultation with the parties.¹⁷ This mirrors the Home Office review proposals, but omits the detailed risk factors included there. The Home Office review sets out two possible approaches: an offence-based and a risk-based approach.¹⁸ Our proposal combines the two so that all cases of domestic abuse falling within the ambit of the current Bill are included.
16. Our concern is that a purely risk-based case by case approach, which contains no guidance on the starting point for domestic abuse cases, may result in police officers under-estimating risk (a wide-spread problem) or believing that bail conditions are not required in ‘low risk’ cases. Clear rules should ensure that bail conditions are routinely used in *all* cases of domestic abuse, *unless* bail conditions are not necessary and proportionate in the particular case. In order to conduct a proper risk assessment the victim must be consulted so that all relevant information is known before the determination is made. The consultation duty is not currently included in the Home Office review proposals, but would mirror the duty on the police in the 2017 Act to consult with suspects when they extend bail.¹⁹
17. The proposed amendment amends the Police and Criminal Evidence Act 1984 to achieve the following:
 - a) The presumption is reversed in all domestic abuse and sexual offences cases, in favour of use of bail unless it is not necessary and proportionate in the circumstances;
 - b) A constable must conduct a risk assessment when considering whether to use bail;
 - c) A constable must consult with the victim and suspect before conducting a risk assessment.

¹⁴ These amendment have been drafted by two barristers from Doughty Street Chambers, Jude Bunting and Heather Williams QC, author of ‘Police Misconduct: Legal Remedies’ <https://www.lag.org.uk/shop/book-title/201292/police-misconduct--legal-remedies>

¹⁵ Paragraph 131

¹⁶ Proposal 1 page 8

¹⁷ A requirement to consult with victims is included in the College of Policing guidance on bail, however frontline domestic abuse services report that this is honoured in the breach. Suspects and their solicitors already routinely make representations to the custody sergeant on bail

¹⁸ Options 2 and 3 page 7

¹⁹ Section 63 of the 2017 act amends PACE to introduce section 47ZD(3) and (4) and 47E(4) and (6) <http://www.legislation.gov.uk/ukpga/2017/3/section/63/enacted>

18. The proposed wording to achieve this is as follows:

Suggested new clause 64 – to be inserted into Part 7 “Miscellaneous and General” of the Domestic Abuse Bill:

- (1) Section 34 of the Police and Criminal Evidence Act 1984 (limitations on police detention) is amended as follows.
- (2) In subsection (5)(a) for the word “applies” substitute “or subsection (5AB) applies”.
- (3) In subsection (5)(b) for the word “applies” substitute “or subsection (5AB) applies”.
- (4) In subsection (5A) insert after the words “applies if”, “subsection (5AB) does not apply and”.
- (5) After subsection (5A) insert –
“(5AB) This subsection applies if-
 - (a) It appears to the custody officer that there is need for further investigation of any matter in connection with which the person was detained at any time during the period of the person's detention;
 - (b) The offence under investigation is an offence of domestic abuse as defined in section 1 of the Domestic Abuse Bill or a sexual offence set out in section 2 of the Sexual Offences (Amendment) Act 2000;²⁰
 - (c) Save that the person shall be released without bail if the custody officer is satisfied that releasing the person on bail is not necessary and proportionate in all the circumstances (having regard, in particular, to any conditions of bail which would be imposed and to the importance of protecting the complainant);
 - (d) Before making a determination to release without bail or a determination as to any conditions of bail to impose, the custody officer shall conduct an assessment of the risks posed by not releasing the person on bail (including, in particular, to the complainant);
 - (e) Before making a determination of a kind referred to at subsection (d) the custody officer must inform: (i) the person or the person’s legal representative and consider any representations made by the person or the person's legal representative; and (ii) the complainant or the complainant’s representative and consider any representations made by the complainant or the complainant’s representative; and
 - (f) An officer of the rank of inspector or above authorises the release on bail (having considered any representations made by the person or the person's legal representative and by the complainant or the complainant’s representative).”

19. We do not consider that (f) above is necessary. The Home Office bail review proposes that all initial bail decisions be made by custody sergeants without authorisation by an Inspector. Legislation usually requires authorisation by a more senior officer for cases that depart from the default position, rather than for those that fall within the default position. However, (f) is included in this draft as an option to draw a parallel with the requirements in the 2017 Act, which would provide parity with non-domestic abuse cases until such time as a Police Powers Bill removes the need for authorisation by an Inspector in all cases.

²⁰ An argument can be made that this is within the scope of the Bill, which aims to “make provision about certain violent or sexual offences” (amongst other aims): https://publications.parliament.uk/pa/bills/cbill/58-01/0096/cbill_2019-20210096_en_2.htm#pt1-l1g1 - this collection of sexual offences is the list of offences to which automatic anonymity applies for victims. It is a helpful list of all the potential serious sexual offences.

Amendment 2 - extending initial bail period to three months

20. We do not think that the Domestic Abuse Bill can or should attempt a general overhaul of the bail regime as planned in the Home Office review. However, one simple amendment would have a significant impact on the ground, which is to extend the initial bail period in domestic abuse cases from 28 days to three months. The Joint Parliamentary Committee in its June 2019 report recommended urgent legislation to extend the initial bail period.²¹ The Home Office consultation shows that around 85% of domestic abuse cases are concluded within 90 days.²² Three months would fit with Models B and C of the Home Office Proposal 2.²³
21. This simple amendment would greatly reduce the burden of bureaucracy created by bail extensions in domestic abuse cases and make bail a more workable tool for the police. It would also avoid the situation that currently arises, where bail is lifted after 28 days, but victims then find it difficult to obtain a non-molestation order without a recent incident, and are therefore left without any protection. Three months on bail is a far cry from the indefinite bail that existed before the 2017 Act and more than meets the concerns of those who called for those reforms. We believe that it is politically uncontroversial.
22. Suggested new clause 65 – to be inserted into Part 7 “Miscellaneous and General” of the Domestic Abuse Bill:
- (1) Section 47ZB of the Police and Criminal Evidence Act 1984 (applicable bail period: initial limit) is amended as follows.
 - (2) After subsection 1(a) and before subsection 1(b) insert:
 - “(ab) In a DA case, the period of 3 months beginning with the person's bail start date,
 - Or...”
 - (3) After subsection 4(e) insert:
 - (6) A “DA case” is a case in which-
 - (i) the relevant offence in relation to the person falls within the definition of “domestic abuse” in section 1 of the Domestic Abuse Bill, and
 - (ii) a senior officer confirms that sub-paragraph (i) applies.

Amendment 3 - providing teeth to breach of bail enforcement

23. Breach of bail is not an offence and if the suspect is not charged, the only power police have is to arrest him and release him again on bail.²⁴ When a breach is reported some time later, or takes place by electronic means, there is little purpose in the police carrying out an arrest. Support workers around the country report that police frequently take no action when breaches are reported. As a result, victims stop reporting breaches and suspects seem to act with impunity. Pre-charge bail is widely viewed by domestic abuse workers and their clients as a deeply flawed and unenforceable system.

²¹ Paragraph 128

²² Page 11

²³ Page 12

²⁴ Unlike post-charge bail, where there is a power to remand in custody

24. We propose that where grounds exist for a DAPO following a breach of bail there should be a duty on the police to apply for one.²⁵ If the suspect goes on to breach the DAPO this will be a criminal offence. This would create a ‘two strikes and you’re out’ regime for breach of pre-charge bail which applies only to domestic abuse cases. This would act as a deterrent and should reduce the number of bail breaches that police have to deal with, while providing enforcement when suspects continue to breach orders. A suspect would have the opportunity to oppose a DAPO application, or to apply to discharge it later.²⁶
25. A duty, rather than merely a discretion, to use DAPOs in this manner will also help to make DAPOs a widely-used tool, which is the intention of the Bill. DAPOs replace Domestic Violence Protection Orders (DVPOs) which were barely used by the police. CWJ’s super-complaint documented how they were used on average in only 1% of domestic abuse offences²⁷ and called for their use to be increased.²⁸ Introducing new powers through a DAPO will have little effect on the lived experience of domestic abuse victims if the powers remain unused.
26. Suggested new clause 66 – to be inserted into Part 7 “Miscellaneous and General” of the Domestic Abuse Bill:
- (1) After section 46A of the Police and Criminal Evidence Act 1984 insert -
- “Section 46B Domestic abuse protection notice where breach of bail**
- (1) Where this section applies and the officer is satisfied that conditions A and B in section 19 of the Domestic Abuse Bill are met in relation to that person, a senior officer must give a domestic abuse protection notice to that person.
- (2) This section applies where:
- (a) the person has been released on bail under this Part of the Act and the senior officer has reasonable grounds for suspecting that the person has broken any of the conditions of bail, and
- (b) the offence under investigation in respect of which bail was granted is an offence of domestic abuse as defined in section 1 of the Domestic Abuse Bill.”
27. The threshold for a breach in 46B(2)(a) above is low, requiring only a reasonable suspicion that bail conditions have been broken. A low threshold is appropriate because police often require evidence, such as phone footage, rather than accepting the victim’s account of a breach.

Amendment 4 - extensions of bail where police delay the investigation

28. The 2017 Act provides that for bail to be extended four conditions A to D must be met. Condition C is that the police investigation is being conducted diligently and expeditiously.²⁹ Where bail is lifted for this reason this is a windfall for suspects and victims are left dangerously exposed. Bail conditions are not an option even where there is clearly a very high risk. Whilst we appreciate that this provision is helpful in providing an incentive to the police to progress investigations promptly, protection must be available for victims. The failure to provide for this may have

²⁵ In practice the duty will be for the police to issue a DAPN, which then in turn creates an obligation on the police to make an application for a DAPO to be heard within 48 hours under clause 25(3) of the Bill

²⁶ Clause 26(4) and 41 of the Bill

²⁷ See CWJ super-complaint report page 42, at note 8, and HMICFRS report 2019 page 42 at note 2

²⁸ Pages 37 to 44

²⁹ Policing and Crime Act 2017 section 63, introduces section 47ZC into PACE, at note 19

arisen inadvertently in the 2017 Act, given the absence of input from victims' groups.

29. Our proposed amendment imposes a duty on the police to issue a DAPN where bail cannot be extended after three months due to delays in the police investigation, where all the other conditions for a bail extension are met. The grounds for a DAPO must exist and the suspect would have an opportunity to oppose the DAPO during the application or apply to discharge it later.³⁰ This would apply where police decide not to apply to the court to extend bail because condition C is not met. We do not seek to bind the court in any way where the police do apply to extend and the court takes the view that condition C is not met.

30. Suggested new clause 67 – to be inserted into Part 7 “Miscellaneous and General” of the Domestic Abuse Bill:

(1) After section 47ZM of the Police and Criminal Evidence Act 1984 insert –
“Section 47ZN Domestic abuse protection notice where condition C not met at time when court extension required

(2) Where this section applies and the officer is satisfied that conditions A and B in section 19 of the Domestic Abuse Bill are met in relation to that person, a senior officer must give a domestic abuse protection notice to that person.

(3) This section applies where:

(a) the applicable bail period in relation to that person is the period mentioned in section 47ZB(1)(ab),

(b) that period has not ended,

(c) a senior officer is satisfied that:

(i) conditions A, B and D in section 47ZC are met in relation to that person,

(ii) condition C in section 47ZC is not met in relation to that person, and

(iii) the circumstances are otherwise appropriate for an application to be made to a magistrates' court under section 47ZF, and

(d) the offence under investigation in relation to that person is an offence of domestic abuse as defined in section 1 of the Domestic Abuse Bill.”

Conclusion

31. We welcome the Domestic Abuse Bill with its aim of providing protection to victims, but this cannot be achieved so long as the current pre-charge bail regime remains in place.

³⁰ Clause 26(4) and 41 of the Bill