Centre for Women's Justice (CWJ) submission to consultation on CPS Domestic Abuse Legal Guidance

June 2022

Question 1 – Do you think the terminology used is appropriate and sensitive to the issues addressed? If not, please identify concerns and share how it can be improved.

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 closely with frontline women's sector organisations on using legal tools to challenge police and prosecution failings around violence against women and girls.

Please note that in this consultation response we use the term "victim" which is used in the guidance, but we note that the term "survivor" is generally used in the women's sector.

The introduction refers to the "Domestic Violence flag" on CPS systems. Whilst this no doubt reflects the wording of the flag and not just wording in this guidance, this is the opportunity to bring the flag up to date with terminology and avoid terms that encourage the view that DA is predominantly about acts of physical violence.

In the final paragraph of the section headed "Supporting Victims" there is reference to IDVAs, and to IDVA services, however many support workers are not IDVAs, and many services, including those supporting Black and minoritised communities, have support workers who are not IDVAs, therefore we propose that this paragraph should refer to IDVAs "and other support workers". We note that elsewhere the guidance refers to "IDVAs, YPVA or other support organisation".

Question 2 – Do you think that the guidance in the section titled: 'Applying the Code' in relation to the principles to consider when applying the evidential test will assist prosecutors in arriving at Code compliant charging decisions in DA cases?

The final sentence of the first paragraph in this section is unclear and could be misleading. It could be read by some to mean that the police can charge some DA offences after 'early advice' from a prosecutor, whereas in fact the Director's Guidance on Charging states that all charging decisions in DA cases must be made by the CPS and not by the police. We propose rewording to make this clear.

The first bullet point under the heading "Evidential Stage" incorporates a wide range of points. It includes within it that when making a charging decision, a prosecutor must assume an "objective, impartial and reasonable jury, Magistrates or judge" which means that any potential myths and stereotypes operating on the minds of the fact-finders must be disregarded and not form part of the assessment of whether there is a realistic prospect of conviction. The so-called "bookmaker's approach" simply seeks to predict the prospects of a conviction without factoring in this approach to the impact of myths and stereotypes. The "bookmaker's approach" is an important error which should be explicitly guarded against in the guidance, but this point is lost in the paragraph as currently worded. It should be spelt out clearly as a separate bullet point, in the same way as in the CPS RASSO guidance, where there is also a high risk of myths and stereotypes influencing the decisions of juries (RASSO guidance chapter 2 third bullet point on evidential test). Whilst the third bullet point in the DA guidance does refer to myths and stereotypes it talks about the prosecutor's own assessment of evidence, rather than the predictive element in the "bookmaker's approach", so there is a need to spell this out separately.

The second bullet point refers in general terms to the reliability and credibility of witnesses. The previous version of the CPS DA guidance had a strong section on how myths and stereotypes have

been wrongly applied in relation to victims' credibility. This has been entirely removed, and the points there on credibility are not included in the new list of myths in Annex C. We reproduce the relevant section from the previous version below and request that it be put back into the guidance in its entirety, as it was probably the most useful section from the point of view of many victims where there are NFA decisions based on negative credibility assessments:

> "Complainants will often not realise that they are in an abusive relationship, as some abuse behaviours may not in fact be violent or immediately obvious; prosecutors therefore should handle cases effectively and without any preconceptions of what a 'perfect victim' will look like. Complainants may often adjust their behaviour to try and prevent any further abuse or violence, especially where children or other dependents are present in the household, or to simply have an 'easier time'; such behaviour may as a result be 'normalised', with the complainant showing no obvious or stereotypical behaviours. However, this should not be used against the complainant.
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> A number of factors have been previously stereotyped as militating against some complainants, including:
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> - the offence not being reported immediately;
> - the account given may have been inconsistent;
> - the complainant carrying on with their everyday life;
> - the complainant voluntarily returning to their abuser; or,
> - the complainant's reliance on alcohol or other substances.
>
> These factors have in the past been seen as undermining the credibility of an account; however, they may in fact support the behaviours of complainants who have been, or continue to be, abused. Complainants of domestic abuse typically experience a number of abusive incidents before they feel able to report the matter. This should not be seen as a detriment."

The fourth bullet point addresses a broad approach to undermining features, and on the fourth line mentions that prosecutors should not introduce a corroboration requirement. In our view this latter point is of fundamental importance and is lost where it is currently included, and should be spelt out in a separate bullet point, in the same way that the CPS RASSO guidance has a separate side heading for "word on word" cases. This is important because we hear reports of cases being NFA'd on the basis of lack of corroboration, and also serious under-charging, which appears to result from a (possibly subconscious) assumption of the need for corroboration. For example, we have heard concerns from a member of the judiciary about cases they have tried, where common assault charged and there is a minor visible injury, but far more serious offences such as threats to kill and false imprisonment have not been charged. This is also an important feature of non-fatal strangulation, where research shows that 50% of cases have no visible injury to the neck (including some fatal cases) and victims describe how perpetrators know this is a form of abuse they can 'get away with'. When a corroboration requirement is applied victims feel disbelieved and acts that tend to occur behind closed doors can be effectively decriminalised, so it is a critical aspect of any guidance that seeks to address VAWG to properly highlight this issue.

A difficulty we see in many cases is that when domestic abuse is reported to the police alongside sexual offences within the same abusive relationship the two matters can be investigated by two separate investigations, one by a RASSO team and another by a separate team. There is often a lack

of linking and co-ordination between the two investigations and this guidance should highlight the need for prosecutors to consider linked investigations together to see the overall picture when making charging decisions. For example, it may be that aspects of the domestic abuse could form bad character evidence for the RASSO offence, or that incidents could be tried together. We are aware that some RASSO investigations take a very long time, sometimes a year, two years or longer, and do not suggest that DA charging decisions should be held up for those, but some consideration to how the two categories of offences are being dealt with, and even considering whether investigations have been linked, are important for a proper criminal justice response.

Question 2 only mentions the evidential test but we wish to address a point on the public interest test section under the 'Applying the Code" heading. The final sentence of the final paragraph states that where possible prosecutors should ask police to seek information from third parties, such as support agencies, Children's Services and schools, to help inform the final charging decision. We agree that this may be important for case-building and assessing the impact on children, as stated. However, the guidance should make clear that any such requests should have a specific factual basis, and should not be based on speculation or a general trawl for information related to the victim's credibility or on a routine 'tick-box' approach. The new AG's Guidelines on Disclosure June 2022 make clear that the Court of Appeal's approach in *Bater-James and Mohammed* [2020] EWCA Crim 790 at paragraph 77, that "There must be a properly identifiable foundation for the inquiry, not mere conjecture or speculation".

Question 3 - Is the new content in the section titled 'Offences available to prosecutors' accurate and comprehensive and do you think it will assist prosecutors in making decisions reflecting all the potential background in DA cases?

The section on 'Offences available to prosecutors' does not refer to the new offence of non-fatal strangulation and suffocation (NFS) and there should be a link to the new CPS guidance on this offence, which was introduced on 7 June 2022. There needs to be not just a mention of the existence of this offence and a link, but a paragraph explaining that this form of offending is highly prevalent in domestic abuse,[1] and some of the key points in the separate NFS guidance. This should include the fact that frequently there are no visible injuries after NFS, and that the lack of visible injury should not undermine the decision to prosecute. It should also refer to the need to explore non-visible injuries and the severity of some of these, including risks to the victim's health, both immediately and in the longer term, due to the restriction of oxygen to the brain, such as risk of brain damage and stroke. It should also refer to the evidence that NFS is associated with a greatly increased risk of homicide.[2]

The guidance sets out in a series of bullet points a list of other CPS guidance on relevant offences. The guidance on Offences Against the Person (OAP) is simply listed without explanation. We would suggest that a brief explanation or reference should be made to two matters which are particularly relevant to domestic abuse.

The first is the extension of the 6 month charging deadline for common assault in DA cases, extended to 6 months from date of reporting with a maximum of 2 years from date of offence to date of charge. This is due to come into force on 28 June 2022.

[1] 43% of high-risk victims who report physical abuse report NFS see Safelives Insights IDVA Dataset 2020/21 page 12 https://safelives.org.uk/sites/default/files/resources/Idva%20Insights%20Dataset%20202021.pdf

[2] Seven-fold risk, see Glass et al., (2008) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2573025/

The second is an aspect of the OAP guidance that is frequently overlooked but of great relevance to DA, namely the section under the heading "Common assault or ABH: decision on charge" which states:

> "Whilst the level of charge will usually be indicated by the injuries sustained, ABH may be appropriate in the circumstances of the case including where aggravating features set out below are present:
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> - the circumstances in which the assault took place are more serious e.g. repeated threats or assaults on the same complainant or significant violence
> - there has been punching, kicking or head-butting (as distinct from pushing or slapping which is likely to be dealt with as battery)
> - a weapon has been used
> - the victim is vulnerable or intimidated – see sections 16(2) and 17(2)Youth Justice and Criminal Evidence Act 1999. This may include: a pattern of similar offending against the victim, either in the past or in a number of offences to be charged; relevant previous convictions; whether the victim would likely be the beneficiary of Special Measures."

A previous version of this section of the OAP guidance specifically referred to DA, but that was removed. We believe that attention needs to be drawn to the importance of this section for DA cases, as in our experience it is often overlooked, and decisions on charge ae guided by the degree of physical injury without taking into account these aggravating features.

Both these matters should be spelt out in the DA guidance even though they also appear in the OAP guidance (assuming that the time limit change will be added to that guidance on 28 June).

The bullet point list of potential offences available does not include breach offences – namely breaches of non-molestation orders, restraining orders and stalking protection orders. Whilst some of these are dealt with in the sections below on various orders, this is in an entirely different part of the guidance, and it is important to stress the need to consider breach offences, which are extremely common, as part and parcel of charging decisions in DA cases.

The previous version of the CPS DA guidance included a helpful list of other potential charges that are not specific to DA but often relevant, such as criminal damage, false imprisonment, witness intimidation etc. It would be helpful to add a wider list to this section, similar to Annex E in the Controlling and Coercive Behaviour draft statutory guidance that is currently under consultation.

Question 4 – Will the new content in the section titled 'Case building and approach to prosecuting DA cases' regarding factors to consider when making charging decisions assist prosecutors with identifying actions and building cases for charge?

Section headed "offender centric approach"

This section does not make any reference to the need to look at wider patterns of behaviour rather than focusing only on the individual incident, and the need to consider use of bad character evidence in DA cases. There should be a specific reference to considering patterns of behaviour and the need to obtain evidence about other incidents in police force systems, such as previous call-outs and reports by the same victim, other intelligence, previous convictions, or charges and acquittals, in relation to DA against the same victim or other intimate partners. Gathering information already held by criminal justice agencies will enable consideration of whether bad character evidence can be

used, or whether earlier incidents could now be prosecuted, for example where the victim had previously withdrawn support but now feels able to support a prosecution. This should be part and parcel of investigative strategies and raised in Early Advice as well as further actions for police in order to strengthen cases. Given the importance of bad character evidence in DA cases, there should be a paragraph devoted to key points on this that arise in DA cases and a link to the separate CPS guidance on BCE.

This section includes that DA offences often take place in private and the victim may be the only witness. It is important to repeat here the need to avoid adopting a corroboration requirement. Although it is mentioned in an earlier section it is highly relevant here, and as we noted above in our reply to Questions 2 this is a critical issue in charging decisions and should be highlighted.

Section headed "Factors to consider when making charging decisions"

This section sets out the division of responsibilities between the police and CPS. It is worth including here that whilst the police can NFA cases without referral to CPS, they cannot do so on the basis of the public interest test, only the evidential test (Director's Guidance on Charging 6th edition para 4.4).

The final bullet point in this section refers helpfully to the need for prosecutors to look at the background, and whether a number of allegations might amount to a more serious offence. It is important to also draw attention here to the need to consider bad character evidence, and to consider patterns of behaviour. Where the guidance mentions a more serious offence it would be helpful to give a couple of examples, in particular controlling and coercive behaviour, and ABH (see point above about "common assault or ABH" in the reply to Question 3).

"Factors to consider" section

At the end of this section there is a link to a separate CPS guidance "Disclosure - A guide to "reasonable lines of enquiry" and communications evidence". This guidance is dated 2018 and is completely out of date, it deals with the examination of digital devices such as mobile phones of the victim in an investigation. In 2020 the Court of Appeal provided a leading judgment on this topic in *R v Bater-James* (full citation above) which is now considered the basis for the correct approach to reasonable lines of enquiry, and referred to in the new Attorney-General's Guidance on Disclosure which is due to come into force in July 2022. The 2018 guidance has not been updated following *Bater-James*, and indeed there will have been many developments in the technology around mobile phone extraction since 2018. This guidance should be removed from the CPS website and updated. The link to the AG Guidance on Disclosure should also be updated as it currently links to the 2020 version of that Guidance.

Section headed "Self-defence and counter-allegations"

The inappropriate prosecution of victims of VAWG is an area within our expertise that requires significant reform, and we therefore address this section of the guidance in some detail.

Summary

Nearly 60% of women in prison and under community supervision in England and Wales are victims of domestic abuse. Through our legal advice and casework service, we 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.

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. In 2021, CWJ published a major piece of research considering the

barriers to justice for women who kill their abuser.[3] 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. Our 2022 Double Standard report sets out how women's offending more broadly is often directly linked to their own experience of domestic abuse, and how victims can be unfairly criminalised in a wide variety of ways.[4]

A decision to prosecute a victim of domestic abuse without investigating the relevant background and/or considering the public interest in prosecuting her, having regard to the context of abuse, may give rise to a breach of positive obligations to protect victims of domestic abuse under Article 3 (and possibly Article 8) of the European Convention on Human Rights.

The section on self-defence and counter allegations, which is carried over from the existing guidance, is helpful in principle to avoid unjust prosecutions. CWJ's experience shows, however, that the guidance is frequently not followed by prosecutors. This section of the guidance therefore needs to go further to overcome the prevailing culture and practices that lead to unjust criminalisation of victims of domestic abuse and other forms of violence against women and girls (VAWG). The section also requires amendment to address distinct factors that may be relevant for Black, Asian, minoritised and migrant women, disabled women (including those with mental health needs) and young women. Additional guidance is required to address the other ways in which victims of VAWG may be criminalised – beyond self-defence and counter-allegations at the scene of a domestic abuse incident – including coerced offending.

Unjust criminalisation of victims of VAWG and action needed

Our 2022 Double Standard report collates evidence of unjust criminalisation of victims of domestic abuse and other forms of VAWG, including those accused of using force against their abuser. The report draws on case studies from CWJ's legal enquiries service, and earlier research, to explain the barriers to justice faced by victims throughout the criminal justice process. In the report, we call for improvements in guidance and practice to be implemented throughout the criminal justice process, including through revisions to the Code for Crown Prosecutors and establishment of a mechanism to challenge inappropriate prosecutions, to ensure that:

(a) 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) Once identified, victim suspects/defendants are protected from abuse, effectively referred to support services, and not stigmatised.
(c) Suspects/defendants' rights as victims are upheld irrespective of any actual or potential criminal proceedings against them.
(d) Criminal justice practitioners at every stage of the process, judges, magistrates and juries are able to take proper account of the abuse suffered by victim suspects/defendants and its relationship to any alleged offending.
(e) Effective procedural safeguards are accessible to enable victim suspects/defendants to give their best evidence about contextual domestic abuse.

Evidence of inappropriate arrests and prosecutions

The challenges faced by police and prosecutors in effectively investigating and prosecuting cases of domestic abuse and other forms of VAWG are well documented. The evidence we have collated shows that victims' unjust criminalisation can arise from police and prosecutors' failure to identify

[3] Centre for Women's Justice (2021) Women who kill: how the state criminalises women we might otherwise be burying
[4] Centre for Women's Justice (2022) Double Standard: ending the unjust criminalization of victims of VAWG

victims at an early stage and, even when the context of VAWG is known about, police and prosecutors' failure to ensure that any decision to arrest or prosecute a potential victim is properly informed by the context of their experience of VAWG.

Recent research by the Howard League for Penal Reform, based on evidence from five police forces, highlights the overuse of arrest for women accused of violence, and the need for the police to respond to incidents of alleged violence in a gender-informed way.[5] This echoes Marianne Hester's 2012 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.[6]

Further evidence of inappropriate arrests and prosecutions is set out in the Double Standard report. Participants in the research for that report described a cursory approach by the CPS, in which there is no attempt to take account of contextual domestic abuse when implementing the evidential and public interest tests in relation to a victim suspect. One lawyer with experience in criminal defence and prosecution work commented:

> *In terms of the CPS, there is no ownership of cases. It is just a box ticking exercise, particularly in the lower level cases.*

The case of Maia, included in the full Double Standard report (p.46), illustrates in detail how badly these cases can be handled by police and prosecutors, the particular vulnerability of migrant women, and the devastating impact that an inappropriate police and CPS response can have on women and their children.

Need for this section of the guidance to go further

This section of the guidance must go further and spell out the need for prosecutors to work to overcome prevailing culture and practices in order to avoid inappropriate prosecutions of victims. It should call for careful scrutiny of any case involving counter-allegations. The guidance already includes some helpful content on this, stating:

> In this situation, prosecutors should carefully review all known information about the suspect and victim. Each case should be considered on its own facts. Victims should not be subjected to any myths, stereotypes or assumptions.

Further detail should be added about the type of information that should be reviewed, potential sources of information (such as health services and domestic abuse services, although it should be noted that third party evidence of this kind will often not be available and this should not be a barrier to taking the victim's account seriously). Further guidance should also be given about the nature of 'myths, stereotypes and assumptions' that should be avoided. This content should be developed in consultation with domestic abuse services, including those led by and for Black, Asian, minoritised and migrant women. It should explicitly link across to guidance on Coercive and Controlling Behaviour.

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[5] APPG on Women in the Penal System (2020) Arresting the entry of women into the criminal justice system: Briefing Two

[6] Hester, M. (2012) Portrayal of Women as Intimate Partner Domestic Violence Perpetrators. 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.

The guidance must seek to ensure prosecutors understand that they are expected to ask the police to investigate further where necessary to identify a victim and/or to ensure their experience of abuse is taken into account. Prosecutors should be encouraged to consult local domestic abuse services to support their decision-making, both where those services may have pertinent information about an individual case, and for more general expert support in understanding the dynamics of domestic abuse and what might be at play in a particular case. This must include consultation with services led by and for Black, Asian, minoritised and migrant women, disabled women and young women, where applicable.

Distinct considerations for Black, Asian, minoritised and migrant women, disabled women and young women

Black, Asian, minoritised and migrant women, as well as disabled women – including those with mental health needs, face additional barriers to accessing support and accessing justice in these cases. Young women and girls have distinct experiences that are often overlooked. The guidance must be amended to address these matters specifically, to help ensure equal treatment in relation to race, gender, disability and age.

In their Tackling Double Disadvantage 10-point Action Plan, Hibiscus Initiatives describe the ways in which intersectional discrimination and the interaction of criminal justice and immigration proceedings lead to additional disadvantage for Black, Asian, minoritised and migrant women in contact with the criminal justice system, and action that needs to be taken.[7] These matters are explored in relation to victims of VAWG who are accused of offending, in our Double Standard report and in Pragna Patel's appendix to our report on women who kill their abuser.[8]

Research by Agenda and the Alliance for Youth Justice (AYJ) reveals how young women and girls' 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 extreme levels of need.[9]

Research by the Prison Reform Trust with Keyring drew on the experiences of 24 women with learning disabilities in contact with, or on the edges of, the criminal justice system; and practitioners working within criminal justice, social care, and women's services.[10] It found that abuse by men lay behind the offending behaviour of most of the participating women.

The draft guidance must be carefully reviewed in consultation with organisations led by and for Black, Asian, minoritised and migrant women, disabled women, and young women, to ensure their circumstances are adequately addressed.

Need for additional CPS legal guidance on victims' criminalisation (beyond self-defence and counter-allegations)

In cases where women are arrested for an offence that does not take place as part of a domestic abuse incident, it is even less likely that contextual domestic abuse will be taken into account in decisions to arrest or prosecute. CPS legal guidance on identifying Controlling or Coercive

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[7] Hibiscus Initiatives (2022) Tackling Double Disadvantage: Ending inequality for Black, Asian, minoritised and migrant women – 10-point action plan for change

[8] Centre for Women's Justice (2021) Women who kill: how the state criminalises women we might otherwise be burying; Centre for Women's Justice (2022) Double Standard: ending the unjust criminalization of victims of VAWG

[9] 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

[10] Prison Reform Trust (2019) Out of the Shadows: Women with learning disabilities in contact with or on the edges of the criminal justice system

Behaviour[11], and the Home Office Statutory Guidance Framework on Controlling or Coercive Behaviour[12] 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.*

In fact, the circumstances in which victims may be coerced into offending are broader than is suggested here. In any event, this recognition of coerced offending is not matched by a statutory defence for victims accused of offending in these circumstances. Nor is there any 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[13], 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.

We have therefore called for the introduction of CPS legal guidance on identifying when case facts may indicate that the suspect is a potential victim of VAWG - not only in relation to counter-allegations in domestic abuse incidents, but in all cases where the suspect is a potential VAWG victim. This should set out when prosecutors should ask the police to make further enquiries, when it may/may not be in the public interest to prosecute or caution the victim, and should cover out of court disposals.

We recommend that the CPS should work with specialist domestic abuse agencies to develop more comprehensive guidance, training and monitoring to ensure that all women whose alleged offending may be driven by domestic abuse and other forms of VAWG are identified, and that the public interest is applied appropriately when deciding whether to prosecute. This must include consultation with services led by and for Black, Asian, minoritised and migrant women, and services for young women, and those with disabilities.

Section headed 'Previous domestic abuse incidents and serial offenders'

We agree with the content of this section but our concern is that it gives the impression that this applies to some special category of cases, when in fact proactive enquiries into the perpetrators' previous criminal behaviour and intelligence reports should be carried out in **every** case of DA, as an essential routine aspect of the "offender centric approach". As set out above, this requirement should be moved into the section higher up on the "offender centric approach" and to leave it here gives the misleading impression that it only applies to some particularly high-risk offenders, whereas in fact the overwhelming majority of DA cases involve an ongoing pattern of abuse not a one-off incident, and there may be previous victims. Also, placing this in a separate section means that this crucial issue could be easily overlooked.

Question 5– Will the new content in the section titled 'Case building and approach to prosecuting DA cases' regarding evidence led prosecutions assist prosecutors when making charging decisions and building cases for charge?

We have no comments on this question.

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[11] CPS Legal Guidance on Domestic Abuse, Controlling or Coercive Behaviour in an Intimate or Family Relationship (reviewed 30 June 2017)

[12] Home Office (2015) Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework, p.4

[13] Ministry of Justice (2018) Managing vulnerability: Women – Fact Pack; Ministry of Justice (2018) A Whole System Approach for Female Offenders: Emerging evidence

Question 6 – Is the content in the section titled 'Sentencing & Ancillary Orders' accurate and comprehensive? Will it assist prosecutors with better awareness of orders to be considered in DA cases?

The section on Restraining Orders refers to a RO being made on conviction or acquittal. It would be helpful to also explicitly mention the possibility of a RO where the Crown offers no evidence (for example if the victim fails to attend for trial, but there is good reason to believe they remain at risk). It would also be helpful to refer to the need to consider a RO where there is a custodial sentence, because some offenders harass victims from prison, and also often the offender will be released from prison after a relatively short time, but a RO can continue to protect the victim for far longer, for example 5 years. In both these situations ROs are sometimes not sought by prosecutors, and so it is important to explicitly draw attention to these scenarios.

The section contains a link which should be to s. 5A Protection from Harassment Act 1997 but is in fact a link to s. 360 Sentencing Act 2020 (which is the previous link in this section).

The power to make a RO only arises at the sentencing hearing and sometimes when this is overlooked at that hearing the victim will be extremely disappointed and ask what can be done to remedy this. The guidance should explicitly refer to the possibility of seeking a RO at a later date under the 'slip rule' (in the Crown Court within 56 days under s.155 Powers of Criminal Courts (Sentencing) Act 2000 and in the Magistrates Court under s.142 Magistrates Court Act 1980). Prosecutors may not consider using the 'slip rule' in this way unless their attention is drawn to it.

The section on ROs should also include the fact that breach of a RO is a criminal offence and the legal provision for this (in the same way as the sections on non-molestation orders and stalking protection orders do). Whilst this is referred to further down in the section on breach of orders, it is important to include it here to make the information easily accessible.

There is no consultation question about the Civil Orders section, but we have the following comments:

- Section on DVPN/Os: this section refers to prosecutors advising police to consider these orders if there is a decision to take no further action, which we welcome. In addition, prosecutors should advise the police to consider using these orders if there has been a breach of pre-charge bail, particularly where there are repeat breaches, as there is no other power available pre-charge to provide further protection, other than imposing bail conditions. A DVPO if breached can be enforced as a contempt of court by the police and so provides an escalation of protection if bail conditions are proving inadequate. This option should also be included in the section on bail above, alongside reference to breaches of bail conditions.

- Section on breach of orders: this section mentions that breach of DVPN/O is not within the CPS remit to prosecute. It should also include that a breach can be enforced as a civil contempt of court by the police punishable by a fine or up to two months' imprisonment. This is included in the section on DVPN/Os but should be repeated here, as it may not be known to prosecutors and to make the information easily accessible.

Question 7 – Do you think the new content on DA myths and stereotypes at Annex C is accurate and comprehensive and do you think it will assist prosecutors in making decisions which are not clouded by myths and stereotypes?

Whilst many of the Myths are helpful, there are a number of critical notable omissions which should be included:

Myth: A delay in reporting abuse is relevant to assessing the credibility of the complainant and undermines a prosecution.

There is a great deal of information about why victims often find it very difficult to disclose abuse, and to leave abusive relationships, some of which are set out in Myth 20 (second set of bullet points bullets 2 to 6, though there are some important points to add, see below). It is essential that prosecutors are alive to this and never consider delays in reporting as a negative factor in their assessments and we believe it is important to include an explicit reference to this in the guidance.

We note that delay in reporting is so common in DA cases that a specific provision has been included for DA cases in the Police, Crime, Sentencing and Courts Act to extend the 6 month time limit for charging common assault.

We also note that some women face barriers to reporting abuse to the police, including the fact that the criminal justice process is intimidating, and family and community pressures. Women from Black and minoritised communities in particular may delay in reporting due to fear of approaching the police, for a variety of reasons for example concerns about racism, because their communities view the police with suspicion or negative experiences of police in other countries. Therefore there is a need to recognise that where DA has been reported that may have involved overcoming a range of barriers and this should be spelt out.

Myth: the victim has now left the abuser, so they are safe.

It is well known that during the period of separation and leaving an abusive relationship there is a significant heightening of risk. The abuser feels that they are losing control of the victim and this will often push them to escalate abuse. Much abuse continues after separation and a high proportion of domestic homicides take place in the period after separation. The Femicide Census 10 year report shows that 43% of women killed by a partner / former partner had separated or taken steps to separate. Of these, 38% were killed within a month of separation and a further 14% in 1 to 3 months of separation.[14]

Myth: If the victim voluntarily returned to the abuser and resumed the relationship then the abuse was not serious, or the allegations were untrue.

It is well known that victims return to abusive relationships, and sometimes leave and return a number of times before finally breaking off the relationship permanently. This is for many of the same reasons that it is difficult to leave in the first place, as noted above, some of which are set out in Myth 20 (second set of bullet points bullets 2 to 6). This was included in the previous version of the CPS DA guidance in the extract copied in above in response to Question 2. This is an important point that arises frequently and should be spelt out separately to the point in Myth 19.

Myth: The allegations are not credible because the victim carried on with their everyday life.

Domestic abuse is often normalised and continues for long periods of time and victims often carry out their usual day to day activities. Victims may not behave in ways that conform to stereotyped ideas and every individual responds differently. The way a victim behaves in their everyday life is not an indication of their reliability or credibility. This point was included in the previous version of the CPS DA guidance in the extract copied in above in response to Question 2.

[14] Femicide Census 10 year report p.30-32 https://www.femicidecensus.org/wp-content/uploads/2020/11/Femicide-Census-10-year-report.pdf

Myth: The victim's reliance on alcohol or other substances makes them less reliable or credible.

Victims may turn to alcohol or other substance misuse as a coping mechanism to help them live with abuse. Substance misuse by the victim does not mean that abuse is less likely and should not be seen as a negative factor in assessment of the evidence. This point was included in the previous version of the CPS DA guidance in the extract copied in above in response to Question 2.

We now give some comments on the Myths that have been included. As a general point it is not clear that where 2 or more myths are listed one immediately after the other, that the following implications and considerations apply to both – this is very confusing, so for example we initially thought that Myth 19 had no comments attached to it and then realised that the comments on Myth 20 are probably intended to apply to 19 and 20. To avoid this confusion we suggest adding "And" if 2 myths have the same implications and considerations.

Myth 1: We agree with this myth. We suggest that in the final sentence which refers to the fact that physical abuse does not always leave physical signs, it would be helpful to make reference to non-fatal strangulation, because evidence shows that it is very common for there to be no visible injuries (in 50% of cases) and include a link to the separate guidance on non-fatal strangulation which stresses this point.

Myth 3: We agree with this, but believe that the most important point, which is that DA is **usually** an ongoing pattern of behaviour is not spelt out or stressed, and the bullet point which is second from the bottom should be the uppermost point. The first bullet point in Myth 11 should also be added here as it makes the point far more clearly.

Myth 6: The issue of victim's credibility is not addressed sufficiently here. We refer to our comment in reply to Question 2 above which sets out the extract on assessing credibility of victims that was in the previous CPS DA guidance and has been removed and request that this be returned to the guidance, and also referred to under Myth 6.

Myth 18: We agree with this myth, but it is important to add the point that abusers frequently claim that their victim has mental health problems to seek to undermine the victim's account and as a strategy of manipulation.

Myths 19 and 20: see our comments above about including a myth on delayed reporting and also how DA can be 'normalised' (as in the previous version of the DA guidance extract in Question 2).

We agree with the reasons given here at bullet points 2 to 5, but there are several other very important reasons why victims remain in abusive relationships that should be added:

- Victims sometimes fear that leaving an abuser may result in them losing custody of their children, or fear leaving for other reasons connected to concerns about their children
- Victims often feel unable to leave an abuser due to economic dependency and insecurity
- Victims may be manipulated emotionally by an abuser into staying in the relationship, believing that he will change or that what they are experiencing is not abuse, particularly where there is coercive controlling behaviour and 'gaslighting'.

Question 8- Do you think Annex E has all the correct details for the relevant national support organisations? If not, please identify concerns and share the correct details.

We have no comment on this question.

Question 9- Do you have any other feedback you wish to share around the how the guidance can be improved?

We wish to share some feedback on the CPS guidance on non-fatal strangulation and suffocation (NFS), which was published on 7 June, and we hope that this can be considered as part of the consultation on domestic abuse, given that non-fatal strangulation most commonly occurs as part of domestic abuse.

We consider that the NFS guidance is very helpful, but there are two important points which are not included that we wish to highlight:

Firstly, the section headed "Case building" includes a range of physical signs and symptoms of NFS. What is not included is a characteristic physical sign of NFS, known as 'petechiae', or pin prick dots where small blood vessels have burst, which can sometimes be seen in the eyes, ears and scalp. This is important to include as it provides strong support for a prosecution where these have been documented.

Secondly, the guidance does not draw the attention of prosecutors to the possibility of using a forensic medical expert to support a prosecution. We do not refer to situations where there has been a forensic medical examination, usually in a Sexual Assault Referral Centre, where the medical evidence will probably be available to the prosecutor. We refer to use of expert evidence to evidence the fact, raised repeatedly in the guidance, that NFS frequently does not leave visible injuries to the neck. This is something that would be outside the usual knowledge of a jury, or a judge or magistrate, and therefore appropriate for expert evidence.

There is no need for the expert to necessarily examine the victim (though that is obviously helpful where they have) but expert evidence can be provided based on documentation from the case, explaining the research that has established that some 50% of NFS victims have no visible injuries, and that in some fatal cases of strangulation there are no external injuries to the neck, although there are internal injuries. This was primarily research carried out in the US on a large sample of 300 NFS cases, and also looking at fatal cases: George McClane, Gael Strack & Dean Hawley 'A review of 300 strangulation cases Part II: Clinical evaluation of the surviving victim and Part III: Injuries in fatal cases' *Journal of Emergency Medicine* (2001) 21, 3, 311 and 317.

The defendant may often assert that if the victim's account were true there would be marks visible on her neck, or that she has greatly exaggerated because minor injuries to her neck would be far more severe if her account were true. Whilst the guidance for prosecutors states that there may not be visible injuries, there is no way to establish that in court without expert evidence, and prosecutions are likely to be far more successful if this evidence is before the court. We have heard from a forensic medical expert in New Zealand who has given evidence in such cases. We have a number of judgments from the New Zealand courts where this evidence has played a part, and can provide these on request. We understand that the experience in New Zealand, since introduction of an NFS offence in 2018, is that prosecutions have increasingly begun to rely on forensic medical evidence and grown to appreciate its value. We are disappointed that there is not even a reference in the guidance to the possibility of instructing a forensic medical expert to comment on this issue, which should in fact be highlighted as valuable good practice.

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