DOUBLE STANDARD

ENDING THE UNJUST CRIMINALISATION OF VICTIMS OF VIOLENCE AGAINST WOMEN AND GIRLS

CREDITS AND ACKNOWLEDGEMENTS

This report was written by Katy Swaine Williams, with assistance from Harriet Wistrich and Nogah Ofer of Centre for Women's Justice, Marchu Girma and Ghadah Alnasseri of Hibiscus Initiatives, Pragna Patel and Latham & Watkins solicitors. The Appendix on duress was written by Dr Alice Storey and Dr Sarah Cooper with research assistance from Georgia Cartwright and Melisa Oleschuk, all of Birmingham City University Law School.

Our thanks go first to the women who agreed to provide anonymised summaries of their cases to help illustrate the systemic problems we are seeking to address, and to the organisations and individuals who have helped gather some of the case examples.

> *I understand that it is too late to do anything for me, but I hope to highlight the serious failings with the system in the hope that it stops other domestic abuse survivors having to go through what I have and will be for life. The ghosts of the abuse are bad enough in their own right…*
>
> Naomi, domestic abuse survivor

We are also grateful to those who took part in our practitioners' roundtables.

With thanks to the Olwyn Foundation.

ABOUT THE CENTRE FOR WOMEN'S JUSTICE (CWJ)

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 identifying and finding legal tools to challenge police and prosecution failings around violence against women and girls (VAWG).

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. 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.

ABOUT THIS REPORT

This report sets out evidence of the unjust criminalisation of victims of VAWG in England and Wales for alleged offending resulting from their experience of abuse, and the reforms in law and practice that are needed to address this. It draws on our briefings to parliamentarians debating the Domestic Abuse Bill and our submissions to the government's recent consultations on domestic abuse and other forms of VAWG. It includes new qualitative research and legal analysis and draws out the wider learning from CWJ's recent report on the state response to women who kill their abuser. Relevant case examples are included, taken from CWJ's own caseload and other sources. The report is primarily focused on women, but we seek to draw out learning relating to girls where possible, and many of the issues faced are common to both. We conclude with detailed recommendations for reform.

Design: Nic Mainwood, Centre for Women's Justice

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METHODOLOGY

This briefing draws together relevant recent literature, including parliamentary briefings by CWJ and others through the passage of the Domestic Abuse Act 2021 and government consultation submissions, legal analysis, parliamentary debates, and the following new material:

- Legal analysis on the defence of duress authored by Dr Alice Storey and Dr Sarah Cooper with research assistance from Melisa Oleschuk and Georgia Cartwright, Birmingham City University (see Appendix)
- Insights from two virtual roundtable discussions held by CWJ with criminal lawyers, academics and women's service providers in September and December 2021
- New case studies drawn from CWJ's legal enquiry service.

Although the Government are wholly sympathetic to the plight of victims of domestic abuse, we are unpersuaded that there is a gap in the law here that needs to be filled.

Lord Wolfson, Parliamentary Under Secretary of State, Ministry of Justice, Domestic Abuse Bill debate[1]

…the Government are again falling into the trap of saying there are nice victims and bad victims, or of saying, "We will change the law for the good, conforming victims but not for the victims who somehow transgress." These are the victims who, in the end, defend themselves because they are so in terror for their lives, who are so in fear of a partner that they commit a crime—carrying the drugs from A to B or hiding them in their sock drawer, for example…there is a double standard…

Baroness Helena Kennedy, Domestic Abuse Bill debate[2]

I have been let down and failed by … Police and all the other bodies involved, I am being punished by the system that was supposed to be there to help and protect me…

Naomi, domestic abuse survivor

KEY FACTS

At least 57% of women in prison and under community supervision are victims of domestic abuse.[3] The true figure is likely to be much higher because of barriers to women disclosing abuse.[4]

63% of girls and young women (16–24) serving sentences in the community have experienced rape or domestic abuse in an intimate partner relationship.[7]

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.[10]

Women are more likely than men to commit an offence to support someone else's drug use (48% to 22%).[12]

Around half of arrests of women for alleged violence result in no further action, indicating widespread inappropriate use of arrest.[15]

Women in prison have high levels of poverty and unmet need for housing, healthcare and addiction recovery support.[17]

Women make up only 4% of the prison population.[5] Women were sent to prison on 5,011 occasions in 2020 – either on remand or to serve a sentence.[6]

Arrest rates in 2014/15 were twice as high for Black and 'mixed ethnic' women as for white women.[8] Migrant women are overrepresented in prison, particularly on remand.[9]

Most women are imprisoned on short sentences, and most are imprisoned for non-violent offences.[11]

An estimated 17,000 children experience their mother's imprisonment each year.[13] 600 pregnant women, on average, are held in prison each year.[14]

Rates of self-harm in women's prisons have risen by 20% in the last decade.[16]

99 women have died in prison in England and Wales since 2010. Nearly two in five deaths were self-inflicted.[18]

INTRODUCTION

TAKING ACCOUNT OF THE CONTEXT OF DOMESTIC ABUSE AND OTHER FORMS OF VIOLENCE AGAINST WOMEN AND GIRLS (VAWG)

What is our criminal justice system for, and who does it protect? When victims of crime are forced to commit an offence as part of, or as a direct result of their victimisation, should they be punished or protected?

Criminal law and procedure allow, in theory at least, for the background circumstances surrounding an offence to be taken into account when determining the suspect or defendant's culpability – the extent to which they can and should be held responsible. Those circumstances can include the suspect or defendant's own experience of victimisation, particularly if this has led directly to the offence they are accused of committing.

This can lead to a decision not to prosecute. For those who are prosecuted, the surrounding circumstances may still provide a complete or partial defence. For those convicted, the circumstances may be taken into account in relation to sentencing.

Yet criminal law and process have long been criticised for failing to protect victims of domestic abuse and other forms of violence against women and girls who are accused of offending that results from their experience of abuse. In fact, the evidence set out in this report makes clear that such prosecutions happen routinely, and that existing defences are ineffective in the context of domestic abuse. When it comes to sentencing, pre-sentence reports are still not provided in many cases and there are significant barriers to disclosure of abuse during court proceedings, so that contextual abuse may well not be known about. Where it is known about, judges' and magistrates' limited understanding of the impact of domestic abuse means it may not be properly taken into account.

Barriers in law and practice prevent proper account being taken of contextual abuse, resulting in wasteful use of public resources, failures to protect victims, and profound injustice for women and girls who, in many cases, will already have been failed multiple times by the same system which should be there to protect them from harm. This creates a double standard, and is a telling example of structural gender discrimination experienced by women and girls at the hands of the criminal justice system.

VICTIMS ARE PROSECUTED, WHILE PERPETRATORS ESCAPE JUSTICE

The prevailing practice of inappropriate prosecutions of victims of VAWG contrasts with the failure to prosecute perpetrators of abuse. Despite the high prevalence of rape and sexual abuse, and the increase in reporting in recent years, prosecutions and convictions have dropped to the lowest since records began. Home Office figures suggest that rape complainants now have a 1 in 70 chance that a complaint made to the police will even result in a charge, let alone a conviction.[19] Since 2016 there has been a sharp decline in prosecutions. Crown Prosecution Service (CPS) figures for the five years from 2014/5 to 2018/9 show that:[20]

- In domestic abuse cases, the number of cases referred by police dropped consistently. The number of cases charged dropped from 85,000 to 67,000, the number of convictions dropped and average time to charge almost doubled.
- The number of rape cases charged plummeted by 52% from 3,648 to 1758 and the number of cases referred by police to CPS dropped by 18% from 4,104 to 3,375, whilst reports of rape soared during the same period.

In many of the case examples included in this report, victims have faced prosecution for alleged offences resulting directly from their experience of abuse, while no proceedings have been brought against their perpetrators.

“Abusers manipulate the criminal justice system to extend their control over their victim.

HOW VICTIMS OF VAWG ARE CRIMINALISED

Successive research reports have demonstrated how women's offending or alleged offending is commonly linked to their experience of domestic abuse and other forms of VAWG, and how they are unjustly criminalised as a result. For some women, this arises from their attempts to defend themselves by using force against their abuser, leading them to face charges for assault offences. Some women are coerced by their abuser into committing offences such as benefit or mortgage fraud, theft, handling stolen goods, bringing drugs into prison, and hiding weapons or drugs. Others are driven to offend due to duress of circumstance, shoplifting to supplement an income restricted by their abuser. Abusers manipulate the criminal justice system to extend their control over their victim, including police officers who can use their contacts and knowledge of the system.

Failings in Police and CPS guidance and practice mean that women who should be protected from abuse instead find themselves arrested, detained, cautioned or prosecuted. A lack of effective defences leaves many women with little choice but to plead guilty. For those who go through a trial, courts are ill-equipped to take proper account of the context of abuse in which their alleged offending took place.

Proposals in the Police, Crime, Sentencing and Courts Bill in relation to Serious Violence Reduction Orders risk widening the net of criminalisation for those subject to coercion, particularly for young women and girls, and Black, Asian and minoritised women and girls. These proposals should be withdrawn.

THE IMPACT OF CRIMINALISATION

Women and girls who are arrested, detained, cautioned or convicted in these circumstances – and their children - face devastating consequences. This includes the trauma of arrest and separation of mothers from children, and negative implications for both private and public family law proceedings about custody and contact with children. Criminalisation can also lead to homelessness, deteriorations in mental health and loss of income, and deportation for those without British citizenship. Having a criminal record also creates a significant barrier to future employment.

COERCION AND THE TRAFFICKING DEFENCE

Women and girls who are coerced by their abuser into committing an offence must rely on the common law defence of duress. This defence has been found ineffective in the context of domestic abuse, leaving victims with no defence at all.

Victims of trafficking and modern slavery have been afforded a different approach, where they are compelled to offend as part of, or as a direct result of, their exploitation. The establishment of the principle of non-penalisation of victims of trafficking and modern slavery is now enshrined (albeit in limited form) in domestic law, with a statutory defence and surrounding policy and practice framework. These developments, as well as some improvements in policy recommendations and practice guidelines for the treatment of victims of child sexual exploitation, demonstrate that the system is capable of taking proper account of victimisation. These protections are under threat from government proposals in the Nationality and Borders Bill which should be withdrawn.

SELF-DEFENCE AND CONTRAST WITH HOUSEHOLDERS

There has long been criticism of the law on self-defence, which fails to protect women who use force against their abuser. Their actions are likely to be found to be disproportionate because they are likely to use a weapon (against their usually physically larger and violent abuser) and courts tend to focus on the immediate circumstances of the incident, without considering the history of abuse.

The law on self-defence has been amended in England and Wales to protect householders seeking to defend themselves against an intruder, allowing their actions to be found reasonable even if they appear disproportionate. No such protection has been afforded to victims of domestic abuse facing their abuser. Other jurisdictions have undertaken alternative legislative reforms to make self-defence more effective for domestic abuse victims, and reform here is long overdue.

WOMEN AND GIRLS EXPERIENCE A DOUBLE STANDARD

Victims of VAWG are left experiencing a double standard when they are accused of offending. They are treated differently from other victims facing prosecution. Faced by the stigma of criminal proceedings, they are also treated differently from other victims of domestic abuse. There is no adequate policy or practice framework guiding practitioners to consider non-prosecution. They can only turn to outdated defences which are not fit for purpose in these cases. They are likely to plead guilty or to be convicted or cautioned, with lifelong negative consequences.

THE LACK OF DISAGGREGATED DATA INHIBITS PROGRESS

The lack of disaggregated data prevents an informed and constructive debate on male victims and female offenders in domestic abuse cases, perpetuates false assumptions and can distort policing responses. Ensuring that properly disaggregated data is gathered and published would create a more nuanced and helpful discussion and ensure better understanding of issues and responses in individual cases. This must include data on age, race, religion and nationality to address intersectional discrimination.

“Victims of VAWG are left experiencing a double standard when they are accused of offending. They are treated differently from other victims facing prosecution

CRIMINAL RECORDS ARISING FROM CHILD SEXUAL EXPLOITATION, AND CRIMINALISATION OF LOITERING AND SOLICITING

There is currently no legal process to allow for the expunging of criminal records for crimes committed as a consequence of coercion, abuse and exploitation, and limited provision for their filtering from mandatory disclosure. This leaves victims with a lifelong criminal record, which is essentially a record of abuse. Decriminalisation of the offence of loitering and soliciting under section 1 of the Street Offences Act 1959, an offence that largely criminalised young women coerced by pimps into street prostitution, is also long overdue.

REFORM IS POSSIBLE AND DESPERATELY NEEDED

It is possible to transform the response to victims of VAWG who are accused of offending, and it is the right thing to do. The changes we propose are both desperately needed and entirely aligned with existing government policies on responding to women both as victims and offenders. Through this report we aim to encourage and inform action to introduce reforms in law and practice and end the unjust criminalisation of victims of domestic abuse and other forms of VAWG. We also call on the government to reverse the dangerous proposals in the Police, Crime, Sentencing and Courts Bill and Nationality and Borders Bill which will otherwise do so much to prevent progress in protecting victims of VAWG.

OUTCOMES TO BE ACHIEVED AND SUMMARY OF ACTION NEEDED

There are five outcomes we believe the government and relevant agencies should be working towards in order to end the unjust criminalisation of victims of violence against women and girls. We list these below with a brief summary of the actions needed to achieve them. These are set out in more detail on pages 88-95.

A **Effective legal defences** are available to victims whose offending or alleged offending results from their experience of domestic abuse.

Action 1: *Legislate to provide effective defences for those whose offending results from their experience of domestic abuse; and reverse proposals in the Police, Crime, Sentencing and Courts Bill that would increase the risk of criminalising victims of VAWG.*

B **Protection and non-penalisation of victims** is established as a national strategic priority for all criminal justice agencies, for those whose offending or alleged offending results from their experience of domestic abuse and other forms of VAWG (subject to appropriate exceptions in line with the public interest); and existing protections for trafficking victims are maintained.

Actions 2-3: *Establish a national policy and practice framework for the treatment of victims of domestic abuse and other forms of VAWG who are suspected of criminal activity; reverse proposals in the Nationality and Borders Bill to (1) penalise trafficking victims for 'late' disclosure and (2) withdraw support from victims with convictions.*

C **Improvements in guidance and practice** are 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.

Summary of actions 4-18:

- *Revise the Code for Crown Prosecutors to ensure that prosecutors take account of the context of domestic abuse and other forms of VAWG when deciding whether to prosecute; and establish an effective mechanism for challenging inappropriate prosecutions.*
- *Introduce a statutory duty for public authorities to adopt the practice of routine enquiry about domestic abuse, with training for practitioners and support for victims.*
- *Improve guidance and training for police, prosecutors, court staff, criminal defence lawyers, and judges and magistrates (in the criminal and family courts) about the dynamics of domestic abuse and other forms of VAWG and how to take it into account in proceedings, including through special measures.*
- *Amend Plea and Trial Preparation Hearings Parties Pre-Hearing Information Forms to include a box that criminal defence lawyers must tick if the defendant is a potential victim of domestic abuse.*
- *Implement legal aid reforms to improve access to justice.*
- *Ensure women and girls in the community, in custody and post-release have adequate support, including safe accommodation, and develop gender-specific risk assessment tools.*

- *Introduce training and guidance for children's social care and other statutory agencies to challenge the stigmatisation of criminalised victims.*
- *Invest in joint work between women's services, health, social care and criminal justice agencies to support women and facilitate disclosure of abuse, including services led by and for Black, Asian, minoritised and migrant women, and services for young women and girls and those with disabilities.*
- *Ensure appropriately qualified female interpreters are available at the police station and in court.*

D **Disaggregated data collection** improves understanding of the criminalisation of women and girls who are victims of domestic abuse and other forms of VAWG, including intersectional discrimination based on race, religion or immigration status and informs action to address inequalities.

Action 19: *Collect and regularly publish disaggregated data to improve understanding of the criminalisation of women who are victims of domestic abuse and other forms of VAWG, including intersectional discrimination based on age, race, religion or immigration status, and use this to inform action to address inequalities.*

E **A mechanism is provided to expunge criminal records** for crimes committed as a consequence of coercion, abuse and exploitation, or at least have them filtered from mandatory disclosure under the disclosure and barring scheme; and loitering and soliciting are decriminalised.

Action 20:

- *Introduce a legal process to allow for the expunging of criminal records for crimes committed as a consequence of coercion, abuse and exploitation, or for their filtering from mandatory disclosure.*
- *Decriminalise soliciting and loitering under section 1 of the Street Offences Act 1959.*

HUMAN RIGHTS FRAMEWORK

The international legal framework surrounding women and girls involved in offending who are victims of domestic abuse includes the provisions of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules), to which the United Kingdom is a signatory.[21] These Rules require the government to ensure that women in the criminal justice system who have experienced violence are identified, treated appropriately and receive the right support, and have their experience taken into account in sentencing decisions.

The Bangkok Rules require sufficient resources to be available for suitable community alternatives to custody, and the UN Special Rapporteur on Violence Against Women recommended in 2015 that the UK government should *"ensure that women's histories of victimization and abuse are taken into consideration when making decisions about incarceration, especially for non-violent crimes"*.[22]

"In many cases, the abuse will not even be disclosed until late on in proceedings, or indeed until after women have been convicted and sentenced

Also of relevance are the provisions of Convention on the Elimination of all forms of Discrimination against Women[23] and the Istanbul Convention[24], which requires governments to *"take the necessary legislative or other measures, in accordance with internal law, to ensure that there are appropriate mechanisms to provide for effective co-operation between all relevant state agencies, including the judiciary, public prosecutors, law enforcement agencies, local and regional authorities as well as non-governmental organisations and other relevant organisations and entities, in protecting and supporting victims and witnesses of all forms of violence covered by the scope of this Convention"* (Art. 18(2)).

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.

Despite existing legal safeguards, it nonetheless remains common practice for limited, if any, consideration to be given to women suspects' and defendants' experiences of VAWG in criminal justice proceedings. In many cases, the abuse will not even be disclosed until late on in proceedings, or indeed until after women have been convicted and sentenced.[25]

POLICY CONTEXT

The government's 2018 Female Offender Strategy established its aim to divert women from the criminal justice system where possible, and acknowledged the links between women's experience of abuse and their criminalisation. The government also aims to transform the response to domestic abuse, having recently passed the Domestic Abuse Act 2021 and introduced a new VAWG strategy, with a Domestic Abuse strategy and statutory guidance framework expected in 2022. It aims to improve the response to victims through its forthcoming Victims' Law, which was recently subject to consultation.

The government has expressed a wish *'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'*.[26] It has advocated a whole system approach to women's offending through its 2018 Female Offender Strategy[27] and accompanying guidance[28], and the cross-government concordat on women in the criminal justice system published in January 2021[29]. All these documents, as well as the Victims' Strategy published in 2018,[30] 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. Some limited investment has been made in services specifically aimed at women involved in offending who are survivors of domestic abuse.

The value of women's specialist services, using a relationship-based approach to help women address underlying trauma and receive practical support, is widely understood as essential for an effective response to women involved in offending who are highly likely to be victims of abuse, as explored in Advance's research.[31] As the National Audit Office has recently pointed out[32], significantly greater investment is needed to make sure adequate services are available throughout the country.[33]

The seminal 2007 Corston Review found that some women are coerced into offending by male partners and relatives.[34] The government's 2019 domestic abuse consultation response acknowledges coercive control as a cause of women's offending,[35] as does the statutory guidance framework and CPS legal guidance on coercive and controlling behaviour.[36] 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 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.

"Women's criminalisation as a consequence of domestic abuse and other forms of VAWG appears to be accepted as a fact of life...

Brief references were made to the criminalisation of victims of domestic abuse and other forms of gender-based violence in the government's VAWG strategy for 2016-20, in the Executive Summary in relation to provision of services (ensuring they are not excluded from service provision) and again in Chapter 4: Pursuing Perpetrators.[37] Two action points result for the National Offender Management Service (now HM Prisons and Probation Service) to '*support female offenders who are victims of violence and abuse to receive the interventions they need to stop offending and move into recovery for example by considering the models under development in Greater Manchester, Wales and London [the whole system approach to female offending*]' and to *'roll out a new helpline for female offenders who have been victims of violence or abuse so that they can obtain support while in custody and on release following the pilot helpline delivered at HMP Holloway'* (action points 80 and 81, both marked as 'ongoing to 2020'). It is not clear what progress has been made on these commitments.

The government's new VAWG strategy for 2021-24 was a critical opportunity to set out expectations and practical measures – including allocation of resources - to address victims' criminalisation decisively. However, despite detailed submissions from organisations including CWJ, Appeal, Women in Prison and Agenda, the government's new strategy fails to make any mention of women's criminalisation, merely referring to the Female Offender Strategy as a related document.[38] It is hoped that both the statutory guidance to accompany the Domestic Abuse Act 2021 and the domestic abuse strategy, expected to be published early in 2022, will address this and make commitments to legal and practice form.

The government-commissioned review of sentencing in domestic homicide cases, due to report in 2022, is to include consideration of the impact of existing defences in homicide cases. However this falls short of what is needed to examine the effectiveness of existing defences for other offences. There is also much that can and must be done without legislation, to achieve improvements in practice by all criminal justice agencies.

The government has so far rejected the need for any legislative reform to provide effective defences for survivors of domestic abuse who are driven to offend, while on the other hand expressing the hope that the law will evolve through caselaw to 'be more flexible'. The Domestic Abuse Act 2021 failed to protect victims from the risk of criminalisation, and excluded migrant women from protection from abuse. Despite widespread calls for reforms in law and practice, we are yet to see a strategic attempt to address the gaps in the law and failures in the criminal justice process that leave victims of VAWG unprotected and unfairly criminalised. There is a degree of complacency, which has seen government ministers arguing that existing checks and balances are sufficient, and that legislative reform would be contrary to the public interest.

In this way, women's criminalisation as a consequence of domestic abuse and other forms of VAWG appears to be accepted as a fact of life, or perhaps as a problem that is too difficult to solve. More worrying still are the government's proposals in the Police, Crime, Sentencing and Courts Bill which risk extending victims' criminalisation, particularly for Black, Asian and minoritised women, and young women and girls; and proposals in the Nationality and Borders Bill which will significantly limit the rights of trafficking victims and increase their risk of criminalisation and deportation.

"Headline figures do not address the fact that male victims are likely to have a male perpetrator

THE NEED FOR DISAGGREGATED DATA

The lack of disaggregated data about women and girls' criminalisation prevents an informed and constructive debate. In relation to women accused of using force against their abuser, the lack of gender disaggregated data perpetuates false assumptions and can distort policing responses. The way the data is currently presented is misleading. Without disaggregation, discussion is generally based on the assumption that male victim cases represent a mirror image of most female victim cases - heterosexual intimate partner abuse. However, as explained in our submission to the government's recent VAWG strategy call for evidence, the true picture is very different and far more nuanced when the limited available data is examined in more detail.[39]

For example, headline figures do not address the fact that male victims are likely to have a male perpetrator, and there is no data on what proportion of cases recorded as having a male victim or a female offender are cases involving counter-allegations and self-defence, where there is a dispute about who is the 'primary aggressor'. Ensuring that properly disaggregated data is gathered and published would create a more nuanced and helpful discussion and ensure better understanding of issues and responses in individual cases.

There is also a need for data to be collected and published as to the extent of cases in which individuals are arrested, cautioned, prosecuted or convicted in relation to any offence, where their offence took place in the context of domestic abuse. This should include exploration of guilty pleas and sentencing

All these data should be disaggregated not only in relation to gender, but also based on age, race, religion and nationality, in order to improve understanding of the criminalisation of women who are victims of domestic abuse and other forms of VAWG, including intersectional discrimination for Black, Asian, minoritised and migrant women, young women and girls, and those with disabilities.

HOW VICTIMS ARE CRIMINALISED DUE TO THEIR EXPERIENCE OF VIOLENCE AGAINST WOMEN AND GIRLS

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'.[40] Yet criminal law and practice still fail to protect those whose experience of abuse drives them to offend.

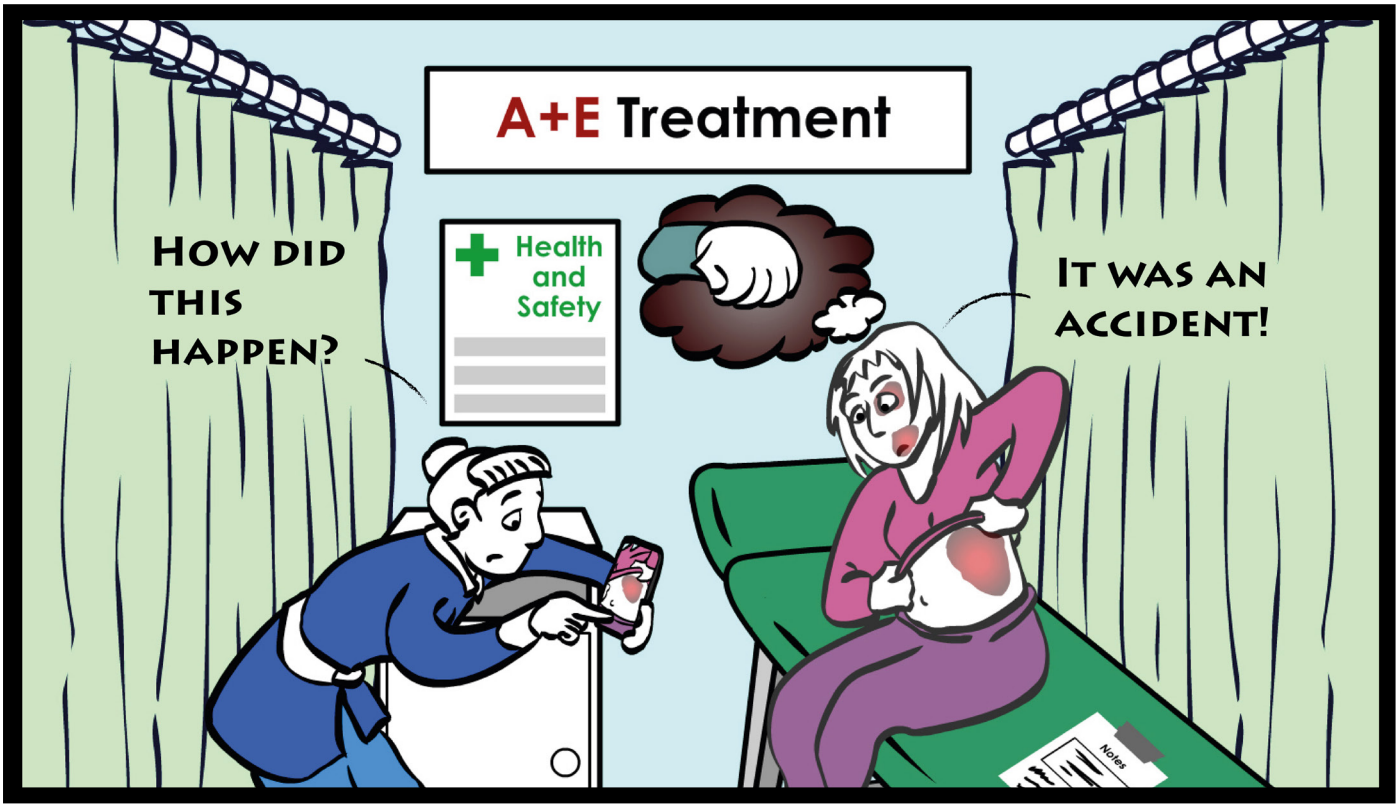
Most women who experience domestic abuse and other forms of VAWG do not become criminalised. However, nearly 60% of women in prison and under community supervision in England and Wales are victims of domestic abuse.[41] Of 173 women screened at HMP Drake Hall, 64% reported a history indicative of brain injury and for most this was caused by domestic violence.[42] Research by Prison Reform Trust (PRT), CWJ and others has shown how women's offending is often directly linked to their own experience of domestic abuse.[43] CWJ's casework reveals how survivors can also be criminalised as a result of their experience of other forms of VAWG. Domestic abuse practitioners taking part in our virtual roundtables 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.*
>
> Domestic abuse service provider

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.[44] The ways in which victims may be criminalised are wide-ranging.[45] 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.

There is limited quantitative data available on the extent to which women are prosecuted or convicted for offences committed in the context of domestic abuse. Women often plead guilty, making it complex to establish a complete picture of how women are criminalised. However, significant qualitative evidence is available from both women and frontline practitioners in domestic abuse services and criminal justice services.

Practitioners at our roundtables gave examples of women experiencing domestic abuse being prosecuted for offences ranging from child neglect to terrorism to possession of fire arms, as well as lower level offending. Far from being encouraged to disclose abuse, some participants commented that women are in fact advised against raising contextual domestic abuse in mitigation or in defence, because it is seen as making an excuse.



Jo Roberts' research has shown how 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.[46] Through interviews with women in contact with the criminal justice system, Roberts explored their means of responding to the power and control exerted within domestic abuse relationships. She identified four themes on a continuum of women's agency reflecting the sets of circumstances constructed by abuse perpetrators affecting whether agency was possible, ranging from subjugation to self-preservation, survival and subversion.

Police officer perpetrators of abuse may use their privileged position as a weapon to criminalise their victims, as shown in evidence gathered for CWJ's super-complaint about failures to tackle police-perpetrated domestic abuse.[47] Research by PRT 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.[48] It found that abuse by men lay behind the offending behaviour of most of the participating women.

"Police officer perpetrators of abuse may use their privileged position as a weapon to criminalise their victims

“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

Agenda has highlighted the prevalence of violence and abuse against women who are experiencing multiple disadvantage, a term referring to any combination of: homelessness, violence and abuse, substance misuse, poor mental health, poverty and contact with the criminal justice system.[49] Agenda explains that women and girls facing multiple disadvantage experience disproportionate and often hidden or overlooked forms of violence and abuse, and that they are often criminalised as a result to the violence and abuse they have experienced. Pointing to the ‘overstretched and under-resourced’ women’s services, they call for ‘ring-fenced funding for specialist women and girls’ services, and services led ‘by and for’ Black and minoritised women, Deaf and disabled women and LBTQ+ survivors’.

Convictions under the law of joint enterprise frequently fail to take account of contextual coercion and abuse. 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.[50]

HOW CRIMINALISATION AFFECTS BLACK, ASIAN, MINORITISED AND MIGRANT WOMEN

INTERSECTIONAL DISCRIMINATION CREATES A DOUBLE DISADVANTAGE

In their recently published 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.[51] Ivory, a woman with experience of the criminal justice system who was supported by Hibiscus, said:[52]

> *In prison there is a lot of discrimination and racism against Black and Asian women because of how we look and the colour of our skin.*

Hibiscus calls for publication of disaggregated data on gender-based violence and its links with Black, Asian, minoritised and migrant women's pathways into the criminal justice system. They also cite the need for training and awareness raising on barriers faced by these women, taking account of gendered analysis of race, faith and culture.

The Female Offender Strategy acknowledges the over-representation of Black, Asian and minoritised women in the criminal justice system.[53] Findings from the Ministry of Justice have shown, for example, that Black women and those from 'mixed ethnic' backgrounds are twice as likely to be arrested in comparison to white women.[54] Black, Asian and minoritised women face a double disadvantage in this context, including poor provision of services to meet their basic needs.[55] As Hibiscus Initiatives has reported, structural racism and socioeconomic inequalities intersect with gender inequality and place women at risk of further disadvantage.

COERCED OFFENDING

In research by Muslim Hands with 60 Muslim women in prison, 79% of women reported experiencing domestic abuse, with abusive and controlling experiences being linked to the offence in some cases.[56] Commenting on her earlier study of the experiences of Muslim women in prison, Sofia Buncy has noted:[57]

> *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.*

"Black, Asian and minoritised women report that they are frequently perceived as the aggressor when police are called out to a domestic abuse incident, before they are considered as a possible victim.

BARRIERS TO PROPER CONSIDERATION OF CONTEXTUAL ABUSE

The Traveller Movement has highlighted the overrepresentation of Gypsy, Roma and Traveller women in prison, and distinct barriers they face to disclosing domestic abuse and accessing support:[58]

> *Domestic abuse workers struggle to reach GRT women and fail to understand their specific needs, while GRT women are often reluctant to report domestic abuse to the police, or to social workers, due to long held mistrust of the authorities.*

Research by Hibiscus Initiatives reveals barriers that can be faced by Black women:[59]

> *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, minoritised and migrant women by many factors.[60] What she terms 'internal barriers' can arise from community dynamics and cultural and religious constraints. Concepts of honour and shame can inhibit any disclosure of abuse, as can fear of violent reprisals, fear of isolation and social ostracism, and concerns about the impact on children and siblings. A practitioner taking part in one of our roundtables agreed, commenting:

> *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.*

Patel explains that women who are already isolated may lack awareness about their rights and services that might help them, and may find lack of English language is a barrier to exercising their rights and getting support. They may lack financial independence and experience low self-esteem and poor mental health.

'External barriers' to disclosure can include immigration and asylum laws and the hostile environment for migrants, which carries the very real fear of destitution and deportation. Institutional cultures of disbelief and indifference can all contribute to women's unwillingness to disclose abuse, while racial discrimination leads to unequal treatment, negative stereotyping and "over-policing". By the same token, cultural and religious sensitivity can lead to non-intervention or "under-policing" of abuse perpetrated on women.

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.[61] Others may face deportation to countries where they are at further risk of violence and abuse.

FAILURES TO RECOGNISE ABUSE AND DISCRIMINATORY ATTITUDES

Frontline domestic abuse practitioners working in services led by and for Black, Asian and minoritised women told us about 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.*

One women's service provider noted that Black, Asian and minoritised women report that they are frequently perceived as the aggressor when police are called out to a domestic abuse incident, before they are considered as a possible victim. Another participant described how a minoritised client had been disbelieved in favour of her abusive white partner, leading to the removal of her children.

POOR QUALITY INTERPRETING AND NEED FOR CRIMINAL JUSTICE STAFF TRAINING

Experts at our roundtables agreed that there are many challenges for the engagement and understanding of duty solicitors with Black, Asian, minoritised and migrant women defendants, particularly where interpreting is needed:

> *Having observed a number of court cases particularly at the Magistrates' Court, there is a huge issue and many challenges for engagement of the duty solicitor with the defendant particularly where interpreters are needed. There is not an understanding around BME communities. The quality of interpreter provision has got worse. When someone is refused bail the chances of any engagement with legal representation goes down and down because there is no funding for the solicitors to do visits to the women in prison. It depends on very limited contact pre the hearing of the trial or the next hearing.*

Hibiscus Initiatives have emphasised 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[62] – an issue that was also highlighted by a practitioner at our 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.*

RISK OF DESTITUTION AND DEPORTATION FOR ABUSED MIGRANT WOMEN

The risk of criminalisation for migrant women is particularly acute, in light of their vulnerability to destitution and deportation and lack of protection from abuse.[63] The Female Offender Strategy recognises the 'unique challenges' for migrant women, who are over-represented in prison receptions, particularly amongst those held on remand.[64] These women are likely to receive poor levels of support while facing the risk of deportation, lack of recourse to public funds and consequent vulnerability to poverty, homelessness, coercion and abuse.[65]

The Domestic Abuse Act 2021 excludes migrant women from protection, leaving them more vulnerable to abuse and with significant barriers to disclosure.[66] The Step Up Migrant Women campaign calls 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 – something that is reflected in Maia's story below (page 46).

The Tackling Double Disadvantage 10-point Action Plan calls for an end to information-sharing between police and immigration control to prevent migrant women being made more vulnerable to criminalization, and reversal of plans under the Nationality and Borders Bill that would unfairly criminalise migrant women who are victims of trafficking, modern slavery, or domestic abuse and expose them to destitution and deportation without due process.[67]

The implications of criminalisation are even more severe for women without British citizenship because, even if they came to the UK as children, they may be liable for deportation if they receive a sentence of one year or more. This occurred in recent case discussed by a roundtable participant:

> *We had a young Muslim woman who was charged with what we believed was a clear act of self-defence, having been a very young victim of domestic abuse and brought over to the country as a very young wife to a man three times her age who locked her in the house, beat her, sexually abused her. He came at her; she grabbed a knife, and he got a cut on his hand as a result, and she was charged with GBH and ended up spending two years in prison which took her over the 12-month custody limit which of course then triggered deportation proceedings. She had a young child and all of the knock-on effects…*

> *When we requested through subject access her records from the Police, it showed a long history of Police call outs where she was the victim, where she had been admitted to hospital with injuries. She was the subject of violence and crime much worse than what happened to her and yet the decision of the CPS was to charge her and to prosecute her because there was a visible injury on the night in question when the Police showed up.*

Another practitioner recalled a case in which it was accepted by an asylum tribunal that a migrant woman had been the victim of a forced marriage, as well as assaults and threats by her husband. She was nonetheless arrested, charged and convicted for entering a sham marriage. No proceedings were brought against her husband.

"92% of migrant women have reported threats of deportation from the perpetrator

PROPOSALS IN THE NATIONALITY AND BORDERS BILL WOULD PUT VICTIMS OF TRAFFICKING AND ABUSE AT RISK

The Female Offender Strategy makes no reference to the experiences of trafficked women in the criminal justice system, who remain at risk of inappropriate criminalization. This includes British as well as foreign national women, whose existing protection will be significantly diminished by the proposals in the Nationality and Borders Bill. This is a significant gap which requires attention at national and local level.[68]

Under current government proposals, the Nationality and Borders Bill would significantly limit the rights of refugees and increase the risk of criminalisation. These provisions are likely to have a particularly severe impact on refugees who are victims of abuse and exploitation.[69] A coalition of leading anti-slavery organisations has called on the government to reverse its plans under the Bill to:[70]

- Penalise trafficking victims who disclose their exploitation too late (despite the fact that late disclosure is a known feature of trafficking and modern slavery)
- Ban victims with convictions for certain offences, or foreign national victims who have received a prison sentence of 12 months or more, from accessing support – even if their conviction relates to their exploitation, and even if committed under duress.

According to ATLEU:[71]

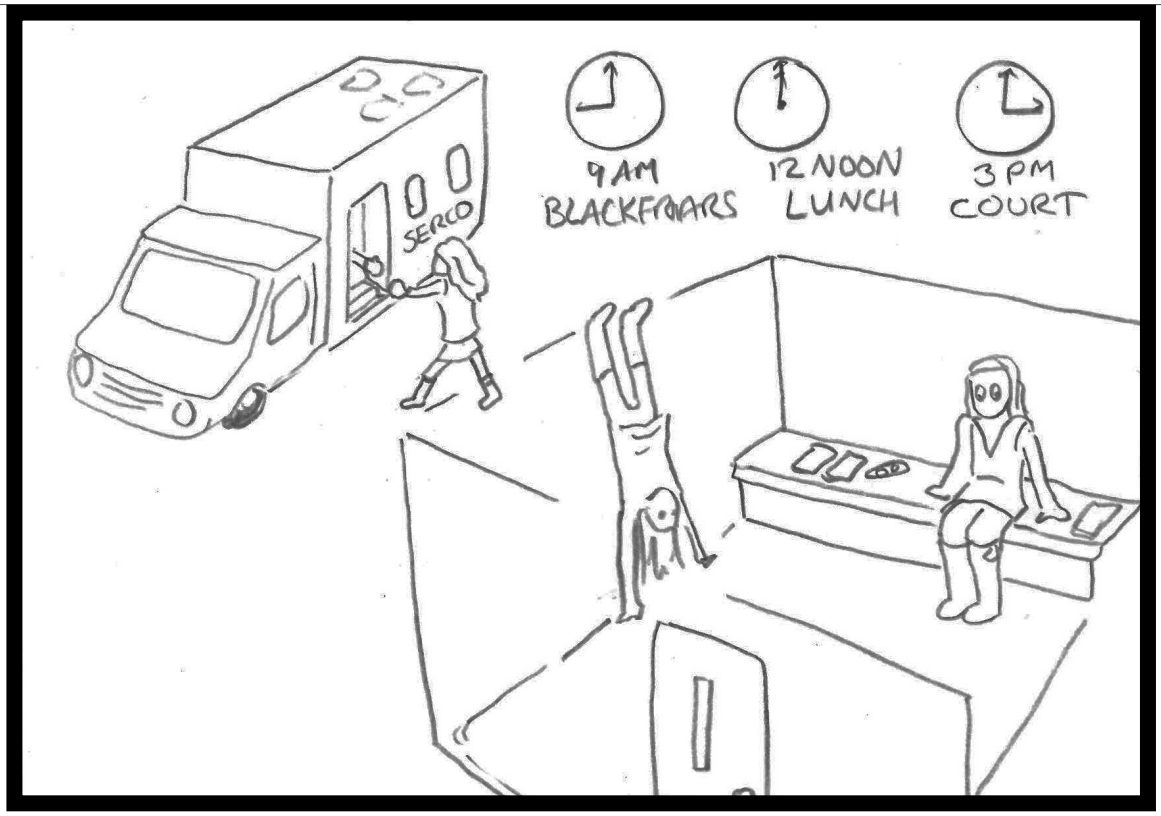
> *The proposed clause will create a category of survivors of modern slavery who will be denied fundamental protections which enable them to approach authorities for help and to cooperate with a police investigation. Instead, the government will be able to remove this category of survivors from the UK during their crucial recovery and reflection period.*

These measures will effectively penalise victims of modern slavery for how they enter the country, and for existing vulnerabilities, creating additional barriers to identification, safeguarding, support and access to justice. They should be withdrawn.

HOW CRIMINALISATION AFFECTS GIRLS, YOUNG WOMEN AND CARE LEAVERS

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.[72] Agenda reports that between three-quarters and 90% of girls (under 18) in the criminal justice system may have experienced abuse from a family member or someone they trusted.[73] Care experienced young women may be more vulnerable to violence and abuse, and less able to access support.[74] Agenda calls for a trauma-responsive, whole system approach to responding to young women and girls in contact with the criminal justice system, who are highly likely to be victims of abuse[75], and whose needs have historically been overlooked or misunderstood.[76]

"between three-quarters and 90% of girls (under 18) in the criminal justice system may have experienced abuse from a family member or someone they trusted.



Plans to develop a Young Women's Strategy for prisons are welcome.[77] However, 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. These proposals should be withdrawn:[78]

> *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.*

CASE EXAMPLES AND WHAT NEEDS TO CHANGE IN PRACTICE

OVERVIEW

The absence of effective defences presents a significant barrier to improving the response to victims whose alleged offending results from their experience of domestic abuse and other forms of VAWG. Nonetheless, even without law reform, changes in culture and practice could help to address some shortfalls.

Government ministers' statements during parliamentary debates suggest a degree of complacency which does not reflect the reality experienced by victims facing criminal proceedings and fail to understand the barriers to disclosure of abuse, as illustrated here:

> *…where a person accused of a criminal offence has been subjected to domestic abuse, this will be considered throughout the criminal justice system, from the police investigation, through the CPS charging decision, to defences under the existing law, and finally as a mitigating factor in sentencing…defendants … need to make sure that their legal representatives and the CPS are aware, as soon as possible, of whether they have previously been a victim of domestic abuse and provide details of their domestic abuse history, as this will have an impact on any charging decisions and when considering guilty pleas.*
>
> Lord Wolfson, Parliamentary Under Secretary of State, Ministry of Justice, Domestic Abuse Bill debate[79]

The reality is that the criminal justice process is not currently effective to facilitate victims' disclosure or indeed proper consideration of any abuse disclosed by a victim suspect/defendant. This may be summarised as systemic failures to:

- Identify where suspects and defendants are victims of abuse;
- Protect and support such victims; and
- Take proper account of their experience of abuse in criminal proceedings against them – particularly in decisions to arrest, detain, prosecute and convict. Problems also arise in relation to sentence progression, rehabilitation, parole and recall.

The anonymised case studies included below have been taken from recent legal enquiries received by CWJ, unless otherwise indicated. All names have been changed. These stories illustrate the variety of ways in which victims of domestic abuse and other forms of VAWG can be inappropriately criminalised. They involve decisions made by the police, CPS and courts that fail to take proper account of contextual domestic abuse and other forms of VAWG. Some cases involve victim defendants pleading guilty. Most arise from allegations of harassment or assault made against the victims by their abuser, or coerced offending. Some cases arise from inappropriate police treatment of victims while their allegations against their perpetrators were being investigated. The cases fall into five categories:

1. Counter-allegations by victim's abuser of use of force
2. Counter-allegations by victim's abuser of harassment and use of Non-Molestation Orders
3. Manipulation of criminal justice and family law proceedings by police officer perpetrators
4. Coerced offending
5. Police actions criminalise (or threaten to criminalise) victims.

DECISIONS TO ARREST, CAUTION OR PROSECUTE

We examine first of all how police and CPS practice can contribute to victims' inappropriate criminalisation, considering each case category in turn.

1. Counter-allegations by victim's abuser of use of force

Perhaps the most commonly cited way in which women are criminalised is where they use force against their abuser and face arrest or prosecution as a result. CWJ has received a number of referrals of such cases. Difficulties in relying on self-defence are explained below (page 69). Emma's case makes clear that counter-allegations of assault can also lead to criminalisation in cases of sexual violence.

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 offence, 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.

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.

TRISH

Extract from blog by Sarah Beresford (PRT), published by Russell Webster on 4 June 2020:

Roxy (aged 16) knew this argument was different. "I'd heard my stepdad screaming and shouting at my mum loads of times before, and I knew he hit her, though we never spoke about it. But this felt really scary... I came downstairs, and he had her by the throat in the kitchen. It all happened really fast... I just remember mum picking up a frying pan and whacking my stepdad over the head with it." Neighbours called the police; Roxy's stepfather was taken to hospital with a serious head injury; and her mum, Trish, was charged with Assault occasioning Actual Bodily Harm which resulted in a 6-month custodial sentence. Her history of experiencing years of domestic abuse at the hands of her partner was not mentioned in the pre-sentence report; like many women, Trish had been afraid to disclose what was happening for fear that her three children would go into care. Roxy concluded, "I lost my mum twice over."*

* All names have been changed.

EVA:[80]

Eva was convicted of GBH in 2015 and sentenced to 8 months in prison. Eva (9 stones) says her then partner Mark (20 stones) had backed her into a corner and she threw a hairdryer at him. She had no previous convictions and had previously reported him for abuse. The investigation took six months before charge and Eva repeatedly wrote to police and MPs explaining it was self-defence. She wanted to press charges against Mark but was told she had to wait until after the trial. Her bruises were recorded by the booking in officer, but not photographed.

Prosecuting counsel claimed Eva was 'controlled and controlling', hence her appearing calm on the stand. Eva was an Ofsted inspector and describes herself as 'being used to giving hard messages calmly'. She is a refugee and 'used to talking about shocking events calmly'. The judge failed to direct the jury as to why bruises on an Asian woman would not show as clearly as if on a white person. Eva complained to the IPCC, but they couldn't investigate until after her trial. Their subsequent investigation found some 'learnings'.

MARTHA:[81]

Martha met her partner when she came to Britain from another country. They were together for around two years and have three children together. Martha describes the relationship as difficult and unpredictable. Martha's partner was highly manipulative and would often disappear for days at a time. Martha became isolated, as her partner would often tell her that people didn't like her. She remembers being left alone with three young children and no friends or family in the country. The relationship was often violent but this was never reported as Martha would sometimes retaliate physically, and she felt that she had no right to tell the police.

Martha developed an alcohol addiction early on in the relationship. At first this was something they did together but it quickly became a way for her to cope. Martha was convicted of GBH and given a two year suspended sentence after attacking her partner with a knife in self-defence. She had never previously been in contact with the criminal justice system. The offence occurred after her partner was violent towards her and she wanted him to leave her alone.

Martha separated from her partner but continued to have some contact with him, as he was involved with their children and was therefore allowed into her property when her brother was there. On one occasion, Martha's ex-partner became aggressive and she pushed him away, leading him to call the police and have her arrested. Although he did not press charges, the police still wanted to prosecute. As the victim was the same person as in Martha's index offence, the case went to the crown court and Martha's suspended sentence may be activated.

The past few months have been extremely difficult for Martha, as she faces potentially being taken away from her children, despite her probation officer and social services advocating against that. The courts are not set up with a childcare provision which means that Martha has been faced with the option of either missing her court case or going to court with her children. She is currently awaiting her fifth court appearance for this offence as it has been adjourned a number of times mainly due to her ex-partner not showing up. Martha's support worker feels that she has been let down by the system at every stage, most recently with the police going ahead with prosecution with such limited understanding about her circumstances and the reasons that led to the event.

Inappropriate arrests of victims

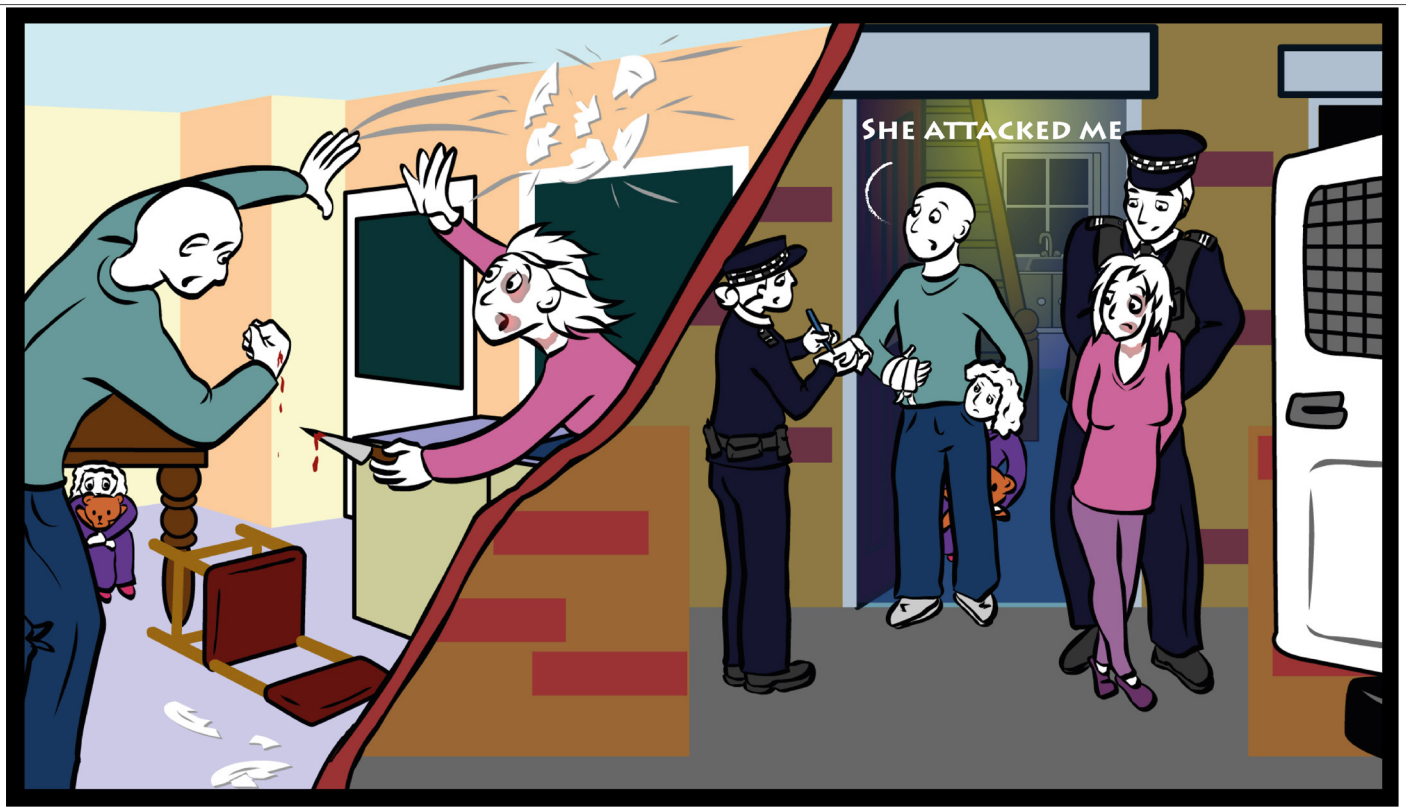
Where counter-allegations of use of force arise, there is a need for detailed guidance for all police forces on how to establish who is the primary aggressor. Where police get it wrong and arrest the true victim this has significant long-term ramifications, even when the case against her is closed soon after.

Research by the Howard League for Penal Reform, based on evidence from five police forces, showed that 40 per cent of arrests of women resulted in no further action, suggesting that 'thousands of women each year are arrested, held in police custody and then released without charge, which is an unnecessary and wasteful use of police resources'.[82]

The research also found that around half of arrests of women for alleged violence resulted in no further action, and highlighted the need for the police to respond to incidents of alleged violence in a gender-informed way. The Howard League note that there is a division between women seen as victims and those seen as perpetrators, and suggest that the National Police Chiefs Council should establish a single lead on women to address this, a recommendation we support.

These research findings echo 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.[83]

"40 per cent of arrests of women resulted in no further action, suggesting that 'thousands of women each year are arrested, held in police custody and then released without charge



The impact of arrest

Significant damage is done by inflicting the trauma of the arrest – particularly where it is witnessed by children – and any subsequent detention. The fact of the arrest may have far-reaching impacts on child custody decisions, housing and other aspects of a survivor's life following relationship breakdown. In one case reported to CWJ by a frontline worker, where the woman was arrested instead of the man at the scene due to counter-allegations, she was put on bail conditions and had to stay in a refuge. The case against her was closed after a few weeks but in the meantime the children stayed with him in the family home and it then took her a year going through the family courts to get an order that they should live with her.

The experience of arrest is likely to leave the victim unlikely to seek help from the police in future and is left effectively unprotected. She may well face difficulties in being recognised as a victim by other agencies due to her status as an 'offender' or 'perpetrator'.

Police guidance

College of Policing Authorised Professional Practice (APP) includes guidance on identifying the primary perpetrator in the event of counter-allegations,[84] 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. For an example of good practice, the Metropolitan Police has helpful guidance within its "Domestic Abuse Q&As".[85]

A women's service provider commented that pressure on the Police to improve their response to VAWG, for example from inspectorate reports, tends to be interpreted as a need to make arrests, rather than taking a nuanced approach and correctly identifying the primary aggressor. This can lead to unintended consequences for women who are victims of abuse but treated as perpetrators in the event of counter-allegations. She also pointed to a lack of training:

> *There is not much training for police on the frontline about trauma responses.*

This is echoed in research by Advance, which also discusses the devastating impact on children who witness their mother's arrest.[86] The same practitioner noted that Domestic Violence Protection Notices and Orders are often used to create space between the victim and the perpetrator, but are sometimes imposed on the victim rather than the perpetrator. Even if no prosecution ensues, that victim is then labelled as an 'offender' on the system and this is very difficult to overcome.

Diversion away from the criminal justice system

The Howard League's research points to examples of good practice where forces are successfully reducing unnecessary arrests and diverting women away from the criminal justice system and into support:

> *Some women come into conflict with the police when they need support. Rather than arresting them, police should be diverting them to services that can address their needs.*

In some parts of the country including the West Midlands, a conditional caution may be made available for women accused of domestic abuse offences, but in most areas such women are excluded from these out of court disposals. Even where they are available, this will still leave women with a criminal record.

Inappropriate prosecutions

Evidence from our caseload and other research makes clear that prosecution practices are inconsistent and may not follow such CPS guidance as there is available, as can be seen in the case studies above and Maia's case below. Where there is an inappropriate prosecution, defence solicitors under considerable pressure with limited resources may not argue for the case to be dropped, and challenging decisions is difficult in any event. Such arrests and prosecutions result in statistics which may in turn give a distorted picture of male versus female victimisation.[87]

CPS legal guidance

CPS legal guidance on domestic abuse includes a section on self-defence and counter-allegations.[88] However despite the existence of these guidance documents, the referrals we have received make clear that practice on the ground is inconsistent to say the least. Participants at our roundtable 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.*

Maia's case 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.

MAIA

Maia is a migrant woman who was arrested in March 2020 for common assault and assault by beating. The complainant was her husband (H) and father of her two daughters, A and B (then aged 7 and 3 respectively). H alleged that Maia had hit his arm over breakfast. Slight reddening was said to be visible to police who attended later that day. A further argument was said to have taken place later on the same day after H took their daughter to school, because he refused Maia's request for some money. He called police alleging fear for his safety and that Maia had threatened to hit him with a bowl.

These incidents arose against a background of longer-term domestic violence by H against Maia, first reported to a third-party agency about a year earlier, when Maia made a self-referral to a domestic abuse service following an attempt by H to strangle her. The case was referred to social services and the local MARAC (Multi-Agency Risk-assessment Conference). Notes collected by the domestic abuse service include references to Maia having been punched, held down, strangled, threatened and otherwise verbally abused, and notes visible injuries. The MARAC referral form records that H used Maia's immigration status and language barrier as a way of controlling her, telling her that she had to stay with him because of her visa, and that he had been physically violent since she was pregnant with their second child.

During the year before her arrest, Maia called the police twice after assaults by her husband. On both occasions she decided not to pursue charges because H was making threats about her visa status and access to the children. Police documents indicate further reports indicating controlling behaviour and/or violence by H during that year.

Maia raised self-defence both upon her arrest in March 2020 and in interview. She did not speak particularly good English at the time of her arrest, yet was questioned at the scene. Body worn video shows that throughout, she was tearful and said she was scared and felt trapped. She tried to tell police what happened but was repeatedly told not to say anything else because they were recording and that the officers were "not the right people to be speaking about this".

At interview Maia relied principally on a prepared statement where she raised self-defence and briefly mentioned previous incidents of assault.

Maia was detained for some 12 hours and then released on bail with conditions not to contact her husband or her two young children (the youngest of whom was still breastfeeding at the time). There is no indication in any of the police documents that any consideration was given to the background of domestic violence against her, including in setting the bail conditions. The only record made in connection with domestic violence against Maia is a brief proforma note in the custody record. Maia had no other family in the UK, had nowhere to go and was effectively made homeless as a result of the bail conditions. She was housed in a temporary women's refuge after a brief period of financial support from her family abroad.

Maia repeatedly contacted police in distress to seek permission to see her children. Bail conditions were varied six days later to allow this, but the first time she was actually permitted by H to see her children after the incident was in April, more than 30 days after her arrest. She was prohibited by her bail conditions from resuming regular contact with her children until after the criminal proceedings concluded several months later.

Maia was on police bail for 2-3 months before being charged. During that period, her arrest and the risk of criminal proceedings were used by H as a further way to coerce and control her. He sought, for example, to pressure her into an agreement that would allow him full custody of the children and only allow her a very small sum by way of a divorce settlement. On one occasion, he emailed police to indicate that he was seeking to negotiate with Maia's solicitors in relation to the divorce agreement, but that he would want to pursue charges if her solicitors were not receptive to his terms. On another occasion he made contact with Maia to arrange for a meeting so she could see the children and then called police to "prove" she had breached bail by meeting them at the park.

Maia was eventually charged by the CPS, and was convicted of assault by beating and acquitted of common assault in the Magistrates Court. She appealed and, nearly a year after her arrest, the CPS confirmed they would not be contesting the appeal on public interest grounds, in order to avoid her daughter having to give evidence in court. The appeal was therefore allowed, and the conviction was quashed.

2. Counter-allegations of harassment and Non-Molestation Orders

There is no guidance for police to interrogate counter-allegations of harassment that may be made by domestic abuse perpetrators against their victims. Debbie's case illustrates how police officers may use their contacts within the police to extend their control over their victim, as seen in evidence submitted as part of CWJ's super-complaint for failures to tackle police-perpetrated domestic abuse.[89] Nina's case shows how applications in the family court for Non-Molestation Orders can be used to the same end. Consideration should be given to introducing safeguards to prevent the abuse of family law proceedings for this purpose.

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.

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.

3. Manipulation of criminal justice and family law processes by Police officer perpetrators

We have been made aware of a number of cases in which a police officer perpetrator appears to have abused his powers or contacts within the police in order to criminalise the survivor. This can be seen powerfully in Margaret's story, as well as those of Debbie and Sophie (pages 48 & 57). These cases should be seen in the wider context of failures by forces to properly investigate allegations made against their officers. This is the subject of a super-complaint by CWJ, submitted in March 2020 and currently under consideration.[90]

MARGARET

Margaret was arrested several 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.

4. Coerced offending

It is recognised in statutory guidance on coercive and controlling behaviour that victims may be coerced by their abuser to commit offences. These offences can also relate to women's attempts at survival and subsistence in the context of financial abuse:

> *[Victims'] resources are drained and they have no option…*
>
> Domestic abuse service provider

No defence for coerced offending

Whereas victims of trafficking who are forced to offend have a statutory defence available (other than for excluded offences, and now under threat from proposals in the Nationality and Borders Bill), there are no effective defences currently available to victims of domestic abuse facing the same situation.[91] In many cases public interest considerations could nonetheless properly lead to a decision not to prosecute or to divert from the criminal justice system. However, in practice, all too often, this does not occur. Where such cases are prosecuted, women are under significant pressure to plead guilty, particularly if they are primary carers of children. Inappropriate prosecutions are difficult to challenge, as explained below.

No police or CPS guidance on non-prosecution for coerced offending

In these cases, where women are not arrested at the scene 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 Behaviour[92], and the Home Office Statutory Guidance Framework on Controlling or Coercive Behaviour[93] 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.*

However, this is not matched by a statutory defence for such coerced offending. 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[94], 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 is also an issue in local authority prosecutions, as seen in Naomi's case below.

NAOMI

Naomi was in an abusive relationship for twelve years. Her partner was frequently physically violent. He tried to strangle her three times over three years. He kicked, punched and slapped her, mainly on the head and ears. He humiliated her in front of friends, called her abusive names and manipulated her to do things for him. She tried to avoid upsetting him. The abuse continued after she had ended the relationship. On one occasion, he beat her over the head with a large plastic water pipe and dragged her over gravel by her hair, in front of their five year old daughter. She reported this to the police, who arrested her ex-partner, released him without bail conditions, and subsequently decided to take no further action.

Naomi's abuser bred horses and he pressured her to help him with the paperwork. He had no phone or bank account and could not read or write. During their relationship she took responsibility for the animals on paper after he was prosecuted for animal welfare offences and banned from keeping horses. She had no part in looking after the animals which he kept some miles away. After his ban was lifted, Naomi took a step back so that she could detach herself from him. Shortly before their separation, the local authority prosecuted him again for animal welfare offences. The local authority knew she was not the owner, but because she had paid for some of the horses' microchips and sent some emails for her ex-partner, they prosecuted her as 'co-keeper'. The vet's account was also still in Naomi's name, as they refused to remove her name from the account unless her ex-partner spoke to them, and he would not do this.

"At the time, I was oblivious as to the extent of my abuse, or that it was abuse and only mentioned it to my solicitor as an aside."

Naomi was prosecuted for animal welfare offences. On her first appearance in court, she was seated next to her abuser as co-defendant. She subsequently pleaded guilty in order to avoid the trauma of appearing in court again alongside her abuser, because she needed to look after her young daughter, and in order to avoid the risk of imprisonment.

LARA[95]

Lara was convicted of conspiracy to defraud in 2016 and sentenced to 6 years and 7 months. She had no previous criminal history. Lara struggled for years with abusive partners, drug and alcohol dependency and poor mental health. Her boyfriend at the time of the offence, later her co-defendant, came into her life as her drug dealer. He kept her high on cocaine and alcohol, dependent on his cash, and belittled her daily. She attempted suicide 5 times and was sectioned twice. While she was in this vulnerable state, he ran a timeshare fraud scheme from her bank accounts. When she became aware of the fraud, she did nothing, as she was dependent on his supply of drugs.

When she found out he had been giving her 14-year-old daughter cannabis, it was the last straw and Lara called the police and told them about the fraud. Lara was arrested and later bailed to a women's refuge. She successfully completed rehab in the two years it took her case to come to trial. Despite her co-defendant supporting her defence by giving a statement saying how little involvement she had in the crime, as the fraud was run from her bank account, she was found by the judge to have benefitted from the full £1m that was run through it and sentenced as a principal conspirator. Lara's defence team did not feel she had strong enough evidence to run a duress defence.

Lack of training for police and prosecutors

As a lawyer taking part in one of our roundtables commented, the police need training about investigating the context for any offence of which a woman is accused to check if there is contextual abuse. Domestic abuse training for both 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. As Working Chance have observed:[96]

> *…there is still a lot of pressure and stigma that might prevent a woman from seeking help or even admitting that she is a victim of domestic violence. Many women may feel ashamed, or are scared of repercussions from their partner or community if they speak out. Some fear losing custody of their children. Others still are afraid they won't be believed.*

Only a conscious process based on an 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. Learning should also be drawn from specialist domestic abuse court processes, in which specialist Court Co-ordinators support the police and prosecutors to work towards a just outcome.[97]

Revisions needed to the Code for Crown Prosecutors

Even in the absence of guidance, contextual abuse 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. The Code for Crown Prosecutors requires consideration of whether there is sufficient evidence for a realistic prospect of conviction (the evidential test). If so, they must consider whether prosecution is required in the public interest (the public interest test). The Code sets out that this should include an assessment of the level of culpability of the suspect, and states:[98]

> *A suspect is likely to have a much lower level of culpability if the suspect has been compelled, coerced or exploited, particularly if they are the victim of a crime that is linked to their offending.*

However, published evidence and CWJ's casework experience make clear that this frequently does not occur. The Code needs to be revisited to make clear what is required in order to ensure contextual domestic abuse is taken into account in decisions to prosecute. Just as there is an additional code for crown prosecutors about people who are mentally unwell, there should also be a code for women and for victims (or potential victims) of domestic abuse and other forms of VAWG who are accused of offending.

"Defendants facing prosecution for making a false allegation of rape or sexual violence lose all the benefits given to rape victims in trials, including anonymity and guidance on rape myths and stereotypes

A statutory duty to make enquiries would inform public interest considerations

We support Agenda's Ask and Take Action proposal for a statutory duty on public authorities to ensure frontline staff make trained enquiries into domestic abuse, backed by sufficient funding and a surrounding framework of support for victims.[99] As APPEAL have pointed out, a duty to make enquiries would be beneficial 'at every stage of contact with the criminal justice system, but in particular for the police and prosecution so that they are consistently able to weigh up the public interest to prosecute in cases where women may have been victims of domestic abuse', but would need to be balanced against the need to 'avoid re-traumatising survivors of abuse'.[100]

Participants in our roundtable agreed that a structure is needed around disclosure to provide protection for victims and build their confidence to disclose abuse. A lawyer noted there is no consistent framework to support disclosures of abuse at the police station:

> *If a disclosure is made, there is no mechanism to put help in place.*

The response to trafficking and 'county lines' shows change is possible

The processes put in place to respond to victims or potential victims of county lines offending or cuckooing[101] show that change is possible, as pointed out by one of our roundtable participants:

> *Police have got better at recognising vulnerabilities around organised crime. So there is the possibility of creating similar mechanisms for domestic abuse victims.*

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. 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. These processes should be built on and replicated in the context of domestic abuse.

5. Police actions criminalise (or threaten to criminalise) victims

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 and concerned about her career, Edie decided to withdraw her allegations, and the case was closed.

Threat of criminalisation for false allegations

CPS guidance is available for cases in which prosecution is being considered in relation to apparently false allegations of rape and other sexual offences. The guidance states, 'Prosecutions for these offences in the situations above will be extremely rare and by their very nature they will be complex and require sensitive handling.'[102] However Edie's case suggests this guidance is not consistently followed in practice.

There are many reasons why allegations of sexual assault may not be found credible in the context of applying the evidential test, which requires a realistic prospect of conviction at the very high criminal standard. In many instances, as is well documented, this may include a culture of disbelief and failure to recognise the impact of abuse which may lead survivors to give inconsistent accounts. However, even in cases where there may be apparent reasons to prefer the alleged abuser's version of events, unless there is evidence of malicious intent, it appears inappropriate to threaten or pursue prosecution.

Defendants facing prosecution for making a false allegation of rape or sexual violence lose all the benefits given to rape victims in trials, including anonymity and guidance on rape myths and stereotypes. They should remain entitled to these protections which have been devised in recognition of the prejudice complainants in rape cases routinely experience. Defendants should be regarded as innocent until proved guilty, but they may be more likely to be found guilty where they are denied protection from those who hold beliefs which are infected by a culture of victim blaming and other rape myths and stereotypes. The absence of guidance on rape myths and stereotypes was recognised by the Court of Appeal in R v Beale.[103]

Criminalisation of victims exhibiting distress

Najma and Sophie's cases, below, both illustrate failures by the police to implement a trauma-informed response to victims of gender-based violence. There is a need for better training and accountability to ensure the police are equipped to respond appropriately to victims 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.

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.

CHALLENGING INAPPROPRIATE PROSECUTIONS

In many of the cases we have seen, the decision to proceed with a prosecution is entirely inconsistent with CPS policy statements in respect of VAWG. However, 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. In such circumstances there is no legal avenue to challenge the decision to prosecute, other than to make submissions on abuse of process within the criminal proceedings. Yet many such decisions may not meet the threshold for an abuse of process, despite the fact that they fail to take account of their own policy statements and practice guidleines. Public interest considerations may not give rise to an abuse of process argument. As one participant in our roundtable commented:

> *It is virtually impossible to succeed in challenging a decision to prosecute using judicial review.*
>
> Criminal defence barrister

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. One lawyer taking part in our roundtable noted that duty solicitors are so under-resourced, women are likely to be treated in a 'factory' manner, without looking under the surface. Lawyers need training about these issues, and might benefit from a checklist of points to consider and investigate when representing women who may be victims of domestic abuse and other forms of VAWG.

Yet however well informed lawyers may be, the absence of an effective mechanism to challenge inappropriate prosecutions makes prosecutors unaccountable for poor or biased decision making. This must be addressed by creating an effective process for challenging these decisions.

COURT PROCEEDINGS

CWJ's recent research on the state response to women who kill their abusers revealed multiple barriers throughout court proceedings which prevent women defendants' experiences of VAWG being taken properly into account.[104] APPEAL have pointed out:[105]

> *The harms of VAWG are often perpetuated and compounded by the inappropriate criminalisation of women who are victims of abuse and charged with crimes linked to their abuse. Current safeguards are not doing enough to divert such women away from prosecution. They are inept at uncovering their histories of trauma through the court process and make it exceptionally hard for women to overturn unjust decisions.*

The increasing digitisation of criminal justice proceedings is likely to add a further barrier to facilitating disclosure and a trauma-informed response. Although our research published last year concerns the very small number of women who kill, 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, particularly in cases of coercive control. The problem of a victim identifying the perpetrator's behaviour as abusive and making a disclosure can be exacerbated for Black, Asian, minoritised and migrant women, where controlling, abusive and violent behaviours may intersect with other cultural factors and internal and external barriers, 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 can be 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 genuine loss 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.

Barriers to participation in court proceedings

Where prosecution is pursued in a case involving alleged offending arising from domestic abuse, there is likely to be significant pressure on women to plead guilty in order to avoid the trauma of a trial and increase the potential leniency of their sentence, particularly where they are primary carers of children. Childcare considerations during proceedings can also be a factor.[106] This is what happened in Naomi's case (page 51). Naomi was told by the judge that if she put in an early guilty plea, she would not go to prison. She was advised that it would be hard to prove that she was not a co-keeper of the animals. The obstacles to her defending herself were overwhelming, and she therefore pleaded guilty:

> *So, my choice was to sit in the dock with my abuser for the predicted 2-3 week trial, explaining, in front of him and everyone else, why I had gone along with everything or to plead guilty to something that I had not done. I chose to plead guilty, I was not well enough to make the 66 mile round trip every day, I could not have afforded to do it, I had nobody to look after my youngest daughter (5 yr old), I was also not well enough to sit in court all day, every day and most of all, I simply could not face sharing the dock with my abuser.*
>
> *Sometimes I wish I was strong enough to [plead not guilty].*

For women accused of using force against their abuser, it is very difficult to rely on self-defence, and there is no other defence available. Women are then left at the mercy of the court to show leniency in sentencing. However, in many cases women are sentenced to custody without any pre-sentence report being made available to the court, in which case they may have little or no information about the context of abuse in which the offence took place.[107]

The trauma of court proceedings can make some women reluctant to appeal their conviction, as another lawyer told us:

> *I have had a case in which a client ran self-defence but was convicted. She could have appealed but didn't want to because she didn't want to go through the trial again.*

Learning should be taken from specialist domestic abuse courts, where prosecutors, defence lawyers and judiciary have greater expertise in the dynamics of domestic abuse, and specialist support is available from Independent Domestic Violence Advisers and a specialist Court Co-ordinator to support a just outcome.[108]

Special measures to safeguard victim defendants

If special measures had been implemented for Naomi (page 51), this might have made a difference:

> *I have had to attend court and sit in the dock with my abuser, I can't describe how this made me feel.*

Failing to safeguard victim defendants from this kind of practice contributes to the ineffectiveness of defences, as a lawyer at one of our roundtables commented:

> *There are not enough safeguards in place to allow defendants in these circumstances to avail themselves of an effective defence.*

However, it is possible to apply for special measures on behalf of a victim defendant, and these should be more widely used. One lawyer at our roundtable explained that she had successfully argued that her client should not appear in the dock alongside her co-defendant, who was her abuser of whom she was terrified, and explained:

> *Judges have the power to make any special measures they deem necessary; it's a matter of advertising them, making them widespread and commonplace.*

The use of special measures for victim defendants could be encouraged through the Equal Treatment Bench Book, as APPEAL have argued:

> *The purpose of the special measures provisions is to enable the witness to give their "best evidence". In cases involving allegations of domestic abuse or violence, there should be specific guidance surrounding witnesses and defendants where these issues arise. This is of particular importance in cases where the allegation of abuse is directed towards a co-defendant.*

Training and guidance for judges and other courtroom practitioners

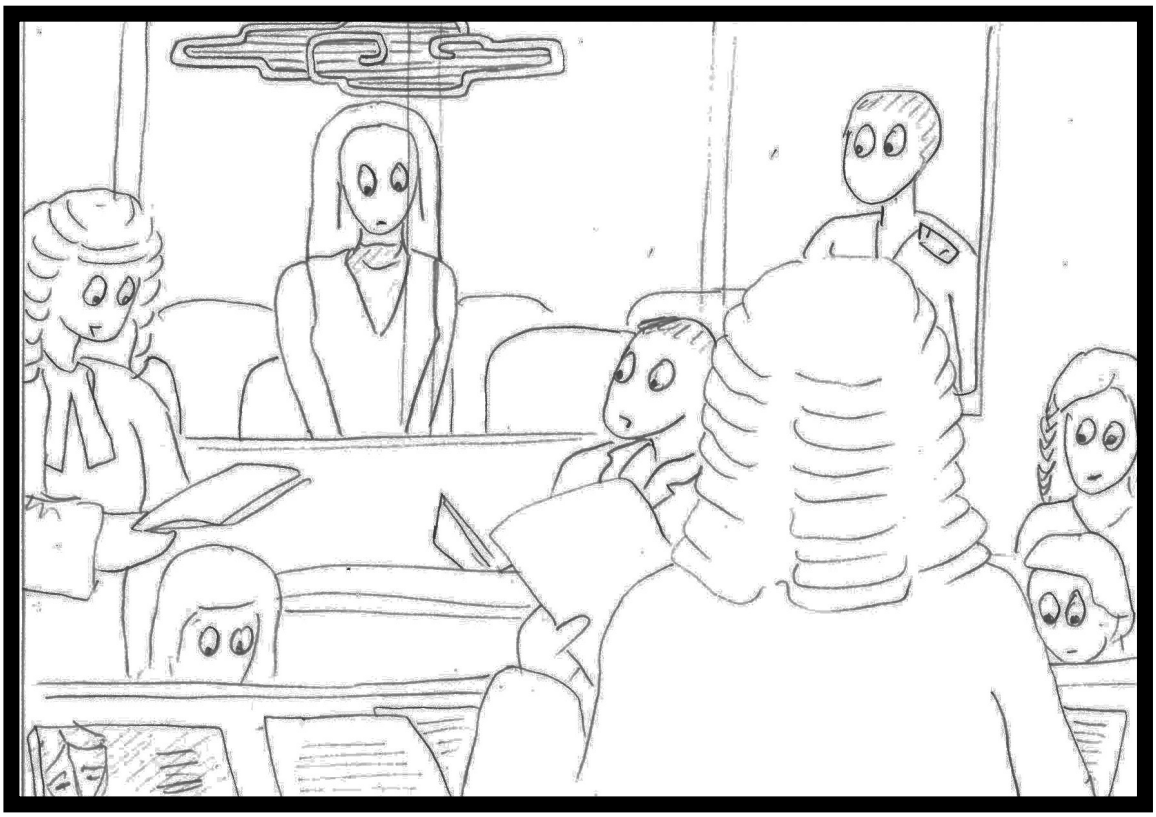
Knowledge and understanding of domestic abuse remain limited amongst prosecutors, judges and other practitioners in the courtroom. As Naomi commented:

> *The magistrates court and the local authority have acted recklessly and without an ounce of compassion towards me, they appear to be grossly ignorant of domestic abuse.*

Judges receive little training on domestic abuse, as one of our roundtable participants pointed out:

> *Judges get a lot of training on terrorism for example, but what training do they receive on domestic abuse?*
>
> Criminal defence lawyer

Both CWJ[109] and APPEAL[110] have recommended that guidance be added to the Crown Court Compendium and Equal Treatment Bench Book to ensure that courts take proper account of the context of domestic abuse in



which some women's offending takes place, and avoid succumbing to myths and stereotypes about how victims should behave.

Plea and Trial Preparation Hearings Parties Pre-Hearing Information Forms[111] include a box that criminal defence lawyers must tick if the defendant is a potential victim of trafficking. As APPEAL has recommended[112], the same could be added for domestic abuse victims in order to trigger enquiries and consideration of the public interest.

Resources like those provided by The Advocates' Gateway (TAG) (an independent resource which provides free access to practical, evidence-based guidance on communicating with vulnerable witnesses and defendants) could provide a checklist for lawyers who are representing someone who may be a victim of domestic abuse, such as whether there should be a presumption that there should be a woman in the criminal defence team; and, where partners are tried together, whether there should be a presumption that they are not represented by the same firm:

It would be helpful to have best practice set out in one place.

POST-SENTENCE

Our research on women who kill their abusers, and Naima Sakande's research focused on criminal appeals, both set out inadequacies in the appeal process for women whose offending resulted from abuse.[113] The research on women who kill also identifies barriers to parole for women whose offending resulted from abuse, rising levels of recall of women to prison and lack of appropriate community support.

One practitioner told us how the parole process can itself be a barrier for Black, Asian, minoritised and migrant women who do not have appropriate support, including counselling in a language they are comfortable with, in order to show that they are no longer at risk of re-offending or that they are ready for rehabilitation. This happened in the case of a woman who was refused parole because she did not show remorse or demonstrate that she would not re-offend. No one in prison did any work with her due to language barriers. A specialist support organisation set up and funded external counselling sessions for her by phone. This was relied on by the parole board when it finally decided to release her from prison.

Jo Roberts' research carries important lessons for probation practitioners as it reveals how, for some women who are serving community-based sentences, their experience of domestic abuse may also have an impact on their ability to comply with their sentences.[114] By extension, it may be expected that the same barriers could have an impact on women's compliance with post-release supervision and licence requirements.

It must be ensured that women whose offending arose from their experience of domestic abuse and other forms of gender-based violence – and who may still be experiencing, or be at risk of experiencing, abuse - have access to support, rehabilitation and resettlement planning that takes proper account of this, including safe accommodation. Risk assessments used in parole proceedings, community supervision and recall decisions were designed for men and should be re-designed – with appropriate training for their use - to ensure a gender-informed approach which is able to take proper account of the context of abuse in which some women's offending occurs.

WHY CURRENT DEFENCES ARE INEFFECTIVE AND OPTIONS FOR LEGISLATIVE REFORM

Current legal defences do not protect survivors of domestic abuse from prosecution or conviction when they are driven to offend. Reforms have been introduced in other comparable jurisdictions, and are needed here. We put forward two proposals for the Domestic Abuse Act 2021 to address this - a new statutory defence for those who are coerced into offending, and an amendment to the law on self-defence for those who use force against their abuser[115]. These would address gaps in legal protection for survivors, strengthen recognition of the links between victimisation and offending, and deter inappropriate prosecutions. There are alternative legislative options that could also be considered.

> *As long as there is no legal defence available, women who offend due to domestic abuse will continue to be criminalised.*
>
> Working Chance[116]

As well as legislative reform, we have also called for a comprehensive, cross-government policy and practice framework to be introduced to protect survivors in these circumstances and ensure the public interest is served, drawing on learning from equivalent work to protect victims of trafficking who are suspects or defendants in criminal proceedings. Supporters of the proposals include the Domestic Abuse Commissioner, the Victims' Commissioner, the Criminal Bar Association, Women's Aid, Prison Reform Trust (PRT) and others.[117] The proposals have so far been opposed by the government, which has however committed to considering the impact of existing defences as part of its review of sentencing in domestic homicide cases.[118] It is hoped this will be a first step towards legislative reform.

In her discussion of the defences of self-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'.[119] Below, we give our own account of the problems with existing defences and options for legal reform.

Our 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. We also discuss alternative options for reforming self-defence, drawing on examples in other jurisdictions.

Summary of proposals in the Domestic Abuse Bill

We proposed that two new Clauses and a new Schedule should be added to the Domestic Abuse Bill:[120]

(a) A new clause amending 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 survivors acting in self-defence against their abuser the same protection as householders defending themselves against an intruder (the 'self-defence proposal').

(b) A new clause and schedule introducing a statutory defence for survivors, modelled on Section 45 of the Modern Slavery Act 2015. This would give survivors of domestic abuse similar protection to victims of trafficking who are compelled to offend (the 'Section 45 proposal').

These proposals are based on legal precedents in place to protect other groups and are not gender specific.

Whereas victims of trafficking rightly have a statutory defence to protect them from prosecution where they have been compelled to offend as part of their exploitation, there is no equivalent defence available for victims/survivors of domestic abuse. And whereas householders have legal protection where they act in self defence against an intruder, no such protection is available to victims/survivors acting in self-defence against their abuser. Common law defences are outdated and ill-fitting to the context of domestic abuse, leaving survivors with no effective defence. Our proposed new laws would reflect improved public understanding of domestic abuse. Alternative models for reforming self-defence to ensure contextual abuse is taken into account are briefly described below.

We have argued that these reforms should be accompanied by a comprehensive cross-government policy framework to aid implementation, drawing on existing guidance and policies in place to support Section 45 and the householders' defence. This should include provision of support for survivors and special measures to protect vulnerable defendants. Statutory guidance, training for criminal justice agencies and judicial directions would also be required. The legislation and surrounding framework would have the significant added benefit of encouraging earlier disclosure of abuse[121] and access to support, and helping to break the cycle of victimisation and offending. This new framework should include a review of the public interest test for prosecutors to take account of abuse and coercive control and measures to ensure this is implemented consistently.

CASE STUDY - IOANNA[122]

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 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.

The law on self-defence allows the use of reasonable force and requires the degree of force to be proportionate. The evidence set out in this report and earlier research makes clear that law reform is needed to address the difficulties faced by victims of domestic abuse in establishing reasonableness and proportionality when accused of using force against their abuser. Other common law jurisdictions have faced the same challenge and attempted to address it through legislation, and such reform is long overdue in England and Wales.

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.[123] As Susan Edwards explains:[124]

…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.[125]

Research by CWJ shows that women who kill their abusers are rarely successful in relying on self-defence.[126] We found that in most cases where women kill abusive men they use a weapon, in contrast to a significant proportion of cases where men kill partners with their bare hands. This is almost certainly due to their smaller physical size as well as their knowledge of the violence of which their abuser is capable. The self-defence proposal would make it easier for victims/survivors to establish they were acting in self-defence, providing them with equivalent protection to those using force against an intruder in their home.

It is also worth noting here that sentencing guidelines, which identify the use of a weapon as an aggravating circumstance where the woman is convicted, fail to take into account the discriminatory impact of this on abused women who are more likely to use a weapon in the context of domestic abuse.

One caseworker at our practitioners' roundtable described a case in which her client had been in a violent and abusive relationship, including being beaten and raped, and was sentenced to two years in prison after using a knife to defend herself during an attack by her abuser. On disclosing the abuse to her defence solicitors, she was advised to attend a Newton hearing[127] but she opted out because it would have involved her husband giving evidence in open court, and she was too afraid to face him. She therefore pleaded guilty to the prosecution's facts and received a tougher sentence as a result. The lawyer commented:

> *It is interesting to observe the fear of victims who fear going through the safeguards in place in fear of the consequences that come from their disclosure. Special measures don't really apply to (victim) defendants who give evidence.*

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.[128]

The 'householder defence'

The self-defence reform that we proposed for the Domestic Abuse Bill was based on an existing English legal precedent which Parliament previously enacted to protect householders facing an intruder, in Section 76 of the Criminal Justice and Immigration Act 2008 - the 'householder defence'

Subsection 76(5A) of the 2008 Act provides that where the case is one involving a householder, the degree of force used by the householder is not to be regarded as having been reasonable, in the circumstances as the householder believed them to be, if it was grossly disproportionate. A householder can therefore use force which is disproportionate but not grossly disproportionate, provided the degree of force was reasonable. CPS guidelines state:[129]

> *The provision must be read in conjunction with the other elements of section 76 of the 2008 Act. The level of force used must still be reasonable in the circumstances as the householder believed them to be (section 76(3)).*
>
> *In deciding whether the force might be regarded as 'disproportionate' or 'grossly disproportionate the court will need to consider the individual facts of each case, including the personal circumstances of the householder and the threat (real or perceived) posed by the offender.*

This provision was introduced by a government amendment to the Crime and Courts Bill in 2013. Lord McNally said, on its introduction:[130]

> *If householders end up being arrested, prosecuted or convicted after injuring a burglar, this can give rise to a public perception that the criminal justice system does not support the real victims in all of this. These amendments are designed to shift the balance of the law further in favour of householders to ensure that they are treated first and foremost as the victims of crime. This means that a householder who has acted honestly and instinctively to protect himself or his loved ones from an intruder could end up being prosecuted if his actions are deemed to have been disproportionate when viewed in the cold light of day. The Government feel strongly that householders, acting in extreme circumstances to protect themselves or others, cannot be expected to weigh up exactly how much force is necessary to repel an intruder.*

The provision followed repeated calls from Conservative backbenchers for householders to be afforded this protection, while critics argued that the change could encourage vigilantism and would effectively sanction extrajudicial punishment, as well as privileging owners of property.[131] The Court of Appeal has since interpreted the difference it makes for householders as 'narrow'.[132] However, it does still allow a degree of latitude to the householder which then factors into the determination of reasonableness, and research would be useful on whether it has an impact on decisions to prosecute.[133]

As is clear from Lord McNally's statement, the householder defence was envisaged as a provision that would primarily be used by men in defence of property, and sought to rebalance the law in favour of victims of (property) crime. As such, whatever other concerns the provision may raise, it appears starkly discriminatory to deny equivalent protection to women who are victims of domestic abuse, defending themselves against their abuser. As Nicola Wake has argued, this disparity in protection is impossible to justify.[134]

It was on this basis that we put forward a reform in the Domestic Abuse Bill that would replicate the householder provision for cases in which the force was used by the defendant (D) against someone (V) who was perpetrating domestic abuse against them. This would ensure that those who act in self-defence in response to domestic abuse receive the same level of protection as those acting in response to an intruder in their home.[135] There would need to be a history of domestic abuse prior to the incident itself, in order for the defence to be triggered. The legislation would need to be accompanied by a comprehensive policy framework, including training and guidance for police, prosecutors, defence lawyers and judges, to aid implementation.

Reforms to self-defence in other common law jurisdictions

Over the last ten years or so there have been reforms to the law on self-defence in a number of common law jurisdictions aimed at making this defence more accessible to victims of domestic abuse acting in self-defence against their abuser. Like our law on self-defence, Canada, New Zealand and all Australian jurisdictions use some combination of subjective and objective tests to establish whether the force used was reasonable. Key aspects of these various provisions include the extent to which the context of a history of domestic abuse perpetrated against the defendant can be taken into account when determining the reasonableness of their actions, and the extent to which an 'imminent' threat must be established. However, researchers have also noted that law reform can be 'either outstripped or undercut' by social attitudes which influence how the law is interpreted and implemented.

Australia and New Zealand

A number of Australian jurisdictions have amended their statutory provisions on self-defence (and related evidence laws) to make evidence of the nature and effects of family violence more readily admissible in cases involving women who use force against a violent partner. In addition, lawmakers in Victoria and Western Australia have legislated to make clear that self-defence applies where a person defends themselves against non-imminent harm, to make the defence more accessible to those living in an abusive relationship. This has also been recommended for homicide cases by the New Zealand Law Commission, but has not been enacted there.[136]

Canada

In response to feminist criticism, legislation was introduced to amend Canadian law on self-defence several years ago, to make it more open to use by abused women.[137] Elizabeth Sheehy, Julia Tolmie and Julie Stubbs noted in a 2012 comparative analysis of law reforms in Canada, New Zealand and Australia, that the revised Canadian law provides *'a non-exhaustive list of factors for the court to use in determining reasonableness, which indicates that the objective test is modified by the "relevant circumstances of the person, the other parties and the act." The factors include "whether there were other means available to respond to the potential use of force," "the size, age, gender and physical capabilities of the parties," "the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat," and "any history of interaction or communication between the parties to the incident," thus clearly making a battered woman's experience of her batterer relevant."*[138]

Thus, "reasonableness" is assessed in light of physical differences between the parties, the history of abuse, the nature of the threat, its imminence and proportionality. Vanessa MacDonnell has argued that the change left defence counsel 'on stronger footing in arguing that triers of fact must take a broad, contextual approach to evaluating self-defence claims', commenting:[139]

> *This may assist marginalized and vulnerable accused, whose self-defence claims can be negatively impacted by de-contextualized assumptions about how the "reasonable person" would or should act in a dangerous situation.*

Imminence

Sheehy et al explain that in some jurisdictions, including Western Australia and Victoria, the law expressly provides that it is not necessary to prove that the accused is responding to an imminent threat in self-defence (although in Victoria this relaxation is confined to cases involving family violence only), while others are silent as to whether the accused must be responding to an imminent threat.[140] The revised Canadian law directs the court to consider the imminence of the force anticipated as one factor amongst others, in determining whether the accused's act was reasonable.

Social attitudes can 'outstrip or undercut' law reform

Sheehy et al conclude that legislation can have a limited effect, and that changing social attitudes can either 'outstrip or undercut' legislative reform, making clear that achieving culture change is essential to making progress:

> *Whilst some jurisdictions appear to be more responsive to the defence claims of accused battered women in terms of case outcomes, our review does not reveal a straight-forward relationship between the strictness of the statutory legal requirements of the various defences in any particular jurisdiction and the manner in which these cases are resolved. New Zealand, for example, has had one of the more liberal statutory definitions of self-defence throughout the period under scrutiny (2000-2010) and yet has the highest conviction rate for murder and the lowest acquittal rate over that period of time. The converse appears to be true for Canada.*

> *How judges and juries interpret and apply the legal requirements for defences when battered women are on trial, and how they assess the factual context in which they do so is clearly influential in these outcomes. The significant role played by the social context in which a battered woman is tried—the social and political assumptions and understandings of her jury and the community from which it is drawn, the gender and cultural competence of her counsel, the position taken by Crown counsel, the evidentiary rulings and attitude expressed by the presiding judge—is a critical but difficult aspect to explore.*

Why duress is ineffective for abused women

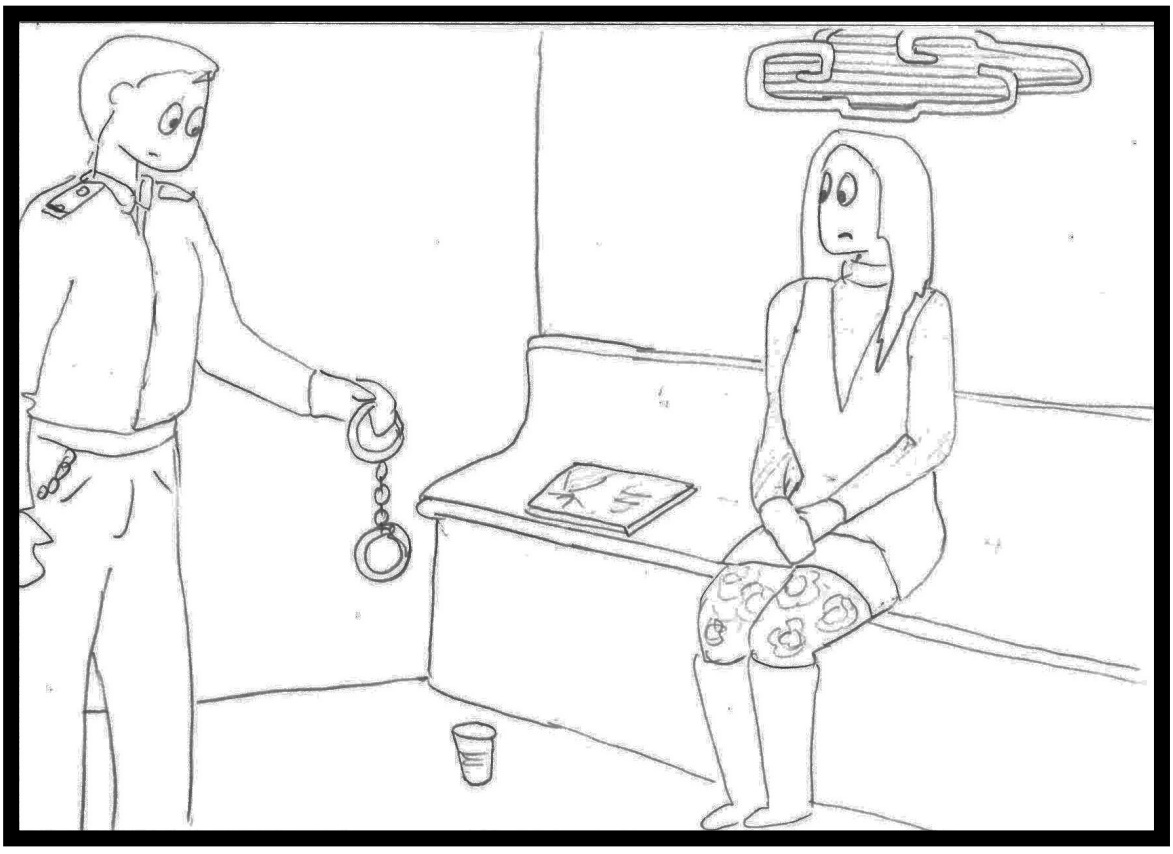
The case of YS illustrates the ineffectiveness of the common law defence of duress in the context of domestic abuse.

CASE STUDY - YS[141]

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.



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 can be applied (other than for murder) where the defendant was acting under threat of imminent death or serious injury and where there would have been no alternative course of action for a reasonable person with relevant characteristics.[142] Yet as illustrated in the case of YS above, the defence of duress 'remains largely inaccessible to abused women',[143] because:[144]

(a) The complexities of domestic abuse are ignored, as the emphasis of the definition of duress is on threat of death or serious injury. The defence does not recognise psychological, sexual or financial abuse.

(b) For the defence of duress to succeed, the threat of physical harm must be imminent. This fails to recognise the nature of domestic abuse, including coercive control, as 'typically entrenched, unpredictable and random…to a woman whose self esteem has been demolished by past violence, the fear of violence may be ever present and overpowering'.[145]

(c) For those experiencing abuse to succeed with a duress defence, 'relevant characteristics' must be established including 'battered woman syndrome' and 'learned helplessness'. These are outdated concepts which pathologise women rather than offering an effective defence suitable for the actual circumstances. They require the production of medical evidence which is not practicable in many cases involving low level offending tried in the magistrates' courts.

CASE LAW ANALYSIS: VICTIMS OF DOMESTIC ABUSE AND THE DEFENCE OF DURESS

(see Appendix for full version)

A case law analysis was carried out pro bono for the purpose of this report by Dr Alice Storey and Dr Sarah Cooper of Birmingham City University, which aimed to identify reported cases[146] relating to the use of the defence of duress where a woman has committed a crime due to the domestic abuse she is suffering or has suffered. The analysis, which is set out in full in the Appendix, concludes that there are limited case law reports available involving women who have been victims of domestic abuse, and then commit an offence and seek to rely on the defence of duress. Six cases were identified and included in this case analysis.

Two key points emerged. First, the six cases identified indicate that courts are generally unreceptive to the duress defence when used by a woman who has offended in circumstances relating to domestic abuse. This suggests that the defence is unsuitable in these circumstances and that reform is required. Second, the language used in some case reports does not reflect the often-complicated nature of domestic abuse. For example, one judgement stated that there could be no duress because the defendant "had a number of options" to leave her abuser or to seek help from family and friends,[147] and another found that a reasonable person would have "told the police that they were acting under duress."[148] This suggests judges would benefit from specialist training on the complexities of domestic abuse.

Further research could consider unreported case law relating to the defence of duress in these circumstances, although that would require further resources, including funding. An international perspective on the defence of duress may also be of benefit to the overarching enquiry of whether such a defence should be reformed.

Lawyers taking part in our practitioners' roundtable commented that duress is ineffective, in part because of a lack of understanding of coercive control and a failure to take account of conduct over a long period, rather than individual incidents. No participants were aware of any successful cases involving duress in this context. One lawyer commented that clients will tend to be advised to accept a plea on a lesser offence rather than going for duress.

Replicating the trafficking defence

The ineffectiveness of duress leaves victims of domestic abuse who are coerced into offending without any defence. We therefore 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.

Section 45 provides a defence for adult and child victims of trafficking who offend as part of, or as a direct result of, their experience of trafficking or modern slavery. Adults must establish that they were compelled – either by another person or by their circumstances - to commit an offence as part of, or as a direct result of, their exploitation. They must also pass an objective test, establishing that a reasonable person with relevant characteristics in the same position as the defendant would have had no realistic alternative to committing the offence. Relevant characteristics are listed as age, sex, and any mental or physical illness or disability. Children may rely on the defence without the need to establish compulsion, and are subject to a lower threshold in the objective element of the test. Schedule 4 to the 2015 Act lists offences that are excluded from the defence.

The defence 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. Proposed measures in the Nationality and Borders Bill threaten to undermine these protections and should be withdrawn.

"The ineffectiveness of duress leaves victims of domestic abuse who are coerced into offending without any defence

Our proposed statutory defence is closely modelled on Section 45, with the following differences:

- References to 'victims of trafficking/slavery/relevant exploitation' have been replaced with 'victims of domestic abuse' as defined in sections 1 and 2 of the Domestic Abuse Act 2021 and including coercive or controlling behaviour as defined in section 76 of the Serious Crime Act 2015. CPS legal guidance on the application of section 76 of the Serious Crime Act 2015 states that relevant behaviour to indicate 'controlling or coercive behaviour' includes acts such as controlling finances and social isolation.[149]

- The definition of 'relevant characteristics' to be considered as part of the objective test has been amended to add 'any experience of domestic abuse'. This is intended to ensure that experience of domestic abuse can be appropriately taken into account when interpreting the application of the defence, without the need for medical or other expert evidence. However it is not intended to exclude the possibility of adducing such evidence where appropriate in individual cases.

- We have proposed that the Secretary of State should monitor the types of offences for which victims of domestic abuse are being prosecuted and use this evidence to inform an annual review of the offences excluded from the defence and any amendment of that list.

The proposed new defence would be available to men and women and would need to be supported by a CPS policy and judicial directions.

Response to our proposals

Of 31 criminal defence lawyers responding to a survey by PRT 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.[150] 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.

The government has so far opposed our proposals for statutory reform because it is not persuaded they are '***practical and proportionate***' and regards them as unnecessary in light of existing defences, but has provided no evidence in support of these arguments. The government argues that '***improved understanding and awareness of the nature of domestic abuse… will mean the existing defences are more able to respond flexibly and proportionately than a narrowly defined statutory defence' and intends to 'monitor the use of the existing defences and keep under review the need for any statutory changes***'.[151]

The government has asked whether there is evidence of multiple cases in which defendants whose offence was attributable to domestic abuse have been convicted where they should have succeeded under a common law defence of duress or self-defence. PRT collated qualitative evidence of such cases from both women and practitioners in their 2018 report 'There's a reason we're in trouble', and there is a wealth of further evidence collated and referred to in this report. Establishing a comprehensive picture is challenging due to the lack of centrally collated, disaggregated data on these cases as pointed out above. Nonetheless, it is clear from the evidence gathered so far that this is a significant problem requiring reform.

Our proposals are closely modelled on provisions already in use for other groups, illustrating that they have been found practicable and proportionate in those cases.

How would the courts establish a nexus (or link) between the abuse and the criminal act, allowing the defence to apply?

For the Section 45 proposal, establishing a nexus would work in the same way as it does under Section 45 of the Modern Slavery Act. The courts would need to determine on the facts whether victims/survivors were compelled to offend as part of, or as a direct consequence of, their experience of domestic abuse.

Under the self-defence proposal, the provisions set out in Section 76 of the Criminal Justice and Immigration Act 2008 would apply as they do currently for householders. This section applies in any case where a question arises whether the defendant is entitled to rely on self-defence, and whether the force used was reasonable in the circumstances. The latter question is decided by reference to the circumstances as the defendant believed them to be. The reasonableness or otherwise of such a belief is relevant to the question whether the defendant genuinely held it.

In cases other than householder cases, the degree of force is not to be regarded as reasonable where it was disproportionate in the circumstances as the defendant believed them to be. In householder cases (and, we propose, in domestic abuse cases) the force used may still pass the reasonableness test if it is disproportionate, but not grossly disproportionate, in the circumstances as the defendant believed them to be. Under our proposal, where a defendant seeks to rely on the domestic abuse defence, evidence of the nature and extent of the alleged domestic abuse would inform the court's consideration of reasonableness, including proportionality.

Does improved understanding of abuse mean legislation is not needed?

The Court of Appeal judgment in March 2019, overturning Sally Challen's conviction for murder, led to increased public recognition of the nature of coercive control and how it can drive offending by victims, and resulted in changes to the Equal Treatment Bench Book on coercive control. This was achieved because the court accepted fresh psychiatric evidence which considered the impact of coercive control on Ms Challen.

The impact of the case may be more significant for serious cases than for lower level offences prosecuted in the Magistrates' Courts. In any event, improved understanding of the nature of domestic abuse and its impact on victims' behaviour will not of itself change the law. As CWJ's research notes, previous legal judgments which it was hoped would lead to a sea change in understanding – the watershed judgments in (and campaigns around) Ahluwalia, Thornton and Humphreys – did not in fact lead to significantly different outcomes for these sorts of cases. Whilst Challen was important there is nothing that gives us confidence that it will lead to general improved practice moving forward. Legislation and embedded policy, guidance and training is needed to ensure the law reflects modern understanding of domestic abuse, making effective defences available in these cases.

Conclusion – why legislation is necessary

During debate of the Domestic Abuse Bill in the House of Commons Public Bill Committee, the then Home Office Minister Victoria Atkins MP (now Minister for Prisons and Probation) argued against these proposals on behalf of the government. She suggested that existing defences are sufficient. Yet the CWJ, PRT and others have collated extensive evidence showing this not to be the case. She argued that existing checks and balances in the criminal justice system provide enough protection. Yet these are no substitute for an effective legal defence – and no use at all for the many victims/survivors who do not feel able to disclose abuse. The minister argued that caselaw will evolve, as our understanding of domestic abuse improves. Yet waiting and hoping for this change to take place, to allow victims/survivors an effective defence at some time in the future, may take a generation.

The government has also referred to concerns that Section 45 is currently being abused. Practical proposals have been put forward by the Independent Anti-Slavery Commissioner and others to overcome these concerns. Both her review and the recent government-commissioned independent review highlight the importance of ensuring we protect victims for whom the statutory defence was intended.[152] The implementation of our proposals should be informed by this learning. The challenges of implementation should not be seen as a reason to give up on protecting victims whom it is not in the public interest to prosecute. The existence of the defences would in fact be likely to uncover significantly more abuse and encourage prosecutions of perpetrators.

Having specific defences on the statute book as we have proposed would ensure that fewer women are prosecuted and convicted of offences when they should instead be receiving support to exit a frightening relationship.

CRIMINAL RECORDS RESULTING FROM CHILDHOOD SEXUAL OR CRIMINAL EXPLOITATION AND DECRIMINALISING LOITERING AND SOLICITING

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 criminal convictions for soliciting and loitering.[153] 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.[154]

We have established a project at CWJ to assist other women affected by their historic criminalisation arising from their sexual and criminal exploitation and the associated impact of continued retention and disclosure of criminal records that had resulted. 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 asked the Independent Inquiry into Child Sexual Abuse 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 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.[155]

However, while recognising that some children, despite being victims of sexual exploitation, have themselves been charged with or convicted of criminal offences which were closely linked with their sexual exploitation, the Inquiry failed to make specific recommendations for reform other than increased sentencing for perpetrators.[156]

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 at least filter such records from disclosure if not expunge them, given they are essentially a record of abuse.

The decriminalisation of the deeply stigmatising offences of loitering and soliciting is long overdue. Police very rarely arrest for this offence now, as it is recognised that women selling sex on the street are usually victims of exploitation. We propose that that this should form part of the forthcoming Victims' Law.

"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.

CONCLUSIONS

In light of the evidence set out in this briefing, there is a clear need for the government and statutory agencies to acknowledge their responsibility to protect victims of domestic abuse and other forms of VAWG from unjust criminalisation, and to undertake necessary reforms in law and practice.

To this end, a comprehensive legal and policy framework needs to be developed to support improved criminal justice responses to those involved in alleged offending resulting from their experience of domestic abuse and other forms of VAWG, aiming to ensure they are protected from abuse and not stigmatised, that their rights are upheld, and that the public interest is served in decision making throughout the criminal justice process.

This must include revisions to the Code for Crown Prosecutors, training and guidance for all criminal justice practitioners, and legal reform to provide effective defences and create a mechanism for expunging convictions arising from exploitation and abuse. Recent government proposals that risk widening the net of criminalisation, weakening protection for migrant victims and limiting the right to redress should be abandoned.

Government ministers repeatedly expressed their ambition for the Domestic Abuse Act 2021 to increase public understanding of domestic abuse and thereby help improve the experience of survivors accused of offending which results from their experience of abuse.[157] The forthcoming Victims' Law is intended to provide the 'cornerstone of our work across government to ensure that victims' needs lie at the heart of the criminal justice system'.[158]

These ambitions cannot be realised without a distinct focus on addressing the unnecessary criminalisation of survivors of domestic abuse and other forms of VAWG, through reforms in law and practice. This must include reversal of proposals in the Police, Crime, Sentencing and Courts Bill that would widen the net of criminalisation for victims of VAWG.

The opportunity for introducing effective defences for victims of domestic abuse accused of offending was missed in the Domestic Abuse Act 2021, though progress could still be made in achieving practice reforms. The forthcoming Victims' Law provides a further opportunity for legislative reform.

This work must be informed by close joint working with women's specialist services in the community, with specific consideration given to the additional challenges that can be faced by certain groups of women, including Black, Asian, minoritised and migrant women, young women and girls, and those with disabilities. Training and guidance materials should be commissioned from specialist women's services with expertise in VAWG, and investment in those services should be increased to ensure women have access to support. Learning should be drawn from models of good practice, such as London's domestic abuse courts, to develop specialist approaches with women defendants.[159] Learning could also be drawn from training and guidance relating to the treatment of suspects and defendants who are potential victims of trafficking.[160] Protection for trafficking victims must be preserved and built upon rather than being threatened as currently under the Nationality and Borders Bill.

Through this concerted action towards shared objectives, it should be possible to end the double standard faced by victims of VAWG who are accused of offending.

"Protection for trafficking victims must be preserved and built upon rather than being threatened as currently under the Nationality and Borders Bill.

RECOMMENDED ACTIONS BY OUTCOME SOUGHT

In the following table we set out 20 actions we believe are needed in order to achieve the outcomes listed at the start of this report.

A: Effective legal defences are available to victims whose offending or alleged offending results from their experience of domestic abuse.		
Action		**Lead agency**
1.	Legislate to provide effective defences for individuals whose alleged offending occurs in the context of domestic abuse and reverse proposals in the Police, Crime, Sentencing and Courts Bill that would widen the net of criminalisation of victims of VAWG.	**MoJ**

B: Protection and non-penalisation of victims is established as a national strategic priority for all criminal justice agencies, for those whose offending or alleged offending results from their experience of domestic abuse and other forms of VAWG (subject to appropriate exceptions in line with the public interest); and existing protections for trafficking victims are maintained.		
Action		**Lead agency**
2.	**Establish a national policy and practice framework for the treatment of victims of domestic abuse and other forms of VAWG who are suspected of criminal activity**, in order to strengthen police and CPS discretion as to whether it is in the public interest to arrest and prosecute an individual in these circumstances and prevent victims of VAWG from being punished for crimes they were forced to commit or where they were acting in self-defence.	**MoJ** **Home Office**
3.	**Reverse proposals in the Nationality and Borders Bill to:**[161] • Penalise trafficking victims who disclose their exploitation too late • Ban victims with convictions for certain offences, or foreign national victims who have received a prison sentence of 12 months or more, from accessing support.	**Home Office** **MoJ**

C: Improvements in guidance and practice are 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.

Action		**Lead agency**
4.	**(a) Revise the Code for Crown Prosecutors** to address in more detail the considerations to be taken into account when the suspect is, or may be, a victim of domestic abuse or another form of violence against women and girls.	**MoJ** **CPS**
	(b) Establish an effective mechanism for challenging decisions to prosecute a victim of domestic abuse or another form of violence against women and girls.	**MoJ**

5.	**Introduce a statutory duty for public authorities and national guidance for the police, prosecutors, probation services and the courts to adopt the practice of routine enquiry** as to whether women and girls' offending took place in the context of domestic abuse, to ensure informed decision making. This work must be supported by training about barriers to disclosure. Resources must be provided to ensure a surrounding framework of available support is in place to protect survivors who make a disclosure.	**MoJ** **Home Office** **College of Policing** **National Police Chiefs Council** **CPS** **HMPPS**
6.	**Introduce national police guidance** on responding to suspects who are potential victims of domestic abuse and other forms of VAWG – to include guidance on identifying potential victims at the point of arrest through routine enquiry supported by close work with specialist services and referral for support; protection of victims' rights (including Victims' Rights to Review); investigation of potential offences against the victim; when it may/may not be in the public interest to charge or caution the victim; trauma-responsive practice; and out of court disposals. This work should learn from equivalent guidance on human trafficking indicators[162] and specialist domestic abuse courts. It should be done jointly with local domestic abuse specialist services, including services led by and for Black, Asian, minoritised and migrant women and services for young women and girls and those with disabilities, where possible including co-location of domestic abuse specialists in police stations. Introduce equivalent guidance for non-police prosecutors, such as local authorities.	**Home Office** **College of Policing** **National Police Chiefs Council** **Department for Levelling Up, Communities and Housing**

7.	**Introduce Crown Prosecution Service 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), when to ask the police to make further enquiries, when it may/ may not be in the public interest to prosecute or caution the victim, and out of court disposals. The CPS should work with specialist domestic abuse agencies to develop guidance, training and monitoring to ensure that women whose alleged offending may be driven by domestic abuse are identified, and that the public interest is applied appropriately when deciding whether to prosecute – including services led by and for Black, Asian, minoritised and migrant women, and services for young women and girls and those with disabilities.	**CPS**
8.	**Introduce Court staff guidance** on identifying when defendants in court are potential victims of VAWG, how to respond in a trauma-responsive way, and when special measures may be appropriate.	**HMCTS**
9.	**(a) Introduce training for criminal defence lawyers** on VAWG, including coercive control, how to facilitate disclosure of abuse and how this should inform the defence. **(b) Amend Plea and Trial Preparation Hearings Parties Pre-Hearing Information Forms** to include a box that criminal defence lawyers must tick if the defendant is a potential victim of domestic abuse, in order to trigger enquiries and consideration of the public interest.	**Law Society** **Bar Council** **MoJ**
10.	**Reform legal aid to enable easier transfer of legal aid** to another criminal defence solicitor where needed and provide adequate funding to reflect the time needed to take instructions and provide adequate representation for victims of abuse.	**MoJ**

11.	**Introduce training and guidance for judges and magistrates in the criminal and family courts** about the dynamics of domestic abuse and how it can lead to offending, and how perpetrators can manipulate court proceedings to extend their control over their victim. Judges' understanding of VAWG can be crucial to the outcome of criminal cases – 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. The Judicial College should review the availability and effectiveness of information and training for the judiciary in this area, including judicial directions regarding the treatment of women defendants affected by domestic abuse. This should include additional guidance in the Crown Court Compendium and Equal Treatment Bench Book, and guidance on the use of special measures in court proceedings to facilitate victim defendants giving their best evidence.	**Judicial College** **MoJ**
12.	**Introduce training for probation practitioners and youth offending service practitioners** on taking account of the context of domestic abuse in which some women and girls' offending arises, in their rehabilitative and supervisory work with those women and girls.	**HMPPS** **YJB**
13.	**Review programmes of information and support** that are available for women and girls affected by domestic abuse, including victim support services, in the community, in custody and on release, by HM Prisons and Probation Service, the Youth Justice Board and the Ministry of Justice, working with women's prison governors, youth custodial settings, probation services, Youth Offending Services and community agencies.	**MoJ** **HMPPS** **YJB**

14.	**Develop gender-specific risk assessment tools** for women and girls in relation to bail, Release On Temporary Licence and other similar measures, parole, supervision and recall.	**HMPPS** **YJB** **MoJ**
15.	**Establish close joint work between the Ministry of Justice, the Department for Levelling Up, Communities and Housing, local authorities and the voluntary sector** to ensure that all women and girls leaving custody who are victims of, or at risk of, domestic abuse and other forms of VAWG are provided with safe accommodation with appropriate support, including specialist refuge accommodation where this is needed.	**MoJ** **DLUCH** **Local authorities**
16.	**Introduction training and guidance for children's social care services and other statutory agencies** to combat the unfair stigmatisation of survivors involved in alleged offending, particularly in relation to their care of, or contact with, their children. This has been the subject of recommendations in research by Advance[163] and in Lord Farmer's review of the importance of maintaining family relationships for women in the criminal justice system[164].	**Dept for Education** **MoJ**
17.	**Increase investment in joint work** between criminal justice agencies, specialist women's services and NHS Liaison and Diversion Services (including co-location) throughout the criminal justice process to improve information sharing and facilitate disclosure of abuse, and ensure effective support is provided to victim suspects/defendants. Ensure this includes services led by and for Black, Asian, minoritised and migrant women, and services for young women and girls, and those with disabilities.	**DHSC** **MoJ** **Local gov**
18.	**Ensure appropriately qualified female interpreters** are available to support identification of potential victims for whom English is not their first language and to enable them to participate in any proceedings.	**MoJ** **HMCTS**
D: Disaggregated data collection improves 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, and informs action to address inequalities.		

Action		Lead agency
19.	Collect and regularly publish disaggregated data to improve understanding of the criminalisation of women and girls who are victims of domestic abuse and other forms of VAWG, including intersectional discrimination based on age, race, religion or immigration status, and use this to inform action to address inequalities.	**MoJ** **Home Office**
E: A mechanism is provided to expunge criminal records for crimes committed as a consequence of coercion, abuse and exploitation, or at least have them filtered from mandatory disclosure under the disclosure and barring scheme; and loitering and soliciting are decriminalised.		
Action		**Lead agency**
20.	(a) Introduce a legal process to allow for the expunging of criminal records for crimes committed as a consequence of coercion, abuse and exploitation, or for their filtering from mandatory disclosure. (b) Decriminalise soliciting and loitering under section 1 of the Street Offences Act 1959.	**MoJ** **MoJ**

APPENDIX

CASE LAW ANALYSIS: VICTIMS OF DOMESTIC ABUSE AND THE DEFENCE OF DURESS

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OVERVIEW

This case law analysis aimed to identify reported cases[165] relating to the use of the defence of duress where a woman has committed a crime due to the domestic abuse she is suffering or has suffered. To do this, search terms[166] were generated to search the following legal databases: Westlaw, LexisNexis, and Bailii.

From this search of the databases identified above, it demonstrated that there are limited case law reports available concerning women who have offended in circumstances relating to domestic abuse and seek to rely on the defence of duress. Six cases were identified from the High Court, Court of Appeal, and European Court of Human Rights. The six cases have been divided into two categories below: Category 1: Cases that provide an express ruling upon the defence of duress, and Category 2: Broader references to the defence of duress. The duress defence was unsuccessful in all six cases.

This case analysis suggests two key points. First, the duress defence is unsuitable for women who offend in circumstances relating to the abuse they have suffered, and that reform is required. Second, the language used in some case reports does not reflect the often-complicated nature of domestic abuse, for example, one judgement stated that there could be no duress because the defendant "had a number of options" to leave her abuser or to seek help from family and friends.[167] This suggests judges would benefit from specialist training on the complexities of domestic abuse.

DURESS

Duress by threats can provide a defence to any charge except to murder, attempted murder, and possibly some forms of treason. The defence is concerned with cases where a Defendant (D) commits the actus reus of an offence with the relevant mens rea, but is induced to do so because of an express or implied threat (or reasonable belief in such a threat) by another person of imminent death or serious physical injury to the D or a third person for whom the D is responsible. If the D was, or may have been so induced, the question arises as to whether a sober person of reasonable firmness, sharing the D's characteristics, would have responded to the threat (or perceived threat) as the D did.[168] If duress is raised, the defence will be successful unless the prosecution proves beyond reasonable doubt that at least one of its requirements is not satisfied.[169]

CASE LAW

Category 1 Cases

Stevens v DPP [2017] EWHC 2839 (Admin)[170]

The Appellant (A) was convicted of numerous driving offences (driving whilst disqualified, under the influence, without insurance, and dangerously).[171] A was seen by police driving "erratically" and when A saw the police siren, she "drove off at excessive speed and in a manner causing potential danger to other road users."[172] The offences were admitted by A, but she "contended that she had driven as a result of duress applied by her partner," (P) who was a passenger in the car at the time of the offences.[173] A gave evidence of "a history of assaults against her by her partner…[including] threats made to kill her children."[174] On the night the offences were committed, P "had been drinking and taking cocaine…he had dragged her from her home partially dressed because he had wanted them to have sex in public…He forced her to drive to McDonald's and when the police car came into view he threatened to kill her if she did not drive on."[175] Throughout the incident, P was "screaming at [A] throughout, punching her in the ribs and trying to grab the steering wheel."[176] A believed that P would kill her if she did not comply with his demands. P had also been arrested multiple times for assaulting A, both prior to the offences and afterwards.[177]

At trial, A presented the following defence:

> *"[T]he Defendant will say that she acted under duress in that she had a genuine fear that if she did not do as instructed her ex-partner [P] would kill her or cause serious injury to her children. Duress is advanced as a general defence to all charges."[178]*

The trial court held, "[w]e did not find that a reasonable person with the defendant's beliefs, history of domestic abuse, age and situation would have done what she did."[179] Instead, the court found that a reasonable person "would have stopped the vehicle and told the police that they were acting under duress."[180] The court also relied upon the fact that she had not reacted in this way to previous abuse when concluding that A was not acting under duress.[181]

A appealed her convictions. One of the two questions considered by the High Court on appeal was: did the court err in the application of the test of duress under R v Bowen?[182] The High Court found that there had been no error by the Magistrates in applying Bowen and, if anything, they had applied Bowen in a more favourable way to A, as they were only obliged to consider A's age and sex, not the history of abuse etc.[183] As such, in denying the appeal, the Court stated that "[i]f there was an incorrect application of the law it was in the Appellant's favour."[184]

R v GAC **(Goldie Anne Coats) [2013] EWCA Crim 1472**[185]

The Appellant (A) appealed against her conviction and sentence for importing Class A drugs on the grounds of duress. A travelled to Jamaica with her then-boyfriend (and co-defendant) (B) and, upon their return, they were apprehended with three suitcases of cocaine.[186] At trial, both A and B asserted that A had no knowledge of the drugs and had thought she was travelling to Jamaica on a holiday paid for by B's family. A made no mention of duress at trial.[187] In 2008, A was convicted and sentenced to 10 years imprisonment.[188]

In 2009, the father of A's second child and alleged mastermind of the drugs enterprise, W, was sentenced to life imprisonment for a drugs-related murder.[189] Subsequently, the child's paternal grandmother contacted the Criminal Case Review Commission and psychiatrist, Dr. Mezey, found that A was suffering from battered woman's syndrome (BWS) from her relationship with W.[190] On appeal against both conviction and sentence, A contended that she should now be permitted to raise the defence of duress as the BWS prevented her from raising this at trial. At the time of the 2013 appeal before the Court of Appeal Criminal Division, A was due to be released on license imminently.[191]

A (and numerous other women) had made several allegations of domestic abuse against W.[192] With regards to a 2007 incident, A stated that W "repeatedly punched her, prevented her leaving, and set the dog on her, as a result of which she suffered a bite on her lip and stomach."[193] However, A did not want to support W's prosecution, as she said W "might retaliate by kicking her doors in."[194] A also described other occasions of abuse, with some being reported to the police. For instance, during an altercation in 2008, W "held her down on the bed and spat on her, dragged her across the floor by her hair, picked up a belt and hit her on her right leg."[195] After this particular incident, A provided a short statement to the police and also stated that W was controlling.[196]

A had witnessed domestic abuse as a child and had also been sexually abused by her father, who later committed suicide.[197] Dr. Mezey believed that "these early experiences would have increased [A's] vulnerability and made her more likely to enter into abusive relationships."[198] Dr. Mezey also reported on the abuse A suffered from W, finding that A "felt she had no alternative but to comply with [W's] requests or demands in fear of the consequences for her, her children and her family," and that when W had demanded she import the drugs from Jamaica she felt "she had no option" but to do it.[199] Dr. Mezey found that A displayed the symptoms of BWS at the time of the offence and continues to.[200]

The Court of Appeal found that A "does not come close to establishing she may have been subjected to serious physical violence so bad that she had lost her free will, at any time, let alone before the importation."[201] Based upon the fact that A had applied for a passport weeks before she alleged that W forced her to commit the offence, and that she was videoed "dancing and joking in Jamaica and at the airport on the way home,"[202] the Court found that "[t]here is absolutely no sign of [A] being in fear…[t]here is not a hint of a woman in a state of helplessness simply doing as she was told or putting on a front as Dr. Mezey would have it."[203] The Court found that A "had a number of options" including her being "perfectly capable of leaving [W] when it suited her,"; having "her own home and her own resources," and was not "isolated from her family and friends."[204] Furthermore, the Court stated:

> *"Unlike the probation officer and unlike Dr. Mezey, we simply did not find [A] credible. Accepting that she may have had an unpleasant childhood and that she may have suffered some violence at the hands of [W], it was not the kind that might raise the possibility of duress."*

The Court dismissed A's appeal, finding that if A had wanted to raise the defence of duress it should have been done at trial, despite the evidence suggesting that she was unable to do this as she was suffering from BWS.

A v R **[2012] EWCA Crim 434[205]**

The Appellant (A) was convicted of perverting the course of justice for falsely withdrawing her allegations of rape against her husband (H). Initially she was sentenced to 8 months imprisonment, but this was quashed by the Court of Appeal and replaced with a community-based order.[206]

A had firstly gone to the police stating that H had raped her. She then withdrew her complaint and subsequently went back and forth on whether her complaint was false or not.[207] Forensic clinical psychologist, Roger Hutchinson, found that "during the latter part of her relationship with [H], [A] was experiencing post traumatic stress disorder, and that this condition persisted at the time when she retracted the allegations of rape, and indeed

still continues."[208] As such, A contended that if this evidence was available at the time of her conviction, she would have put forward a defence of duress.[209]

While the police were investigating the retraction, A applied for a non-molestation order against H, alleging that he had been abusive and controlling, and that he raped her and then "persuaded" her to retract the allegations.[210] It appears that there were discussions between A, H, and H's sister about it being better for their children for A to get a suspended sentence for retracting her statement, than for H to go to prison for raping A.[211]

A eventually pleaded guilty to the offence of making a false retraction of an allegation of rape.[212] The prosecution and courts pursued this matter on the basis that they believed A's allegations of rape and domestic abuse to be true.213 A appealed the conviction and the sentence.

Prior to A being sentenced, H went to A's home and "attacked her."[214] He "dragged her outside by her hair and began to tear her clothes off."[215] A few days later, the pre-sentence report was released which noted A had stated H was "controlling" and "violent," that he was abusive, they had serious financial issues, and that she tried to put on a brave face for the children's sakes.[216] A said that she initially withdrew her statement because she felt "immense guilt."[217] The Court of Appeal found that this account provided by A in the pre-sentence report was "inconsistent with a defence of duress."[218]

Moreover, with regards to the defence of duress, A relied upon the fact that she was suffering from PTSD at the time.[219] However, the Court stated that "duress should not and cannot be confused with pressure."[220] Essentially, the Court believed that A had provided a great deal of mitigation as to why she had retracted the true allegation of rape, but that this evidence did not meet the threshold for duress.[221] The Court said "[i]f she was asserting that he forced a retraction by raping her or threatening to rape her, there was no reason why she should not also have explained her retraction of the rapes by reference to any such threats."[222]

The appeal was dismissed on all grounds by the Court of Appeal.[223] A later appealed the case to the European Court of Human Rights (ECtHR) alleging a violation of her right to respect for her private and family life under Article 8 European Convention on Human Rights, which was heard but rejected as inadmissible by the ECtHR.[224] In 2016, A was awarded Criminal Injuries Compensation for the injuries she suffered because of the rape.[225]

R v Spillman (David Stephen), R v Spillman (Annette) [2000] 10 WLUK 696[226]

AS pleaded guilty to the offence of conspiracy to defraud by using a forged will and was sentenced to five years and three months' imprisonment.[227] Her husband (DS) was also convicted. AS appealed against her sentence on the grounds that it was excessive and the judge had failed to take into account that she was suffering from BWS and therefore acted under duress.[228] AS had been physically abused by her mother (who was also involved in the conspiracy to defraud), sexually abused by her father and had a child by him, and physically abused by DS who had previously been convicted of assaulting AS.[229]

Psychiatrist, Dr. Kinane, found that AS "repeatedly returned to [DS] because of his contrition and remorse and requests for forgiveness following battering episodes…[and] like many battered women, [AS] felt it her responsibility to stay and make her marriage work."[230] Dr. Kinane reported that AS "found during her relationship with her husband that if she attempted to stand up to him over a particular issue this was likely to provoke violence."[231] Dr. Kinane stated that "a person's mental state and/or personality can be important in modifying a person's ability to withstand duress. [AS] endured chronic environmental stress and suffers from anxiety. Her personality is such that she tends to passively accept events."[232]

The judge, when sentencing AS, was not persuaded by the expert evidence. He stated that "I do not for one moment accept the account of matters which has been put before me in the pre-sentence report or that you were forced into any participation in this matter."[233] AS was going to present a defence of duress but did not have the chance to as she pleaded guilty.[234] Additionally, the Court of Appeal found that the sentence was justified and dismissed AS's appeal.[235]

Category 2 Cases

R v Wood (Kayleigh) [2019] EWCA Crim 1633[236]

W assisted her boyfriend (R) in committing the offence of arson with intention to endanger life. W drove R to a petrol station to purchase the petrol he used to commit the offence, she drove him to the block of flats where he set the fire, waited for him as he committed the arson, and drove him away.[237] Whilst W pleaded guilty, she contended that she only assisted the arson because R had threatened physical violence against her,[238] which R admitted, as well as admitting "his wider coercive behaviour."[239]

R had texted W prior to the offence stating that he was going to burn someone's house down and said, "[i]f you love me you'll take me to do this."[240] Whilst R had not been physically violent, "he made repeated threats to punch her during the commission of the offence."[241] R attempted to force her to fill the petrol cannister which she refused to do, and W "was crying and hysterical and continued to plead with him not to do it…There was no actual violence but she was frightened and through that fear she drove him on to the address feeling that she had no choice."[242] Furthermore, when questioned by police about text messages they had found where W had offered to hide R from police, she said "she felt controlled by [R] but she also wanted to be with him."[243] A pre-sentence report found that W "had been in a number of abusive relationships and it was her intimate relationship with [R] that linked her to the offending behaviour."[244] W was convicted of encouraging or assisting the commission of an offence of arson with intent to endanger life, believing that it would be committed. She pleaded guilty and was sentenced to two years' imprisonment suspended for 18 months, 200 hours of unpaid community service, and payment of a victim surcharge. W had no previous convictions.[245]

This 2019 case before the Court of Appeal Criminal Division, involved the Solicitor General seeking leave to refer the sentence as being unduly lenient, as the offence can carry a maximum of 12 years imprisonment. In terms of duress, the Solicitor General contended that this was a case that involved "[a] degree of coercion falling short of duress."[246] The Court did not comment on duress explicitly, but cited the assertion by the Solicitor General twice in its judgment, indicating that the Court of Appeal did not dispute that R's behaviour did not constitute duress. The Court of Appeal denied the appeal and W's sentence was upheld.

***Flisher & Ors v R (Rev 1)* [2012] EWCA Crim 794[247]**

This case related to multiple drugs and firearms convictions, and the appeal of Mr Flisher (F), as opposed to Lisa Varley (V), who raised the defence of duress at trial (in an unreported case). However, the Court of Appeal did make reference to the link between F's domestic abuse against V, and her defence of duress. At trial, V provided evidence of F's domestic abuse to support her defence of duress regarding the firearms charges against her.248 The Court found that the abuse perpetrated by F "while relevant, had doubtful probative value upon the issue of duress."[249]

FINDINGS

There are limited case law reports available involving women who have been victims of domestic abuse, and then commit an offence and seek to rely on the defence of duress. Six cases were identified and included in this case analysis.

Two key points have emerged from this analysis. First, the six cases identified indicate that courts are generally unreceptive to the duress defence when used by a woman who has offended in circumstances relating to domestic abuse. This suggests that this defence is unsuitable in these circumstances and that reform is required. Second, the language used in some case reports does not reflect the often-complicated nature of domestic abuse, for example, one judgement stated that there could be no duress because the defendant "had a number of options" to leave her abuser or to seek help from family and friends,[250] and another found that a reasonable person would have "told the police that they were acting under duress."[251] This suggests judges would benefit from specialist training on the complexities of domestic abuse.

Further research could consider unreported case law relating to the defence of duress in these circumstances, although that would require further resources, including funding. An international perspective on the defence of duress may also be of benefit to the overarching enquiry of whether such a defence should be reformed.

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115 These proposals were developed by PRT in collaboration with CWJ and others, as part of PRT's Transforming Lives programme to reduce women's imprisonment. Since that programme ended in November 2020, CWJ took over the lead on this work by agreement with PRT. For more information go to: www.centreforwomensjustice.org.uk/dabill

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145 Loveless, J. (2010) 'Domestic Violence, Coercion and Duress', Criminal Law Review, pages 93-108

146 The scope of this research covered reported cases that appear on Westlaw, LexisNexis, and Bailii. Whilst there may be a wider number of unreported cases, to identify them would involve a wider-scale project, requiring funding and a longer timeframe to complete it.

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166 Search terms used (using different connectors and combinations of searches): "domestic violence"; "domestic abuse"; duress; force; "forced cooperation"; self-protection; self-preservation; "putting up a fight"; "intimate partner violence"; "violent relationship"; afraid; "battered woman syndrome." Further searches using more obscure terminology and of other databases may yield other reports.

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169 See, generally, Card & Molloy (Oxford University Press) (ed 22).

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173 Ibid para 3.
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