**Briefing: Domestic Abuse Bill 2019-21**

**House of Lords – Second Reading**

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Executive Summary

The Equality and Human Rights Commission has been given powers by Parliament to advise Government on the equality and human rights implications of laws and proposed laws and to publish information or provide advice, including to Parliament, on any matter related to equality, diversity and human rights.

The Domestic Abuse Bill is intended to be a ‘once-in-a-generation opportunity to transform the response’[[1]](#footnote-1) to this crime, which disproportionately impacts women and girls. The Commission welcomes the opportunity the Bill presents to ensure better support and protection for survivors of domestic abuse in England and Wales. The need to improve routes to support and safety for domestic abuse survivors has been brought into sharp focus during the coronavirus pandemic, with increases in reported cases of domestic abuse across the UK.[[2]](#footnote-2)

The Government has made a number of important improvements to the Bill since it was introduced, including: (i) a new duty on local authorities to ensure service provision in refuges and other safe accommodation; and (ii) improvements in protections for survivors in the courts (including: automatic eligibility for special measures in the family courts; a ban on cross-examination in person in certain circumstances in the family courts; and provisions allowing for discretion to order these measures in the civil courts in certain circumstances).

We welcome these improvements but recommend that further changes are required for it to be the transformative legislation the Government intends it to be. This briefing sets out our recommendations to ensure the legislation meets this ambition, improves support and protection for all survivors, and supports compliance with the Government’s commitments under the Convention on Preventing and Combatting Violence against Women and Domestic Violence (the Istanbul Convention) and with the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

We recommend changes to the Bill in five priority areas to ensure:

1. **Sufficient specialist support services, provided in the community as well as in refuges, and available to all without discrimination**. We recommend the Bill includes a duty to provide: community-based services (as well as refuge-based services which are covered in Part 4 of the Bill); sufficient specialist services for groups with protected characteristics, and for those with migrant status; services for children and young people; and perpetrator programmes.
2. **Equal protection and support for migrant survivors,** including by: enshrining a non-discrimination principle in the Bill; extending the Domestic Violence Rule to provide a route for all survivors to regularise their immigration status (preventing immigration status from being used as a tool of coercive control); and prohibiting the sharing of survivors’ personal data for immigration purposes, where that data is given by a survivor seeking support for domestic abuse.
3. **Improved protections for survivors in the courts,** with special measures and a prohibition on cross-examination in person available automatically in all cases where domestic abuse is an issue, and consistency of protection for survivors across all court jurisdictions.
4. **Improved protections for disabled survivors subject to coercive control**, by repealing the ‘best interests’ defence to the crime of coercive control, introduced in the Serious Crime Act 2015 (section 76).This would help ensure disabled survivors receive equal protection from this crime.
5. **Guidance issued under the Bill takes into account the cross-government violence against women and girls (VAWG) strategy**, so that there is a consistency of approach towards domestic abuse as a form of VAWG, and that the gendered nature of domestic abuse and its connections to other forms of VAWG is taken into account in responding to this crime.

Commission’s Recommendations

1. Sufficient specialist services, available without discrimination

### *Our recommendation*

We recommend that the Bill places a statutory duty on relevant public authorities to ensure provision of sufficient specialist domestic abuse services for everyone affected by domestic abuse. This should include a duty to ensure provision of: community-based services (as well as refuge-based services which are covered in Part 4 of the Bill); sufficient specialist services for groups with protected characteristics, as well as those with migrant status; services for children and young people; and services for perpetrators. The Commission has worked with organisations from the children’s and violence against women and girls’ sectors to develop a proposed amendment to the Bill showing how this could be done. A copy of the proposed amendment is available on request.

### *Why are these changes to the Bill needed?*

* *To ensure sufficient provision of services for survivors in the community*

During the Commons stages, the Government introduced a statutory duty on local authorities to provide accommodation-based domestic abuse services. This is a welcome step forward. However, this is a narrow duty that only assists survivors in refuges or other safe accommodation and does not address the needs of the majority (70%) of survivors who seek help for domestic abuse in the community.[[3]](#footnote-3)

The Government has acknowledged the importance of community-based services[[4]](#footnote-4) and efforts to keep survivors and their children safe in their own homes[[5]](#footnote-5) but has asserted that a review of existing services led by the Domestic Abuse Commissioner is necessary before any wider duty covering community-based services can be considered. However, the Domestic Abuse Commissioner has advised:

“In order to address the breadth of domestic abuse services, the statutory duty must encompass those community-based services that are accessed by the majority of victims, survivors and their children, and must also include quality provision for perpetrators. I have very real concerns about Local Authorities redistributing their funding simply to meet the statutory duty, and therefore deprioritising those critical community-based services that can intervene earlier and prevent a survivor from being forced to flee to a refuge. There is already ample evidence to support this, and while my mapping work may well add to this evidence base, it is wholly unnecessary for Parliament to wait for it to complete before considering this issue.”[[6]](#footnote-6)

We are also concerned there is a risk that a narrow duty to provide accommodation-based services only could incentivise local authorities with limited resources to divert vital funds away from services provided in the community (such as advocacy, IDVA and outreach services, and dedicated children’s services) to meet the new duty.

We therefore recommend that a complementary duty on public authorities to commission community-based services is vital to help survivors and their children remain safely in their homes and the community wherever possible. Allowing a survivor to stay safely in their home causes less disruption to the family’s circumstances. It allows them to stay near support networks, schools and jobs, as well as helping to prevent homelessness.[[7]](#footnote-7)

* *To ensure sufficient specialist services are available for all survivors*

We also recommend a statutory duty requiring provision of sufficient specialist services for survivors sharing protected characteristics, particularly ethnic minority, migrant, disabled, and LGBT survivors, as well as non-discrimination in the provision of services. Despite being disproportionately impacted by domestic abuse,[[8]](#footnote-8) these groups face greater barriers to reporting abuse, accessing support and engaging with the criminal justice system.[[9]](#footnote-9) And although specialist services for these groups are vital in providing routes to support and safety,[[10]](#footnote-10) they are poorly and precariously funded, and scarce.[[11]](#footnote-11) For example:

* while an average of 1 in 5 referrals to women’s refuges are declined due to lack of space,[[12]](#footnote-12) this number rises to nearly 4 in 5 for ethnic minority survivors.[[13]](#footnote-13)
* there were only six voluntary sector providers of LGBT specialist support in England in 2019.[[14]](#footnote-14)
* only 38% of domestic abuse services offer some form of specialist service to disabled women,[[15]](#footnote-15) and there are only two specialist disabled domestic abuse providers in England and Wales.[[16]](#footnote-16)

Older survivors also struggle to access support, with Age UK reporting recently how “very few older victims of domestic abuse are accessing any kind of professional support.”[[17]](#footnote-17)

Our proposed amendment would require provision of sufficient appropriate specialist services to meet the needs of all survivors, regardless of immigration status or other characteristics such as age, LGBT identity, race or disability.

1. Equal protection and support for migrant survivors

### Non-discrimination clause

***Our recommendation***

We recommend that the Bill include a standalone non-discrimination clause that ensures all victims of domestic abuse receive equally effective protection and support, regardless of their status, in line with Article 4(3) of the Istanbul Convention.

### *Why is this change to the Bill needed?*

The government has stated its intention to ratify the Istanbul Convention, and intends the Domestic Abuse Bill as the final step to enable the ratification of the Convention.[[18]](#footnote-18) However, the Convention requires that protection and support for survivors of domestic abuse be provided without discrimination on any grounds, including immigration status.

Currently, migrant survivors with insecure immigration status are almost entirely excluded from being able to access refuge or other safe accommodation, due to being subject to the no recourse to public funds condition (which prohibits access to welfare benefits and social services). This may be because they have limited leave to enter or remain subject to the NRPF condition, or because they do not have leave to enter or remain. Women’s Aid’s ‘No Woman Turned Away’ project, which supports women who face barriers accessing refuge spaces, recently found that only 11.7% of women with NRPF involved in the project were accommodated in a suitable refuge.[[19]](#footnote-19)

We consider that failure by the government to ensure that survivors with insecure immigration status can access equal support and protection for domestic abuse may breach Article 14 of the European Convention on Human Rights (ECHR) (the right to non-discrimination), read together with Article 3 (the prohibition on torture and cruel, inhuman and degrading treatment, Article 2 (the right to life), and/or Article 8 (the right to private and family life). The ECHR imposes positive obligations on the Government to take steps to protect individuals against abuse or harm caused by other individuals. Specifically with respect to domestic abuse, the European Court of Human Rights has made clear that a state’s “failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional.”[[20]](#footnote-20) Further, in our view, where a survivor is unable to access a shelter simply because, by virtue of her immigration status, she has no recourse to public funds, this will breach obligations under Articles 4(3) and 23 Istanbul Convention.

**2.2 Extend the Domestic Violence Rule**

***Our recommendation***

We recommend that the Domestic Violence Rule (DV Rule) is extended to allow all survivors of domestic abuse a route to regularising their immigration status, and access refuge space and welfare support whilst applying through this route.

***Why is this change to the Bill needed?***

The DV Rule – an application under the Immigration Rules - provides a way out for survivors of domestic abuse on a spousal visa, allowing them to regularise their status by applying for indefinite leave to remain. Southall Black Sisters, who work with survivors with NRPF, states that it is a model of protection that is currently working well for those on spousal visas.[[21]](#footnote-21) However, it is not available to survivors on other visas or no visa, leaving them at risk of the perpetrator using the threat of deportation or destitution as a means of coercive control.

The Destitute Domestic Violence Concession (DDVC) permits survivors applying under the DV Rule three months’ temporary access to public funds, as well as allowing them to enter into employment while they make an application under the DV rule. However, the three-month time limit is a barrier to women in obtaining accommodation, accessing support and obtaining legal advice and representation to make an application.[[22]](#footnote-22) Further, as it is linked to the DV Rule, the DDVC is limited to those on spousal visas.

We recommend that eligibility to apply under the DV Rule should be extended to all survivors of domestic abuse with insecure immigration status, not just those on spousal visas. The DDVC should be extended from three to six months, and also be available to all migrant survivors of domestic abuse with insecure immigration status, not just those on spousal visas. This would provide a route to regularising immigration status for all survivors of domestic abuse, and enable them to access refuge space and welfare support whilst applying through this route.

**2.3 Safe reporting of domestic abuse for migrant survivors**

### *Our recommendation*

The Bill should be amended to ensure that the personal data of migrant survivors of domestic abuse that is given or used for the purpose of their seeking or receiving support and assistance is not used for immigration control purposes.

### *Why is this change to the Bill needed?*

The personal data of migrant survivors of domestic abuse should not be shared by providers of accommodation, banking services, education, employment, financial or social assistance, healthcare and policing services for immigration purposes.

We consider that it is inappropriate for survivors accessing support for domestic abuse to have their information shared for the purposes of immigration enforcement. Such information-sharing acts as a deterrent on survivors from reporting crimes and seeking the support of these services. A joint investigation by HMICFRS, the College of Policing and the Independent Office for Police Conduct recently found that victims of crime with insecure or uncertain immigration status are fearful that, if they report crimes to the police, their information will be shared with the Home Office. The investigation found that the current system of information sharing between police and Home Office “was causing significant harm to the public interest.”[[23]](#footnote-23)

Further, as highlighted above, the threat of immigration enforcement is in itself used by perpetrators as a form of coercive control. The CEDAW Committee has called on states, in the context of gender-based violence, to repeal “…restrictive immigration laws that discourage women, including migrant domestic workers, from reporting this violence…”.[[24]](#footnote-24) With respect to the UK in particular, the CEDAW Committee recommended in March this year that “asylum-seeking women, migrants and women with insecure immigration status are able to seek effective protection and support services without fear of having their immigration status reported to authorities.”[[25]](#footnote-25)

We therefore recommend that the Bill prohibits the sharing of survivors’ personal data for the purposes of immigration enforcement where the data was collected in the course of the person accessing assistance or support for domestic abuse.

1. Better protections for survivors in the courts

***Our recommendation***

We recommend the Bill is amended to ensure that the prohibition on cross-examination in person is available automatically in all cases where domestic abuse is declared to be an issue (and not just in cases where there is a caution, conviction, injunction, charge or specified evidence available), across both the family and civil courts. We also recommend that the automatic provision for special measures in the family courts is mirrored in the civil courts.

***Why are these changes to the Bill needed?***

We welcome the government’s amendments extending automatic eligibility for special measures to the family courts (Section 61). This is a very important improvement for survivors. We also welcome the extension of a discretionary provision for special measures and a discretionary prohibition on cross-examination in person to the civil courts (Sections 62 and 64). However, we consider that the Bill needs to go further in this area to ensure survivors are able to fully participate in court proceedings and access justice across all court jurisdictions.

*Special measures*

Currently, the Bill provides for automatic eligibility of special measures in the family courts for victims of domestic abuse without the need for determination of the victim’s vulnerability (Section 61). Section 62 provides a discretion for special measures in the civil courts, but does not ensure automatic eligibility. Rather, it is a provision that a court may make a special measures direction where the survivor is the “victim, or alleged victim, of a specified offence,” meaning that only survivors whose alleged perpetrator has been convicted, cautioned or charged with an offence, will benefit, and then only subject to judicial discretion.

This is problematic both in relation to the evidential bar and to judicial discretion. Most survivors do not report their abuse to the police (the Office for National Statistics estimates that around four in five (79%) survivors do not report partner abuse to the police[[26]](#footnote-26)). Secondly, judicial discretion in relation to special measures has proved highly inconsistent in the family courts (as evidenced by Ministry of Justice research, [[27]](#footnote-27) as well as research by Women’s Aid[[28]](#footnote-28)) and there is no reason to think that judicial discretion will be more consistently exercised in the civil courts. We therefore recommend automatic eligibility for special measures for survivors in the civil courts, as in the family courts, ensuring consistency of protection across all jurisdictions, as recommended by the Draft Bill Committee.[[29]](#footnote-29)

*Cross-examination*

Cross-examination in person in cases where domestic abuse is an issue is well-recognised as being re-traumatising for survivors[[30]](#footnote-30) and a means by which perpetrators can continue their abuse.[[31]](#footnote-31)

Currently, for family proceedings, section 63 of the Bill provides for automatic prohibition of cross-examination in person where there is a caution, conviction, charge, injunction or specified evidence provided (according to the Bill’s explanatory notes, this is to be along similar lines to that required for legal aid, e.g. letter from refuge or doctor). For civil proceedings, section 64 will enable a court in civil proceedings to give a direction prohibiting a party to the proceedings from cross-examining a witness in person, where either the quality of the witness’s evidence would otherwise be diminished, or such cross-examination would be likely to cause significant distress to the witness or party (and it would not be contrary to the interests of justice to give the direction).

We recommend there should be an automatic prohibition of cross-examination in person in all cases where a survivor makes a statutory declaration of domestic abuse, and that this should apply in both the family and civil courts, with an additional discretionary provision in the civil courts where the quality of the witness’s evidence would be diminished or where significant distress would be caused to the witness or party (which would cover other vulnerable witnesses accessing the civil courts).

We consider this measure is important to protect survivors due to the abovementioned low reporting rates. [[32]](#footnote-32) Reliance on ‘specified evidence’ can also be problematic - many survivors face difficulties in evidencing their abuse, as shown by recent Ministry of Justice research. [[33]](#footnote-33) These difficulties include language barriers, unwillingness of organisations (and health professionals in particular) to write supporting letters, and the fact that a survivor may not have disclosed or reported their abuse at the time to a relevant organisation.[[34]](#footnote-34) It is important that this also applies in the civil courts, where survivors may find themselves in a variety of civil cases, including, for example, libel cases[[35]](#footnote-35) or small claims courts where there has been economic abuse and the couple were unmarried.

1. Protection for disabled survivors subject to coercive control

***Our recommendation***

We recommend that the ‘best interests’ defence to the crime of coercive control, introduced in the Serious Crime Act 2015, is repealed. This would help ensure disabled survivors receive equal protection from this crime.

***Why is this change to the Bill needed?***

The Serious Crime Act 2015 (SCA) introduced the crime of coercive and controlling behaviour. The following conditions must be met for this crime to take place: a person (A) must repeatedly engage in behaviour towards another person (B) that is controlling or coercive; the behaviour by person A must have a serious effect on person B; and person A must know, or ought to know, that the behaviour will have a serious effect on person B. There are two ways in which it can be proved that the behaviour has a serious effect on person B: (i) it causes person B to fear, on at least two occasions, that violence will be used against them (S76(4a)); or (ii) it causes person B serious alarm or distress which has a substantial effect on their day to day activities (S76 (4b)).

However, Section 76 (subsections 8-10) of the SCA sets out a defence which allows an alleged perpetrator to defend their actions by if they can show that: (a) they believed they were acting in the best interests of the victim; and (b) that the behaviour was in all circumstances reasonable. The legislation specifies that this defence cannot apply in relation to behaviour that causes person B to fear that violence will be used against them, but the defence does apply to behaviour that causes person B “serious alarm or distress which has a substantial adverse effect on their day to day activities”.

Examples given in the explanatory notes to the act are: “circumstances where a person was a carer for a mentally ill spouse, and by virtue of his or her medical condition, he or she had to be kept at home or compelled to take medication, for his or her own protection or in his or her own best interests.”[[36]](#footnote-36)

We are concerned that this defence provides an overly broad defence for behaviour amounting to coercive control. The defence risks negatively impacting on disabled victims and survivors and being exploited by abusers and wrongly used to protect them. Disabled women are already disproportionately impacted by domestic abuse.[[37]](#footnote-37) They are over twice as likely to experience domestic abuse compared to non-disabled women[[38]](#footnote-38) and four times more likely to report abuse from multiple perpetrators.[[39]](#footnote-39) The charity Stay Safe East, which supports disabled survivors of domestic abuse, considers that the defence: “has the potential to prolong the abuse of disabled victims, to prevent victims getting justice and disadvantages disabled victims of coercive control.”[[40]](#footnote-40) This is particularly concerning in a context where disabled survivors already experience abuse for longer before seeking help.[[41]](#footnote-41)

There is already a statutory framework in place to involve professionals where a person may lack capacity and require medication or confinement (i.e. the procedures under the Mental Capacity Act or the Mental Health Act) and protection from criminal liability for carers of people who lack capacity.[[42]](#footnote-42)  Should a person not lack capacity, then they have a right to refuse medication or other treatment/restraints. Nobody should be subject to coercive and controlling behaviour by a spouse or carer, and the law should not provide lesser protection for disabled people. As well as enabling potential abusers to justify their behaviour[[43]](#footnote-43) by claiming they were acting in a disabled person’s best interest, the defence feeds into stereotypes about disabled people lacking autonomy.

We recognise that carers often face challenging situations and that support for them is lacking. However, as the Carers Trust has said to us, the answer is to make better provision for services that support carers and ensure access to the relevant procedures under the Mental Capacity Act or Mental Health Act. In this context, the Carers Trust states that “unpaid carers need better services and support. Fully funding, implementing and enforcing legislation and guidance which protects unpaid carers’ rights and entitlements under such legislation as the Care Act, the Mental Capacity Act and the Mental Health Act would achieve this.”[[44]](#footnote-44) The answer to the challenges faced by carers does not lie in providing a potential loophole for the abuse of disabled survivors.

We therefore recommend that the Domestic Abuse Bill is amended to include a provision repealing Section 76 SCA.

1. Reference to violence against women and girls strategy

**Our recommendation**

We recommend that guidance issued under the Bill must take into account any strategy to end violence against women and girls adopted by a Minister of the Crown, and that clause 73 of the Bill should be amended to require this.

**Why is this change to the Bill needed?**

Domestic abuse is a gendered crime, and a form of violence against women and girls (which is both a cause and consequence of gender inequality).[[45]](#footnote-45) Whilst men can and do experience domestic abuse, women are disproportionately impacted: they are more likely to experience domestic abuse, and also more likely to experience repeated victimisation and to be seriously hurt or killed than male victims of domestic abuse.[[46]](#footnote-46) Domestic abuse also overlaps and is connected with many other VAWG crimes such as rape, forced marriage and stalking. It is therefore important that any guidance issued under the Bill takes into account the cross-government VAWG strategy, so that prevention and response measures are informed by and recognise the gendered and overlapping nature of domestic abuse alongside other forms of VAWG.

**Further information**

The Equality and Human Rights Commission is a statutory body established under the Equality Act 2006. Find out more about our work on the [Equality and Human Rights Commission website](http://www.equalityhumanrights.com)**.**

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35. Eg. The Times, 14 February 2019, ‘[Courts ‘are silencing abused women](https://www.thetimes.co.uk/article/courts-are-silencing-abused-women-95hrdjqnq?ni-statuscode=acsaz-307)’. [↑](#footnote-ref-35)
36. [Explanatory Notes to section 76, Serious Crime Act 2015](https://www.legislation.gov.uk/ukpga/2015/9/notes/division/3/5/2/11). [↑](#footnote-ref-36)
37. EHRC (November 2020), [Survival, recovery and justice: specialist services for survivors of domestic abuse](https://www.equalityhumanrights.com/sites/default/files/parliamentary_breifing_specialist_services_for_survivors_of_domestic_abuse.docx). [↑](#footnote-ref-37)
38. Office for National Statistics ONS (2019) [Domestic abuse prevalence and victim characteristics - Appendix tables](https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/domesticabuseprevalenceandvictimcharacteristicsappendixtables). [↑](#footnote-ref-38)
39. SafeLives (2017) [Disabled Survivors Too: Disabled people and domestic abuse](https://safelives.org.uk/sites/default/files/resources/Disabled%20Survivors%20Too%20CORRECTED.pdf),18: one in five disabled survivors compared to one in twenty for non-disabled survivors. [↑](#footnote-ref-39)
40. Stay Safe East (April 2020), [Domestic Abuse Bill: Briefing and Proposed Amendments - Disabled](https://drive.google.com/file/d/1GBA95OxQHMzmx3n3Pztag03uHbtn9gkD/view)

    [Survivors](https://drive.google.com/file/d/1GBA95OxQHMzmx3n3Pztag03uHbtn9gkD/view). [↑](#footnote-ref-40)
41. An average of 3.3 years before accessing support, compared to 2.3 years for non-disabled victim, according to figures from domestic abuse charity Safe Lives. See: Safe Lives (2017), [Disabled Survivors Too](https://safelives.org.uk/sites/default/files/resources/Disabled%20Survivors%20Too%20CORRECTED.pdf), 6. [↑](#footnote-ref-41)
42. s.5 Mental Capacity Act 2005. The Government’s Explanatory Notes for s.5 of the Act state: ‘This provides statutory protection against liability for certain acts done in connection with the care or treatment of another person. If an act qualifies as a ‘section 5 act’ then a carer can be confident that he will not face civil liability or criminal prosecution.’ [↑](#footnote-ref-42)
43. Note comments by Mother’s Union (January 2015), Written evidence to the [Public Bill Committee on the Serious Crime Bill](https://publications.parliament.uk/pa/cm201415/cmpublic/seriouscrime/memo/sc10.htm). [↑](#footnote-ref-43)
44. Email from Carer’s Trust to Equality and Human Rights Commission, 18 December 2020. [↑](#footnote-ref-44)
45. As recognised in HM Government, [Ending Violence Against Women and Girls Strategy 2016-2020](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522166/VAWG_Strategy_FINAL_PUBLICATION_MASTER_vRB.PDF), p. 16. See also: WHO (2001), [Promoting Gender Equality to prevent violence against women](http://www.who.int/violence_injury_prevention/violence/gender.pdf). [↑](#footnote-ref-45)
46. Walby, S. and Towers, J. (May 2017) ‘Measuring violence to end violence: mainstreaming gender’, *Journal of Gender-Based Violence*, vol. 1, no; Walby, S. and Allen, J. (2004) Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey. Home Office Research Study 276. London: Home Office; Office for National Statistics (ONS). (2019) Domestic abuse in England and Wales: year ending March 2019. Published online: ONS. Cited in Women’s Aid (2020), [Domestic abuse is a gendered crime](https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/domestic-abuse-is-a-gendered-crime/). [↑](#footnote-ref-46)