LIBERTY

LIBERTY’S SUBMISSION TO THE JOINT COMMITTEE ON HUMAN RIGHTS’ DRAFT DOMESTIC VIOLENCE AND ABUSE BILL SCRUTINY

JANUARY 2019
ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at libertyhumanrights.org.uk/policy

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INTRODUCTION

1. Liberty welcomes this opportunity to respond to the Joint Committee on Human Rights’ (JCHR) inquiry on the draft Domestic Abuse Bill – as part of the process of pre-legislative scrutiny. The terms of reference focus on whether the draft Bill adequately protects the rights of victims and perpetrators. In summary, Liberty believes that although the draft Bill introduces some welcome measures, as a whole it is too narrow in scope, represents a missed opportunity and will continue to fail thousands of survivors of domestic abuse.

2. The Domestic Abuse Bill must promote equality, safety, liberty and dignity for all survivors of abuse. Anything less is discriminatory and contrary to both domestic and international human rights laws – including the European Convention on Human Rights (ECHR) (as conferred into domestic law by the Human Rights Act 1998), the Convention for the Elimination of Discrimination Against Women (the CEDAW Convention) and Council of Europe recommendations. Further, once this Bill becomes law we will also be bound by the Istanbul Convention – a legal instrument considered the ‘gold standard’ legislation for tackling violence against women and girls. Yet the Bill as it stands risks falling short of many key requirements of the Istanbul Convention.

3. In this submission, Liberty will focus on three areas to explain why the draft Domestic Abuse Bill does not go far enough and fails to comply with our obligations under human rights law. First, the inadequate protection afforded to migrant survivors of abuse perpetuates a discriminatory, two-tier system of safety in the UK. Second, reforms to the justice system are insufficient and fail to provide survivors with the access, security and support they need. Third, we are deeply concerned by a suite of measures which are a smoke screen for real commitment to change, and risk violating fundamental civil liberties.

SUMMARY OF RECOMMENDATIONS

PROTECTING MIGRANT WOMEN

- The Bill should be amended to require an impenetrable ‘firewall’ between vital public services and the Home Office so that all survivors can safely report abuse to the police, social services, health professionals and others without fear of immigration enforcement.

- The Bill must render all migrant survivors eligible to apply for indefinite leave to remain under the Domestic Violence Rule.

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• The Bill must extend the Destitute Domestic Violence Concession so that all migrant survivors of abuse can apply for temporary support, regardless of their immigration status. The Government must also extend this support to be given for at least six months.

• The No Recourse to Public Funds rule should be abolished for survivors of abuse, or at the very least they should be made eligible for refuge accommodation.

• The Government should end the harmful practice of indefinite immigration detention and improve the widely-criticised Adults at Risk policy to ensure that vulnerable people – including migrant survivors of domestic abuse – are not placed in detention in the first place.

REFUGES AND SAFE ACCOMMODATION

• The Government should address the crisis in funding for refuges and domestic abuse services to address threats to basic human rights standards.

IMPROVING THE JUSTICE SYSTEM

• The evidential threshold under the Domestic Violence Gateway must be lowered further, to ensure survivors can access legal aid for vital litigation. The scope of cases which use the Domestic Violence Gateway should also be widened – and include applications for judicial review - so that survivors can apply for legal aid in a wider range of proceedings, on the basis of their experiences of domestic abuse.

• In conjunction with the above, the extremely low means test for legal aid applications must be increased so that survivors of abuse are not barred from accessing justice – and this must also apply across the board; including applications for judicial review.

• We recommend for the removal of the clauses in Part 3 of the draft Bill which create a civil order scheme that will be both ineffective and a threat to civil liberties.

• We oppose the plan in the Government’s consultation response to put Clare’s Law on a statutory footing, and to include it as a ‘positive requirement’ under the DAPO scheme.
• Liberty urges the Government to reconsider its strategy on using conditional cautions more widely in domestic abuse cases, and to instead adhere to current policy, practice and legal precedent.

DISPORPORTIONATE TECHNOLOGICAL RESPONSES

• We recommend for the removal of Clauses 31–33 in the draft Bill, as the proposal of using electronic monitoring as a positive requirement of the DAPO scheme risks violating fundamental human rights and may put survivors at greater risk.

• The Government must rethink plans to roll out body-worn cameras to police forces in the UK, not only in the context of domestic abuse, but in other settings as well.

• Liberty recommends for the removal of Clause 52 from the draft Bill – as polygraph testing risks breaching civil liberties, and may result in decision-makers deferring to machines when making fundamental choices about offenders’ lives and victims’ risk management plans.

A TWO-TIER SYSTEM OF SAFETY FOR MIGRANT WOMEN IN THE UK

SURVIVORS LIVING IN A HOSTILE ENVIRONMENT

4. The Government’s ‘hostile environment’ agenda has prioritised immigration enforcement over the need to provide safety and security to survivors of domestic abuse. Invasive data-sharing agreements between trusted public services and Immigration Enforcement prevent survivors with insecure immigration status from accessing the services they need, as they often fear reporting crimes due to the real risk of detention or deportation.\(^2\) We are particularly concerned by the police’s routine referral of victims of crime to the Home Office – considering 60 per cent of forces admitted that they do so.\(^3\) What is especially harrowing is the fact that victims of domestic abuse and other serious crimes may even be considered ‘low-hanging fruit’ – as vulnerable people are seen as easy marks to meet the Government’s removal targets.\(^4\) Under s.6 of the Human Rights Act 1998, public bodies have a statutory duty to respect individual human rights. Therefore, statutory agencies’ practices must uphold their obligation to keep all survivors safe from violence, and place survivors’ safety as paramount to immigration control. Failure to do so risks breaching victims’ rights under Articles 2, 3, 4 and 8 ECHR.

\(^2\) For further information, please see Liberty’s ‘Care Don’t Share’ report, December 2018.


\(^4\) Ibid.
5. Perpetrators of abuse also often use these hostile environment measures as a tool of coercive control, by threatening to report victims to the Home Office if they go to the police with a complaint, or by suggesting the victim is entirely dependent on him for her residency in the UK. In some cases, a woman’s vital documentation and paperwork is also kept by the perpetrator. This leaves survivors fleeing violence in an impossible position – where they are forced to choose between detention/deportation, destitution or staying with their abuser. As the End Violence Against Women Coalition (EVAW) argues; “it is essential immigration policies are designed so they can’t be used as a weapon by abusers or as an excuse by authorities not to help women or take action.” In one case, a survivor who left her abusive husband found out that he had been lying about managing her immigration paperwork, and as a result she had become an ‘overstayer’. She had a real fear of detention or deportation – particularly as a victim of FGM who was terrified her daughters would be at risk of being cut if they were sent back to Nigeria. The hostile environment has left her in a state of limbo, uncertainty and at very high risk of further abuse.

6. These policies contravene our obligations under international human rights instruments – primarily the CEDAW Convention and associated recommendations made by the Committee. CEDAW updated its General Recommendation 35 on gender-based violence in 2017, and calls on states to repeal “…restrictive immigration laws that discourage women, including migrant domestic workers, from reporting this violence…” Further, as the Home Affairs Select Committee notes in their Report on Domestic Abuse, “many police forces continue to share details of victims with the Home Office for the purposes of immigration control. This practice is contrary to national police guidance, makes it harder for particularly vulnerable victims to seek protection and access justice, and conflicts with the Government’s stated objective that all vulnerable migrants, including those in the UK illegally, receive the support and assistance they need regardless of their immigration status”.

7. In order to comply with our domestic and international human rights obligations, we urge the Committee to support an impenetrable legislative ‘firewall’ between vital public services and the Home Office so that all survivors can safely report abuse to the police, social services, health professionals and others without fear of immigration enforcement.

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8. The Government must provide the adequate resources necessary to meet basic human rights standards for protecting survivors of abuse. Council of Europe guidelines on ‘minimum standards for support services’ recommends that victims have access to appropriate services, that a range of support options are available for women facing multiple discrimination, and that service providers are skilled and specialist.\(^9\) However, specific policy decisions of this Government have resulted in the decimation of these crucial services since 2010 – with more than 65 per cent of England’s local authorities slashing their spending on refuges.\(^10\) As a result, 60 per cent of all referrals to refuges are now routinely refused\(^11\), which rises to 80 per cent for black, Asian and minority ethnic (BAME) women.\(^12\) It is evident that our refuge services are at crisis point. No survivor of abuse or child should ever be turned away from safety.

9. The Government’s failure to ensure there is adequate refuge provision across the country may breach our positive obligations under the ECHR. Positive obligations under the ECHR – to take action in response to harm - include systemic duties, operational duties and investigative duties. This is cemented by legal precedent in the European Court of Human Rights (ECtHR) that reinforces states’ obligations to effectively protect, prevent and provide appropriate remedies for victims of domestic abuse.\(^13\) Without providing shelter and safety to thousands of women every year, the Government therefore risks breaching survivors rights’ under Article 2 (right to life), Article 3 (freedom from torture, inhuman and degrading treatment and punishment), Article 8 (right to protection of the home, private and family life – including autonomy in decision making, the right to live with dignity and the right to physical and psychological integrity), and Article 14 (the equal enjoyment of all these rights).

10. Despite the human rights implications of cutting refuge services over the past decade, the Government has not committed to reversing these harmful policies to ensure all survivors of domestic abuse are safe. This issue is compounded for BAME and migrant women – as specialist services for these groups have suffered the most as a result of budget cuts, and subsequently these women are more likely to be denied safety. ‘By

\(^9\) Council of Europe— Professor Liz Kelly, Roddick Chair on Violence Against Women, ‘\textit{Combating violence against women: minimum standards for support services}’, September 2008, Directorate Gender of Human Rights and Legal Affairs, p.16.

\(^{10}\) Jamie Grierson, ‘\textit{Council funding for women’s refuges cut by nearly £7m since 2010}’, The Guardian, 23 March 2018.


\(^{12}\) \textit{Imkaan, ‘Capital Losses: the state of the specialist BME ending violence against women and girls sector in London’}, 2016.

\(^{13}\) In Osman v United Kingdom\(^{[1998]}\) ECHR 101, the case established a positive obligation upon the State to prevent loss of life where the authorities ‘\textit{knew or ought to have known}’ of a real and immediate risk to the life of a person from criminal acts of another, and failed to take measures that could reasonably have avoided that risk, \textit{MC v Bulgaria}, Application No. 39272/98 \textit{[2003]} ECHR 646 found that there were breaches of Article 3 and 8 arising from investigative and prosecutorial failures as a result of the state’s actions in response to the rape of a 14 year old girl by two men. Similarly, in \textit{Opuz v Turkey}, Application No. 53401/02 ECHR \textit{[2009]} at para 176, ECtHR found Turkey was in violation of its obligations to protect victims of domestic violence, and for the first time held that gender-based violence is a form of discrimination under ECHR. The violation of Article 3 was a result of the State authorities’ failure to take protective measures in the form of effective deterrence against serious breaches of the applicant’s personal integrity by her husband.
and for’ specialist services are critical, as providers who understand the experiences of their service users, provide an unparalleled level of skill and knowledge, can transcend language and cultural barriers, and provide holistic care to women with complex needs, are best placed to support survivors towards an independent life away from violence. However, the Government has pledged a mere £300,000 to build resources and expertise within specialist BAME services – which barely scratches the surface considering the scale of the problem and the background of extensive prior cuts to services. Not only is this funding insufficient to compensate for such catastrophic cuts over recent years, but it will not stretch far enough to provide meaningful support and protection to the thousands of BAME survivors of abuse across the UK. We are also concerned that this funding is limited to developing provisions within existing providers, rather than recognising the need to open more specialist refuges and services. Liberty believes the Government can no longer offer insignificant concessions to such a fundamental problem, and instead must meet the basic needs of all survivors, grounded in minimum standards of human rights – including for BAME women, LGBT+, disabled and older victims of abuse.

NO RECOURSE, NO SAFETY

11. Liberty believes this Bill will be a missed opportunity if it does not protect all survivors of abuse – regardless of their immigration status. However, the draft Domestic Abuse Bill makes limited provision for survivors with no recourse to public funds (NRPF). Women who are subject to the NRPF rule – with no access to support from the state – are some of the most marginalised and isolated survivors of abuse in our society. And without access to housing support, they are routinely denied refuge spaces and safe accommodation.¹⁴ One survivor, who suffered emotional and psychological abuse at the hands of her partner for two years in the UK, was denied a refuge space because of her immigration status and had to continue living with her perpetrator in the same house.¹⁵ This experience is familiar to many other migrant women – who face a harrowing choice between destitution and staying with their abuser.

12. By continuing to perpetuate this discriminatory, two-tier system of safety, the Government will fail to comply with a key provision in the Istanbul Convention which specifies that any measures to, “protect the rights of victims shall be secured without discrimination on any ground such as ... national or social origin ... migrant or refugee status, or other status”.¹⁶ Many women fleeing abuse with NRPF also become destitute and even street homeless, which violates their rights under Articles 3 and 8 ECHR. In addition, the discriminatory nature of the NRPF rule for survivors of domestic abuse – which includes the fact that women with this status are far more likely to be turned

¹⁴ Women’s Aid’s ‘No Woman Turned Away’ project found that during 2016/17, only 5.4 per cent of vacancies for refuges on Routes to Support would consider applications from women with NRPF, 2018, p.23.
¹⁵ End Violence Against Women Coalition, ‘Women Living in a Hostile [Environment], Personal Stories’.
¹⁶ Article 4(3), Istanbul Convention.
away from a refuge space\textsuperscript{7}\textendnote{7} – violates their rights under Article 14 ECHR, when applied alongside Articles 2, 3 and/or 8.

13. The Government’s pledge of £500,000 for a new ‘crisis support system’ for survivors with no recourse to public funds is a sticking plaster, and will not stop thousands of migrant women from having their fundamental human rights infringed, and their safety disregarded. We are also alarmed by the Government’s entirely inappropriate suggestion that, “In some cases, the victim of domestic abuse may be best served by returning to their country of origin and, where it is available, to the support of their family and friends”\textsuperscript{8}.\textendnote{8} These proposals show that the Government remains completely detached from the realities of survivors’ experiences. We recommend the abolition of the NRPF rule for survivors of abuse, or at the very least delinking eligibility for public funds from a woman’s eligibility for refuge accommodation.

RIGHT TO REMAIN AND BE FREE FROM INDEFINITE DETENTION

14. Migrant women who are victims of abuse are increasingly vulnerable when it comes to asserting their rights to remain in the UK. The Domestic Violence Rule – an immigration application survivors can make in order to obtain indefinite leave to remain – is a crucial tool that enables women to establish independent residency in the UK\textsuperscript{9}. However, it is only open to women who arrived in the UK on a spousal visa, which restricts many other survivors of abuse from securing an autonomous right to remain away from their perpetrators. The Domestic Abuse Bill should therefore make all migrant survivors eligible to apply for indefinite leave to remain under the Domestic Violence Rule.

15. Similarly, the Destitute Domestic Violence Concession (DDVC) enables survivors applying for leave under the Domestic Violence Rule to access public funds for three months – however this is again limited to those on spousal visas. Access to state support is vital for any migrant survivor of domestic abuse who needs to establish independent residency and a life away from violence. Further, making a distinction for the provision of services on the basis of whether a survivor has a spousal visa or not contravenes Article 4(3) of the Istanbul Convention, which prevents discrimination on the basis of “marital status... or any other status”. It is therefore crucial that in conjunction with an extension of the Domestic Violence Rule, the DDVC is also widened so that any migrant survivor can apply for indefinite leave to remain and associated support from the state. Further, the length of time in which survivors are able to access public funds under the DDVC must be extended to at least six months – so they have sufficient time to find safety and obtain financial security.

\textsuperscript{7} Women’s Aid’s ‘Nowhere to Turn’ report found that only one quarter of women seeking refuge were accommodated in suitable refuge spaces, while only 7 per cent of women with no recourse to public funds were accommodated.


\textsuperscript{9} Section DVLR: Indefinite leave to remain (settlement) as a victim of domestic abuse, Immigration Rules, Appendix FM: family members.
16. Egregiously, since 2015 those eligible have also no longer had the right to appeal applications made under the Domestic Violence Rule to the Tribunal, only leaving them with recourse to an administrative review – which is limited to procedural errors rather than reconsidering the substance of a decision. This new system is clearly impeding access to justice for migrant survivors of domestic abuse as before 2015, Domestic Violence Rule appeals had a high success rate – with 82 per cent of Home Office decisions being overturned in 2011.\textsuperscript{20} However, between 2015 and 2018, only 2 per cent of administrative reviews resulted in an overturned decision.\textsuperscript{21} Liberty is calling for the 2015 change to be reversed, to ensure survivors have the right to appeal decisions to the Tribunal.

17. We are also greatly concerned by the routine use of immigration detention in the UK. Migrant women who have experienced domestic abuse and other forms of gender-based violence are immensely affected by this inhuman and degrading system. Being detained indefinitely in poor, unsanitary conditions, where ill-treatment and abuse are rife, and access to mental health and medical care is inadequate, vulnerable people are inevitably re-traumatised. We welcome the Home Secretary’s commitment to piloting alternatives to detention for women who would otherwise be placed in Yarl’s Wood detention centre, by managing their cases in the community – but this does not go far enough. We believe the Government should end the harmful practice of indefinite detention altogether by imposing a 28-day time limit, and improve the widely-criticised Adults at Risk policy to ensure that vulnerable people – including migrant survivors of domestic abuse – are not placed in detention in the first place.

18. The legal framework is clear – there is an obligation on the UK Government to protect all women residing in this country from violence, abuse and discrimination. Yet Liberty is deeply concerned that migrant survivors of domestic abuse have been entirely left out on the face of the draft Bill, and are afforded insignificant concessions as part of the Government’s weak package of commitments. This contravenes international and domestic human rights law, and denies thousands of women the safety, security and support they need.

**ACCESS TO JUSTICE**

19. As a result of drastic cuts by the Ministry of Justice since 2012, legal aid provisions for survivors of domestic abuse are now extremely limited. We acknowledge that legal aid is currently available for immigration applications under the Domestic Violence Rule and for private family law proceedings using the Domestic Violence Gateway, but these are


\textsuperscript{21} Niamh McIntyre and Alexandra Topping, *Abuse victims increasingly denied right to stay in UK*, The Guardian, 16 August 2018.
extremely difficult to obtain through the normal means-tested eligibility rules. This contravenes Council of Europe guidelines that state victims should receive “free, immediate and comprehensive assistance including ... legal assistance”\(^2\), as well as Article 57 of the Istanbul Convention which outlines that there should be “a right to legal assistance and free legal aid for victims”.

20. Although the evidential barriers to accessing legal aid in private family law proceedings were lowered in January 2018\(^3\), the extremely low means test must be increased and the evidential burdens must continue to be reduced. We urge the Committee to consider the recommendations made in the LASPO review (June 2017), which specifically outlines the detrimental impact of legal aid cuts to domestic abuse cases.\(^4\) Liberty also believes that the scope of cases which use the Domestic Violence Gateway should also be widened – and include applications for judicial review – so that survivors can apply for legal aid in a wider range of proceedings, on the basis of their experiences of domestic abuse. In conjunction with this, the extremely low means test for legal aid applications must be increased across the board, so that survivors of abuse are not barred from accessing justice. This should include higher means tests for legal aid applications for judicial reviews against statutory agencies who fail to provide survivors with essential services, so that we can hold these authorities to account and ensure they comply with their legal duties.

A SMOKE SCREEN RESPONSE

CIVIL ORDERS

21. Liberty further believes that the Government’s draft Domestic Abuse Bill uses ineffective civil measures as a smoke screen for the absence of real reform and commitment to change. We are also deeply concerned that these measures pose a significant threat to fundamental civil liberties. First, Part 3 of the draft Bill creates new Domestic Abuse Protection Notices (DAPNs) and Domestic Abuse Protection Orders (DAPOs). These would be imposed on an individual before there has been any criminal charge, conviction or acquittal, and breach of a DAPO would amount to a criminal offence under the Government’s proposals. These measures circumvent the criminal justice system as a person may end up incarcerated based on facts determined by a legal process that falls far below the standard of fair process necessary to justify a criminal conviction. Where a criminal sanction results from breach of a civil order, this in effect creates a personal criminal code that a person must abide by – a code set by the conditions of the DAPO, rather than the individual being measured against a general legislative criminal standard. This is a clear threat to fair process, the rule of law and

engages defendants’ rights under Article 6 ECHR. Liberty is also concerned that this scheme will be ineffective at achieving the Government’s intended aims, as survivors who are afraid of criminalising their abusers will face the same fears in relation to the proposed civil orders.

22. Rights of Women – a leading women’s charity that helps survivors of domestic abuse through the law – also argues that it is not compatible with the UK’s human rights obligations to impose a civil order on a perpetrator that limits their liberty without conviction and without representation. They believe the DAPO scheme should not be an alternative to prosecution and that the Government cannot put forward such a proposal without addressing the problems with existing Domestic Violence Protection Orders. Further, Rights of Women highlights that we need greater reforms in the justice system than just another protective order – and that this work should include: improving access to courts through legal aid, keeping local courts open, helping victims attend court, and increasing support through Independent Domestic Violence Advocates. As a result, they do not think that the introduction of DAPOs would help protect victims of domestic abuse. Sisters for Change raises similar concerns around the new DAPO scheme, arguing that it will not consolidate or rationalise the current system. We therefore urge the Committee to recommend the removal of the clauses in Part 3 of the draft Bill which create these civil order schemes.

23. Second, the introduction of positive requirements as a condition of a DAPO would disproportionately interfere with the accused’s rights to liberty and privacy (Articles 5 and 8 ECHR). Sisters for Change similarly argue that the Government’s proposed positive requirements go far beyond the standard scope of protective orders – and there is no mention of how this would be funded. Further, the suggested notification requirement, in which an individual would need to notify certain personal details to the police, including where they live and current intimate relationships, compromises privacy rights in a context where these individuals have not been convicted of a crime. Liberty has historically opposed the Domestic Violence Disclosure Scheme (DVDS) – otherwise known as ‘Clare’s Law’ – for its inefficacy and the fact that it puts the emphasis on women to take action to protect themselves from abuse. When the scheme was first proposed by the Government, Refuge – a leading domestic violence charity – argued that the DVDS would not be supported by, “any of us with the expertise to judge its chances of success” and questioned (1) how many women would

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26 Ibid.
27 Ibid.
29 Ibid.
use the scheme, and (2) what meaningful difference this would make, considering the Government’s own impact assessment suggested that at best the DVDS would result in an annual reduction of 0.5 per cent in domestic violence.\(^{31}\) Rights of Women have also argued that the DVDS should not be considered a core part of the response to domestic abuse.\(^ {32}\) In January 2018, statistics showed that there are discrepancies in the application of Clare’s Law between areas, and in some regions it is particularly low: for instance 3.3 per 100,000 people in West Yorkshire.\(^ {33}\) Therefore, we oppose the proposition in the Government’s consultation response to put Clare’s Law on a statutory footing, and to include it as a ‘positive requirement’ under the DAPO scheme.

24. Related to this, we are deeply troubled by the suggestion that electronic monitoring should be used as part of the DAPO scheme, and could be flexibly imposed by the courts. The Bill suggests using new technologies (including controversial GPS tracking) to monitor an alleged perpetrator’s location, to establish behaviour patterns, or to provide evidence of someone’s movements e.g. compliance with an exclusion zone. Liberty believes this risks violating an individual’s right to liberty and right to privacy (Articles 5 and 8 ECHR). The Council of Europe have expressed concerns about using electronic monitoring at the pre-trial stage, concluding that, “using [electronic monitoring] on suspects who would comply with the non-custodial requirements without the additional element of [electronic monitoring] ... should be avoided.”\(^ {34}\)

25. We have further concerns about the effectiveness of this technology. Last year, the Ministry of Justice was accused of delivering a “fundamentally flawed” new generation electronic monitoring programme, which was deemed to be a “waste of public money”.\(^ {35}\) Further, EVAW have expressly disagreed with the Government’s electronic monitoring proposal, stating that they are “concerned that this proposal would be used differently by different courts, is unlikely to be policed/enforced given current police capacity, and may give [a] false sense of security to victims and interested agencies.”\(^ {36}\) We support the independent women’s sector when we say that these electronic monitoring proposals are ill-conceived and ineffective. Such a scheme is likely to cause more harm than good, and therefore we recommend for the removal of Clauses 31–33 in the draft Bill.

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\(^{31}\) The Telegraph, “Clare’s Law plans criticised by violence charities”, 5 March 2012.

\(^{32}\) Rights of Women, “Transforming the Response to Domestic Abuse”, Response from Rights of Women to the Government Consultation on the proposed Domestic Abuse Bill, 31 May 2018, p.28.

\(^{33}\) Georgina Morris, “Justice by Geography” as Clare’s Law figures reveal discrepancies in force use’, The Yorkshire Post, 8 January 2018.


\(^{36}\) EVAW, ‘Submission to the Government Consultation on the proposed Domestic Violence and Abuse Bill’, April 2018.
26. The Government’s consultation response on the Bill also provides for some police forces to pilot conditional cautions for “lower risk first reports of domestic abuse.”

Liberty opposes this, as we have long been concerned that out-of-court disposals resulting in deprivations of liberty are incompatible with Article 5 ECHR. Conditional cautions require a person to comply with coercive conditions that are rehabilitative, reparative or punitive in nature – and failure to comply may result in prosecution for the offence. This renders a person subject to an unlawful deprivation of their liberty without the necessary intention to pursue legal proceedings. As the Government acknowledges, DPP guidance has long restricted the use of conditional cautions for domestic abuse cases, as these can rarely be considered ‘low-level’ offending because of the complexity of abuse, and the fact that conditional cautions are generally recommended for minor and/or isolated incidents. To suggest domestic abuse fits this description is to entirely misunderstand the nature of this crime. Further, Liberty has consistently raised concerns about how summary justice of this type can undermine judicial standards, make individuals subject to arbitrary and inconsistent decision-making, and damage public perceptions of the police and the justice system as a whole. As a result of cost-saving and target-achieving desires, it appears that persistent alleged offenders and those suspected of serious crimes are not being prosecuted when they should be and that out of court disposals are being supplemented instead. We have the same concerns about the proposal to increase the use of conditional cautions in domestic abuse cases. We urge the Government to reconsider this strategy and to adhere to current policy, practice and legal precedent.

TECHNOLOGICAL RESPONSES AND ARTICLE 8

27. The Government’s consultation response includes a commitment to roll out body-worn cameras to police who attend domestic abuse incidents. Liberty firmly opposes this as the routine use of body-worn cameras when responding to domestic abuse call-outs infringes upon a person’s right to privacy in their own homes and private spaces (Article 8 ECHR). We are also troubled by the specific reasons cited by the Government in their consultation document of 2018 when making this proposal. The suggestion that a recording can “provide an immediate and exact record of the disturbance at the scene and the emotional effect on the victim or family”, is deeply problematic and reflects the

38 “Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law: … the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent him committing an offence or fleeing after having done so.”, Article 5 (1)(c) ECHR.
40 In R (Robson) v CPS [2016] EWHC 2191 (Admin), the court held that conditional cautions can be offered in some rare domestic abuse cases, however the nature of the crime and the circumstances of the offender must warrant this and the case must be immediately referred to a prosecutor. The Government’s proposals would circumvent this process proscribed by case law, and pilots by individual police forces will likely result in inconsistent applications.
Government’s broader lack of understanding and sensitivity to domestic abuse cases.\footnote{HM Government, ‘Transforming the Response to Domestic Abuse’, March 2018, p.49.}

To propose recording the aftermath of a distressing incident suggests that (1) the victim must behave in a certain way in order to be believed, (2) that there needs to be a clear ‘disturbance’ (this term only really lends itself to physical violence), and (3) interferes with the privacy rights of the victim, their family and any others present.

28. Further, body-worn cameras are limited in their use in this context - they can only capture the aftermath of a single incident, they record the situation from the officer’s perspective, an officer generally chooses when to turn them off and on, and a host of other concerns as to the integrity and efficacy of the footage collected. As a result, recordings will be entirely detached from the bigger picture of each particular case. The use of body-worn cameras in this context also feeds into the culture of disbelief, as it suggests that police and prosecutors need video evidence of a victim’s immediate emotional reaction, rather than listening to their testimony and relying on other forms of evidence. The Government must therefore rethink plans to roll out body-worn cameras to police forces in the UK, not only in the context of domestic abuse, but in other settings as well.

29. Clause 52 of the Government’s draft Bill creates a polygraph condition for offenders of domestic abuse who are released on licence. This would ostensibly provide Offender Managers with additional information about the offender’s risk and allow them to monitor relevant behaviour. Further, the Government suggests that the condition would allow Offender Managers to monitor compliance with other conditions of the person’s licence and improve risk management plans. Liberty believes that this measure is a futile, ineffective and dangerous way to address re-offending. First, the use of polygraph testing risks infringing upon the offender’s rights under Article 5 (right to liberty), Article 6 (right to a fair trial) and Article 8\footnote{In R (on the application of) C v Ministry of Justice[2016] UKSC 2, C sought to overturn the polygraph requirement of his licence on the grounds that it breached his Article 8 rights. The court accepted that the imposition of the polygraph condition did indeed engage Article 8, but that the seriousness of the offences for which he had been convicted justified the imposition for the purposes of Article 8(2). In this case, C was convicted of two murders – this is clearly distinguished from applying polygraph testing to every offender convicted of a domestic abuse related crime, which may not reach the level of seriousness needed to justify an interference with Article 8(2) as was made in C’s case.} (right to privacy), particularly if their conditions become more restrictive and their monitoring becomes more intrusive as a result of the test. As Ward et al. have argued “Recent technologies such as the polygraph pose significant human rights questions... there appears [to be] little consideration as to how polygraph examination may impinge upon the offenders’ rights, and – consequently – damage the therapeutic alliance so vital for the effective treatment of offenders (see Serran et al. 2003) ... The rigid utilization of intrusive measures such as the polygraph may result in the loss of the human rights objects of social recognition, freedom, and equality.”\footnote{Ward, T., Gannon, T. and Birgden, A. (2007), ‘Human Rights and the Treatment of Sex Offenders’, Sexual Abuse: A Journal of Research and Treatment, 19(3), p. 208} Second, polygraph testing has been subject
to immense criticism for its accuracy and credibility. We therefore do not believe this type of technology has a place in making fundamental decisions about an offender’s life and freedom, or for human reliance on this technology to form a risk management plan for the victim – in which the decision-maker may defer to the machine rather than making their own informed call by looking at a range of evidence. Liberty therefore recommends for the removal of Clause 52 from the draft Bill.

CONCLUSION

30. Liberty believes the Government’s draft Domestic Abuse Bill is a missed opportunity and is so limited in scope that it will fail to fully incorporate the Istanbul Convention into domestic law. As a result of these missteps, this Bill will fall short of complying with the UK’s human rights obligations both on an international and national scale. We emphasise to the Committee that the human cost of these failures will be severe – as thousands of survivors of domestic abuse and their children will remain at risk of destitution and further violence. The system of support for survivors in this country is already at crisis point and the Government’s draft Bill does little to address this situation.

31. To ensure this Bill is fit for purpose, the Committee should support calls for this legislation to be widened in scope – so that protections for migrant survivors of domestic abuse can be finally placed on a statutory footing in line with our duties under CEDAW, the Istanbul Convention and the ECHR. Further, reforms to the justice system must increase legal aid provisions and remove ineffective civil measures that disproportionately interfere with fundamental civil liberties. Liberty believes that the recommendations in this submission will create a system that is fair, just and equal for all – and crucially places survivors at the heart of all measures. Only with these changes can the Government truly transform the response to domestic abuse in the UK and ensure this ‘landmark’ legislation is as ground-breaking as it should be.

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