LIBERTY

LIBERTY’S WRITTEN EVIDENCE TO THE JOINT
PRE-LEGISLATIVE SCRUTINY COMMITTEE ON
THE DOMESTIC ABUSE BILL

APRIL 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 Pre-Legislative Scrutiny Committee on the Domestic Abuse Bill. The terms of reference focus on a number of issues; owing to our expertise and current work on the Bill, we will focus on the following:

   a. Human rights compliance: Whether the measures in the Bill ensure that the UK is compliant with the Istanbul Convention.
   b. Protections for migrant women: Support for victims of domestic abuse with uncertain immigration status which means they have no recourse to public funds.
   c. Legal measures: The Domestic Abuse Protection Order (DAPO), Domestic Abuse Protection Notice (DAPN) schemes, and how the Domestic Violence Disclosure Scheme (Clare’s Law) should operate.
   d. Disproportionate use of technology: Enabling the National Probation Service to pilot polygraph testing with high risk domestic abuse perpetrators to monitor licence conditions in the community.
   e. Women in Northern Ireland: Issues raised in relation to the interface between reserved and devolved powers within the United Kingdom.

2. In summary, Liberty believes that although the draft Domestic Abuse Bill introduces a few welcome measures, as a whole it is too narrow in scope, represents a missed opportunity and will continue to fail thousands of survivors. In our view, 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.

3. In this submission, Liberty will focus on two main areas to explain why the draft Domestic Abuse Bill fails to comply with our obligations under human rights law. First, the Bill as it stands does not fully incorporate the Istanbul Convention into domestic law as it offers no meaningful protections for migrant survivors of abuse, excludes women in Northern Ireland, and fails to ensure there is access to safety and justice for all survivors. This is particularly pressing as this Bill will ratify the Istanbul Convention – the legal instrument considered the ‘gold standard’ legislation for tackling violence against women and girls.¹ Second, we are deeply concerned by the suggested legal measures and technological ‘answers’ to domestic abuse, which risk violating fundamental civil liberties such as the right to privacy, fair trials and liberty.

COMPLIANCE WITH THE ISTANBUL CONVENTION

PROTECTIONS FOR MIGRANT WOMEN

4. For further detail regarding the specific barriers faced by migrant survivors of domestic abuse and key recommendations for the draft Domestic Abuse Bill, Liberty has submitted a separate submission jointly with Amnesty UK, the End Violence Against Women Coalition (EVAW), Latin American Women’s Rights Service (LAWRS), Imkaan and Sisters for Change for the Committee’s reference.\(^2\) To avoid repetition, this section focuses on the ways this Bill fails to fully incorporate the Istanbul Convention into domestic law with particular focus on provisions in the Convention which mandate protections for migrant women.

NON-DISCRIMINATION PRINCIPLE – Article 4(3)

5. Article 4(3) specifies that discrimination based on a host of characteristics is not permitted under the Istanbul Convention, by outlining that any measures, “to protect the rights of victims shall be secured without discrimination on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, migrant or refugee status, or other status.” Thereby equal protection for all survivors of domestic abuse must be provided for.

6. However, specific policy decisions of this and previous Governments prevent migrant women from accessing basic services including: refuge accommodation, specialist support, vital welfare benefits (even where there is risk of destitution/street homelessness), and safe reporting mechanisms. As no remedy to the existing two-tier system of safety for migrant women appears on the face of this Bill, the proposed legislation risks perpetuating discrimination against survivors on the basis of their migrant or refugee status, which would be in clear breach of the Istanbul Convention. We urge the Committee to support the recommendations made in Liberty’s joint briefing\(^3\) with Amnesty UK, EVAW, LAWRS, Imkaan and Sisters for Change in order to remedy the discrimination currently faced by migrant women.

7. Article 4(3) also protects survivors from discrimination on the basis of “marital status … or other status…” However, the Domestic Violence Rule (DV Rule) – an immigration application survivors of abuse can make to obtain indefinite leave to remain in the UK – is a lifeline for many women, but restricts eligibility to those on spousal visas. Similarly the Destitution Domestic Violence Concession (DDVC) - which provides vital access to public funds for three months to women making DV Rule applications - also only supports migrant survivors on spousal visas, while others are left destitute. This evidently breaches the principle of non-

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\(^3\) Ibid.
discrimination set out at Article 4(3) of the Istanbul Convention. The Domestic Abuse Bill should enable all migrant survivors eligible to apply for indefinite leave to remain under the DV Rule and concurrently extend the DDVC so that all migrant women can apply for temporary financial support from the state. Further, the length of time in which survivors are able to access public funds under the DDVC must be lengthened to at least six months—so they have sufficient time to find safety and economic security. Anything less than six months will risk survivors continuing to be turned away from safe accommodation, falling into destitution and potentially experiencing further violence.

IMPROVING STATE RESPONSES TO DOMESTIC ABUSE – Article 5(1), Article 7, Article 61

8. Article 5(1) states that “Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation”. Further, Article 7 of the Istanbul Convention calls for all Parties to “place the rights of the victim at the centre of all measures”. However, evidence shows ‘hostile environment’ data-sharing schemes between trusted public services and the Home Office result in immigration enforcement actions against victims of domestic abuse- including arrests, detention and deportation.

a. In one case, a survivor of rape—who was five months pregnant at the time—reported her ordeal to the police. Although they initially took her to a sexual assault centre, she was subsequently arrested while in these premises and taken into custody.4 As a result of the hostile environment, this type of dehumanising treatment has unfortunately become all too common for migrant survivors of domestic abuse. In another case, a survivor who came to the UK with her British citizen partner was regularly physically abused by him and treated like a slave. When a member of the public who witnessed the abuse reported it to the police, the survivor was taken to a hospital due to the severity of her injuries then transferred to a hostel, where she was later arrested and sent to Yarl’s Wood detention centre to be deported.5

b. Following an investigation led by Natalie Bloomer in May 2018, it was revealed that 60 per cent of police forces in the UK are handing over victims of crimes’ data to the Home Office for immigration enforcement purposes.6 This policy results in many survivors being too afraid to report crimes. According to research by LAWRS, roughly two out of three migrant women fear reporting abuse, leaving them with a choice between further abuse and destitution. Many perpetrators of abuse also use a woman’s insecure immigration status as a weapon for control, particularly through threatening

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6 Ibid.
detention/deportation if she reports him to the police. Unfortunately, these threats are grounded in the reality of the hostile environment agenda, resulting in state actors perpetuating cycles of abuse by prioritising immigration enforcement over the protection and safety of victims. Such practices clearly breach Article 5(1) of the Istanbul Convention and fail to “place victims at the heart of all measures” in line with Article 7. We urge the Committee to correct this and ensure compliance through the Bill. Liberty recommends an impenetrable ‘firewall’ between public services and the Home Office, to stop data sharing about victims of crime for the purposes of immigration enforcement. This will help ensure migrant survivors of domestic abuse can report crimes safely and receive necessary support from statutory agencies. The Joint Committee on Human Rights (JCHR) has also echoed these calls in a recent letter to Government Ministers.

9. Article 61 of the Istanbul Convention provides that states must respect the principle of non-refoulement in accordance with existing obligations under international law, and that survivors of gender-based violence who are in need of protection, regardless of their status or residence, shall not be removed under any circumstances to any country where their life would be at risk or where they might be subjected to torture, inhuman or degrading treatment. To ensure compliance with Article 61 - alongside a ‘firewall’ which would enable migrant women to report crimes safely without the real risk of falling foul of the hostile environment - the Home Office must also ensure that vulnerable people, including migrant survivors of domestic abuse, are not placed in immigration detention in the first place and are not removed to countries where they may be at risk of further harm.

SAFETY, SECURITY AND SUPPORT – Article 12(3), Article 22, Article 59

10. Article 12(3) states that “Any measures taken pursuant to this chapter [Chapter III - Prevention] shall take into account and address the specific needs of persons made vulnerable by particular circumstances and shall place the human rights of all victims at their centre.” Article 22 further provides that “Parties shall take the necessary legislative or other measures to provide or arrange for, in an adequate geographical distribution, immediate, short-and long-term specialist support to any victim subjected to any of the acts of violence covered by the Scope of this Convention.” However, the draft Domestic Abuse Bill does not ensure compliance with either of these key provisions.

a. Specific policy decisions of this Government have resulted in the decimation of crucial services since 2010 – last year The Guardian obtained figures to show that more than

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8 Ibid.
9 For further information about data-sharing agreements for immigration enforcement purposes, please see Liberty's ‘Care Don't Share’ Report.
10 Letter to Victoria Atkins MP, Parliamentary Under Secretary of State for Crime, Safeguarding and Vulnerability and Minister for Women, Home Office and Edward Argar MP, Parliamentary Under Secretary of State, Ministry of Justice from Joint Committee on Human Rights (Chair, Rt Hon Harriet Harman MP), Draft Domestic Abuse Bill, 10 April 2019, p.2.
65 per cent of England’s local authorities have slashed their spending on refuges. As a result, many survivors of domestic abuse are routinely turned away from refuge accommodation – with 60 per cent of all referrals to refuges now regularly refused, which rises to 80 per cent for black, Asian and minority ethnic (BAME) women. Failure to ensure there is adequate refuge provision across the country clearly breaches Article 22 of the Istanbul Convention and may breach our positive obligations under the ECHR – namely to take action in response to harm, including systemic duties, operational duties and investigative duties. This is cemented by legal precedent in the European Court of Human Rights (ECHR), which reinforces states’ obligations to effectively protect, prevent and provide appropriate remedies for victims. By failing to provide basic shelter and safety to thousands of women every year, the Government also risks breaching survivors rights’ under Articles 2, 3, 8 and 14 ECHR. In accordance with Articles 12(3) and 22 of the Istanbul Convention, Liberty believes this Bill must provide meaningful long-term and sustainable funding to domestic abuse services, which meet the basic needs of all survivors and grounded in minimum human rights standards – particularly for migrant women, BAME women, LGBT+, disabled and older victims of abuse.

b. Migrant survivors with No Recourse to Public Funds (NRPF) are even more vulnerable, as without access to support from the state they find it almost impossible to access refuge accommodation. Many women fleeing abuse with NRPF subsequently become destitute, street homeless or trapped in abusive relationships, 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 away from a refuge space – violates their rights under Article 14 ECHR, when applied alongside Articles 2, 3 and/or 8. The specific needs of persons made vulnerable by particular circumstances (including immigration status and race) are not taken into account by this Bill and the human rights of all victims are not at the centre of proposed measures, in violation of Article 12(3) of the Istanbul Convention. To ensure compliance with our human rights obligations, we recommend the abolition of the NRPF rule for survivors of abuse with insecure

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14 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 ‘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. MC v Bulgaria, Application No. 39272/02 [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 Opuz v Turkey, Application No. 33401/02 ECHR 2009 at para 176, ECHR 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.
15 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.
16 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.
immigration status, or at the very least delinking eligibility for public funds from a woman’s eligibility for refuge accommodation.

11. Article 59 of the Istanbul Convention states that parties must make provision for grant of autonomous resident permits in cases of dissolution of marriage or relationship where the woman’s status is dependent on her spouse or partner, and that migrant women should be provided with a renewable permit where necessary owing to their personal status or because stay is necessary owing to criminal or civil proceedings. However, the draft Bill fails to ensure this will be the case considering the Government’s refusal so far to extend applications under the DV Rule and support under the DDVC to all migrant women. Survivors of abuse are often dependent on their abusers for residency whether or not they have a spousal visa. For instance, a survivor on a work visa may be dependent on her partner for residency as he may control her paperwork and use revocation as a threat to ensure she does not report the abuse. In one case, a survivor who left her abusive husband found out he had been lying about managing her immigration paperwork, and as a result she had overstayed her visa. 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 to Nigeria.  

Autonomous residency permits can be lifelines for many survivors in similar situations. In her capacity as a Council of Europe Expert for GREVIO, Louise Hooper, has noted in relation to Article 56, “For migrant women this provision is extremely important. The risk of losing residence status should not constitute an impediment to victims leaving an abusive and violent marriage or relationship.” By failing to ensure all migrant survivors have access to autonomous residency rights when fleeing abuse, women continue to be trapped in cycles of abuse and control. This Bill must ensure compliance with Article 50 of the Istanbul Convention by extending the DV Rule and DDVC to all migrant women.

12. The Domestic Abuse Bill as it stands fails to provide adequate protections for all survivors of abuse regardless of their race, ethnicity or immigration status. This breaches multiple provisions of the Istanbul Convention as well as the UK’s obligations under CEDAW and the ECHR. In accordance with the spirit and letter of the Istanbul Convention, the Committee must ensure protections for migrant women are placed on the face of this legislation to secure compliance and guarantee protections for every survivor of domestic abuse.

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17 End Violence Against Women Coalition, *Women Living in a Hostile [Environment], Personal Stories*.
18 GREVIO is the independent expert body responsible for monitoring the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) by the Parties.
19 Louise Hooper, ‘Council of Europe standards with a focus on Articles 60 and 61 of the Council of Europe Convention on Preventing Violence against Women and Domestic Violence’, on behalf of Council of Europe and UNHCR, 21 February 2019.
WOMEN IN NORTHERN IRELAND

13. The draft Bill currently only applies to England and Wales. Liberty is deeply concerned that this will exclude survivors in Northern Ireland from vital human rights protections, which in our view is Westminster’s responsibility to uphold on the basis of the Devolution Agreement. The devolved institutions in Northern Ireland are governed by the Northern Ireland Act 1998. The settlement gives legislative control to the Northern Ireland Assembly for “transferred matters” while under Schedule 2 of the 1998 Act, matters of national importance will usually remain the responsibility of the UK Government. These are known as “excepted matters”, for which the Northern Ireland Assembly does not have the authority to legislate on. Under these “excepted matters” in Schedule 2, s.3(c) includes, “observing and implementing international obligations, obligations under the Human Rights Convention and obligations under EU law.”20 It is well-established that violence against women and girls is a human rights issue21 and domestic abuse in particular engages survivors’ rights under Articles 3 and 8 ECHR, Article 2 in extreme circumstances, and Article 14 when read together with Articles 2, 3 and/or 8. Therefore, the Domestic Abuse Bill must extend to Northern Ireland, to ensure Parliament upholds its human rights obligations under the Istanbul Convention, CEDAW and the ECHR, to protect women across the UK from domestic violence and abuse.

14. Further, Northern Ireland, unlike Scotland22, does not have legislation on domestic abuse and has not yet criminalised coercive control, which is required by Article 34 of the Istanbul Convention. As the Northern Ireland Assembly has been dissolved since January 2017, the exclusion of Northern Ireland in the Bill appears even more likely to result in unequal and inadequate protections for women in this part of the UK. In the 2018 progress report on ratification of the Istanbul Convention, the Home Office specifies that the Convention covers both reserved and devolved areas.23 Further, Article 4(3) prevents discrimination on the basis of “national or social origin”, while the Explanatory Note to the Istanbul Convention provides that “it is incompatible with the object and purpose of the Convention for state Parties to exclude parts of their territory from application of the Convention without valid reason.”24 The JCHR, in its letter to Ministers, has asked the Government to provide a ‘valid reason’ for excluding Northern Ireland from this legislation.25 We urge the Committee to similarly probe this question and consider the serious risk to human rights standards if there is not parity between Northern Ireland and the rest of the UK in relation to domestic abuse laws.

22 Domestic Abuse (Scotland) Act 2018.
25 Letter to Victoria Atkins MP, Parliamentary Under Secretary of State for Crime, Safeguarding and Vulnerability and Minister for Women, Home Office and Edward Argar MP, Parliamentary Under Secretary of State, Ministry of Justice from Joint Committee on Human Rights (Chair, Rt Hon Harriet Harman MP), Draft Domestic Abuse Bill, 10 April 2019, p.2.
ACCESS TO JUSTICE

15. Article 57 states that “Parties shall provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law”. However, currently survivors of domestic abuse face multiple barriers when accessing our justice system. 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 extremely difficult to obtain through the normal means-testing eligibility rules - which also fail to take into account the impact of economic abuse when assessing women’s financial circumstances. For instance, the National Centre for Domestic Violence found that over 6,000 survivors of domestic abuse were denied free legal representation in 2017 because they appeared to have money or assets that precluded them from receiving legal aid – however these economic resources were actually being controlled by their abusers. 26 There are also other types of cases for which victims may need legal aid but will be out of scope – such as most housing claims and social security disputes. Although exceptional case funding may be available if human rights law so requires, this type of funding is very difficult to secure and very limited in availability. 27 This means many victims who may be involved in proceedings relevant to domestic abuse issues are unable to access legal aid, denying people equal access to justice.

16. This breaches Article 57 of the Istanbul Convention and contravenes Council of Europe guidelines that state victims should receive “free, immediate and comprehensive assistance including ... legal assistance”. 28 In order to ensure compliance with the Istanbul Convention and our domestic and international human rights obligations, we urge the Committee to consider the recommendations made in the LASPO review (June 2017) 29 - which specifically outlines the detrimental impact of legal aid cuts to domestic abuse cases. Further, although the evidential barriers to access legal aid in private family law proceedings were lowered in January 2018, 30 the extremely low means test must be increased and the evidential burdens must continue to be reduced, so that survivors of abuse are no longer barred from accessing justice.

17. Without meeting the UKs obligations under the Istanbul Convention and by failing to fully incorporate its key provisions into UK law through the Domestic Abuse Bill, the Government will not be able to comply with this vital legal instrument – contrary to its own stated commitment.

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26 Sachin Croker and Ben Robinson, ‘Legal costs halt thousands of domestic violence cases’, BBC 5 live Investigates, 8 April 2018.
to compliance and ratification. Not only will this undermine fundamental human rights standards, but it will leave thousands of domestic abuse survivors at risk of serious harm.

**A SMOKE SCREEN RESPONSE**

**CIVIL ORDERS**

18. 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 the accused’s 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.

19. Many women’s rights organisations have raised similar concerns regarding the compatibility of this scheme with the UK’s human rights obligations, including Rights of Women and Sisters for Change. They also believe that the introduction of DAPOs would do little to protect survivors of domestic abuse. The JCHR has also questioned the efficacy of the current civil order landscape and has asked the Government to clarify “how the proposed new regime will be more effective in protecting victims than the existing civil order regime.” We therefore urge the Committee to recommend the removal of the Clauses in Part 3 of the draft Bill which create this flawed civil order scheme.

20. Further, 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

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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.21. – in particular on the DAPO scheme they raise concerns that the scheme limits an alleged perpetrator’s liberty without conviction and without representation, in breach of human rights standards, and that the 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.


34 Letter to Victoria Atkins MP, Parliamentary Under Secretary of State for Crime, Safeguarding and Vulnerability and Minister for Women, Home Office and Edward Argar MP, Parliamentary Under Secretary of State, Ministry of Justice from Joint Committee on Human Rights (Chair, Rt Hon Harriet Harman MP), Draft Domestic Abuse Bill, 10 April 2019, p.5.
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.\textsuperscript{35} 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. \textit{Liberty opposes the ‘positive requirements’ created by Part 3 of this Bill and recommends their removal.}

21. 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.”\textsuperscript{36}

22. 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”.\textsuperscript{37} 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.”\textsuperscript{38} We support the independent women’s sector when we say that these electronic monitoring proposals are ill-conceived and ineffective. \textit{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.}

\textbf{CLARE’S LAW}

23. 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.\textsuperscript{39} 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 use the scheme, and (2) what meaningful difference this would make, considering the Government’s own impact assessment suggested that at best the DVDS

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\begin{itemize}
\item\textsuperscript{35} Sisters for Change, ‘Domestic Abuse Bill Consultation Response’, 31 May 2018, p.7.
\item\textsuperscript{36} Mike Nellis, ‘Standards and Ethics in Electronic Monitoring’, Council of Europe, June 2015.
\item\textsuperscript{37} Public Accounts, ‘Summary: Offender-monitoring tags’, 23 January 2018.
\item\textsuperscript{38} EVAW, ‘Submission to the Government Consultation on the proposed Domestic Violence and Abuse Bill’, April 2018.
\item\textsuperscript{39} Jamie Grace, ‘Dodgy DVDS: some problems with the national rollout of the Domestic Violence Disclosure Scheme’, Centre for Crime and Justice Studies.
\end{itemize}
would result in an annual reduction of 0.5 per cent in domestic violence.\textsuperscript{40} Rights of Women have also argued that the DVDS should not be considered a core part of the response to domestic abuse.\textsuperscript{41} 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.\textsuperscript{42}

24. We also have concerns about the Article 8 implications of such a scheme. This was mirrored by the JCHR’s letter to Government Ministers, which outlined that “Any disclosure must be necessary to protect, lift or prevent harm and must be proportionate to that aim” and questions whether Clare’s Law “strikes the right balance between the right to know/ask and the right to privacy.”\textsuperscript{43} In our view placing Clare’s Law on a statutory footing will not constitute a proportionate and legitimate aim in order to justify any interference with Article 8 ECHR, considering the uncertainty around the scheme’s utility and worries that putting it on a statutory footing without proper review may perpetuate the inefficiency of the current system. Therefore, we oppose the proposition in the Government’s consultation response to put Clare’s Law on a statutory footing.

CONDITIONAL CAUTIONS

25. 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.”\textsuperscript{44} 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.\textsuperscript{45} 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

\textsuperscript{40} The Telegraph, “Clare’s Law plans criticised by violence charities”, 5 March 2012.  
\textsuperscript{41} 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.  
\textsuperscript{42} Georgina Morris, “Justice by Geography” as Clare’s Law figures reveal discrepancies in force use; The Yorkshire Post, 8 January 2018.  
\textsuperscript{43} Letter to Victoria Atkins MP, Parliamentary Under Secretary of State for Crime, Safeguarding and Vulnerability and Minister for Women, Home Office and Edward Argar MP, Parliamentary Under Secretary of State, Ministry of Justice from Joint Committee on Human Rights (Chair, Rt Hon Harriet Harman MP), Draft Domestic Abuse Bill, 10 April 2019, p.4.  
\textsuperscript{44} HM Government, “Transforming the Response to Domestic Abuse: Consultation Response and Draft Bill”, January 2019, p.61.  
\textsuperscript{45} “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.
police and the justice system as a whole.\textsuperscript{46} We urge the Government to reconsider this strategy and to adhere to current policy, practice and legal precedent\textsuperscript{47}.

DISPROPORTIONATE TECHNOLOGICAL RESPONSES AND ARTICLE 8

26. The Government’s consultation response includes a commitment to roll out body-worn cameras to police who attend domestic abuse incidents.\textsuperscript{48} 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 Government’s broader lack of understanding and sensitivity to domestic abuse cases.\textsuperscript{49} To propose recording the aftermath of a distressing incident suggests that the victim must behave in a certain way in order to be believed, that there needs to be a clear ‘disturbance’ (this term only really lends itself to physical violence), and interferes with the privacy rights of the victim, their family and any others present.

27. 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 such as support letters from domestic abuse advocates or medical reports. 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.

28. 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

\textsuperscript{46} See para 1.13, Joint Committee on Human Rights, 20\textsuperscript{th} Report, Police and Justice Bill, HL Bill 104, 2 June 2006.

\textsuperscript{47} In \textit{R (Robson) v CPS [2016] EWHC 2181 (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.

\textsuperscript{48} HM Government, \textit{“Transforming the Response to Domestic Abuse: Consultation Response and Draft Bill”}, January 2019, p.51.

\textsuperscript{49} HM Government, \textit{“Transforming the Response to Domestic Abuse”}, March 2018, p.49.
rights under Article 5 (right to liberty) and Article 860 (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... 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.”61 Second, polygraph testing has been subject to immense criticism for its accuracy and credibility.62 We 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 survivor — 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

29. Liberty believes that 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.

30. To ensure this Bill is fit for purpose, we urge the Committee to endorse Liberty’s recommendations. These proposals include:

- Reflecting the non-discrimination principle at Article 4(3) of the Istanbul Convention in the Domestic Abuse Bill.
- Legislating for an impenetrable ‘firewall’ between vital public service 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.
- Extending the DV Rule and DDVC so that all migrant women are eligible to apply for autonomous leave to remain in the UK and associated public funds, which they should receive for at least six months.

60 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.
62 See as an example and overview of the debate: Gareth Evans, How credible are lie detector tests?, BBC News, 4 October 2018.
• Abolishing the NRPF rule for survivors of abuse, or at the very least they should be made eligible for refuge accommodation, regardless of their immigration status.

• Ending the harmful practice of indefinite immigration detention and ensure ‘Adults at Risk’ – including migrant survivors of domestic abuse – are not placed in detention in the first place.

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

• Extending the Bill to include women in Northern Ireland, so that there is parity in human rights protections for survivors of domestic abuse across the UK.

• Ensuring all survivors have access to legal aid by increasing the low means test requirement and continuing to lower the evidential threshold under the Domestic Violence Gateway.

• Removing Part 3 of the Bill, which creates an ineffective and human rights non-compliant civil order scheme.

• Opposing the plan to put Clare’s Law on a statutory footing due to its inefficacy and Article 8 ECHR implications.

• Reconsidering the strategy to use conditional cautions more widely in domestic abuse cases and instead adhere to current policy, practice and legal precedent.

• Removing Clauses 31-33 in the Bill that allow the use of electronic monitoring as a positive requirement of the DAPO scheme, as it risks violating fundamental civil liberties and may put survivors at greater risk.

• Stopping 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.

• Removing Clause 52 from the Bill, as polygraph testing risks breaching civil liberties and may result in decision-makers deferring to machines when making important choices about offenders’ lives and victims’ risk management plans.

31. To ensure this Bill is both fit for purpose and human rights compliant, the Committee should support the above recommendations so that this domestic law meets our obligations under the Istanbul Convention, CEDAW and the ECHR. Liberty believes that these changes are necessary in order to create a system that is fair, just and equal for all – and crucially places the human rights of survivors at the heart of all measures. Only with these reforms 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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