

DOMESTIC ABUSE BILL
EUROPEAN CONVENTION ON HUMAN RIGHTS
SECOND SUPPLEMENTAL MEMORANDUM BY THE HOME OFFICE AND
MINISTRY OF JUSTICE

Introduction

1. The Home Office and Ministry of Justice published a memorandum addressing issues arising under the European Convention on Human Rights (“ECHR”) on introduction of the Domestic Abuse Bill in the House of Commons on 3rd March 2020. A first supplemental memorandum was published by the Ministry of Justice on 30th June 2020 dealing with special measures in civil proceedings and the so-called “rough sex” defence.
2. This second supplemental memorandum addresses issues arising from three Government-supported amendments, tabled on 1st March 2021 for Lords Report Stage. This memorandum has been prepared by the Home Office and the Ministry of Justice.

Extending the controlling or coercive behaviour offence (new clause “*Controlling or coercive behaviour in an intimate or family relationship*” tabled by Baroness Lister of Burtersett)

3. New clause “*Controlling or coercive behaviour in an intimate or family relationship*” amends the offence in section 76 of the Serious Crime Act (“SCA”) 2015 so as to:
 - a. remove the “living together” requirement in relation to former intimate partners or family members; and
 - b. also align in other respects the definitions of “personally connected” in section 76 of the SCA 2015 and clause 2 of the Domestic Abuse Bill.
4. Only the amendment described at paragraph 3(a) potentially engages human rights under the ECHR, which are analysed below.
5. The criminal offence of controlling or coercive behaviour in an intimate or family relationship is provided for in section 76 of the SCA 2015. The offence applies where a person repeatedly or continuously engages in behaviour which is controlling or coercive towards another who they are in an intimate relationship with, whether or not they live together, or the behaviour stems from a family member or a former partner where they live together.
6. The amendments to section 76 would remove the current requirement for former intimate partners and family members to live together when the controlling or coercive behaviour took place.
7. The purpose of these amendments is to provide clarification for investigation and prosecution agencies that this legislation should be used to prosecute controlling or coercive behaviour, where this involves former intimate partners in “on-off”

relationships, or where they are former intimate partners or family members and their living arrangements are not clear.

8. Currently, prosecutions for controlling or coercive behaviour between former intimate partners or family members who do not live together can be made under sections 2, 2A, 4 or 4A of the Protection from Harassment Act 1997, if the abusive behaviour amounted to harassment or stalking. However, the offence created by section 76 of the SCA 2015 is expressly designed to address controlling or coercive behaviour in an intimate or family relationship.

Article 8

9. The amendment to remove the “living together requirement” from section 76 of the SCA 2015 potentially engages Article 8(1) of the ECHR which confers the right on individuals to have respect for private and family life, home and correspondence.
10. In particular, the effect of the amendment to remove the “living together” requirement for former intimate partners and family members in section 76 of the SCA 2015, will mean that the behaviour of a wider category of persons will fall within the remit of this criminal offence.
11. However, the Government considers that this wider category of persons will still only include those persons who will justifiably be considered as having a “personal connection” and whose behaviour should be considered to be domestic abuse.
12. Further, the behaviour of this wider category of persons is generally captured now under the criminal offences of stalking and harassment and will therefore already be subject to criminal prosecution under different legislation.
13. It is arguable, in the Government’s view, that this amendment does not engage Article 8 of the ECHR, given that Article 8 would not confer protection for controlling or coercive behaviour as part of the right to respect for private and family life.
14. If the amendment does engage an individual’s right to private and family life, home and correspondence, given that Article 8 is a qualified right, the question is whether the rights of an individual are infringed or not by this amendment. This will depend on whether, by virtue of Article 8(2), any interference occurs in accordance with the law and whether it is necessary in a democratic society in the interests of public safety, the prevention of crime and for the protection of rights and freedoms of others.

In accordance with the law

15. Any interference will be in accordance with the law. The proposed change will amend an existing criminal offence set out in primary legislation, with the proposed amendment being clearly prescribed in primary legislation to enable

preciseness and certainty. Its effect can also be further explained in statutory guidance which is aimed at those investigating and prosecuting controlling or controlling behaviour, which is issued by the Home Office under section 77 of the SCA 2015 (and under clause 73 of the Domestic Abuse Bill (as amended in Lords Committee)) following consultation with the Crown Prosecution Service.

16. As the amended offence will be consistent with the Government's view of what constitutes domestic abuse, it should clarify for investigation and prosecution agencies when faced with controlling or coercive behaviour in a former intimate relationship (in particular), which legislation to use, thereby clarifying as the law and its effect.

Necessary and proportionate

17. The Government considers that any interference with the rights in Article 8 is necessary in a democratic society, it is in the interests of public safety, the prevention of crime and for the protection of the rights and freedoms of others. The Government considers that any interference is proportionate to achieving those aims.
18. By extending the offence to a wider category of persons, but only to those who might justifiably still be considered to be "personally connected", the amendment should reduce the risk of controlling or coercive behaviour that constitutes domestic abuse and therefore the serious emotional and psychological harm and damage that this poses to victims in all parts of society. By preventing such crime, this will enhance public safety.
19. The Government considers that the amendment goes no further than necessary to clarify and confirm its position on what constitutes domestic abuse and removes existing confusion for law enforcement agencies in relation to this behaviour. As stated above, the wider category of persons within the remit of the amended offence will be persons who would naturally be considered as having a "personal connection" and whose behaviour would justifiably be considered as domestic abuse.
20. Currently, the behaviour of this extended category of persons generally falls within the remit of legislation protecting against harassment and stalking and is therefore already subject to criminal prosecution.
21. Article 8 also imposes positive requirements on the state to ensure an individual's private and family life, home and correspondence are respected (i.e. *X and Y v Netherlands* 1985 ECHR 4). This obligation extends to protecting individuals from each other including their physical and psychological integrity. The amendment will protect the rights and freedoms of victims of controlling or coercive behaviour by respecting their psychological integrity and right to self-determination and freedom in their lives. Any interference with a person's rights brought about by the Government's amendment may therefore be outweighed by the state's positive obligations to protect the Article 8 rights of specified individuals and/or the public at large.

22. The Government considers that each of the potential interferences identified would be in accordance with the law, are in pursuit of a legitimate aim and are necessary in a democratic society. The Government believes they are justified in accordance with Article 8(2).
23. The limited remit of these amendments, the existing safeguards in the offence and the Human Rights Act 1998 will, in the Government's view, protect against arbitrary interference with an individual's Article 8 rights.
24. The Government is satisfied that the amended provisions will be compatible with Article 8 in that they are a proportionate measure for tackling the significant threat of non-violent domestic abuse in the form of controlling or coercive behaviour.

Other Articles

25. These amendments do not impact on other parts of the criminal offence, such as the requirements relating to the mental element, the serious effect of the controlling or coercive behaviour on the victim, the defence, modes of trial, or penalties for conviction.
26. Although Articles 5 and 6 of the ECHR are engaged by the offence in section 76 of the SCA 2015, as a whole, these amendments will not directly engage these Articles.

Extension of the so-called "revenge porn" offence (new clause "*Threatening to disclose private sexual photographs and films with intent to cause distress*" tabled by Baroness Morgan of Cotes)

27. This new clause will amend the offence under section 33 of the Criminal Justice and Courts Act 2015 ("the 2015 Act"), of disclosing a private sexual photograph or film with intent to cause distress to an individual who appears in the photograph or film. It will make it an offence to threaten to disclose a private sexual photograph or film.
28. The prosecution will not have to prove the private sexual photograph or film referred to in the threat exists so long as the individual is said to feature in them. This extension of the offence may capture within this discrete regime behaviour which might also be an offence under other provisions of criminal law e.g. blackmail.
29. The three specific defences to the original substantive offence will be available in relation to any threat to disclose. Those three defences are the disclosure:
 - (i) was for the purposes of preventing, detecting or investigating crime,
 - (ii) was made in course of publication of journalistic material and was believed to be in public interest, or
 - (iii) the image was previously disclosed by another for reward.

30. This extension of the offence mirrors the law in Scotland in section 2 of the Abusive Behaviour and Sexual Harm (Scotland) Act 2016. It will be punishable by a maximum of two years' imprisonment or a fine (or both). The terms used "private sexual photograph" etc. are defined in 2015 Act.

Article 10 (freedom of expression)

31. Article 10 is a broad right which applies to different forms and contents of expression (including photographs). Article 10 is engaged by section 33, which already criminalises the disclosure of certain images. The expansion of section 33 to include threats to disclose also potentially engages Article 10.

Is there an interference with Article 10?

32. Criminalising a certain type of expression (i.e. a threat to disclose certain images) restricts one's freedom to express oneself and is therefore an interference with Article 10. Whether this interference constitutes an infringement of an individual's Article 10 or not depends on whether it complies with Article 10(2).

Is the interference "prescribed by law"?

33. Yes, by virtue of the amendments to section 33.

Is the interference necessary and proportionate?

34. The Government believes that outlawing the making of such threats with intent to cause distress to another is necessary "for the protection of the reputation or rights of others" i.e. the reputation or Article 8 privacy rights of those individuals who are subject to such threats. Article 8 imposes positive requirements on the state to ensure an individual's private and family life, home and correspondence are respected (*X and Y v Netherlands 1985 ECHR 4*). This obligation extends to protecting individuals from each other including their physical and psychological integrity. The amendment will protect the rights of victims by respecting their psychological integrity and private life. Any interference with another person's rights brought about by the Government's amendment may therefore be outweighed by the state's positive obligations to protect the Article 8 rights of individuals.
35. The Government believes this interference is proportionate and goes no further than is necessary to protect the rights and reputation of potential victims. The type of expression involved ("threatening to disclose an image") is qualitatively not an important one, and its protection is maintained by virtue of the three defences in section 33(3), (4) and (5) listed above. The interference with Article 10 is therefore limited and confined to very specific circumstances, and is proportionate in the context of threats to disclose private sexual images with intent to cause distress, which threatens a victim's reputation, right to privacy, and psychological integrity.

Non-fatal strangulation (new clause "*Strangulation or suffocation*" tabled by Baroness Newlove)

36. This new clause creates a new offence of non-fatal strangulation or suffocation. It will only apply to behaviour which is currently criminal and aims to improve the ability to prosecute such offences effectively. The offence is designed to deal with physical assaults on any person which affects their ability to breathe, whether by application of force to the neck (“strangulation”) or by any other, act e.g. by “suffocation” or “constriction” (henceforth all are “strangulation”).
37. Although such criminal behaviour can currently be captured under the offence of battery or, where more “serious harm” is caused which includes unconsciousness, is an offence of occasioning actual bodily harm under the Offences against the Person Act 1861, it has been decided to distinguish such crimes by this new standalone offence. Serious offences against the person currently require “actual bodily harm” and there can, in such strangulation cases, be limited signs of such harm. Given this, the existing charge of “battery”, which carries a penalty of six months’ imprisonment, does not adequately enable the seriousness of the offence, i.e. terror caused during the assault or the often long-lasting psychological effect, to be punished.
38. Unlike “battery”, the new offence will not be time-barred if a prosecution does not commence within six months of the offence. This will enable “historic” offences to be prosecuted. The new offence will expose the defendant to a more serious sentence than the current six months’ imprisonment for battery as the nature of the harm required to qualify for a possible five-year maximum sentence has been reduced. It will also enable the defendant to elect for trial by jury.
39. The new clause inserts a new section 75A into the 2015 Act. New section 75A(1) sets out that a person commits the offence if, the person (i) “intentionally strangles” another person B, or (ii) the person does another act, such as suffocation, that affects B’s ability to breathe and that act constitutes a battery. Battery here refers to the common law offence of battery. “Strangulation” and “strangles” bear their ordinary meaning.

The restricted “consent” defence

40. New section 75A(2) provides that it is a defence for a person accused of the offence to show that the “victim” consented to the act. This reflects the current law as established by the House of Lords in *R v Brown* [1993] 1 AC 212; where a “victim” consents to an act that amounts to no more than a battery, the consent of the victim is a valid defence for the perpetrator. Section 75A(3) also gives effect to the other aspect of *R v Brown* [1993]; a person cannot ordinarily validly consent to having serious harm inflicted upon them.
41. New section 75A(3)(a), however, states that the consent defence does not apply when the “victim” suffers “serious harm” as a result of the strangulation. This restriction potentially engages the human rights of the perpetrator and consenting victim under the ECHR, which are analysed further below. “Serious harm” is defined in new section 75A(6) as “grievous bodily harm” or “wounding” within the meaning of section 18 of the Offences against the Person Act 1861 or “actual bodily harm” within the meaning of section 47 of the 1861 Act.

42. In addition to causing serious harm, new section 75A(3)(b) makes clear that to be guilty the perpetrator of the serious harm must have (i) intended to cause serious harm to the “victim”, or (ii) been reckless as to the “victim” suffering serious harm. Where a person intends to inflict some harm that would only amount to a battery and the “victim” consents to that act, but serious harm occurs as an unforeseen accidental consequence of the consensual act, it is a defence if the perpetrator can show that they did not intend to cause serious harm or were not reckless as to serious harm being caused. (There are permissible “serious harm” exceptions recognised by the common law in relation to sports etc. These were explored by the Court of Appeal in *R v BM* [2018] EWCA Crim 560 when ruling that amateur surgical “body modification” was unlawful.¹)
43. The offence is triable in either the magistrates’ or Crown Court. New section 75A(4) sets out the penalties for the offence. The maximum penalty on summary conviction in the magistrates’ court is 12 months’ imprisonment (but this should be read as six months’ until such time as provisions in the Sentencing Act 2020 come into force) or a fine (or both). On conviction on indictment in the Crown Court the maximum penalty is five years’ imprisonment or a fine (or both).

ECHR analysis

44. To the extent that the restriction on consent interferes with Article 8 (“right to respect for private and family life”), the House of Lords decision in *R v Brown* [1994] 1 AC 212 (“consent of victim a defence but not where serious harm caused”), upheld by the ECHR in *Brown v UK* (1997) 24 EHRR 39, confirms it is a lawful interference.
45. The restricted consent defence adds to the codification of the general proposition of law in this area as set out in *R v Brown* [1993] that where an assault occasioning actual bodily harm takes place, then public policy permits that society be protected by criminal sanctions notwithstanding that the victim may have consented to the acts inflicted on them.
46. Paragraphs 34 to 36 of *The Domestic Abuse Bill – European Convention on Human Rights – [First] Supplementary Memorandum by Ministry of Justice* (30th June 2020) were prepared in relation to the Government’s so-called “rough sex amendment” at clause 65 of the Bill (“Consent to serious harm for sexual gratification not a defence”). That clarificatory clause restates the decision in *Brown* in relation to three existing assault offences. The paragraphs which are summarised at 47 and 48 below analysed the same ECHR issues which apply to this new offence.

¹ Brendan McCarthy (BM) was later sentenced to forty months’ imprisonment for three counts of causing grievous bodily harm. He was a registered tattooist and with their consent had surgically modified the bodies of three people; removing Mr Lott’s left ear, removing the nipple of another male and in relation to the tongue of the third person divided it “producing an effect similar to that enjoyed by reptiles”.

Article 8(2) - Right to respect for private and family life

47. “In *Brown v UK* (1997) 24 EHRR 39, the European Court of Human Rights noted that the injuries caused by the applicants’ sado-masochistic activities were of a significant nature and degree. The Court found that the State authorities acted within their margin of appreciation in order to protect its citizens from real risk of serious physical harm or injury. The notion of necessity implied that the interference corresponded to a pressing social need and, in particular, that it was proportionate to the legitimate aim pursued; and that in determining whether an interference was “necessary in a democratic society”, the Court would take into account that a margin of appreciation was left to the national authorities. The scope of that margin of appreciation was not identical in each case but varied according to the context.
48. Relevant factors included the nature of the Convention right in issue, its importance for the individual, and the nature of the activities concerned. The Court considered that one of the roles which the State was unquestionably entitled to undertake was to seek to regulate, through the operation of the criminal law, activities which involved the infliction of physical harm. This was so whether the activities in question occurred in the course of sexual conduct or otherwise, and the determination of the level of harm that should be tolerated by the law in such situations where the victim consented, was in the first instance a matter for the State concerned as what was at stake related, on the one hand, to public health considerations and to the general deterrent effect of the criminal law and, on the other, to the personal autonomy of the individual. Accordingly, the Court found that there was no breach of Article 8 rights because the State was entitled to consider that the prosecution and conviction of individuals was necessary in a democratic society to deter certain forms of behaviour on public health grounds, where the level of physical harm inflicted exceeded that which should be tolerated where the victim consents, i.e. the conduct in question could not be considered to be of a trifling or transient nature.”
49. The Government acknowledges that there is a possible interference with Article 8 in relation to this new offence, but it will be in accordance with the law, and is necessary and proportionate in a democratic society, and goes no further than is necessary to protect the rights of potential victims from real risk of serious physical harm or injury. The interference with Article 8 is limited, is proportionate and lawful.

**Home Office/Ministry of Justice
March 2021**