

# Domestic Abuse Bill – legal protection for survivors who offend due to domestic abuse

Prison Reform Trust submission to the Public Bill Committee on proposed amendments for Committee Stage in the House of Commons, 19 May 2020

## Introduction

1. The Prison Reform Trust (PRT) is an independent UK charity working to create a just, humane and effective penal system. Our Transforming Lives programme to reduce the unnecessary imprisonment of women in the UK is supported by the National Lottery Community Fund.
2. At least 57% of women in prison and under community supervision are victims of domestic abuse.<sup>1</sup> Many have been driven to offend as a direct result of their abuse.<sup>2</sup> Yet current legal defences do not protect survivors of domestic abuse from prosecution or conviction when they are driven to offend. This submission primarily focuses on our proposed amendments to the Bill to address this significant gap in the law, supported by the Designate Domestic Abuse Commissioner, the Victims' Commissioner, the Criminal Bar Association, Women's Aid and others.<sup>3</sup>
3. We also remain concerned about plans to introduce a new civil order, the Domestic Abuse Protection Order (DAPO), breach of which is punishable by imprisonment.<sup>4</sup>

## Legal protection for survivors driven to offend

### Summary of proposals

*"I have been astounded by the number of female offenders who are victims of domestic abuse and how that is a significant trigger to their offending."*

Police inspector<sup>5</sup>

4. We propose that two new Clauses and a new Schedule should be added to the Bill:<sup>6</sup>

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<sup>1</sup> Ministry of Justice (2018) Female Offender Strategy, London: MoJ. This is likely to be an underestimate because many women fear disclosing abuse. (Gelsthorpe, L., Sharpe, G., and Roberts, J. (2007) Provision for Women offenders in the community London: Fawcett Society)

<sup>2</sup> [Prison Reform Trust \(2017\) There's a reason we're in trouble: Domestic abuse as a driver to women's offending, London: PRT](#)

<sup>3</sup> For a list of supporters go to [www.prisonreformtrust.org.uk/women/domesticabuse](http://www.prisonreformtrust.org.uk/women/domesticabuse)

<sup>4</sup> Please note that our comments in relation to DAPOs are PRT's alone and references in this submission to supporting organisations and individuals relate solely to our proposed statutory defences for survivors driven to offend.

<sup>5</sup> PRT (2017) Fair Cop? Improving outcomes for women at the point of arrest, London: PRT

<sup>6</sup> The provisions were developed with the assistance of Paramjit Ahluwalia of Lamb Building; Clare Wade QC of Garden Court Chambers and Harriet Wistrich of the Centre for Women's Justice, who together represented Sally Challen in the Court of Appeal; Dame Vera Baird DBE QC, the Victims' Commissioner; Naima Sakande of Appeal; Olive Craig of Rights of Women and other experts.

- (a) A new clause amending the law on self-defence, modelled on the provisions for householders in Section 76 of the Criminal Justice and Immigration Act 2008. This would allow survivors acting in self-defence against their abuser the same protection as householders defending themselves against an intruder (the 'self-defence proposal').
- (b) A new clause and schedule introducing a statutory defence for survivors, modelled on Section 45 of the Modern Slavery Act 2015. This would give survivors of domestic abuse similar protection to victims of trafficking who are compelled to offend (the 'Section 45 proposal').

These provisions are appended to this submission with explanatory notes. They are based on legal precedents in place to protect other groups and are not gender specific.

5. Whereas victims of trafficking rightly have a statutory defence to protect them from prosecution where they have been compelled to offend as part of their exploitation, there is no equivalent defence available for victims/survivors of domestic abuse. And whereas householders have legal protection where they act in self defence against an intruder, no such protection is available to victims/survivors acting in self-defence against their abuser. Common law defences are outdated and ill-fitting to the context of domestic abuse, leaving survivors with no effective defence. The Bill presents an ideal opportunity to modernise the law by ensuring the available legal defences reflect improved public understanding of domestic abuse.
6. We recommend that these provisions be accompanied by a policy framework to aid implementation, drawing on existing policies in place to support Section 45 and the householders' defence. This should include provision of support for survivors and special measures to protect vulnerable defendants. Statutory guidance, training for criminal justice agencies and judicial directions would also be required. Guidance should focus on the nature of domestic abuse, its impact on the behaviour of survivors, the manner in which this should be taken into account in criminal proceedings against a defendant or suspect who is a survivor of such abuse and the need for a culturally-informed response to women in minority ethnic groups and of minority religions.<sup>7</sup> The legislation and surrounding framework would have the significant added benefit of encouraging earlier disclosure of abuse and access to support, and helping to break the cycle of victimisation and offending.

## **Links between domestic abuse and women's offending**

7. Sally Challen's case highlighted the devastating impact of coercive relationships and the lack of legal protection for survivors of domestic abuse who are driven to offend.<sup>8</sup> Our proposals would apply to a wide range of offences, some of which were discussed with us as part of our research, including:<sup>9</sup>
  - Handling stolen goods under threat of violence by a partner.

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<sup>7</sup> See PRT's recommendations in: [Prison Reform Trust \(2017\) There's a reason we're in trouble: Domestic abuse as a driver to women's offending, London: PRT](#) and the accompanying [briefing by the Criminal Bar Association and Muslim Hands \(2018\) \(In\)visibility: Female. Muslim. Imprisoned, London: Muslim Hands](#).

<sup>8</sup> Challen, D. (2019) 'My mother, Sally Challen, was branded a cold-blooded killer. At last, she has justice', The Guardian, available at <http://bit.ly/SallyChallen>

<sup>9</sup> See: [Prison Reform Trust \(2017\) There's a reason we're in trouble: Domestic abuse as a driver to women's offending, London: PRT and Criminal Bar Association of England and Wales \(2017\) Defences available for women defendants who are victims/survivors of domestic abuse, London: CBA](#)

- Possession of a controlled substance belonging to an abusive partner.
  - Use of force against an abusive partner or ex-partner.
  - Failure to ensure school attendance for fear of meeting abusive ex-partner.
8. The government recognises the links between domestic abuse and women's offending and wishes '*to help female offenders and women at risk of offending to identify their abuse earlier and receive the support that they need to reduce their chances of reoffending*'.<sup>10</sup> In response to research showing that of 173 women screened at HMP Drake Hall, 64% reported a history indicative of brain injury and for most this was caused by domestic violence,<sup>11</sup> the Secretary of State stated that he wants 'to do more'.<sup>12</sup>

## Lack of effective defences

### Self-defence

#### Case study - Ioanna<sup>13</sup>

Ioanna was convicted for attacking her abusive partner with a knife, having been subject to long-term coercion and control by him. When he became threatening during an argument at home, she grabbed a knife lying nearby in the kitchen and raised it towards him. He tried to catch the knife and in the process received a small cut on his finger. He contacted the police. Ioanna received a community order.

9. Criminal defence lawyers have told us that the common law defence of self-defence is very difficult to establish in cases of violent resistance by a survivor of domestic abuse against their abusive partner or former partner, where a jury may well conclude that the response was disproportionate without taking account of the long history of abuse. The self-defence proposal would make it easier for victims/survivors to establish they were acting in self-defence, providing them with equivalent protection to those using force against an intruder in their home.

### Duress

10. The Section 45 proposal is intended to avoid the inadequacies in the common law defence of duress for survivors of domestic abuse, and provide equivalent protection to victims of trafficking. The same exclusions would apply.
11. The defence of duress can be applied (other than for murder) where the defendant was acting under threat of imminent death or serious injury and where there would have been no alternative course of action for a reasonable person with relevant

<sup>10</sup> HM Government (2019) Transforming the response to domestic abuse: Consultation response and draft Bill, London: OGL. See also: Ministry of Justice (2018) Female Offender Strategy, London: Ministry of Justice

<sup>11</sup> [The Disabilities Trust \(2019\) Making the link: Female offending and brain injury, London: The Disabilities Trust](#)

<sup>12</sup> Full debate available at: <https://hansard.parliament.uk/commons/2019-10-02/debates/C3488538-CFEC-4670-9299-732672E2BE67/DomesticAbuseBill>

<sup>13</sup> Case study provided by Women in Prison. Ioanna is not her real name.

characteristics.<sup>14</sup> As illustrated in the case of YS below, the legal test for duress is ill suited in domestic abuse cases because:<sup>15</sup>

- (a) The complexities of domestic abuse are ignored, as the emphasis of the definition of duress is on threat of death or serious injury. The defence does not recognise psychological, sexual or financial abuse.
- (b) For the defence of duress to succeed, the threat of physical harm must be imminent. This fails to recognise the nature of domestic abuse, including coercive control, as *'typically entrenched, unpredictable and random...to a woman whose self esteem has been demolished by past violence, the fear of violence may be ever present and overpowering'*.<sup>16</sup>
- (c) For those experiencing abuse to succeed with a duress defence, 'relevant characteristics' must be established including 'battered woman syndrome' and 'learned helplessness'. These are outdated concepts which pathologise women rather than offering an effective defence suitable for the actual circumstances. They require the production of medical evidence which is not practicable in many cases involving low level offending tried in the magistrates' courts.

#### YS<sup>17</sup>

YS is charged with driving whilst disqualified, driving with excess alcohol, driving without insurance and dangerous driving. An officer noticed a vehicle with its brake lights permanently illuminated and swerving from side to side. He activated the siren, indicating for the vehicle to stop. The vehicle did not stop, and a chase continued for five minutes. In the driving seat was a woman, YS.

YS explained she had been dragged from her home partially dressed by her partner, forced to drive, and that he threatened to kill her if she did not drive on. The partner was screaming at her throughout, punching her in the ribs and trying to grab the steering wheel.

The following findings of fact were made by the Magistrates' Court:

*'There is no doubt that [YS] has been involved in an abusive relationship with R who has a history of violent offences in the domestic setting. We believe that [YS] drove dangerously to escape the Police at the behest of R, although, as the driver of the car, she could have halted the vehicle. **We are prepared to believe that the reason she drove at speed was because [YS] believed if she did not R might kill or seriously injure her.***

Despite these findings, the Magistrates' Court concluded that the defence of duress failed on the following grounds:

<sup>14</sup> R v Bowen 1996 2 Cr App R 157

<sup>15</sup> [Criminal Bar Association of England and Wales \(2017\) Defences available for women defendants who are victims/survivors of domestic abuse, London: CBA.](#) See also: Loveless, J. (2010) 'Domestic Violence, Coercion and Duress', Criminal Law Review, pages 93-108

<sup>16</sup> Loveless, J. (2010) 'Domestic Violence, Coercion and Duress', Criminal Law Review, pages 93-108

<sup>17</sup> Case study provided by Paramjit Ahluwalia of Lamb Building, taken from factual matrix within R v YS [2017] EWHC 2839

*'We do not find that a reasonable person with the defendant's beliefs, history of domestic violence, and of her age, in her situation, would have done what she did.'*

*'She admits to having consumed alcohol before driving.'*

YS' conviction was upheld on appeal to the High Court, with Mrs Justice McGowan ruling that the Magistrates' Court had in fact used an overly favourable application of the Bowen test. In her judgment she set out that:

*'A strict application of the principles in R v Bowen would have meant that they only considered the Appellant's age and sex. In fact, they adopted a test more favourable to the Appellant and also considered her personal history of domestic abuse. Even taking that background into account they found that a reasonable person having experienced violence and threats which, on occasion, had not always been carried out would not have acted as the Appellant did. A modified form of the test was applied adding a subjective element to the objective test...*

*'A proper application of the test in Bowen should have caused the Justices to ask themselves the following questions, 1. Did the Appellant behave in the way she did on the night because she believed her partner would seriously assault or kill her because he had behaved in that way in the past? 2. Would a reasonable woman of her age have responded to those threats in that way?*

*'Accordingly, in so far as the Justices misdirected themselves it was in the Appellant's favour.'*

## **The government's position and our response**

12. The government has so far opposed our proposals because it is not persuaded they are '*practical and proportionate*' and regards them as unnecessary in light of existing defences, but has provided no evidence in support of these arguments. The government argues that '*improved understanding and awareness of the nature of domestic abuse... will mean the existing defences are more able to respond flexibly and proportionately than a narrowly defined statutory defence*' and intends to '*monitor the use of the existing defences and keep under review the need for any statutory changes*'.<sup>18</sup>
13. Contrary to the government's position, there is ample evidence of the inadequacy of existing defences. Our proposals are closely modelled on provisions already in use for other vulnerable groups. There is no foreseeable further opportunity to amend the criminal law in the way we propose. If there is a failure to take up this important opportunity, the government must make a clear and time limited commitment to review the law.

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<sup>18</sup> [HM Government \(2020\) Further Government Response to the Report from the Joint Committee on the Draft Domestic Abuse Bill, Session 2017-19 HL Paper 378 / HC 2075: Draft Domestic Abuse Bill, CP214, London: TSO](#)

## **Current failures to take into account the context of domestic abuse in criminal proceedings**

14. Criminal defence lawyers advise that where an offence is committed in the context of abuse, the extent to which this is taken into account depends on the individual prosecutor. In many cases women may plead guilty, not realising that their experience of domestic abuse could be a reason not to be prosecuted under the CPS's public interest test. As recognised in recent government guidance for the police and local agencies working with women in contact with the criminal justice system,<sup>19</sup> the police and CPS may not apply the public interest test properly even if the abuse is known about. Defence solicitors under considerable pressure with limited resources may not argue for inappropriate cases to be dropped.
15. By contrast, in cases involving defendants who are victims of trafficking, Section 45 and the surrounding policy framework requires proactive, early case management and allows all agencies to become more adept at recognising and responding to circumstances which should indicate there is no public interest in prosecuting a case, or where the statutory defence should apply. This means that magistrates, judges and legal advocates increasingly understand how exploitation in this context can lead to offending and are taking this into account.

## **Does improved understanding of abuse mean legislation is not needed?**

16. The Court of Appeal judgment in March 2019, overturning Sally Challen's conviction for murder, has led to increased public recognition of the nature of coercive control and how it can drive offending by victims, and resulted in changes to the Equal Treatment Bench Book on coercive control. This was achieved because the court accepted fresh psychiatric evidence which investigated the impact of coercive control on Ms Challen.
17. The impact of the case may be more significant for serious cases than for lower level offences prosecuted in the Magistrates' Courts. In any event, improved understanding of the nature of domestic abuse and its impact on victims' behaviour will not of itself change the law. Legislation is needed to ensure the law reflects such understanding, making effective defences available in these cases.

## **Conclusion**

18. Parliament has previously introduced equivalent protections for other vulnerable groups. Decisive action is needed now to extend the same protection to survivors of domestic abuse who are driven to offend, and to end the cycle of victimisation and offending.

## **Clauses 24–46 — Domestic Abuse Protection Orders (DAPO)**

19. Clause 24 of the Bill introduces a new civil order, the DAPO, and builds on the existing Domestic Violence Protection Order (DVPO) piloted in 2014. The DVPO may be used where there is insufficient evidence to convict, to allow the alleged victim/survivor breathing space.

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<sup>19</sup> Ministry of Justice (2018) Managing vulnerability: Women – Fact Pack, London: MoJ; Ministry of Justice (2018) A Whole System Approach for Female Offenders: Emerging evidence, London: MoJ. Both available at: <https://www.gov.uk/government/publications/female-offender-strategy>

20. While we appreciate the challenges in obtaining convictions in domestic abuse cases, we are concerned that a breach of the new order would be treated as a criminal offence—as outlined in clause 36. Criminalising breach is not the right solution, and may contravene the right to a fair trial under Article 6 of the European Convention on Human Rights.
21. We oppose in principle a policy under which civil orders imposed on a balance of probabilities can, if breached, result in a criminal conviction and even imprisonment for a period of up to five years, without a criminal process in relation to the original, alleged offending behaviour. Further, as the government’s consultation document itself acknowledged: “*There is...a risk that criminalising breach could deter people from applying for the proposed order, or...reporting a breach.*”
22. The proposal to criminalise breach in relation to positive conditions of an order, for instance a failure to attend a particular programme, is particularly problematic. There may be legitimate reasons for such a breach, for instance illness or childcare responsibilities or unavailability of suitably adapted programmes for people with learning disabilities or mental health needs. In these circumstances, prosecution for breach would be disproportionate and could have negative consequences for both survivor and perpetrator.
23. Making provision for certain breaches to be dealt with as a contempt of court is not a sufficient safeguard, as this is still a serious offence punishable by up to two years in prison or an unlimited fine. In conclusion we believe the provision allowing for criminalisation of breach of DAPOs should be removed from this Bill.

May 2020

## Appendix – New clauses and schedule

### **Amendment XX – Self defence in domestic abuse cases** **New clause - to clarify the degree of force which is reasonable under the common law of self-defence where the defendant is a survivor of domestic abuse**

After Clause 65 insert the following new Clause –

#### **Reasonable force in domestic abuse cases**

- (1) Section 76 of the Criminal Justice and Immigration Act 2008 is amended as follows.
- (2) In sub-section 76(5A) after ‘In a householder case’ insert ‘or a domestic abuse case’.
- (3) In sub-section 76(6) after ‘In a case other than a householder case’ insert ‘or a domestic abuse case’.
- (4) After sub-section 76(8F) insert –  

‘(8G) For the purposes of this section “a domestic abuse case” is a case where—

  - (a) the defence concerned is the common law defence of self-defence,
  - (b) D is, or has been, a victim of domestic abuse,
  - (c) the force concerned is force used by D against the person who has perpetrated the abusive behaviour referred to at sub-section (8G)(b),
  - (d) Sub-section (8G)(b) will only be established if the behaviour concerned is, or is part of, conduct which constitutes domestic abuse as defined in sections 1 and 2 of the Domestic Abuse Act 2020, including but not limited to conduct which constitutes the offence of controlling or coercive behaviour in an intimate or family relationship as defined in section 76 of the Serious Crime Act 2015.’
- (5) In sub-section 76(9) after ‘This section, except so far as making different provision for householder cases’ insert ‘and domestic abuse cases’.

#### **Explanatory notes**

1. The law on self-defence allows the use of reasonable force and has been clarified by section 76 of the Criminal Justice and Immigration Act 2008. Subsection 76(5A) allows householders to use disproportionate force when defending themselves against intruders in the home. It provides that where the case is one involving a householder the degree of force used by the householder is not to be regarded as having been reasonable, in the circumstances as the householder believed them to be, if it was grossly disproportionate. A householder will therefore be able to use force which is disproportionate but not grossly disproportionate. As CPS guidelines state:<sup>20</sup>

*“The provision does not give householders free rein to use disproportionate force in every case they are confronted by an intruder. The provision must be read in conjunction with the other elements of section 76 of the 2008 Act. The*

*level of force used must still be reasonable in the circumstances as the householder believed them to be (section 76(3)).*

*“In deciding whether the force might be regarded as ‘disproportionate’ or ‘grossly disproportionate’ the court will need to consider the individual facts of each case, including the personal circumstances of the householder and the threat (real or perceived) posed by the offender.”*

2. The proposed new clause would replicate the householder provision for cases in which the force was used by the defendant (D) against someone (V) who was perpetrating domestic abuse against them. This would have the effect that in such circumstances the degree of force used by D would have to be ‘grossly disproportionate’ rather than simply ‘disproportionate’ by reference to the circumstances as D believed them to be and taking into account the other factors set out in section 76. This would ensure that those who act in self-defence in response to domestic abuse receive the same level of protection as those acting in response to an intruder in their home.
3. If amended as proposed, Section 76, Criminal Justice and Immigration Act 2008 as amended would read as follows (amendments in bold and underlined):

#### **76 Reasonable force for purposes of self-defence etc.**

- (1) This section applies where in proceedings for an offence—
  - (a) an issue arises as to whether a person charged with the offence (“D”) is entitled to rely on a defence within subsection (2), and
  - (b) the question arises whether the degree of force used by D against a person (“V”) was reasonable in the circumstances.
- (2) The defences are—
  - (a) the common law defence of self-defence; and
  - (aa) the common law defence of defence of property; and
  - (b) the defences provided by section 3(1) of the Criminal Law Act 1967 (c. 58) or section 3(1) of the Criminal Law Act (Northern Ireland) 1967 (c. 18 (N.I.)) (use of force in prevention of crime or making arrest).
- (3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and subsections (4) to (8) also apply in connection with deciding that question.
- (4) If D claims to have held a particular belief as regards the existence of any circumstances—
  - (a) the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; but
  - (b) if it is determined that D did genuinely hold it, D is entitled to rely on it for the purposes of subsection (3), whether or not—

(i) it was mistaken, or

(ii) (if it was mistaken) the mistake was a reasonable one to have made.

(5) But subsection (4)(b) does not enable D to rely on any mistaken belief attributable to intoxication that was voluntarily induced.

(5A) In a householder case **or a domestic abuse case**, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was grossly disproportionate in those circumstances.

(6) In a case other than a householder case **or a domestic abuse case**, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was disproportionate in those circumstances.

(6A) In deciding the question mentioned in subsection (3), a possibility that D could have retreated is to be considered (so far as relevant) as a factor to be taken into account, rather than as giving rise to a duty to retreat.

(7) In deciding the question mentioned in subsection (3) the following considerations are to be taken into account (so far as relevant in the circumstances of the case)—

(a) that a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action; and

(b) that evidence of a person's having only done what the person honestly and instinctively thought was necessary for a legitimate purpose constitutes strong evidence that only reasonable action was taken by that person for that purpose.

(8) Subsections (6A) and (7) are not to be read as preventing other matters from being taken into account where they are relevant to deciding the question mentioned in subsection (3).

(8A) For the purposes of this section “a householder case” is a case where—

(a) the defence concerned is the common law defence of self-defence,

(b) the force concerned is force used by D while in or partly in a building, or part of a building, that is a dwelling or is force accommodation (or is both),

(c) D is not a trespasser at the time the force is used, and

(d) at that time D believed V to be in, or entering, the building or part as a trespasser.

(8B) Where—

(a) a part of a building is a dwelling where D dwells,

(b) another part of the building is a place of work for D or another person who dwells in the first part, and

(c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is a dwelling.

(8C) Where—

(a) a part of a building is forces accommodation that is living or sleeping accommodation for D,

(b) another part of the building is a place of work for D or another person for whom the first part is living or sleeping accommodation, and

(c) that other part is internally accessible from the first part, that other part, and any internal means of access between the two parts, are each treated for the purposes of subsection (8A) as a part of a building that is forces accommodation.

(8D) Subsections (4) and (5) apply for the purposes of subsection (8A)(d) as they apply for the purposes of subsection (3).

(8E) The fact that a person derives title from a trespasser, or has the permission of a trespasser, does not prevent the person from being a trespasser for the purposes of subsection (8A).

(8F) In subsections (8A) to (8C)—

- “building” includes a vehicle or vessel, and
- “forces accommodation” means service living accommodation for the purposes of Part 3 of the Armed Forces Act 2006 by virtue of section 96(1)(a) or (b) of that Act.

**(8G) For the purposes of this section “a domestic abuse case” is a case where—**

**(a) the defence concerned is the common law defence of self-defence,**

**(b) D is, or has been, a victim of domestic abuse,**

**(c) the force concerned is force used by D against the person who has perpetrated the abusive behaviour referred to at sub-section (8G)(b),**

**(d) Sub-section (8G)(b) will only be established if the behaviour concerned is, or is part of, conduct which constitutes domestic abuse as defined in sections 1 and 2 of the Domestic Abuse Act 2020, including but not limited to conduct which constitutes the offence of controlling or coercive behaviour in an intimate or family relationship as defined in section 76 of the Serious Crime Act 2015.**

(9) This section, except so far as making different provision for householder cases **and domestic abuse cases**, is intended to clarify the operation of the existing defences mentioned in subsection (2).

(10) In this section—

(a) “legitimate purpose” means—

(i) the purpose of self-defence under the common law, or

(ia) the purpose of defence of property under the common law, or

(ii) the prevention of crime or effecting or assisting in the lawful arrest of persons mentioned in the provisions referred to in subsection (2)(b);

(b) references to self-defence include acting in defence of another person; and

(c) references to the degree of force used are to the type and amount of force used.

## **Amendment XX Defence if offence attributable to domestic abuse**

### **New Clause and Schedule – to provide a statutory defence for survivors of domestic abuse who commit an offence**

After Clause 65 insert the following new Clause –

#### **“Defence for victims of domestic abuse who commit an offence**

(1) A person is not guilty of an offence if—

(a) the person is aged 18 or over when the person does the act which constitutes the offence,

(b) the person does that act because the person is compelled to do it,

(c) the compulsion is attributable to their being a victim of domestic abuse and

(d) a reasonable person in the same situation as the person and having the person’s relevant characteristics might do that act.

(2) A person may be compelled to do something by another person or by the person’s circumstances.

(3) Compulsion is attributable to domestic abuse only if—

(a) it is, or is part of, conduct which constitutes domestic abuse as defined in sections 1 and 2 of this Act, including but not limited to conduct which constitutes the offence of controlling or coercive behaviour in an intimate or family relationship as defined in section 76 of the Serious Crime Act 2015, or

(b) it is a direct consequence of a person being, or having been, a victim of such abuse.

(4) A person is not guilty of an offence if—

(a) the person is under the age of 18 when the person does the act which constitutes the offence,

(b) the person does that act as a direct consequence of the person being, or having been, a victim of domestic abuse as defined at sub-section (3)(a) above, and

(c) a reasonable person in the same situation as the person and having the person’s relevant characteristics might do that act.

(5) For the purposes of this section “relevant characteristics” means age, sex, any physical or mental illness or disability and any experience of domestic abuse.

(6) In this section references to an act include an omission.

(7) Subsections (1) and (4) do not apply to an offence listed in Schedule X.

(8) The Secretary of State may by regulations amend Schedule X.

(9) The Secretary of State must make arrangements for monitoring of the types of offence for which victims of domestic abuse are prosecuted and use this evidence to inform an annual review of the offences listed in Schedule X and any amendment to Schedule X.”

After Schedule 2 insert the following new Schedule -

**“Schedule: Offences to which the defence for victims of domestic abuse who commit an offence does not apply**

**Common law offences**

- 1 False imprisonment.
- 2 Kidnapping.
- 3 Manslaughter.
- 4 Murder.
- 5 Perverting the course of justice.
- 6 Piracy.

**Offences against the Person Act 1861 (c. 100)**

7 An offence under any of the following provisions of the Offences Against the Person Act 1861—

- section 4 (soliciting murder)
- section 16 (threats to kill)
- section 18 (wounding with intent to cause grievous bodily harm)
- section 20 (malicious wounding)
- section 21 (attempting to choke, suffocate or strangle in order to commit or assist in committing an indictable offence)
- section 22 (using drugs etc to commit or assist in the committing of an indictable offence)
- section 23 (maliciously administering poison etc so as to endanger life or inflict grievous bodily harm)
- section 27 (abandoning children)
- section 28 (causing bodily injury by explosives)
- section 29 (using explosives with intent to do grievous bodily harm)
- section 30 (placing explosives with intent to do bodily injury)
- section 31 (setting spring guns etc with intent to do grievous bodily harm)
- section 32 (endangering safety of railway passengers)
- section 35 (injuring persons by furious driving)

- section 37 (assaulting officer preserving wreck)
- section 38 (assault with intent to resist arrest).

### **Explosive Substances Act 1883 (c. 3)**

8 An offence under any of the following provisions of the Explosive Substances Act 1883—

- section 2 (causing explosion likely to endanger life or property)
- section 3 (attempt to cause explosion, or making or keeping explosive with intent to endanger life or property)
- section 4 (making or possession of explosives under suspicious circumstances).

### **Infant Life (Preservation) Act 1929 (c. 34)**

9 An offence under section 1 of the Infant Life (Preservation) Act 1929 (child destruction).

### **Children and Young Persons Act 1933 (c. 12)**

10 An offence under section 1 of the Children and Young Persons Act 1933 (cruelty to children).

### **Public Order Act 1936 (1 Edw. 8 & 1 Geo. 6 c. 6)**

11 An offence under section 2 of the Public Order Act 1936 (control etc of quasi-military organisation).

### **Infanticide Act 1938 (c. 36)**

12 An offence under section 1 of the Infanticide Act 1938 (infanticide).

### **Firearms Act 1968 (c. 27)**

13 An offence under any of the following provisions of the Firearms Act 1968—

- section 5 (possession of prohibited firearms)
- section 16 (possession of firearm with intent to endanger life)
- section 16A (possession of firearm with intent to cause fear of violence)
- section 17(1) (use of firearm to resist arrest)
- section 17(2) (possession of firearm at time of committing or being arrested for specified offence)
- section 18 (carrying firearm with criminal intent).

**Theft Act 1968 (c. 60)**

14 An offence under any of the following provisions of the Theft Act 1968—

- section 8 (robbery or assault with intent to rob)
- section 9 (burglary), where the offence is committed with intent to inflict grievous bodily harm on a person, or to do unlawful damage to a building or anything in it
- section 10 (aggravated burglary)
- section 12A (aggravated vehicle-taking), where the offence involves an accident which causes the death of any person
- section 21 (blackmail).

**Criminal Damage Act 1971 (c. 48)**

15 The following offences under the Criminal Damage Act 1971—

- an offence of arson under section 1
- an offence under section 1(2) (destroying or damaging property) other than an offence of arson.

**Immigration Act 1971 (c. 77)**

16 An offence under section 25 of the Immigration Act 1971 (assisting unlawful immigration to member state).

**Customs and Excise Management Act 1979 (c. 2)**

17 An offence under section 170 of the Customs and Excise Management Act 1979 (penalty for fraudulent evasion of duty etc) in relation to goods prohibited to be imported under section 42 of the Customs Consolidation Act 1876 (indecent or obscene articles).

**Taking of Hostages Act 1982 (c. 28)**

18 An offence under section 1 of the Taking of Hostages Act 1982 (hostage-taking).

**Aviation Security Act 1982 (c. 36)**

19 An offence under any of the following provisions of the Aviation Security Act 1982—

- section 1 (hijacking)
- section 2 (destroying, damaging or endangering safety of aircraft)
- section 3 (other acts endangering or likely to endanger safety of aircraft)
- section 4 (offences in relation to certain dangerous articles).

**Mental Health Act 1983 (c. 20)**

20 An offence under section 127 of the Mental Health Act 1983 (ill-treatment of patients).

**Child Abduction Act 1984 (c. 37)**

21 An offence under any of the following provisions of the Child Abduction Act 1984—

- section 1 (abduction of child by parent etc)
- section 2 (abduction of child by other persons).

**Public Order Act 1986 (c. 64)**

22 An offence under any of the following provisions of the Public Order Act 1986—

- section 1 (riot)
- section 2 (violent disorder).

**Criminal Justice Act 1988 (c. 33)**

23 An offence under section 134 of the Criminal Justice Act 1988 (torture).

**Road Traffic Act 1988 (c. 52)**

24 An offence under any of the following provisions of the Road Traffic Act 1988—

- section 1 (causing death by dangerous driving)
- section 3A (causing death by careless driving when under the influence of drink or drugs).

**Aviation and Maritime Security Act 1990 (c. 31)**

25 An offence under any of the following provisions of the Aviation and Maritime Security Act 1990—

- section 1 (endangering safety at aerodromes)
- section 9 (hijacking of ships)
- section 10 (seizing or exercising control of fixed platforms)
- section 11 (destroying fixed platforms or endangering their safety)
- section 12 (other acts endangering or likely to endanger safe navigation)
- section 13 (offences involving threats).

**Channel Tunnel (Security) Order 1994 (S.I. 1994/570)**

26 An offence under Part 2 of the Channel Tunnel (Security) Order 1994 (SI 1994/570) (offences relating to Channel Tunnel trains and the tunnel system).

### **Protection from Harassment Act 1997 (c. 40)**

27 An offence under any of the following provisions of the Protection from Harassment Act 1997—

- section 4 (putting people in fear of violence)
- section 4A (stalking involving fear of violence or serious alarm or distress).

### **Crime and Disorder Act 1998 (c. 37)**

28 An offence under any of the following provisions of the Crime and Disorder Act 1998 —

- section 29 (racially or religiously aggravated assaults)
- section 31(1)(a) or (b) (racially or religiously aggravated offences under section 4 or 4A of the Public Order Act 1986).

### **Terrorism Act 2000 (c. 11)**

29 An offence under any of the following provisions of the Terrorism Act 2000—

- section 54 (weapons training)
- section 56 (directing terrorist organisation)
- section 57 (possession of article for terrorist purposes)
- section 59 (inciting terrorism overseas).

### **International Criminal Court Act 2001 (c. 17)**

30 An offence under any of the following provisions of the International Criminal Court Act 2001—

- section 51 (genocide, crimes against humanity and war crimes)
- section 52 (ancillary conduct).

### **Anti-terrorism, Crime and Security Act 2001 (c. 24)**

31 An offence under any of the following provisions of the Anti-terrorism, Crime and Security Act 2001—

- section 47 (use of nuclear weapons)
- section 50 (assisting or inducing certain weapons-related acts overseas)
- section 113 (use of noxious substance or thing to cause harm or intimidate).

### **Female Genital Mutilation Act 2003 (c. 31)**

32 An offence under any of the following provisions of the Female Genital Mutilation Act 2003—

- section 1 (female genital mutilation)
- section 2 (assisting a girl to mutilate her own genitalia)
- section 3 (assisting a non-UK person to mutilate overseas a girl's genitalia).

### **Sexual Offences Act 2003 (c. 42)**

33 An offence under any of the following provisions of the Sexual Offences Act 2003—

- section 1 (rape)
- section 2 (assault by penetration)
- section 3 (sexual assault)
- section 4 (causing person to engage in sexual activity without consent)
- section 5 (rape of child under 13)
- section 6 (assault of child under 13 by penetration)
- section 7 (sexual assault of child under 13)
- section 8 (causing or inciting child under 13 to engage in sexual activity)
- section 9 (sexual activity with a child)
- section 10 (causing or inciting a child to engage in sexual activity)
- section 13 (child sex offences committed by children or young persons)
- section 14 (arranging or facilitating commission of child sex offence)
- section 15 (meeting a child following sexual grooming)
- section 16 (abuse of position of trust: sexual activity with a child)
- section 17 (abuse of position of trust: causing or inciting a child to engage in sexual activity)
- section 18 (abuse of position of trust: sexual activity in presence of child)
- section 19 (abuse of position of trust: causing a child to watch a sexual act)
- section 25 (sexual activity with a child family member)
- section 26 (inciting a child family member to engage in sexual activity)
- section 30 (sexual activity with a person with a mental disorder impeding choice)

- section 31 (causing or inciting a person with a mental disorder impeding choice to engage in sexual activity)
- section 32 (engaging in sexual activity in the presence of a person with a mental disorder impeding choice)
- section 33 (causing a person with a mental disorder impeding choice to watch a sexual act)
- section 34 (inducement, threat or deception to procure sexual activity with a person with a mental disorder)
- section 35 (causing a person with a mental disorder to engage in or agree to engage in sexual activity by inducement, threat or deception)
- section 36 (engaging in sexual activity in the presence, procured by inducement, threat or deception, of a person with a mental disorder)
- section 37 (causing a person with a mental disorder to watch a sexual act by inducement, threat or deception)
- section 38 (care workers: sexual activity with a person with a mental disorder)
- section 39 (care workers: causing or inciting sexual activity)
- section 40 (care workers: sexual activity in the presence of a person with a mental disorder)
- section 41 (care workers: causing a person with a mental disorder to watch a sexual act)
- section 47 (paying for sexual services of a child)
- section 48 (causing or inciting child prostitution or pornography)
- section 49 (controlling a child prostitute or a child involved in pornography)
- section 50 (arranging or facilitating child prostitution or pornography)
- section 61 (administering a substance with intent)
- section 62 (committing offence with intent to commit sexual offence)
- section 63 (trespass with intent to commit sexual offence)
- section 64 (sex with an adult relative: penetration)
- section 65 (sex with an adult relative: consenting to penetration)
- section 66 (exposure)
- section 67 (voyeurism)

- section 70 (sexual penetration of a corpse).

### **Domestic Violence, Crime and Victims Act 2004 (c. 28)**

34 An offence under section 5 of the Domestic Violence, Crime and Victims Act 2004 (causing or allowing a child or vulnerable adult to die or suffer serious physical harm).

### **Terrorism Act 2006 (c. 11)**

35 An offence under any of the following provisions of the Terrorism Act 2006—

- section 5 (preparation of terrorist acts)
- section 6 (training for terrorism)
- section 9 (making or possession of radioactive device or material)
- section 10 (use of radioactive device or material for terrorist purposes)
- section 11 (terrorist threats relating to radioactive devices etc).

### **Modern Slavery Act 2015 (c. 30)**

36 An offence under any of the following provisions of the Modern Slavery Act 2015—

- section 1 (slavery, servitude and forced or compulsory labour)
- section 2 (human trafficking).

### **Ancillary offences**

37 (1) An offence of attempting or conspiring to commit an offence listed in this Schedule.

(2) An offence committed by aiding, abetting, counselling or procuring an offence listed in this Schedule.

(3) An offence under Part 2 of the Serious Crime Act 2007 (encouraging or assisting) where the offence (or one of the offences) which the person in question intends or believes would be committed is an offence listed in this Schedule.”

### **Explanatory notes**

1. The new clause would create a statutory defence for those who are compelled to offend as a result of their experience of domestic abuse. It is closely modelled on Section 45, Modern Slavery Act 2015, with some differences as explained below.
2. References to ‘victims of trafficking/slavery/relevant exploitation’ have been replaced with ‘victims of domestic abuse’ as defined in clauses 1 and 2 of the Bill and including coercive or controlling behaviour as defined in section 76 of the Serious Crime Act

2015. CPS legal guidance on the application of section 76 of the Serious Crime Act 2015 states that relevant behaviour to indicate ‘controlling or coercive behaviour’ includes acts such as controlling finances and social isolation.<sup>21</sup>

3. The common law defence of duress includes an objective ‘reasonable person’ test deriving from the case of R v Bowen (the ‘Bowen test’). The ‘reasonable person’ tests contained in sub-sections 45(1)(d), 45(4)(c) and 45(5) of the Modern Slavery Act 2015 are based on the Bowen test. However the Bowen test has proved problematic for defendants seeking to rely on duress where they were compelled to act due to their experience of domestic abuse. Under the Bowen test, for those experiencing abuse to succeed with a duress defence, ‘relevant characteristics’ must be established including ‘battered woman syndrome’ and ‘learned helplessness’. These are outdated concepts which pathologise women rather than offering an effective defence suitable for the actual circumstances. They require the production of medical evidence which is not practicable in many cases involving low level offending tried in the magistrates’ courts.
4. The provisions at sub-clauses (1)(d), (4)(c) and (5) of the proposed new statutory defence represent a new objective test which is not intended to be interpreted in light of R v Bowen and is not intended to operate as the Bowen test does currently. Instead, the new test is intended to allow the defendant’s experience of domestic abuse to be taken into account without the need for medical evidence. The new test is not intended, however, to prevent medical evidence being relied upon where relevant. The new statutory defence differs as follows from sub-sections 45(1)(d), 45(4)(c) and 45(5) of the Modern Slavery Act 2015:
  - a. References to the reasonable person having ‘no realistic alternative to doing that act’ have been removed and substituted for ‘might do that act’.
  - b. The definition of ‘relevant characteristics’ contained in section 45(5) of the Modern Slavery Act 2015 has been amended to add reference to ‘experience of domestic abuse’ in order to ensure that experience of domestic abuse can be appropriately taken into account when interpreting the application of the defence without the need for medical evidence.
5. The clause is not gender specific and would offer protection to men as well as women.
6. The proposed list of offences for which the defence should not be available, contained in the new Schedule, is identical to the list of excluded offences in Schedule 4 of the Modern Slavery Act 2015. It is proposed that the Secretary of State should monitor the types of offences for which victims of domestic abuse are being prosecuted and use this evidence to inform an annual review of the offences listed in the new Schedule and any amendment of that list (sub-clause (9)).

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<sup>21</sup> CPS (2017) Controlling or Coercive Behaviour in an Intimate or Family Relationship: Legal Guidance – Domestic Abuse, London: CPS