



## **Briefing for Committee Stage of the Domestic Abuse Bill**

### **About us**

The Bar Council is the representative body for the Bar of England and Wales, representing approximately 17,000 barristers. The independent Bar plays a crucial role in upholding and realising the constitutional principles of government accountability under law and vindication of legal rights through the courts. It provides a pool of talent, from increasingly diverse backgrounds, from which a significant proportion of the judiciary is drawn, and on whose independence the rule of law and our democratic way of life depends.

### **Background**

The Bill itself addresses many of the concerns we raised in response to the two consultation papers. However, we would reiterate the need for proper resourcing of the criminal justice system - to accelerate disclosure and to ensure trial dates are fixed rather than placed in rolling warned lists - and would make these observations in relation to the amendment led by the Rt Hon Harriet Harman MP.

1. Firstly, on **NC4** and **NC5**, the Law Reform Committee would question the need to rule out lawful consent to death or serious injury in cases of domestic violence. As Parliament will be aware, where a victim suffers actual bodily harm or more serious injury, consent is no defence without good reason. In the context of sexual activity, it has long been held that the satisfaction of sado-masochistic desires is not a good reason: *Brown* [1994] 1 AC 212. This was deemed compliant with the right to a private and family life (ECHR Art. 8) in *Laskey* (1997) 24 EHRR 39 and remains good law today (see judgment of the current Lord Chief Justice in *BM* [2019] QB 1).

2. Secondly, on barring the defence of consent where the complainant is deceased, the Committee would observe that if the injuries were grossly outwith anything to which he or she could in law have consented, the judge can make that finding and withdraw the defence from the jury - subject to the possibility of an appeal where his decision is wrong and the resulting conviction unsafe. In any event, the deceased may have died for any number of reasons unconnected to the defendant's direct actions for example because the defendant abandoned the deceased and the deceased died of cold, shock or through the effects of alcoholic intoxication.

3. Thirdly, on **NC6** and **NC7**, the Committee is concerned that imposing a requirement for the Director of Public Prosecutions' consent to charge manslaughter rather than murder in domestic homicide risks an unnecessary interference with prosecutorial independence.

4. Fourthly, on NC8 and NC9, non-fatal strangulation is already an offence under section 21 of the Offences Against the Person Act 1861.

5. Fifthly, on NC10, the prohibition on cross-examination in relation to a complainant's sexual history is not and has never been absolute, leaving room for questioning in highly exceptional circumstances when this evidence is needed to avoid the risk of a wrongful conviction: see the House of Lords decision in *A* [2001] UKHL 25.

6. Finally, on NC11, the idea of granting anonymity to deceased complainants, the Committee observes that Parliament conferred anonymity on sex complainants specifically. That should not be seen as a first step towards complainants more generally.

**Law Reform Committee, on behalf of the Bar Council**

**1 June 2020**