



## **Bar Council response to the Government Review of Workplace Support and Survivors of Domestic Abuse**

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the Government review of support in the workplace for survivors of domestic abuse<sup>1</sup>.
2. The Bar Council represents approximately 17,000 barristers in England and Wales. It promotes the Bar's high-quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.
3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board (BSB).

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<sup>1</sup> [https://www.gov.uk/government/news/government-to-review-support-in-the-workplace-for-survivors-of-domestic-abuse?mc\\_cid=8d7395eaea&mc\\_eid=\[UNIQID\]](https://www.gov.uk/government/news/government-to-review-support-in-the-workplace-for-survivors-of-domestic-abuse?mc_cid=8d7395eaea&mc_eid=[UNIQID])

4. The Government opened a consultation in June 2020 inviting responses to one of the following questions:

- what practical circumstances arise in relation to domestic abuse and work?
- what support can be offered in the workplace for victims of domestic abuse?
- what is possible with the existing framework?
- what does current best practice look like?
- what is the potential to do more?

5. The Bar Council has elected to address the question “what is possible with the existing framework?” though it goes on to make some suggestions which align with the question “what is the potential to do more?”.

6. The common law imposes a duty of care on an employer, but the extent to which this duty could or would be invoked in the case of a victim of domestic abuse is highly fact sensitive especially because there is no one type of domestic abuse and the ways in which persons abused can be affected are myriad. There is no general duty imposed on an employer to protect an employee from the consequences of domestic abuse or to provide specific support to her or to him. In many cases, the workplace may be the only safe haven for the person concerned and the employer may be wholly oblivious to the fact that abuse is taking place or has taken place. In other circumstances, it is possible that the abuser is someone within the same workplace which will present its own difficulties and could engage internal disciplinary procedures if sufficient relevant circumstances are known to the employer. Without actual or constructive knowledge of abuse, however, it is hard to see what form of common law duty the employer could reasonably be placed under.

7. There are no specific employment laws (including health and safety laws) in place to require or facilitate the support of those who have been subjected to domestic abuse. We note the reference to “survivors” of domestic abuse, but anticipate that the review seeks to address ways in which those who have been or continue to be subjected to domestic abuse of a physical or emotional nature can be supported, and not to restrict it to those who have already escaped a situation in which they have been abused. All references to a person who is being subjected to domestic abuse in this response should be taken to include someone who has been abused, or “survived” abuse to use the language of the consultation.

8. It is open to any employer to assist and treat with sensitivity a person who is being abused or has been abused. To the extent that this can be encouraged without recourse to legislative provisions or law reform, then plainly this is desirable. This could include increasing awareness of the signs of abuse, creating a scheme whereby champions or buddies can help those affected, and making it easier for someone to confide in somebody whom they trust at work.

9. The circumstances of a person who is being abused may be such that other legal protections, which already exist, may be invoked. For example, a person being abused may fulfil the statutory definition of disability contained within the Equality Act 2010. It may be possible to look at the rights of the person abused through the prism of sex discrimination, perhaps in the context of difficult childcare arrangements being exacerbated by the abuse or consequences of the abuse. An employee may request flexible working arrangements (though that is a fairly toothless piece of legislation as matters stand, given that the employer is under no obligation other than to consider the request) in order to allow them to manage or continue to work.

10. It is worth pausing to note, at this juncture, that existing employment rights do not apply universally and it remains the case that workers have fewer rights than employees (for the definition of employee for most relevant purposes please see section 230, Employment Rights Act 1996). Many economically vulnerable persons in the workplace, especially within the modern gig economy, are not employees in the legal sense. Their working lives are often both economically and legally more precarious as a result. It is not difficult to envisage circumstances in which someone who is suffering or fleeing domestic abuse needs to act suddenly, with little time to prepare, and needs to be absent from work in order to protect life or limb. Their behaviour or productivity may be affected. Their perception of danger, resilience and confidence may be affected in adverse ways. In truth, how they fare at work in such circumstances may come down to the type of managerial support they have in place and what sort of person their manager or supervisor is. It will also depend on the flexibility and tolerance of the employer for the work-wage bargain to be temporarily disrupted.

11. Additionally, many employment-based rights are based on length of service rather than day one rights, such as most dismissal and redundancy rights, although, significantly, the Equality Act 2010 does establish day one rights for workers (and indeed job applicants).

12. While we recognise that not all employees or workers experiencing domestic abuse, or having suffered it, will fulfil the statutory definition of “disability” in section 6 Equality Act 2010, we consider that the model for disability discrimination could usefully be adapted to provide a workable set of workplace rights and protections for victims of domestic abuse, and merits further exploration.

13. As a starting point, if being domestically abused or having been abused is added as a new protected characteristic in the Equality Act 2010, we consider that the existing framework for disability discrimination could be adapted successfully and proportionately to meet the needs of such victims. Plainly, however, as the definition of victim-status would be the gateway to a number of rights (unlawful direct or indirect discrimination, discrimination arising as contained in section 15 Equality Act 2010 and the making of reasonable adjustments as set out in sections 20 and 21 of the same) it will be important to create a definition with some care.

14. The framework for disability discrimination currently provides that it is unlawful for an employer to directly discriminate (section 13), indirectly discriminate (section 19), subject the disabled person to discrimination “arising” in consequence of the disability (section 15) or to breach a duty to make reasonable adjustments to the workplace or working arrangements where the duty applies (sections 20 and 21) in a number of ways which bite upon working arrangements. Notably, discrimination arising and reasonable adjustments are legal concepts unique to disability discrimination and do not feature in relation to any other protected characteristic in the Equality Act 2010. This is because these special rights and obligations are designed to level the playing field and to encourage disabled persons to take up employment, as well as to assist them in retaining employment. The policy rationale may be thought to have synergy with the aims of assisting survivors of domestic abuse in the workplace.

15. This response will go on to explore how the existing framework of rights in the field of disability discrimination could be adjusted and applied, but before doing so, we address the gateway definition, i.e. the definition of abuse which could be adopted as a protected characteristic.

16. We consider that the existing framework for disability discrimination, again, provides assistance. It defines someone as disabled if they have a mental or physical impairment which causes a substantial and adverse effect on their ability to carry out normal day to day activities. To exclude short term illnesses which are not to be regarded as disabilities, the condition and its effects must endure for at least 12

months or be expected to, with some defined exclusions. There is guidance on the constituent elements of the definition. It is not unusual for the most important evidence to come from a combination of medical records and the claimant's reported history in the form of a disability impact statement. Sometimes an independent expert will be required. Where disability itself is challenged in proceedings issued under the Equality Act 2010, Employment Tribunals and Courts have to balance the need for proper information to be considered with the need to avoid subjecting a person to a mini-trial and to expose every element of their private medical information and lives. Judges and assessors are experienced in striking the correct balance in this regard and there are means by which private information can be kept out of the public domain e.g. a private hearing or restricted reporting order. It is clear that privacy may have a particular resonance for victims of abuse, not least because they may even be living under a new identity or in a secret location to avoid coming to harm. Where the alleged abuse is sexual and has given rise to a complaint to the Police the victim has an automatic right to life-long anonymity under the Sexual Offences (Amendment) Act 1992. Ticking a box in relation to domestic abuse on a claim form ought to trigger administrative responses which guard against breaching privacy rights and possibly endangering a person in such circumstances.

17. We consider that the addition of the protected characteristic of "victim of domestic abuse" would be workable. While we do not anticipate that this protection would be exploited by an unscrupulous worker or employee, the possibility always remains for this to happen. Where an employer disputes that its employee is a victim of domestic abuse, in proceedings, a simple way of avoiding the need for a preliminary hearing would be a requirement that the employee's current GP provides a statement. He or she would be uniquely placed, in our view, to be able to opine on whether someone is, in his or her professional opinion, suffering or has suffered domestic abuse and will have access to prior medical records and interface with other agencies such as social services. A family doctor is ideally placed to assist the Tribunal or Court in this regard where there is a challenge to the status of the claimant. Where the victim has had to move around and the current GP is not best placed to assist in this regard, we suggest that an opinion from a crisis centre or similar domestic abuse unit used to dealing with and assisting victims of abuse would be a reasonable alternative. It should *at the very least* set up a rebuttable presumption that the threshold is met i.e. that the claimant is in fact a victim of domestic abuse.

18. Where the protected characteristic applies, the victim of domestic abuse should be protected in the same way as others with protected characteristics, but with the added necessary assistance that arises from the extra provisions that apply to those who are disabled, on which see above. It is essential that a victim of domestic abuse is not forced to prove a disability in order to take advantage of these extra provisions, given the restrictive definition that exists. Not all victims of domestic abuse will suffer mental or physical disability but may need immediate flexibility and adjustments in the workplace in order to manage their crucial needs, e.g. finding emergency accommodation; providing police statements; getting family law advice; obtaining an injunction in court; picking up children from school each day and changing child care arrangements because of a threat from the domestic abuser, etc. It is, then, critical, that not only is there a right to request reasonable adjustments be available but there is also a duty on the employer to provide them. In addition, a right not to suffer detriment or be treated unfavourably for a reason arising as a consequence of domestic abuse is essential. This again borrows from the disability discrimination model which is well embedded in the legal and social justice systems.

19. Dealing with each of these in turn: With reasonable adjustments the victim should be under the same burden of proof as in a disability case, that being the need to show that a provision, criterion or practice ('PCP') places the victim at a substantial disadvantage as compared to a person who is not such a victim. The employer is then under a duty to make such adjustments as are reasonable to avoid that disadvantage. An example might be that the victim is obliged by her or his work hours to ensure that they are available to meet clients at any time up to 6pm; this may place her or him at a substantial disadvantage in that they are forced by their circumstances to be at home safeguarding their children after school for a number of weeks. If it can be accommodated reasonably the employer should be obliged to offer the victim the opportunity to work reduced hours for a certain period. It cannot be appropriate that a victim is forced to choose between protecting his or her children (or indeed themselves) and resignation/dismissal or disciplinary sanction.

20. With the equivalent of the right under s.15 of Equality Act 2010 (referred to above in relation to disability cases), a victim would be protected against detriment meted out by an employer because of circumstances which arise as a consequence of the abuse (or action taken to avoid it). This last added extra we regard as important. There will be many situations in which victims of domestic abuse are forced to move quickly to different accommodation or take immediate protective action of another kind in order to avoid further abuse. It should be unlawful for an employer to

penalise the victim for this, subject to the defence of justification, (i.e. that the employer can show that the penalty was a proportionate response in furtherance of legitimate aims (as with s.15)). The employer would be under a duty to abide by this law if they knew or ought to have known that the employee was a victim of domestic abuse - again the same as with s.15.

21. As with the majority of the rights contained within the Equality Act 2010, we consider that the right not be discriminated against because of this protected characteristic (including the right to reasonable adjustments) should be a 'day one right'. That is to say, this is a right that applies irrespective of the individual's length of service. The rationale for this is that those who need to avail themselves of the statutory protection are deserving of the protection irrespective of their length of service. If society wishes to treat this issue with the seriousness that it deserves, this right should apply to all and not be curtailed by a secondary consideration (length of service) that is unrelated to the situation.

22. We consider that an interim relief regime similar to that which exists in relation to whistleblowing would also be appropriate in respect of this protected characteristic. For those who have been the subject of financial control or have had to change their location, immediate access to funds is going to be a key concern. We would suggest that identifying a compelling case under the proposed legislation may in many cases be a more straightforward exercise than in cases of making a protected disclosure. For those who have a good case, an interim relief application would be a possible route to maintaining access to much needed funds and in some cases would reduce the need to rely upon external or state support for basic funds.

23. Finally, we also consider that reforms could be made to the flexible working regime in the Employment Rights Act 1996 ('ERA') to enable the issue of domestic abuse to expressly feature as part of the statutory framework. At present, it is not necessary for an individual to have a protected characteristic in order to make a flexible working application. The regime is correctly designed to enable as many individuals as possible to make an application and to have it considered within the framework.

24. We would suggest three modest alterations in respect of domestic abuse cases. The first alteration relates to the time period in which the flexible working application is considered. We suggest that an individual, if they so choose, would be able to tick a box on the flexible working application or to indicate that this was a 'domestic abuse related application' in the grounds of their application.

25. This would then engage a fast track flexible working request requiring a reply from the employer within seven calendar days as opposed to the current period of three months. We consider that a statutory three month period is too long in respect of an individual who may be facing an immediate, emergency situation at home. It may well be worth considering a regime under which a victim of abuse can make an emergency application for flexible working to his or her employer which requires a response in a shorter period, such as 24 to 48 hours.

26. For example, an urgent change may be required in the individual's circumstances, for example the individual has left the home and moved to temporary premises further from the office or the children's school. These premises may be in the form of emergency accommodation in which the individual has had little or no say and does not take into account their working pattern.

27. Employers would still be able to reject a flexible working application in accordance with the current statutory regime as they would any other request.

28. The second alteration would be to permit more than one request to be made in a calendar year. If an individual's circumstances are rapidly changing then it is conceivable that more than one request may be required as those circumstances change. If the concern is that repetitious applications could be made, a requirement can be introduced that requires a change in circumstances or a materially different application in order for a valid request to be made.

29. The third alteration follows from what has already been stated above. In cases where the flexible working application is related to domestic abuse, then the right to make such an application should be a day one right, unrestricted by length of service.

Bar Council<sup>2</sup>

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<sup>2</sup> Prepared for the Bar Council by the Law Reform Committee

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