

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, 25 October 2019

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. The Domestic Abuse Bill provides an important opportunity to ensure that survivors of domestic abuse get the protection and support they need and that perpetrators are effectively dealt with. This submission primarily focuses on PRT's proposals for new legal protection for survivors of domestic abuse who are driven to offend. These proposals are supported by Dame Vera Baird QC, the Victims' Commissioner; Nicole Jacobs, the designate Domestic Abuse Commissioner and a number of legal and domestic abuse experts and organisations.
3. We also remain concerned about the government's plans to introduce a new civil order, the Domestic Abuse Protection Order (DAPO), breach of which is punishable by imprisonment.

Summary of proposed new clauses

"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 inspector¹

4. Two new Clauses and a new Schedule should be added to the Bill to strengthen legal protection for survivors of domestic abuse who are driven by that experience to commit an offence, by introducing -
 - (a) An amendment to the law on self-defence modelled on the provisions for householders in Section 76 of the Criminal Justice and Immigration Act 2008; and
 - (b) A new statutory defence modelled on Section 45 of the Modern Slavery Act 2015.

The new Clauses and Schedule were developed with the assistance of 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 QC, the Victims' Commissioner; Paramjit Ahluwalia of Lamb Building; Naima Sakande of Appeal and other legal and domestic abuse experts. The provisions are appended to this submission together with explanatory notes.

5. The links between victimisation and offending are now better recognised and there has been some progress in recognising the nature of coercive control. However, the

¹ PRT (2017) Fair Cop? Improving outcomes for women at the point of arrest, London: PRT

experience of abuse and trauma is too often disregarded by criminal justice agencies and current legal defences fall short of protecting survivors of domestic abuse from prosecution or conviction, leading to injustice. The Domestic Abuse Bill presents an important opportunity to address this gap in the law and improve recognition of the links for between victimisation and offending. For a full list of the legal and domestic abuse experts and organisations who support the proposals, please visit the PRT website.²

6. Our proposed new clauses are based on legal precedents which are already in place to protect other groups. The new statutory defence would give survivors of domestic abuse equivalent protection to that which is already in place for victims of trafficking who are compelled to offend. The amendment to the law on self-defence would allow survivors acting in self-defence against their abuser the same protection that is currently available to householders who act in self-defence against an intruder in the home.
7. These provisions must be accompanied by statutory guidance and training for criminal justice agencies and judicial directions and guidance. These should focus on the nature of domestic abuse, its impact on the behaviour of survivors, the manner in which it 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 specific response to women in minority ethnic groups and of minority religions.³

Pre-legislative scrutiny and revised proposals

8. The Pre-legislative Scrutiny Committee on the Draft Bill recommended that the government should consider our proposal for a new statutory defence for survivors of domestic abuse (both men and women) who are compelled to offend, modelled on the defence for victims of human trafficking and modern slavery contained in Section 45 of the Modern Slavery Act 2015 and developed in partnership with the Criminal Bar Association, with particular assistance from Paramjit Ahluwalia of Lamb Building.⁴
9. In response, the government acknowledged the link between domestic abuse and some women's offending, noting the existence of the common law defences of duress and self-defence.⁵ In conclusion, the government stated: "...*the Bill's definition of domestic abuse should clarify the wide-ranging nature of domestic abuse for all those involved in the criminal justice system. We agree with the Prison Reform Trust's view that legal representatives and the CPS should be aware of domestic abuse histories in making charging decisions and when considering guilty pleas, but we have not yet been persuaded that the creation of a new defence is a practical or proportionate proposal in all circumstances.*" Lucy Frazer QC MP, Minister of State for Prisons and Probation, reiterated at a conference held by the Prison Reform Trust on 4 September 2019, that the government continues to consider the proposal.

² For a list of supporters go to www.prisonreformtrust.org.uk/women/domesticabuse

³ 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.](#)

⁴ Joint Committee on the Draft Domestic Abuse Bill (2019) Draft Domestic Abuse Bill: First Report of Session 2017-19, London: House of Commons, at paragraph 180

⁵ Home Office (2019) The Government Response to the Report from the Joint Committee on the Draft Domestic Abuse Bill Session 2017-19 HL Paper 378 / HC 2075, London: Home Office

10. In light of the government's comments we have since amended our proposal to limit the scope of the new statutory defence and align it more closely with the defence for victims of trafficking in Section 45 of the Modern Slavery Act 2015. We have also introduced a further proposal to amend the law on self-defence, in response to comments from criminal defence lawyers about the difficulty faced by domestic abuse survivors in establishing that the force used against their abuser was reasonable. This proposal seeks to build upon improved public and judicial understanding of coercive control following the Court of Appeal judgment in the case of Sally Challen, which was referred to more than once during the Bill's Second Reading debate.
11. The proposed clauses are not gender specific and would offer protection to men as well as women, although in practice women are most often likely to benefit due to the much greater likelihood that they will experience domestic abuse.

Second Reading debate

12. During the Bill's Second Reading debate, Kate Green MP spoke in support of our proposals and commented:

"As the Bill continues its parliamentary passage, I hope that the option will be taken to include statutory protection for survivors of domestic violence and abuse who offend."
13. Speaking powerfully about her own mother's imprisonment Naz Shah MP emphasised the need for a culturally specific response for BAME women, explaining:

"It is more complicated for women of BAME heritage. My mother did not talk about being abused because of the concept of honour... Had Zoora Shah been arrested by an officer who was non-white, she might have had a different experience. Had she been arrested by a woman of colour, or even a woman of her background, they might have understood her experience of abuse, which drove her to kill. Had she been represented by a female solicitor from her cultural background, she might have had a different experience. Had her case been dealt with by a judge with an ethnic background or who understood her culture, the outcome for her might have been very different. The outcome of my life might have been very different, and that of my siblings and my family."
14. Referring to Sally Challen's case and responding to Naz Shah MP, Jess Phillips MP commented:

"Hopefully, legal change will continue through the Bill to allow people to understand that some of these issues are not simply black and white, but the reality of the lives of people who have been terribly abused..."
15. Chris Bryant MP referred to research by The Disabilities Trust which found 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.⁶ The Secretary of State responded that he wants 'to do more' for these women.⁷

⁶ [The Disabilities Trust \(2019\) Making the link: Female offending and brain injury](#), London: The Disabilities Trust

⁷ Full debate available at: <https://hansard.parliament.uk/commons/2019-10-02/debates/C3488538-CFEC-4670-9299-732672E2BE67/DomesticAbuseBill>

The links between domestic abuse and women's offending

16. The majority of women in prison are survivors of domestic abuse and many have been driven to offend as a direct result of that abuse. Yet 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 protection for survivors of domestic abuse. The Bill presents an important opportunity to address this anomaly.
17. 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.⁸ Our proposed amendment to the law on self-defence and new statutory defence would help to ensure a just outcome in many more cases involving a wide range of offences.
18. Women in prison in England and Wales have often been victims of more serious offences than those they are accused of committing, and for many their offending behaviour is driven by their experience of domestic abuse. Offending may result from a victim's attempts to survive and the criminal justice process itself can be used as a weapon of abuse.⁹ As Women's Aid puts it:¹⁰

“Coercive control creates invisible chains and a sense of fear that pervades all elements of a victim's life. It works to limit their human rights by depriving them of their liberty and reducing their ability for action. Experts like Evan Stark liken coercive control to being taken hostage. As he says: “the victim becomes captive in an unreal world created by the abuser, entrapped in a world of confusion, contradiction and fear”.”

19. More than half (53%) of women in prison report having experienced emotional, physical or sexual abuse as a child compared to 27% of men.¹¹ According to Ministry of Justice data, 57% of women in prison and under community supervision, who have had an assessment, are victims of domestic abuse.¹² Both figures are likely to be an underestimate because many women fear disclosing abuse.¹³
20. Women's offences are more likely than men's to be prompted by their relationships. 48% of women, compared to 22% of men, have reported that they committed offences to support someone else's drug use.¹⁴

⁸ 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>

⁹ Roberts, J. (2015) 'It was do or die' – How a woman's experience of domestic abuse can influence her involvement in crime: A qualitative investigation of the experiences of community-based female offenders, Unpublished doctoral research findings summary report, University of Leicester

¹⁰ Women's Aid website, viewed 03/04/19: <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/coercive-control/>

¹¹ Ministry of Justice (2012) Prisoners' childhood and family backgrounds, London: Ministry of Justice

¹² Ministry of Justice (2018) Female Offender Strategy, London: MoJ

¹³ Gelsthorpe, L., Sharpe, G., and Roberts, J. (2007) Provision for Women offenders in the community London: Fawcett Society

¹⁴ Light, M., Grant, E. and Hopkins, K. (2013) Gender differences in substance misuse and mental health amongst prisoners, London: MOJ

21. In research by Muslim Hands with Muslim women in prison, 71% of interview participants reported that they had experienced domestic abuse.¹⁵ Women with learning disabilities are particularly vulnerable to domestic abuse.¹⁶ Women with children can be reluctant to disclose their exposure to domestic violence, but the impact of prosecution and imprisonment may be particularly disruptive and traumatic for both mothers and children.¹⁷
22. PRT's report 'There's a reason we're in trouble' and the accompanying briefing by the Criminal Bar Association (CBA) include women's accounts of their convictions for offences committed as a direct result of domestic abuse, such as:¹⁸
- Handling stolen goods under threat of violence by a partner.
 - Taking the blame for possession of a controlled substance belonging to an abusive partner.
 - Taking the blame for carrying a knife on behalf of an abusive partner.
 - Theft offences to pay for drugs and alcohol used by themselves and their abusive partner.
 - Assault against an abusive partner or ex-partner.
 - Failure to attend school for fear of abusive ex-partner.
 - Bringing drugs into prison for an abusive partner.
23. In October 2017 Sarah Newton MP, then Home Office minister for crime, safeguarding and vulnerability, commented that a '*root and branch review*' was needed of how women victims of abuse are treated in the criminal justice system. The Rt Hon Amber Rudd MP, then Home Secretary, commented at the time:
- "We recognise that a significant proportion of female offenders have experienced domestic abuse and the important role of the justice system in addressing the complex needs of female offenders."*
24. The government's response to the domestic abuse consultation and its Female Offender Strategy¹⁹ both recognise the links between domestic abuse and women's offending and highlight findings from PRT's report²⁰. The government acknowledges:
- "Female offenders often face significant stigma when accessing domestic abuse services. We want 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."*²¹

¹⁵ Muslim Hands (2018) (In)visibility: Female. Muslim. Imprisoned, London: Muslim Hands

¹⁶ Prison Reform Trust (2019) Out of the Shadows: Women with learning disabilities in contact with or on the edges of the criminal justice system, London: PRT

¹⁷ Beresford, S. (2018) What About Me? The impact on children when mothers are involved in the criminal justice system, London: PRT

¹⁸ 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](#)

¹⁹ Ministry of Justice (2018) Female Offender Strategy, London: Ministry of Justice

²⁰ Prison Reform Trust (2017) There's a reason we're in trouble: Domestic abuse as a driver to women's offending, London: Prison Reform Trust

²¹ HM Government (2019) Transforming the response to domestic abuse: Consultation response and draft Bill, London: OGL

Failures to take into account the context of domestic abuse in criminal proceedings

25. The introduction of the offence of controlling or coercive behaviour in Section 76 of the Serious Crime Act 2015 was a progressive move that recognises the consequences of domestic abuse as a pattern of behaviour over time. Crown Prosecution Service (CPS) guidance makes clear that the offence covers a wide range of behaviours, including financial control and social isolation of victims. The government recognises that women's offending is often driven by their experience of this kind of abuse.²²
26. Anyone who offends and is a survivor of domestic abuse is entitled to have her experience of abuse taken into account at each stage of criminal justice proceedings. However too often this does not happen.²³ The fact that the criminal law does not provide a specific defence for those who offend as a result of abuse contributes to these failures.²⁴
27. Criminal justice agencies told us that in many cases women may plead guilty upon charge by the police, not realising that their experience of domestic abuse could be a reason not to be prosecuted, under the CPS's public interest test. Evidence suggests that the police and the CPS often do not apply this test properly even if the abuse is known about. This is recognised in recent government guidance for the police on working with vulnerable women and for local agencies on developing a whole system approach to women in contact with the criminal justice system.²⁵
28. There is also a systematic failure to take the woman's experience of abuse into account in relation to both conviction and sentencing, particularly following reduced provision of thorough pre-sentence reports (PSRs) in favour of swift justice. One woman imprisoned three times without a PSR commented:

"I lost hope in the system. If that can happen to me, my story isn't that important."

Why current legal defences do not work

Duress

29. The common law 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 characteristics.²⁶ Analysis by the CBA makes clear that the legal test for the defence of duress is ill suited for those who are driven to offend by their experience

²² Ibid

²³ [Prison Reform Trust \(2017\) There's a reason we're in trouble: Domestic abuse as a driver to women's offending, London: PRT](#)

²⁴ [Criminal Bar Association of England and Wales \(2017\) Defences available for women defendants who are victims/survivors of domestic abuse, London: CBA](#)

²⁵ 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>

²⁶ R v Bowen 1996 2 Cr App R 157

of domestic abuse.²⁷ The deficiencies of the duress defence are explained in the CBA's 2017 briefing and research by Janet Loveless²⁸, and are summarised below:

- (a) The complexities of domestic abuse are ignored, because the emphasis of the definition of duress is on threat of death or serious injury. The existing defence does not recognise psychological, sexual or financial abuse – which are all included in the offence of coercive or controlling behaviour and the statutory definition of domestic abuse in clauses 1 and 2 of the Bill.
- (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*”. (Loveless 2010)
- (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.

30. These deficiencies are illustrated in the examples given in the case of YS, summarised below, with thanks to Paramjit Ahluwalia of Lamb Building:

Example - YS²⁹

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:

²⁷ [Criminal Bar Association of England and Wales \(2017\) Defences available for women defendants who are victims/survivors of domestic abuse, London: CBA](#)

²⁸ Loveless, J. (2010) ‘Domestic Violence, Coercion and Duress’, Criminal Law Review, pages 93-108

²⁹ 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.'

31. The proposed new statutory defence is intended to avoid the pitfalls that exist in the common law defence of duress and give survivors of domestic abuse equivalent protection to victims of trafficking who are compelled to offend.

Self-defence

32. Criminal defence lawyers advise that the common law defence of self-defence is very difficult to establish in cases of reactive violence 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 proposed amendment to section 76 of the Criminal Justice and Immigration Act 2008 would make it easier for those who acted in response to domestic abuse to establish they were acting in self-defence, providing them with equivalent protection to those acting in response to an intruder in their home.

Conclusion

33. Parliament has previously accepted the need for a statutory defence in similar circumstances, introducing Section 45 of the Modern Slavery Act 2015 for victims of human trafficking or modern slavery who have committed an offence as a consequence of their exploitation. This requires proactive, early case management and allows all agencies, including the courts, 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. Parliament has

also legislated to give householders additional protection where they act in self-defence against an intruder. Adding the proposed new clauses to the Bill would allow the same protection to be extended to survivors of domestic abuse who are driven to offend.

34. Given the prevalence of histories of violence and victimisation amongst women held in prison, it is essential that criminal justice agencies should routinely enquire whether suspects or defendants are currently experiencing or have experienced domestic abuse and that their enquiries should be culturally informed in relation to women in minority ethnic groups and of minority faiths.³⁰ Supported by appropriate training and guidance, agencies should be enabled to recognise the signs of domestic abuse and identify where this may be an underlying factor in offending, ensuring survivors of all ethnic backgrounds and faiths are treated fairly, diverted where appropriate and provided with support. Existing NHS liaison and diversion services could play a key role in ensuring that this is done in a sensitive and effective manner. The proposed new legal protection for survivors of domestic abuse – accompanied by guidance and training for the police, CPS, probation service, defence lawyers and the judiciary - would encourage these practices.
35. We therefore urge MPs to support the introduction of new legal protection for survivors of domestic abuse who are driven to offend. This decisive action is needed in order to end the cycle of victimisation and offending that is one of the many damaging effects, and perpetuating factors, of domestic abuse.

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

36. 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.
37. 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.
38. 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.*"
39. 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.

³⁰ [Prison Reform Trust \(2017\) There's a reason we're in trouble: Domestic abuse as a driver to women's offending, London: PRT](#)

40. 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.

If you have any questions about this briefing, please contact:

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**Transforming Lives Programme
Prison Reform Trust
25 October 2019**

Appendix – new clauses

Amendment XX

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 56 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 an offence under section 76 of the Serious Crime Act 2015 or domestic abuse as defined in Sections 1 and 2 of the Domestic Abuse Act 2020.’
- (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:³¹

³¹ Crown Prosecution Service legal guidelines: Self-Defence and the Prevention of Crime, available at: <https://www.cps.gov.uk/legal-guidance/self-defence-and-prevention-crime>

“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. This new provision would address a current gap in the criminal law and improve recognition of the links for between victimisation and offending. It must be accompanied by statutory guidance and training for criminal justice agencies and judicial directions and guidance. These should focus on the nature of domestic abuse, its impact on the behaviour of survivors, the manner in which it 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 specific response to women in minority ethnic groups and of minority religions.³²
4. The provision was developed with the assistance of 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 QC, the Victims’ Commissioner; Paramjit Ahluwalia of Lamb Building; Naima Sakande of Appeal and other legal and domestic abuse experts.
5. 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—

³² 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.

- (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 forces 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 an offence under section 76 of the Serious Crime Act 2015 or domestic abuse as defined in Sections 1 and 2 of the Domestic Abuse Act 2020.

(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

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

After Clause 56 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 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 2.

(8) The Secretary of State may by regulations amend Schedule 2.

(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 2 and any amendment to Schedule 2.”

After Schedule 1 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.³³
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

³³ CPS (2017) Controlling or Coercive Behaviour in an Intimate or Family Relationship: Legal Guidance – Domestic Abuse, London: CPS

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, although in practice women are most often likely to benefit due to the much greater likelihood of their being victims of domestic abuse.
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)).
7. These new provisions would address a current gap in the criminal law and improve recognition of the links for between victimisation and offending. They must be accompanied by statutory guidance and training for criminal justice agencies and judicial directions and guidance. These should focus on the nature of domestic abuse, its impact on the behaviour of survivors, the manner in which it 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 specific response to women in minority ethnic groups and of minority religions.³⁴

³⁴ 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.

8. The provisions were developed with the assistance of 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 QC, the Victims' Commissioner; Paramjit Ahluwalia of Lamb Building; Naima Sakande of Appeal and other legal and domestic abuse experts.

For further information see the Prison Reform Trust's submission to the Public Bill Committee and list of supporters at: www.prisonreformtrust.org.uk/women/domesticabuse or contact Katy Swaine Williams, Senior Programme Manager, Prison Reform Trust: katy.swainewilliams@prisonreformtrust.org.uk | 020 7251 5070

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