Law Commission
Reforming the law

# Model Law Commission Report 2021

BVL
IMPROVING SOCIAL MOBILITY IN LAW

DIVORCE

DOMESTIC VIOLENCE


AI & IP

EDUCATION

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# Contents



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# Foreword note by the BVL Chief Executive Officer and Senior Coordinators

BVL is a social mobility charity. The meaning of 'social mobility' is wide and often debated, but for the purpose of BVL's work it is quite simple. Opportunities which provide access to the legal profession as a career are widely available to those from privileged backgrounds, and in particular young people attending fee paying schools. BVL seeks to redress the balance, by offering projects to students attending non-fee paying schools, with the aim of engaging them in the law and inspiring them to pursue a career in the legal profession.

I am proud to say that this year, 10 years since the charity was founded, BVL has done exactly that — but on a larger scale than ever before. As the world began to reopen, BVL has also opened its doors to a more diverse pool of students. In 2020, at the start of the pandemic, we moved online and began for the first time to offer our opportunities to students from across England and Wales. We have continued with this model and to reflect the shift, earlier this year we changed the charity's name from 'Big Voice London' to simply 'BVL'. We're delighted to be reaching students outside of London and this name change is a statement of our commitment to continue doing so, even after the pandemic.

We have also grown in other ways. This year, with the benefit of a year of online programmes under our belt, we have offered the largest number of projects since the charity's inception. In 2021, over 400 students have benefitted from:

1. A mooting competition, with a final judged by former UK Supreme Court Justice, Lord Hughes;
2. An introduction to the legal system project, also in association with the UK Supreme Court;
3. A virtual work experience and six-month mentoring programme, in partnership with Schillings International LLP;
4. A regular weekend mentoring programme in association with the Black Men in Law Network;
5. Places at a conference hosted by Cumberland Lodge;
6. A Student Barrister Experience in association with Radcliffe Chambers;
7. A Space Law Summer School in association with Linklaters LLP;
8. An essay competition, in association with 9 Gough Chambers;
9. A Music and Entertainment Law evening, in association with PRS for Music and Simkins LLP;
10. A Planning Law evening, in association with Town Legal; and
11. Of course, the ninth annual Model Law Commission (the "MLC").

I offer my overwhelming thanks to everyone that made this possible, including the organisations which have partnered with us and offered us their support and sponsorship. Of course, this fantastic achievement is in no small part also thanks to BVL's incredible volunteers. In particular, our Senior Coordinators, Cameron Wallis and Fatima Aamir, who have worked tirelessly in 2021 and in the process have impacted the ambitions and prospects of so many young people. I asked Cameron and Fatima to share a bit about their experience with BVL and the Model Law Commission this year:

**Cameron Wallis, Senior Coordinator**

On the MLC 2021, I have had the privilege of seeing our students' ideas mature into fully-fledged proposals for legal reform. Most students start the MLC with little or no knowledge of the law. However, with the guidance of our fantastic Group Leaders, inspirational talks from visiting legal professionals, and their own hard work and ingenuity, they become experts in an assigned area of law in a matter of weeks. Beyond merely learning what the law is, our students consider the vital matter of what the law ought to be.

Our MLC students do not, and never have, shied away from difficult and divisive topics. This year, for instance, the family law group considered the law on no-fault divorce, sensitively navigating the polarised debates about whether couples know best when their relationship has reached the end of the road or whether the very purpose and sanctity of marriage is undermined by divorce 'on- demand'. You may not agree with all of our students' recommendations in this report, but I sincerely hope you will also find their discussions and ideas thought-provoking, illuminating and novel. I for one was surprised by the criminal law group's finding that there was overwhelming popular support for a domestic abuse offenders registry. Nor could I have predicted the public and commercial law groups' findings that large sections of the general public are confused about legal aid and uneasy about artificial intelligence.

The MLC is our most demanding project, and I want to congratulate the students for all of their hard work, participating in weekly sessions alongside A-levels, university applications, part-time jobs, and extracurricular activities.

The project is only possible with the support, dedication and expertise generously given by a fleet of wonderful volunteers. To them, I extend my heartfelt gratitude. First, the legal professionals who gave up their limited free-time to speak passionately and lucidly to our students on weekends and after work. Second, the Group Leaders who ran stimulating sessions for our students alongside full-time jobs and university courses, devising activities and leading debates and discussions with our students. Third, the BVL administrative team, especially Felix, Fatima and Victoria, whose tenacity, vision and organisational prowess ensured the project ran smoothly from start to finish.

May I finish this overlong preface by imploring you — whoever you are and whatever stage you're at — to consider getting involved with BVL's work. If you believe in our vision and think you could support the charity as a volunteer, legal expert or sponsor, we would love to hear from you.

**Fatima Aamir, Senior Coordinator**

The end of the year is usually a time of reflection, but with 2021 marking the second year of the pandemic, it is easy for us to forget or undermine our achievements as we continue this trek through the unknown. However, it is important that any and all accomplishments are acknowledged and celebrated. 2021 was an eventful year for BVL with many new opportunities and experiences, a few of which I would like to highlight:

- The second year of the pandemic also marks the second year that BVL has offered its projects to students at state schools across the whole of England and Wales. This year, over 400 students have benefitted from one of our projects!
- 2021 also saw BVL partner with several organisations to provide students with various new opportunities, including an essay competition and insight evenings dedicated to niche areas of the law. I would like to express my sincere and heartfelt thanks to everyone that has contributed towards a BVL project for their time and never-ending support.

While this list could go on, I believe it is also important to acknowledge the success of our annual projects – most of which have been running since the charity's inception in 2011. The annual Model Law Commission project is now in its ninth year and is our most demanding project to date, giving students only three months to learn about an area of law and propose reforms.

It is important to note that our students normally start each BVL project with little to no prior knowledge of the law and come out of it with the skills and confidence to rival any aspiring legal professional. It is a testament to what young people are capable of, if given the opportunity.

Increasing diversity in the legal profession is at the heart of what BVL aims to achieve, so I look forward to seeing what the future holds for these young people. But for the time being, I hope you listen to (and support) the voices and opinions that our students have expressed in this report.

*Cameron Wallis, Senior Coordinator*
*Fatima Aamir, Senior Coordinator*
*Victoria Anderson, CEO*

# Introduction

## BVL

BVL is a social mobility and legal education charity, which seeks to engage young people from non-traditional backgrounds between the ages of 16 and 18 years old with law and legal policy, with the aim of assisting them in entering the legal profession should they choose to pursue a career in law. To further this aim, we take students from non-fee paying schools and provide them with opportunities to give them insight into the law, such as the Model Law Commission.

Since BVL's inception in 2011, BVL has gone from a small student run organisation, to a registered charity and continues to grow, reaching out to more students each year. We now run a total of six main programmes, namely: a Mooting Competition with the UK Supreme Court, an Introduction to the Legal System project, also in association with the UK Supreme Court, a Summer School in association with Linklaters LLP, the Model Law Commission and a two day student barrister experience with Radcliffe Chambers.

From 2020 onwards, as a result of the Covid-19 pandemic, BVL took its projects online and has offered the last two years' projects, including the Model Law Commission, to students across the whole of England and Wales. As result of our growth to a national charity, in 2021 we changed from 'Big Voice London', to 'BVL'.

We are delighted to be able to name BamLegal, Eversheds Sutherland LLP, the Magdalen College Trust, Oxford as a financial donors and sponsors of the charity, in addition to ongoing support from LexisNexis, Linklaters LLP, Radcliffe Chambers, the Law Commission, the University of Law, Schillings International LLP and 9 Gough Chambers. We also extend our appreciation to the UK Supreme Court for their continued support of our objectives.

## Model Law Commission 2021

The Model Law Commission is a three-month long project that provides A-Level students with the chance to simulate the work of the Law Commission. We split our pool of students into four groups, each tasked with the reform of one of the following areas of law: (1) Family, Trusts or Land Law; (2) Criminal Law; (3) Commercial and Common Law; or (4) Public Law. From October to December, the young people undertook a five-stage process: research, formulating recommendations, consulting with their peers, reporting on their proposals and devising their legislation.

Each year, the Model Law Commission begins with a two-day conference, which again this year was hosted entirely online via Zoom. It is over the course of these two days that our students were introduced to their respective topics by experts in the field who spoke to them from all over the country. The young people then took that information and over the following weeks discussed reform ideas with each other, their Group Leaders and their peers. Finally, in November, individuals from the Law Commission itself spoke to our students and advised on the difficulties in reforming the law and how to write a law reform report.

The results of these weeks of hard work are contained within this report. This is a reflection of what these young people believe should be the law governing these particular issues and is written entirely in their own words.

## Our students

When recruiting students, our only requirement is that applicants come from non-fee paying schools, we do not set grade boundaries or have entrance exams, we only ask that students be keen to learn and commit to the project.

All the students that participate in the Model Law Commission apply to this project entirely independently. It is not a school run activity; these are students who want to learn about and have their voices heard in the law. With sessions run every week in the evenings after school, this is not a small commitment to undertake alongside studying for all-important A-Level exams. We hope that as we expand, we will be able to provide this valuable opportunity to more ambitious young people.

## The Authors/Commissioners

The young people that have contributed to this briefing paper are:

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***BVL, December 2021***

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## Disclaimer

The work, recommendations and opinions contained in this report are solely those of the student authors listed. The views expressed do not represent those of any other external organisation or individuals, including guest speakers listed in this report, the UK Supreme Court and the Law Commission. BVL is an entirely independent organisation, and while we value the ongoing support and guidance of many organisations all views expressed are our own.

# Part One: Property, Family & Trusts

Recommendations on the laws of divorce and parental alienation.

Compiled with thanks to:

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## Parental Alienation

### Introduction

After weeks of research and discussion, we are proposing four main areas of reform in regard to parental alienation, which essentially is recognised as when a child's resistance or hostility towards one parent is not justified and is the result of psychological manipulation by the other parent.

### Summary of Proposals:

- Criminalisation for parental alienation offences, alongside differentiation between conscious and unconscious alienation;
- Judges receive psychological training, to cater to each individual case and allow for a possibly faster verdict;
- Statutes for parental alienation to increase awareness of parental alienation, providing a solid definition and discouraging flexibility.

### Methodology

To make sure that the reform for parental alienation is beneficial to the public, we followed the four stages used by the Law Commission: pre-consultation, consultation, policy development and reporting. During the pre-consultation stage we spoke to many family lawyers to gain more of an understanding of parental alienation. Many of these lawyers said that parental alienation was an area of concern due to the different views of judges on what parental alienation is.

Throughout the consultation stage we conducted a survey with 137 respondents. We came up with the questions together to get more of the public's view on these ideas. The demographic of our survey consisted of different races, ethnicities, ages, and marital statuses. This allowed us to get more of a wider range of answers. After, we reviewed the results from our survey and the implications for our reform proposals.

Thirdly, we considered policy development where we had a group discussion and decided on what reforms to propose using the public's ideas to come up with what is most advantageous. Finally, we concluded and entered the last stage of drafting this report.

## Current Law

There is currently no law that defines parental alienation or any law that criminalises parental alienation. However, within the Children Act 1989, there are relevant sections which outline children's care and procedure to follow if a child is thought to be in danger physically or mentally:

- Section 1, the welfare of the child is paramount;
- Section 18, local authorities hold the power to clarify the procedure for referrals for a child in social care;
- Section 19, within local authorities, the main concern is a child's safeguarding within their social care, which includes contact details with parents or other family members;
- Section 21, information on a child in social care should include the capacity of the child's parents or carers to meet the child's needs and any external factors that may impede their abilities, this includes any assessments which have been done.

We believe these sections of the Children Act 1989 will benefit from a definitive definition of parental alienation (as seen below), to ensure children's safeguarding and to better define if a parent is fit to care for a child, within the government structure of child safeguarding.

## Why Reform is Needed

There is a need for change within parental alienation. Parental alienation has been an area of uncertainty since its first establishment in the 1980s. Many children are going months and even years without seeing the parent they have been alienated from ultimately having a significant negative impact on the child. This increases the chance that the child ends up not wanting to see the parent as they have not had the opportunity to build a strong relationship between them and even between other family members, ultimately having a significant negative impact on the child. A child being withheld from having the choice to have a close relationship with one parent puts a strain on the child's mental health. So, as the child lacks trust in their parents, this will have an impact on their trust on other people later in life, which would inevitably impact their way of communication and how they value themselves in their future experiences. The use of a proper definition for parental alienation is required for the because having a definition could in fact increase awareness and hopefully prevent more harmful effects from happening to future generations.

## Proposals for Reform

## Main Proposal:

- We propose that there should be a statutory definition of parental alienation and for it to be, *"when a child's resistance or hostility towards one parent is not justified and is the result of psychological manipulation by the other parent"*. This definition has come from the Children and Family Court Advisory and Support Service (Cafcass). We believe this is a suitable definition for parental alienation because it outlines the psychological impact parental alienation can have as well as the long-term effects caused because of the manipulation by a parent. Our reason for this proposal is partly based on our survey results that showed many people were not aware of parental alienation and were not able to define it. A clear definition will make it easier for judges to identify cases involving parental alienation and offer an appropriate resolution faster. Within this formal definition we believe it is necessary to have a differentiation between unconscious and conscious alienation. Not only will this reduce the flexibility judges have when identifying cases of parental alienation, but it will also make the public clear on what parental alienation is so that those who were doing it unconsciously are aware of their behaviours.
- Parental alienation has significant psychological impacts on both the children involved and the parents as well as the wider family which can cause familial relations to break to a point where they are unrepairable. Therefore, to avoid this, we would suggest training for all judges who are making the decisions in parental alienation cases, on the psychological impacts of parental alienation for both the parents and children. With this information, judges would be better informed to make decisions and within these rulings, take into consideration the impact, whether harmful or positive. We think this will have a positive effect on the aftermath of legal cases and the social cohesion of families after potentially hostile legal proceedings.

## Analysis of Proposals:

**Judges Receiving Psychological Training**

*Costs*

- The costs for this training are expected to be high initially, yet the cost to train one judge is likely to be relatively low as compared to paying a psychologist to appear as an expert witness. Consequently, as time progresses, this decision will be more economical in the sense that the outcome will likely have a significant reduction in costs in court proceedings by avoiding use of an expert witness, meaning the funding can be used elsewhere.

*Efficiency*

- The psychological training of the judiciary will allow judges to make informed decisions much quicker without having to confer with other parties. Therefore, each individual case will be dealt with effectively and efficiently. However, as psychology is a complex topic, it cannot be predicted how quickly a judge is to complete the psychological training, which initially may cause delays. In relation to this, it would be proposed that all judges within family law should receive psychological training, which not only will aid parental alienation cases, but potentially many other sub-sections and areas of family law.

**Statutory definition for Parental Alienation**

*Social Impact*

- With a clear definition for parental alienation written in statutes, there will be more awareness to the topic, and more than 21.2% of people (the percentage of those who stated they could confidently define parental alienation) will be able to define it and recognise instances where parental alienation may be an issue. It can be expected that there will be a significant reduction in conscious parental alienation if it is known that there will be a punishment following the actions. So, fewer children should be negatively impacted by parental alienation.

*Flexibility*

- By preventing judges from making the law and forming precedent on parental alienation cases, there will be a decrease in cases being judged on a case-by-case, inconsistent basis. However by writing legislation, there will be issues in the delay with the numerous stages within the legislative process. But ultimately the law of parental alienation will then conform with parliamentary sovereignty and the rule of law, minimising as many potential flaws and conflicts as possible.

## Other Proposals

## Increasing legal aid support

Within discussions regarding issues facing the area of parental alienation, legal aid funding appeared significant. Though this is not mentioned within the main proposals (as it is more of a general proposal for family law), many families and individuals are being negatively impacted by this flaw within the justice system. By granting people legal aid in family cases, the social impact will be massive: we will see lower income families that currently have no access to justice being granted the same rights as others of a higher income. This may see more families able to maintain relationships in cases where parental alienation is a relevant issue. Regardless of if families are rebuilt or not, the weaponised child will be provided with the support they deserve, which should decrease long-term implications to that child's life. It is also noted that financial implications for this proposal are low: we will expect a more holistic approach by tax being increased for all, to maintain justice for whoever may require sufficient access to justice. May it also be noted that 95.6% of the public believe there should be legal aid funding in parental alienation cases. Consequently, it is noted that many are accusing the other party of serious offences (e.g., sexual offence and domestic abuse) in order to gain legal aid in the criminal respect: by granting legal aid for parental alienation cases, these instances will no longer need to occur, and false accusations will be reduced – reducing time spent at court.

## Criminalisation of parental alienation

We have identified that parental alienation causes the children who have been alienated to suffer tremendously not only at the time of the alienation but for years beyond as they attempt to rebuild a relationship with the parent they were alienated from. As mentioned in the Cafcass definition, parental alienation can be psychological, suggesting it would take a lifetime for the child to overcome the effects of the alienation. Therefore, we believe that a future proposal could be criminalising parental alienation so that parents who alienate can be convicted of a criminal offence and face a sentence. Those who consciously alienate should face harsher sanctions than those who alienate unconsciously.

## Criminalisation impacts

Floodgates

- Although the criminalisation of parental alienation seems welcome by the public (88.3% approved of criminalising parental alienation with a clear distinction in sentencing between conscious and unconscious), there is the concern that floodgates will be opened with this act. For instance, parental alienation can be used in a way to paint the other party in a more negative manner.

Social Impact

- It can be expected that there will be a significant reduction in conscious parental alienation if it is known that there will be a punishment following the actions. Henceforth, less children will be negatively impacted by parental alienation. However more people would also be involved in the criminal justice system: this negative impact may outweigh the positive.

# Divorce

## Introduction

After three months of research and discussions, we are proposing two areas of reform to the Divorce, Dissolution and Separation Act 2020. This Act allows for no-fault divorce within England and Wales.

## Proposals:

1. Allowing parties to appeal divorces within a set time-frame.

2. Reducing the time it takes for a divorce to be finalised.

## Methodology

While writing our report, we tried to follow the process of the Law Commission. For the pre-consultation stage we listened to talks from 4 distinguished experts in the field of family law. We had the opportunity to question them and this allowed us to build a greater understanding of divorce law and how divorce proceedings occur.

For researching the current opinion on the law of divorce and public opinion on change, we created and circulated a survey, which we collectively decided on questions for. In receiving over 100 responses, we got a wide range of opinions over different ages, levels of legal knowledge, and types of people, allowing a more thorough and comprehensive understanding of public opinion. This survey helped us to understand what people knew about the current divorce law and some of the things which they were for and against. We then engaged in a discussion to figure out the proposals we would like to report on. The final stage we undertook was the report writing stage.

## Current Law

The current law, outlined in the Matrimonial Causes Act 1973 states that one spouse (who is called 'the petitioner') must file for a divorce, proving that the marriage has broken down irretrievably. To prove this, the petitioner must indicate that the other spouse is at fault by giving one of the following reasons. The first ground for divorce is adultery: this must have been with someone else of the opposite sex and is invalid is you lived together for more than 6 months after you found out. The second ground is unreasonable behaviour: this would include any behaviour that makes it hard to live with your partner, including verbal abuse and drug-taking. The third ground for divorce is desertion: your partner must have left you for at least 2 years before you apply for divorce. However, if there is no proof of one of the grounds for divorce, the

separating couple can apply for a divorce based on separation. If you have been separated for two years before applying and you both agree then you can be granted a divorce. Similarly, the law states that you can apply for a divorce even if one party disagrees, if you have been separated for at least 5 years.

Under the new legislation coming in April 2022, the 'Divorce, Dissolution and Separation Bill,' separating couples can divorce without having to cite blame. With the removal of fault, the divorce application cannot be contested: aiming for couples to pursue an amicable divorce. In addition, this law will allow a joint application for divorce.

### Why Reform is Needed

The current divorce law gives couples only five reasons in which they could opt for a divorce, these include: adultery; 'unreasonable behaviour'; desertion; separation for 2 years or 5 years. We believe that these reasons need to be broadened because there are many other factors that influence the failure of relationships/marriage, some of which are not highlighted in the reasons. These could include failing to share equal responsibility of children, unsatisfactory sex life, and financial problems. All of which are not mentioned in the current law but can be important factors in nourishing a healthy marriage. Marriages which have these features – or are otherwise healthy – are not necessarily going to avoid divorce, but may be more likely to come to a mutual agreement to get a divorce. However, the current law stops them because their circumstances do not fall under the five reasons the current law suggests are reasonable to get a divorce. They would have to wait two years to obtain a divorce by consent. This should be put to a stop with the new 'no fault divorce' law which is due to come into effect in England and Wales in April 2022. This law means that couples will be able to get divorced without one person needing to put the blame on the other. This makes divorces easier and less expensive than previous divorces. Nonetheless, there will be a minimum period of six months from the application stage to the final divorce which is still a considerably lengthy period. Furthermore, the new law is bound to make the divorce rate increase, which may not favour couples with children as their children could suffer from the effects of not having their two parents together.

Before the Divorce, Dissolution and Separation Act, the last Act of Parliament that outlined the process for divorce was the Matrimonial Causes Act 1973. The Matrimonial Causes Act meant couples had to put blame on a partner for a divorce to proceed. This was outdated for the 21st century, in which divorce is less taboo. The new Divorce, Dissolution and Separation Act will rectify this and allows for divorces to proceed without blame. This has raised some questions as to whether the Act dilutes the meaning of marriage and whether divorce should be such an easy process.

Furthermore, as mentioned before, the nature of divorce has changed as both parties have a more equal split of joint assets following the divorce, meaning the process has higher stakes which need to be taken into consideration. For many couples, especially due to the circumstances surrounding divorce, this can lead to confrontational approaches between them if there is conflict over the division of their belongings or if the process of divorce is complicated, which could be even worse if there are issues surrounding custody of children who are put at risk due to this. By streamlining this process, these issues would be avoided and the confrontational nature of divorce would be reduced greatly.

## Proposals for Reform

### Allowing appeals/contesting

With the new Divorce, Dissolution and Separation Act 2020, the possibility of a divorce being contested will be virtually removed due to removal of fault. Some might argue that being unable to contest or appeal is unfair to a partner who is not at fault, or a marriage with children. This will also encourage more people to seek a divorce, knowing that it will not be contested, which triumphs the other's potential to save the marriage.

Therefore, we propose that in a no-fault divorce, the partner who did not file for the divorce should have the opportunity to contest, appeal or delay their partner's motion for divorce within a month and based on relevant grounds.

We suggest that grounds to contest, appeal or delay should include:

1. Children in the marriage;
2. Financial support;
3. Awaiting negotiations based on assets shared within the marriage.

## Reducing the time between applying for divorce and divorce becoming final

The new Divorce, Dissolution and Separation Bill 2020 states that a minimum of twenty weeks between applications for divorce and the finalisation of divorce will remain. This is an arguably long period of time that consequently slows down the process of divorce and therefore implicates costs on both the court and the divorcees. Given this, we are proposing that the time between application and finalising divorce should be reduced to a minimum of fourteen weeks instead of twenty weeks.

## Analysis of Proposals

**Reducing time needed to finalise divorce**

Under the new Divorce Act, the process to finalise divorce is still quite slow. We think that reducing the time to process divorces would have many positive aspects, though it is not without flaws. We believe this would be a positive change if the time taken for a divorce is quicker because faster proceedings can be more financially beneficial. For example, less money would need to be spent on hiring lawyers to conduct the process. In addition to this, the divorce will overall be faster. This is rather beneficial for both parties in a divorce as they can simply get on with their lives faster instead of waiting to finalise the divorce. However, there could be some negatives to this reform, too. For example, getting a divorce through a faster process could lead to individuals regretting it soon after and devaluing marriages; if it is so easy and fast to get a divorce, marriage is overall devalued.

**Contesting the divorce**

We also propose that a system to contest and appeal against the divorce could be considered. This will allow those that do not want a divorce to appeal, but also for them to put in their point of view and conditions for the divorce, for example: children and financial issues post-divorce. This could avoid extended proceedings with multiple additional hearings to finalise child arrangement orders, or financial orders. This can be seen as a positive thing because it will give people the opportunity to save their marriage and ultimately it could reduce the number of divorces in England and Wales. There could also be more control and more time to consider the terms of the divorce, hence allowing individuals to think it through instead of making rash decisions, which they later regret. However, the negatives of this proposal could be that some individuals may end up getting trapped in a marriage because of the appeals process. Additionally, mediation already provides a way of working through many of these issues.

# Part Two: Commercial & Common Law

Recommendations on the laws artificial intelligence and intellectual property.

Compiled with thanks to:

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## Introduction

The Oxford Dictionary defines Artificial Intelligence ("AI") as "the theory and development of computer systems able to perform tasks normally requiring human intelligence".[1] The growth of AI allows for improved efficiency in data processing and collection. However, there are also a number of issues with AI, particularly the laws governing it and the lack of formal education in the area despite its growing prevalence in our lives.

This report will set out some of the specific areas within AI which require reform.

## AI and Legal Personality

### The Current Situation

AI systems cannot currently transfer or own patent rights under UK Law. The Patent Act 1977 ("the 1997 Act") indicates that only a person with a legal personality is capable of owning a patent – a legal personality being either a human or corporation.[2] AI is thus deemed incapable of holding patent rights. It is said to need an inventor or an accompanying entity and cannot be recognised as a legal personality.[3] There are many social, commercial, and ethical issues arising from this. Sections 7 and 13 of the 1977 Act do not allow for a non-human to be recognised as an applicant for a patent, however reforms to these sections are being considered. The UK Intellectual Property Office ("the UK IPO") has outlined plans to open consultation on potential changes to the 1977 Act as it is not fully justified legally why the inventor must be a human given the current development of advanced technology and the fast-paced development of AI.[4] This issue was considered by the High Court earlier this year in a case where the UK IPO had refused the granting of a patent where DABUS, an AI machine, was listed as the inventor.[5] Dr Stephen Thaler, bringing the appeal, argued that we should be able to recognise AI systems as inventors and that owners of AI systems should be default owners of patents for inventions derived from those systems.

### Need for Change

AI not being eligible for patents raises questions of liability. If AI cannot own its own invention, then how can we discern those accountable for any faults or errors? The fact that AI requires an inventor or an accompanying entity to be considered a legal entity is problematic as it shows AI as somewhat incapable and, if it requires human assistance, that it is not without human error. Additionally, if AI can be an inventor, and therefore liable, how can we truly blame AI, as it only follows instructions. On the other hand, we have to consider that the outcomes created by AI are calculated by complicated algorithms which even humans could not create. AI-based applications are to be deemed objects and products, with respect to the EU legal framework they primarily fall under two different bodies of legislation: (i) product safety regulation; and (ii) the product liability directive ("PLD"). While the first set of rules imposes essential safety requirements for products to be certified and thus distributed onto the market, the latter aims at compensating victims for the harm suffered from the use of defective goods.[6] Although the PLD does have a measure in place for faulty products, it fails to look at how to measure the extent of the fault and how liability would be appointed to given parties.

1 https://www.lexology.com/library/detail.aspx?g=5424a424-c590-45f0-9e2a-ab05daff032d
2 *Thaler v The Comptroller-General of Patents, Designs and Trademarks* [2021] EWHC 2412 https://www.bailii.org/ew/cases/EWHC/Patents/2020/2412.html
3 Ibidem
4 https://www.gov.uk/government/consultations/artificial-intelligence-and-intellectual-property-call-for-views/government-response-to-call-for-views-on-artificial-intelligence-and-intellectual-property
5 *Thaler v Comptroller General of Patents Trade Marks and Designs* [2021] EWCA Civ 1374.
6 https://www.europarl.europa.eu/RegData/etudes/STUD/2020/621926/IPOL_STU(2020)621926_EN.pdf

The UK IPO has outlined plans regarding changes to the 1977 Act, of the current legislation sections 7 and 13.[7] This must be considered as the law does not fully explain why the inventor must be human. Additionally, since we cannot understand AI as it becomes more autonomous, the UK IPO should also convey how the current laws are not meeting the requirements of giving in-depth laws to deal with the issue of liability, accountability, ownership, identity, etc. posed by AI. Perhaps granting a legal personality to machines would mean equating them to human beings, granting them the same legal rights we enjoy? If so, are we willing to let AI be a legal person?

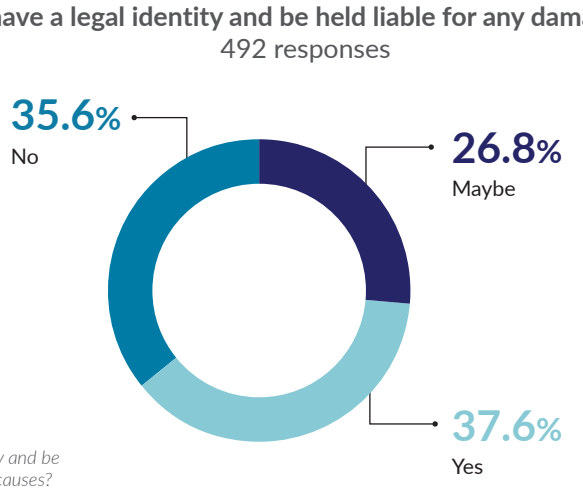


*Figure 1:*
*Should AI have a legal identity and be held liable for any damage it causes?*

## Reform Proposal

If we were to consider AI not to be a legal entity, the company or person responsible for the development of AI technologies, such as self-driving cars, would be held liable for any damage they cause. According to the survey we conducted, this is the most plausible response to the issue of AI and liability. The aim of reform, therefore, should be to ensure that victims receive justice for any damage suffered at the hands of faulty AI and to ensure that the processes by which AI technology is developed are regulated. One way the government can achieve this is by monitoring how manufacturers utilise data to create AI technologies. New laws need to be passed to force companies to be transparent about how data has been collected, any biases in the data, and what they have done or aim to do to reduce the consequent potential for harm to be caused to consumers. Public company commitments to clean and consistent data collection may act as an effective deterrent to the development of "bad" data for machine learning. In addition, the government could allow victims to sue AI developers whose products have caused them harm. However, difficulties may arise when deciding whether the greatest cause of damage can be attributed to the developer of the algorithm, the manufacturer of the product, or the company as a whole. Moreover, the UK government could adopt a "no-fault" coverage policy, similar to New Zealand's accident compensation scheme, whereby victims lose the ability to sue individual developers but are compensated for their losses and their medical expenses are covered by the government.[8] These ideas might be useful in holding technology companies accountable for the actions of AI and applying the principle of victim compensation to AI-related lawsuits.

7 See the current consultation: https://www.gov.uk/government/consultations/artificial-intelligence-and-ip-copyright-and-patents

8 See for example Marchisio, E. In support of "no-fault" civil liability rules for artificial intelligence. SN Soc Sci 1, 54 (2021). https://doi.org/10.1007/s43545-020-00043-z

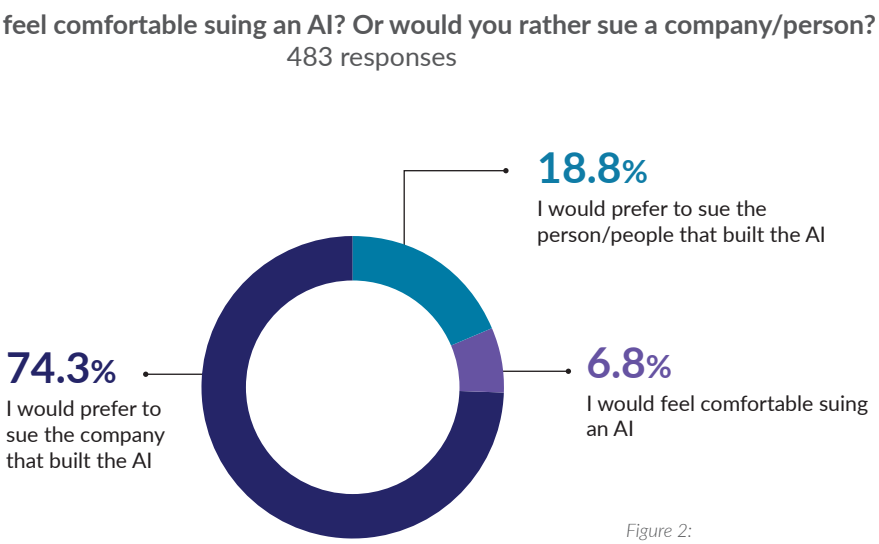


*Figure 2:*
*Would you feel comfortable suing an AI? Or would you rather sue a company/person?*

### Impact

Having better transparency, regarding credit given to AI, allows the law to be more in line with the DABUS case in which the first patent was granted to AI. By allowing AI to retain some, but not all, ownership of its creations encourages innovation which is essential to the progression of society.

Additionally, making the powers of AI clearer allows society to trust AI rather than fear its progress. This fear is caused by the uncertainty of AI's legal identity[9], which 37.6% of people from our survey identified needed to change for them to feel more comfortable with AI. Given the negative outcomes arising from AI as an entity – for example, the liability issues surrounding AI and its inability to enter contracts as it cannot reciprocate intentions[10]– society would take solace in suing an actual person/company (only 6.8% in the survey said they'd be comfortable suing AI (Figure 2)). Society will find comfort in knowing that they can be compensated for damage caused by AI. Whilst AI may have some rights to invent, it cannot have the same rights as humans. Even if AI were to be made a legal entity, the controller should always be liable for damage caused by AI as they have a duty of care to their customers and failing to prevent AI from creating this damage would be a breach of duty.[11]

## Regulating AI's Decision-Making Process

### The Current Situation

Currently, the UK law on regulating AI's decision-making process is underpinned by Article 22 of the General Data Protection Regulation ("GDPR") – Automated individual decision making. This includes profiling, which the UK absorbed onto its statute book during Brexit.[12] Article 22 guarantees that people can seek a human review of algorithmic decisions such as an online decision to award a loan. However, this is presently under review by the government who are seeking to produce a White Paper in early 2022.[13] This will consider whether the UK's existing approach is adequate and whether there is a case for greater cross-cutting AI regulation or greater consistency across regulated sectors. The UK government will have in mind the current EU regulations and whether such an approach within the UK context would be likely to

9 https://www2.deloitte.com/content/dam/Deloitte/us/Documents/deloitte-analytics/us-deloitte-cognitivesurvey.pdf Thomas Davenport, Jeff Loucks, and David Schatsky, "Bullish on the Business Value of Cognitive" (Deloitte, 2017), p.3

10 Linarelli, John, A Philosophy of Contract Law for Artificial Intelligence: Shared Intentionality (June 29, 2021). Martin Ebers, Cristina Poncibò, and Mimi Zou eds., Contracting and Contract Law in the Age of Artificial Intelligence (Hart, Forthcoming), Available at https://ssrn.com/abstract=3876606

11 Article 82 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (United Kingdom General Data Protection Regulation) https://www.legislation.gov.uk/eur/2016/679/article/82

12 The UK GDPR is the General Data Protection Regulation ((EU) 2016/679) (EU GDPR) as it forms part of UK law by virtue of section 3 of the European Union (Withdrawal) Act 2018 and as amended by Schedule 1 to the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019 (SI 2019/419). It is defined in section 3(10) of the Data Protection Act 2018 (DPA 2018), supplemented by section 205(4).

13 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1022315/Data_Reform_Consultation_Document__Accessible_.pdf

encourage innovation in AI or to stifle it. Additionally, the House of Lords Liaisons committee report titled 'AI in the UK: No Room For Complacency will be referenced.[14] This emphasises that urgent action is required in numerous areas in relation to the UK's strategy regarding AI systems, the ethical framework and AI within the public service sector. In relation to the ethics in regulating AI's decision making, the government has pointed out tools, such as the Data Ethics Framework and the Public Sector guidance, that are available to support ethical and safe use of algorithms in the public sector.[15]

## Need for Change

Although AI has streamlined and augmented many human activities, there are many issues with the decision-making process: Cognitive biases – the AIs performance is dictated by the data input. patterns identified by the AI could include gender or race or geographical location; aspects that are not relevant to their candidacy. As society (or even the developers according to Google's decision to dismiss a black woman who accused them of lacking diversity are historically biased, the data harvested or input by the programmer will create a certain criteria for candidates that will favour those from certain backgrounds, gender etc.[16] For example, Amazon's AI recruiting engine was highly biased towards women.[17] This means those who deviate from this biased sample will be rejected despite being a suitable candidate in terms of qualifications, limiting diversity within the legal sector. As AI's decision-making process lacks transparency, Specific biases cannot be identified and therefore stopped, so traditional values of racism could be perpetuated through its use.

In addition, the human element in programming the algorithm means that mistakes can be made. Due to issues such as lack of transparency and explainability, clients are deprived of the right to challenge these erroneous decisions, and are also prevented from being informed as to how their data is used. This is because the dynamic, self-learning algorithm is not only complex with substantial volumes of data involved, but the procedure cannot be disclosed as the algorithm is constantly updating, so the steps taken at the time the specified data is input is not known or guessable. This creates issues for claimants whose rights have been breached. For example, Appriss' risk assessment algorithms led to a doctor rejecting a patient for medicine as they mistakenly believed she was taking opioids prescribed for her dog.[18]

## Reform Proposal

Harnessing the potential of technology to improve and modernise public services will be a key challenge in the coming years. As adoption rates of sophisticated algorithmic platforms in the public sector increase, questions will emerge about the risk of error, bias, transparency, which will no doubt lead to claims, so public confidence in outcomes must be ensured.

Therefore, in order to reform this, we need to have more human-controlled AI systems, with more means-tested ways in creating AI's judgement. Business and organisational leaders need to ensure that the AI systems they use improve human decision-making, and they have a responsibility to encourage progress on research and standards that will reduce bias in AI. Silvia Chiappa of DeepMind has developed a path-specific approach to counterfactual fairness that can handle complicated cases, where some paths by which the sensitive traits affect outcomes is considered fair, while other influences are considered unfair. For example, the model could be used to help ensure that admission to a specific department at a university was unaffected by the applicant's sex while potentially still allowing the university's overall admission rate to vary by sex if, for instance, female students tended to apply to more competitive departments.

## Impact

It is clear from the success of corporations like Amazon and Apple, that AI has a substantial role in improving the efficiency of firms. Increasing the difficulty and cost of implementing AI by forcing firms to employ more sophisticated AI systems, or more employees, will reduce the quality of goods or be less efficient for consumers as corporations will have less capital to invest in research and development/raw materials, therefore reducing standards of living. This is a major likelihood as the scope of investment will be substantial. Not including the AI technology, the cost of hiring an AI developer goes far beyond just paying for their average salary of £45,000 Artificial Intelligence Jobs in the United Kingdom: Who's Hiring and Why? — Glassdoor; it encompasses recruiting, training, benefits, and more — The Cost of Hiring a New Employee (investopedia.com).[19] [20]

14 https://publications.parliament.uk/pa/ld5801/ldselect/ldliaison/196/196.pdf
15 https://www.gov.uk/government/publications/ethics-transparency-and-accountability-framework-for-automated-decision-making/ethics-transparency-and-accountability-framework-for-automated-decision-making
16 https://www.theguardian.com/technology/2020/dec/04/timnit-gebru-google-ai-fired-diversity-ethics
17 https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G
18 https://www.wired.com/story/opioid-drug-addiction-algorithm-chronic-pain/
19 https://www.glassdoor.com/research/ai-jobs-uk/
20 https://www.investopedia.com/financial-edge/0711/the-cost-of-hiring-a-new-employee.aspx

Despite this, cash flows in digital businesses that have embraced AI are 20% higher than those who haven't so it is unlikely companies will be deterred.[21] Furthermore, the positive impact on employment needs to be appreciated. There will be an increase in jobs available from an amplified demand for human-operated AI systems, as well as developers to create AI systems that are more ethical and less prone to mistakes. The UK economy could grow 10.3% by 2030 solely as a result of the AI sector.[22] However, there are implications for unskilled workers as job displacement will occur. The WEF estimates that 85 million jobs could be lost worldwide by 2025, but that 97 million new jobs could emerge.[23]

## Protection of Data Used by AI

### The Current Situation

The Minimum Cyber Security Standard ("MCSS"), launched in 2018, is a proposed series of technical standards to be developed with the National Cyber Security Centre ("NCSC"), that will be incorporated into the Government Functional Standard for security once published. It is important to note that the NCSC is not a law, but rather guidance. However, the GDPR is statute alongside the Data Protection Act 2018, mandating adherence to rules of the NCSC. To meet their obligations under the Security Policy Framework and the National Cyber Security Strategy, all government agencies, including Arm's Length Bodies and contractors, must comply with all mandatory cyber resilience outcomes set forth by the MCSS. The maximum fine an organisation can receive if they were in breach of UK GDPR is "£17.5 million or 4% of the total annual worldwide turnover".[24]

Cyber Essential is a UK government scheme, which lays out five basic security controls (boundary firewalls and internet gateways, secure configurations, user access controls, malware protection and patch management) to protect organisations. Their approach is simple and low cost, allowing the scheme to help organisations of any size in order to demonstrate their commitment to cyber security. The ISO 27001 is the international standard that sets out the specification for an Information Security Management System, which offers a set of 114 best-practice security controls that can be applied based on the risk an organisation faces. Its independently accredited certification is recognised around the world as an indication that a company's ISMS is aligned with security's best practices.

### Need for Change

Despite the current cyber security standards that seek to minimise the risk and mitigate the impact of cyber-attacks, corporations often do not observe them. According to the Cyber Security Breaches Survey 2021, only 42% of large businesses adhere to the PCI DSS standards and a mere 24% adhere to ISO 27001.[25] Also, there is inadequate awareness of Cyber Essentials among organisations, and it is generally uncommon for them to adhere to any external standards. While some businesses opt for individual cyber-security policies rather than following the government guidelines, only 33% have formal policies covering cyber security risks as of 2021.[26] It is suggested that corporations concentrate more on fields such as business continuity and flexibility, especially during the Covid-19 pandemic.

However, this lack of implementation of cyber security standards foments major data breaches. One such example is the British Airways breach where data was harvested from 400,000 customers in 2018.[27] Subsequent investigation by the Information Commissioner's Office ("ICO") concluded that sufficient security measures like multi-factor authentication were not in place at the time and that this was one of the key causes of the attack.[28] Similar case studies include the Cambridge Analytica scandal which harvested data from 87 million Facebook users[29] and the LinkedIn hack of 2012.[30] The impact of such cyber-attacks is usually measured in terms of substantial financial damage

Nonetheless, the social impact is equally important; the erosion of public trust and confidence in AI impedes our displacement towards a more technologically advanced society and economy. In fact, 93% of the respondents to our survey believe that companies should be legally obliged to have a certain standard of cyber security in place to protect their customers' data. Additionally, many businesses are negatively impacted by data breaches through staff time diversion, wider business disruption or the cost of implementing further cyber security measures.[31]

21 https://cybercrew.uk/blog/artificial-intelligence-statistics-uk/
22 Ibid.
23 https://publications.parliament.uk/pa/cm5802/cmselect/cmworpen/216/21605.htm
24 https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-law-enforcement-processing/penalties/
25 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972399/Cyber_Security_Breaches_Survey_2021_Statistical_Release.pdf
26 Ibid.
27 https://www.badatabreach.com/
28 Ibid.
29 https://www.bbc.co.uk/news/technology-43649018
30 https://www.ncsc.gov.uk/blog-post/linkedin-2012-hack-what-you-need-know
31 https://www.investopedia.com/financial-edge/0112/3-ways-cyber-crime-impacts-business.aspx

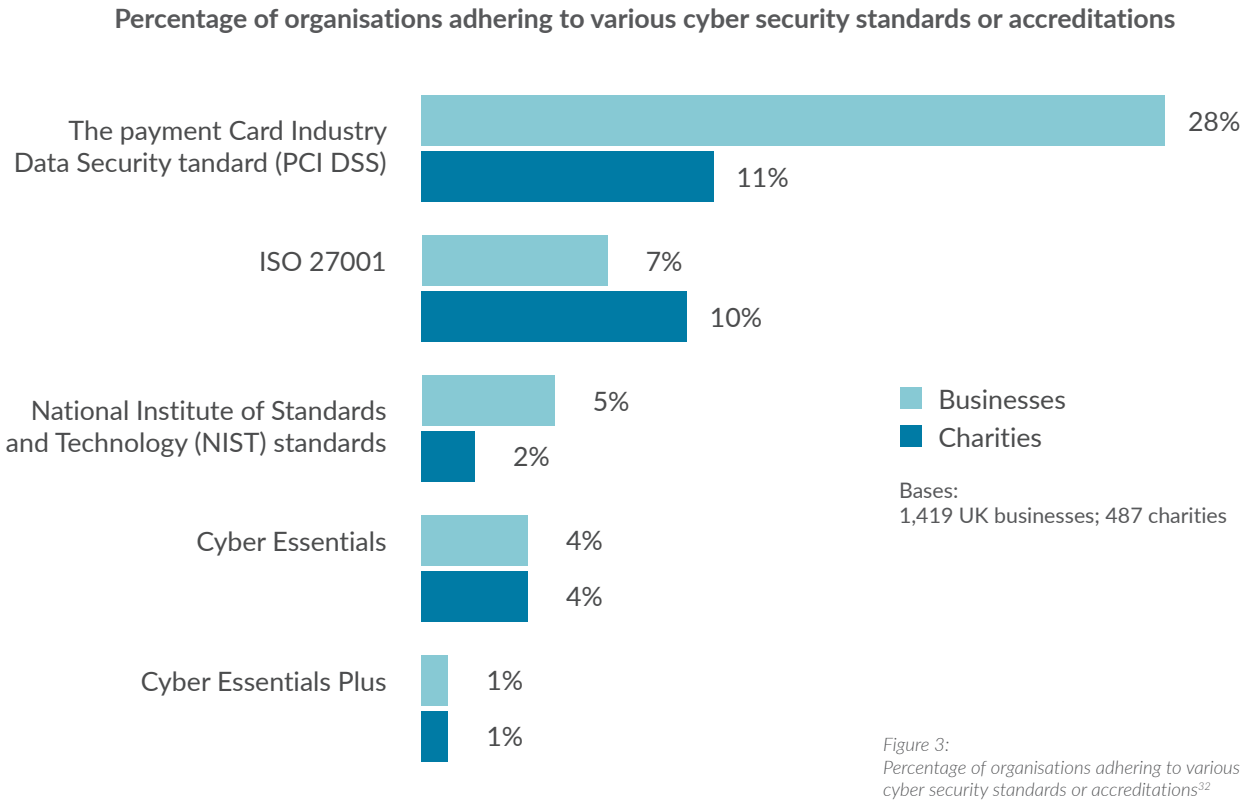


*Figure 3:*
*Percentage of organisations adhering to various cyber security standards or accreditations*[32]

## Reform Proposal

Due to the large number of data breaches experienced by organisations despite UK GDPR, we propose to create a government body (that could be called the Cyber Security Enforcement Agency) which would be responsible for auditing organisations (at least every 3-5 years) to ensure their compliance with the GDPR. This should not only protect organisations from liability for data breaches but also from cyber-attacks as they would have the necessary firewalls, multi-factor authentication and other software and checks in place as expressed in the GDPR.

Secondly, we propose to increase the consequences organisations receive when they are found to be in breach of the GDPR. The maximum amount that a company can be fined should increase to £22.5 million or 10% of its annual worldwide turnover, whichever is greater. This effectively discourages organisations from not adhering to the GDPR. However, the maximum fine should be £27.5 million or 15% of the liable organisation's annual worldwide turnover if they handle sensitive data. This should be done because the impact of this breach would carry worse consequences to the clients/customers/volunteers/employees/any other affiliated member and/or body of the organisation. Sensitive data can be defined as information, when disclosed to others, that "might result in loss of an advantage", or erode the level of security and privacy, of the person(s)/body(ies) of whom the information is about.[33] For example, medical information or bank and credit card details.

## Impact

The suggested change of increasing the consequences organisations could receive would most definitely affect charities and businesses financially, forcing them to comply and therefore, making it an effective action to help reduce the violations. Due to these increasing consequences, companies would likely be at risk, and this may result in them taking certain methods that may not be ethical to prevent having such a huge financial loss. For example, organisations may need to take additional measures with the use of reduction methods, such as laying off employees in order to reduce costs as cyber security now requires far more specialised technology to ensure defence for modern businesses and organisations are strong.

The other suggested change involved creating a government body that would: (i) regularly audit organisations to ensure they are following UK GDPR; and (ii) implement heftier fines to ensure organisations are following regulation guidelines on how to protect sensitive data to prevent leaks of confidential information. If the suggested body audits regularly,

32 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/972399/Cyber_Security_Breaches_Survey_2021_Statistical_Release.pdf
33 ASIS International, Information Asset Protection Guideline, 2007, page 8

they can acknowledge when an organisation is acting negligent towards sensitive information which could cause the information to be misused to commit illegal activity such as fraud. This is important as cybercrime is on the rise and implementing these restrictions would decrease crime being committed. As with the presence of the ICO, organisations can be sanctioned appropriately, thus making organisations more likely to be transparent with how they manage sensitive data. These necessary changes would preserve compliance and prevent a sense of trust being lost by the members of the public.

## The Need for Education

### The Current Situation

The Office for AI is the Government Department responsible for oversight and implementation of the National AI Strategy, a 10-year strategy focussing on investment in, planning for, and support of an AI-enabled society, and effective and appropriate governance of AI technology.[34]

Education underpins the effectiveness of this strategy, both within educational settings and in the wider society. That said, the National Curriculum does not currently include any specific provisions concerning the teaching of the scientific development or societal impact of AI. Furthermore, there is currently no AI-specific legislation. It is worth noting that any legislation must be sufficiently "future-proof" so as not to be undermined by the pace of technological change. Nonetheless, individuals need to be made aware of how AI impacts current legislation designed to protect their rights. For example, AI impacts on:

- Human Rights Act 1998 and Equality Act 2010 provisions protecting against discrimination
- Decision logic and security in relation to Data Protection legislation protecting individual rights over their data
- Contractual relationships between individuals and businesses under Consumer Rights legislation

Individuals need to be better informed about how AI impacts their daily lives, and how the legislation will protect them and their data which is the key driver of AI.

### Need for Change

The educational system should implement AI-related courses, as the gap in the education system for AI has made accessibility and understanding difficult for the average person. As a result, many individuals are afraid of AI since they cannot comprehend what it is or how it works. This is also regressive for businesses and companies who intend to use AI but cannot get stakeholders to buy into it simply because those stakeholders do not understand the system. Another problem is that ordinary people lack education in AI as shown by our questionnaire which stated 65.7% of people believe there is currently insufficient education on AI. Most people do not know the basics of AI due to the current absence of AI education. It is important for everyone to understand AI as often we are all unknowingly engaging with it. While AI may seem to be a complicated topic for young people, Gen Z has become much faster at picking up new technology as it surrounds them daily. The development of technology has been drastic in recent years and if this continues, the future will be largely impacted and potentially driven by AI. It is therefore a topic that students and adults must be taught about. We must also ensure that the elder generation has access to AI education so that they can keep up with the fast-paced evolution of AI.[35] If the UK expects and wants to become a "global AI superpower"[36], it must update and educate all members of society to obtain this and therefore there is a need for change.

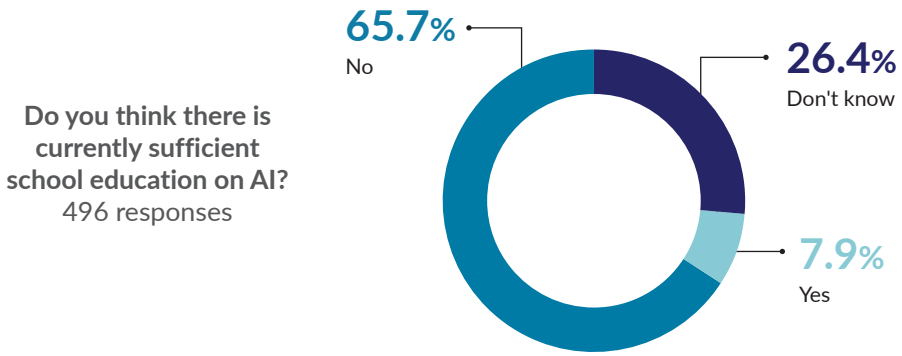


*Figure 4:*
*Do you think there is currently sufficient school education on AI?*

34 https://www.gov.uk/government/publications/national-ai-strategy/national-ai-strategy-html-version
35 https://medium.com/@humansforai/the-ai-literacy-imperative-why-everyone-needs-to-learn-ai-fc4a58760f8d
36 https://www.gov.uk/government/publications/national-ai-strategy/national-ai-strategy-html-version

### Reform Proposal

The Model Law Commission recognises that there are two separate areas of education that need to be reformed: (i) education concerning adults, the current workforce; and (ii) education concerning children, the future workforce.

Initially, it is recognised that in order to implement AI education into the curriculum, teachers must first be educated themselves. The Model Law Commission proposes a reform to the National Centre for Computing Education, in which a new CPD course specialising in AI, ranging from Key Stage Levels 1-4, will be created. This ensures that teachers are sufficiently qualified. All schools must have at least 1 teacher per Key Stage Level that has completed the course.

Moreover, a new 'Teach AI Curriculum' will be created for each Key Stage Level, following a similar structure to that of the 'Elements of AI' program. The course will be completed by all UK students from Key Stage Levels 1-4 and will cover 6 main topics: what AI is; problem solving; real world applications; machine learning; neuron networks; and societal implications of AI.

Concerning the education of adults currently in the workforce, the Model Law Commission supports the government's proposed creation of free AI Skills Bootcamps.[37] However, further education should be available to those who are entering/working in industries where AI is currently being used (e.g. technology companies). A new government scheme will replace any current AI training companies have in place with standardised, sector specific courses. These courses will be completed by all current and all new employees.

### Impact

The implementation of the CPD course will enable teachers to have an enhanced knowledge of AI, which they are then able to pass onto students in their respective Key Stage Levels. This creates an awareness of AI and its roles from an early age, allowing children to be confident in dealing with AI, preparing them to work alongside it.

Introducing the mandatory 'Teach AI Curriculum' will further reiterate the different aspects of AI at various points during an individual's time at school. This will ensure that all of the UK's future workforce has a thorough understanding of AI; therefore, maximising potential and productivity in the future.

In addition, the creation of the AI Skills Bootcamp, will deepen the understanding and awareness of AI, allowing consumers and potential investors (the current workforce) to have more confidence whilst engaging with AI. High consumer trust increases demand, incentivising firms to continue using AI to increase their productive potential and services even further.

By 2030, it is projected that GDP will increase by up to 14%, given that the acceleration of AI continues across various industries.[38] However, this will only be possible if confidence in AI is maintained within the general public. Hence, our proposal of introducing the AI Skills Bootcamp will result in a positive economic impact as it enables the economy to expand.

## Conclusion

In conclusion, there is a significant need for reform to combat the ever-changing legal issues surrounding AI. There are many areas where reform is needed, as outlined in this report, ranging from issues concerning current law to education policy. The urgency of this must be noted and appreciated, as not only do a staggering 65.7% of people from our survey feel that there is not enough education regarding AI, but also because Britain has great potential to become a global AI superpower as proposed in the government's ten-year plan. Therefore, we must impose reform now surrounding the topics discussed in this paper in order to expedite the UK's transition into becoming an AI powerhouse whilst also benefiting future generations.

37 https://www.gov.uk/government/publications/find-a-skills-bootcamp/list-of-skills-bootcamps#digital
38 https://www.pwc.com/gx/en/news-room/docs/report-pwc-ai-analysis-sizing-the-prize.pdf

# Part Three: Public Law

Recommendations on education law.

Compiled with thanks to:

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## Introduction

Education law is a tangled web, full of many different players with specific duties and powers. It involves many powerful governmental bodies including Ofsted, local government and central government. Education law also includes the jurisdiction of public bodies, such as local authorities, to maintain state schools. For example, at the start of the COVID-19 pandemic, the Secretary of State used his public law powers to advise that schools should be closed. The Secretary of State may also guide schools on topical issues to include in the curriculum. These powers are constantly in the public spotlight as they affect such an important pillar of society.

Our report shall focus on four main branches of education law. These are Special Educational Needs (SEN), exclusions, the data rights of children and gender issues in schools. We shall explore the powers and duties of different bodies within these areas of law, and suggest ways in which the law may be more responsive to the needs of children.

## Preface: The crisis of legal aid

The law governing provisions for children with Special Educational Needs and Disabilities (SEND) is the area of education law currently suffering the greatest crisis. As will be explored, provisions for SEND children are poor, leaving many needs unmet. Such unmet needs are often characterised as behavioural issues; accordingly, SEND children are six times more likely to be permanently excluded than those without SEND.[39] This issue is perpetuated by the legal aid crisis. When 88% of people do not have access to a legal aid lawyer, this seriously affects the ability of parents and children to challenge unfair decision making.[40]

Legal aid is a provision of support, given to individuals who are unable to afford legal representation. It is crucial to ensure access to justice, which is itself vital for enabling equality before the law. The right to legal representation is an important aspect of the right to a fair trial. Legal aid eligibility is determined through the 'income-means test'.[41] However, since the implementation of the Legal Aid, Sentencing and Punishment for Offenders Act (LASPO 2012), which introduced budget cuts and a severe increase in court fees, the criteria of eligibility has drastically narrowed and thus hinders the most disadvantaged peoples from gaining effective legal advice to resolve their disputes.

We surveyed 99 individuals, of which 76.8% had no previously acquired legal knowledge. The remaining 23.2% either had some sort of education in law or were qualified lawyers. Of these 99 responses, an overwhelming 73.7% admitted to anxiety at the thought of self-representing in court. This confirms the crisis at hand.

The best way to mitigate the problem of legal aid is to reduce the requirement for it. This means reducing the number of parents and children that have to bring a case of unfair exclusion to court. That is the purpose of our reform choices. Our reforms aim to encourage schools to understand the unique needs of all students. This creates an inclusive and fair environment for children in schools. It minimises the likelihood that unmet needs are characterised as poor behaviour which forces parents to defend their child in court.

39 https://www.specialneedsjungle.com/exclusions-2018-children-with-send-six-times-more-likely-to-be-excluded/
40 https://www.lawyer-monthly.com/2021/08/laspo-how-a-near-decade-of-legal-aid-cuts-has-affected-britains-most-vulnerable/
41 https://www.gov.uk/guidance/civil-legal-aid-means-testing

# Reform proposals

## Special Educational Needs

### Current Law

Special Educational Needs and Disability (SEND) describes those children who have learning disabilities and/or require health and education support in a school setting. Schools are required to maintain a standard and provide high-level teaching and support to all children who have SEND.[42] Indeed, SEND pupils may have tailored provisions made by their local authority, such as an Education, Health and Care Plan (EHCP): a legal document which details the extra support they will need.[43] As of January 2021, there are only 430,697 children and young people with EHCPs.[44] The Children and Families Act 2014 puts the focus on removing barriers to learning for SEND pupils in mainstream education. Similarly, the Equality Act of 2010 protects disabled pupils from discrimination.

### The Need for Change

Despite this, procedures have not proved adequate with regards to protecting SEND pupils. Those with SEN are over five times more likely to be excluded than their non-SEN classmates.[45] This illustrates that current policies to support minority children are ineffective, leading to behavioural difficulties and a disengagement with learning negatively impacting their future in the long-term.

### Statistics

Our survey demonstrated that there is generally good public awareness about the different needs of children in the education system, with 82.7% of our sample recognising that some students will find it harder to follow rules than others. We also observed that 65.3% of our sample recognises that multiple groups of individuals may be affected negatively by a school's lack of inclusion.

On 27th October 2021, the Chancellor of the Exchequer, Rishi Sunak, introduced the government's upcoming financial plan.[46] In relation to education, schools are receiving more funding than ever to support children and young people with their learning and to ensure that they do not suffer academically from the consequences of the pandemic.[47] The spending review for the 2021 period will provide over £3.2 billion for education recovery.[48] This includes an investment of £2.6 billion in order to create 30,000 places in special schools over the next 3 years for children with SEND. This is significant. This funding can be used to provide a higher quality of education to SEN students and implement some reform ideas considered below.[49]

### Reforms

#### Have a proactive minister

- Mandate the Children's Commissioner with assessing every Department of Education policy.
- Publish impact assessments on the consequences each policy might have on children and young people with SEN, to which the Department would be required to react.

#### Ofsted SEN reviews

- A specific Ofsted check to review the SEN systems in schools.
- This may encourage schools to work harder to ensure all students are made to feel at ease in their learning environment and implement more provision for those with special needs.
- Additionally, by publishing these results, prospective SEN students will also be able to analyse the school's capacity in SEN, before deciding on their next school.

42 https://explore-education-statistics.service.gov.uk/find-statistics/education-health-and-care-plans
43 https://www.gov.uk/children-with-special-educational-needs/extra-SEN-help
44 https://explore-education-statistics.service.gov.uk/find-statistics/education-health-and-care-plans
45 Special educational needs and disability: an analysis and summary of data sources - May 2021 (publishing.service.gov.uk)
46 https://www.theguardian.com/uk-news/2021/oct/27/autumn-budget-2021-key-points-rishi-sunak
47 https://www.theguardian.com/uk-news/2021/oct/27/autumn-budget-2021-key-points-rishi-sunak
48 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1029973/Budget_AB2021_Print.pdf
49 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1029973/Budget_AB2021_Print.pdf

**Revise teacher training courses**

- Should include a requirement to demonstrate how it will support staff in meeting the needs of children and young people with SEN.
- Add extra training to ensure they are prepared to teach a SEN student.

**Have a member of staff specialising or have experience dealing with those with SEN**

- They would provide guidance specifically tailored to those students with curriculum, social lives, career choices, next-steps and adapting to school life.
- This will centre on achieving the highest possible outcomes for all learners as part of a larger narrative about students with special needs attending university, landing top jobs, and starting businesses.

**Set extra sessions for SEN students and those with language barriers where teachers can aid them 1 to 1**

- For SEN students with conditions like dyslexia or autism, extra sessions that review the work they do in class or extra reading can make a great difference in their improvement and also allow them to work at their own pace.
- Language barriers alone will not mean that a child has SEN. However, we still believe that they should be able to access additional support sessions to help their language skills improve as quickly as possible.

**Make it mandatory for all teachers teaching SEN students to read EHCPs**

- This will provide a snapshot of the student's needs and make the teacher aware of any issues that could occur and how to deal with it swiftly and effectively.
- Teachers will also be able to create lessons that could be easy for SEN students to interpret or print extra resources for them. Even slight differences like layout, font or size of the writing can help them understand or read better.

# Exclusions

## Current Law

There are two types of school exclusions:

- Temporary exclusions (also known as fixed period exclusions): when a child is excluded from school for a certain period not totalling more than 45 days per school year.
- Permanent exclusions: when a child is no longer allowed to attend their school (unless the exclusion is overturned).[50]

In this section, we focus on permanent exclusions. The current law states that only the school's headteacher can decide whether a child should be excluded, on either a fixed term or permanent basis.[51] Parents should be notified immediately. Headteachers must take into account any reasons for the child's behaviour or actions, and exclusion must be the last resort, after other options have been tried and failed.[52]

Once the decision to exclude the child has been made, it will then be considered at a meeting of at least three members of the school's governing body.[53] The parents of the child and the head teacher involved will both be invited to the review of the exclusion. The governing body must ensure that the exclusion is the right decision for all parties involved.

The governing body can either uphold the exclusion or decide to reinstate the pupil.[54] If they decide to uphold the exclusion, the parents have the right to have this reviewed by an Independent Review Panel (IRP).

The IRP will again analyse the decision, including the interests of all parties involved, to ensure that the decision to permanently exclude the child is the correct one.[55] They can either decide to uphold the exclusion, or only recommend that the governing body reconsiders the exclusion.

50 https://explore-education-statistics.service.gov.uk/find-statistics/permanent-and-fixed-period-exclusions-in-england
51 Section 51 A, Education Act 2002
52 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/921405/20170831_Exclusion_Stat_guidance_Web_version.pdf
53 Section 6 (52), Statutory Guidance for those with legal responsibilities in relation to Education, September 2017
54 Section 6 (55), Statutory Guidance for those with legal responsibilities in relation to Education, September 2017
55 Section 9 (136), Statutory Guidance for those with legal responsibilities in relation to Education, September 2017

## Statistics

As a group, we asked 99 members of the general public questions to gauge their perception on how exclusions impact a child's life:

**Do you think being permanently excluded from a school will have a significant effect on a child's education?**

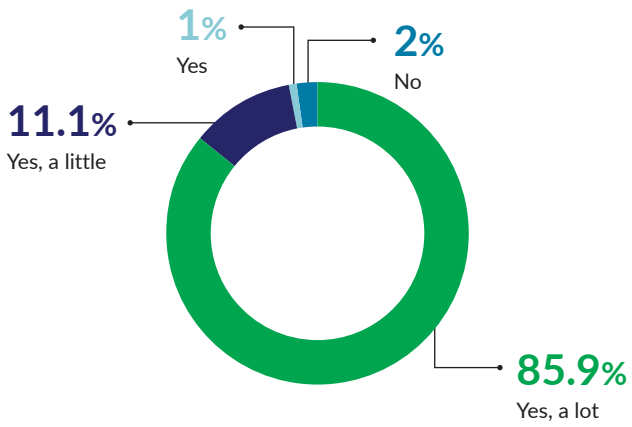


*Figure 5:*
*Do you think being permanently excluded from a school will have a significant effect on a child's education?*

**Do you think being permanently excluded from a school will have a significant effect on a child's future after school?**

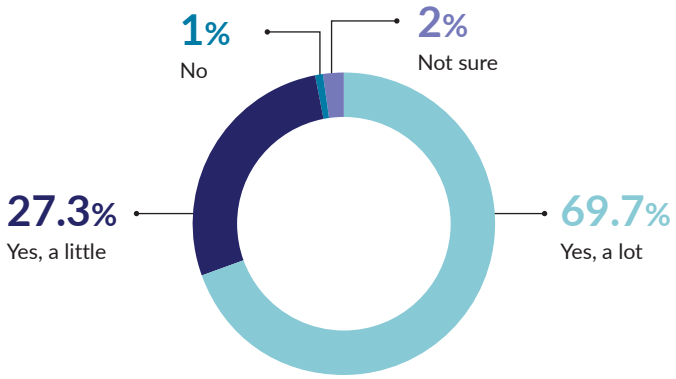


*Figure 6:*
*Do you think being permanently excluded from a school will have a significant effect on a child's future after school?*

## The Need for Change

In reality, the effect of exclusion on both a child's education and their future is severe. For example, studies have found that only 1% of excluded pupils will go on to achieve five good GCSE grades, and children who are excluded from school by the age of 12 are four times more likely to be imprisoned as an adult.[56]

There are also disparities in school exclusion statistics. Students who are in receipt of free school meals and Black Caribbean children are three times more likely to be permanently excluded.[57] Children from Gypsy and Traveller backgrounds are up to nine times more likely to be excluded from school.[58]

We felt surprised that 27.3% of respondents thought that a child's future will only be affected 'a little' by a permanent exclusion. It is therefore extremely important to increase awareness of the effects of exclusion and reduce their likelihood.

We also think that it is unjust that only parents are able to appeal an exclusion decision, and not the child themselves. Parents are legally allowed to appoint someone to make written and/or oral representations on behalf of the child to the panel and that parents may also bring a friend to the review (who may not know the child as well), while the child is left voiceless. Equally, this system disadvantages children whose parents are not interested in fighting for their education, children who are in the care of the local authority, and children of disabled parents, who may need help with accessing information.

56 Statistics collated by https://www.khulisa.co.uk/why-we-care-about-school-exclusions/
57 https://londonchallengepovertyweek.org.uk/wp-content/uploads/2020/10/RacePovertyandSchoolExclusions_FV-1.pdf
58 https://www.theguardian.com/education/2021/mar/24/exclusion-rates-black-caribbean-pupils-england

## Reforms

### Improving training

- As school staff initiate the exclusion process, their training should cover the effects of permanent exclusions to ensure they are aware of the impact that the exclusion will have on a child's life. However, we suggest that training should go further than this and should also cover unconscious bias.
- Unconscious bias training enhances awareness of how biases and preconceived perceptions of certain groups of people can impact decisions and actions.
- We suggest that improving unconscious bias training for teachers would reduce the disproportionate numbers of ethnic minority students excluded from school because it would enable them to actively assess their approach to disciplining these students. 66.7% of our survey respondents agreed that improving such training would reduce exclusions.
- However, this alone is not enough to reduce school exclusions. Recent reports have suggested that the impact of unconscious bias training is short-lived, and can paradoxically lead to more stereotyping.[59] Unconscious bias training must therefore form part of a more holistic approach to reducing exclusions and racial disparities within exclusions.

### The Role of the Child

- We recommend that children who are deemed to be Gillick competent should have the right of appeal. However, as the requirement for Gillick competency may disadvantage children with SEN, we recommend that an independent specialist should be given the right to appeal on the child's behalf if they consider the child to have been unfairly excluded.

### Independent Review Panel

- We recommend that IRPs should be given the opportunity to reinstate students, rather than be restricted to recommending their reinstatement, because school governing bodies can ignore the 'recommendations' if they do not think that reinstating the child is in the child's or the school's best interest. Indeed, 61.2% of the respondents to our survey believe that an IRP should have the final say in whether a student is permanently excluded from school, rather than the headteacher.
- We recognise that a headteacher's in-depth knowledge of the student might mean they are in a better position to make the final decision. However, we suggest that this knowledge could be brought into the independent review process via a headteacher's report on the student. A report by a SEN specialist should also be produced, where appropriate. We consider that this would strike a better balance than the current review process; the power to reinstate would also provide a stronger counterweight to any perceived racial bias.

# Gendered spaces and treatment in schools

## The Current Law

The Equality Act 2010 protects people from discrimination, harassment or victimisation in the public sector, based on nine protected characteristics, one of which is gender reassignment. This refers to the process of changing one's gender but has no provisions that include non-binary people. In *Taylor v Jaguar Land Rover Ltd*,[60] the Employment Tribunal held that non-binary people are covered under the definition of gender reassignment in s.7 of the Act, however this was noted to be a novel area of law and the judgement is not binding.

## The Need for Change

This means that it is entirely possible that discrimination towards non-binary people can still continue and would not be protected under the Equality Act 2010. This can have a significant impact in terms of education as it means that non-binary children are not protected by law. This has a knock-on effect on discrimination and can lead to indirect and direct discrimination. This can be seen in many forms and if families decide to prosecute, they currently do not have any legal protection. The law therefore needs to do more to protect those who belong to the LGBTQ+ community whilst they're in education from their peers, as well as from those who hold the educational power within their school.

59 https://www.edweek.org/leadership/training-bias-out-of-teachers-research-shows-little-promise-so-far/2020/11
60 *Taylor v Jaguar Land Rover Ltd* (1304471/2018)

### Statistics

It has also been seen that the public are not aware of the current law on these characteristics and 40.8% (as seen in our public survey) are unsure as to whether being transgender is a protected characteristic under the Equality Act 2010.

In the National LGBTQ Survey, only 3% of respondents said that they discussed one's sexual and gender identity at school, whether that was during lessons, assemblies or anywhere else.[61] The report also stated that many respondents highlighted the importance of LGBTQ-specific content as part of lessons that prepare students for later life, such as sex education, but noted that it had been lacking in their own school experience.

A third of the respondents also said that they have experienced a negative reaction due to them being LGBTQ, where the most frequent harassers were other students (88% of cases). However, almost a tenth (9%) said the harassment actually came from a member of staff.

Only 63.3% of our sample recognised the demand for gender neutral policies, suggesting that a large portion of the public are uneducated on gender identities and therefore may be unaware that certain policies (e.g. only providing single sex communal facilities) is indirect discrimination. This may cause a child with gender dysphoria to feel negatively about school, greatly impacting their ability to learn and may lead to behavioural issues which could progress to the point of exclusion.[62]

### Reforms

Our reform is about ensuring that the school environment is one of learning and not exclusion, and that it does not reinforce biases, misconceptions or discrimination. This ties strongly to our theme of exclusions when we consider the context of a child's right to self-determination and gender expression which may be incorrectly characterised as a behavioural issue.

- We recommend that non-binary should be included as protected characteristic under the Equality Act 2010 to prevent discrimination against non-binary pupils.
- We believe that teachers should be undergo mandatory training on gender policies and indirect discrimination so they are less likely to make decisions that significantly hinder students with different gender identities.
- Education of different gender identities should be included in the government's new 'anti-bullying schemes'.
- We propose that schools should explain to children what it means to have a different gender identity and emphasise the inclusion of these children and also those who are questioning their gender identity. This allows a safe space for these pupils and also provides their peers with an understanding as they might be unkind to another child without realising how it would affect them and what their words mean.

## Data rights of children in education

### The Current Law

The Data Protection Act 2018 is the implementation of The General Data Protection Regulation, created by the EU in 2016.

Under the UK GDPR, children have the right to be given a copy of their personal data, have their personal data erased and access to a transparent privacy notice explaining who you are and how their data will be processed. Children may exercise the above rights provided they are competent to do so; if not, the ability to consent falls to the parent of the child. The current standard of assessing competency is the system of *Gillick* competence: a term used to describe that children under 16 may consent as long as they have sufficient intelligence to fully understand what is involved in that particular decision (for example, in consenting to undergo medical treatment).

### The need for change

It is important for children to have access to their data because it gives them a sense of autonomy and privacy over their personal information and online activity. Recent studies suggest that children "develop their privacy related awareness and desire for privacy as they grow older."[63] Therefore, in an increasingly digitised world, it is absolutely imperative that the law fairly and appropriately protects their rights to share and access to their own data.

61 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/722314/GEO-LGBT-Survey-Report.pdf
62 https://www.transgendertrend.com/equality-act-boys-and-girls/
63 https://www.lse.ac.uk/my-privacy-uk/Assets/Documents/Childrens-data-and-privacy-online-report-for-web.pdf

### Reforms

- We recommend that that competency assessment continues to take this holistic approach, where multiple areas of a child's character are considered. If we solely looked at age, for example, we may find the outcomes to be unfair, as children today are more aware of their rights than in the past. This would therefore create a set of results that are unreliable, an outcome that should be avoided.
- We also believe that a child should be assessed by an independent assessor, with the focus purely on the child. The respondents to our survey agree: only 12.2% believed that a parent's voice should be important in the assessment.

## Conclusion

To conclude, this report has focused predominantly on four areas of education law. These have been Special Educational Needs (SEN), exclusions, the data rights of children and gender issues in schools. We have suggested a variety of ways in which the law can be used to better support children and create an environment of inclusion in schools. Set within the context of the legal aid crisis, our report has aimed to explain just how pressing educational law issues are. Our reform suggestions aim to reduce the number of children and parents that are forced into court to challenge unfair decision making. Our reform suggestions do this by mandating schools with a duty to consider, respect and understand every individual student's needs.

# Part Four: Criminal Law

Recommendations on the law governing domestic abuse.

Compiled with thanks to:

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Jonathan Ingram, 5 St. Andrew's Hill
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## Introduction

This report proposes reform to the laws concerning domestic abuse in England and Wales, and more specifically, argues for the creation of a registry of domestic abusers in the UK. This is comparable to that of the Sex Offenders registry already in circulation.

The Model Law Commission Criminal Law group conducted an exploratory survey, gathering responses from 109 members of the general public in England, which covered the issues one would face when bringing legal action in circumstances of domestic abuse and looked into defining a 'registry' as a list of all known and convicted domestic abusers, available to the authorities, potential partners, and potential employers.

This report covers the current law regarding domestic abuse and its definition, as well as the benefits that we feel the implementation of such a registry would achieve by recounting previous legal instances/personal testimonies of domestic abuse, an area that we feel the current law is ineffective in ensuring a just outcome. Conversely, this report also considers the potential counterarguments to our proposed reform, including why this idea has previously been rejected in the UK, and the position of other countries on this issue.

We believe that with the combined evidence of our survey results and the additional analysis of the costs required to implement the system, this reform proposal could benefit victims of domestic abuse and enhance the current law on domestic abuse in numerous ways.

### Current law

The current legal definition of domestic abuse comes from the Domestic Abuse Act 2021.[64] This act gives a statutory definition of domestic abuse:

The behaviour of a person ("A") towards another person ("B") is "domestic abuse" if— A and B are each aged 16 or over and are personally connected to each other, and the behaviour is abusive.

The Act states that behaviour is abusive if it involves "physical or sexual abuse; violent or threatening behaviour, controlling or coercive behaviour, economic abuse; psychological, emotional or other abuse". "Economic abuse" means any behaviour that has a substantial adverse effect on B's ability to— acquire, use or maintain money or other property, or obtain goods or services.[65]

There is no single criminal offence for domestic abuse. Instead, the act of domestic abuse has been criminalised. Criminalisation occurs through different legislation in England and Wales. As well as criminal remedies, victims of domestic abuse can also be provided with remedies and protection under civil law.[66] This is in line with the Istanbul Convention, which mandates that victims must have protection orders available to them. For example, in section 16 of the Offences Against the Person Act 1861, the act of domestic abuse would be threatening to kill.

### How is domestic abuse presented in the media?

In the book *It ends with us* by Colleen Hoover, which is written and based on true events, readers are made to fall in love with the abuser at the beginning of the book to show how hard it is for a victim to walk away from the abuser they love even though that they are in an abusive relationship. Sometimes the ones you love the most, are also the ones who hurt you the most.

64 Domestic Abuse Act 2021
65 Gov.UK Policy paper: Domestic Abuse Act 2021: overarching factsheet (Updated 28 July 2021) https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-bill-2020-overarching-factsheet
66 The Law Society 'Domestic Abuse Act 2021' (2 June 2021) https://www.lawsociety.org.uk/en/topics/family-and-children/domestic-abuse-act-2021

There are many misconceptions that come along with the thought of domestic abuse and the main one is that a victim of domestic abuse can just get up and leave. However, this is not the case as victims of domestic abuse often stay in abusive relationships for a variety of reasons and leaving an abusive partner – even if they want to – can be extremely difficult. A relationship that ends in abuse begins with falling in love and being in love, just like any other. Abuse seldom begins at the start of a relationship, but it is far more difficult to leave after it has begun. For instance, a victim may still love their partner and believe them when they apologise and swear that it would never happen again, or the victim may be afraid for their life and/or the safety of their children, also they may have nowhere to go or may lack financial independence. To control their partners, abusers frequently isolate them from family and friends, making it much more difficult for the individual to leave the relationship.

When asked in our survey “How do you think laws around domestic abuse have been presented in the media?” It was revealed that 58.7% of survey participants voted that there is no/neutral representation of domestic abuse in the media.

An illustrative American definition for domestic abuse is as stated “the continuing crime and problem of the physical beating of a wife, girlfriend or children, usually by the woman's male partner (although it can also be female violence against a male). It is now recognized as an antisocial mental illness. Sometimes a woman's dependence, low self-esteem and fear of leaving cause her to endure this conduct or fail to protect a child. Prosecutors and police often face the problem that a battered woman will not press charges or testify due to fear, intimidation and misplaced "love." Increasing domestic violence is attracting the sympathetic attention of law enforcement, the courts and community services, including shelters and protection for those in danger.”

## Survey results

We have put together a survey with a range of questions concerning the current laws and regulations concerning domestic violence and have gathered a wide range of answers from 109 people.

We also decided to include questions about the person’s background such as age and gender to determine whether or not there might be a significant pattern in explaining beliefs regarding domestic violence and to what extent they might be aware of the severity of it.

The main portion of the survey asks participants to define domestic abuse, almost all answers received involved a correlation with the act being either physical or mental abuse from someone you know. Some questions provided answers for the participants to choose from, which was useful, as it allowed the platform to automatically create charts and graphs of the results, meaning we could easily see where opinions were similar or different.

Whilst the survey results provide useful information, some of the answers might be considered a drawback due to age, demographic or it could be argued that they might not be genuine or the person may be answering and not aware of what the question is trying to specify. For example, one answer to the definition of domestic violence was ‘not great’ instead of an actual meaning. However, this does not mean the results come as unreliable as we can still see what the definition a majority of people were leaning towards.


*Figure 7:*
*Do you think there should be a national registry of convicted domestic abusers in the UK?*

This question was answered with a resounding 'yes' by 67%. The majority agree that convicted domestic abusers should be listed on a national registry in the UK.

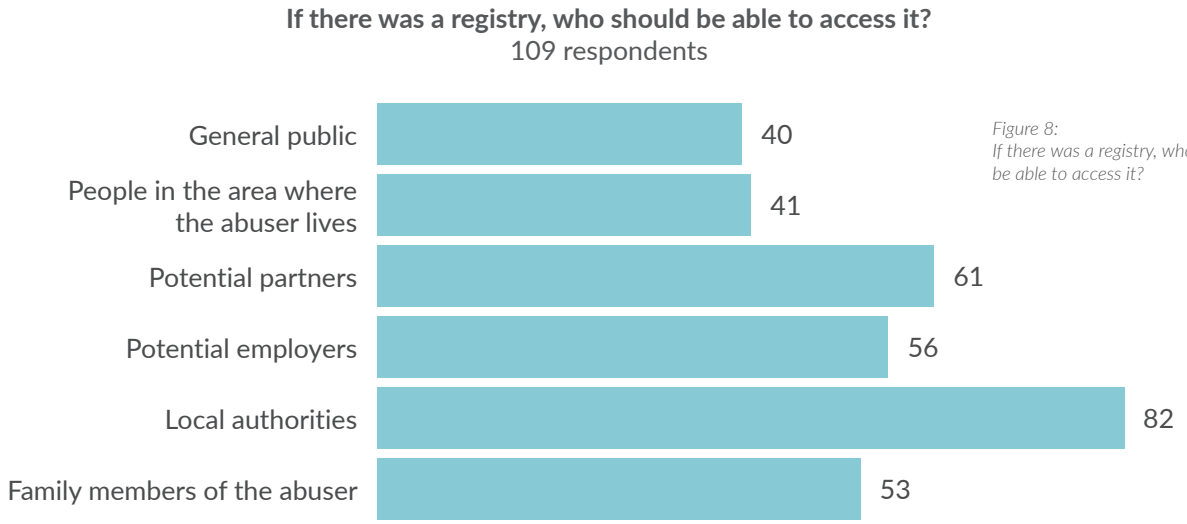


*Figure 8:*
*If there was a registry, who should be able to access it?*

When asked if the registry is a good or bad idea and why, the vast majority responded that it will 'keep others safe' because abusers will be identified so that 'others can avoid them'. However, a small number of people believe it would be a negative idea because it would make no difference because 'only police will have access to it', preventing the public from avoiding domestic abusers.

Local authorities should have access to the domestic violence registry, according to 75.2% of responses. When asked if the registry would be a breach of someone's privacy, the majority of the responses were 'no'. However, some thought it would be a breach of someone's privacy, but it may be justified because 'potential partners could otherwise be unaware and could be putting themselves in danger.'

When determining how long an abuser should be on the registry, 48.6% feel it depends on the offence, while 41.1% believe the abuser may be removed if they meet certain requirements.

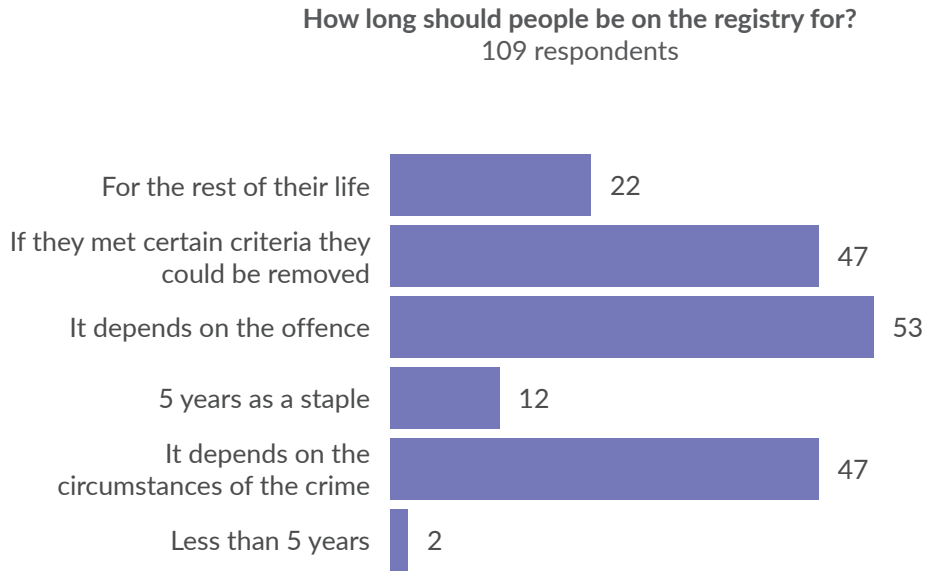


*Figure 9:*
*How long should people be on the registry for?*

## To what extent is the registry beneficial?

A primary benefit of having a registry is the protection it offers victims of domestic abuse, and their close relatives or friends. For example, in some cases of domestic abuse, the 'cycle of violence' otherwise known as the 'intergenerational theory' is applied, mostly when discussing the effects of domestic abuse on children whose parent(s) have been victims of domestic abuse in some form.[67] Therefore, a registry would be useful as a way of preventing this cycle of violence from continuing, thus decreasing the rates of offending which sometimes (but not always) arise from family/friends of victims of abuse. The registry would also help in protecting possible victims, statistics have shown that between January and November of 2018, 29 people were killed in London by a partner or family member.[68]

Another advantage of the registry is that it could assess the credibility of potential employees and recognise whether they are a potential threat to a business from social and financial contexts. Having a registry could prove to be a necessity that employers and the local authority would be able to access, to prevent the contravention of legislation, and avoid potential threats towards vulnerable co-workers. For example, it has been recognised that disclosing information to a potential victim of domestic abuse about their partner's previous abusive or violent offending can be beneficial. This can be done through *The Domestic Violence Disclosure Scheme*. This same approach should be taken when employing as it places individuals in the workplace at risk. Co-workers should have access to the registry to maintain a safe environment.

On the other hand, it can be argued that having a male manager or superior that has previously committed assault, sexual or otherwise, may cause female co-workers to feel unsafe. Even in today's society male dominance remains prominent, and the divulging of such documents could ostracise women and make them prone to fear and distress. Andrew Henley discusses that those who have been punished should not face further discrimination and to some extent this holds true as those who have been punished may have redeemed themselves, thus making the registry futile. However, it is essential to consider that as 74% of domestic violence crimes are committed against women, it should be ensured that women don't face adversity at the workplace and a registry would be beneficial to this cause.[69]

## What potential issues may arise with the registry and how could they be addressed?

While a domestic abuse registry would come with a multitude of benefits, there are flaws in the system that need to be addressed before it could be implemented.

The first issue with this idea could potentially be the safety of the inquirer after a disclosure had been made. If one was to make an inquiry or be informed of an individual's previous convictions, this could put them in possible danger from the abuser, if that offender was to find out about said inquiry.

Another possible problem could be that a police-based registry would be insufficient as the perpetrator may not be known to the police, but to other agencies. This suggests that there is a need for a multi-agency picture of risk, to fully protect the public.

A third drawback might be that people may consider this registry to be an infringement on their civil liberties. However, this would be addressed, as the police would need to satisfy several tests before a decision to disclose the information was made, much like with the current Domestic Violence Disclosure Scheme.[70]

A more unlikely issue is that of false accusations. If someone were to be falsely accused of domestic violence, the registry would be a shadow that would follow them for many years to come. Nevertheless, false domestic violence claims are few and far between and this is very unlikely to occur.[71]

Another potential risk of the registry is the impact on witness withdrawal statements due to guilt or fear of reprisal (often cited as a key reason for witness withdrawal due to close relations with the offender). Witnesses may increasingly withdraw statements due to guilt of 'ruining' the offender's life with a registry that would follow them post-sentence, this may even put people off reporting domestic abuse in smaller communities — however, this could be mitigated by limited public access.

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67 Women's Aid, 'The impact of domestic abuse on children and young people' https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/impact-on-children-and-young-people/ accessed 22 November 2021.

68 LondonAssembly, *Domestic Abusers Register*, (January 2019) https://www.london.gov.uk/sites/default/files/london_assembly_-_domestic_abusers_register_report.pdf accessed 22 November 2021.

69 ManKind Initiative, 'Statistics on Male Victims of Domestic Abuse' https://www.mankind.org.uk/statistics/statistics-on-male-victims-of-domestic-abuse/ accessed 22 November 2021.

70 Gov.UK Policy Paper: 'Domestic Violence Disclosure Scheme factsheet' (Updated 28 July 2021) https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet

71 House of Commons Library, '"Clare's law": the Domestic Violence Disclosure Scheme' (26 November 2013) https://researchbriefings.files.parliament.uk/documents/SN06250/SN06250.pdf

Another risk would be vigilante justice — a common issue in the US where the sex offender registry has public access. In the UK where the sex offenders register has restricted access (Sarah's Law) vigilante groups like 'Dark Justice' exist which endangers justice and rehabilitation — especially in cases of mistaken identity and creates 'trial-by-media' scenarios by encouraging online vigilante groups, where people have their lives ruined no matter of whether there's evidence of a crime committed (like the Dameon Hunter case).[72]

There is also evidence to prove that a registry does not prevent re-offending — a 2011 US paper by the University of Chicago compared research of offending rates of sex offenders who appear on public registers and those who don't — it found little difference in reoffending rates — which calls into question the cost-effectiveness of the measure.[73]

There is also the concern of disproportionate public panic which conflicts with the main aim of the registry to secure safety.[74] After a campaign in Australia for public access to the sex offenders registry, the Australian Institute of Criminology review found registries had no substantial effect on levels of fear in the community.[75] Some research shows registries have the opposite impact by increasing levels of fear in the community. In 2007, residents of a town in upstate New York showed (according to researchers) 'community-wide hysteria' that included insomnia after notification of sex offenders living nearby — this hysteria could be reflected in the creation of a domestic abuse registry as both crimes often involve violence and sexual offences.[76] It's important to note that the majority of these risks e.g. vigilante justice, community panic and fear of reporting can be decreased by restricting public access (have a system like Sarah's Law).[77]

## Why a registry was removed from the final version of the 2021 Domestic Abuse Bill

Introducing a registry for serial domestic abusers and stalking perpetrators under the Domestic Abuse Act 2021 was initially proposed to be included. However, in April 2021 the House of Lords voted to remove it. Parliament is made up of the House of Lords along with the House of Commons, the House of Lords is an unelected body made up of appointed members e.g. leading businessmen/women, lawyers etc. Their decision to remove the registry can be seen as undemocratic as it is an unelected body, therefore this decision does not reflect public opinion.

Despite this, one of the main reasons for voting to remove the registry was because police records already act as a database and the police, who should have access to this information rather than the general public, already do have access. Moreover, by introducing the Act, it was argued that one of the aims was to ensure that the abusers and perpetrators were managed effectively under MAPPA (Multi-Agency Public Protection Arrangements). Through this scheme, it would be ensured that perpetrators would be identified, managed and monitored to protect victims and potential victims. Furthermore, the idea of protecting the privacy of affected individuals was kept in mind, and it was held that it would have been unfair to publish the names of the perpetrators/abusers and by rejecting the registry this would keep them anonymous to the public.

A similar concept/alternative to the registry can be found under Clare's law, also known as the Domestic Violence Disclosure Scheme (DVDS). This was implemented in 2014 in England and Wales enabling police to disclose information to a victim or a potential victim with information about their partner/ex-partner's domestic abuse history which has allowed people to access this information, as a safety precaution.[78]

## The policies and approaches of other countries in tackling domestic abuse

Most countries work on the rehabilitation of perpetrators to prevent reoffending, rather than informing possible victims of abuse through registries.

### *C-CHANGE*

C-CHANGE offers support for those in difficult situations such as those in a violent household. As well as offering support to victims, it also acts as a multi-agency Scottish re-education programme for men.[79] They provide a process that includes different forms of therapy to rehabilitate the mind and stop abuse/controlling behaviour from recurring.

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72 Robert Booth, 'Vigilante paedophile hunters ruining lives with internet stings', (The Guardian, 25 October 2013) https://www.theguardian.com/uk-news/2013/oct/25/vigilante-paedophile-hunters-online-police

73 Maggie Hall, 'Sex offender registries don't prevent re-offending (and vigilante justice is real)' (The Conversation, 10 January 2019) https://theconversation.com/sex-offender-registries-dont-prevent-re-offending-and-vigilante-justice-is-real-109573

74 https://eprints.lancs.ac.uk/id/eprint/126011/

75 https://www.jstor.org/stable/10.1086/658483?seq=1#metadata_info_tab_contents

76 Maggie Hall, 'Sex offender registries don't prevent re-offending (and vigilante justice is real)' (The Conversation, 10 January 2019) https://theconversation.com/amp/sex-offender-registries-dont-prevent-re-offending-and-vigilante-justice-is-real-109573

77 https://clant.org.au/wp-content/uploads/Daniels_Law_121115.pdf

78 https://homeofficemedia.blog.gov.uk/2021/04/29/domesticabuseactfactsheet/; https://www.independent.co.uk/news/uk/home-news/domestic-abuse-bill-stalkers-register-b1832164.html; https://www.theguardian.com/uk-news/2021/apr/27/dropping-of-stalkers-register-from-bill-an-insult-to-victims.

79 C-CHANGE https://c-change.org.uk/what-we-do/ accessed 19 November 2021

***The Emerge Program***

The Emerge Program in the United States targets 'people who have abused their relationship partners as well as people in potentially abusive relationships'. This programme 'seeks to educate individual abusers'.[80] This programme aims to prevent reoffending in previous abusers.

***UN advice***

The UN Strategies for Confronting Domestic Abuse: A Resource Manual specify the training needed for authorities in how they deal with offenders and how to monitor these individuals after trial and the completion of their sentences. This document specifies the need for follow-up calls, interviews, and coordinating the process with other practitioners.[81] This highlights that keeping track of the offender allows the authorities to prevent reoffending and alert the relevant authorities if they suspect that another incident may occur.

***Other countries***

Many countries have registries for other serious crimes, like the sex offenders registry, but do not seem to be discussing the idea of creating a domestic violence registry. However, countries like America have websites where anybody with the name of the offender, victim, or the state where the incident took place, can easily access records concerning the said case.[82] Texas and New York are the only states where legislation to create domestic violence registries were considered (in 2011) and that legislation would require individuals to have been convicted of domestic violence at least three times to be placed on the registry.[83] The Texas legislation was halted in a legislative subcommittee while the bill in New York was eliminated in the corrections committee. To date, there has not been any information released regarding why both proposals failed.

A private venture, The National Domestic Violence Registry was created as the "first national database model for domestic violence convictions".[84]

## How the sex offenders registry operates in practice

The sex offenders register contains the details of anyone convicted, cautioned or released from prison for sexual offences against children or adults. The register is run by the police.

Since it was set up in 1997 anyone convicted before 1997 would not be on it. If you are convicted, you will be required to go to your local police station and sign the register, otherwise you will be charged with another criminal offence.

The police do not notify the public when a sex offender moves into a neighbourhood as it is not practical for them to knock on every door and let every family know. However, if a case is particularly extreme, authorities may notify the public.

Headteachers, doctors, youth leaders, sports club managers and others including landlords are notified of the existence of a local sex offender on a confidential basis.

Checks are in place once someone is removed from the register.

An enhanced Criminal Record Bureau check, required by anyone who works with children, would flag up someone's presence on the register or previous convictions or cautions, to a potential employer.

Registered offenders are required to notify the police if they change their name or address.

The Home Office states that 97% of convicted sex offenders are on the list.[85]

Offenders placed indefinitely on the register can apply to be taken off after 15 years.[86]

80 The California Evidence-Based https://www.cebc4cw.org/program/the-emerge-program accessed 19 November 2021

81 United Nations, "Strategies for Confronting Domestic Violence: A Resource Manual" https://www.unodc.org/pdf/youthnet/tools_strategy_english_domestic_violence.pdf accessed 19 November 2021

82 Truthfinder.com - Domestic Violence Record

83 https://www.cga.ct.gov/2011/rpt/2011-R-0196.htm

84 Amanda Gordon, 'Domestic Violence Registries' (OLR Research Report, June 27, 2011, 2011-R-0196) https://www.cga.ct.gov/2011/rpt/2011-R-0196.htm#:~:text=PRIVATE%20DOMESTIC%20VIOLENCE%20REGISTRIES%20Although%20no%20state-run%20domestic,is%20a%20database%20of%20convicted%20domestic%20violence%20offenders accessed 22 November 2021.

85 David Batty, 'Q&A: the sex offenders register', (The Guardian, 18 January 2006) https://www.theguardian.com/society/2006/jan/18/childrensservices.politics1

86 *Nacro*, 'Advice for people convicted for sex offences' https://www.nacro.org.uk/criminal-record-support-service/support-for-individuals/advice-prisoners-people-licence-sex-offenders-mappa/advice-people-convicted-sex-offences/ accessed 22 November 2021.

## How our proposed domestic abuse registry would operate in practice

Our registry will operate by prioritising the currently established "Right to Know" policy in Clare's Law (allowing the list to remain only in the eyes of authorities) and creating criteria that will dictate how long a criminal remains on this registry.

Clare's Law (outlined previously) contains the “Right to Ask” policy that gives the general public the option to enquire if a person close to them has a history of domestic violence. The “Right to Know” policy enables the police to disclose on their own initiative if they receive information about the violent or abusive behaviour of a person that may impact on the safety of that person’s current or ex-partner.[87]

By prioritising "Right to Know" over "Right to Ask", the general public will be limited to enquiring about the contents of the registry; the latter’s quality has been increasingly depleting and relatively unpopular amongst Commons.[88]

Freedom of Information laws organisation says that 23% of these request-response rates fell below the Government target in 2020.[89] With this reform, the public will only be notified of the registry's contents when assessed as a threat to their safety, easing public concerns about their welfare.

From our survey results, a primary concern was the future of the abusers listed if they had managed to change their ways. This is where our tiered registry will be utilised to the benefit of the abusers’ and victims' wellbeing.

A registry with a tiered system will allow for a more quality reform environment, the most preferred form of punishment following case dependency. A tiered registry highlights convicts who are a high-level threat and those who could be removed if meeting the criteria of, but not limited to:

1. Has not committed any additional offences since the first offence
2. Has attended recommended rehabilitation groups (e.g. Nacro)[90]
3. Has had a good prison behaviour record (if sentenced)
4. Has passed multiple mental health screening tests (number will be in proportion to the seriousness of case)
5. Has had positive references from, not limited to: Employer, Counsellor, GP, Probation Officer.
6. Is under or at the age of 18

## Costs to implement our proposed registry

In the USA, a sexual offenders registry costs over $10 million per year to maintain. The UK is approximately 40 times smaller than the USA. This means that our domestic abusers registry will cost roughly £185,000. In stark contrast, the UK spent approximately £5.63 billion on its prison system in the last 2 years.[91] £185,000 is only 0.003% of this cost, demonstrating that this registry is well within the government's budget.

In 2019, the cost of one prisoner per year was £44,600 and there were 60,160 convictions for domestic abuse-related crimes.[92] This reinforces the available budget for a domestic abusers registry. Aside from the financial cost, the emotional stress of victims and people’s loss of privacy also comes at a cost. However, this is not a numerical value and arguably holds more weight than £185,000. Further, this loss of privacy can lead to vigilante justice, leading to higher rates of violence, leading to more court and prison costs. If a case of violence is heard in the crown court, the cost of a trial will be more than £3,000, higher than a magistrate’s court.[93] Moreover, as this registry will be exposed to human error, there is a concern for mistaken identities. If this happens, there will be irrevocable circumstances such as 'cancel culture', leading to someone being fired from their job, for example. These various costs must be considered.

87 Gov.UK, Home Office, *Policy Paper: Domestic Violence Disclosure Scheme factsheet* https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-violence-disclosure-scheme-factsheet accessed 13 November 2021

88 Pat Strickland, *“Clares Law”: the Domestic Violence Disclosure Scheme* https://researchbriefings.files.parliament.uk/documents/SN06250/SN06250.pdf accessed 12 November 2021

89 Yohannes Lowe, *‘Women at risk as police in England and Wales miss Clare’s Law deadlines’* (The Guardian 9 May 2021) https://www.theguardian.com/society/2021/may/09/women-at-risk-as-police-in-england-and-wales-miss-clares-law-deadlines accessed 13 November 2021

90 Gov.UK, *Guidance and Support, Leaving Prison* https://www.gov.uk/leaving-prison/support-when-someone-leaves-prison accessed 13 November 2021.

91 https://www.refuge.org.uk/our-work/forms-of-violence-and-abuse/domestic-violence/domestic-violence-the-facts/

92 https://www.statista.com/statistics/1202172/cost-per-prisoner-england-and-wales/

93 https://www.cps.gov.uk/legal-guidance/costs-annex-1

# Conclusion

After thorough consideration and research regarding domestic abuse, both in the UK and abroad, the prospect of a domestic abuse registry seems promising and would be of substantial benefit in reforming domestic abuse law within England and Wales. Though the current law defines what domestic abuse entails, the lack of representation within the media and potential risks still posed to society proves that more could be done.

The survey results gained from a wider audience demonstrate how a registry would create a sense of safety within the general public and would be a justified 'breach' of privacy, that would ensure protection for possible victims and those already suffering from past abuse. In domestic and workplace environments, having awareness of any potential employees' or partners' abusive histories will ensure that a safe environment can be maintained for others, and informed decisions can be made in light of any past abuse.

We have addressed the possible issues that could arise as a result of our registry, notably the safety and civil liberties of those on the register, and fear within society. However, the tiered system and 'right to know' policies we have established will ease these public concerns and lessen the likelihood of harm towards those on the register. Despite the prospect of a registry being proposed for the 2021 Domestic Abuse Bill, how this was removed was fundamentally undemocratic, and the main concerns regarding the safety of abusers would be curbed by our previous suggestions.

Whilst the UK, as well as other countries, have sex offender registries and provide rehabilitation for offenders, many do not discuss the idea of a domestic abuse registry; the combined evidence within this report and the cost-benefit ratio it would take to implement this registry suggests that it would be of great benefit in reforming domestic abuse law and creating a safer society for all.

# Notes

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BVL is always looking to grow our support from organisations and individuals who share our passion for increasing youth access to the legal system. For more information or to view our other publications, please visit our website at www.bvl.org.uk.

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