CHAPTER FIVE: THE SERIOUS CRIME ACT 2015, s 76

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Abstract

The last chapter focused on the first legislative development to take place this century that is particularly relevant to the survivors of domestic abuse and coercive control: the Sexual Offences Act 2003. This chapter continues with a review of later legislative developments that lie at the heart of this book. Firstly, the chapter takes up the story of the development of the criminal law where chapter three left off and looks in particular at amendments to the Protection from Harassment Act 1997 that had particular significance for survivors of domestic abuse. Secondly, the chapter reviews Parliament's intentions for the new law on coercive control via an analysis of the relevant parliamentary debates. Finally, the chapter provides a doctrinal assessment of the new law (Serious Crime Act 2015, s 76) itself. The Domestic Abuse Act 2021 received Royal Assent on 29 April 2021, the chapter concludes with a discussion of this Act, and suggestions for further work and reform.

Introduction

In the last chapter I focused on the first legislative development to take place this century that is particularly relevant to the survivors of domestic abuse and coercive control: the Sexual Offences Act 2003. This chapter continues with a review of later legislative developments that lie at the heart of this book. Firstly, I take up the story of the development of the criminal law where chapter three left off. I explain the review of the Protection from Harassment Act 1997, (the 'PHA') that resulted in considerable amendments. I also review other developments in 2012 - 2015 that led to the introduction of the Serious Crime Act 2015, s 76 ('section 76'). Secondly, I review Parliament's intentions for section 76 via an analysis of the relevant parliamentary debates and finally, I go on to assess section 76 itself. The Domestic Abuse Act 2021 (the 'DAA') received Royal Assent on 29 April 2021, and I conclude the chapter with a discussion of this Act, and suggestions for further work and reform.

Before the introduction of section 76, domestic abuse was prosecuted via statutes that were reviewed in the previous three chapters, as an offence against the person, as harassment, as a sexual offence. None of these crimes account properly for the strategic patterns of control outlined in chapter one of this book, either in terms of the behaviour of the perpetrator or the harm experienced by the victim. Section 76 was an opportunity to put this right. Recognising coercive control as a crime does represent significant progress. Unfortunately, Parliament did

not give enough consideration to the behaviour (coercive control) that it was trying to regulate. As a result, while section 76 is innovative up to a point, it reflects mistaken assumptions as to the nature of coercive control. The 'controlling or coercive behaviour' construct set out in section 76 does not properly capture the phenomenon of coercive control as set out in this book. For the avoidance of doubt, and as explained in chapter one, I use the label 'coercive control' in this book to describe the empirical phenomenon articulated originally by Evan Stark.[1] When I use the label 'controlling or coercive behaviour' I am referring to the construct set out in section 76, which is the subject of this chapter. The fact that these two constructs, 'coercive control' and 'controlling or coercive behaviour' are not the same thing goes to the root of the problems that persist with the criminalisation of domestic abuse in England and Wales.

There are three mistaken assumptions that I focus on in this chapter. One of these mistaken assumptions has, thankfully, been put right by the DAA. This is the assumption that there is a transactional moment of separation for a victim that is a useful legal boundary. The two mistakes that still stand are: first, that coercive control is "psychological" abuse, a bullet point in a list of behaviour types that make up domestic abuse, and second that focusing on the victim's response to coercive control is an appropriate way to define the offence. As a result of these mistakes, Deborah Tuerkheimer's mismatch between 'life' and 'law'[2] referred to in chapter three remains, as do many of the issues identified in the context of the old regime.

Developments since 2015 show how this could be improved upon: the Domestic Abuse (Scotland) Act 2018 (the 'DASA') deals with both of the outstanding issues raised above and is an example of what Evan Stark has referred to as a 'gold standard' for domestic abuse and coercive control legislation.[3] It could point the way for further reform in England and Wales. In the absence of that reform, I conclude that, while section 76 and the amendments put in place by the DAA represent progress, the criminal law still does not allow for the proper recognition of the wrong of coercive control.

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[1] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press 2007).
[2] Deborah Tuerkheimer, 'Recognizing and Remedying the Harm of Battering: a Call to Criminalize Domestic Violence' (2004) 94(4) Journal of Criminal Law and Criminology 959, 980.
[3] Libby Brooks, 'Scotland Set to Pass "Gold Standard" Domestic Abuse Law' *The Guardian* (London 1 February 2018) available at <https://www.theguardian.com/society/2018/feb/01/scotland-set-to-pass-gold-standard-domestic-abuse-law> accessed 28 March 2018.

The Road to the Serious Crime Act 2015, 76

I reviewed the PHA in detail in chapter four. The first significant development in the time period 2012 - 2015 took the form of substantial amendments to the PHA, one of which provided the template for the later section 76. Secondly, a new working definition (the 'Working Definition') of domestic abuse was introduced in 2012 which fed into the third development - Theresa May's governmental consultation of 2014 -15 on the criminalisation of 'controlling or coercive behaviour'. These developments will be looked at in turn.

The Protection of Freedoms Act 2012

In February 2012, the Justice Unions' Parliamentary Group conducted an extensive review into the PHA. Their concluding report referred to Home Office research that suggested that the police chose to press charges under the lesser PHA, s 2 'harassment' offence over the more serious PHA, s 4 offence 'causing fear of violence'. This, it was reported, is true even where the nature of the offending in question means that the PHA, s 4 is available.[4] This is because the section 2 offence is perceived to be 'easier to run with'.[5]

My empirical work with police supports this finding. Detective Constable Shell, for example, confirmed that he does not tend to use the PHA, s 4 charge 'technically, just because it is a definition of section 4, it does not mean that we will charge it'.[6] By this he meant that, just because he comes across behaviour that fits the definition of a section 4 offence, it does not mean that the defendant will end up being charged with a section 4 offence. He went on to explain, 'if you charge a lesser offence, they might plead guilty, or you might get an early magistrates'.[7] An earlier trial, a guilty plea, a trial in a lower court, all of these points made by Detective Constable Shell in favour of the lesser charge are examples of the section 2 charge being 'easier to run with'. This meant that the PHA, s 4 was 'rarely used'[8] and that the maximum sentence available under the PHA, s 2 (six months' imprisonment) was out of step with the more serious offences which were being prosecuted. As a result of the difficulties with the PHA, s 4 and the limitations of the PHA s 2, the PHA was declared no longer fit for

[4] Justice Unions' Parliamentary Group, 'Independent Parliamentary Inquiry into Stalking Law Reform: Main Findings and Recommendations' (2012) available at <http://www.dashriskchecklist.co.uk/wp-content/uploads/2016/09/Stalking-Law-Reform-Findings-Report-2012.pdf> accessed 9 May 2017.
[5] Jessica Harris, *An Evaluation of the Use and Effectiveness of the Protection from Harassment Act 1997* (Home Office Research Study 203, Home Office 2000) 24.
[6] Interview with Detective Constable Shell (4 December 2017) 9.
[7] Ibid. more empirical work urgently needs to be done with magistrates on this issue.
[8] Justice Unions' Parliamentary Group, Independent Parliamentary Inquiry n4 12.

purpose in the context of stalking.

The enactment of the PHA followed an extensive parliamentary debate around the decision of whether or not to define stalking. This was reviewed in chapter three. The so-called "list" approach recommended by the then opposition party was abandoned because it was not thought necessary or helpful to attempt to define stalking in law. The Justice Unions' Report concluded that this had been a mistake: 'many believed that the chief shortcoming of the 1997 iteration of the PHA was its failure to name "stalking" in law'.[9] The report argued that 'behaviours' were 'being hidden and missed as they are recorded under different crime categories such as malicious communications, common assault, harassment and so on'.[10] The report concluded that 'the victim's perspective was missing' and that 'many incidents were not recorded as crimes and that stalking behaviour was therefore hidden'.[11]

I explained how Tuerkheimer describes 'cloaking' in chapter two. Cloaking occurs when there is a failure to recognise aspects of offending behaviour and/or harm in the criminal law.[12] Cloaking is the resulting exclusion of the crime, or part of the crime, from the criminal law meaning that harm experienced by the victim goes unrecognised and unacknowledged. Emily Finch uses the term 'fragmentation' to describe the process by which the sum of parts of behaviours recorded under different crime categories amounts to less than a recognition of the behaviour as a whole.[13] It is interesting that the Justice Unions' Report appears to support Tuerkheimer and Finch, as it finds that the failure to properly define the stalking behaviour being criminalised leads to it being 'hidden' (cloaked) and 'recorded under different crime categories' (fragmented). This, concludes the Report, leads to behaviours being 'missed'.

Parliament addressed these concerns with the Protection of Freedoms Act 2012, which inserts two offences, sections 2A and 4A, into the PHA.[14] Section 2A introduces an offence of stalking by replicating the old section 2 but with a reference to 'stalking'. The PHA, s 2A states that a person is guilty of an offence where he commits an offence under the existing section 2 offence *and* his course of conduct includes actions or omissions 'associated with stalking'.

[9] Justice Unions' Parliamentary Group, Independent Parliamentary Inquiry n4 2.
[10] Ibid. 11.
[11] Ibid.
[12] Tuerkheimer, Recognizing and Remedying the Harm of Battering n2.
[13] Emily Finch, *The Criminalisation of Stalking: Constructing the Problem and Evaluating the Solution* (Cavendish 2001).
[14] Protection of Freedoms Act 2012, s 111.

Examples of actions or omissions 'associated with stalking' are given in exactly the list approach that was rejected by the government fifteen years previously. Examples include following, contacting, publishing any statement, monitoring the use by a person of the internet, email, loitering, interfering with any property, watching or spying. There is no new mens rea requirement. The possibility that the offence can be committed with an objective mens rea is included with the wording 'knows *or ought to know'*:[15] the same as for the existing PHA, s 2.

The new section 4A offence is entitled 'stalking involving fear of violence or serious alarm or distress' and has two limbs. The first limb, section 4A(1)(b)(i), states that a person whose course of conduct amounts to stalking and who causes another to fear, on at least two occasions, that violence will be used against them, is guilty of an offence. This is the old section 4 base offence (harassment involving fear of violence) but amended to include a specific reference to stalking. The second limb, section 4A(1)(b)(ii), states that conduct that amounts to stalking and causes the victim serious alarm or distress that has a substantial adverse effect on their day to day activities is an offence.

This second limb of section 4A is thus the only significant insertion made by the Protection of Freedoms Act 2012 to the PHA in that it constitutes a brand-new offence.[16] The "new" section 2A, and section 4A(1)(b)(i) (the so-called "first limb" of s. 4A), simply add emphasis to the old section 2 and section 4 of the PHA. The potential to prosecute stalking always existed under the old section 2 and section 4 offences. The Protection of Freedoms Act simply clarifies that this is so.

The second limb of section 4A creates a significant new offence which was hailed at the time as having the potential to 'fill an important gap in the protection offered to victims of stalking'.[17] It is this new offence that was used as a template for the construction of the later section 76. The new offence is especially innovative in that it does, finally, abandon the old 'fear of violence' paradigm. It also has less of an incident specific focus. This is because it moves further away from the necessity of temporal specificity with the wording 'substantial

[15] My emphasis.
[16] Neil Addison and Jennifer Perry, 'Will the New Stalking Legislation Deliver for Victims?' (2013) 177 Criminal Law and Justice Weekly 53.
[17] Ibid. 54.

adverse effect'. It does not require the identification of any particular incident as 'especially alarming or serious'.[18] Instead, it looks at the overall effect on the victim's life. This is important because 'looking at the cumulative effect of stalking and indeed all harassment is what is important, rather than getting bogged down in the effect and nature of individual incidents'.[19] By defining the crime in terms of an ongoing 'substantial adverse effect' rather than an incident based fear of something specific, the statute is moving towards a more contextual, less transactional approach that is helpful in the context of stalking.

As is to be expected, it is apparent from the guidance notes that were issued by the Home Office to accompany the amendments that the 'substantial adverse effect' was considered by the government in terms of the harms that result from stalking. This is relevant because the same wording is used in the later section 76, (which is attempting to capture the harms that result from coercive control, not from stalking). The guidance notes state that:

> The second arm of the offence prohibits a course of conduct which causes "serious alarm or distress" which has a "substantial adverse effect on the day-to-day activities of the victim". It is designed to recognise the serious impact that stalking may have on victims, even where an explicit fear of violence is not created by each incident of stalking behaviour.[20]

The guidance goes on to give examples of what might constitute 'substantial adverse effect on day-to-day activities' as follows:

> The Home Office considers that evidence of a substantial adverse effect when caused by the stalker may include: the victim changing their routes to work, work patterns, or employment, the victim arranging for friends or family to pick up children from school (to avoid contact with the stalker), the victim putting in place additional security measures in their home, the victim moving home, physical or mental ill-health, the victim's deterioration in performance at work due to stress, the victim stopping /or changing the way they socialise.[21]

Changing work patterns, moving house etc are all indications of behaviour designed to minimise contact with a stalker, who is therefore conceived of as a stranger, or an ex-partner, but not as someone who is still in a relationship with the victim. As explained above this becomes important in the context of the later section 76 which I review later on in this chapter.

The Working Definition of Domestic Abuse

[18] Ibid. 54.
[19] Ibid. 54.
[20] Home Office Circular 018/2012 available at <https://www.gov.uk/government/publications/a-change-to-the-protection-from-harassment-act-1997-introduction-of-two-new-specific-offences-of-stalking> accessed 26 July 2017.
[21] Ibid.

Two further developments with regard to definitions of domestic abuse since 2012 need consideration. The first was the introduction of the Working Definition of domestic abuse which I will set out here. Secondly, and more importantly, a legal definition of domestic abuse has been introduced for the first time into law by the DAA, which replaces the Working Definition. I will come back to this development when I discuss the DAA at the end of this chapter.

Previously, on 14 December 2011, the government launched a consultation on whether or not to change the cross-governmental working definition of 'domestic violence' (as it was then).[22] The government first introduced a single working definition of domestic violence in 2004, for use across government and the public sector. The definition was not given statutory footing, but was used by government departments to inform policy development and by agencies such as the police, the Crown Prosecution Service and health services to help with the identification of domestic abuse. The 2004 definition was as follows:

> Any incident of threatening behaviour, violence or abuse (psychological, physical, sexual, financial or emotional) between adults who are or have been intimate partners or family members, regardless of gender or sexuality.[23]

As part of the consultation, participants were asked whether they thought that coercive control should form part of the definition of domestic abuse. The vast majority of respondents (85%) indicated that it should.[24]

Feedback from consultees indicated that the incident specific nature of the 2004 definition was unsatisfactory, as it 'equates domestic violence with discrete incidents of threats or assaults', which 'seriously distorts the nature of abuse experienced by the vast majority of abuse victims'.[25] Furthermore, 'The current (2004) definition fails to identify coercive control, the most common class of abuse cases in which victims seek outside assistance'.[26] As a result of the consultation, the Working Definition, which also had no legislative status

[22] Home Office 'Cross-government Definition of Domestic Violence A Consultation' (December 2011) available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/157798/dv-definition-consultation.pdf> accessed 2 February 2018.
[23] Ibid. 6.
[24] Ibid. 5.
[25] AVA Against Violence and Abuse, 'AVA's Response to Cross-government Definition of Domestic Violence: A Consultation' (document on file with me) 2.
[26] Ibid.

(and therefore received little or no attention in the legal literature), was published in September 2012:

> Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members regardless of gender or sexuality. This can encompass but is not limited to the following types of abuse:
> - psychological
> - physical
> - sexual
> - financial
> - emotional
>
> Controlling behaviour is: a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour.
>
> Coercive behaviour is: an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim.[27]

This is in many ways a helpful definition that accurately defines and portrays both the "wrong" and the "harm" of domestic abuse. In part, this definition is helpful because it begins from the behaviour being defined, (what domestic abuse really looks like), rather than the existing criminal law legislative infrastructure, (how fragments of domestic abuse are currently prosecuted). It uses coercive control as a wrapper within which to locate its constituent parts, by stating that any pattern of incidents of coercive control *encompasses* various examples of abusive behaviour.

The reference to 'family members' is in my view unfortunate,[28] but apart from that, this definition reflects the interconnected nature of the different physical and non-physical behaviour patterns that constitute coercive control. It also recognises the perpetrator's strategic intent. Most importantly, the definition correctly puts 'controlling, coercive or threatening behaviour' at the heart of the definition. Much of the wording for the definition was in fact taken from the response to the consultation drafted by Davina James-Hamman and Evan Stark.[29] In particular, the definitions of 'controlling behaviour' and 'coercive

[27] Home Office, 'New Definition of Domestic Violence' (19 September 2012) available at <https://www.gov.uk/government/news/new-definition-of-domestic-violence> accessed 12 September 2017.
[28] I deal with this in more detail in the section on the Government Consultation of 2014-15 below.
[29] Home Office, 'Strengthening the Law on Domestic Abuse Consultation Summary of Responses' (December 2014) 5 available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/389002/StrengtheningLawDomesticAbuseResponses.pdf> accessed 31 July 2017; email from Evan Stark to me (2 February 2018).

behaviour' were drafted by Stark.[30] Unfortunately, the new definition introduced by the DAA reverts to a bullet point list approach. This is a step backwards, as I explain at the end of this chapter.

One side effect of the Working Definition with its paradigm-shift style focus on coercive control is that it served to highlight that the existing criminal infrastructure was inadequate. The central component of the Working Definition - the controlling/coercive behaviour - was not captured by the criminal law. Furthermore the Working Definition had no legal status and did nothing to resolve the main issue created by *Hills*, *Curtis* and *Widdows*. Thanks to those judgments, which the Government later referred to as an 'unhelpful barrier',[31] the ability of police to take action in a situation where a victim was still in an intimate relationship with her partner was limited. In August 2014 the government launched a consultation to investigate exactly this issue.[32] It is this consultation that led directly to the passage of section 76.

The Government Consultation Of 2014 – 15

The Home Office was clear from the start about the remit of the consultation: its scope was extremely narrow. This was a mistake. Parliament's intentions for section 76 can be understood partly as a response to this consultation, and the eight weeks that it was given (the consultation ran from 20 August - 15 October 2014), puts it in the camp of 'single-stage, executive controlled' legislation, which, it has been pointed out, 'tends to be fast and driven by Cabinet with limited or no opportunity for consultation or independent input'.[33] The equivalent consultation in Scotland (prior to the DASA) was much more extensive.[34] The English/Welsh consultation description states:

> This consultation is specifically focused on whether we should create a specific offence that captures patterns of coercive and controlling behaviour in intimate relationships, in line with the Government's non-statutory definition of domestic abuse.[35]

Many important issues were overlooked. There is no attempt to unpick or define 'patterns of

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[30] Ibid.
[31] 'Even where stalking and harassment legislation may be the appropriate tool to tackle domestic abuse, Court of Appeal case law is an unhelpful barrier.' (R v Curtis 1 Cr. App. R.31, and R v Widdows (2011) 175 J.P. 345).' Home Office, Summary of Responses n28 11.
[32] Home Office, 'Strengthening the Law on Domestic Abuse: A Consultation' [2014] 9 available at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/344674/Strengthening_the_law_on_Domestic_Abuse_-_A_Consultation_WEB.PDF> accessed 28 March 2018.
[33] Julia Quilter, 'Evaluating Criminalisation as a Strategy in Relation to Non-Physical Family Violence' in Marilyn McMahon and Paul McGorrery (eds), *Criminalising Coercive Control* (Springer 2020) 112.
[34] This included a consultation, public evidence from senior police, prosecutors, academics and survivors groups taken at six different meetings over a two month period, written evidence and private testimony from survivors of domestic abuse. See the Justice Committee, *Stage One Report on the Domestic Abuse (Scotland) Bill* (SP Paper 198, 16th Report, 2017) 47. See also my interview with Marsha Scott, Chief Executive of Women's Aid (1 December 2017).
[35] Home Office, Strengthening the Law on Domestic Abuse: A Consultation n32 5.

coercive and controlling behaviour in intimate relationships'. Theresa May was clear: in her mind coercive control *is* non-violent behaviour. She explains: 'The consultation asks whether reinforcing the law to capture patterns of *non-violent behaviour* within intimate relationships will offer better protection'.[36] This assumption - that coercive control is non-violent behaviour - is not interrogated.

Moving on to the legal position, there is no suggestion that it might be appropriate to consider how, or to what extent, the existing legal infrastructure was capturing the behaviour patterns that constitute domestic abuse in general and coercive control in particular. The fact that a core part of the government's own definition of domestic abuse, (the strategic intent), was not captured by the existing infrastructure might have suggested that a review of the regime was in order, not unlike the review of the sexual offences regime that took place before the introduction of the Sexual Offences Act 2003 that was the subject of the last chapter.

Around 85% of respondents to the consultation felt that the law as it stood did not adequately protect the victims of coercive control.[37] The government's conclusions at the end of the consultation period are summarised as follows:

> On balance, we are persuaded that there is a gap in the current legal framework around patterns of coercive and controlling behaviour, particularly where that behaviour takes place in an ongoing intimate partner or inter-familial relationship. Non-violent coercive behaviour, which is a long-term campaign of abuse, falls outside common assault, which requires the victim to fear the immediate application of unlawful violence.[38]

The Home Office makes a number of problematic assertions in this extract that I will review in turn. First: the conclusion begins with the reference to a 'gap in the current legal framework'. It has been pointed out that 'one of the most powerful tropes in criminalisation debates is the identification of the alleged "gap" that needs to be "filled".[39] One of the pitfalls of identifying a "gap" in this way is that it cements the surrounding legislative infrastructure.

The second part of the first sentence locates coercive and controlling behaviour in two contexts: 'an ongoing intimate partner' context, and an 'inter-familial relationship' context. 'Inter-familial relationship' is not defined, but presumably the Home Office is referring to relationships within a family but not between intimate partners. The empirical research to

[36] Ibid. 8 (my emphasis).
[37] Home Office, Summary of Responses n29 5.
[38] Ibid.
[39] Quilter, Evaluating Criminalisation as a Strategy n33 124.

date has focused on coercive control between intimate partners. More research is needed before it can be decided whether other relationships (between siblings, for example, or between parents and children) are affected by coercive control.[40]

The second sentence refers to 'non-violent coercive behaviour', and comments that this kind of behaviour falls outside the law on common assault. This is the "gap" referred to in the preceding sentence. This is a good example of where assuming 'a simple lacuna into which a new offence can be inserted to "fill" …. has the capacity to obfuscate the well documented problematic operation of current criminal laws'.[41] It is correct to state that non-violent coercive behaviour falls outside common assault. But what about violent coercive behaviour? The implication seems to be that it is already covered by common assault. This is not entirely correct. Violent behaviour per se falls within the law on assault. The Offences Against the Person Act 1861, however, as I explained in chapter two, is transactional, incident specific, and does not take either a controlling perpetrator's strategic intent or the full extent of the harm he inflicts into account. Violent *coercive* behaviour is only partially captured by the law on common assault.

The other false implication is the one already touched upon above, that 'controlling or coercive behaviour' can be described as 'non-violent coercive behaviour'. The government Working Definition states that, 'Incidents of coercive, controlling or threatening behaviour' can encompass psychological *and* physical types of abuse.[42] Vanessa Bettinson and Charlotte Bishop, commenting on the Serious Crime Bill as it was in the summer of 2015, highlight this confusion as an obstacle. They argue that, 'Such a concept of coercive control is difficult to criminalise while… this separation of physical and non-physical forms of domestic violence and/or abuse does not reflect … the complex way that both physical and non-physical forms of behaviour often co-exist'.[43] Stark is clear. He writes:

> Some have contrasted coercive control as a "psychological" crime to the "physical crime" of domestic violence. This is a mistake. Coercive control often includes psychological abuse.

[40] Liz Kelly and Louise Westmarland, 'Time For a Rethink. Why the Current Government Definition of Domestic Violence is a Problem.' (2014) available at <http://www.troubleandstrife.org/2014/04/time-for-a-rethink-why-the-current-government-definition-of-domestic-violence-is-a-problem/> accessed 25 October 2017.
[41] Quilter, Evaluating Criminalisation as a Strategy n33 125.
[42] Gov.uk, 'Guidance Domestic Violence and Abuse' (2018) available at <https://www.gov.uk/guidance/domestic-violence-and-abuse> accessed 28 March 2018.
[43] Vanessa Bettinson and Charlotte Bishop, 'Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence' (2015) 66(2) Northern Ireland Legal Quarterly 179, 184.

> But it is not primarily a psychological or a physical process but a course of deliberate conduct.[44]

My empirical work supports this. In chapter one, I explained how the survivors I spoke to described a combination of violent and non-violent tactics. It is possible for coercive behaviour to exist in the absence of physical violence, but it is unusual.

The government continues:

> The law on stalking and harassment does not explicitly apply to coercive and controlling behaviour in intimate relationships. Indeed, as some respondents to our consultation pointed out, the law on stalking and harassment is not designed to capture the dynamic of sinister exploitation of an intimate relationship to control another, particularly where a relationship is ongoing. The element of control is not such a feature of stalking or harassment, which is generally intended to intimidate or cause fear. Domestic abuse adds an extra layer to such intimidation, with perpetrators operating under the guise of a close relation or partner to conceal their abuse, and safe in the presumption that the victim is likely to want to continue a relationship despite the abuse. For these reasons, domestic abuse may be said to be more subversive than stalking.[45]

These observations are the most interesting of all, in light of the legislation that followed (section 76). The government correctly identifies that coercive control is not the same thing as stalking. As stated in chapter three, while there is no doubt that stalking and coercive control are highly correlated in that they are often simultaneously present,[46] stalking forms *part* of the controlling or coercive behavioural repertoire of a perpetrator. The government therefore recognises that, as different phenomena, coercive control and stalking require a different legislative approach. Despite this, the law that was designed to capture coercive control used the PHA (stalking law) as a template, as is discussed in more detail below.

Serious Crime Act 2015, s 76

Parliamentary Debate

Then Attorney General Robert Buckland introduced a new clause on 'controlling or coercive behaviour' into the Serious Crime Bill in January 2015, which was the government's major

[44] Evan Stark, 'Introduction to the Second Edition' in Evan Stark, *Coercive Control and the Criminal Law* (Oxford University Press 2022) 7.
[45] Home Office, Summary of Responses n29 11.
[46] In a study in Maine, stalking was found to occur within 80% of domestic abuse cases: Michael Sazl, 'The Struggle to Make Stalking a Crime: a Legislative Road Map Of How to Develop Effective Stalking Legislation in Maine' (1998) 23 Seton Hall Legislative Journal 57. This finding was mirrored by Jane Monkton-Smith in the UK: see Jane Monkton-Smith et al, 'Exploring the Relationship Between Stalking and Homicide' (Suzy Lamplugh Trust 2017) and also by Charlotte Barlow et al, 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60(1) British Journal of Criminology 160.

crime bill of 2014 - 2015. This clause is quietly tucked away in Part V of the Act under the heading 'Protection of Children and Others'. This seems unfortunate, in light of the Attorney General's rousing introduction to the committee: 'Abuse is hidden behind the closed doors of far too many families. We must bring domestic abuse out into the open if we are to end it. The first step is to call it what it is: a crime of the worst kind'.[47] 'Protection of Children and Others' seems a far cry from 'call it what it is'.

With regard to coercive control and stalking, Buckland comments:

> I am sure that the Committee would agree that a person who causes someone to live in constant fear through a campaign of intimidations should face justice for their actions. If such a person is unknown to their victim or is known but unrelated they would be called a stalker… We must create a new offence that makes it crystal clear that a pattern of coercion is as serious within a relationship as it is outside one.[48]

Buckland would appear to be making the assumption that coercive control and stalking are much the same thing. Controlling or coercive behaviour is constructed as a kind of stalking within a relationship. The purpose of the new law on controlling or coercive behaviour is simply to overcome the barrier put into place by the Court of Appeal and the House of Lords - in other words, to criminalise 'stalking within a relationship' in the same way that the PHA criminalises 'stalking outside a relationship'. This shows a misunderstanding of both coercive control and stalking as empirical phenomena; it also assumes that this boundary is a useful marker around which to delineate behaviour that is coercive and controlling from that which is not.

Secondly, on the question of coercive control and physical violence Buckland says:

> In the consultation we identified a gap in the law - behaviour that we would regard as abuse that did not amount to violence. Violent behaviour already captured by the criminal law is outside the scope of the offence. Within the range of existing criminal offences a number of tools are at the disposal of the police and prosecution, which are used day in and day out. We do not want duplication or confusion; we want an extra element that closes a loophole.[49]

He thus adopts the assumption made previously by the Home Office that coercive control, like stalking, is behaviour that by definition does not involve physical violence. This is, as has been stated, empirically incorrect. Perhaps the thread that connects all of the above is his last sentence: 'we want an extra element that closes a loophole'.[50] It is possible that in his desire for an 'extra element' he is over influenced by the 'loophole'.

[47] HC Deb, 20 January 2015, Vol 591, Col 171.
[48] HC Deb, 20 January 2015, Vol 591, Col 172.
[49] Ibid.
[50] Ibid.

In other words, the Attorney General appears to construct his understanding of controlling or coercive behaviour around a legal lacuna that he has previously identified, and not the other way around. It would have made more sense to reverse that process, to begin with an understanding of coercive control, and then conduct a review of legislation. By approaching the project in terms of a legislative gap rather than as a (relatively) newly recognised form of behaviour in need of a fresh approach, Buckland reified much of what was unhelpful about the old regime. The reporting of the new offence in the legal press at the time confirmed this impression, for example:

> Section 76 of the Serious Crime Act 2015 … creates an offence of controlling or coercive behaviour in an intimate or family relationship. The new offence is designed to close a gap in the law surrounding patterns of controlling or coercive behaviour in ongoing intimate or family relationships.[51]

In any event, the clause on controlling or coercive behaviour generated significant cross-party agreement and was adopted as the Serious Crime Act 2015, s 76:

Controlling or coercive behaviour in an intimate or family relationship
(1) A person (A) commits an offence if
> (a) A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive,
> (b) at the time of the behaviour, A and B are personally connected,
> (c) the behaviour has a serious effect on B

I use the rest of this chapter to reflect on the constituent parts of section 76. Throughout, I report on how section 76 has been interpreted by the courts so far, drawing on my interviews with some of the judges and police who have been involved with these early cases, and the sentencing decisions that have been reported to date. The last part of the chapter concludes with a summary of the relevant, (to this chapter), changes brought in by the DAA and some suggestions for further reform.

Section 76(1)(a) the conduct element of the offence

Repeatedly or continuously

Section 76(1)(a) deals with the criminal conduct itself. The first innovative step is the abandonment of any reference to a "course of conduct". The original intention was to use the PHA course of conduct model, or to define the conduct element around a single "incident" of

[51] Joanne Clough, 'Criminal Law Legislation Update' [2016] Journal of Criminal Law 3, 3.

controlling or coercive behaviour.[52] The inadequacy of the course of conduct model, and the tendency of some judges and legal academics to 'lapse back'[53] into incident specific analysis, was highlighted in chapter three. Instead, section 76(1)(a) states that A commits an offence if A 'repeatedly or continuously' engages in controlling or coercive behaviour. This aroused suspicion in the legal literature, with the meaning of repeatedly or continuously causing concerned questions such as: 'how consistent does D's controlling or coercive behaviour have to be in order for it to be repeated or continuous?'.[54]

In fact, repeatedly and continuously appear to be given their ordinary meanings and this marks significant progress. It allows the victim to move away from dates/times of "incidents" of control, and instead take a more contextual approach, which is more in line with the 'chronic'[55] nature of coercive control as explained in chapter one. This conclusion, (that the move away from an incident specific focus is workable and working), is supported by a review of the first 107 section 76 cases which concluded: 'None of the reported cases in our research suggests that there have been any noticeable issues in relation to the prosecution needing to establish particulars such as dates, times and locations for alleged behaviours'.[56]

Judge Little, who has presided over three section 76 trials, agreed that juries understand and like the wording 'repeatedly or continuously'. She felt that it was appropriate to move away from the course of conduct approach taken by the PHA: 'Harassment is a different thing - there has to be that - minimum number before it can be considered to be harassment, but coercive and controlling behaviour is a different thing.'[57] It is possible that the new wording successfully allows for a move away from the tendency for judges to 'lapse back'[58] into an incident specific focus.

Lack of a definition of 'controlling or coercive behaviour'

[52] Serious Crime Bill 2014-2015, Notices of Amendment 7 January 2015, House of Commons Public Bill Committee; Serious Crime Bill 2014-2015 Written Evidence (22 January 2015) SC12 as cited in Bettinson and Bishop, Discrete Offence n42 191.
[53] Charlotte Bishop, 'Domestic Violence: The Limitations of a Legal Response' in Sarah Hilda and Vanessa Bettinson (eds), *Interdisciplinary Perspectives on Protection, Prevention and Intervention* (Palgrave Macmillan 2016) 68.
[54] Karl Laird, 'Parts 5 and 6 of the Serious Crime Act 2015 - More Than Mere Miscellany' [2015] Criminal Law Review 789, 800.
[55] Tanya Palmer, 'Failing to See the Wood For the Trees: Chronic Sexual Violation and the Criminal Law' 2020 84(6) The Journal of Criminal Law 573, 573.
[56] Paul McGorrery and McMahon, 'Criminalising "the Worst" Part: Operationalising the Offence of Coercive Control in England and Wales' (2019) 11 Criminal Law Review 957, 963.
[57] Interview with Judge Little (20 March 2018) 3.
[58] Bishop, Domestic Violence n53 68.

An 'interesting anomaly'[59] with the conduct element, however, is the lack of a definition of controlling or coercive behaviour. The phrase 'controlling or coercive' in 1(a) is given no further explanation. Even the construct of 'controlling or coercive' is awkward, with the use of the conjunction 'or' potentially suggestive of a further fragmentation of meaning. In fact, 'or' as a conjunction can be used to connect possibilities as well as alternatives, and thankfully there has been no suggestion to date in either the academic or the policy based literature that the government's intention is to fragment coercive control into 'controlling' and 'coercive' behaviour as alternatives from a legislative/crime category perspective.

The statutory guidance issued by the Home Office further to section 77, (the 'Statutory Guidance'), does define 'controlling' behaviour and 'coercive' behaviour separately, but there is no indication that there is an expectation that the one will exist without the other, rather that they work together to encompass a behaviour that is criminal via its manifestation of both. Stark himself, while he describes the different aspects of coercive control separately in his book does not intend the reader to assume that the 'coercion' and the 'control' that make up coercive control can exist in isolation.[60] Certainly the possibility of "controlling behaviour" existing as a separate phenomenon to "coercive behaviour" was not raised by any of the survivors, Independent Domestic Violence Advisers ('IDVAs'), police or judiciary that I spoke to while researching this book. It is also not raised by the Court of Appeal in any of the first thirty or so reported cases on section 76.

A clumsy construction notwithstanding, early research into implementation of the new offence suggests that the lack of definitional clarity is a problem, because it means that services do not understand controlling or coercive behaviour and are not prepared to report, prevent or prosecute it as a result.[61] The Attorney General explained the decision not to include a definition of controlling or coercive behaviour as follows:

> The Government's new clause has no reference to domestic violence or domestic abuse. That is deliberate. We are dealing with specific behaviour that can be characterised as coercive or controlling, but that should not be the subject of over-prescriptive statutory definition, which would do a disservice to victims… we did not fall into that trap when it came to the law on stalking and harassment. We should not fall into it now with the law on coercive and controlling behaviour within the context of domestic abuse.[62]

[59] Bettinson and Bishop, Discrete Offence n43 192.
[60] Stark, Coercive Control n1 228.
[61] Cassandra Wiener, 'Seeing What Is Invisible in Plain Sight: Policing Coercive Control' (2017) 56(4) Howard Journal of Crime and Justice 500. See also Iain Brennan, 'Service Provider Difficulties in Operationalizing Coercive Control' (2019) 25(6) Violence Against Women 635.
[62] HC Deb, 20 January 2015, Vol 591, Col 172.

In fact, the issue of how to define harassment and/or stalking caused Parliament considerable difficulty in the context of the PHA, as was explained in chapter three. The decision not to define stalking was eventually reversed, (as explained above), by the Protection of Freedoms Act 2012. A definition of stalking was inserted into the PHA precisely because it was recognised that stalking consists of interlinking and complicated behaviour patterns and therefore is especially in need of clear labelling. There was a realisation that the PHA as it stood, without a definition, missed an opportunity to fulfil the educative function of the criminal law. It is thus odd that the Attorney General states, 'We did not fall into that trap when it came to the law on stalking and harassment'. If indeed there was a trap, it was not to define stalking and harassment, a misstep that was corrected with the "list" approach introduced by the Protection of Freedoms Act 2012.

The final reason that a lack of a definition was a mistake relates to the confusion over what controlling or coercive behaviour *is*. Does it incorporate physical abuse? As stated above Stark is absolutely clear on this: it does.[63] Michael Johnson, also a prominent academic commentator on coercive control, (whose work is reviewed in detail in chapter one), is also clear that coercive control usually includes physical and non-physical behaviours.[64] My empirical work with survivors and IDVAs supports Stark and Johnson on this.

The tension between the Statutory Guidance, and the new definition of domestic abuse that is set out in the DAA, suggests that there is ambiguity at a Home Office level as to what behaviours should be charged further to section 76, and what should be charged separately.[65] The definition set out in the Statutory Guidance is clear: controlling or coercive behaviour includes behaviours that are physically violent as well as behaviours that are psychologically and/or emotionally abusive. Furthermore, on the following page, under the heading 'Types of Behaviour', the Statutory Guidance helpfully lists behaviours that may be associated with controlling or coercive behaviour. It explains that the types of behaviours listed 'may or may not constitute a criminal offence in their own right'. Both physical and sexual violence are

[63] Stark, Introduction to the Second Edition n44.
[64] Michael Johnson, *A Typology of Domestic Violence Intimate Terrorism, Violent Resistance and Situational Couple Violence* (University Press 2008).
[65] Home Office, 'Controlling or Coercive Behaviour in an Intimate Relationship Statutory Guidance Framework' (Home Office December 2015) available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482528/Controlling_or_coercive_behaviour_-_statutory_guidance.pdf> accessed 7 May 2021.

included in the list.

As I explain below, however, the new definition of domestic abuse in the DAA lists 'controlling or coercive behaviour' as a bullet point alongside physical and sexual violence, suggesting that it is being constructed as something separate to physical and sexual violence. Certainly, the approach taken to date by the Crown Prosecution Service and the courts is inconsistent. A review of early sentencing decisions confirms this inconsistency. In *Barratt*,[66] for example, the Court of Appeal observes that:

> In our judgment, a sentence of 30 months' imprisonment before a reduction for the guilty plea for the offence in this case of controlling and coercive behaviour is appropriate and is not manifestly excessive, given the conduct involved. The offence involves a sustained period of abuse and violent and controlling conduct by the appellant towards his former partner. There was prolonged and serious aggression and violence.

The Court of Appeal in *Barratt*, in other words, seems to be making the assumption that controlling or coercive behaviour incorporates violent behaviour. The "conduct" which comprises the section 76 offence includes violent conduct. In *Conlon*, however, the Court of Appeal took a different approach. It said: 'The new offence targets psychological abuse in which one partner to a relationship coerces or controls the life of the other without necessarily or frequently using threats or violence.'[67] Thus in *Conlon* although the Court of Appeal leaves open the possibility that violence can be used (whether this is alongside, or as part of, the controlling or coercive behaviour is not entirely clear), the main purpose of the offence is to target psychological (non-violent) abuse.

Challen[68] is also interesting on this point. *Challen* is not a sentencing decision, but a review of a murder conviction. Sally Challen killed her husband Richard in 2010, and the Court of Appeal was asked to consider whether the criminalisation of coercive control constituted new evidence in that it encouraged a legitimisation, from a criminal law perspective, of Sally's experiences of coercive control and her resulting mental state at the time of the homicide. The Court of Appeal, therefore, was being asked to consider the impact of the introduction of the section 76 offence, and the high profile nature of the judgment makes it potentially influential and therefore important. At paragraph [35] Hallet LJ explains that:

> Parliament enacted s. 76 of the Serious Crime Act 2015 to make it a criminal offence to exercise coercive control over one's partner. S. 76 criminalises a pattern of abusive

[66] [2017] EWCA Crim 1631.
[67] [2017] EWCA Crim 2450 [26].
[68] [2019] EWCA Crim 916.

> behaviour, the individual elements of which are not necessarily unlawful in themselves.

As violence in unlawful in itself, this suggests that Hallet LJ leaning towards constructing controlling or coercive behaviour as non-violent abuse. The use of the word 'necessarily' implies a degree of ambiguity, so it could be said that Hallet LJ is not ruling out the inclusion of violent offending.

Sentencing is the subject of a full discussion later in this chapter, but present in many of the sentencing decisions is evidence of the difficulty caused by the lack of clarity with regards to what, exactly, constitutes controlling or coercive behaviour. In *Conlon,* for example, there is evidence of violence which is constructed as separate to controlling or coercive behaviour and which goes uncharged as a result. Robert Conlon was charged separately with one assault occasioning actual bodily harm, but there are numerous references throughout the judgment to his *frequently* violent behaviour to the victim. For example, paragraph 4 of the judgment states:

> While on police bail, on 8th November 2015 the appellant jumped on top of the complainant when she was in bed, she screamed and to stop her screaming the appellant put his fingers in the complainant's mouth. The neighbours again contacted the police and the appellant was arrested. On that occasion the complainant told the police the appellant controlled every aspect of her life.[69]

Paragraph 8 refers to the fact that, 'On occasions the complainant reported that the defendant had been violent to her, pinning her to the wall and shouting at her.'[70] In paragraph 13 there is a reference to the defendant punching the victim in the right breast. Paragraph 18 of the judgment reports: 'In anger he repeatedly punched the complainant to the head and face, kicked her to the back and pulled her by the hair to prevent her from leaving.'[71]

None of the references to violence in paragraphs 8, 13 or 18 are charged separately (the assault occasioning actual bodily harm charge relates to yet another violent episode). The violence exhibited by Conlon in this case is very typical of the violence in coercive control that I have described in previous chapters, and, indeed of behaviours evident in other section 76 reported cases.[72] This is a good example of a continuing mismatch between 'life' and

[69] Ibid 4.
[70] Ibid 8.
[71] Ibid 18.
[72] See, for example, *Ramskill* [2021] EWCA Crim 61; *Dalgarno* [2020] EWCA Crim 290; *Holden* [2019] EWCA Crim 1885 and *Berenger* [2019] EWCA Crim 1842.

'law' in the area of coercive control.[73] In other words, if an offence of "psychological abuse" as something separate to "physical violence" is constructed then this has the potential to mean that a significant amount of violence goes uncharged.

This point was made by the Court of Appeal in *Berenger*.[74] Joshua Berenger was charged with one count of controlling or coercive behaviour and one count of assault occasioning actual bodily harm contrary to the Offences Against the Person Act 1861, s47. The Court of Appeal observed that:

> That controlling behaviour took a number of forms of an essentially non-violent, but nevertheless, coercive kind. However, in addition he had also been violent towards her on a number of occasions … he had on occasions pulled her hair, ripped her clothing, punched her to the face, threatened her with a knife, spat in her face, stamped on her, thrown a drink on her, elbowed her to the face and head butted her.[75]

This use of 'in addition' in the second sentence suggests that the controlling or coercive behaviour is being constructed as separate to physical violence. The Court of Appeal recognises that this is problematic:

> For reasons which we have not had to investigate, these serious offences of violence were charged as coercive or controlling behaviour which is a new offence designed to capture conduct of that description specifically when it does not involve some other more serious substantive offence.[76]

The "solution" proposed by the Court of Appeal in this case is that violence should be properly charged separately.[77] Especially in relation to the apparently "low-level" violence that is so typical of coercive control, this is a step backwards. As is explained in some detail in chapter two, the incident specific nature of the Offences Against the Person Act 1861 is inconsistent with victims' experiences of physical abuse that are 'chronic'[78] - that is consistent and ongoing.

If it is not always possible to charge low level violence separately, the same cannot be said, perhaps, about one off serious incidents of violence that amount to inflicting grievous bodily harm. For the same reasons that were put forward in the preceding chapter in the context of rape, there is an argument to suggest that serious violence that amounts to grievous bodily

[73] Tuerkeimer, Recognizing and Remedying the Harm of Battering n2 980.
[74] [2019] EWCA Crim 1842.
[75] Ibid [3].
[76] Ibid [12].
[77] Ibid [22].
[78] Palmer, Failing to See the Wood For the Trees n55 573.

harm could - or even should - be charged separately. Survivors that were interviewed for this research tended to remember specific incidents of serious violence in a way that is more compatible with an incident specific focus. Is the infliction of grievous bodily harm so discrete as a wrong that it becomes a separate offence? I argued in the previous chapter that the taking of someone's life is an example of a wrong that is so serious, so qualitatively different as a wrong both in terms of the culpability of the defendant and the harm done to the victim that it *has* to be dealt with as a separate offence. I said that arguably the same could be said for the crime of rape. Could the same be said for the infliction of grievous bodily harm? I come back to this point with the discussion of the DASA in the following chapter.

To conclude, if the physical and psychological aspects of coercive control are separated this makes it more difficult to prosecute both fragments of coercive control. If the physical abuse is prosecuted separately further to the Offences Against the Person Act 1861, survivors will still have to pinpoint ongoing abuse to specific dates on which particular assaults took place. This is difficult in the context of supposedly "low-level" physical abuse that is 'chronic',[79] that is ongoing. Coercive control is harder to understand in the absence of the physical abuse that often underpins it. In other words, 'the binary juxtaposition of physical and psychological/emotional abuse fails to capture the embodied physicality and brutality of coercive control'.[80] As explained in chapter one, the victim obeys the perpetrator because she has reason to be frightened of him. The physical assaults are often (not always) the reason.

Early research into media reports of the first cases suggest that police and CPS are struggling to be consistent on the question of how to charge section 76. Should "incidents" of violence be charged separately? Should "on-going" violence be simply 'part of the factual matrix constituting the course of controlling or coercive conduct'?[81] Or can supposedly "low-level" day-to-day violence be ignored altogether?

The authors of this early research conclude that, 'Given this apparent conflict between the sociological and legislative conceptualisations of coercive control, it is perhaps unsurprising that the various police forces in England and Wales have taken what seem to be quite

[79] Palmer, Failing to See the Wood For the Trees n55 573.
[80] Adrienne Barnett, '"Greater Than the Mere Sum of its Parts": Coercive Control and the Question of Proof' [2017] Child and Family Law Quarterly 379, 380.
[81] McGorrery and McMahon, Criminalising "the Worst" Part n56 964.

disparate approaches to charging alleged offences.'[82] Some forces charge violence separately.[83] Some put it forward as evidence of the controlling or coercive behaviour.[84] In some cases there is no mention of physical or sexual violence,[85] which could mean that there was not any, or could mean that the relevant force has decided to leave it out altogether.

Statistics published by the Ministry of Justice show that in 2018, half the defendants who were prosecuted for coercive or controlling behaviour were also prosecuted for common assault and battery.[86] The Home Office, in its early review of section 76, concludes that there is 'insufficient evidence to confidently assess what is driving the current practice'.[87] It surmises that it could be that it is easier to prosecute 'controlling or coercive behaviour' when it is charged alongside other offences that are perceived as less difficult to prosecute. Another explanation for the charging practices put forward by the Home Office review is the low maximum sentence tariff of the section 76 offence,[88] (which I come back to in more detail below). Finally, it could be 'a lack of understanding among the CJS that these other crimes could be charged and prosecuted as part of coercive or controlling behaviour'.[89]

Earlier, in the same review, the Home Office captures this ambiguity perfectly. It states:

> While CCB (coercive and controlling behaviour) (sic) often includes both physical and non-physical forms of abuse, a key aim of the creation of the offence was to provide a clearer legal framework to capture patterns of non-physical domestic abuse, where were not prosecutable under alternative offences in the same way that forms of physical abuse might be.[90]

The Home Office is contrasting in one sentence the reality of the behaviour (physical and non-physical) with the fragmentation effect of section 76, as it only captures, or only tries to capture 'patterns of non-physical domestic abuse'. In my view, it is not surprising that there is a 'lack of understanding' in the Criminal Justice System as to how and what to charge.

In this respect there may be lessons to learn from Scotland, who have taken a different approach. The DASA received Royal Assent on 9 March 2018. Referred to as, 'One of the

[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] Home Office, *Review of the Controlling or Coercive Behaviour Offence* (Home Office Research Report 122, Home Office 2021) 26.
[87] Ibid.
[88] Ibid.
[89] Ibid.
[90] Ibid. 11.

most radical attempts yet to align the criminal justice response with contemporary (feminist) conceptual understandings of domestic abuse as a form of coercive control'[91] newspapers reported on its novel approach - ie that a central feature of this new Scottish law is that, 'The legislation will cover not only physical abuse but psychological abuse and controlling behaviour'.[92] In fact, extensive research was conducted by the Scottish Parliament Justice Committee over a ten year period prior to the drafting of the Bill, which I return to and examine in the following chapter.[93]

Section 76(1)(b) The Circumstances Element of the Offence

Section 76(1)(b) originally dealt with the necessary circumstances of the offence. At the time of the behaviour, defendant and victim must be 'personally connected'. As originally drafted, subsection 76(4) stated that two people were personally connected if they were in an intimate personal relationship (but not necessarily living together); or, if they lived together and were members of the same family; or, if they lived together and had previously been in an intimate personal relationship. This was at once too narrow and too wide. It was too narrow because the so-called "residency requirement" meant that section 76 was not always available to protect a victim who was trying to separate from her abusive partner. The partner who has ended her relationship and who is no longer living with the perpetrator did not come within section 76(4). It was too wide because it included family relationships other than intimate partnerships, and it is not clear that broader family relationships are relevant in the context of coercive control.

The difficulties with using the moment of separation as a legal boundary were explored in some detail in chapter three. Firstly, separation rarely exists as a transactional moment.[94] Secondly, if identifying the moment of separation is difficult, it is also, from the survivor perspective, not necessarily that significant. This is because the perpetrator's controlling intent does not change with the end of the relationship.[95] Karen comments: 'I am obviously still "in it", but obviously most people are anyway as it doesn't actually generally go away, that's the sad thing.'[96] Finally, leaving a relationship is dangerous. This is because the

[91] Michele Burman and Oona Brooks-Hay, 'Aligning Policy and Law? The Creation of a Domestic Abuse Offence Incorporating Coercive Control' (2018) 18(1) Criminology & Criminal Justice 67, 78.
[92] Ibid.
[93] See n34, in particular Justice Committee, Stage One Report n33 para 47. See also interview with Marsha Scott, Chief Executive of Women's Aid (Edinburgh, 22 October 2019).
[94] Deborah Tuerkheimer, 'Breakups' (2013) 25 Yale Journal of Law and Feminism 51; interview with Karen (6 October 2016); interview with Kim (24 November 2016); interview with Sarah (29 June 2016) 1.
[95] Sarah, Survivors Focus Group (8 September 2016).
[96] Karen n94 1.

controlling behaviours often intensify once a perpetrator fears that his relationship with his victim is over, and separation is a well established homicide trigger.[97] It is not a good time to be withdrawing protection and support.

Judge Harwood became aware of this section 76 limitation - that it does not apply where a couple have separated and are no longer living together - for the first time in her interview with me. She commented:

> Well that is definitely a change that needs to happen. As you will know from your research, and I know from my limited experience, very often the controlling and coercive behaviour is ongoing … If you have had the strength to leave - we are suddenly not supporting those people? They have got the legislation wrong, haven't they as they are probably missing about 50 or 60% of the people who need to be protected? Those that manage that to escape but are still being controlled? That has got to be wrong. We have to change the law.[98]

Early research into the first media reports of cases concluded that limiting the application of section 76 to current partners in this way caused police and the Crown Prosecution Service considerable confusion. In some cases, behaviour which post-dated the relationship appeared to be included in the evidence put forward in court of the section 76 charge.[99] This had potentially serious implications for the validity of the criminal sanction.

I used these findings to assist leading domestic abuse charity, Surviving Economic Abuse, with its excellent campaign to use the Domestic Abuse Bill 2021 to change the faulty definition of 'connected persons' in section 76. We were not successful at the Commons stage of the debate in June 2020. This was partly, to be fair, because the Public Bill Committee wanted to wait for the Home Office review into the section 76 offence that was, at that time, about to be published. It was also partly because the Justice Minister Alex Chalk MP was under the misapprehension that the stalking offences provided adequate protection for the victims of coercive control post separation. We organised a coalition of supportive peers who rallied behind us during the parliamentary debates. At the Second Reading of the Domestic Abuse Bill, in the House of Lords, Baroness Hayman said:

> Cassandra Wiener… has pointed out that the residency requirement for protection under Section 76 of the Serious Crime Act means that an abused partner is not protected under the Act when the couple stop living together. Yet there is mounting evidence that violence, the danger of injury and even death, actually increase at the point when an abused partner leaves the shared home. While some continuing abuse can be pursued by police through legislation

[97] Tuerkheimer, Breakups n94 15.
[98] Interview with Judge Harwood (21 May 2018) 9.
[99] McGorrery and McMahon, Criminalising "the Worst" Part n56.

> on harassment and stalking, not all forms of abuse are covered, as was pointed out earlier in the debate, particularly in relation, for example, to financial abuse and coercive control around childcare arrangements.[100]

On 22 February 2021, we asked the Domestic Abuse Commissioner, Nicole Jacobs, to host an online (mid-pandemic) round table. Nicola Sharp Jeffs (CEO, Surviving Economic Abuse) and I presented to ten peers, together with representatives from the Home Office and the Ministry of Justice. Using the story of an expert by experience, Nicola and I were able to demonstrate how the existing definition of 'connected persons' in section 76 hampered police efforts to protect women when they were at their most vulnerable. On Monday 1 March, the Home Office announced that it was adding a new clause to the Domestic Abuse Bill which would extend the definition of 'connected persons' in section 76 to include ex partners no longer living with victims. Clause 69 of the Domestic Abuse Bill 2021 duly replaces the faulty section 76(1)(b) with the improved section 76(6). In other words, clause 69 of the Domestic Abuse Bill 2021 amends section 76 by removing the residency requirement so that ex partners no longer living together are 'personally connected' for the purposes of the controlling or coercive behaviour offence. This is welcome progress.

Another difficulty with the old subsection 76(1)(b) that has not been improved is the way it defines 'members of the same family' for the purposes of section 76(4). This is the part of the definition that is unnecessarily wide. The defendant and victim were held to be members of the same family, and therefore personally connected, if they were 'relatives' and lived together (section 76(6)(c)). The new clause 69 of the Domestic Abuse Bill 2021 extends this further - the removal of the residency requirement means that in the future, defendant and victim will be personally connected if they are related, whether or not they live together. There is, as yet, not enough research on the important question of the extent to which coercive control might apply to family relationships. It is likely that coercive control is perpetrated almost always by men who are, or who have been, in an intimate relationship with their victims. Certainly data from the early convictions suggests that the majority of defendants (between 97% and 99%) are overwhelmingly male and are partners, or ex partners, of the victim.[101] From the clear labelling perspective it is therefore detrimental to draft the offence so widely that it could include, for example, an overbearing parent or a

[100] Hansard HL Deb 5 Jan 2021, vol 809, col 100.
[101] Home Office, Review n86 23.

controlling sibling. Some police expressed confusion on this point at interview.[102]

There have been prosecutions of cases involving non partners in England and Wales, some of which have been reported in the media. Often in these cases the perpetrator was convicted of extracting money from his parents/adopted parents. Many of the indicators of coercive control as set out in chapter one (the coercive intent, for example, or the desire to control victim behaviour) appear to be absent.[103] My concern is that if we are unnecessarily extending the legislation to include other family relationships, we could be diluting and therefore diminishing our response to coercive control. I come back to this point when I review the approach taken by the Scottish government in the next chapter.[104]

Section 76 (1)(c) The Result Element of the Offence

Section 76(1)(c) is the result element of the crime and is defined in terms of the effect that the perpetrator's behaviour has on his victim. Section 76(1)(c) states that the controlling or coercive behaviour is an offence only where it has a 'serious effect' on the victim. 'Serious effect' is defined in subsection (4): if it causes the victim to fear, on at least two occasions, that violence will be used against the victim or if it causes the victim serious alarm and distress which has a substantial adverse effect on her usual day-to-day activities. This mirrors the wording of the new PHA, s 4A (as inserted by the Protection of Freedoms Act 2012) that was discussed above. Using this construct thus has the advantage that it is familiar, which has the potential to be helpful for police and prosecutors.

Familiarity is only helpful, however, if the harm experienced by the victims of coercive control is properly captured by section 76(1)(c). The case law on the offences against the person regime that I referred to in chapter two limited the recognition of emotional distress to

[102] See Detective Constable James' comments on the difficulties of trying to use s. 76 to prosecute in the context of a difficult mother-daughter relationship: Police Focus Group (30 November 2016) 3.
[103] Crown Prosecution Service, 'Man Sentenced For Controlling and Coercive Behaviour Against His Mother' (26 March 2019) available at <https://www.cps.gov.uk/london-north/news/man-sentenced-controlling-and-coercive-behaviour-against-mother> accessed 26 June 2019; Andrew Bardsley, 'This Bully Terrorized His Adoptive Mother and Demanded Booze Money' *Greater Manchester News* (Manchester 26 February 2019) available at <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/daniel-beech-openshaw-manchester-court-15885131> accessed 26 June 2019; Emily Walker, 'Crawley Man Banned From Seeing Mother After Months of Bullying' *The Argus* (Brighton 19 March 2018) available at <https://www.theargus.co.uk/news/16097510.crawley-man-banned-from-seeing-mother-after-months-of-bullying/> accessed 26 June 2018; Stuart Able, 'The Evil Grandson Who Controlled His Own Family and How They Got Him Back' *The Plymouth News* (Plymouth 6 June 2018) available at <https://www.plymouthherald.co.uk/news/plymouth-news/evil-grandson-who-controlled-family-1647659> accessed 26 June 2019.
[104] The Scottish Government, 'A Criminal Offence Of Domestic Abuse Scottish Consultation Paper' (Scottish Government, March 2015) available at <https://www2.gov.scot/Resource/0049/00491481.pdf> accessed 28 June 2019, 6.

diagnosed clinical disorders. It was suggested that the PHA was in part a political response to Parliament's perception (guided by the media) of the inadequacy of the old offences against the person regime to deal with such emotional distress. Social science analysis of the victim response to coercive control indicates that it is complicated: such responses incorporate cognitive, emotional, behavioural and physiological reactions.[105]

While the definition of 'adverse effect' does not incorporate all of this complexity, it should be remembered that criminal justice recognition of purely psychological harm is still recent. It would be unrealistic to expect section 76 to incorporate all of the nuances of the extensive harms suffered by victims. Emotional harm is, as has been pointed out, difficult to operationalise.[106] As I explained in chapter two, the only psychological harm recognised in an Offences Against the Person Act 1861 prosecution is harm that constitutes a clinical mental illness. To the extent that section 76(1)(c) does go some way towards addressing the 'cloaking'[107] of any emotional response that is not a clinical condition, it is progress.

However, the wording of the two limbs of the result element of section 76 seem a better description of the harm experienced by victims of the stranger stalking type offences for which they were originally intended, than for the harm experienced by victims of coercive control. The first limb, if it causes the victim to fear that violence will be used against her on two occasions, brings with it the incident specific focus reviewed in chapter three with all of its attendant problems.[108] The generalised fear induced by coercive control cannot always be located to a singular threat or violent event. The fear experienced by the victim is not always (although often can be) of violence. She might fear disgrace. Or shame. Her fear is most likely to be generalised, in response to the 'state of siege'[109] described by survivors in chapter one.

The second limb, 'if it causes the victim serious alarm or distress that has a substantial adverse effect on her day-to-day activities' has more potential. Even this wording, however,

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[105] Sara Simmons et al, 'Long-Term Consequences of Intimate Partner Abuse on Physical Health, Emotional Well-Being and Problem Behaviors' (2018) 33(4) Journal of Interpersonal Violence 540; see also Wiener, Seeing What is Invisible in Plain Sight n61.
[106] Marilyn McMahon and Paul McGorrery, 'Criminalising Emotional Abuse, Intimidation and Economic Abuse in the Context of Family Violence: the Tasmanian Experience' (2016) 35(2) University of Tasmania Law Review 1; Sandra Walklate and Kate Fitz-Gibbon, 'The Criminalisation of Coercive Control: The Power of Law?' (2019) 8(4) International Journal for Crime, Justice and Social Democracy 94.
[107] Tuerkheimer, n1 980.
[108] McGorrery and McMahon, Criminalising the "Worst" Part n56.
[109] Mary Ann Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome' (1992) 21 Hofstra Law Review 1191, 1208.

focuses on the state of mind of the victim, her 'alarm or distress'. This runs the risk of necessitating medical and psychological evidence as to depression or anxiety, for example.[110] It is also too imprecise.

Specialist police interviewed for this project found the second limb too broad. Detective Constable Canford, for example, a specialist domestic abuse officer, explained that 'The wording is too broad. I think that it is far too broad… debatable and poorly defined'. When I questioned him as what he meant by this, Detective Constable Canford explained that, 'The issue is less about the serious adverse effect, and more about the evidence of control and the nature of the control'.[111] In other words, Detective Constable Canford felt from an investigative perspective that the behaviour of the perpetrator is more relevant than the mindset of the victim.

Stark conceptualises the harm experienced by victims of coercive control as political: 'A deprivation of rights and resources that are critical to personhood and citizenship'.[112] Alafair Burke, who has written extensively about domestic abuse legislation in the US, argues for a doctrinal conceptualisation of the harm experienced as 'restricting the victim's "freedom of action".[113] Jennifer Youngs and Charlotte Bishop both advocate this approach, Bishop arguing that the 'freedom of action' construct 'is a useful and preferred approach that focuses less on the mental capacity of the victim and her reactions to the offending behaviour. It more adequately reflects the nature of coercive control as a liberty crime'.[114]

I agree with Bishop and Youngs. Survivors who took part in the focus group expressed the harms they experience in terms of what they felt they had lost, (their freedom), rather than in terms of an impact on day-to-day activities. A statute could capture this by, for example, listing examples of ways in which a victim's freedom might be constrained, such as the dependence she might have on her abuser, the isolation she might be experiencing, the economic abuse she might be experiencing. The DASA, s 2 defines abusive behaviour in exactly this way. Subsection 3 lists the 'relevant effects' on the victim's behaviour both in

[110] Susan Edwards, 'Coercion and Compulsion - Re-imagining Crimes and Defences' [2016] Criminal Law Review 876.
[111] Interview with Detective Constable Canford (20 November 2017) 4.
[112] Stark, Coercive Control n1 5.
[113] Alafair Burke, 'Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization' (2007) (75) George Washington Law Review 558, 602.
[114] Bettinson and Bishop, Discrete Offence n43 194. Jennifer Youngs, 'Domestic Violence and the Criminal Law: Reconceptualising Reform' (2015) 79(1) Journal of Criminal Law 55.

terms of restrictions on her liberty (isolation, dependence, being punished) *and* emotional distress (being afraid).

Finally, the resilient survivor is the survivor who, against the odds, manages to continue with her roles at work and/or in the home without displaying visible signs of distress. This has, in fact, proved to be a thorny issue. Judge Harwood, when asked about the result element, commented:

> I think that this is unnecessary for this offence. Yes, yes so if you are someone who is able to cope with it, and it hasn't affected your daily life. You are still able to go to work, and see friends. The fact that you're living in coercive or controlling relationship, the court will say this hasn't had enough of an effect on you yet, terribly sorry, we are not going to be supporting a prosecution. That can't be right.[115]

Recent media reports seem to support Judge Harwood's concern. Paul Measor subjected his partner Lauren Smith to horrific abuse, teaching their toddler son to tell her to "fuck off" and spitting in her face. Nevertheless, District Judge Helen Cousins acquitted him, (in my view, from the limited amount of information I have gleaned from the media, correctly), of a section 76 offence. District Judge Cousins ruled that while Paul Measor's actions were 'disgraceful', they did not have a 'serious effect' on Lauren's life. District Judge Cousins said:

> I have to be satisfied the behaviour was controlling, coercive and had a serious effect on the victim. There's no doubt the victim is a strong and capable woman. It is to her credit that I cannot find his behaviour had a serious effect on her in the context of the guidelines.[116]

The women's sector responded angrily with Women's Aid calling for judges to be 'sent for training on the Serious Crime Act 2015'.[117] Suzanne Jacob, Chief Executive of SafeLives, argued immediately after the ruling that 'Yes, you can be strong and still be a victim of coercive control'.[118] All of the points Jacob makes in her article - that there is a link between assault and coercive control, that leaving your abusive partner shouldn't be a justification for not holding that partner liable for his crimes, and that 'This analysis of Lauren's strength is entirely subjective and plays into the narrative of what a "perfect victim" should look like'[119]

[115] Judge Harwood n98 4.
[116] Jeremy Armstrong, 'Violent Boyfriend is Cleared After Judge Says Partner Is 'Too Strong' To Be Victim' *The Mirror* (London 23 November 2018).
[117] Ibid.
[118] Suzanne Jacob, 'Yes, You Can Be "Strong" and Still Be a Victim of Coercive Control' *The New Statesman* (London 27 November 2018).
[119] Ibid.

- are entirely accurate. But the problem lies with the wording of the offence, and not in District Judge Cousins' application of the law.

Irrespective of how the harm is defined, therefore, there is a second question that is more fundamental. Is the prominent role that harm plays in the construction of s.76 appropriate? The Home Office reported in its review that, 'The requirement for proof of the "serious effect" that the controlling or coercive behaviours have had on the victim likely creates further difficulties in gathering and providing the necessary evidence for the CCB (controlling or coercive behaviour) offence.'[120] Or is a focus on the response of the victim, rather than the actions of the perpetrator, in the context of coercive control unhelpful? One of the concerns expressed by commentators researching the likely legal implications of the criminalisation of coercive control is that:

> People who do not understand how entrapment operates - because they have not personally lived the manner in which coercive control can inhibit resistance and who have life experiences that have led them to expect personal safety at all times and for whom calling the police will always be an effective means of achieving this - can be vehement and entrenched in their judgments of victims.[121]

Many of the judges interviewed for this research project showed, in fact, an impressive understanding of how entrapment operates. No judge was 'vehement' in his or her judgment of victims. Nevertheless, it is fair to say that their appreciation of how difficult it might be for the victim to portray her experience of harm in the courtroom was, as is to be expected, more limited than that of other criminal justice agents such as IDVAs or police.

Police spend time with survivor-witnesses on an almost daily basis in the run up to a trial. Judges do not speak to witnesses outside the courtroom, and the judicial perspective is necessarily detached. While judges interviewed for this project tried to be sympathetic, they admitted frustration at what they perceived to be the victim's inadequacies as a witness. In other words they expressed frustration that the victim-witness is frequently unable to deliver what is needed in order to persuade a jury of the defendant's guilt. Judge Little, for example emphasised that, 'I am not unsympathetic as I know the reasons that very often women are unwilling [to give evidence], because they have been rather ground down by the situation in

[120] Home Office, Review n86 (my brackets).
[121] Julia Tolmie, 'Coercive Control: To Criminalize or Not to Criminalize?' (2018) 18(1) Criminology and Criminal Justice 50, 9.

which they've been'.[122] At the same time Judge Little expressed frustration with what she called 'woolly witnesses'.[123] She explained:

> From a judge's point of view the difficulties are often in getting women to come to court and to speak fully and openly and honestly about their experiences - probably the most frustrating thing… They come to court, and they are a bit wishy washy and they are trying to water it down because they still love him and so trials can be very frustrating.[124]

Judge Little's perception that victim/witnesses are 'woolly' or 'a bit wishy washy', and that they 'water it down because they still love him' might be entirely fair, but it must be remembered that an abusive partner who is not in custody, or on bail with no-contact conditions, may still have access. That a victim-witness finds it difficult to testify against an abusive and controlling partner who still has access to her might be because she is afraid.[125] It could also be that it is particularly complicated to portray the effect of the perpetrator's behaviour in an adversarial court of law. Adversarial justice, it has been pointed out, is not sensitive generally to the needs of victims experiencing trauma.[126] Coercive control involves the repetition of stress for the victim in a way that has a direct impact on the memory function.[127] Complications arising from the interplay between trauma, the giving of testimony and the requirements of adversarial justice process are particularly acute in the case of the victim of coercive control.

The process of cross-examination is a good example of the "catch-22" situation experienced by the coercive control victim in court. There is much empirical evidence that suggests that the way in which a witness gives evidence affects jurors' perception of their credibility.[128] Furthermore, giving cross-examination is highly stressful. In fact, the experience is challenging 'even for professional witnesses (eg police officers and experts)'.[129]

The first hurdle, therefore, is for the coercive control victim to 'maintain her perspective under cross-examination'.[130] If she cannot hold her ground she, like all victims of crime

[122] Judge Little n57 1.
[123] Ibid. 2.
[124] Ibid. 1.
[125] Antonia Cretney and Gwynn Davis, 'Prosecuting "Domestic" Assault' [1996] Criminal Law Review 162.
[126] Louise Ellison and Vanessa Munro, 'Taking Trauma Seriously: Critical Reflections on the Criminal Justice Process' (2017) 21(3) International Journal of Evidence and Proof 183.
[127] Vanessa Bettinson, 'Adding to the Domestic Abuse Criminal Law Framework: the Domestic Abuse Act 2021' (2022) Criminal Law Review 92.
[128] For a full discussion of the impact of the way in which a victim, post trauma, gives evidence on a jury see Louise Ellison and Vanessa Munro, 'Reacting to Rape Exploring Mock Jurors' Assessments of Complainant Credibility' (2009) 49 British Journal of Criminology 202.
[129] Ellison and Munro, Taking Trauma Seriously n126, 192.
[130] Tolmie, Coercive Control n121 7.

whose trauma interferes with their ability to produce evidence under pressure, will have failed in her role as prosecution witness.[131] But the victim of coercive control has an additional evidential hurdle to surmount. This is because, if she *can* hold her own, it may 'undercut her claim to have been the victim of coercive control'.[132] Even where a victim is able to give evidence 'it is difficult… to present a complex account of women as both oppressed and struggling'.[133] What Stark refers to as the 'victimisation narrative' allows us, as he puts it, a 'personal buffer'. 'Picturing battered women as pathetic, tragic and helpless allows us to act sympathetically, while remaining at a safe distance'.[134] If a woman is too competent and articulate as a witness, the court will inevitably ask 'why the victim didn't leave if the effect of the behaviour was so bad'?[135] Jen, a criminal justice IDVA who supports survivors through the trial process, put it this way: 'Fundamentally, the bottom line is judges think that she is somewhat complicit or it is her fault'.[136]

My empirical work shed some light on the issues facing victims. In the focus group that I ran with survivors I asked expressly for survivors' thoughts on their experiences of the criminal justice process. No two survivors had an identical experience, but the difficulties that they encountered included a lack of support, a lack of legal aid, and a feeling of being "bullied" all over again by police and prosecutors.[137] Underpinning all of their experiences was fear for their safety, and that of their children in the face of what they knew about perpetrator capability and the inadequacy (to their minds) of the safeguarding capabilities of the police.[138]

Judge Fern agreed that domestic abuse trials are incredibly frustrating from the judicial perspective. He said:

> Oh yes, they are a nightmare. They are a total nightmare to prosecute. Because as we know the problem with the controlling coercive relationship is that the victims of that behaviour inevitably are persuadable by the individual. I mean that is the old problem. So, what ends up happening is that we have a compete nightmare - or the prosecution which is more to the point have a complete nightmare - trying to get the witness, the complainant at that stage - to court. It's very - you end up with: do you issue witness summonses? To somebody who has

[131] For a discussion of the effect of trauma on evidence giving generally see Ellison and Munro, Taking Trauma Seriously n126.
[132] Ibid.
[133] Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90(1) Michigan Law Review 90, 161.
[134] Stark, Introduction to the Second Edition n44 30.
[135] Bettinson and Bishop, Discrete Offence n43 194.
[136] Interview with Jen (15 January 2016) 14.
[137] Survivors Focus Group (8 September 2016).
[138] Ibid.

> clearly suffered a great deal? Is that the best way to deal with it? Often they just won't co-operate. Withdraw statements, and so it goes on, and we lose a lot of cases that cannot be prosecuted because witnesses are, for whatever reason - you don't always get to the bottom of it - persuaded not to give evidence. Whether they persuade themselves or they are persuaded.[139]

Judge Fern thus exhibits a similar mix of sympathy and frustration as that expressed by Judge Little. He recognises that victims have 'clearly suffered a great deal', but is frustrated by the 'nightmare' of trying to get victims to testify in court. Intermixed with the sympathy and frustration is, perhaps, a lack of understanding of the complexity of the survivor's situation.

Judge Fern says, for example, that the victims of coercive control are 'persuadable'. He says 'Witnesses are, for whatever reason - you don't always get to the bottom of it - persuaded not to give evidence. Whether they persuade themselves or they are persuaded'. Survivors encountered for this research project were bullied and terrorised, rather than persuaded. In fact Judge Fern recognises that he does not understand the victim's behaviour, 'you don't always get to the bottom of it', and this only adds to his frustration.

Specific research into the behavioural response of abused women has shown that victims are resourceful and strategic in what amounts to impossibly complex life situations.[140] Stark and others have vividly described how a victim will try to at once conform to the perpetrator's demands while remaining in a permanent state of hyper vigilance to keep herself and her children safe.[141] Being responsibilised as a witness entails testifying in court against her abuser, and is a difficult and potentially dangerous experience. The impact of trauma, and the way that it can cause disorientation and confusion, can undermine perceptions of credibility still further.[142]

Thus, a focus on the victim's response is unhelpful in the context of coercive control legislation because of the pressure that it puts on the victim to disclose intimate details about her emotional state when under cross examination, and possibly while living with her abusive and controlling partner. As has been pointed out, offences that are 'heavily reliant on the

[139] Interview with Judge Fern (6 March 2018) 1.
[140] Mahoney, Legal Images of Battered Women n133; Dutton, Understanding Women's Responses n109; Cathy Humphreys and Ravi Thiara, 'Neither Justice Nor Protection: Women's Experiences of Post-Separation Violence' (2003) 25(3) Journal of Social Welfare and Family Law 195; Stark, Coercive Control n1; Vanessa Bettinson and Charlotte Bishop, 'Evidencing Domestic Violence, Including Behaviour That Falls Under the New Offence of 'Controlling or Coercive Behaviour' (2018) 22(1) The International Journal of Evidence and Proof 3.
[141] Stark, Coercive Control n1; Bettinson and Bishop, Evidencing Domestic Violence n140.
[142] Charlotte Bishop, 'Why It Is So Hard to Prosecute Cases of Controlling or Coercive Behaviour' *The Conversation* (2016) available at <http://theconversation.com/why-its-so-hard-to-prosecute-cases-of-coercive-or-controlling-behaviour-66108> accessed 1 August 2019.

victim's testimony' are unhelpful when, 'frequently victims are in dangerous and/or compromised positions when it comes to giving that testimony'.[143] Certainly the data from my interviews with judges and the police show that the requirement for the survivor to play the dual role of victim and chief witness for the prosecution creates pressure points right the way through the criminal justice system.

Mens Rea

The last aspect of section 76 to be considered in this chapter is the mens rea. The mens rea is set out in s. 76 (1) (d) as follows:

(1) A person (A) commits an offence if— …
(d) A knows or ought to know that the behaviour will have a serious effect on B.

Section 76(1)(d) thus states that the mens rea can be satisfied both subjectively, in terms of what the perpetrator actually knew, or objectively, in terms of what the reasonable person would have known. As with the PHA, section 76(5) states that the reasonable person for these purposes is in possession of the same information as the perpetrator. Including the possibility of a wholly objective mens rea as a route to conviction was justified in the context of the PHA in that it was thought necessary to make sure that stalkers whose mental illness precluded them from appreciating the impact of their behaviour were not excluded from the scope of the legislation.[144]

Chapter three argued, in addition, that the negligence construct did not derail 'the central quest of identifying blameworthiness'[145] in the context of the PHA in part because establishing the serious harm experienced by the victim is a constituent part of the offence. As far as section 76 is concerned, however, it could be argued that including the possibility of an objective mens rea is harder to justify. More research is needed to investigate the issue of whether or not perpetrators of coercive control are mentally ill. If a correlation was found between perpetrators and mental ill-health this would introduce a new factor into the debate: perpetrators should not be subject to a mens rea standard that they cannot meet. The reasonable person, it could be argued, is not an appropriate culpability standard in these circumstances.

[143] Tolmie, Coercive Control n121 55.
[144] Finch, Criminalisation of Stalking n13.
[145] Sally Kyd et al, *Clarkson and Keating: Criminal Law* (Sweet and Maxwell 2020) 146.

Another potential negative consequence relates to what an objective mens rea says about the crime of coercive control. In the introduction, I highlighted that the correct labelling of a crime is one of the most important functions of the criminal law. Research shows that, 'An abuser's intent is now a crucial and engrained portion of our modern understanding of intimate partner violence'.[146] From the perspective of the survivor of coercive control, the malevolence of the strategic campaign of domination is *the* central (and most harmful) feature of the abuse. If crimes must be defined in a way that 'reflects what makes the conduct of defendants who are convicted under them publicly wrongful',[147] then is ostracising the motive of the defendant counter-productive? In other words, the perpetrator's strategic intent is a key part of what makes him culpable. Does the criminal law need to reflect this if it is to fulfil its educative and normative function?

Arguments as to the inclusion of an intention requirement in a domestic abuse statute are more developed in the US literature. Tuerkheimer and Burke disagree on the relative merits of subjective/objective mens rea in the context of coercive control.[148] Burke supports the arguments set out above in relation to the result element of the crime, and argues that a 'discursive shift' away from the victim focus is necessary. She sees a mens rea of intent as a necessary part of this 'shift'. She argues that:

> By grounding a specialized domestic violence statute in the requirement of intent, this Article's proposal would bring an important discursive shift in the criminal law's treatment of domestic violence by turning the focus away from the claimed effects of domestic violence on a victim's autonomy and instead toward the coercive motivations of the batterer.[149]

I agree with Burke that the discursive shift away from the victim focus is necessary and desirable, but I do not agree that a requirement of intent is necessary to achieve this. I consider this in more detail in the following chapter, but the DASA achieves a shift away from the victim without a mens rea of intent.

Finally, it is possible for reasons that have been put forward in the literature and that are supported by my empirical work with judges, that a mens rea of intent would create as many

[146] Meghan Bumb, 'Domestic Violence Law, Abusers' Intent, and Social Media: How Transaction-Bound Statutes Are the True Threats to Prosecuting Perpetrators of Gender-Based Violence' (2017) 82(2) Brooklyn Law 917, 925.
[147] Victor Tadros, 'Rape without Consent' (2006) 26(3) Oxford Journal of Legal Studies 515, 524.
[148] Tuerkheimer, Recognising and Remedying the Harm of Battering n1 959; Burke, Domestic Violence n113 558.
[149] Burke, Domestic Violence n113 556.

problems as it would solve. Tuerkheimer, herself a former prosecutor, argues that a mens rea of intent would place too great a burden on the prosecution. She says:

> Prosecutors would understandably balk at a requirement that intentional mens rea be proven with respect to the exercise of power and control. The difficulty of convincing jurors beyond a reasonable doubt that a batterer *consciously* intended to dominate his victim may be practically insurmountable.[150]

Bishop and Bettinson also point out that, just as with the PHA, the behaviour could appear innocuous.[151] They argue that:

> The defendant could simply claim that they just wanted their partner to be at home for a particular reason or did not realise that preventing their partner from leaving the house on occasions would have that effect upon her, whereas, the harm to the victim is the same regardless of the intention of the perpetrator.[152]

Bishop and Bettinson conclude by agreeing with Tuerkheimer that, 'The objective standard is to be welcomed as providing the best possible means of securing a conviction given the present limitations to legal and societal understandings of coercive control'.[153] I agree with Tuerkheimer, Bettinson and Bishop that the objective standard is necessary in the context of what is currently understood about the mindset of perpetrators of coercive control.

Data from my interviews with judges support this conclusion. Judge Little emphasised that, for her, a mens rea of intent 'would change it completely'. She said 'I think actually it would make it far more difficult to get convictions, I feel that very strongly'.[154] She gave as an example a defendant in one of the cases she had presided over, Robert Clint.[155] In Judge Little's view, Robert Clint was 'your typical kind of offender'. 'But', she went on to explain, while 'He intended to control her', 'he had no concept that what he was doing was wrong'.[156]

Judge Little thought that this would be difficult for a jury because, 'For a jury an intent is a very specific mens rea, so it has to be something somebody has thought about, the consequence of their action'. Judge Little used assault occasioning grievous bodily harm as an example to illustrate her point. She said:

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[150] Tuerkheimer, Recognizing and Remedying the Harm of Battering n1 1022, her emphasis.
[151] Bettinson and Bishop, A Discrete Offence n43 195; Youngs, Domestic Violence and the Criminal Law n114.
[152] Bettinson and Bishop, A Discrete Offence n32 195.
[153] Ibid.
[154] Judge Little n57 5.
[155] The name of the defendant has been changed to protect the anonymity of Judge Little.
[156] Judge Little n57 5.

> If you intend to do GBH, you intend to do somebody really grievous bodily harm, if you intend to control somebody, it seems to me you can only intend to effectively diminish the quality of their life - Robert Clint actually I don't believe intended to diminish the quality of her life. There may well have come a point when he did.'[157]

Judge Little thus identified a difference between the intention to dominate and the intention to cause harm. This difference, for Judge Little, allows for a disconnect in the minds of defendants between the two constructs. Despite the presence of the intention to dominate, there is a simultaneous absence of the intention to cause harm that makes a mens rea of intent inappropriate. While Judge Little conceded that Robert Clint had a specific intention to dominate, she felt that if there was a mens rea of intent, then the fact that he *did not intend to cause harm* would cause problems for a jury. It would remain open to Clint to escape liability by claiming that he did not know that his behaviour would have a harmful effect on the victim, despite his intention to dominate.

Judge Little thus raises an important issue. I agree that, while a defendant's strategic intent to control his partner might be clear, his conviction that that intent (his desire to control her) is benign, and not intended to cause her harm, might indeed cause problems for a jury. There is no doubt that the perpetrator's strategic intent is a key part of what makes him culpable, but it is possible that the perpetrator might confuse a jury by convincing them of his lack of intention to cause harm. My empirical work did not include interviews with perpetrators, and more research is urgently needed on this point. In the meantime it would appear that including the possibility of an objective mens rea is appropriate in the context of the section 76 offence.

Sentencing

The sentencing difficulties experienced by judges in the context of a section 76 conviction are the practical repercussion of what this chapter has found is the fundamental (and unhelpful) confusion generated by the controlling or coercive behaviour construct. Whether or not so called "low level" physical violence is charged alongside section 76, the low maximum sentence of imprisonment for section 76, (five years), makes sentencing an especially delicate exercise.

[157] Ibid. 6.

The most common accompanying counts on a section 76 indictment are, as is to be expected, offences against the person and sexual offences. The difficulty for the sentencing judge is how to separate out the different strands of the offending behaviour while avoiding the possibility of double counting. Judge Little referred specifically to this dilemma. She said:

> Because where we have to be a bit careful, and the reason I gave (the defendant) four years with the plea, was the two offences of violence I said effectively were aggravating features of the overall behaviour, and this is one of the difficulties, because the CPS do put the violence where they have got specific incidents they can point to…

In the sentencing decision Judge Little is referring to (which has been upheld by the Court of Appeal) the other counts on the indictment are assault occasioning actual bodily harm (one count) and perverting the course of justice (two counts). There is a significant amount of addition violence detailed in the Court of Appeal judgment that is not charged separately.[158] Judge Little decided to use the section 76 offence as the principal offence to reflect the totality of the offending for the sentence on that count, and to make the sentencing for the aggravated assault charge concurrent. The Court of Appeal confirmed that it is happy with this approach. If there had been an even more serious charge on the indictment then it would have been open to Judge Little to use that charge (for example rape, or inflicting grievous bodily harm) as the principal offence and to make the sentencing of the section 76 offence concurrent.[159]

Difficulties remain, however. I did not ask Judge Little the extent to which she felt able to take into account (for sentencing purposes) the additional violence that was not charged separately, and this is an important question. The risk is that if controlling or coercive behaviour is constructed as 'psychological' or 'non-violent' abuse (as suggested by the judgments in *Challen*, *Conlon* and *Beringer* referred to above) then a significant amount of low-level violence continues to go unpunished.

Furthermore, even where serious violence is charged separately, the approach that has been taken by the courts, (to make the serious violence the principal offence and to punish the controlling or coercive behaviour with a concurrent sentence), means that the distinct harm of

[158] It is not possible to cite the Court of Appeal judgment in question as this identifies Judge Little.
[159] This approach was approved by the Court of Appeal in cases such as *Chanaa* [2019] EWCA Crim 2335 (where the defendant was convicted of rape and controlling or coercive behaviour); *Cunningham* [2019] EWCA Crim 2101 (four counts of rape and controlling or coercive behaviour) and *Holden* [2019] EWCA Crim 1885 (rape and controlling or coercive behaviour).

coercive control potentially does not get enough recognition. *Parkin*[160] is a good example of the pitfalls of this approach. Parkin was convicted of three counts of rape (counts one to three) for which he received a total of seven years imprisonment. He was also convicted of controlling or coercive behaviour (count four), for which he received two years imprisonment concurrent. Application for leave was made by the Attorney General to refer the sentence on the basis that it was too lenient. The application was granted, with the Court of Appeal explaining:

> There was effectively no sentence passed in respect of count 4, which was quite separate coercive behaviour. We do not agree that that offence could properly be simply absorbed into the overall low sentence that he was already going to pass for the three other offences. The controlling behaviour was a quite separate offence requiring to be reflected either in a separate consecutive sentence or by an uplift of the principal sentence.[161]

The Court of Appeal is therefore suggesting that the judge could properly have sentenced the controlling behaviour separately, or by using the totality principal to "uplift" the principal sentence. Neither approach is ideal. Sentencing separately raises the issues of double counting highlighted by Judge Little above. And using the violence as the 'principal sentence' means we are still left with the hierarchy of harms that places physical violence at the top, which is not the way that survivors articulate their experiences of abuse. The 'mismatch' between life and law, in other words, continues.

Unfortunately, the low maximum sentence of imprisonment for controlling or coercive behaviour, (five years), adds to the perception of a hierarchy of harms.[162] Judges interviewed for this project agreed that this is too low.[163] The low sentencing threshold contributes to a perception of a hierarchy of harm that places physical violence at the top, which is not how survivors articulate the harms they have experienced. Furthermore, it does not reflect the severity of coercive control. The DASA deals with this issue by incorporating the violent and non-violent behaviours into a single offence with a maximum penalty on conviction on indictment of fourteen years imprisonment.[164]

<u>Domestic Abuse Act 2021</u>

[160] *Parkin* [2018] EWCA Crim 2764.
[161] Ibid. [39].
[162] Serious Crime Act 2015, s 11.
[163] Judge Little n57; Judge Harwood n98.
[164] Domestic Abuse (Scotland) Act 2018, s 8.

The DAA received Royal Assent on 29 April 2021. Hailed as a once in a lifetime opportunity to improve the lot of men and women experiencing domestic abuse, its torturous journey through Parliament began in 2017 when it was introduced by Theresa May as one of her government's flagship reform initiatives. While the DAA is not as radical or reformist as many in academia and the women's sector had hoped, it does include some helpful procedural and doctrinal improvements for survivors of abuse. I have already set out the reform introduced by section 68 of the DAA, which amends the definition of 'connected persons' in section 76 to include ex partners. The other important innovation for this chapter is the new statutory definition of domestic abuse for all agencies with safeguarding obligations, which is introduced by section 1.[165]

As I mentioned above, the problem with the DAA, s1 definition (which replaces the Working Definition) is that it uses a bullet point approach which emphasises the fragmentation of domestic abuse into constituent parts, and moves away from Stark's conception of coercive control. In the Working Definition I explained that the five behaviour types listed (psychological, physical, sexual, financial and emotional abuse) are given correctly as constituent *parts* of coercive control. The DAA s 1 definition, on the other hand, lists 'controlling or coercive behaviour' as one of five different examples of what constitutes "abusive" behaviour:

> Behaviour of a person ("A") towards another person ("B") is "domestic abuse" if—
> (a)A and B are each aged 16 or over and are personally connected to each other, and
> (b)the behaviour is abusive.
> (3)Behaviour is "abusive" if it consists of any of the following—
> (a)physical or sexual abuse;
> (b)violent or threatening behaviour;
> (c)controlling or coercive behaviour;
> (d)economic abuse (see subsection (4));
> (e)psychological, emotional or other abuse;
> and it does not matter whether the behaviour consists of a single incident or a course of conduct.

Rather than using the coercive control paradigm as the wrapper for what constitutes domestic abuse, the DAA, s 1 definition follows the fragmentation approach of the existing criminal

[165] Bettinson, Adding to the Domestic Abuse Criminal Law Framework n127.

law legislative infrastructure. 'Controlling or coercive behaviour' is positioned (incorrectly) as a bullet point, to be understood alongside the other (bullet point) behaviour types such as physical or sexual abuse, or psychological abuse. This makes no sense - as was explained in chapter one coercive control is a strategy that brings particular meaning to all of the other behaviour types listed.

Section 1 DAA does contain some improvements. The types of abusive behaviour that are listed in the definition explicitly define economic abuse for the first time, replacing the more narrow 'financial abuse' with the more accurate 'economic abuse' terminology. This is welcome. The concept of 'personally connected' is thankfully defined to include ex partners. Section 68, as explained above, amends section 76 to include ex partners and bring it in line with the new DAA, s 1 definition of domestic abuse.

Conclusion

Section 76 brings challenges even as it creates opportunities. The first challenge is the further fragmentation of domestic abuse, as police and prosecutors are expected to use section 76 to capture psychological aspects of abuse alongside the existing offences against the person regime, a consequence of the Attorney General's construction of 'controlling or coercive behaviour' via a focus on the "gap" in the law.

A second challenge is the emphasis on the response of the victim - the harm she experiences - and the inadequate/inappropriate articulation of what constitutes that harm to the victim. This makes section 76 uniquely challenging to investigate and prosecute, and creates a more traumatic courtroom experience for survivors. Both of these challenges, the fragmentation of coercive control and the consequences of focusing on the victim's response to the abuse, formed a central plank of Scottish governments extensive (six year) consultation into domestic abuse law reform. In the following chapter I turn to this consultation, and to the resulting DASA, which has been heralded by Evan Stark as the 'Gold Standard' of domestic abuse legislation.[166] It could be that the DASA points the way to the future of domestic abuse law reform in England and Wales.

[166] Libby Brooks, Scotland Set to Pass "Gold Standard" Domestic Abuse Law n3.

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