

Adding to the Domestic Abuse Criminal Law Framework: The Domestic Abuse Act 2021

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Abstract:

The Domestic Abuse Act 2021 finally received royal assent almost 4 years after the announcement of the Bill in the Queen's Speech in 2017. This article examines the new provisions relating to criminal law and justice introduced by the Domestic Abuse Act 2021 and the evolution of the Domestic Abuse Bill following its prolonged journey through the Parliamentary process. It will explore the introduction of the new criminal offences: breach of a domestic abuse protection order and threatening to disclose a private sexual photo or film. It shall consider the extension of mandatory use of special measures for domestic abuse victims, a statutory statement on the limitation of the so-called rough sex defence and amendments to the offence of coercive and controlling behaviour. Background regarding the consultation process and the decision to produce a once in a generation chance to provide legislative transformation to domestic abuse is provided. Analysis of these new provisions includes an assessment of where issues concerning implementation may arise. Reform is to be welcomed as greater recognition is given to the public's increasing intolerance towards domestic violence and abuse.

Key words: Domestic Abuse, Coercive Control, non-fatal strangulation, consent, protective orders, threats to disclose a private image

Introduction

The government's commitment to take domestic abuse seriously, with the aim of preventing and combatting this serious, insidious social problem reached a new level in 2017. A draft Domestic Abuse Bill was promised in the Queen's speech¹ and a consultation paper followed

¹ Queen Elizabeth II (2017). Queen's Speech. <https://www.gov.uk/government/speeches/queens-speech-2017> [Accessed 11 June 2021].

in 2018², receiving 3,200 responses to a “once-in-a-generation opportunity to transform the response to this terrible crime.”³ The consultation was also supplemented by workshop events held by the Home Office across the country, inviting stakeholders and victims to discuss the draft proposals in detail.⁴ Such wide consultation and engagement with victims, domestic violence support agencies and women’s right campaigners has ensured that victims’ experiences informed the Bill throughout the lengthy legislative process. Royal Assent was received on 29th April 2021, three years after the start of the initial consultation, following a change of government, Brexit and a global pandemic that continues today. The COVID 19 pandemic has created wider awareness of domestic abuse, and domestic abuse services saw the number of phone calls rise significantly as people were forced to stay at home with no reprieve from the abuse they were experiencing.⁵ The huge response to the consultation in itself illustrates the wider public desire to see legal reform in this area, legal reform that carries with it, greater resources to protect, house, support victim-survivors and prevent domestic violence and abuse.⁶ Whilst the consultation generated this degree of interest in enhancing legal provisions around domestic abuse, at the outset the consultation provided very little change in terms of the criminal law itself. Although, there was scope to consider criminal law changes under the third aim set out in the consultation, that of pursuing and deterring perpetrators. No new criminal offences were proposed initially, instead the

² HM Government *Transforming the Response to Domestic Abuse: Government Consultation* (2018) <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/> [Accessed 11 June 2021].

³ HM Government *Transforming Domestic Abuse: Consultation Response and Draft Bill* (2019) at p.1 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772247/Transforming_the_response_to_domestic_abuse_-_consultation_response_and_draft_bill_-_print.pdf [Accessed 11 June 2021].

⁴ HM Government *Transforming Domestic Abuse: Consultation Response and Draft Bill* (2019) at p.3 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772247/Transforming_the_response_to_domestic_abuse_-_consultation_response_and_draft_bill_-_print.pdf [Accessed 11 June 2021].

⁵ ONS, *Domestic Abuse in England and Wales overview: November 2020*, at para. 5 “Results from Women’s Aid June provider survey showed that during the first few months of the pandemic, an increase in demand was reported by: 58% of 26 refuge services, 80% of 30 community-based services, 91% of 22 online support services, 81% of 31 telephone support services.” <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwalesoverview/november2020#latest-figures-for-the-year-ending-march-2020> [Accessed 1 March 2021].

⁶ The term domestic violence and domestic abuse will be used interchangeably throughout or the term domestic violence and abuse will be used. J. Aldridge, “‘Not an Either/or Situation’: The Minimization of Violence Against Women in United Kingdom ‘Domestic Abuse’ Policy” (2020) *Violence Against Women* DOI: <https://doi.org/10.1177/107780122092707> argues that the term domestic abuse can have the effect of minimising the experiences of victims.

introduction of a statutory aggravating factor was suggested.⁷ As amendments were introduced to the Bill, more attention was given to criminal law aspects of domestic violence and abuse with new offences and defences proposed.⁸ Amendments introducing offences were more successful than those concerning defences. For example, the government rejected the creation of a defence for defendants who commit crimes as a result of being coerced or controlled by an intimate partner or family member.⁹ A statutory restatement of the judicial approach to the application of the defence of consent, however, was successful with clause 65 introduced in May 2020 preventing defence arguments of consent to rough sex where the victim-survivor was seriously harmed during an alleged sex game gone wrong.¹⁰ New criminal offences have been introduced including a non-fatal strangulation offence,¹¹ an offence prohibiting threats to disclose intimate images with the intention to cause distress,¹² breach of a domestic abuse protection order¹³ and an amendment to the offence of coercive and controlling behaviour, s. 76 Serious Crime Act 2015 (SCA 2015).¹⁴ These provisions are a direct response to campaigning and illustrate the continued effort to produce legal reform that is informed by key stakeholders and to encapsulate the lived experiences of domestic abuse victim-survivors. This article will reflect on the consultation's initial proposal to address criminal law and domestic abuse and then explore the new criminal law reforms. It is argued that whilst the opportunity to create law reform captures a wider variety of methods that domestic abuse consists of, the Domestic Abuse Act 2021 (DAA 2021) adds to the existing

⁷ HM Government *Transforming Domestic Abuse: Consultation Response and Draft Bill* (2019) at p.59 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772247/Transforming_the_response_to_domestic_abuse_-_consultation_response_and_draft_bill_-_print.pdf [Accessed 11 June 2021].

⁸ For analysis of the strangulation and suffocation offence introduced by s. 70 DAA 2021 which inserts section 75A into the SCA 2015 see R.Kelly and d. Ormerod, "Non-fatal strangulation and suffocation" (2021) (7) *Crim. L.R.* 532.

⁹ For discussion see XXX (this issue); V. Bettinson, "Defending the domestic abuse victim/defendant: Why the Prison Reform Trust's campaign to introduce defences for offending driven by domestic abuse is important" *Prison Journal* (Forthcoming).

¹⁰ O. Bowcott and J. Grierson, 'MPs to try to ban 'rough sex' murder defence in domestic abuse bill' *The Guardian* (28 April 2020) <https://www.theguardian.com/society/2020/apr/28/mps-to-try-to-ban-rough-sex-defence-in-domestic-abuse-bill> [Accessed 1 March 2010].

¹¹ Section 70 Domestic Abuse Act 2021.

¹² Section 69 Domestic Abuse Act 2021.

¹³ Section 39 Domestic Abuse Act 2021.

¹⁴ Section 68 Domestic Abuse Act 2021.

piecemeal approach to legislative efforts and would benefit from codification in the future, as has been proposed for offences against the person.¹⁵

Domestic Abuse Consultation

In the last decade there has been a growing awareness and with it an increased prioritising of domestic violence and abuse within the Westminster government.¹⁶ Government activity to develop an integrated policy strategy in respect of violence against women began over two decades ago.¹⁷ A call to end violence against women and girls' strategy was declared in 2010, with an accompanying Action Plan.¹⁸ The gendered nature of domestic abuse was recognised by its inclusion in the strategy, although concerns about male victims were evidenced at this early stage with a recognition that the strategy would also seek to address domestic and sexual abuse of men and boys, anticipating the strategy to directly benefit them through preventative activity and signposting to appropriate services.¹⁹ In the strategy, creating new criminal offences to address domestic abuse was not an overt part of the actions considered. Instead, training was emphasised for those working with victim-survivors of domestic violence and abuse, including prosecutors and there was a focus on building partnership working. Partnership working and evidence gathering formed an important part of the Home Office Consultation process and the Act retains this approach. S. 75 DAA 2021 is an example of this, which arose out of concerns for consistent and effective management of serial perpetrators of domestic abuse. The provision requires, by the end of the first year of the Act's enactment, that the Secretary of State prepare a strategy, in consultation with the

¹⁵ Law Commission, Reform of Offences Against the Person, Law Com. No. 361 (2015)

¹⁶ The Westminster government is not alone. For example, there has been increased government action in Scotland around domestic abuse culminating in the introduction of the Domestic Abuse (Scotland) Act 2018.

¹⁷ S. Walklate, K. Fitz-Gibbon, J. McCulloch, 'Is more law the answer? Seeking justice for victim of intimate partner violence through the lens of legal categories' (2018) 18(1) *Criminology & Criminal Justice* 115 at 117.

¹⁸ HM Government, *Call to End Violence against Women and Girls: Strategic Vision* (2010), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97905/vawg-paper.pdf accessed 1 March 2021; HM Government, *Call to End Violence against Women, Action Plan* (2011), available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97903/vawg-action-plan.pdf accessed 1 March 2021.

¹⁹ HM Government, *Call to End Violence against Women and Girls: Strategic Vision* (2010), at p.2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97905/vawg-paper.pdf [Accessed 1 March 2021].

Domestic Abuse Commissioner²⁰ and other stakeholders²¹ for a) detecting, investigating and prosecuting offences involving domestic abuse, b) assessing and managing the risks posed by individuals who commit offences involving domestic abuse, including (among others) risks associated with stalking, and c) reducing the risk that such individuals commit further offences involving domestic abuse.²² Baroness Royall of Blaisdon explained that the existing multi-agency public protection arrangements (MAPPA) process are not operating effectively as they do not address domestic abuse and stalker cases. This is because they tend to be considered not serious enough cases and where they are used, specialist domestic abuse and stalking services are not invited to attend the MAPPA meetings.²³ The new national strategy would be aimed at addressing serial offending and generating a consistent policy approach.

Greater awareness of what domestic abuse involves by both professionals and victims themselves has seen the number of police recorded crimes increase. In the year ending March 2019 2.4 million people experienced domestic abuse with an increase in police recorded crime amounting to 746,219 recorded offences, a rise of 24% on the previous year.²⁴ Figures remained similar the following year with 758,941 recorded domestic abuse offences by the police.²⁵ With increased prevalence in the reporting of this type of crime, improved partnership working and the introduction of victim-centred approaches to prosecuting domestic abuse, the government's 2018 consultation paper on *Transforming the Response to Domestic Abuse* sought to go even further "to make domestic abuse everyone's business."²⁶ Domestic abuse is clearly harmful to the victim-survivors and their families on a personal

²⁰ The role is created in Part 4 of the Act, although the first Domestic Abuse Commissioner was appointed before the Act was enacted in September 2019

<https://publicappointments.cabinetoffice.gov.uk/appointment/designate-commissioner-for-domestic-abuse/> [Accessed 10 June 2021].

²¹ To be determined by the Secretary of State, s. 75(4)(b) DAA 2021.

²² Section 75(1) DAA 2021.

²³ House of Lords Hansard, "Domestic Abuse Bill" (15 March 2021) Volume 811 at col. 75

<https://hansard.parliament.uk/lords/2021-03-15/debates/2DB5363F-1D41-4E5A-B2E2-3CA3A2D5A28B/DomesticAbuseBill> [Accessed 5 May 2021].

²⁴ ONS, *Domestic abuse prevalence and trends, England and Wales, year ending March 2019*

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseprevalenceandtrendsenglandandwales/yearendingmarch2019> [Accessed 11 June 2021].

²⁵ ONS, *Domestic abuse prevalence and trends, England and Wales, year ending March 2020*

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseprevalenceandtrendsenglandandwales/yearendingmarch2020> [Accessed 11 June 2021].

²⁶ HM Government *Transforming the Response to Domestic Abuse: Government Consultation* (2018) at p.5 <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/> [11 June 2021].

level, however, the government agenda to make domestic abuse everyone's business can be justified by the economic cost of this criminality to the public. Walby and Olive estimated that gender based violence cost society in the UK £26 billion pounds annually in 2012.²⁷ A more recent study looking at the years 2016/17 found that the annual cost of domestic abuse to the economy was £66 billion, with the significant increase reflecting a greater understanding of the emotional impact of the abuse since 2012.²⁸

Statutory Definition of Domestic Abuse

Whilst there is evidence of increased police reporting of domestic violence and abuse, the Domestic Abuse Act 2021 seeks to promote awareness of all the forms it can take among practitioners of both statutory and non-statutory agencies and the general public.²⁹ To support this aim, the Act begins with a statutory definition of domestic abuse for all agencies with safeguarding obligations which affirms the cross-government policy definition.³⁰ Section 84 DAA 2021 requires the production of statutory guidance to set standards and promote best practice among agencies. Draft guidance has been produced that provides clear information on what domestic abuse is and how to identify it, support to frontline workers and assistance with signposting to responding agencies to help them respond appropriately.³¹ The guidance is an important corollary of the statutory definition, as the majority of organisations did not expect their working practices to change with the introduction of a legal definition, as this had been achieved through the policy definition.³² The consultation argued that a shared definition for all will prevent “myths and stereotypes [that] lead to victims receiving negative responses, poor advice which exacerbates

²⁷ S. Walby and P. Olive, 'Estimating the costs of gender-based violence in the European Union.' (The European Institute for Gender Equality, 2014) <https://eige.europa.eu/publications/estimating-costs-gender-based-violence-european-union-report> [Accessed 1 March 2021].

²⁸ R. Oliver, B. Alexander, S. Roe, M. Wlasny, 'The economic and social costs of domestic abuse' Home Office Research Report 107 (London: Home Office, 2019) at p. 41. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918897/horr107.pdf [Accessed 11 June 2021].

²⁹ HM Government *Transforming the Response to Domestic Abuse: Government Consultation* (2018) at p.11 <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/> [11 June 2021].

³⁰ Ibid at p.12. See Home Office Circular 003/2013, "New government domestic violence and abuse definition".

³¹ Home Office, *Domestic abuse: draft statutory guidance framework* (2021) chapter 1.

³² HM Government: *Transforming the Response to Domestic Abuse: consultation response and draft bill* (2019) at p.6 <https://www.gov.uk/government/publications/domestic-abuse-consultation-response-and-draft-bill> [23 September 2021].

suffering.”³³ A common definition for statutory agencies was also the goal of the policy definition, however, a statement in law may provide a higher profile in which the public become more aware of the ambit of domestic abuse.

Section 1 DAA 2021 closely mirrors the policy definition, defining first the nature of the relationship required between the parties and then the abusive behaviour. Parties must be aged 16 or over and personally connected to each other.³⁴ The reference to age acknowledges that domestic abuse can occur within teenage relationships and that parents can be subject to abuse from their teenage child.³⁵ However, the domestic abuse definition stopped short of including all ages in order to preserve a distinction between child abuse, governed by different frontline agencies with a separate legal framework.³⁶

‘Personally connected’ is explained in s. 2 DAA 2021 which contains an extensive list of relationships. Of note is its inclusion of former intimate partners³⁷ and those who have or once had a parental relationship to the same child. The policy definition also encompasses former partners however, it does not refer to parties being personally connected. Instead the phrase appears in s. 76 Serious Crime Act 2015 that criminalises coercive or controlling behaviours. As explained below, any variation between the two uses will be removed as s. 68 DAA 2021 amends the offence to correspond with s. 2 DAA 2021.

The types of abusive behaviour that are deemed to fall within domestic abuse are contained in s. 1(3)(a)-(e) DAA 2021 covering physical, psychological and sexual abuse, coercive or controlling behaviours, threatening behaviour and economic abuse. Clearly, these forms of abuse overlap, for instance economic and sexual abuse may be employed as ongoing coercive behaviour. The term economic abuse is a substitute for financial abuse that is part

³³ HM Government *Transforming the Response to Domestic Abuse: Government Consultation* (2018) at p.11 <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/> [11 June 2021].

³⁴ Section 1(2)(a) DAA 2021.

³⁵ See C. Barter, ‘In the name of love: Partner abuse and violence in teenage relationships’ (2009) *The British Journal of Social Work* 39(2) 211; C. Miles and R. Condry, ‘Adolescent to Parent Violence: The Police Response to Parents Reporting Violence from Their Children’ (2016) *Policing and Society* 26(7) 804.

³⁶ Home Office, Policy paper: Statutory definition of domestic abuse factsheet (2021) <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/statutory-definition-of-domestic-abuse-factsheet> [23 September 2021].

³⁷ S. 2(1)(a),(b) and (e) DAA 2021.

of the policy definition and has been preferred for its broader meaning.³⁸ Economic abuse “involves behaviours that control a woman’s ability to acquire, use, and maintain economic resources, thus threatening her economic security and potential for self-sufficiency.”³⁹ In contrast financial abuse involves a perpetrator’s use or misuse of their victim’s money, by spending it, using credit cards or pressuring the victim to apply for loans, which are then used to fund activities for the perpetrator.⁴⁰ S. 1(4) DAA 2021 includes conduct that “has a substantial adverse effect on the victim’s ability to a) acquire, use or maintain money or other property, or b) obtain goods or services.”⁴¹ Statutory clarification of what amounts to economic abuse ought to advance the government’s aim of raising awareness of this particular form of abuse.

Under s. 3 DAA 2021 the first statutory recognition of children as victims of domestic abuse as witnesses to it is provided. It applies to children under the age of 18, related to the abuser and/or the victim, who see, hear or experience the effects of the abuse. This provision was not included in the initial consultation process or draft bill, although the government noted the significance of recognising the impact of domestic abuse on children as witnesses to it and the need to improve support in this area.⁴² A clause was later added with the expectation that the provision once enacted would “be adopted more generally by public authorities, frontline practitioners and others responding to domestic abuse.”⁴³ Greater awareness among these organisations and the wider public will emphasise the

³⁸ HM Government: *Transforming the Response to Domestic Abuse: consultation response and draft bill* (2019) at p.6 <https://www.gov.uk/government/publications/domestic-abuse-consultation-response-and-draft-bill> [23 September 2021].

³⁹ A.E. Adams, C.M. Sullivan, D. Bybee & M.R. Greeson, ‘Development of the scale of economic abuse’ (2008) *Violence Against Women*, 14(5) 563 at 564.

⁴⁰ See Women’s Aid <https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/financial-abuse/> [23 September 2021].

⁴¹ For examples of what conduct can amount to economic abuse see Home Office, *Domestic abuse: draft statutory guidance framework* (2021) chapter 2.

⁴² HM Government: *Transforming the Response to Domestic Abuse: consultation response and draft bill* (2019) at p.16 <https://www.gov.uk/government/publications/domestic-abuse-consultation-response-and-draft-bill> [23 September 2021]. For a literature review on the impact of domestic abuse on children see R. Oliver, B. Alexander, S.Roe, M. Wlasny, ‘The economic and social costs of domestic abuse’ Home Office Research Report 107 (London: Home Office, 2019) Annex at p.1. https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/918897/horr107.pdf [Accessed 11 June 2021].

⁴³ House of Commons Hansard “Domestic Abuse Bill” (6th July 2020) col 678. at col. 701

harmful nature of domestic abuse to children and could lead to increasing public intolerance of it.

A final observation regarding the definition of domestic abuse is its gender-neutrality to ensure that it applies to all victims. In an effort to highlight the gendered nature of this criminal behaviour the draft statutory guidance framework details current statistics that emphasise the disproportionate effect of domestic abuse on women. Women are more likely to experience repeat victimisation, be physically injured or killed by a partner or former partner, and be subject to non-physical forms of abuse.⁴⁴ Embedding an understanding of how domestic abuse manifests itself more frequently in women's lives is expected by updated training packages and resources, supported by the guidance framework.⁴⁵

Changes to Protective Orders

In terms of criminal law, the consultation did not propose any draft offences to develop the central aim of transforming the justice process for domestic abuse cases.⁴⁶ New criminal law was outlined in relation to breaches of protective orders to be renamed Domestic Abuse Protection Notices (DAPN) and Orders (DAPO), originally governed by sections 24-30 Crime and Security Act 2010.⁴⁷ The Consultation proposed that a system of protective orders should remain, expanding to include all forms of domestic abuse as captured by the statutory definition change to domestic abuse.⁴⁸ Given the increased understanding of the methods of abuse used by abusers and the coercive and controlling nature that is employed, extending this regime of protective orders beyond the use of physical violence and threats thereof is a

⁴⁴ Home Office, Controlling or Coercive Behaviour in an Intimate or Family Relationship. Statutory Guidance Framework. (London: Home Office, 2015) at chapter 2.

⁴⁵ HM Government: *Transforming the Response to Domestic Abuse: consultation response and draft bill* (2019) at p.6 <https://www.gov.uk/government/publications/domestic-abuse-consultation-response-and-draft-bill> [23 September 2021].

⁴⁶ HM Government (2018) *Transforming the Response to Domestic Abuse: Government Consultation* <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/> at p.4.

⁴⁷ HM Government (2018) *Transforming the Response to Domestic Abuse: Government Consultation* <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/> at p.34-39.

⁴⁸ HM Government (2018) *Transforming the Response to Domestic Abuse: Government Consultation* <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/> at p.34. S. 1 Domestic Abuse Act 2021.

necessary change that recognises behaviours captured by s. 76 SCA 2015 and now s. 1 DAA 2021. In the original system a breach of a Domestic Violence Protection Notice (DVPN) could result in an arrest as would a breach of a Domestic Violence Protection Order (DVPO) under s. 29 Crime and Security Act 2010. Only breaching the latter was treated as a civil contempt of court under s. 63 of the Magistrates' Court Act 1980. Their replacements are governed under sections 22-49 Domestic Abuse Act 2021. Both remain subject to the power of arrest,⁴⁹ however, breach of a DAPO amounts to a criminal offence and not a contempt of court, subject on indictment to a maximum penalty of five years imprisonment and a fine.⁵⁰

The purpose of a protection notice issued by the police force, and a protection order ordered by a magistrates' court following a successful application made by the police, provides victim-survivors with some space from the abuse and time to contact domestic abuse support agencies in the immediate aftermath of an incident.⁵¹ They may carry conditions that prohibit the perpetrator from molesting the victim-survivor and can include the prevention of the perpetrator from returning to the home.⁵² These provisions apply for a short time with a notice being made first followed by an application to the magistrates' court for an order to be heard within 48 hours.⁵³ Whilst a DVPO order would apply between 14-28 days,⁵⁴ a DAPO can be made for a specified time.⁵⁵ Crompton raised concerns that the protection notice and order provisions could be inappropriately used as a substitute for the criminal law, with police opting to use DVPNs and DVPOs instead of investigating alleged crimes leading to prosecution and potentially giving rise to disputes about the human rights of the perpetrator.⁵⁶ Burton suggested that protection orders may be less effective than bail conditions, which can also prevent the perpetrator from molesting the victim-survivor pending the outcome of the court

⁴⁹ For DAPNs see s. 26 DAA 2021 and DAPOs see s. 39 DAA 2021.

⁵⁰ S. 39(5) DAA 2021.

⁵¹ L. Kelly, JR. Adler, MAH. Horvath, J. Lovett, M. Coulson, D. Kernohan and M. Gray, Evaluation of the Pilot of Domestic Violence Protection Orders' Home Office Research Report 76. (London: Home Office, 2013) at p.4.

⁵² Section 24(8) Crime and Security Act 2010; section 35 DAA 2021.

⁵³ Section 25(c) Crime and Security Act 2010; section 29 DAA 2021. A DAPO can be made without a prior DAPN being made, section 34 DAA 2021.

⁵⁴ S. 28(10) Crime and Security Act 2010.

⁵⁵ Section 38(3) DAA 2021.

⁵⁶ L. Crompton, 'DVP notices and orders: Protecting victims or the public purse?' (2014) 44 *Family Law* 62

case and have the additional benefit of amounting to a criminal offence if breached.⁵⁷ The Consultation noted that there was interest in securing a criminal breach to strengthen this protective system, a factor also acknowledged in an evaluation study reported in 2013.⁵⁸ However, creating a criminal sanction for breach of a civil order is not without criticism, particularly as these protective orders can be made without the victim-survivor's consent.⁵⁹ Porter highlights the danger of criminal justice agencies undermining victim autonomy with decisions to pursue criminal charges.⁶⁰ The victim may have calculated that they are safer if they appease the abuser or if they felt disempowered by a decision to charge, they may be resistant to contacting the police on future occasions and increasing their risk of more serious harm by the perpetrator.⁶¹ Approaches that seek to bring charges for a substantive criminal offence or breach of a protective order will require a risk assessment to be carried out before making the decision to pursue these routes. If the matter of victim autonomy could be overcome, Burton suggests that such measures are likely to have limited success as they depend upon a victim-survivor reporting and providing evidence of a breach.⁶² The new amendments will share the same limitations, although Baroness Kennedy suggested that before a criminal sanction was pursued, victims' views should be taken into consideration and civil options explored.⁶³ Victim retraction in domestic abuse cases has traditionally been problematic and is higher than for other types of offending.⁶⁴ Greater victim-survivor

⁵⁷ M. Burton, 'A Fresh Approach to Policing Domestic Violence' in *Domestic Violence: Interdisciplinary Perspectives on Protection, Prevention and Intervention* (eds S. Hilder and V. Bettinson) (Palgrave:2016) at p.47.

⁵⁸ See HM Government (2018) *Transforming the Response to Domestic Abuse: Government Consultation* at p.34, and L. Kelly, J. Alder, M. Howarth, J. Lovett, M. Coulson, D. Kernohan, et al., *Evaluation of the pilot of domestic violence protection orders*, Home Office Research Report 76. (London: Home Office, 2013).

⁵⁹ M. Burton, 'A Fresh Approach to Policing Domestic Violence' in *Domestic Violence: Interdisciplinary Perspectives on Protection, Prevention and Intervention* (eds S. Hilder and V. Bettinson) (Palgrave:2016) at p.48. L. Bates and M. Hester, 'No longer a civil matter? The design and use of protection orders for domestic violence in England and Wales' (2020) *Journal of Social Welfare and Family Law* 42(2) 133. Criminalising a breach of a civil order is not unique with one example being the non-molestation order.

⁶⁰ A. Porter, 'Prosecuting Domestic Abuse in England and Wales: Crown Prosecution service 'Working Practice' and New Public Managerialism' (2019) 28(4) *Social & Legal Studies* 493 at 499.

⁶¹ *Ibid.*

⁶² M. Burton, 'Emergency barring orders in domestic violence cases: What can England and Wales learn from other European countries?' (2015) 21(1) *Child and Family Law Quarterly* 25.

⁶³ Home Office, Letter from Baroness Williams to Peers (27 January 2021) <https://www.gov.uk/government/publications/domestic-abuse-bill-2020-letter-from-baroness-williams-to-peers-following-second-reading/letter-from-baroness-williams-to-peers-accessible-version#male-victims> [Accessed 26 May 2021].

⁶⁴ A. Cretney and G. Davies, 'Prosecuting Domestic Assault: Victims Failing Courts or Courts Failing Victims?' (1997) 36(2) *The Howard Journal of Crime and Justice* 146.

participation in the forthcoming system of DAPNs and DAPOs may be achieved, as a proposal to extend the parties who are permitted to apply for an order beyond the police to include the victim-survivor or a representative on their behalf has been included under s. 28(2) DAA 2021. Thus, the victim-survivor is not required to proactively secure her own protection through civil law remedies and any pressure from the perpetrator to stop court action is diffused, although Hitchings raises concerns that for some, having the decision to pursue a protection order taken from them will be disempowering.⁶⁵ What has made this protective system particularly useful is its multi-agency function. Whilst not mandatory, upon making a notice or order, the victim-survivor is referred to support services as highlighted in Home Office guidance.⁶⁶ Reform should have included a mandatory requirement to refer cases to support services and funding awarded to agencies that receive the cases to develop multi-agency and partnership working practices.

Proposed Changes to Controlling or Coercive Behaviour Offence

On Consultation the Home Office asked respondents to consider whether there were ways to strengthen the effectiveness of the controlling or coercive behaviour offence under s. 76 SCA 2015.⁶⁷ At the time of the Consultation the offence had been in force for approximately two years and two months, and police reporting of the offence continued to steadily increase. The first crime statistics available on domestic abuse that included this offence was a domestic abuse report for the year ending 2016/17.⁶⁸ The report showed that in the first full year between March 2016 and March 2017 4,246 crimes falling under s. 76 SCA 2015 were recorded by the police, with 309 prosecutions instigated at the magistrates' court. This

⁶⁵ E. Hitchings, 'A consequence of blurring the boundaries – less choice for the victims of domestic violence?' (2005) *Social Policy and Society* 5(1) 91.

⁶⁶ Home Office Domestic Violence Protection Notices (DVPNs) and Domestic Violence Protection Orders (DVPOs) Guidance (December 2016) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/575363/DVPO_guidance_FINAL_3.pdf [Accessed 1 March 2021].

⁶⁷ HM Government (2018) *Transforming the Response to Domestic Abuse: Government Consultation* at p.54 <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/> [Accessed 14 June 2021].

⁶⁸ ONS Domestic abuse in England and Wales: year ending March 2017 at para. 11 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2017#coercive-and-controlling-behaviour> [Accessed 14 June 2021].

compares with 9,053 s. 76 offences recorded by the police (960 prosecuted) in the year ending March 2018⁶⁹ and 17,616⁷⁰ (1,177 prosecuted)⁷¹ in the year ending March 2019. The ability of the police to identify the crime has significantly evolved over the years since the offence entered into force, although Barlow *et al* argue that further training and resourcing is needed to continue to develop police understandings of the gendered nature of the crime.⁷² However, enforcement, on the basis of these figures, appears to stall most vividly at the point of prosecution. Discussion about the challenges facing the prosecution authorities has been raised by Bettinson and Robson, noting that the model of repeated and continuous controlling or coercive behaviour is unfamiliar to those arguing, judging and deciding these cases.⁷³

This unfamiliarity is significant when jurors assess the credibility of the parties through their individual behaviours. Coercive and controlling behaviours involve the repetition of stressful incidents that can impair memory so that they are more likely to struggle with particularising individual events.⁷⁴ This differs to the inaccurate lay-finders' views that the memory captures exact details of an event like a video camera.⁷⁵ Therefore, it is plausible that an inconsistent witness, like a complainant of coercive and controlling behaviour is perceived as not credible and their testimony discounted.⁷⁶ Bettinson and Robson suggest that the injustice stemming from these views could be mitigated against with judicial directions as is adopted in sexual

⁶⁹ ONS Domestic abuse in England and Wales: year ending March 2018 at para. 11

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwales/yearendingmarch2018#domestic-abuse-related-offences-specific-crime-types> [Accessed 14 June 2021].

⁷⁰ ONS Domestic abuse prevalence and trends in England and Wales: year ending March 2019 at para. 5 <https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseprevalenceandtrendsenglandandwales/yearendingmarch2019#police-recorded-crime-data-show-an-increase-in-domestic-abuse-related-crimes> [Accessed 14 June 2021].

⁷¹ Crown Prosecution Service Violence Against Women and Girls Annual Report 2018-19 at p. 9 <https://www.cps.gov.uk/sites/default/files/documents/publications/cps-vawg-report-2019.pdf> [Accessed 1 March 2021].

⁷² C. Barlow, K. Johnson, S. Walklate, L. Humphreys, 'Putting Coercive Control into Practice: Problems and Possibilities' (2020) 60(1) *The British Journal of Criminology* 160.

⁷³ V. Bettinson and J. Robson, 'Prosecuting Coercive Control: Reforming Storytelling in the courtroom' (2020) 12 *Crim. L.R.* 1107.

⁷⁴ N. Dilevski, H.M. Paterson and C. van Golde, "Investigating the effect of emotional stress on adult memory for single and repeated events" (2020) *Psychology, Public Policy and Law*.

⁷⁵ D.J. Simons and C.F. Chabris, "What People Believe about How Memory Works: A Representative Survey of the U.S. Population" (2011) 6(8) *PLoS ONE* e22757.

⁷⁶ A. Roberts, "The frailties of human memory and the accused's right to accurate procedures" [2019] *Crim. L.R.* 912.

offence trials.⁷⁷ with exemplars found in the Crown Court Compendium.⁷⁸ Bettinson and Robson also recommend that the hearsay framework should include ‘explicit recognition of a witness’ position as a victim of coercive control’ in statute to promote consistency in judicial exercises of discretion in these cases.⁷⁹

Whilst there were no amendments to the hearsay framework proposed by the Domestic Abuse Bill 2021, automatic eligibility for special measures will be introduced under section 62 DAA 2021. This provision extends measures provided to vulnerable witnesses testifying in court under section 17 Youth Justice and Criminal Evidence Act 1999 on the grounds of fear and distress where the alleged behaviour of the accused amounts to domestic abuse.⁸⁰

No amendments to strengthen the offence of controlling or coercive behaviour were included in the Domestic Abuse Bill until March 2021 at the report stage at the House of Lords, which coincided with a Home Office review of the offence’s operation.⁸¹ Several limitations about the offence have been noted, including the fact that the offence extends only to ex-partners or family members where the victim-survivor and perpetrator are living together.⁸² The distinction was maintained in an effort to prevent overlap with stalking and harassment offences.⁸³ Coercive and controlling behaviour can continue once relationships have ended with issues such as economic abuse and child contact arrangements serving as opportunities for the perpetrator to do so. Equally, disagreements about when relationships end can arise particularly where the parties are not co-habiting.⁸⁴ The fact that leaving an abusive relationship is the most dangerous time for a victim-survivor, makes it difficult to comprehend how a matter of definition can stand in the way of making a clear statement that continued coercive control once a relationship has ended is legally recognised and subject to equal

⁷⁷ V. Bettinson and J. Robson, “Prosecuting Coercive Control; Reforming Storytelling in the Courtroom” [2020] 12 Crim. L.R. 1107 at 1124.

⁷⁸ *Crown Court compendium* (Judicial College, 2020).

⁷⁹ Above n. 58 (4) at 1121.

⁸⁰ Section 62 DAA 2021 inserts a new (4A) to section 17 Youth, Justice and Criminal Evidence Act 1999.

⁸¹ Home Office, *A review of the Controlling or Coercive Behaviour Offence* (March 2021).

⁸² V. Bettinson and C. Bishop, ‘Is the creation of a discrete offence of coercive control necessary to combat domestic violence?’ (2015) 66(2) *Northern Ireland Legal Quarterly* 179;

⁸³ C. Wiener, ‘From social construct to legal innovation: The offence of controlling or coercive behaviour in England and Wales’ in M McMahon and P McGorrey (eds) *Criminalising Coercive Control* (Springer, 2020); HM Government Transforming the response to domestic abuse: consultation and draft bill (2019) at p. 53 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/772202/CCS1218158068-Web_Accessible.pdf [Accessed 1 March 2021].

⁸⁴ Home Office, *A review of the Controlling or Coercive Behaviour Offence* (March 2021) at p. 7.

censure as similar behaviour that occurred during the relationship. This logic seems to have prevailed with a late amendment introduced to the Bill at the House of Lords Report Stage.⁸⁵ Section 68 DAA 2021 now amends s. 76(6) SCA 2015 to include both former partners and relatives within the meaning of the term 'personally connected' regardless of whether they live with the abusive person or not.

The review noted that stakeholders expressed the view that the maximum penalty for the controlling or coercive behaviour offence should be raised. However, this was not given serious consideration during the Bill process. Scotland's equivalent offence under section 1 Domestic Abuse (Scotland) Act 2018 provides for a maximum penalty of 14 years' imprisonment, therefore, raising the maximum penalty in England and Wales would not be out of line with the practice of similar legal systems. However, the Scottish offence is structured very differently to s. 76 enabling different levels of serious behaviour and its potential impact upon the victim to be considered at the sentencing stage.⁸⁶ Further consideration should be given to the structure of s.76 in the future, which could allow for a hierarchy of seriousness to be considered in the same vein as non-fatal offences against the person. An offence which is characterised by more extreme behaviours could be created, allowing for a maximum penalty of life imprisonment in line with section 18 Offences Against the Person Act 1861.⁸⁷

Criminalising threats to disclose private sexual photographs or films

Section 69 DAA 2021 creates the offence of threats to disclose private sexual photographs or films with the intention to cause distress. The provision will amend the existing s. 33 Criminal Justice and Courts Act 2015 (CJCA 2015) which currently covers actual disclosures. Disclosing private sexual images, which may have been taken with or without the victim's consent

⁸⁵ <https://www.theguardian.com/society/2021/mar/01/campaigners-welcome-extra-protections-in-domestic-abuse-bill> [Accessed 1 March 2021].

⁸⁶ V. Bettinson, 'A Comparative Evaluation of Offences: Criminalising Abusive Behaviour in England, Wales, Scotland, Ireland and Tasmania' in M McMahon and P McGorrey (eds) *Criminalising Coercive Control* (Springer, 2020).

⁸⁷ A point made by V. Bettinson, 'A Comparative Evaluation of Offences: Criminalising Abusive Behaviour in England, Wales, Scotland, Ireland and Tasmania' in M McMahon and P McGorrey (eds) *Criminalising Coercive Control* (Springer, 2020) at p.214.

features in domestic abuse cases as a means of coercing, controlling or harassing the victim. Alternatively, it is used by aggrieved ex-partners, hence the informal term ‘revenge porn.’ Actual disclosures to friends, family, employers or strangers via a number of methods (phones, email, social media platforms, websites, posters or mail) can result in the isolation of the victim. Threats to disclose private sexual images can be used as a method of controlling or coercive behaviour whereby the perpetrator seeks compliance to his demands otherwise the threat becomes realised.⁸⁸

Section 33 CICA 2015 has achieved some degree of success since its inception with 206 prosecutions in its first year, 465 in 2016-2017⁸⁹ and 376 in 2018-2019.⁹⁰ Prosecutions are challenging as the definition of what constitutes a private sexual image is narrow, does not include digitally altered images and requires proof that the defendant intended to cause distress by the making the disclosure.⁹¹ Whilst securing prosecutions are brought in respect of actual disclosures, the Cyber Civil Rights Initiative found that threats to share were the most common type of threat,⁹² with one in seven young women subjected to threats to use revenge porn.⁹³ Adding threats to disclose to s. 33 CICA 2105 means the provision is a closer reflection of the Scottish counterpart in s. 2 Abusive Behaviour and Sexual Harm (Scotland) Act 2016, where the first conviction was for a threat to disclose a sexual video of the complainant by her ex-partner.⁹⁴ Pegg highlights a further rationale for adding a threats to disclose offence. It can be used where a disclosed image can no longer be located on the chosen platform, which would pose an insurmountable challenge to the prosecution pursuing a disclosure charge.⁹⁵ Furthermore, section 69(5) DAA 2021 inserts a new section 33(2A) CICA

⁸⁸ Home Office, Controlling or Coercive Behaviour in an Intimate or Family Relationship. Statutory Guidance Framework. (London: Home Office, 2015) at p. 4.

⁸⁹ CPS, Violence Against Women and Girls, 10th ed. 2016-2017 at p.16.

⁹⁰ Law Commission Consultation, Taking, making and sharing intimate images without consent (2021) Summary at p. 10. Available at: <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2021/03/Intimates-Images-summary-final.pdf> [Accessed June 8 2021].

⁹¹ For analysis see S. Pegg, “A Matter of Privacy of Abuse? Revenge Porn in the Law” (2018) (7) Crim. L.R. 512.

⁹² Cyber Rights Initiative (June 2017), Data and Society Research Institute (December 2016).

⁹³ House of Lords Hansard, “Domestic Abuse Bill” (15 April 2021) Volume 692 at col. 516 <https://hansard.parliament.uk/commons/2021-04-15/debates/0E322BD7-571C-4DC5-A8C8-7B29806DE067/DomesticAbuseBill> [Accessed 8 June 2021].

⁹⁴ *R v Robinson* Unreported, September 5, 2017 Jedburgh Sheriff Court.

⁹⁵ S. Pegg, “A Matter of Privacy of Abuse? Revenge Porn in the Law” (2018) (7) Crim. L.R. 512.

2015 that assists the prosecution by not requiring proof that the film or photograph existed or where it does exist, that it amounts to a private image.

The addition of a threats to disclose offence is therefore an important amendment to the criminal law seeking to address harmful domestic abuse behaviour. The timing, however, overlaps with the Law Commission's Consultation, *Taking, making and sharing intimate images without consent*. This Consultation proposes a threat to disclose an intimate image offence with a mens rea requirement of either an intention or recklessness to cause the victim to fear the image will be shared. This offers the potential of a much wider application than the s. 69 DAA amendment, removing the need to prove an intention to cause distress. Rather than waiting for the completion of the Consultation, debates in the House of Lords concluded that immediate action was preferable in order to provide protection to domestic abuse victims.⁹⁶

Abolition of consent as a defence to serious harm caused for sexual gratification

Concerns around the issue of defendants alleging that they seriously injured or killed their partners during a consensual sexual encounter that had gone wrong were raised by the campaign group We Can't Consent To This (WCCTT).⁹⁷ These defence claims were employed to argue that either the defendant did not have the mens rea to harm or kill their partner in order to reduce their liability to a lesser offence or alternatively to act as mitigation at the sentencing stage.⁹⁸ Supporters of the amendment saw this potential legal reform as a means of stopping men getting away with murder.⁹⁹ The extent of this issue is difficult to ascertain

⁹⁶ House of Lords Hansard, "Domestic Abuse Bill" (15 April 2021) Volume 692 at col. 516 <https://hansard.parliament.uk/commons/2021-04-15/debates/0E322BD7-571C-4DC5-A8C8-7B29806DE067/DomesticAbuseBill> [Accessed 8 June 2021].

⁹⁷ We Can't Consent To This, "What Can be Consented to? Briefing on the Use of "Rough Sex" Defences to Violence" (2019) <https://wecantconsenttothis.uk> [Accessed 29 May 2021].

⁹⁸ For extended discussion see H. Bows and J. Herring, 'Getting away with murder? A review of the 'rough sex' defence' (2020) 84(6) *Journal of Criminal Law* 525. Evidence has been gathered to show a rise in male defendants accused of killing women raising the so-called rough sex defence, Femicide Census, 'UK Femicides 2009-2018' (2019) <https://www.femicidecensus.org/wp-content/uploads/2020/11/Femicide-Census-10-year-report.pdf> [Accessed 28th May 2021].

⁹⁹ House of Commons Hansard, "Domestic Abuse Bill (28 April 2020) Volume 675 (at 250)" <https://hansard.parliament.uk/Commons/2020-04-28/debates/AABF0D9C-D3BC-40C5-830A-52073E09ED35/DomesticAbuseBill#contribution-68EA0ED7-34FB-442B-9B4F-A69D3CAD30F3> [Accessed 28th May 2021].

through national statistics on domestic homicides.¹⁰⁰ However, WCCTT found a rise in its use since 2010 using searches of online local and national news sites and available judicial decisions.¹⁰¹ In all cases where the defence was used in both homicide and non-fatal cases the defendant was male, and of the victims killed, 55 out of 60 were female.¹⁰² In many cases, the defendant will be a partner or ex-partner of the victim, however, a number of cases occur in the context of casual sex.¹⁰³

In fact, section 71 DAA 2021 does little to address this problem and varies significantly from the initial proposal sponsored by Harriet Harman, MP. Harman's original amendments were for the abolition of a consent defence where injuries ranging from actual bodily harm to death were caused in the course of domestic abuse, including encounters that are sado-masochistic.¹⁰⁴ In addition, the Crown Prosecution would only bring charges of manslaughter in domestic abuse homicides with the consent of the Director of Public Prosecutions, who would need to consult with the victim's family prior to giving that consent.¹⁰⁵ Bows and Herring, reflecting upon these proposals suggested that they were of limited value as they were concerned only with domestic abuse cases as defined by s. 1 DAA 2021, thereby excluding casual sexual encounters such as the Grace Milane case in New Zealand that had increased the public's awareness of the issue. However, they did counter arguments that the provision was pointless serving as a restatement of the law in *R v Brown* [1993] 1 AC 212 rather than the abolition of an existing defence. Whilst *R v Brown* makes a clear statement in regards to sado-masochistic activities within homosexual relationships, its application to martial relationships has been less certain with *R v BM* [2018] EWCA Crim 560 approving the decision in *R v Wilson* [1997] QB 47 that within marriage sado-masochistic activities causing

¹⁰⁰ H. Bows and J. Herring, 'Getting away with murder? A review of the 'rough sex' defence' (2020) 84(6) *Journal of Criminal Law* 525 at 526.

¹⁰¹ We Can't Consent To This, "What Can be Consented to? Briefing on the Use of "Rough Sex" Defences to Violence' (2019) <https://wecantconsenttothis.uk> [Accessed 29 May 2021].

¹⁰² *Ibid.*

¹⁰³ A point highlighted by the murder of Grace Milane in New Zealand, E. Ainge Roy, 'Grace Millane murder: man jailed for life for killing of UK backpacker', *The Guardian* (20 February 2020) <https://www.theguardian.com/world/2020/feb/21/grace-millane-man-jailed-for-life-for-killing-of-uk-backpacker> [Accessed 29 May 2021].

¹⁰⁴ House of Commons Notice of Amendments (7 October 2019) https://publications.parliament.uk/pa/bills/cbill/2017-2019/0422/amend/domestic_rm_pbc_1007.1-3.html [Accessed 17 September 2021].

¹⁰⁵ *Ibid.*

injury may be lawful as ‘consensual activity between husband and wife in the matrimonial home was not a matter for criminal investigation and prosecution under section 47 [Offences Against the Person Act 1861].’¹⁰⁶ As to the second proposed amendment, it would be unlikely to have little effect on jury decision making as they would still have the alternative verdict of manslaughter available to them as with all murders under s. 6 Criminal Law Act 1967 and there is no evidence available that the prosecuting authorities are bringing inappropriate charges in domestic homicide cases.¹⁰⁷

Section 71 DAA 2021 in fact dispenses with any mention of death and murder and instead confines itself to cases where s. 47, 18 or 20 Offences Against the Person Act 1861 are charged.¹⁰⁸ It provides that the defence of consent does not apply to these offences where the serious harm is caused for the purpose of obtaining sexual gratification,¹⁰⁹ unless the serious harm is or is the result of a sexually transmitted infection to which the victim was aware of at the time of sexual intercourse.¹¹⁰

The first observation to make is the omission of the new strangulation and suffocation offence under s. 75A Serious Crime Act 2015, inserted by s. 70 DAA 2021, to the offences that this provision should apply to. There are numerous justifications for creating this offence in the context of domestic abuse not least because it is a very dangerous activity leading to a variety of serious long-term health problems, it is used as an extreme form of coercive control and is a significant indicator of future risk of death.¹¹¹ Whilst this behaviour falls within the definition of a number of non-fatal offences, evidence suggests that they are rarely used appropriately.¹¹² A specific offence helps to improve risk assessments of future harm, as it details that strangulation or suffocation has been used. Without it, Douglas and Fitzgerald found that health professionals, domestic abuse workers or criminal justice professionals did

¹⁰⁶ *R v BM* [2018] EWCA Crim 560 at para. 33.

¹⁰⁷ H. Bows and J. Herring, ‘Getting away with murder? A review of the ‘rough sex’ defence’ (2020) 84(6) *Journal of Criminal Law* 525 at 536.

¹⁰⁸ S. 71(3) DAA 2021.

¹⁰⁹ S. 71(5) DAA 2021 states that it applies regardless of whether the sexual gratification was for the defendant, the victim or another person.

¹¹⁰ S. 71(4) DAA 2021.

¹¹¹ R. Kelly and d. Ormerod, “Non-fatal strangulation and suffocation” (2021) (7) *Crim. L.R.* 532.

¹¹² Centre for Women’s Justice, Submission on Domestic Abuse Bill (2021) at para. 15; S. Edwards, ‘The strangulation of female partners’ (2015) 12 *Crim.L.R.* 949.

not include references of strangulation or suffocation in their records, and the perpetrator's potential risk to others was lost.¹¹³

It is this issue that could be undermined by the offence's exclusion from the ambit of s. 71 DAA 2021. Charging a non-fatal strangulation under s. 47 OAPA 1861 where the defendant alleges it took place for sexual gratification purposes would mean that consent would be irrelevant in determining whether they were guilty of the offence as s. 71 DAA 2021 applies. However, this would mean that the future risk of harm posed by the act of strangulation in domestic abuse cases would be less visible, thereby undermining one of the purposes of creating a specific offence for non-fatal strangulation. If a charge was brought under s. 75A SCA 2015, s. 71 DAA 2021 does not apply.

The task of the prosecution is more onerous where consent is raised in respect of the strangulation and suffocation defence compared to a non-fatal offence under s. 47 OAPA 1861 because the mens rea requirements have different thresholds. Should consent not be raised in respect of s. 75A SCA 2015, it is sufficient for the prosecution to show that the defendant strangled the victim or did a battery that affected their ability to breathe.¹¹⁴ When consent is raised in defence, however, the prosecution must prove that in the event that the victim suffered serious harm as a result of the act, the defendant either intended or was reckless as to causing *serious harm*.¹¹⁵ In contrast, where a s. 47 OAPA 1861 offence is charged and consent alleged, the prosecution need only prove the mens rea of a battery or assault, in other words that the defendant either intended or was reckless as to causing the application of unlawful force, or alternatively causing the victim to apprehend such force.¹¹⁶ Clearly, the prosecution could be expected to select a charge under s. 47 OAPA 1861 where the conduct that caused injury was either strangulation or suffocation on the basis that there was a greater prospect of conviction. This oversight ought to be addressed by Parliament at the soonest opportunity to prevent an inconsistent approach and a failure to achieve an aim of the new specific offence of strangulation and suffocation. One proposal would be to treat

¹¹³ H. Douglas and R. Fitzgerald, 'Strangulation, Domestic Violence and the Legal Response' (2014) 36 Sydney Law Review 231 at 233.

¹¹⁴ S. 75A(1)(a) and (b) SCA 2015.

¹¹⁵ S. 75A(3) SCA 2015.

¹¹⁶ *R v Venna* (1975) 3 All ER 788.

claims that the strangulation was consensual under s. 75A SCA 2015 as unsuccessful where serious harm has been established, without needing to determine the defendant's state of mind when conducting the strangulation.¹¹⁷ As illustrated above, to do otherwise, would mean that s. 71 DAA 2021 and s.75A SCA 2015 would contradict each other, allowing a prosecution to succeed where the strangulation is charged as a s. 47 OAPA 1861 offence, but limiting success if charged under s. 75A SCA 2015.

Bows and Herring's concern with the proposed amendment's restriction to domestic abuse relationships has been addressed, as there is no limitation that the sexual encounter took place within a domestic abuse relationship.¹¹⁸ This ensures that the goal of the provision has the potential to fulfil a wider ambit of condemning violence against women. However, placing the ruling of *R v Brown* on a statutory footing creates a conflict for those who legitimately wish to engage in BDSM experiences and hopes that the decision could be altered in common law in the future are extinguished by s. 71 DAA 2021.¹¹⁹ Following the case of *R v Brown*, consent is no defence to harm that amounts to actual bodily harm or more severe, unless it falls within an exempted category.¹²⁰ Sexual gratification may be an exemption from the *Brown* position, however, not in homosexual sado-masochistic circumstances as was the case in *Brown* with justification made to some extent on grounds of protecting public morals. In cases involving heterosexual intimate partnerships, the courts have accepted greater levels of permissiveness as illustrated by *R v Wilson*,¹²¹ however, they have drawn the line where the activity involves a greater risk of serious harm and it is an unreasonable risk to run.¹²² Herring notes that the cases of *R v Wilson* and *R v Emmett*¹²³ are regarded in legal textbooks as cases of sado-masochistic conduct rather than domestic abuse,¹²⁴ and yet there is little evidence that consent was given beyond the defendants' say so.¹²⁵

¹¹⁷ Required by Section 75A(3)(b) Serious Crime Act 2015 once enacted.

¹¹⁸ As defined in s. 1 DAA 2021.

¹¹⁹ J. Rogers, "'Abolition" of the "Rough Sex" Defence: Hurried Legislation and Missed Opportunities" Criminal Law Reform Now Network (2020) <http://www.clrnn.co.uk/blog/?page=5> [Accessed 17th September 2021].

¹²⁰ *R v Brown* [1993] 1 AC 212.

¹²¹ *R v Wilson* (1996) 3 WLR 125.

¹²² *R v Meachen* (2006) EWCA Crim 2414.

¹²³ *Emmett* 18 June 1999, Internet transcript.

¹²⁴ J. Herring, 'Criminal Law: Text, Cases and Materials' (8th ed) 2018 at p.383.

¹²⁵ H. Bows and J. Herring, 'Getting away with murder? A review of the 'rough sex' defence' (2020) 84(6) *Journal of Criminal Law* 525 at 533.

Certainly, female participation in sado-masochistic activities may have increased if as Busby suggests, “the bestseller status of [sado-masochistic]... Fifty Shades trilogy is any indication” along with the commercialisation of its iconography such as black leather, dog collars and whips.¹²⁶ However, WCCTT found that 38% of women under the age of 40 had experienced unwanted slapping, spitting, choking or gagging in sex that was consensual until that point.¹²⁷ Bows and Herring note that significantly more men than women “report arousal for fetishism and sadism and significantly more men than women report participating in sado-masochistic activity.”¹²⁸ Conducted properly and with considered consent sado-masochistic conduct must be ‘safe, sane and consensual’¹²⁹ and yet 44% of women responding to a study commissioned by BBC Radio 5 said they experienced unwanted conduct,¹³⁰ whilst a third of men admitted slapping, gagging, choking or spitting on their partner without obtaining consent.¹³¹ S. 71 DAA 2021 now implicitly recognises that women may be pressured into agreeing to BDSM acts and accepting of risks which they would prefer not to take.

However, where BDSM activities are not for the purpose of violence against women and are practised in a safe, sane and consensual manner this provision is difficult to reconcile, although it seeks to restate the common law. Had this provision been subject to more extensive debate it would have enabled considerations of what Weinberg considers is needed – a more nuanced approach than the current criminal law framework delivers.¹³² Instead, the

¹²⁶ K. Busby, ‘Every Breath You Take: Erotic Asphyxiation, Vengeful Wives and Other Enduring Myths in Spousal Sexual Assault Prosecutions, (2021) 24 *Canadian Journal of Women and Law* 328 at 346.

¹²⁷ We Can’t Consent To This <https://wecantconsenttothis.uk/our-stories> [Accessed 29 May 2021].

¹²⁸ H. Bows and J. Herring, ‘Getting away with murder? A review of the ‘rough sex’ defence’ (2020) 84(6) *Journal of Criminal Law* 525 at 533. J. Ritchers, R.O. De Visser, C.E. Rissel, A.E. Grulich and A.M.A. Smith, “Demographic and Psychosocial Features of Participants in Bondage and Discipline, Sadomasochism or Dominance and Submission (BDSM): Data From a National Survey’ (2008) 5(7) *Journal of Sexual Medicine* 1660 and A.A. Brown, E.D. Barker and Q. Rahman, “A Systematic Scoping Review of the Prevalence, Etiological, Psychological, and Interpersonal Factors Associated With BDSM’ (2019) *Journal of Sex Research* DOI: 10.1080/00224499.2019.1665619.

¹²⁹ K. Busby, ‘Every Breath You Take: Erotic Asphyxiation, Vengeful Wives and Other Enduring Myths in Spousal Sexual Assault Prosecutions, (2021) 24 *Canadian Journal of Women and Law* 328 at 338.

¹³⁰ H. Bows and J. Herring, ‘Getting away with murder? A review of the ‘rough sex’ defence’ (2020) 84(6) *Journal of Criminal Law* 525 at 533; Alys Harte, “A man tried to choke me during sex without warning” (28 November) BBC News <https://www.bbc.co.uk/news/uk-50546184> [Accessed 29 May 2021].

¹³¹ Ibid; G. Mair, “Over two-thirds of men under 40 have slapped, choked, gagged or spat on partner during sex” (23 March 2020) <https://www.thescottishsun.co.uk/news/5415762/rough-sex-bbc-scotland-partner-men/> [Accessed 29 May 2021].

¹³² J. Wienberg, *Consensual Violence: Sex, Sports and the Politics of Injury* (University of California Press, 2016).

dominatrix finds that her work is criminalised under the same law aimed at domestic abusers and men seeking to inflict violence against women.

Rogers suggests that this statutory “abolition” of the consent defence will have no practical effect, because the defendant will still be able to refer to a consensual sexual activity as the context in which the harm occurred in their testimony, in efforts to deny the existence of the mens rea of the offence.¹³³ Seeking to deny the necessary foresight of the harm the defendant is able to rely on the sexual consent narrative by manipulating and appropriating sado-masochistic narratives “to disguise what is essentially cruel and misogynist conduct.”¹³⁴ Even where there is a lack of evidence that the victim consented to rough sex “the defence is able to rely on broader cultural scripts about women and sexuality to position the complainant as an enthusiastic and willing participant.”¹³⁵ Should such claims fail at trial, the defendant can still benefit at the sentencing stage, and will not be prevented from raising the claim in mitigation. The advent of s. 71 DAA 2021 is unlikely to change this position, where the defendant will continue to suggest that he was encouraged to partake in the activity by the victim with neither of them perceiving any risk of injury.

Other Options for Reform

There are alternative options for reform in this area that did not find their way into the Domestic Abuse Act, such as a change to the rules of evidence. Under S. 41 Youth Justice and Criminal and Evidence Act 1999 (YJCEA 1999) restrictions are placed on the use of the complainant’s previous sexual history in sexual offence trials. The provision does not provide for absolute prohibition, as certain criteria must be met before such information can be raised by the defence. For non-sexual offences character evidence is governed by s. 100 Criminal Justice Act 2003, where the conditions of admissibility are significantly wider than s. 41 YJCEA 1999 and Edwards considers that “if admitted, it may be so prejudicial and unfair to the

¹³³ J. Rogers, “Abolition” of the “Rough Sex” Defence: Hurried Legislation and Missed Opportunities” Criminal Law Reform Now Network (2020) <http://www.clrnn.co.uk/blog/?page=5> [Accessed 17th September 2021].

¹³⁴ S Edwards, “Assault, Strangulation and Murder--Challenging the Sexual Libido Consent Defence Narrative’ in A. Reed, M. Bohlander, N. Wake and E. Smith (eds), *Consent: Domestic and Comparative Perspective* (Routledge, Abingdon 2016) at p.102.

¹³⁵ *Ibid.*

deceased, given the sea of sexual presumptions about women” that it fundamentally alters “the landscape of the trial.”¹³⁶ In cases of death, the victim’s reputation is traduced in post-mortem abuse.¹³⁷ Widening the framework under s. 41 YJCEA 1999 could ‘partially address the way the narrative is produced by the defence’ in a manner which affords protection to the victims’ reputations and the defendant’s right to a fair trial enshrined in Article 6 European Convention on Human Rights.¹³⁸

Another potential option for legal reform is to change prosecutorial practice by making a presumption that there was no consent to the receiving of injuries in cases of rough sex, thereby favouring the prosecution. Rogers explains that this will mean that whilst the defendant may still claim that he did not foresee the injuries or death when embarking upon the activity, “the judge will add, they should not be quick to accept what they had heard about the victim’s consent and should only take into account of it if they think it more likely than not to be true.”¹³⁹ This would change the current position as it enables the judge to actively inform the jury that the defendant could be lying and gives some assurance to relatives that the claim will be approached from a position of untruth unless proven otherwise. Bows and Herring query whether this would be of practical significance as it is not known conclusively whether their verdicts for murder or manslaughter, or lesser non-fatal offences, can be explained by the so-called rough sex defence without a review. Their preference would be the addition of a sexual activity aggravator that can be taken into consideration upon sentencing.¹⁴⁰ However, it is suggested that this would not address the frustrations of the victim’s relatives that could be achieved with a rebuttable presumption.

Ratification of the Istanbul Convention

¹³⁶ S. Edwards, ‘Consent and the “rough sex” defence in rape, murder, manslaughter and gross negligence’ (2020) *Journal of Criminal Law* 84(4) 293 at 303-304; *R v Phillips* [2012] 1 Cr App R 25 at 332.

¹³⁷ *Ibid* at 304.

¹³⁸ H. Bows and J. Herring, ‘Getting away with murder? A review of the ‘rough sex’ defence’ (2020) 84(6) *Journal of Criminal Law* 525 at 537.

¹³⁹ J. Rogers, “‘Abolition’ of the “Rough Sex” Defence: Hurried Legislation and Missed Opportunities” Criminal Law Reform Now Network (2020) <http://www.clrnn.co.uk/blog/?page=5> [Accessed 17th September 2021].

¹⁴⁰ H. Bows and J. Herring, ‘Getting away with murder? A review of the ‘rough sex’ defence’ (2020) 84(6) *Journal of Criminal Law* 525 at 531 and 537.

The Council of Europe Convention on preventing and combating violence against women and domestic violence 2011 (Istanbul Convention) entered into force on 1st August 2014 for states who have ratified it. However, the United Kingdom has yet to ratify this treaty although its intention to do so is indicated by the Preventing and Combating Violence Against Women and Domestic Violence (Ratification of the Convention) Act 2017, which requires the Secretary of state to produce a report for Parliament explaining the steps needed to be taken to progress to ratification.¹⁴¹ Ratification by the United Kingdom has, in part, been delayed by the issue of extraterritorial jurisdiction required by Article 44. To be compliant with the treaty, each legal jurisdiction in the United Kingdom needs to criminalise domestic abuse as it is understood by the terms of the treaty. Article 33 ensures that this includes psychological violence, such as that caused by controlling and coercive behaviours. It has taken some time to achieve this in each jurisdiction in the United Kingdom which is now completed following Northern Ireland's introduction of a domestic abuse offence that criminalises such behaviour in the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021. Sections 72-74 Domestic Abuse Act 2021 provides the power to prosecute nationals and residents for a number of listed offences¹⁴² with implementation expected from the 29th June 2021.¹⁴³ Despite this, ratification will remain on hold until concerns about providing support to vulnerable migrant victims of domestic abuse required by articles 3, 4 and 59 of the Istanbul Convention, are resolved.

Domestic Violence Disclosure Scheme

The domestic violence disclosure scheme (DVDS) was introduced in 2014 and was based on common law powers of police to disclose information where it is necessary to prevent crime.¹⁴⁴ It allows potential victims of domestic abuse a 'right to ask,' by approaching the police, or a 'right to know,' where the police proactively inform the potential victim, about a partner's history of abuse. The scheme has its critics, concerned with its reliance upon victim engagement with the criminal justice system and for those with children concerned about

¹⁴¹ Preventing and Combating Violence Against Women and Domestic Violence (Ratification of the Convention) Act 2017 s. 1(1)(a).

¹⁴² Sections 72(2) and 73(2) DAA 2021.

¹⁴³ Victoria Atkins, HC Deb, 26 May 2021, col.141. Available at: <https://www.theyworkforyou.com/whall/?id=2021-05-26a.137.0#g141.2> [Accessed 16 June 2021].

¹⁴⁴ Home Office, Domestic Violence Disclosure Scheme (DVDS) Guidance (2016) at p. 4.

agency involvement in respect of their parenting in an abusive relationship.¹⁴⁵ During the Domestic Abuse Bill debates Jess Phillips MP noted that there are significant variations in practice regarding the scheme for example, in 2019 Kent had an 8.5% disclosure rate to right to ask disclosures, while Hampshire had 99.5% rate.¹⁴⁶ Duggan and Grace suggest that inconsistency in practice is to be expected as the guidelines supporting operational police staff to judge the appropriateness of disclosure are vague and those seeking information are vulnerable, requiring better support when engaging with the scheme.¹⁴⁷ The DAA 2021 offered an opportunity to place the DVDS on a statutory footing, which could provide Parliamentary clarity on the scope of the scheme and how it should operate. However, the Act falls short of codification with s. 77 requiring the Secretary of State to produce guidance about the disclosure of information by police forces. The guidance as required by statute has the potential to address limitations identified with the DVDS, such as promoting greater national consistency and improved support to potential victims when accessing the scheme.¹⁴⁸ As with the statutory guidance framework on the definition of domestic abuse, s. 77 DAA 2021 may achieve better education of “the public around police and multi-agency methods for addressing and preventing domestic violence in society.”¹⁴⁹

Conclusion.

The Domestic Abuse Act 2021 represents significant progress in government and public recognition of an insidious harm that pervades many peoples' lives, the majority of whom are women, but also include men and children. From the outset, the focus was not on the criminal law framework governing domestic violence and abuse, however, the resulting legislation did produce a number of reforms with the introduction of new offences, more criminalisation for breaches of protection orders and requirements for statutory guidance on the definition of

¹⁴⁵ M. Duggan, 'Victim hierarchies in the domestic violence disclosure scheme' (2018) 24(2) *International Review of Victimology* 199 at p.206. S. Gracia, 'Domestic violence policy and legislation in the UK: A discussion of immigrant women's vulnerabilities' (2017) 22(1) *European Journal of Current Legal Issues*.

¹⁴⁶ Domestic Abuse Bill Deb, 11 June 2020, col. 281.

¹⁴⁷ M. Duggan and J. Grace, 'Assessing vulnerabilities in the Domestic Violence disclosure Scheme' (2018) (30)2 *Child and Family Law Quarterly* 145.

¹⁴⁸ Home Office, Domestic Violence Disclosure Scheme (DVDS) Guidance (2016) at p. 4.

¹⁴⁹ M. Duggan and J. Grace, 'Assessing vulnerabilities in the Domestic Violence disclosure Scheme' (2018) (30)2 *Child and Family Law Quarterly* 145 at 148.

domestic abuse and DVDS. Consequently, efforts have been made to address some gaps in the prevention of domestic abuse and the protection provided by the criminal law to victims. All progress is to be welcomed, although there will invariably be challenges to the implementation of some of the provisions created, such as prosecuting the offence of strangulation where the defence of consent is raised, or applying the statutory abolition of consent to non-fatal offences carried out in the pursuit of sexual gratification. The process that has led to the Domestic Abuse Act 2021 has highlighted the need for a coherent and structured criminal law framework to govern offences and defences applicable to domestic violence and abuse. The Act contains only aspects that effect criminal offences, although debates arose around the criminality of domestic abuse victims that warrant further evaluation and potential reform in the future in the interests of fairness and consistency.¹⁵⁰ From a more positive perspective, the government has harnessed a collaborative approach that shaped the development of the Act and this sentiment may well continue with the appointment of the new statutory position of Domestic Abuse Commissioner (s. 4 DAA 2021), whose has a consultative role among other tasks.¹⁵¹ The Domestic Abuse Act 2021 may have been intended as a once in a generation opportunity to address the law in this area, but it may prove to be the start of the journey for comprehensive criminal legal reform.

¹⁵⁰ See XXX (this issue)

¹⁵¹ S. 7(2)(f) DAA 2021.