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**Protecting Victims of Coercive Control in the Law: Should  
New Zealand follow the Scottish Approach?**

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*Abstract*

Over the past two decades, many jurisdictions have begun to enact offences which criminalise non-physical abuse, including coercive and controlling behaviour. These offences are intended to capture the long-term patterns of harm that IPV victims suffer, as opposed to isolated events of violence. Since the radical legislative reform of England and Wales in 2015, where the Serious Crime Act established the s 76 offence of coercive or controlling behaviour, several European countries have followed suit. One such example is the Domestic Abuse (Scotland) Act 2018 which introduces a wide-reaching offence of “abusive behaviour”. This article discusses whether New Zealand should follow Scotland’s lead and adopt a similar offence. It discusses the benefits such an offence could offer, as well as the challenges that must be overcome in order for its implementation to be effective. The Scottish offence has inspired other jurisdictions because it is able to capture a wide range of abusive behaviours, thus reflecting the lived experiences of victims. New Zealand should seriously consider taking a similar approach, if it is to address the vast gap in the law’s response to intimate partner violence.

**Keywords:** coercive control, intimate partner violence, domestic abuse, violence against women, criminal justice

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## *I Introduction*

Over the past two decades, many jurisdictions have begun to enact offences which criminalise non-physical abuse, including coercive and controlling behaviour. These offences are intended to capture ‘courses of conduct’, as opposed to one-off incidents of violence. In other words, they aim to address the patterns of harm perpetrated by aggressors.<sup>1</sup> Since the radical legislative reform of England and Wales in 2015, where the Serious Crime Act established the s 76 offence of coercive or controlling behaviour,<sup>2</sup> several European countries have followed suit. This has resulted in a smorgasbord of different offences targeting psychological abuse in quite different ways.<sup>3</sup> One example of this is the Domestic Abuse (Scotland) Act 2018 which introduces a wide-reaching offence of “abusive behaviour”<sup>4</sup>. In 2016, the New Zealand government decided not to make any legislative change despite these developments.<sup>5</sup> Years have passed since the law reforms in other jurisdictions, and we now have the benefit of determining how effective each has been. It is time New Zealand engaged in this exercise and took a step towards addressing the serious and rapidly growing issue of intimate partner violence, in order to improve- and save- womens’ lives.

During the last decade, there has been increasing recognition by social science academics that the harm suffered by women in abusive relationships is much more than physical. Victims often report that the psychological aspects of the abuse they endure are the most harmful.<sup>6</sup> Coercive control is often present in relationships where the victim experiences

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<sup>1</sup> Julia Tolmie “Coercive control: To criminalize or not to criminalize?” (2018) 18 CCJ 50 at 50.

<sup>2</sup> Serious Crime Act 2015 (UK), s 76.

<sup>3</sup> For a comparative overview and analysis of these offences, see Vanessa Bettinson “A Comparative Evaluation of Offences: Criminalising Abusive Behaviour in England, Wales, Scotland, Ireland and Tasmania” in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer Singapore, Singapore, 2020) 197.

<sup>4</sup> Domestic Abuse (Scotland) Act 2018.

<sup>5</sup> Cabinet Office Circular “Prosecuting Family Violence” (2016) CAB at [26]-[29].

<sup>6</sup> Heather Douglas “Alternative Constructions of a Family Violence Offence” in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer Singapore, Singapore, 2020) 243 at 253-254.

physical violence, but it can be equally as harmful in relationships where no physical abuse is present.<sup>7</sup>

This article aims to contribute to the existing scholarly debate around the most effective way to criminalise intimate partner violence in a manner which incorporates coercive control. Different terms appear across jurisdictions to classify abuse occurring within the household and between partners. I will primarily be using the term ‘intimate partner violence’ (IPV) because it involves a dynamic that is distinct from other familial relationships, which affects the nature of the abuse. I have based my analysis on the instance of IPV which occurs most frequently, in which the perpetrator is male and the primary victim is female.

I situate the debate within the New Zealand context, arguing the New Zealand criminal response to IPV is far from adequate. In Part II I provide necessary background on the impact of IPV in New Zealand, and the shortcomings in our justice system’s response to it. After outlining the harm that is caused by coercive control in Part III, in Part IV I discuss the potential benefits a discrete offence which criminalises coercive control can offer. Part V provides an in-depth discussion of the challenges that arise in drafting and implementing such an offence, as well as a key risk of criminalisation: the potential minimisation of victims’ experiences. In Part VI I introduce the Domestic Abuse (Scotland) Act 2018 (*DASA*) and its approach to criminalising IPV, highlighting its innovative features that have awarded it the title of ‘gold standard’ legislation. In this section I discuss how this unique offence has the potential to overcome the challenges I traversed in Part V. Finally, in Part VII I offer the suggestion that New Zealand should introduce a new offence to target IPV and base it on the Scottish model. I argue that legislative reform is needed if New Zealand is to see tangible change in its soaring domestic violence statistics. Yet, legislative change alone is no “panacea”.<sup>8</sup> Reforms must be systemic and accompanied by substantial

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<sup>7</sup> Vanessa Bettinson “Criminalising Coercive Control in Domestic Violence Cases: Should Scotland Follow the Path of England and Wales?” (2016) 3 Crim. L.R. 165 at 168.

<sup>8</sup> Tolmie, above n 1, at 51.

and ongoing education of the public, as well as specialist training for judges, police, and frontline responders.<sup>9</sup> But legislative change may be the right place to start.

## II *The New Zealand Context*

New Zealand has the highest rates of family and intimate partner violence of all the developed countries in the world.<sup>10</sup> 35% of New Zealand women have experienced physical or sexual violence from intimate partners in their lifetime, and when psychological and emotional abuse is included, that number goes up to 55%.<sup>11</sup> National domestic violence support service, *Shine*, notes that reports of intimate partner violence and the severity of violence have sharply increased since the first Covid-19 lockdown in 2020.<sup>12</sup> As more and more women seek help, services like *Shine* are working beyond their capacity. It is clear that more work needs to be done to effectively prevent violence against women in this country, and to protect those who are experiencing it on a daily basis.

New Zealand's domestic violence policies consistently state that what constitutes domestic violence can include a range of behaviours by aggressors.<sup>13</sup> The Ministry for Women's website explicitly acknowledges that intimate partner violence "involves a pattern of coercion and control that may include physical, sexual and psychological violence, social isolation and financial abuse."<sup>14</sup> Similarly, the Family Violence Act 2018 defines

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<sup>9</sup> Tolmie, above n 1, at 51.

<sup>10</sup> Blair Ensor, Edward Gay and Andy Fyers "The Homicide Report: 2019 the worst year for intimate partner homicide in a decade" (2 April 2020) Stuff <[www.stuff.co.nz/national/crime/120413867/the-homicide-report-2019-the-worst-year-for-intimate-partner-homicide-in-a-decade](http://www.stuff.co.nz/national/crime/120413867/the-homicide-report-2019-the-worst-year-for-intimate-partner-homicide-in-a-decade)>.

<sup>11</sup> New Zealand Family Violence Clearinghouse "Frequently Asked Questions" <[www.nzfvc.org.nz/frequently-asked-questions](http://www.nzfvc.org.nz/frequently-asked-questions)>.

<sup>12</sup> Anna Leask "Domestic violence increases rapidly in New Zealand – strangulation, beatings 'commonplace' in 2020" (2 September 2020) NZ Herald <[www.nzherald.co.nz/nz/domestic-violence-increases-rapidly-in-new-zealand-strangulation-beatings-commonplace-in-2020/TKNYCLLUVQMBANS4QNXFXORLLM/](http://www.nzherald.co.nz/nz/domestic-violence-increases-rapidly-in-new-zealand-strangulation-beatings-commonplace-in-2020/TKNYCLLUVQMBANS4QNXFXORLLM/)>.

<sup>13</sup> New Zealand Police "Help for family violence" <[www.police.govt.nz/advice/family-violence/help](http://www.police.govt.nz/advice/family-violence/help)>.

<sup>14</sup> Ministry for Women "Violence against women" (8 August 2012) <[www.women.govt.nz/safety/what-violence-against-women](http://www.women.govt.nz/safety/what-violence-against-women)>.

“violence” as a term which covers physical, sexual and psychological abuse.<sup>15</sup> It explicitly states that violence may entail a “pattern of behaviour” that is made up of a number of acts of abuse.<sup>16</sup> It even states that ‘violence’ may have one or both of the following features: it is “coercive or controlling”<sup>17</sup>, and it causes or may cause the victim “cumulative harm”.<sup>18</sup> Yet, that Act does not include any provision which actually makes such behaviour criminal.

As Tolmie notes, attempts have already been made in New Zealand’s criminal law to address patterns of harm in the sphere of family violence.<sup>19</sup> For example, police safety orders were designed to provide a legal avenue to protect victims of abuse from abusive behaviours not limited to physical violence.<sup>20</sup> Additionally, New Zealand has the offence of criminal harassment, which was designed to capture a pattern of behaviour which causes a person to fear for their safety.<sup>21</sup> Despite these developments, the legal response to intimate partner violence at present remains focused on isolated instances of assault or threatening behaviour, rather than the long-term, repeated nature of much domestic abuse.

The New Zealand Police website states that domestic violence is no private matter; it is a crime.<sup>22</sup> Yet, under New Zealand laws to date, psychologically or emotionally abusing an intimate partner is not a criminal offence. There is no legal avenue to convict an individual on the basis of a course of conduct that includes psychological abuse. As a result, there is a significant gap in our law at present.

### *III The Harm: Defining ‘Coercive Control’*

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<sup>15</sup> Family Violence Act 2018, s 9(2).

<sup>16</sup> Section 9(3).

<sup>17</sup> Section 9(3)(a).

<sup>18</sup> Section 9(3)(b).

<sup>19</sup> Tolmie, above n 1, at 52.

<sup>20</sup> (6 Nov 2018) 734 NZPD 8065.

<sup>21</sup> Harassment Act 1997, s 8.

<sup>22</sup> New Zealand Police, above n 13.

As previously stated, the criminal law in various jurisdictions has been shifting towards criminalising a broader range of behaviours than physical violence within the domestic setting. This has been in response to the increasing understanding of the range of behaviours employed by aggressors and the harmful impact those behaviours have upon victim/survivors of domestic abuse. In his book, *Coercive Control: How Men Entrap Women in Personal Life*,<sup>23</sup> sociologist Professor Evan Stark redefines traditional understandings of domestic abuse. He presents a gendered theory of domestic abuse which is underpinned by the term ‘coercive control’. For Stark, the presence of a coercive and controlling dynamic is what makes the harm suffered in abusive intimate relationships so distinct.<sup>24</sup> Stark’s model refocuses the notion of abusive behaviour from isolated acts of violence to “a pattern of coercive and controlling behaviours that causes a range of harms in addition to injury.”<sup>25</sup> The greatest harm to sufferers of abuse is the erosion of their personal autonomy and integrity that occurs as a result of these behaviours. It is this pattern of harm, Stark argues, that the criminal law should aim to address. This paradigm shift has formed the basis of much of the legislative reform to date.

Coercive control is a deliberate course of conduct characterised by the use of a combination of non-physical tactics to “intimidate, degrade, isolate and control victims”.<sup>26</sup> Examples of these tactics include isolating the victim from family and friends, monitoring their whereabouts, controlling their finances, threatening to hurt them, and verbally humiliating or insulting them.<sup>27</sup> This kind of treatment is often coupled with frequent low-level physical violence and sexual coercion.<sup>28</sup> On a psychological level, the harm is cumulative. Ongoing coercive and controlling behaviour can have a devastating impact on a victim’s psychological wellbeing. Not only do victims of repeated physical violence tend to develop

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<sup>23</sup> Evan Stark *Coercive Control: How Men Entrap Women in Personal Life* (Oxford University Press, New York, 2007).

<sup>24</sup> Stark, above n 23, at 382.

<sup>25</sup> Stark, above n 23, at 99-100.

<sup>26</sup> Evan Stark “The dangers of dangerousness assessment” (2013) 6 FIPVQ 2 at 18.

<sup>27</sup> Crown Prosecution Service “Controlling or Coercive Behaviour in an Intimate or Family Relationship” (30 June 2017) <[www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship](http://www.cps.gov.uk/legal-guidance/controlling-or-coercive-behaviour-intimate-or-family-relationship)> at 3.

<sup>28</sup> Crown Prosecution Service, above n 27, at 3.



‘battered women’s syndrome’ which often meets the criteria for post-traumatic stress disorder,<sup>29</sup> women who are subject to domestic abuse are five times more likely to attempt suicide than the average person.<sup>30</sup> Patterns of behaviour intended to encroach upon a woman’s liberty and diminish her personhood have been shown to cause depression and other mental health disorders as well as feelings of terror, paranoia and helplessness.<sup>31</sup>

The extent of the impact on the victim will depend on the nature and degree of the coercive control and will vary greatly between intimate relationships. The line between what is and should be considered abusive behaviour and what is considered ‘normal’ is certainly blurry, and will also vary depending on the specifics of each relationship. This has created a difficult task for legislatures when deciding what specific behaviour should be criminalised.

#### *IV Potential Benefits of Criminalising Coercive Control*

I will now address, on a broad level, the benefits of enacting a specific offence which criminalises coercive control (or non-physical abuse more generally). These benefits have been discussed at length by scholars such as Tuerkheimer<sup>32</sup> and are summarised here.

The criminal law at present separates ongoing patterns of IPV into individual incidents, and responds to each individually through interpersonal violence offences. It is not currently equipped to respond to the *pattern* of abuse in which these incidents occur. As a result, the law is largely limited to addressing physical violence, and fails to address the

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<sup>29</sup> Lenore Walker “Battered Woman Syndrome” (8 July 2009) *Psychiatric Times* <[www.psychiatrictimes.com/view/battered-woman-syndrome](http://www.psychiatrictimes.com/view/battered-woman-syndrome)>.

<sup>30</sup> Evan Stark and Anne Flitcraft *Women at Risk: Domestic Violence and Women’s Health* (Sage Publications, California, 1996) at 103.

<sup>31</sup> Judith Herman *Trauma and Recovery: The Aftermath of Violence- from Domestic Abuse to Political Terror* (Basic Books, New York, 1992) at 2.

<sup>32</sup> Deborah Tuerkheimer “Recognizing and Remediating the Harm of Battering: A Call to Criminalize Domestic Violence” (2004) 94 *J. Crim. L. & Criminology* 959.

long-term patterns of harm resulting from IPV outlined above. Each incident of violence is consequently taken out of its broader context, which produces too high a risk of the victim's lived experience being misunderstood. The extent of the abuser's wrongful behaviour and the reality of the cumulative impact on the victim have the potential to be minimised throughout the entire criminal justice process,<sup>33</sup> and the psychological and/or financial aspects of the abuse become virtually irrelevant. It follows that the primary advantage of enacting an offence which criminalises coercive control is that such a reform would capture the real nature of the conduct and harm that IPV consists of.<sup>34</sup>

Coercive and controlling conduct is often at the centre of cases of domestic abuse, whether physical violence occurs or not. Criminalising coercive control would provide a mechanism for the criminal law to respond to cases where little or no physical violence is present, addressing the vast gap in the law at present.<sup>35</sup> It may help police officers to identify patterns of harmful behaviour in perpetrators who instead exercise a high level of "psychological intimidation and control, which can have fatal consequences."<sup>36</sup> Criminalising coercive control could also help IPV victims to understand the harm they have suffered, as studies have shown that victims of domestic abuse themselves struggle to identify coercive and controlling behaviour as abusive conduct.<sup>37</sup> Criminalisation would also increase community awareness of IPV, thereby performing an educative function.<sup>38</sup> Further, criminalising coercive control would offer the benefit of making the wider context of isolated events of violence evidentially relevant. At present, when a domestic abuse case is prosecuted, the incident of violence is separated from the pattern of abuse it comes from. This means that the courts will only hear a fragment of the victim's narrative. Each incident is taken out of the context of the relationship dynamic within which it arose. This leaves room for the victim's testimony to become deformed, and the jury may question or discredit

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<sup>33</sup> Tolmie, above n 1, at 52.

<sup>34</sup> Bettinson, above n 7, at 169.

<sup>35</sup> Tolmie, above n 1, at 52.

<sup>36</sup> Bettinson, above n 7, at 166.

<sup>37</sup> Bettinson, above n 7, at 166.

<sup>38</sup> Tolmie, above n 1, at 53.

her account, or trivialise the incident.<sup>39</sup> However, if the wider context of the perpetrator's behaviour became relevant at trial, this would "add to the victim's credibility and provide clear evidence of the perpetrator's motives".<sup>40</sup>

This type of reform would reflect the lived experience of victims who live in a constant state of fear and anxiety. It should, in theory, legitimise those experiences, prevent victim-blaming, and encourage more women to report the abuse they have suffered.<sup>41</sup> This kind of empowerment should be a priority for New Zealand's criminal justice system, particularly as it is estimated that a mere 33% of family violence cases are reported to police.<sup>42</sup>

Criminalising coercive and controlling conduct may also prevent the harm resulting from IPV by contributing to the rehabilitation of offenders.<sup>43</sup> This is because when a discrete offence is prosecuted with no regard given to the pattern of abuse in which it occurred, the offender is merely deterred from crossing the "line into criminality" again.<sup>44</sup> In contrast, the message should be sent that perpetrating any amount of abuse in an intimate relationship is wrongful behaviour. This arguably cannot be achieved while such conduct remains entirely legal.

## *V Challenges of Criminalisation*

There are a plethora of potential challenges on the road to successfully implementing an offence which criminalises coercive control. These challenges must be overcome in order

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<sup>39</sup> Bettinson, above n 7, at 166-167.

<sup>40</sup> Tolmie, above n 1, at 52.

<sup>41</sup> Evan Stark and Marianne Hester "Coercive Control: Update and Review" (2019) 25 VAW 81 at 86.

<sup>42</sup> Good Shepherd New Zealand "New Zealand Family Violence and Economic Harm Statistics" (2022) <[www.goodshepherd.org.nz/economic-harm/new-zealand-family-violence-and-economic-harm-statistics/](http://www.goodshepherd.org.nz/economic-harm/new-zealand-family-violence-and-economic-harm-statistics/)>.

<sup>43</sup> Law Commission (UK) *Reform of offences against the person: A scoping consultation* (UKLC CP217, 2014) at 126-127.

<sup>44</sup> Judith Gowland "Protection from Harassment Act 1997: The 'New' Stalking Offences" (2013) 77 J. Crim. L. 387 at 389.

to reap the benefits of criminalisation. This section will canvas the many difficulties that may arise in both the drafting of a new offence and its implementation. I will draw on the work of Julia Tolmie and Jane Wangmann in particular, who have warned of such challenges.

A key concern in moving towards criminalising coercive control is whether a new offence will leave underlying ‘deficiencies’ associated with the legal response to IPV unchallenged.<sup>45</sup> There are certainly existing problems with the implementation and practice of domestic and sexual violence laws. For example, as Tolmie notes, sexual violence is “rarely reported to the police and is notoriously difficult to prosecute successfully, while the trial process is widely documented to be traumatic and gruelling for complainants.”<sup>46</sup> These issues are complex and ingrained and can undermine the effective use of existing laws targeting domestic abuse.<sup>47</sup>

Due to these ‘deficiencies’, scholars have voiced concerns that adding more law into the mix may not achieve the desired outcomes of protecting victims and increasing perpetrator accountability.<sup>48</sup> A new law would only be as effective as those who apply, prosecute and enforce them.<sup>49</sup> Without improving these practices, through education and training and utilising IPV experts within the justice system, simply creating new offences is likely to prove ineffective.

It should therefore be mentioned that at a broad level, adopting a specific offence centred around coercive control will have limited success if there remains a lack of understanding of IPV and how it manifests. Stark advocates for a more transformative approach which requires an understanding of the nuances of coercive control to be extended to all layers of

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<sup>45</sup> Jane Wangmann “Coercive Control as the Context for Intimate Partner Violence: The Challenge for the Legal System” in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer Singapore, Singapore, 2020) 219 at 230.

<sup>46</sup> Tolmie, above n 1, at 58.

<sup>47</sup> Wangmann, above n 48, at 229.

<sup>48</sup> Wangmann, above n 48, at 229.

<sup>49</sup> Wangmann, above n 48, at 230.

our criminal justice system.<sup>50</sup> Truly effective legislative change will require “significant reforms in practice and thinking”<sup>51</sup> among police, lawyers, judicial officers and support workers. There must be an understanding of the abuse victims suffer, the signs of such abuse, and how victims may respond to it. The current lack of understanding of the intricacies of coercive control provides a basis for many of the barriers to successful criminalisation discussed below.

### *A Unique Evidential Concerns*

Criminalising coercive control introduces unique evidential challenges. Unlike other domestic violence offences, prosecuting an offence of coercive control requires background information about a relationship to be admissible. This is because the harm of coercive control is not able to be objectively measured in the way that physical injuries are.<sup>52</sup> As an example, the England and Wales offence of “coercive and controlling behaviour”<sup>53</sup> requires the conduct to have had a “serious effect”<sup>54</sup> on the victim. An undetermined range of behaviours may satisfy the actus reus requirements. The Home Office’s Statutory Guidance sets out a non-exhaustive list of 17 types of behaviours that, if continuous or repeated and have a ‘serious effect’ on the victim, *may* satisfy s 76, therefore being deemed “coercive and controlling behaviour.”<sup>55</sup> For such an offence, Bettinson and Bishop envision considerable difficulties in gathering sufficient evidence to prove that the behaviour did have such an effect.<sup>56</sup> These difficulties will now be examined.

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<sup>50</sup> Stark, above n 23, at 366.

<sup>51</sup> Tolmie, above n 1, at 50.

<sup>52</sup> Vanessa Bettinson and Charlotte Bishop “Evidencing domestic violence, including behaviour that falls under the new offence of ‘controlling and coercive behaviour’” (2018) 22 Int. J. Evid. Proof. 3 at 8.

<sup>53</sup> Serious Crime Act 2015 (UK), s 76.

<sup>54</sup> Section 76(1)(c).

<sup>55</sup> UK Home Office Statutory Guidance Framework “Controlling or Coercive Behaviour in an Intimate or Family Relationship” (5 December 2015) at 4.

<sup>56</sup> At 7-12.

### *1 The Need for a Complex and Individualised Analysis*

Tolmie has opined that coercive control may be too difficult to successfully prosecute as it may require “a complexity of analysis that the criminal justice system is not currently equipped to provide”.<sup>57</sup> She suggests that it may be too far a leap to expect criminal prosecutors to be able to prove a continuing course of conduct that amounts to coercive control.<sup>58</sup> This is because, as I have noted, coercive and controlling behaviours may cumulate over an extended period of time, operating to systematically dismember the victim’s sense of self and undermine her autonomy.

In addition, a coercive and controlling relationship may not be obvious to a person outside of it. This is because what amounts to coercive and controlling behaviour will differ between perpetrators. For example, a perpetrator may utilise gestures, looks or comments that indicate a threat of violence to the victim herself, but would go unnoticed by anyone else.<sup>59</sup> Each case will involve an “individualised package of behaviours”, some of which may be subtle.<sup>60</sup> Coercive control, therefore, requires a much more individualised and complex level of analysis than isolated incidents of violence. Given this complexity, the judiciary will have a key role in successfully implementing a new offence. Judges will need to firstly, have a sound conceptual grasp of coercive and controlling behaviour, and secondly, be able to accurately identify these behaviours which manifest in many different ways. This is no simple task.

One issue of particular concern is the need for a “sensitive gender analysis.”<sup>61</sup> Perpetrators of coercive control are able to exploit existing gender norms, as some degree of male dominance is normalised in heterosexual relationships- even in non-abusive ones.<sup>62</sup> It will be difficult, therefore, for both judges and police to identify what behaviour is ‘normal’ or

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<sup>57</sup> At 50.

<sup>58</sup> At 54.

<sup>59</sup> Bettinson, above n 7, at 168.

<sup>60</sup> Tolmie, above n 1, at 54.

<sup>61</sup> Tolmie, above n 1, at 55.

<sup>62</sup> Tolmie, above n 1, at 56.

acceptable within an intimate relationship, and what behaviour crosses the line into illegality.

The risk is that, in some instances, seriously harmful and oppressive conduct will be ignored, due to heteronormative behaviour within intimate relationships being “normalised and reinforced at a societal level.”<sup>63</sup> This arose in the Australian family law case of *Ackerman v Ackerman*.<sup>64</sup> which concerned parenting arrangements and the division of property following the breakdown of a marriage. The wife alleged that the husband had coerced and controlled her, constituting family violence under the Family Law Act.<sup>65</sup> She claimed he was a “domestic tyrant, who required her to meet oppressively high standards in terms of the performance of her housework responsibilities”<sup>66</sup>, isolated her from her friends, dictated her day-to-day life, stalked her following their separation, was aggressive and frightened their children. The federal magistrate classified these instances as “marital tensions”,<sup>67</sup> adding that the husband “may be criticised for being old fashioned or even sexist in his attitudes.”<sup>68</sup> However, he found that the husband’s actions fell “far short of coercive or controlling behaviour”.<sup>69</sup> This case makes salient the risk that, without a critical understanding of how traditional gender roles support “patterns of power and domination in heterosexual relationships,”<sup>70</sup> it can be difficult to identify coercive control, rendering invisible the oppression that many women endure.

Additionally, if decision makers lack an understanding of IPV, or make assumptions about it, this can undermine attempts at reforming the legal response to it.<sup>71</sup> One assumption that is often made is that IPV victims can make the choice to leave or end an abusive relationship of their own volition. As Tolmie notes, this assumption is accompanied by a

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<sup>63</sup> Bettinson and Bishop, above n 54, at 9.

<sup>64</sup> *Ackerman v Ackerman* [2013] FMCAfam 109.

<sup>65</sup> Family Law Act 1975 s 4AB(1) (Cth).

<sup>66</sup> *Ackerman*, at [20] per Brown FM.

<sup>67</sup> At [155].

<sup>68</sup> At [162].

<sup>69</sup> At [162].

<sup>70</sup> Tolmie, above n 1, at 55.

<sup>71</sup> Tolmie, above n 1, at 57.

broader one: that victims can competently prevent the abuse they have experienced by using the tools available to them; for example, by calling the police or applying for a protection order.<sup>72</sup> This is not necessarily accurate, particularly when studies have shown that for many coercively controlling relationships, the highest risk of violence occurs post-separation.<sup>73</sup>

These assumptions and misconceptions inform the way decision makers interpret cases of IPV. One consequence of this is that the current legal response to IPV focuses on the efforts the victim has made to address the abuse.<sup>74</sup> This is problematic for the reasons I noted above, and also because in intimate relationships involving violence, a victim will seek to avoid punishment by obeying her partner's commands.<sup>75</sup> Therefore, it is often mistakenly assumed that victims who "choose" to remain with violent partners "consent to the overall dynamic of the relationship."<sup>76</sup>

Addressing these issues requires an understanding of how victims of coercive control become more and more isolated and traumatised over time, and less resilient. This makes them less likely to resist as time goes on, and their options become limited. It is easy for those who have not experienced such entrapment to attribute blame or responsibility on the part of the victim, but this is a privileged point of view. An offence of coercive control would need to mitigate the risks I have outlined by shifting its focus onto the behaviour of the abuser, rather than the response of the victim.

## 2 *Dependence on Victim Testimony*

There are already a myriad of issues which arise from the need for victim participation in criminal proceedings for existing interpersonal violence offences. Tolmie has argued that

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<sup>72</sup> Tolmie, above n 1, at 57.

<sup>73</sup> Stark and Hester, above n 43, at 90.

<sup>74</sup> Tolmie, above n 1, at 57.

<sup>75</sup> Bettinson, above n 7, at 167.

<sup>76</sup> Tolmie, above n 1, at 58.



the nature of the adversarial system itself makes it a questionable fit for prosecuting domestic abuse.<sup>77</sup> The objective of defence counsel to have their client acquitted may result in brutally cross-examining the victim in an attempt to discredit her story and invalidate her experience, which risks retraumatising and re-victimising her.<sup>78</sup> Additionally, the prosecution may agree to dramatically amend the statement of facts and retract some of the charges in order to have the case resolved.<sup>79</sup> These factors have contributed to a lack of victim confidence in the system's response to IPV.<sup>80</sup>

Unfortunately, for existing violence offences, there is a much greater likelihood of securing a conviction when the victim is present in Court and is willing to give testimony.<sup>81</sup> This is problematic for the following reasons. Firstly, due to lengthy delays in proceedings as well as psychological trauma, a victim may not be able to present a clear narrative, particularly if they are not able to recall times and dates of incidents.<sup>82</sup> This may also impact their perceived reliability. Secondly, detailing their experiences in Court can put victims in dangerous positions, especially as the majority of victims of coercive control experience post-separation abuse.<sup>83</sup> Finally, it has been reported in the UK that the rates of victims withdrawing from the trial process or refusing to testify are much higher for domestic violence cases than other criminal cases.<sup>84</sup> There are many reasons why a victim may decide to do so. She may have become disillusioned with the process. She may have 'normalised' the abuse due to psychological trauma, and wish to remain in the relationship.<sup>85</sup> She may have received threats from her abuser, and withdrawn for fear of repercussions, deciding that prosecution will do more harm than good.<sup>86</sup>

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<sup>77</sup> Tolmie, above n 1, at 53.

<sup>78</sup> Tolmie, above n 1, at 54.

<sup>79</sup> Tolmie, above n 1, at 54.

<sup>80</sup> Bettinson and Bishop, above n 54, at 4.

<sup>81</sup> Bettinson and Bishop, above n 54, at 6.

<sup>82</sup> Heather Douglas "Do We Need a Specific Domestic Violence Offence?" (2015) 26 Melb. U. Law. Rw. 434 at 437.

<sup>83</sup> Stark and Hester, above n 43, at 84.

<sup>84</sup> Bettinson and Bishop, above n 54, at 6.

<sup>85</sup> Bettinson and Bishop, above n 54, at 12.

<sup>86</sup> Bettinson and Bishop, above n 54, at 6.

Tolmie has cautioned that prosecuting an offence of coercive control may place even more emphasis on experience-based testimony, due to the complex level of analysis required.<sup>87</sup> How coercive control manifests is specific to each relationship due to the way in which a perpetrator “individualises his abuse based on his privileged access to personal information about his partner.”<sup>88</sup> Therefore, successfully convicting abusers may depend on victims being able to articulate in detail the abuse they experienced and how it impacted them.<sup>89</sup> A victim may not be able to do so effectively if she is not yet in a position of safety or has not received adequate support to fully comprehend the trauma she has experienced.<sup>90</sup> This is particularly so when an abuser has systematically worked to alter her perception of reality, imposing a kind of ‘stockholm syndrome’.<sup>91</sup> Bettinson and Bishop have advocated for reforming the court environment when it comes to prosecuting IPV, stating that a victim-centred approach should be taken in order to facilitate their safe and effective participation.<sup>92</sup>

### *B Definitional Challenges*

Criminalising the concept of coercive control presents some inherent definitional challenges. This is because, much like sexual violence, the line is blurred between what should constitute criminal behaviour and what is deemed acceptable or ‘normal’ conduct.<sup>93</sup> For example, even nowadays it is not uncommon for a male to be the more dominant partner in an intimate relationship, assuming the traditional role of earning the majority of the couple’s income and having control over their finances. This being normalised, it would be difficult to prove that he was doing so with the goal of limiting his partner’s capacity to support herself, making her financially dependent on him in order to reduce her means of escape. Hence, a new offence which criminalises a continuing course of harmful conduct

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<sup>87</sup> Tolmie, above n 1, at 55.

<sup>88</sup> Stark and Hester, above n 43, at 87.

<sup>89</sup> Tolmie, above n 1, at 55.

<sup>90</sup> Tolmie, above n 1, at 55.

<sup>91</sup> Bettinson and Bishop, above n 54, at 12.

<sup>92</sup> Bettinson and Bishop, above n 54, at 6.

<sup>93</sup> Tolmie, above n 1, at 56.

will likely require an inquiry into the impact such conduct has had on the victim. Although legislation can provide certain terms to indicate what coercive and controlling behaviour may look like, what crosses the line into illegality will be very factually dependent, so much will be left up to judicial interpretation.

A legislature is faced with particular challenges in drafting a discrete offence based on non-physical harms. As Quilter notes, it will “inevitably attract debate and disagreement about which behaviours fall within it, and which remain outside it.”<sup>94</sup> Quilter argues that a discrete offence is unlikely to reflect the broad spectrum of harms experienced by victims.<sup>95</sup> Moreover, she warns that it may cause decisions to turn on the perceived immorality (in the minds of police, prosecutors, judges and juries) of a certain relationship, rather than the wrongfulness of the harm.<sup>96</sup> However, any problems and inequities that could arise would be more likely to occur at the judicial stage, since other legislatures who have criminalised coercive control have included rather broad and uncontentious terms.<sup>97</sup>

### *C The Risk of Minimisation*

As Wangmann notes, there is not only a risk that an offence of coercive control may fail to achieve what it sets out to, but it may also have “unintended consequences.”<sup>98</sup> One of these is the potential to negatively affect the victims that the offence would set out to protect. Tolmie has highlighted that a new offence could contribute to the minimisation of IPV in the criminal justice response. She argues that this may occur if only the most “overt and extreme” cases of coercive control, or those where there is also evidence of physical violence, result in prosecution.<sup>99</sup> There is potential for judicial officers to “lapse back into

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<sup>94</sup> Julia Quilter “Evaluating Criminalisation as a Strategy in Relation to Non-Physical Family Violence” in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer Singapore, Singapore, 2020) 111 at 127.

<sup>95</sup> At 127.

<sup>96</sup> At 127.

<sup>97</sup> See Domestic Abuse (Scotland) Act 2018, s 1 and Serious Crime Act 2015 (UK), s 76.

<sup>98</sup> Wangmann, above n 48, at 231.

<sup>99</sup> Wangmann, above n 48, at 233.

an examination of individual incidents of assault that can be proven”<sup>100</sup> in trying to prove a course of coercive and controlling conduct. This approach would defeat the purpose of a discrete offence as it would shift the focus back onto physical violence. If this was the case, the offence could serve to minimise and normalise lower levels of abuse which do not meet the perceived threshold, and invalidate those victims’ experiences.

The drafting of the England and Wales offence, in particular, demonstrates this risk.<sup>101</sup> There, the behaviour is required to have had a “serious effect”<sup>102</sup> on the victim, which is defined as causing the victim to “fear, on at least two occasions, that violence will be used against”<sup>103</sup> them, or causing “serious alarm or distress which has a substantial adverse effect on [the victim’s] day-to-day activities”<sup>104</sup>. This raises the question of whether the wording of the offence actually reflects the everyday experiences of IPV victims, or whether some may remain outside of that specific threshold.<sup>105</sup> Wangmann points out that this kind of drafting may unnecessarily shift the focus of proving the offence onto the victim rather than on the offender’s behaviour.<sup>106</sup> She points to an English case from 2018 to evidence this point, in which a man was acquitted of the s 76 coercive control charge as the victim was said to be too “strong and capable” to be under his control.<sup>107</sup> The judge called the accused’s treatment of the victim “disgraceful”<sup>108</sup> yet said “it is to her credit that I cannot find his behaviour had a serious effect on her in the context of the guidelines.”<sup>109</sup> The abusive behaviour in that case was well evidenced, and had the judge concentrated on the offender himself, rather than the victim, he would likely have been convicted. This case represents the danger of injustices when a victim acts contrary to how she is expected to.

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<sup>100</sup> Tolmie, above n 1, at 59.

<sup>101</sup> Wangmann, above n 48, at 233.

<sup>102</sup> Serious Crime Act 2015 (UK), s 76(1)(c).

<sup>103</sup> Section 76(4)(a).

<sup>104</sup> Section 76(4)(b).

<sup>105</sup> Wangmann, above n 48, at 233.

<sup>106</sup> At 234.

<sup>107</sup> Jeremy Armstrong “Violent boyfriend cleared after judge says partner is ‘too strong’ to be victim” (22 November 2018) *The Mirror* <[www.mirror.co.uk/news/uk-news/violent-boyfriend-cleared-after-judge-13629612](http://www.mirror.co.uk/news/uk-news/violent-boyfriend-cleared-after-judge-13629612)>.

<sup>108</sup> Armstrong, above n 110.

<sup>109</sup> Armstrong, above n 110.

There is also a risk of minimisation when it comes to assessing which charges to lay in a case of IPV. It has been argued that a new offence may only complicate matters for police and prosecutors in that regard.<sup>110</sup> If the offence of coercive control becomes a ‘one size fits all’ approach to IPV cases, they may fail to sufficiently address serious instances of violence where other offences would provide more appropriate sentencing.<sup>111</sup> Hence, inappropriate use of the offence could lead to minimising the full extent of the harm. This issue can be seen elsewhere in the criminal justice response to IPV. Civil protection orders, for instance, which were designed to work alongside criminal offences in the domestic context, have become the most common response to domestic violence in several jurisdictions, even where more serious substantive offences should be applied.<sup>112</sup>

## VI *The Scottish Offence: The Domestic Abuse (Scotland) Act 2018*

In February 2018, by unanimous vote, the Scottish Parliament passed the *Domestic Abuse (Scotland) Act 2018* (*‘DASA’*), which created the specific offence of abusive behaviour in relation to a partner or ex-partner.<sup>113</sup> The Act defines and criminalises ‘domestic abuse’, which encompasses the multitude of harms that can result from IPV, including and with a strong focus on psychological harm. The legislation has been acclaimed by Stark and Hester as “one of the most radical attempts yet to align the criminal justice response with a contemporary feminist conceptual understanding of domestic abuse as a form of coercive control.”<sup>114</sup> The Act has caught the eye of other jurisdictions, such as Australia, where all states are in the process of rolling out new legislation.<sup>115</sup> Having examined the potential

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<sup>110</sup> Nicola Padfield “Controlling or Coercive Behaviour in an Intimate or Family Relationship” (2016) 3 *Crim. L. Rev.* 149 at 149-151.

<sup>111</sup> Tolmie, above n 1, at 60.

<sup>112</sup> Douglas, above n 85, at 437-438.

<sup>113</sup> Domestic Abuse (Scotland) Act 2018, s 1.

<sup>114</sup> Stark and Hester, above n 43, at 85.

<sup>115</sup> NSW Government “Criminalising coercive control one step closer” (20 July 2022) <[www.nsw.gov.au/media-releases/criminalising-coercive-control-one-step-closer](http://www.nsw.gov.au/media-releases/criminalising-coercive-control-one-step-closer)>. Most recently, New

benefits and challenges associated with criminalising coercive control that the New Zealand Legislature must consider, In this section I review what is considered to be the “gold standard”<sup>116</sup> for criminalising domestic abuse. I discuss the significant features of the *DASA*’s drafting and why they are advantageous, bring attention to the key lessons New Zealand can learn from the Scottish reform thus far.

### A *The Act’s Genesis*

By as early as 2000, Scotland had adopted a definition of domestic abuse which recognised a broad range of harms, including mental, emotional and financial harm.<sup>117</sup> However, as Marsha Scott, the Chief Executive of *Scottish Womens’ Aid*, notes, it took nearly two decades for the criminal law to actualise this definition.<sup>118</sup> The Scottish women’s sector was quick to embrace Stark’s critique of the traditional dogma relating to domestic violence, and were early advocates of his coercive control model.<sup>119</sup> It was widely held by womens’ safety groups in Scotland that attempts to police and prosecute domestic abuse under general laws against violence or assault had been mostly unsuccessful.<sup>120</sup> Stark and Hester have attributed this crisis to the lack of adequate laws to convict under, stating that “statutory agencies throughout the United Kingdom...had become revolving doors through which hundreds of thousands of offenders passed annually without sanction or having otherwise been held to account.”<sup>121</sup> When women reported abuse to these agencies, the vast majority of the time there was nothing they could do, particularly when each act

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South Wales has committed to enacting a stand-alone offence of coercive control, and is set to introduce a final bill to Parliament in Spring 2022.

<sup>116</sup> Libby Brooks “Scotland set to pass gold standard domestic abuse law” (1 February 2018) *The Guardian* <[www.theguardian.com/society/2018/feb/01/scotland-set-to-pass-gold-standard-domestic-abuse-law](http://www.theguardian.com/society/2018/feb/01/scotland-set-to-pass-gold-standard-domestic-abuse-law)>.

<sup>117</sup> Marsha Scott “The Making of the New ‘Gold Standard’: The *Domestic Abuse (Scotland) Act 2018*” in Marilyn McMahon and Paul McGorrery (eds) *Criminalising Coercive Control: Family Violence and the Criminal Law* (Springer Singapore, Singapore, 2020) 177 at 178.

<sup>118</sup> Scott, above n 120, at 178.

<sup>119</sup> Scott, above n 120, at 179.

<sup>120</sup> S. L. Weldon *Protest, Policy and the Problem of Violence Against Women: A Cross-National Comparison* (University of Pittsburgh Press, Pennsylvania, 2002) at 14.

<sup>121</sup> At 82.

reported in itself was not considered sufficiently serious to justify the use of existing criminal charges.<sup>122</sup> Criminal justice professionals needed a “robust legal tool”<sup>123</sup> which could help shift the focus from victim safety to offender accountability.<sup>124</sup> This would prevent victim-blaming and stop minimising victims’ experiences.

In 2015, the Scottish Government consulted on whether a specific offence would improve the ability of the justice system to respond to domestic abuse.<sup>125</sup> They were met by an overwhelming agreement by advocacy groups, lawyers and academics, local authority, and health representatives that the existing laws were inadequate.<sup>126</sup> 96% of respondents opined that a bespoke offence would be beneficial.<sup>127</sup> In September 2015, the Scottish Government committed to drafting an offence which would criminalise psychological abuse, and in particular, coercive and controlling behaviour.<sup>128</sup> This resulted in the enactment of the *DASA* in 2018.

### *B Significant Features of the Offence*

The *DASA*, through section 1, creates a single, ‘course of conduct’ offence, under which physical, psychological and sexual behaviour can be prosecuted at once.<sup>129</sup> It targets the offender’s behaviour rather than the effect on the victim. As Scott notes, the Act is grounded in human rights, such as the right to autonomy, and the right to be free from fear or coercion.<sup>130</sup> I will now discuss the most important aspects of the Act, which contribute

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<sup>122</sup> Stark and Hester, above n 43, at 84.

<sup>123</sup> Stark and Hester, above n 43, at 86.

<sup>124</sup> Stark and Hester, above n 43, at 86.

<sup>125</sup> Scott, above n 120, at 183.

<sup>126</sup> Scott, above n 120, at 183.

<sup>127</sup> Scottish Government “Equally Safe: Reforming the Criminal Law to Address Domestic Abuse and Sexual Offences” (June 2015).

<sup>128</sup> Scott, above n 120, at 183.

<sup>129</sup> Section 11.

<sup>130</sup> Scott, above n 120, at 184.

to it being hailed as the “gold standard” of legislation which criminalises coercive control. Section 1 sets out the elements of the offence:

### **1. Abusive behaviour towards a partner or ex-partner**

(1) A person commits an offence if—

- (a) the person (“A”) engages in a course of behaviour which is abusive of A’s partner or ex-partner (“B”), and
- (b) both of the further conditions are met.

(2) The further conditions are—

- (a) that a reasonable person would consider the course of behaviour to be likely to cause B to suffer physical or psychological harm,
- (b) that either—
  - (i) A intends by the course of behaviour to cause B to suffer physical or psychological harm, or
  - (ii) A is reckless as to whether the course of behaviour causes B to suffer physical or psychological harm.

(3) In further conditions, the references to psychological harm include fear, alarm and distress.

#### *1 Course of Conduct*

A “course of behaviour” is defined in section 10(4) of the Act, which states: “a course of behaviour involves behaviour on at least two occasions.”<sup>131</sup> As I have previously detailed,

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<sup>131</sup> Section 10(4).



constructing IPV as a continuing course of conduct, rather than a disjointed collection of incidents, is essential to capturing the long-term patterns of harm that IPV victims endure.

## 2 “Partner or Ex-Partner”

Section 11 provides that the offence applies not only to spouses and civil partners, but also to intimate personal relationships where the partners do not cohabit, as well as to those that have ended.<sup>132</sup> This reflects the increasing understanding that domestic abuse does not only occur within the household, and it also dispels the misconception that abusive behaviour desists upon the ending of a relationship, and when the couple are physically separated. This is crucial as a victim removing herself from her abuser’s immediate control is only the first step towards safety. It is also in contrast to the English and Welsh offence of coercive and controlling behaviour which did not originally extend to ex-partners.<sup>133</sup> The importance of recognising post-separation abuse in the law was recently realised by the legislature in England and Wales, evidenced by the Domestic Abuse Act 2021, which extended the s 76 offence to cover non-marital relationships which have ended.<sup>134</sup> Unlike the s 76 offence, the *DASA* does not apply to family relationships that are not intimate in nature (for example, child or parental abuse).<sup>135</sup> This is in line with the existing Scottish policy definitions of domestic abuse, and has been justified by the Scottish Government on the basis that IPV has a “different dynamic”<sup>136</sup> to other kinds of familial abuse, necessitating a tailored legal response.

## 3 The ‘Reasonable Person’ Test

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<sup>132</sup> Section 11.

<sup>133</sup> Serious Crime Act 2015 (UK), s 76(6).

<sup>134</sup> Domestic Abuse Act 2021 (UK), s 2.

<sup>135</sup> See Serious Crime Act 2015 (UK), s 76(6)(c).

<sup>136</sup> Scottish Government, above n 135, at [1.34]-[1.35].

Subsection 2 of section 1 introduces a ‘reasonable person’ test.<sup>137</sup> This was unprecedented in the sphere of domestic abuse legislation, as was the incorporation of a recklessness standard.<sup>138</sup> The test that must be satisfied is whether a reasonable person would find that the accused either *intended* to harm the victim, or was *reckless* as to whether his behaviour would cause her harm.<sup>139</sup> Scott commends this language, being familiar with victim-survivor stories, which she says are “filled with details that would lead a ‘reasonable person’ to understand that harm was an expected outcome”<sup>140</sup> of the offender’s behaviour. It is also markedly different from the English and Welsh offence, which imposes the threshold that the alleged behaviour must have a ‘serious effect’ on the victim. While designed to limit the scope of the offence,<sup>141</sup> as discussed earlier in this paper, such wording produces a greater risk of minimising less ‘overt’ cases of coercive control. Hence, the *DASA* focuses on the conduct of the alleged offender, rather than the effect on the victim, which should mitigate the risk of minimisation.

#### 4 *Defining ‘Abusive Behaviour’*

‘Abusive behaviour’ is defined non-exhaustively in s 2 of the *DASA*. It can include behaviour directed at the victim which is “violent, threatening or intimidating”<sup>142</sup> or behaviour which either has as its purpose, or which a reasonable person would find to have, one or more of the list of ‘relevant effects’.<sup>143</sup> These relevant effects are set out in subsection 3:

(3) The relevant effects are of—

(a) making B dependent on, or subordinate to, A,

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<sup>137</sup> Domestic Abuse (Scotland) Act 2018, s 1(2).

<sup>138</sup> Scott, above n 120, at 185.

<sup>139</sup> Section 1(2)(b)(i) and (ii).

<sup>140</sup> Scott, above n 120, at 185

<sup>141</sup> Wangmann, above n 48, at 233.

<sup>142</sup> Section 1(2)(a).

<sup>143</sup> Section 2(2).

- (b) isolating B from friends, relatives or other sources of support,
- (c) controlling, regulating or monitoring B's day-to-day activities,
- (d) depriving B of, or restricting B's, freedom of action,
- (e) frightening, humiliating, degrading or punishing B.

This section, as well as the relevant explanatory notes, reflects Scottish victim-survivors' descriptions of their experiences. The relevant effects were included to ensure that psychological abuse and/or coercive control, which could not be prosecuted under existing offences, fall within the meaning of 'abusive behaviour'.<sup>144</sup>

Throughout the drafting period, members of the Government's Bill Team routinely consulted with policy experts from the *Scottish Womens' Aid*, a domestic abuse advocacy organisation and service provider.<sup>145</sup> These experts set up focus groups with victim-survivors using their services to seek their guidance, particularly in relation to the proposed wording of the bill.<sup>146</sup> This is particularly evident in s 2(3). The language in this subsection reflects victims' wishes that there be explicit mentions of restrictions being placed on their autonomy,<sup>147</sup> seen in paragraphs (c) and (d), which mention "controlling, regulating or monitoring...day-to-day activities", and "restricting...freedom of action", respectively.<sup>148</sup> As Michael Matheson, former Justice Secretary, said in concluding the final debate on the Bill, "the very heart of this legislation is the voices of those women who have experienced domestic abuse."<sup>149</sup>

The *Explanatory Notes* offer examples of behaviour that can be considered to have a 'relevant effect'. For example, they provide that behaviour which has the effect of frightening, humiliating, degrading or punishing the victim could include "abusive name-

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<sup>144</sup> Domestic Abuse (Scotland) Act 2018 (explanatory note) at 17.

<sup>145</sup> Scott, above n 120, at 183.

<sup>146</sup> Scott, above n 120, at 183.

<sup>147</sup> Scott, above n 120, at 183.

<sup>148</sup> Section 2(3)(c) and (d).

<sup>149</sup> Craig Hutchison and Louise Wilson "MSPs Pass Domestic Abuse Bill" (1 February 2018) BBC News <[www.bbc.com/news/live/uk-scotland-scotland-politics-42858902](http://www.bbc.com/news/live/uk-scotland-scotland-politics-42858902)>.

calling, threats of self-harm, playing mind games with the victim that cause them to doubt their sanity, controlling the victim's access to the toilet or forcing the victim to eat food off the floor.”<sup>150</sup>

### 5 *Shifting the Focus from the Victim to the Perpetrator*

The *DASA* does not provide for “victimless prosecutions”, but from an evidential standpoint, it shifts the focus from evidence of the victim's suffering to evidence of the perpetrator's harmful behaviour.<sup>151</sup> There is no requirement to prove that the victim did, in fact, suffer harm or injury, or experience a ‘relevant effect’ (although such evidence will be relevant).<sup>152</sup> Instead, the prosecution must prove that the abusive behaviour would be *likely* to cause the victim to suffer physical or psychological harm (taking into account the personal characteristics of the victim).<sup>153</sup> As pointed out by Scott, this focus on the offender's accountability opens the door to drastically improving victims' experiences throughout the entire criminal justice process, and particularly in Court.<sup>154</sup> She contends: “the relentless pressure to present in Court as traumatised and broken have made testifying a necessary evil at best, and a form of re-victimisation at worst.”<sup>155</sup> The Act provides hope to those who have been affected by domestic abuse that a trial might be less traumatic for the victim than it is for her abuser.<sup>156</sup>

### C *The DASA: Overcoming Key Challenges*

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<sup>150</sup> At 22.

<sup>151</sup> Scott, above n 120, at 187.

<sup>152</sup> Domestic Abuse (Scotland) Act 2018, s 4.

<sup>153</sup> Scott, above n 120, at 187.

<sup>154</sup> At 187.

<sup>155</sup> At 187.

<sup>156</sup> Scott, above n 120, at 187.

It is contended by many that the *DASA* is inherently innovative because it privileges the experiences of victims.<sup>157</sup> The legislation should raise awareness within the community of the harms of domestic abuse, and should aid the public in recognising them. It represents a movement towards empowering victims of domestic abuse; those whose entire individuality has been eroded by such an insidious crime. The *DASA* is a momentous step towards that empowerment.

The *DASA* offers the potential to mitigate some of the concerns scholars have warned an offence of coercive control introduces. It is important to note that the passing of the *DASA* was accompanied by an extensive amount of specific training for police and judicial officers on the new offence and domestic abuse itself.<sup>158</sup> This is critical as the complex and individualised analysis the offence requires will necessitate a wide and thorough understanding of coercive control tactics across the board. With regards to the concern of the need for a reliance on victim testimony, the evidential focus on the accused should significantly reduce the likelihood of injustices occurring due to not having to prove the victim actually suffered harm. It should also minimise the chance of her being re-victimised and picked apart at trial.

The language of the *DASA* is deliberately broad, to avoid prescribing what ‘abusive behaviour’ must look like, as this so variable. What crosses the line into behaviour deemed criminal will be a matter of judicial interpretation. The Act and Explanatory notes provide examples of behaviour that can be deemed ‘abusive’, but these lists and definitions are inexhaustive. The offence has been criticised by some as ‘too broad’, but the details and examples in the Act should guide the judiciary to only prosecute conduct that is truly harmful. There is still a risk that moral judgements will play a considerable part in this exercise. Nonetheless, what is considered to be ‘abusive behaviour’ will be established over time by the courts.

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<sup>157</sup> Bettinson, above n 3, at 207.

<sup>158</sup> BBC News “New domestic abuse laws: more than 400 crimes recorded” (17 August 2019) <[www.bbc.com/news/uk-scotland-49374667](http://www.bbc.com/news/uk-scotland-49374667)>.

As discussed earlier in this article, certain conduct that has become normalised, particularly due to traditional gender norms, may be overlooked when it comes to assessing the ‘full picture’ of the abuse. I previously noted that such issues may necessitate some inquiry into the impact abuse had on the victim. However, the test of proving that a ‘reasonable person’ would consider the behaviour to cause the victim to suffer harm, in combination with the ‘likely effect’ test is innovative. It strikes a balance between providing details as to what behaviour can be captured under the offence, while remaining wide enough in scope to capture a range of harmful conduct. Burman and Brooks-Hay have argued that the offence is *too* wide in scope, and that it may risk over-criminalisation.<sup>159</sup> However, the offence provides for a wide range of sentencing options in order to fit the particular circumstances of each case, with a maximum penalty of 14 years imprisonment.<sup>160</sup> The severity of the behaviour and the degree of harm it is likely to cause will be taken into account. This is a worthy exercise, as the alternative can entail the ‘square peg, round hole’ approach of fitting years’ worth of abuse into more minor offences, designed for stalking and harassment.

#### *D Impacts of the DASA*

After one year of the *DASA* being in force, 1,065 charges under the new offence were reported by police, 96% of which progressed to prosecution.<sup>161</sup> Many of these have resulted in convictions.<sup>162</sup> The number of reports of offences are increasing, and was recorded to have raised to 1,760 by the beginning of 2022.<sup>163</sup> Tens of thousands of Police Scotland staff have completed face-to-face training, and a variety of measures have been

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<sup>159</sup> Oona Brooks-Hay and Michele Burman “Aligning Policy and Law? The Creation of a Domestic Abuse Offence Incorporating Coercive Control” (2018) 18 CCJ 67 at 77.

<sup>160</sup> Bettinson, above n 3, at 209.

<sup>161</sup> Scottish Government “Equally Safe: Year Three Update Report” (November 2020) at 40.

<sup>162</sup> Police Scotland, above n 173.

<sup>163</sup> Police Scotland “Five domestic abusers sentenced to 61 years in prison” (2022) <[www.scotland.police.uk/what-s-happening/news/2022/may/five-domestic-abusers-sentenced-to-61-years-in-prison/](http://www.scotland.police.uk/what-s-happening/news/2022/may/five-domestic-abusers-sentenced-to-61-years-in-prison/)>.

taken to train prosecutors, judges and solicitors.<sup>164</sup> While a close eye is being kept on the progress of the Act, these early results are encouraging.<sup>165</sup> The number of crimes reported illustrates the need for the legislation, and shows the Act is achieving its objective to encourage victims of domestic abuse to speak up and seek reparation. The amount of crimes recorded and prosecuted show that the police are utilising the offence to good effect. Challenges are undeniable, and more time is needed to determine whether the legislation can live up to its ‘gold standard’ title in implementation. Nonetheless, the Scottish offence represents a strong step towards empowering those who are or have been affected by domestic abuse. The symbolic power of the criminal law to publicly denounce behaviour should not be ignored.<sup>166</sup> The Act takes advantage of this and sends a clear message from the state that domestic abuse, in any or all forms, is unacceptable. It certainly warrants attention from other jurisdictions, who may, in time, choose to follow its blueprint.

## *VII A New Offence of Domestic Abuse in New Zealand?*

As previously mentioned, an offence criminalising coercive control was considered by the New Zealand government in 2016. It was recognised that such an offence would recognise the ongoing nature of the harm, and would send a clear message that this kind of behaviour is serious enough to justify criminal intervention.<sup>167</sup> Yet, it was decided that enacting legislation of this kind would raise a number of challenges, particularly when it comes to defining the type of behaviour it should cover.<sup>168</sup>

As I have outlined, there are numerous challenges which arise regarding the introduction of a course of conduct offence which criminalises non-physical abuse. However, just as challenges in drafting did not prevent Scotland from achieving this goal, the same should apply for New Zealand. As *DASA* demonstrates, these challenges are surmountable, and

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<sup>164</sup> Scottish Government, above n 172, at 40.

<sup>165</sup> BBC News, above n 169.

<sup>166</sup> Quilter, above n 95, at 126.

<sup>167</sup> Cabinet Office Circular, above n 5, at [26].

<sup>168</sup> Cabinet Office Circular, above n 5, at [27]-[29].

are well worth tackling. While domestic abuse is a high political priority for our government, more must be done. Since New Zealand is ranking as having the highest rates of domestic abuse in the Western world, the status quo is in drastic need of reform, and must be challenged. In fact, the prevalence of domestic abuse in New Zealand is predicted to increase by 35% by 2025.<sup>169</sup> Several lessons can be gleaned from the Scottish approach so far, including drawing on the expertise of victim-survivors as well as advocates. Just as in Scotland, a new offence could be a powerful symbol in recognising the ongoing trauma that survivors of abuse suffer. If coupled with widespread campaigns, it could raise public awareness of the complexities of IPV and encourage more victims to speak up. It is time that domestic abuse legislation aligns with national policy, which recognises that psychological abuse is often the most harmful form of IPV. As in the United Kingdom, womens' support services have become 'revolving doors'. More abuse is being reported, and less offenders are facing Court.<sup>170</sup> A new, specific offence of domestic abuse could provide police with a new 'tool' to charge offending that previously had little legal recognition. Scoping concerns do not justify continued inertia from the New Zealand Parliament. The law needs to provide protection against all types of abuse, including coercive control, that prevents women from realising their right to autonomy.

### *VIII Conclusion*

There is a real need for an improved legislative response to IPV in many countries including New Zealand. The criminal justice response to IPV can and should be strengthened by a criminal offence which captures the real nature of the behaviour and harm it consists of. The introduction of a discrete offence which criminalises coercive control has been considered by many jurisdictions a necessary step to achieve this goal. While there are many potential benefits to such an offence, it also imposes several challenges in

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<sup>169</sup> Good Shepherd New Zealand, above n 44.

<sup>170</sup> Kirsty Johnson "More victims are reporting family violence but abusers aren't facing court. No-one knows why" (5 September 2021) Stuff <[www.stuff.co.nz/national/crime/300397629/more-victims-are-reporting-family-violence-but-abusers-arent-facing-court-noone-knows-why](http://www.stuff.co.nz/national/crime/300397629/more-victims-are-reporting-family-violence-but-abusers-arent-facing-court-noone-knows-why)>.



implementation, as well as risks that must be overcome. I have argued that The Domestic Abuse (Scotland) Act 2018 represents a momentous shift in the legislative response to IPV. It is capable of capturing a broad range of behaviours and impacts that IPV can cause, which is reflective of the lived experiences of victim-survivors of domestic abuse. It makes these experiences visible, and clearly marks psychological abuse and coercive control as conduct that is criminal. This has the power to prevent terrible injustices, such as intimate partner homicides, that can result from instances of abuse going unnoticed. New Zealand should thoroughly consider adopting a similar offence structure to that of the *DASA*, in order to provide tangible protection from and prevention of this harm. The law can no longer turn a blind eye to coercive control if it is to protect women's rights to self-determination that were denied to them for so long. Legislative reform is no "panacea"<sup>171</sup> but it is certainly a step in the right direction.

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<sup>171</sup> Tolmie, above n 1, at 51.

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