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Domestic Violence needs Coercive and Controlling Behavior - Incumbent, Futile Laws Fail to Capture its Horrors

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ABSTRACT

The distinctive nature of domestic abuse as an offence and a socio-legal issue poses several challenges that makes it difficult to legislate on. The article grapples with the question of whether due to its distinctive nature the new offence of coercive control is necessary to properly understand and prevent domestic violence. The article aims to demonstrate this through comparisons with prior existing acts like the Offences Against the Person Act 1861 and the Protection from Harassment Act 1997 which were used to tackle domestic violence earlier.

Keywords: Domestic violence. Coercive and controlling behaviour. UK law.

I. INTRODUCTION

This short note will argue that tackling domestic violence requires the new offence of Coercive and controlling behaviour instead of focusing on the enforcement of existing laws. In answering if a discrete offence of coercive control is needed, the essay will be discussing 3 topics. Firstly, the essay will focus on the distinctive nature of domestic violence as a crime. Secondly, the inadequacy of prior legislation on domestic violence will be considered. And lastly, the essay will analyse the new offence of coercive control.

Domestic abuse is a term which covers a multitude of harmful behaviours within intimate and familial relations. These behaviours include both physical violence and psychological harm in varying combinations.

II. A DISTINCT OFFENCE

Domestic abuse is distinguished from other common law offences. *Tedros (2005, p.998)* puts forward two distinctions, it's setting in an intimate relationship and its "systematic nature". These features serve to erode the kind of freedom an individual has. Unlike other offences which protect individuals against 'the reduction of options' domestic abuse involves not only

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the options of the victim is reduced, it also subjects the remaining options to unwarranted and arbitrary control of another person. Moreover, due to the intimate relationship, victims are less likely to go ahead with the prosecution to keep the matter private and the police are reluctant to intervene because of this sense of privacy and respecting one's right to private and family life.

The lack of a distinct offence of domestic abuse also resulted in concerns about fair labelling. This means that when an accused is convicted, he is not labelled as a criminal in general but is labelled in relation to the particular offence he committed. As stated by **Tedros(2005,p.65)**, fair labelling requires that the "offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law breaking." Taking into account the distinctive nature of the harm caused by the abuse, prosecution through other offences like harassment is not only misleading but also undermines the significance of domestic violence. This was further highlighted by **Robert Buckland** the solicitor general while addressing the house of commons in 2015, "We must bring domestic abuse out into the open if we are to end it. The first step is to call it what it is...we must make a new offence that makes it clear that a pattern of coercion is as serious within a relationship as it is outside one."

III. INADEQUACY OF EXISTING LAWS

Prior to the enactment of the 2015 offence of coercive control, England and Wales had a range of single assault offences that could be applied to domestic violence cases like the *Offences Against the Person Act 1861* along with 'course of conduct' offences that were covered by harassment and stalking offences under the *Protection from Harassment Act 1997* and common law offences of assault and battery.

It is argued that *c 40 s2 of the Protection from Harassment Act*, could be potentially be applied to cases where domestic violence is non-physical and instead is coercive and controlling, however, it is not explicitly recognised. The case of **R v Curtis (2010)**², poses a barrier to application as pointed out by **Heather Douglas(2015,p.439)**. The court of appeal held that "the spontaneous outbursts of ill-temper and bad behaviour... Interspersed with considerable periods of affectionate cannot be described as course of conduct." Further in the case of **R v Widdows**³, which followed the same approach indicates two assumptions undertaken by the court that misinterprets the context and consequence of coercive control. Victims remain in the relationships by their own choice and the abuse is less serious.

² [2010] 1 WLR 2770

³ [2011] EWCA crim 1500; [2011] Crim LR 959

The home office in ‘*Strengthening the law on domestic abuse – A consultation*’ (2014) held that ‘the law in England and Wales is ambiguous about whether controlling and coercive behaviours are included in existing stalking and harassment offences.’ The existing legislation failed to capture the patterns of power and non-physical coercive control within an ongoing relationship and reinforced an approach based on single individual instances of assault which has resulted in a ‘legislative gap’. It creates a misalignment between the law and policy understandings of domestic violence and/or abuse *Bettison(2016,p.170)*. Judicial interpretations reflect the dominant social perspective of domestic violence as physical acts and domestic abuse as non-violent and less serious. By using other offences like assault which are focused on physically violent acts causing harm and are determined according to an objective standard of the outcome, the court measures harm without reference to the context or presence of coercive control. This creates a hierarchy of harm that is not always corresponding to the injury experienced by the victims of domestic abuse as pointed out by *Bettison and bishop(2015,p.185)*.

IV. AN ANALYSIS OF SECTION 76

Section 76 Serious Crimes Act 2015 enacted the new offence of ‘coercive and controlling behaviour in an intimate or family relationship’. *Section 1(a)* states that an offence is committed if one “repeatedly or continuously engages in behaviour towards another person that is controlling or coercive”. The requirement for continuous or repeated behaviour allows the court to consider the broader context of the relationship. Since the focus is not on establishing separate incidents, it bridges the ‘legislative gap’ mentioned earlier and enables the broader context of the relationship to be evidentially relevant by adding to the victim’s credibility and clear evidence of the perpetrator’s motives. Therefore it criminalizes the underlying architecture of domestic violence as pointed out by *Tolmie(2018,p.52)*. Additionally, it alleviates concerns that the offence will criminalise individuals in healthy relationships since the behaviour must be repetitive.

Further, the section doesn’t specify a definition for ‘controlling’ and ‘coercive’, while another option for the courts is to refer to non-statutory definitions of the terms, the legislation doesn’t explicitly confirm it. This allows the courts to interpret and apply the offence in different situations of abuse easily since what might be seen as controlling and coercive may vary from situation to situation. For example, a perpetrator publicly offering his sweatshirt to the victim as an indication that she has made him jealous and would need to cover the bruising. Each case involves an individualised package of behaviours developed through trial and error

Stark(2007,p.229) This liberty in discretion given to the courts reflects how the legislation is sensitive to the fact that even if it is relatively easy to explain coercive control in theory, it manifests in complex and unique ways and cannot be based on a ‘one size fits all approach.

Section 76(2) states the requirement for the victim and the perpetrator to be closely connected i.e. in an intimate personal relationship. There are two advantages of this section. Firstly, it is gender-neutral in its inclusion of intimate relationships **Bettison and bishop(2016,p.193)**. argued that violence that takes place between heterosexual couples differs and requires different responses as compared to others and since violence is qualitatively different in certain relationships the same laws shouldn’t apply. However, as stated by **C Donovan and M Hester(2014,p.12)** empirical research shows that coercive control exists within same-sex relationships and intentional intimidation through acts and words is not a gender issue but a power issue. This provision also reflects the reasoning behind the enactment of section 76, a pattern of coercion is as serious as physical acts of violence. Secondly, **Section 76(3)** excludes personal connections where the defendant has responsibility over B under the **Children’s and Young persons act 1933 s.17** and where B is under 16 years of age. In response to concerns that it may overlap with child abuse offences. This illustrates that the focus is not on parental relationships but at the same time, the offence can be applied to relationships where both or one partner is under 16. This is further supplemented by **section 76(2)(a)** which doesn’t limit the offence to those living together and includes dating relationships. (young)

A problem with this subsection however is that it does not properly address the grievance pointed out by the police in **Everyone’s Business: Improving the police response to domestic abuse**, regarding the term domestic violence being too inclusive due to its coverage of family relationships and thus why a domestic violence response was not always appropriate. **Section 76(6)** locates the offence within the domestic setting by the inclusion of all relatives living within a household and even non-intimate relations since **section 76(6)(c)** is based on **section 63(1) of the Family Law Act 1996**. It includes relations like siblings, aunt, uncle, stepson, etc this will continue societal confusion over forms of domestic abuse and might not always be an appropriate dynamic for a domestic violence offence since levels of trust invoked between family members varies from trust between intimate partners.

The actus reus of the offence is contained in **section 76(4)** calls for the controlling and coercive behaviour to have a serious effect on the victim. Either by causing the victim to fear on at least, two occasions violence being used against her (**s.76(4)(a)**) or by causing alarm and distress which hinders the daily activities of the victim(**s.76(4)(b)**). It is argued by **Bettison(2016,p.172)** that the victim will have to experience fear that violence will be used and this subjective

approach will limit the application to those who can verbalise the impact of the harm they are experiencing. However, the case of *A County Council v LW and another*⁴ refutes this assumption. The victim LW was a 60 year old woman who was unable to express or even understand the level of harm she was experiencing. Despite this, the court under justice Hayden held that “ even the most cursory glance on the evidence available points to the relationship as being abusive, exploitative, coercive and wholly inimical to LW’s welfare.” Further, while LW expressed a strong wish for the relationship to continue, the court on a rational and objective analysis held she derived nothing substantial from the relationship.

The Mens rea of the offence is listed in *section 76(1)(d)* which states that ‘ A knows or ought to know that the behaviour has a serious effect on B’, *76(5)* further clarifies that the defendant ought to know what a reasonable person in possession of the same offence would know. This objective standard prevents the perpetrator from escaping liability by claiming that they didn’t know the behaviour had a serious effect on the victim or that behaviours he thought were ‘reasonable’ in the context of a relationship where male dominance is seen as natural in society. However, in continuing to focus on the effect on the victim, the focus is on the actual injury inflicted, and not on the motivation of the offender or why they acted the way they did. Moreover, there are evidential difficulties that are increased by a Mens rea of intention. As illustrated by *Bettison and Bishop*, A could simply claim they wanted their partner to be at home for some reason and did not realise the effect it would have on them whereas the harm suffered is the same regardless of intention.

V. CONCLUSION

The creation of a discrete offence of coercive control was necessary to reflect the reality of harm experienced by victims of domestic violence. It addresses the distinct nature of the offence and captures the shortcomings of prior legislation to ensure a better and more sensitive response to domestic abuse. However, the new offence does have certain shortcomings like the inclusivity of family members under *section 76(6)* and difficulties with evidence and proof due to the requirement of Mens rea for intention under *section 76(1)(d)*. Despite these shortcomings, the new offence is a better means of tackling domestic abuse since it effectively acknowledges the totality of harm caused.

⁴ [2020] EWCOP 50

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