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Aligning policy and law? The creation of a domestic abuse offence incorporating coercive control

Abstract

Since 2000, the Scottish Government has adopted a gendered definition of domestic abuse which explicitly positions it as both a cause and a consequence of gender inequality. Following the launch of a new strategy to prevent and eradicate violence against women and girls, the Scottish Government announced proposals to create, for the first time, a bespoke offence of domestic abuse, designed to encompass the spectrum of abusive acts that constitute domestic abuse, including emotional and psychological abuse. The new offence is intended to better reflect the experience of victims subject to coercive control, improve the criminal justice response and facilitate access to justice. It represents one of the most radical attempts yet to align the criminal justice response with contemporary policy and feminist conceptual understanding of domestic abuse as a form of coercive control. Drawing on feminist scholarship which has interrogated the value of law reform, we critically assess the scope of the (proposed) legislation, the likely challenges associated with its use in the Scottish context, and the potential for unintended consequences.

Key Words: Domestic abuse; coercive control; criminal justice; Scotland; gender

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Introduction

The criminal justice system and its agencies have long been criticised for a failure to provide adequate protection, responses or preventative measures in cases of domestic abuse (Pahl 1985; Edwards 1989; Dobash and Dobash 2000; Buzawa and Buzawa 2003). Early research into the experiences of women seeking legal protection suggested that the criminal justice system was failing both to meet the needs of victims and to hold perpetrators to account (Edwards 1989; Grace 1995; Hoyle 1998; Hester *et al.* 2003; Parmar and Sampson 2007; Burton 2008; Hanna 2009). More recently, and in many jurisdictions, there have been important developments in the recognition of the patterns of harms of domestic abuse (Douglas 2015), alongside policy innovation (Hester and Westmarland 2005; Brooks *et al.* 2014); legislative change (Cavanagh *et al.* 2003; Hester *et al.* 2008a); the establishment of dedicated courts (Cook *et al.* 2004; Eley 2005; Hester *et al.* 2008b); specialised training of police, prosecutors and sentencers (McMillan 2015); and the introduction of advocacy services (Robinson 2009; Howarth and Robinson 2016). Nonetheless, the ways in which the law conceptualises and responds to domestic abuse remains subject to critical scrutiny and continues to animate academic, legislative and policy debate internationally (Hester 2013; Robinson 2014; Fitzgibbon and Walklate 2016).

Scotland has seen significant developments, both in terms of the conceptualisation of domestic abuse, specifically the early adoption of a policy definition that focuses on ‘abuse’ rather than violence, a gendered understanding, and the implementation of policy and practice responses which position the Scottish approach¹ at the international forefront in this area (McKie and

¹ Although formally part of the UK, Scotland has had a devolved parliament since 1999 and criminal justice policy is the responsibility of the Scottish Government. Scotland has historically had its own judicial system and separate legislation.

Hearn 2004; Coy *et al.* 2007). Yet domestic abuse continues to be enduring and pervasive in Scotland, and pressing questions remain about the ability of the criminal justice system to respond to a crime characterized by its complex and multi-faceted nature. Following Government investment in measures to identify and address domestic abuse stemming back to the early 2000s, the Scottish Government recently proposed the introduction of new legislation to create a specific statutory offence of domestic abuse which draws centrally upon the concept of 'coercive control' (Stark 2007), cited as a means of better reflecting the experience of victims in its recognition of the impact and consequences of all types of abusive behavior, and improving the justice system approach by ensuring more effective investigation and prosecution (Scottish Government 2015a; 2015b).

Stark's work (2007; 2009) emphasises the importance of power and control in relationships characterised by domestic abuse, and his formulation of coercive control has been critical to recent understandings of the complex dynamics of domestic abuse. For Stark, coercive control is a cumulative form of subjugation that uses a range of tactics - physical abuse alongside a pattern of non-physical abusive behaviors such as threats, intimidation, stalking, destruction of personal property, psychological abuse, economic oppression, and restrictions on liberty - that both isolate women and 'entrap' them in relationships with men by making them constantly fearful (Stark 2007). This represents one of the most notable attempts to link domestic abuse to gender inequality. Following feminist critiques of the 1980s/1990s highlighting that legal conceptualisations hinged on single acts of physical violence, which obscured the nuances and complexity of domestic abuse and reduced the ability of women to derive adequate protection or equality for either themselves or their children (e.g. Dutton and Painter 1981; Ferraro and Johnson 1983), Stark argues that using the lens of coercive control exposes dimensions of domestic abuse that have traditionally been overlooked by criminal justice (2007: 204), and render visible the patterns and processes that characterise women's experiences. This argument has subsequently been extended (see, for example, Anderson 2009; Arnold 2009; Hanna 2009; Velonis 2016) and the term is now commonly used to convey the range of behaviours that women can experience from abusive men. Stark's calls for an understanding of abusive relationships which takes into account these dimensions have influenced legal, policy and advocacy strategies, and informed attempts to embed the concept in criminal law. Stark's ideas have had considerable traction in Scotland where coercive control is seen as a more 'modern' conceptualisation of the dynamics of domestic abuse, and its criminalisation an opportunity to recognise and clarify forms of abusive behaviour that have been overlooked (Scottish Women's Aid 2014; Scottish Government 2015a, 2015b).

In what follows, we critically assess the scope and potential of the (proposed) new legislation and the likely challenges associated with its interpretation and use in Scotland. In so doing, we draw on insights from feminist scholarship that has interrogated the value of legislative reform introduced to improve criminal justice responses to violence against women in the absence of systemic change (see, for example: Smart 1989; Douglas 2008; Walklate 2008; Burman 2009; Robinson 2014) and sound a strong note of caution about Scotland's response to the complexities of domestic abuse. Our discussion will be foregrounded, first, by consideration of the specificities of relevant existing Scottish policy, legislative and criminal justice frameworks. Second, the evolution of responses to domestic abuse in Scotland will be briefly considered prior to examination of the legislative intent behind the creation of the new offence of domestic abuse. The third part of the article offers a critical assessment of whether and how the Scottish aspirations associated with it - specifically that the new offence will enhance victim's access to justice, better reflect women's experiences, result in more effective investigation and

prosecution, and will hold more perpetrators to account – may ever be realised. Specifically we consider some of the problems likely to arise in terms of practical implementation, in particular the challenges posed by Scottish evidentiary requirements, and review potential unintended consequences - in particular that it may require a greater reliance on victim testimony and, worryingly, the possibility of more women being drawn into the criminal justice system as perpetrators.

Scotland's gendered policy approach to domestic abuse

A broad overview of the approach taken to violence against women in Scotland is important for contextualizing and understanding the direction of reform in relation to domestic abuse. Political Devolution in 1999 has been identified as a critical catalytic opportunity for mobilization around violence against women, whereby women's organisations, together with newly elected and supportive members of the new Scottish Parliament, coalesced to ensure government prioritization of violence against women, and set the groundwork for a national partnership approach based on gendered notions of violence (Breitenbach and McKay 2001; Mackay 2010; Burman and Johnstone 2015) effectively cementing Scotland's distinctive approach to domestic abuse.

In 2000 the *Scottish Partnership on Domestic Abuse* produced a keystone *National Strategy to Address Domestic Abuse in Scotland* identifying domestic abuse as requiring a response which 'takes account of its gender specific elements and the broader gender inequalities which women face' (Scottish Executive 2000:5). A working definition of domestic abuse, which both recognised its gendered nature and broadened the focus to acknowledge the combination of psychological and physical dimensions and the ongoing manipulation of power, was proposed:

'Domestic abuse (as gender-based abuse), can be perpetrated by partners or ex-partners and can include physical abuse (assault and physical attack involving a range of behaviour), sexual abuse (acts which degrade and humiliate women and are perpetrated against their will, including rape) and mental and emotional abuse (such as threats, verbal abuse, racial abuse, withholding money and other types of controlling behaviour such as isolation from family or friends) (Scottish Executive 2000:5)

This gendered definition was rapidly adopted across a range of policy areas (Scottish Executive 2001) though it was not, at that time, shared by other parts of the UK.

At a time of constitutional change and nation-building, domestic abuse effectively provided a nucleus for collaboration and coalition in social and health policies, and also in evolving agendas on inequalities and poverty (Breitenbach and McKay 2001). Tackling violence against women was stated as a prerequisite to reducing gender inequality (Scottish Executive 2002) and a fundamental recognition of the gender-based nature of domestic abuse has formed the basis of Scottish initiatives ever since (Scottish Government 2009, 2010, 2014).

The current Government strategy on responding to violence against women and girls, *Equally Safe: Scotland's Strategy for Preventing and Eradicating Violence Against Women and Girls* (2014, 2015) builds on the partnership approach and sets out ambitious priorities to ensure the safety of women and girls. There has been a noticeable shift in emphasis towards criminal justice interventions and a more 'robust' response to perpetrators evident in *Equally Safe's* commitment to a 'whole systems' review of the justice approach, which includes review of the

criminal law relating to domestic abuse (and sexual offences) and the provision of an additional £20m from the Justice portfolio to tackle all forms of violence against women and girls.

Criminal justice responses in Scotland

Over the past two decades, there have been considerable efforts to improve aspects of the criminal justice response (Mackay 2010; Brooks *et al.* 2014) including identification by the police of domestic abuse and rape as key priority areas and an explicit commitment to address ‘under-reporting’. A National Domestic Abuse Task Force was established, as well as a National Domestic Abuse Co-ordination Unit with specialist Domestic Abuse Units in every local policing division, and police-led Multi Agency Tasking and Coordination Groups set up to target serious and serial perpetrators.

Scotland’s prosecution service, the Crown Office and Procurator Fiscal Service (COPFS) has, since the early 2000s, introduced a raft of changes including a dedicated Victim Information and Advice Service (VIA), and a specialist response through enhanced specialist training and guidance for prosecutors. A dedicated lead national prosecutor for domestic abuse² oversees cases, providing guidance, and reviewing policy and training. Emphasising partnership, a Joint Police/COPFS Protocol was introduced in 2013 and revised in early 2017, favouring a consistent and robust investigative, enforcement and prosecution approach (Police Scotland and COPFS 2013, 2017).

Feminist activism and scholarship has undoubtedly been influential in these developments which, by any account, constitute a robust and concerted effort to improve aspects of the criminal justice response. Yet, despite the political rhetoric that claims to prioritise ending such violence, and the raft of associated reforms, domestic abuse and other forms of violence against women remain enduring and endemic, and the law continues to fail many women. This is a well-told story: feminist scholars internationally have revealed how legal and policy reform in relation to violence against women simultaneously both succeeds and routinely fails, whether through indeterminacy of legislation, legal discretion or the influence of cultural assumptions on legal principles and practice (see, for example: Carline and Easteal 2014), producing highly contradictory outcomes. In Scotland, we have already witnessed the under-utilisation and inadequate enforcement of existing legal protections (Burman *et al* 2007; Brooks *et al* 2014) and the prevalence of negative cultural attitudes (Reid *et al* 2015) which undermine reform intent.

Paradoxically, Scotland’s policy embrace of a broad definition of domestic abuse covering a range of behaviours, including mental and emotional abuse has been seen as contributing to the difficulties in providing an effective criminal justice response³ as currently there is no specific criminal offence or statutory definition of what constitutes domestic abuse in Scots law to match the policy framework. Rather, there are a number of associated common law and statutory offences, including assault; breach of the peace; rape and sexual assault; murder or attempted murder; possession of an offensive weapon; vandalism and breach of a non-harassment order, interdict and bail which, if carried out by someone on their partner or ex-partner, can be classed as an incident of domestic abuse.

² As well as the appointment of dedicated lead prosecutors for human trafficking and female genital mutilation (FGM).

³ See, for example the Domestic Abuse (Scotland) Members Bill introduced by Rhoda Grant MSP in 2010. <http://www.parliament.scot/parliamentarybusiness/Bills/21239.aspx>

The issue of whether the criminal law should seek to distinguish between different forms of abuse according to the context in which it is perpetrated is complex and contested, and this has played out in interrelated debates concerning whether Scots criminal law covers *all* forms of non-violent behaviour contained within the current policy definition of domestic abuse; whether it sufficiently recognises the particular nature, dynamics and consequences of domestic abuse; that the criminal justice focus on specific criminal incidents precludes adequate consideration of the ongoing, and cumulative processes that characterise domestic abuse; and that the focus falls upon the presence or otherwise of physical injury and not the isolation, fear or psychological trauma endured by victims (see e.g. Scottish Government 2008; Hough 2010; McMillan 2010).

In August 2013 a high profile legal case marked new ground and spurred the call for the introduction of a new criminal offence. The case concerned the conviction and sentencing of Bill Walker a Member of the Scottish Parliament (MSP), who was tried in one of Scotland's specialist domestic abuse courts, in the course of which a 28-year history of abuse against his three former female partners was revealed (Johnson 2013). On announcing the verdict, the presiding Sheriff noted that there was 'evidence showing the accused to be controlling, domineering, demeaning and belittling' towards his three ex-partners.⁴ Whilst Walker was convicted of 24 separate charges involving physical assault and threats of violence for which he was sentenced to 12 months in prison, the case stoked the debate about the focus on discrete incidents rather than recurring patterns of domestic abuse and the perceived inability of Scots criminal law to recognise Walker's coercive, controlling and belittling behavior. In October that year, Evan Stark visited Scotland where he delivered several talks and met with key figures in criminal justice to discuss moving from an incident-based model to one which recognises coercive control. Responding to the Walker case, he wrote: "An appropriate response would be a law that expanded the current response by criminalising the course of coercive and controlling conduct that typifies partner abuse. Such a law would give police and courts the tool they need to respond more appropriately to partner abuse. It would also strengthen families and communities in Scotland by recognising that partner abuse typically consists of a systematic violation of basic human rights to security, independence, dignity and equality" (cited in: Scottish Women's Aid 2014:6)

Legislative Reform

Calls for the criminalisation of coercive control gained a new momentum following the Walker case - and its incorporation into criminal law was proposed as a means for widening the lens through which domestic abuse is viewed by criminal justice agencies. Resonating strongly with this lobbying, in May 2014 Scotland's Solicitor General called for the creation of a specific, bespoke offence of domestic abuse which reflected the experience of victims of long-term abuse and would provide recognition of the cumulative impact and consequences of all types of abuse, including patterns of coercive and controlling behaviour (Thomson 2014).

In early 2015, the Scottish Government issued a consultation paper, *Equally Safe Reforming the Criminal Law to Address Domestic Abuse and Sexual Offences*, seeking views on changes to the law to strengthen the powers of police and prosecutors to tackle domestic abuse and sexual offences, including whether a specific statutory offence of domestic abuse would improve victims' access to justice, and whether there was a need to amend existing legal provisions to better reflect victims' experiences (Scottish Government 2015a). The majority (93%) view

⁴ <http://www.scotland-judiciary.org.uk/8/1109/PF-v-BILL-WALKER>).

from the consultation was that the existing legal framework *does not* provide sufficient powers for the investigation and prosecution of domestic abuse and that a specific offence should be created to identify the particular, distinctive ‘wrong’ of abuse perpetrated within an intimate relationship which would reflect the true experience of victims of long term abuse during which they are, on repeated occasions, subjected to multiple forms of abuse (Scottish Government 2015b).

In December 2015, the Government undertook a further consultation and, in March 2017 announced the Domestic Abuse (Scotland) Bill proposing a specific offence of ‘domestic abuse’ intended to cover the wide range of conduct that can make up a pattern of abusive behaviour within a relationship, including physical, emotional and psychological abuse. Importantly, within the Bill, the decision was taken to use the term ‘abusive behaviour’ rather than ‘coercive control’. The accompanying policy memorandum notes that this was due to the ‘complexities’ of defining the terms ‘coercion’ and ‘control’ without elaborating on what these are, though within a legal framework, these complexities are likely to relate to the challenge of identifying and distinguishing behaviours from their impacts. A central feature of coercive control, as envisaged by Stark, is the focus on the (controlling) impacts of behaviours rather than individual acts or behaviours per se. Within the scope of the proposed offence, ‘abusive behavior’ is understood to be that which is ‘violent, threatening or intimidating’ and would be considered by a ‘reasonable person’ likely to have the effect of: making a partner or ex-partner dependent on or subordinate to the perpetrator; isolating them from friends, relatives or other sources of support; controlling, regulating or monitoring their day-to-day activities; depriving or restricting their freedom of action; or frightening, humiliating, degrading or punishing them. Crucially, the focus is on behavior of the perpetrator, which is targeted at their partner or ex-partner (including at their pets or property), either directly or indirectly via another person who may be encouraged to act. A non-exhaustive list of what constitutes abusive behaviour is included within the Bill and may provide sufficient guidance to address the complexities of abuse, though ultimately, it will be for the court to determine whether an alleged perpetrator’s behaviour falls within the scope of the offence. Definitional challenges almost certainly lie ahead.

Despite Scotland’s gendered understanding of domestic abuse, and calls in the consultations for gender-specificity on the basis that it provides clearer recognition of the gendered reality of domestic abuse, the proposal is for a gender-neutral offence of abusive behaviour. De-gendering is a departure from dominant policy discourse (and possibly a missed opportunity), although an equality impact assessment of the Bill emphasised the importance that the offence be broad enough in its scope to encompass specific forms of abuse that relate to protected characteristics, such as sexual orientation, disability or religious belief, as well as recognising the abuse of males (Scottish Government 2017), something which the Scottish Government has always long sought to acknowledge (Gadd *et al* 2002). However, reflecting on the current legal response in England and Wales (detailed below), Bishop (2016) suggests that the adoption of a gender neutral approach may be indicative of the male-dominated and patriarchal nature of a legal system which continues to fail to challenge gendered assumptions.

The Scottish approach differs to the (more narrow) offence of ‘controlling or coercive behavior in an intimate or family relationship’⁵ introduced in England and Wales (S.76, Serious Crime

⁵ Guidance on the new offence provides that where there are multiple offences committed by an offender against the one victim (for example, coercive and controlling behaviour, rape, grievous bodily harm) then the charges

Act 2015) which was intended to capture behaviour that was *not* covered by existing criminal offences (see Home Office 2015). Whilst the addition of a similar offence of coercive and controlling behavior was considered in Scotland, it was rejected in favour of a bespoke offence of domestic abuse intended to capture a range of behaviour which is *already criminal* as well as that which might not be captured by existing laws within a single offence.

There are other differences. The English/Welsh offence applies to abuse perpetrated on those in an intimate or family relationship; the Scottish offence takes a narrower approach covering only the abuse of a partner or ex-partner. Whereas S.76 applies where a person ‘repeatedly and continuously’ engaged in behavior, the Scottish offence requires proof of a ‘course of behaviour’ involving abuse on at least two occasions (so single incidents are not covered, but would be by other existing laws). Additionally, for an offence of domestic abuse to have been committed, two other conditions must be met: the behaviour needs to be such that a reasonable person would consider it likely to cause the victim physical or psychological harm; and that the accused either intended to cause the victim physical or psychological harm, or else has been reckless as to the causing of such harm. Hence, the focus is on the behaviour of the alleged perpetrator rather than the victim’s reaction or the evidencing of actual harm to them. The rationale behind the Scottish approach is to remove the requirement to prove specific harm, and hence reduce the risk of re-victimisation in requiring victims to give evidence of the effects the abuse had on them. It is unlikely that this will have the desired effect. It is difficult to imagine that evidence on harm (that is, fear, alarm or distress) will not be required to be led from victims and/or other witnesses. Drawing lessons from sexual offence trials, the likelihood of the strategic use of evidence challenging victim credibility and character and suggesting ‘motive to lie’ in such circumstances is high, with attendant implications for shifting the trial focus from the accused’s actions to those of the victim (see: Brown *et al* 1993; Easton 2000; Burman 2009). It is also not inconceivable that access to victims’ medical records will be sought, as in Scottish sexual offence cases, raising significant issues of privacy and exacerbating victim distress.

Achieving aspirations

The incorporation and use of coercive control in an adversarial context is relatively uncharted territory. The existing evidence base supporting the criminalisation of coercive control is underdeveloped, largely due to the limited time that any reforms have had to ‘bed-in’. There have been few prosecutions under s.76 in England and Wales; in 2016, just five people were cautioned for coercive and controlling behavior and 155 defendants prosecuted (ONS 2017). So how well might the introduction of a new offence incorporating coercive control transform Scottish legal processes responding to domestic abuse?

A key claim is that the new offence will facilitate access to justice for women. But it is not clear *how* it will do this. There are very likely to be challenges around identification and recognition, as well as response. Findings from the 2014 Scottish social attitudes survey on violence against women show that people are less likely to recognise verbal abuse and controlling behaviour as being wrong and harmful; that there are circumstances under which abusive (rather than violent) behaviours are viewed as less serious, and; that sex without consent is less seriously wrong or harmful if perpetrated by the victim’s spouse than by someone she has just met (Reid *et al.* 2015). The tactics of coercive control are often reminiscent of the normative constraints for women in society (Stark 2007) and can be particularly hard to identify, or for women to

should be heard together to avoid isolating the incidents and to encourage the court to view the behaviour as ‘a pattern’ of abuse (Home Office 2015).

articulate, far less consider reporting to the police. Consecutive sweeps of the Scottish Crime and Justice Survey (SCJS) have confirmed that only one in five incidents of partner abuse come to the attention of the police (MacQueen and Norris 2014). The gendered nature of coercive and controlling behaviour makes these behaviours difficult to recognise by those involved in the criminal justice process (Bishop and Bettinson, 2017) since they coalesce with normalised expectations of male and female behaviour. Difficulties in recognising subtle and insidious controlling behaviours and the ability of victims to report domestic abuse to the police means that 'justice' will most likely continue to be accessed by only the minority of those affected.

Scotland's multi-agency approach provides many access points to criminal justice and so it is crucial that practitioners are able to recognise and respond to the defining features of the new offence. The ability to detect the perpetration of a pattern of coercive control is critical. Research in other jurisdictions has noted that coercive controlling behavior has proven difficult to operationalise (Pitman 2017), not least because of the challenge of identifying emotional or psychological torment. The new offence carries with it the aspiration of facilitating a criminal justice response that is less incident-based and more appreciative of the ongoing nature and cumulative impact of domestic abuse. For this aspiration to be realised, questions need to be asked about professionals' understanding of the complex nature of abusive behavior. Whilst Scotland's 175 independent domestic abuse advocates (IDAAs) will undoubtedly assist in supporting women to recognise the behaviour they are subject to as abusive, shortcomings in police understandings are well-documented (Edwards 1989; Hoyle 1998; Myhill and Johnson 2016) and, whilst Police Scotland prioritise domestic abuse and the Joint Protocol signals a robust and consistent approach, important questions remain about police – and other professionals' – informed understandings of the complex interplay of factors that make up women's experiences. Professional training and awareness-raising with the aim of better serving the needs of victims, and improving prevention practices is key, yet there is scant evidence that this is taking place with front-line criminal justice professionals.

Another aspiration is that the new offence will improve investigation and prosecution of domestic abuse. Any assessment of its potential for doing so needs to take into account the evidentiary barriers that will need to be surmounted. The specific (and unique) evidential requirement of corroboration in Scots law which requires two different and independent sources of evidence in order to prove a crime animates debate amongst legal practitioners and scholars (see: Nicolson and Blackie 2013). Applied to all crimes in Scotland, the corroboration requirement is considered to increase the barriers to prosecution and conviction when applied to rape and incidents of domestic abuse that, by their very nature, most frequently occur in private (Brown *et al* 1993; Cowan 2010). Despite the high volume of cases, only a minority of domestic abuse perpetrators are brought to justice and when they are the focus is invariably on culpability with regard to one or two discrete incidents – so it remains unclear whether the incorporation of coercive control into a statutory offence of domestic abuse will have an affect here. The challenge of securing corroborated evidence in relation to psychological abuse and other forms of coercive and controlling behaviours raised in the consultations was rebuked by COPFS who confidently asserted that Scottish police and prosecutors have developed specialist skills and expertise in the investigation and prosecution of sexual crime and stalking which would apply in domestic abuse cases. Interestingly, the legislation potentially allows for a lesser offence to be corroborated by a more serious offence, if they form part of the same course of conduct in one charge, thereby opening up the possibility of side-stepping the requirement. Perhaps more realistically, there will undoubtedly be particular challenges in corroborating a 'course of conduct' of abusive behavior, as well as corroborating emotional and psychological

abuse, due to its inherently private and individual nature. Complainer statements alone, no matter how strong and credible are not legally sufficient and the corroboration requirement will require supplementary evidence to establish 'fact' and/or reliability to be drawn from other sources, like friends, family but potentially also medical and psychiatric records.

Unintended consequences, unanticipated effects

There is scope for the new offence to make a symbolic and positive contribution to improving understanding of coercive control, particularly if its introduction is accompanied by public awareness-raising campaigns. However important the symbolic effect, this does not necessarily result in changes in legal practice and, even where it does, it may trigger unanticipated counter effects. This is evident, for example, in the shift towards pro-arrest and prosecution policies as a response to concerns about case attrition and police failure to arrest in cases of domestic abuse (Buzawa and Buzawa 2003). Pro-arrest approaches have been adopted in a number of jurisdictions including Scotland and the UK more broadly. While such policies may provide the scope for more perpetrators to be held accountable, an important but unintended consequence of these policies witnessed across a range of jurisdictions is that more women are now being arrested as perpetrators of domestic abuse (DeLeon-Granados 2006).⁶ This is largely due to the focus on providing a robust response to the most immediate incident, with limited capacity to adopt a more nuanced understanding of the longer-term context of a particular incident. Consequently, women who have endured abusive relationships can find themselves rapidly drawn into the criminal justice system as alleged perpetrators for reacting in kind to violence they have long tolerated as victims (Swan and Snow 2006).

In a similar vein, the proposed expansion of behaviour that legally constitutes domestic abuse to incorporate psychological abuse (including emotional and financial abuse) has the potential to draw more women into the system as perpetrators. Claims of emotional abuse perpetrated by women may gain credence by drawing upon familiar and well-worn tropes about women's capacity to be emotionally manipulative and deceitful (Jordan 2004). There is also a risk that misuse of the proposed offence could see victims of domestic abuse criminalised in instances where they have attempted to protect themselves or their children (e.g. where women who are in, or are escaping, an abusive relationship with children withhold parental visitation due to safety concerns and are then construed as psychologically abusive to their partner or ex-partner). Such risks may be mitigated, however, by the incorporation of the 'reasonable person' test and the focus on perpetrator intent within the proposed offence.

In Scotland (and elsewhere) there are growing concerns about counter-allegations and the related phenomenon of dual reports whereby both partners in a relationship are reported as perpetrators⁷. It is estimated that 3,000 dual reports of domestic abuse are reported to the police in Scotland annually with a disproportionately high number of women being reported as perpetrators within these reports compared to other reports of domestic abuse (Brooks and Kyle 2015). The proposed offence will undoubtedly impact upon reports of this nature, though the specific effects are likely to be multi-directional. While the proposed offence may exacerbate this problem through the extended range of behaviours subject to criminalisation (including

⁶ In Scotland, the proportion of incidents where women are recorded by the police as the perpetrators of domestic abuse and men are recorded as the victims has increased from 9% in 2002-03 to 18% in 2015-16.

⁷ Perpetrators may make a 'counter-claim' of domestic abuse victimisation as a tactic to subvert the criminal justice response to their own behaviour and further control their partner or ex-partner. Meanwhile, dual reports occur when both parties in a relationship are reported to the police as perpetrators at the same time, and may include counter-allegations (Brooks and Kyle 2015)

emotional and psychological abuse), the centrality of a course of conduct within the new offence has the potential to reduce the likelihood of dual and counter-allegations being prosecuted due to its greater emphasis on a pattern of behaviour rather than the existing problematic focus on individual incidents.

The new offence will criminalise a course of conduct of entirely non-physical abuse in recognition of the severe harm that can result from this form of abuse, thus challenging the 'hierarchy of harm' which privileges physical violence (Bishop 2016). The policy guidance highlights the appropriateness of listing both physically violent and other (non-violent) abusive behavior together in a single charge as it can show a pattern of abuse and better reflect the experience of victims, yet this very wide scope and the wide range of behaviours potentially risks over-criminalisation. As highlighted in the consultations, there is insufficient clarity over what constitutes a 'course of conduct' which may be only two incidents, and there is no specification of what time period might be reasonable to constitute the offence. In theory, a prosecution could occur based upon two incidents several years apart. As any violent, threatening or intimidating behaviour would be caught under existing law, a threshold of two incidents is a relatively low bar to establish a 'course of conduct', particularly where neither incident involved violence or a threat of violence. In recognition of this, and drawing upon concerns from stakeholders, including the Scottish Police Federation, and the Law Society of Scotland, the Scottish Parliament's Justice Committee have called upon the Scottish Government to consider the possibility that the proposed definition has set the 'bar of criminalisation too low' (Scottish Government 2017).

Against a very high volume of domestic abuse cases, the introduction of a new law of this scope is likely to increase pressure on police and court resources and exacerbate time constraints for the system and those caught up within it. Scottish government statistics reveal a marked increase in the volume of domestic abuse incidents recorded by the police in recent years. In 2015-16 there were 58,104 incidents recorded, representing almost a 50% increase since 2003/04 (Scottish Government 2016). COPFS, receive cases with more than 27,000 charges annually, representing around 25% of summary level business with increasing numbers and complexity of cases received at solemn level (Hicks 2014). Domestic abuse is fast becoming mainstream criminal justice work in Scotland. Increased numbers have contributed to significant problems of volume and capacity, leading the Scottish Police Federation to criticise COPFS for progressing cases with little likelihood of conviction (Marshall 2016) and the creation of huge delays in court time, with the domestic abuse courts described as 'creaking at the seams...' (Robertson 2014).

The introduction of new policy/legislation is always costly (in terms of 'bedding-in', appropriate training, re-alignment with existing practice, operation costs) and the Justice Committee at the Scottish Parliament have already attempted to highlight the cost implications for police, prosecution, social work and third sector services (Scottish Government, 2017) Moreover, while being seen to strengthen the law and adopt a robust approach to an emotive crime like domestic abuse may be politically popular, such measures could well eclipse other aspects of the response to domestic abuse including the adequate resourcing of vital support services in a time of fiscal constraint. This also raises the concern that legislative reform may obscure the need for cultural/institutional reform and decelerate the mobilisation of public opinion, resources, and other areas of public policy to address domestic abuse, effectively and inadvertently restricting other avenues to justice.

Conclusion

This article offers a critical insight into intended as well as potential unintended consequences of legislative reform on domestic abuse; something rarely elicited during consultation processes for new legislation whereby the focus is primarily on what *should be done* rather than *what might happen* as a result. As such, it is anticipated that these insights will be of interest in other jurisdictions where work is being undertaken to align criminal justice and policy responses with the concept of coercive control.

The Scottish legal response has been subject to critique as a result of its incident-based focus and perceived inability to tackle domestic abuse as a crime characterized by its complexity and sustained nature. Whilst some have questioned whether there can *ever* be an adequate criminal justice response, Scotland is at a pivotal point with regard to legislative reform and recognition of coercive control. For the first time, a statutory offence of domestic abuse is proposed, representing a bold and aspirational attempt to better reflect the experience of victims, recognise the impact and consequences of all types of abusive behavior, and facilitate access to justice. What is proposed is more radical than that adopted in some other jurisdictions, such as England and Wales, whereby coercive and controlling behaviours have been criminalized, rather than incorporated within a broader, more holistic and overarching offence of domestic abuse.

We have reflected on one of the most radical attempts yet to align the criminal justice response with contemporary (feminist) conceptual understandings of domestic abuse as a form of coercive control and speculated about some of the likely impediments to the use of the new offence, which may well undermine the legislative spirit and intent. Decades of policy and legislative reform of the criminal justice response to other forms of violence against women leave us somewhat pessimistic that the introduction of this new offence within Scotland's adversarial context, which sustains forms of legal practice known to effectively undermine the spirit of any well-intentioned legislation, will fully achieve its bold ambitions (Brown et al 1993; Burman 2009; Cowan 2010). Legislative change cannot on its own lead to improvements. Whatever laws we have will be only as effective as those who enforce, prosecute and apply them. Improving these practices – through education, training and embedding best practice and domestic abuse expertise - is likely to be more effective than the creation of new offences alone.

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