

# Evidencing domestic violence\*, including behaviour that falls under the new offence of ‘controlling or coercive behaviour’

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## Abstract

In 2015 an offence of ‘controlling or coercive behaviour’ was introduced under the Serious Crime Act, criminalising for the first time the non-physical abuse which so often occurs in the domestic context. This new offence implicitly recognises the psychological and emotional harm which can result from an ongoing pattern of behaviour, and the need to consider the controlling or coercive nature of this behaviour in the context of the power dynamics of the relationship in question. Unique evidential difficulties are raised by this offence, in part because of the ways in which gendered expectations can disguise the controlling and coercive nature of certain behaviours. At the same time, to increase the number of prosecutions for domestic violence offences, including under the new offence, acknowledgement of the ongoing trauma often experienced by victims, and the ways in which this may hinder their ability to safely and effectively participate in the criminal justice process, is required. We will outline recommendations to enable this participation, whilst also asserting the need for creative prosecution methods which allow these type of cases to be prosecuted without being solely reliant upon the victim’s oral testimony in court.

## Keywords

coercive control, credibility, domestic violence and abuse, hearsay evidence, trauma

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Academic literature has previously highlighted concerns in the context of prosecuting perpetrators of domestic violence-related offences.<sup>1</sup> One long-standing difficulty has been due to the inherent limitations in the substantive criminal law itself, which predominantly focused on isolated incidents of physical violence or criminal damage (Bettinson and Bishop, 2015). Consequently, evidence relating to the context of the relationship or the serious psychological effect of ongoing and programmatic abusive behaviour was legally irrelevant (Bettinson and Bishop, 2015; Bishop, 2016). The subsequent failure of the criminal law to reflect the real lived experiences of domestic violence victims, who typically suffer psychological harm (Tagg, 2011) and experience the abuse as a process in everyday life (Robinson, 2014: 71), has contributed to a lack of victim-confidence in the criminal justice system (Cretney and Davis, 1997; Robinson and Cook, 2006). Acknowledging these obstacles, the government introduced, under s. 76 of the Serious Crime Act 2015, the offence of ‘controlling or coercive behaviour within an intimate or family relationship’.<sup>2</sup> Building on previous work justifying the criminalisation of this behaviour (Bettinson and Bishop, 2015), the authors will provide a deconstruction of the offence to expose the evidential difficulties associated with this type of behaviour. The significance of this discussion is to highlight the unique nature of the offence in matters of evidence and proof, and to outline ways in which the anticipated evidential barriers can be overcome, thus encouraging a greater number of prosecutions for domestic violence offences overall, including under s. 76.<sup>3</sup> Ellison has previously written that there has been ‘a lack of creativity in the prosecution of domestic violence offences in England and Wales’ (Ellison, 2002: 839). We will therefore argue for increased innovative practices borrowing from initiatives employed to assist in sexual offence cases. In particular, this will involve measures enabling the complainant to participate safely and effectively in the criminal justice process, whilst at the same time gathering a wide variety of evidence and thus reducing, where possible, reliance on the testimony of complainants as the sole, or central, piece of evidence.

After outlining issues surrounding victim participation in the prosecution process in part one, part two will examine the behaviours encapsulated under the new offence, and the ways in which gendered expectations may make their controlling and coercive nature hard to recognise and discern by those involved in the criminal justice process. Second, there will be an evaluation of the harm that typically results from this type of abuse and why victims oftentimes experience even non-physical abuse as traumatic. The significance of this experience for victims may have profound implications for police and CPS decision-making based upon perceptions of complainant-witness credibility. Part three then explores aspects of evidential law and practice that can be used to enable the prosecution to build a case, based upon recognition of the potential difficulties the specific behaviour and harm encapsulated by the new offence present. It will be argued that normalising applications for special measures in appropriate cases of domestic violence-related offences to accommodate the effects of the trauma experienced by many victims is needed. It will be demonstrated how psychological injury caused by controlling or coercive behaviour may create further difficulties in terms of prosecuting the new offence. Long-term psychological and physiological effects of ongoing abuse will be shown to affect perceptions of witnesses as reliable and

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1. Cretney and Davis (1997); Ellison (2002). These difficulties are found in same-sex as well as heterosexual partnerships (Hester, 2009) and the Home Office definition of domestic violence and abuse applies to those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality (<https://www.gov.uk/guidance/domestic-violence-and-abuse>).
  2. Section 76 of the Serious Crime Act 2015; Home Office, 2014.
  3. A Freedom of Information request made by law firm Simpson Millar in August 2016 found that in the first six months of the new offence being in force it had been used by police only 62 times, with 11 forces making no arrests at all ([www.simpsonmillar.co.uk/news/police-and-victims-urged-to-use-new-coercive-control-laws-3818](http://www.simpsonmillar.co.uk/news/police-and-victims-urged-to-use-new-coercive-control-laws-3818), accessed 1 August 2017). This widespread lack of awareness of when and how to use the new offence led the College of Policing to set up a new pilot in September 2016 aimed at helping to support officers to detect the signs that someone is being controlled by their partner ([www.college.police.uk/News/College-news/Pages/Police-support-victims-of-coercive-control.aspx](http://www.college.police.uk/News/College-news/Pages/Police-support-victims-of-coercive-control.aspx), accessed 1 August 2017) but evaluations of the impact of the training expose ongoing concerns ([www.college.police.uk/News/College-news/Documents/Domestic\\_Abuse\\_Matters.pdf](http://www.college.police.uk/News/College-news/Documents/Domestic_Abuse_Matters.pdf), accessed 1 August 2017).

credible, something which is known to influence decisions to charge and to prosecute (Roberts and Saunders, 2010; see also Fisher et al., 2009; McMillan and Thomas, 2009. O’Keefe et al., 2009; Temkin J, 1997, 2002). Increased training for legal professionals on the effects of trauma and greater use of pre-trial witness interviews as a means of countering these perceptions will be explored.

## Part one

### *Background: Victim participation*

As stated above, the offence of controlling or coercive behaviour within an intimate or family relationship was introduced to ensure criminalisation of the pattern of behaviours commonly characteristic of many abusive relationships. Views received in response to the consultation paper (Home Office, 2015a) made a strong case for introducing an offence of this kind, due to the nature and severity of psychological harm that victims of domestic violence frequently suffer as a result of this type of behaviour. The criminal law commonly used prior to the introduction of s. 76 SCA 2015 in the context of domestic violence cases often fell under the Offences Against the Persons Act 1861 (OAPA 1861) and the offences of assault and battery.<sup>4</sup> These did little to provide redress for psychological injuries as emphasised initially in *Chan Fook*<sup>5</sup> and approved in *Dhaliwal*.<sup>6</sup> To some extent offences created under the Protection from Harassment Act 1997 (PHA 1997)<sup>7</sup> ought to apply in domestic violence cases and enable the prosecution to connect a series of incidents taking place within the relationship. However, judicial interpretations of these offences in *Curtis*<sup>8</sup> and *Hills*<sup>9</sup> revealed problematic application to cases involving ongoing intimate relationships and non-physical harm (see detailed analysis in Bettinson and Bishop, 2015: 188–190). Likewise Harris’s findings on the early use of the harassment offences under the 1997 Act showed the relationship between the complainant and the suspect was often as ex-partners (Harris, 2000: 9, 10). Proving offences of this kind, particularly when they took place in the ongoing domestic context, with non-physical and non-criminal behaviours, is clearly difficult. The behaviour and harm encapsulated by the s. 76 offence is therefore different from the types of incidents envisaged by the creators of the OAPA 1861 and PHA 1997. Offences under the OAPA 1861 either do not require, or even allow, any information to be given regarding the context in which they took place, whilst the harassment offences do not apply where episodes are interspersed with periods of affection between the complainant and the defendant.<sup>10</sup>

Conceptualising behaviour within an ongoing intimate relationship as criminal is therefore fraught with difficulties and has meant that the criminalisation of domestic violence is not universally accepted. This is particularly the case when a prosecution is carried forward against the victim’s wishes and when the relationship is continuing. In arguing against mandatory criminal justice interventions in domestic violence cases, Mills notes that the law used in this way can lead to double victimisation of the vulnerable (Mills, 1999); mandatory criminal justice interventions are traumatic and can render the victim powerless (Herman, 1992). Hitchings argues that a prosecution should not be carried out against the victim’s wishes as this further removes their power and denies them the ability to control their fate (Hitchings, 2005). Hirschel and Hutchinson argue that the very act of withdrawing a complaint or refusing to testify demonstrates the victim’s preference of avoiding a criminal justice response to their personal situation (Hirschel and Hutchison, 2003). They advocate that the victim herself is in the best

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4. Crown Prosecution Service (2015a: 29) states: ‘as in previous years, offences against the person were the most frequently prosecuted offences, representing 72% of DA [sic] crimes. Criminal damage and public order offences accounted for a further 12% and 5% respectively.’ See Burton, 2008.

5. [1994] 1 WLR 689 (CA)

6. [2006] EWCA Crim 1139

7. Section 1(1) and s. 4

8. [2010] 3 All ER 849

9. [2001] Crim LR 318

10. *R v Curtis* [2010] EWCA Crim 123.

position to assess the likelihood of her own repeat victimisation and safety, ultimately judging that prosecution will do more harm than good. However, one of the after-effects of chronic and serious trauma is a heightened sensitivity to danger and the perception of the perpetrator as being more powerful than he is (Herman, 1992; Williamson, 2010). Therefore, a successful prosecution may act to decrease these perceptions and means that threats or promises directed towards the victim by the perpetrator in return for the victim withdrawing from the prosecution process become weakened. Mills' argument was focused on mandatory arrest practices and she supported a victim-centred approach. Without such an approach, criminalisation can lead to examples of injustice, such as happened in *R v A*<sup>11</sup> where A was found to be in contempt of court for refusing to give evidence out of fear of repercussions from the perpetrator. Edwards argues that judicial assertions that the law should not force itself upon a victim who does not wish to avail herself of it<sup>12</sup> 'demonstrate[s] the capacity of the law in its selective myopia to be a tacit party to law's own violence against women' (Edwards, 2012: 30). The European Court of Human Rights has ruled that criminalisation is necessary to ensure that states have the means to provide sufficient protection from domestic violence. According to *Opuz v Turkey*,<sup>13</sup> requiring victims themselves to pursue their complaints through the criminal justice system does not achieve this, as intimidation by the perpetrator is used to deter victims from continuing. There is a clear distinction between compelling someone to testify, which is not appropriate and is likely to traumatise and further violate their psychological integrity, and the trial process occurring regardless of the victim's position and without their oral testimony. Criminalisation does not require the victim to end the relationship with the perpetrator. The goal of criminalisation is to reduce the behaviour and educate the public about coercive control.

'A victim-centred approach is at the heart of the National Strategy to End Violence Against Women and Girls' aim of encouraging victim confidence in the criminal justice system. The Strategy seeks to fulfil this goal, in part, by increasing domestic violence conviction rates and therefore barriers to prosecution arising from the criminal law aim of encouraging victim confidence in the criminal justice system. The Strategy seeks to fulfil this goal, in part, by increasing domestic violence conviction rates and therefore barriers to prosecution arising from the criminal law.' Victim retraction and non-attendance in domestic violence cases is considerably higher when compared with other criminal cases.<sup>14</sup> The literature has identified a number of factors affecting complainant decisions to withdraw from the trial process, including fear of retaliation by the defendant or their relatives, a desire to continue with the relationship, and dissatisfaction with, or fear over, the court process (Cretney and Davis, 1997; Ellison, 2002; Robinson and Cook, 2006). Initially, victim retraction proved the prime factor in prosecutorial decisions not to proceed with the charges against the defendant, based on the view that without the complainant's presence during court proceedings there was insufficient prospect of securing a conviction.<sup>15</sup> Before the creation of s. 76 efforts had been made to encourage victim participation in the trial process, the partial success of which are evidenced by a reduction in the high victim withdrawal rate and an increase in convictions (Crown Prosecution Service, 2015). Specialist Domestic Violence Courts, located within the magistrates' court (see Bettinson, 2016; Cook et al., 2004; Valley, 2005), and Independent Domestic Violence Advocates (IDVAs), where available, provide a victim-centred court

11. *R v A* [2010] EWCA Crim 2913.

12. For example Lord Salmon in *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474 at 495.

13. *Opuz v Turkey* (2010) 50 EHRR 28

14. 'Over 7,500 domestic violence cases failed to attend court or retracted their evidence; that is 1 in 3 of all failed cases. That compares with a general figure of about 10 per cent for all prosecutions.' (Crown Prosecution Service, 2011: 16). The most recent CPS Violence Against Women and Girls Crime Report (2015–16) reports that victim retraction, victim non-attendance and evidence that the victim does not support the case accounted for 13.4% of all unsuccessful domestic violence prosecutions that year, that is 1 in 3 of all failed cases. This compares with a general figure of about 10 per cent for all prosecutions' (Crown Prosecution Service, 2016a: 31).

15. Cretney and Davis (1997); Robinson and Cook (2006).

environment. Their presence serves as a reminder that prosecutors are not representatives for the victim but in fact are prosecuting on behalf of the Crown and in the public interest. In these courts, personnel are trained in domestic violence matters and delays are reduced by what is essentially a fast track approach. IDVAs have been particularly important in providing support and guidance to the complainant about the criminal justice process and beyond (Bowen et al., 2014; Taylor-Dunn, 2015).

Those located in the courthouse are beginning to use their residual knowledge of how the system works to encourage complainants to attend the courthouse on the day, even if they do not then wish to give evidence to the court.<sup>16</sup> Taylor-Dunn's research suggests that defence lawyer's advice to their clients is to change their plea to 'guilty', once they are aware that the complainant is present. This makes enabling safe and effective victim participation of paramount importance to securing increased domestic violence conviction rates (Taylor-Dunn, 2015).

However, these measures are insufficient on their own to overcome every complainant's legitimate fears about the trial process and the evidential issues raised by cases involving domestic violence related offences, particularly the unique ones encountered when proving a s. 76 offence, explored below. Indeed, there may be limited access to the specialist court provision and a court-based IDVA (Bettinson, 2016: 81–103; Bowen et al., 2014). Consequently, as has been highlighted by Ellison, creative measures that are more often raised in sexual offence cases can become crucial in supporting prosecutorial efforts to build cases without reliance on the complainant's testimony. The CPS have identified several examples of good practice that take into account the obstacles caused by victim non-participation in its annual Violence Against Women and Girls Crime Reports.<sup>17</sup> These reveal the growing recognition of the ability to build domestic violence cases without sole reliance on the victim's participation through the use of admissible hearsay evidence under the Criminal Justice Act 2003. For example, 999 calls, in either audio or transcription form, were routinely used in Norfolk, which experienced a high conviction rate in 2010 (Crown Prosecution Service, 2016a: 15). Emergency service calls have repeatedly been regarded as good practice in case studies in subsequent CPS reports. Body-worn cameras have proven useful to convey what was occurring when police arrived at the scene, as have photos of injuries and CCTV footage taken in public areas.<sup>18</sup> In the 2014–15 report, clear examples of hearsay applications being successfully made under s. 116 Criminal Justice Act 2003 and s. 118 were included (Crown Prosecution Service, 2015a: 30). The most recent report provides examples of successful prosecutions under s. 76, although no indication is provided as to matters of evidence and proof involved in each case (Crown Prosecution Service, 2015a: 33–34). The next section will begin to explore exactly these issues, beginning with a discussion about how controlling and coercive behaviour may be evidenced.

## Part two: Behaviour and harm

### *Evidencing the behaviour*

The offence under s. 76 is concerned with behaviour by person A that is continuous or repeated and has a serious effect on person B, either by making B fear that serious violence will be used against them, or by causing B serious alarm or distress which has a substantial adverse effect on their usual day-to-day activities.<sup>19</sup> Thus the offence is designed to encapsulate a *range of behaviours*, which, when taken together, seriously affect the victim due to their controlling or coercive nature. This makes background

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16. Although the ideal from the criminal trial process is for the complainant to give live testimony, this is not a concern of the IDVA.

17. These can all be located on the CPS website.

18. For evaluation of current use of body worn cameras in policing see Grossmith L et al., 2015. Use of body camera evidence has been explored in other jurisdictions for example see Westara and Powell (2017) and Morrow et al. (2016).

19. Where persons A and B are 'personally connected'. This is the case if they are members of the same family; if they are, or have been, married to each other or civil partners of each other; if they are relatives; if they have agreed to marry one another (whether or not the agreement has been terminated); if they have entered into a civil partnership agreement (whether or not the

information about the relationship necessary in order to prove that the behaviour which occurred did have a serious effect on the victim due to its controlling or coercive nature. This marks a departure from other criminal offences used in the domestic context whereby the harm can be measured objectively by assessing the severity of physical injuries. In contrast to other offences, a significant difficulty is envisaged in terms of gathering sufficient evidence to prove that the specific behaviour in question did have this effect. In part, this difficulty occurs because of the gendered nature of much domestic violence, especially that which involves coercive and controlling behaviour. It is not simply that women are statistically more likely to experience violence and abuse in intimate relationships, it is that coercive control itself 'is "gendered" in its construction, delivery and consequences' (Stark, 2007: 205; see also Kelly and Johnson, 2008). This may make coercive and controlling behaviour hard to discern as it falls at the extreme end of the spectrum of power relations that exist in 'normal' family life (Hearn, 1998: 36) and within 'normal' intimate partnerships.

The Home Office's Statutory Guidance on the new offence acknowledges the issue of gender in respect of this type of behaviour, recognising that it is 'primarily a form of violence against women and girls and is underpinned by wider societal gender inequality.'<sup>20</sup> However, it is essential to note that structural gender inequality, as well as underpinning this form of domestic violence, also acts to normalise it, making it hard for those involved in evidence-gathering to recognise it, and, at the same time, obscuring and minimising its harmful impact. This is significant because without an acknowledgement of the ways in which gendered expectations may serve to obscure the coercive and controlling nature of certain behaviours, it may be decided that there is insufficient evidence that the behaviour of A had a serious adverse effect on B,<sup>21</sup> for the purposes of proving the offence. The prosecutorial guidance for the s. 76 offence does refer to the need to assess behaviour in the context of the power dynamics of the relationship in question,<sup>22</sup> based upon recognition that the commission of much domestic violence consists of a pattern of behaviours with related incidents which may not be harmful, or recognised as harmful, when abstracted from the relational context in which they occur. Equally significant in determining whether or not behaviour is controlling or coercive is the cultural context in which the dynamics of individual relationships play out. This includes the way in which gendered expectations operate to construct a normative framework against which the behaviours within individual relationships are understood and assessed.

### *The role of gendered expectations in the commission of controlling and coercive behaviour*

For more than 40 years, feminist academics have emphasised the role of power and control in the commission of domestic violence, asserting that its existence is a manifestation of male power in a male-dominated society (see in particular Dobash and Dobash, 1979; Hearn, 1998; Pence and Paymar, 1993). From this perspective it has been argued that the commission of domestic violence-related offending has its roots in the gender inequality apparent at the broader social and cultural level (Bishop, 2016: 59). Under this analysis, that the majority of domestic violence is commissioned by heterosexual males<sup>23</sup> is not merely coincidence; men who are violent towards their wives and female partners do so as

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agreement has been terminated); if they are both parents of the same child, or if they have, or have had, parental responsibility for the same child (s. 76(6)).

20. The gendered nature of domestic violence has also been recognised by the European Court of Human Rights in *Opuz v Turkey* (2010) 50 EHRR 28.

21. Section 76(1)(c) of the Serious Crime Act 2015

22. Section 77 SCA 2015; Home Office, 2015b; Crown Prosecution Service, 2016b.

23. The CPS Violence Against Women and Girls Crime Report of 2015 reported that of the 100,930 defendants prosecuted for domestic violence offences that year, 92,852 were male and 7,992 were female. In 87 cases gender was not recorded (Crown Prosecution Service, 2015a: 30).

a result of conforming to cultural norms that support male dominance (Dobash and Dobash, 1979: 22–24). Whilst the feminist perspective linking domestic violence to male power and control has been challenged and, to a certain extent, undermined by recognition that men can be victims (Dempsey, 2013; Martin, 2016) and that domestic violence occurs within same-sex relationships (Donovan and Hester, 2011; Hester, 2009), the role of gender, particularly in the context of controlling and coercive behaviour, cannot be ignored.<sup>24</sup> Despite an increase in formal equality within the public sphere, pervasive violence against women persists and coercive control has emerged as a separate strategy of male power and control. Indeed, Stark places coercive control in the context of this ‘newly won equality’, claiming that it emerged as a strategy due to women’s formal equality gains; a lack of explicit male power and control at a societal level meant individual men needed to find new ways of controlling women in their private lives (Stark, 2007: 130).

Stark identified the strategies of coercive control that are used to maintain power over the victim as centring on ‘gendered enactments’ because they involve the micro-regulation of everyday activities already typically associated with women in their roles as homemakers, parents and sexual partners, such as how the victim dresses, cooks, cleans, looks after children and performs sexually.<sup>25</sup> As a result, the strategies serve to reinforce a specific construction of feminine identity and, due to the cultural association of masculine identity with control (Connell, 2004, 2009; Crowther-Dowey et al., 2016; Dowd, 2008; Johnson, 2005), the male dominance that is typically seen in a relationship characterised by coercive control may be hard to discern because it merely falls on the extreme end of a spectrum of acceptable male control over the allocation of resources and so on. This means coercive and controlling behaviour may be hard to distinguish from the gendered behaviours that are normalised and reinforced at a societal level. In order to maintain control over the victim, the abuser’s demand must be linked with a ‘credible threatened negative consequence for noncompliance’ (Dutton and Goodman, 2005: 747), such as the infliction of physical or sexual violence or the withholding of finances or other resources. This ensures that the victim feels compelled to comply to avoid the negative consequences that are threatened. The credibility of threats is contextually dependent and thus their ability to coerce and control a victim will be determined by social and cultural expectations of appropriate gender roles and behaviours. This is why it is ‘exceptional for [a woman] to achieve the kind of dominance over her male partner that characterises [coercive control]’.<sup>26</sup> The manifestation of coercive control along gendered lines, alongside the limitations of assessing behaviour as controlling or coercive in the absence of a full understanding of the dynamics of the relationship in question, must all be taken into account when discussing how to evidence and prove the s. 76 offence.

The tactics of coercive control are also often confused and misinterpreted as signs of affection, caring and even love because the behaviours engaged in through a desire to control may merge with acceptable and desirable expressions of love and concern (see Crowther-Dowey et al., 2016). For example, tactics designed to isolate the victim from friends and family and the policing of behaviour and clothes may be seen as signs of love rather than jealousy or male proprietariness (Suarez, 1994). Whilst the CPS guidance does make it clear that context is important, this context may not be easily understood by criminal justice professionals and juries with relatively little understanding or experience of domestic violence and coercive control. They may see the behaviours which reinforce male dominance and proprietariness as an acceptable or ‘normal’ part of a heterosexual relationship and thus the victim’s compliance with the demands of the perpetrator as voluntary rather than as a result of coercion and control. For example, the victim being ‘forced’ to do household chores in a particular way or keep a record of expenditure may be normalised due to existing gendered expectations and, even if recognised

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24. For example, findings from a recent study by Myhill supported previous structural explanations for the gendered nature of coercive control established within the literature (Myhill, 2015: 369).

25. Stark (2007: 129–130). Also more generally see Stark (2007) and Anderson (2009).

26. Pence and Dasgupta (2006: 6). It is possible for women to achieve this dominance over a male partner in certain circumstances, such as when she has an advantage based on income or social class (Stark, 2012).

as abusive or controlling, the full extent of the impact on and harm to the victim may not be appreciated. Adding further complexity is the compliance of the victim with the demands of the perpetrator, giving the appearance of a voluntary response (Dutton and Goodman, 2005: 752). However, because the victim is aware, from past experience, that the abuser has the means to carry out the threatened consequences, the abuser has the means to exert coercion and the victim's 'choice' over whether or not to comply is not 'free choice'.<sup>27</sup> This links with the exploitation of widely accepted gender roles in that a victim may not recognise what has happened as being abusive and criminal, because the demands and rules were very close to what is expected of her in her stereotypical role anyway. Juries may be of the same perception, implicitly assuming that 'women do these things anyway' and that often it is easier 'just to get on with it'. Therefore, whilst the new offence enables the prosecution to include the context in which the behaviour took place, without acknowledgement of the gendered nature of coercive control, the potential of the s. 76 offence could be significantly limited.

### The harm: Trauma

To appreciate the obstacles faced by the prosecution in s. 76 cases, it is not just the behaviour of the perpetrator that needs to be understood, but also the harm it inflicts upon the victim. The offence requires that the controlling or coercive behaviour has a 'serious effect'<sup>28</sup> on the complainant. Serious effect is further defined as being when A's behaviour causes B to fear, on at least two occasions, that violence will be used against B, or it causes B serious alarm or distress which has a substantial adverse effect on B's usual day-to-day activities.<sup>29</sup> It is therefore clear that the offence includes behaviours that do not threaten or cause physical injury, in clear recognition of the emotional and psychological harm that results from controlling or coercive behaviour. This is clearly of paramount importance given the substantial body of research within the social sciences emphasising that the harm of domestic violence extends beyond the infliction of physical injuries to emotional distress and psychological trauma (Dutton, 2009; Herman, 1992; Jones et al., 2001; Pico-Alfonso, 2005; Stark, 2007, 2009; Tadros, 2005; Tagg, 2011: 169; Williamson, 2010). Psychological injury falls within Article 33 of the Council of Europe Convention on preventing and combating violence against women and domestic violence requiring parties to legislate to 'ensure that the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats is criminalised'. A clear obligation is also placed upon the state to protect the psychological integrity of its citizens by virtue of decisions on the scope of Articles 3<sup>30</sup> and 8<sup>31</sup> of the European Convention of Human Rights 1950. However, because domestic violence has been legally constructed as a crime of physical violence rather than an attack on the psychological integrity of the victim, the harm and impact upon the victim has frequently been misconstrued by the criminal justice system in England and Wales (Bishop, 2016) and the human rights implications not always recognised. Section 76 offers the potential for this approach to be changed by enabling a move away from a focus on physical injury and towards emotional and psychological trauma, the relevance of which is currently typically recognised only in the context

27. Dutton and Goodman (2005: 745). The damaging impact this has on a victim's autonomy in terms of reducing their capacity to exercise their options in a meaningful way is noted in Tadros (2005).

28. Section 76(1)(c) Serious Crime Act 2015.

29. Section 76(4) Serious Crime Act 2015.

30. See *Eremia v Moldova* [2013] ECHR 3564/11 where the European Court reiterated that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3, the assessment of which is relative and contextual. Thus for someone who is vulnerable because they are in an abusive relationship, the level of threat required to meet the threshold is lower than for a person who is not. Moreover, the Court deemed the risk to the applicant's physical and, importantly, *psychological* well-being imminent and serious enough as to require the authorities to act swiftly.

31. It was held in *X and Y v The Netherlands* (1985) 8 EHRR 235 that the right to private life encompasses the right to be protected from attacks upon physical and psychological integrity.

of rape and other sexual offences.<sup>32</sup> Significant evidential barriers result from the ways in which trauma typically manifests, especially when that trauma results from ongoing abuse committed by an intimate, and therefore the impact, in evidential terms, of trauma in domestic violence cases cannot be underestimated. As will be shown below, trauma can result from domestic violence whether it takes the form of physical violence, psychological and emotional abuse, or coercive control. Therefore, if s. 76 is to be effective and the attrition rate of existing offences is to be reduced, it is necessary for the symptoms of trauma to be understood and taken into account in order to mitigate its effect on matters of evidence and proof.

Trauma is commonly associated with experiences such as war, terrorism and natural disasters; one-off events where the survivor experiences, objectively, a physical threat to their life. Therefore the traumatic nature of domestic violence is more commonly appreciated when the perpetrator inflicts serious physical injuries, or where there is a threat of such. Far less common is recognition that domestic violence can result in trauma for the victim even in the absence of serious or life-threatening violence. However, psychological research indicates that any event or set of enduring conditions can be traumatic for an individual (Ellison and Munro, 2016; see also Allen, 1995: 14 and Herman, 1992) if their ability to integrate their emotional experience is overwhelmed, or they experience, *subjectively*, a threat to life or integrity, whether physical or psychological (Pearlman and Saakvitne, 1995: 60). Psychological research on trauma makes it clear that severe and enduring traumatic reactions can occur even in the absence of physical violence, and thus there need not be bodily injury. Such psychological trauma is coupled with physiological upheaval and changes in the brain, which arise in the same way whether the threat is verbal, emotional, psychological or physical (Allen, 1995: 14), due to the fact that the neuroarchitecture for experiences of the former have, in effect, ‘piggybacked on the already-established neuroarchitecture that evolved for the experience of physical pain’ (Eisenberger and Lieberman, 2004, 2005; MacDonald and Leary, 2005; Panksepp, 2003). Although not all those who experience ongoing physical violence and psychological abuse will develop significant traumatogenic reactions, many victims do experience post-traumatic stress symptoms of some kind (Tagg, 2011: 167). Trauma may be acute, where it is a response to a single traumatic event, or it may be complex, developing as a response to ongoing and/or repeated exposure to extreme external events where the trauma is never-ending (Dutton, 2009; Tagg, 2011: 170).

The latter, known as complex-PTSD, is thought to frequently develop in the context of ongoing abuse as a result of the behaviours, and the overall relationship dynamics in which they occur. Herman’s research found that the state of entrapment established through coercive control, which she likened to crimes such as political kidnappings, typically manifested as complex-PTSD due to the inescapable nature of the abuse and the fact that the victim is in a constant state of hypervigilance trying to conform to the demands of the abuser (Herman, 1992). In relationships of this kind, power and control are established through extremely controlling rules that dictate how the victim must act in all aspects of everyday life (Stark, 2007). These rules and demands become coercive because they are backed up with threatened negative consequences for non-compliance, which the victim knows, through past experience, can be carried out for resistance or perceived resistance (Dutton and Goodman, 2005). Therefore, to avoid the threatened consequences for non-compliance, the victim tries to conform to the demands and to pre-empt the expectations of the abuser, leaving her in a permanent state of hypervigilance and fear of doing the ‘wrong’. This constant state of vigilance is *traumatic*; it is inescapable,<sup>33</sup> and, coupled with the ongoing verbal, psychological and emotional abuse – which the brain experiences as threatening

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32. Victims of sexual offences are automatically entitled to apply for special measures under s. 17(4) YJCEA 1999. The Judicial College recognises that the trauma associated with rape can have an impact upon victim memory and recall (Judicial Studies Board, 2010) and the CPS recognises that rape can inflict long-lasting trauma on victims (Crown Prosecution Service, 2010: 2). Also see Smith and Heke (2010). This is not to suggest the criminal justice system’s approach to investigating and prosecuting sexual offences is unproblematic, but that there is recognition of the traumatic nature of rape and sexual violence is clear.

33. Herman has compared the situation of victims of ongoing domestic abuse with the plight of victims of capture crimes such as kidnapping, because there is no escape (Herman, 1992). Stark also emphasises how difficult it is for victim’s to leave an

in the same way as a physical threat to life – often causes the victim to develop significant post-traumatic symptoms which frequently manifest as complex-PTSD. Drawing upon psychological research into the effect that trauma has on an individual, it becomes clear that understanding the link between ongoing abuse in an intimate relationship and trauma is crucial in terms of evidencing and proving all domestic violence related offences.

The effect of repeated and continuous behaviour that is controlling and coercive may not be apparent to the victim at the time of the offending behaviour, especially as research indicates that many victims have a distorted perception of what is ‘real’ and often internally redefine their version of reality to match the version presented by the perpetrator. They may come to believe the abuse is their fault or feel there is something wrong with them for causing or allowing it to happen (Williamson, 2010). Victims may also wish to continue with the relationship and may have ‘normalised’ and minimised the behaviour,<sup>34</sup> requiring the police and CPS to build cases without the sole reliance on the victim’s testimony. Where a victim has normalised the behaviour it is equally important that the judiciary appreciate the insidious nature of the behaviour and the harm it causes. Judges share the widespread misunderstanding of the affect coercive and controlling behaviours can have on a victim. For example, Judge Andrew Thomas QC noted that a complainant wished her relationship to continue with the defendant and accepted that to be a genuine wish without any pressure from him (Ankers, 2016). Arguably, the defendant no longer needed to exert pressure having engaged in ‘an escalating course of conduct over a period of time’ where he ‘controlled her contact with other people on Facebook and her mobile phone’. Her previous ‘threat’ to end the relationship led to Rodgers threatening self-harm and suicide. In the judge’s view, despite this background of continuous controlling and coercive behaviour, the complainant was ‘robust and there is *no evidence today of long lasting psychological harm*’ (Ankers, 2016). The inherent vulnerability of victims of domestic violence was again misunderstood after Judge Richard Mansell QC gave a non-custodial sentence to Mustafa Bashir, who pleaded guilty to a s. 47 offence after forcing his wife to drink bleach and hitting her over the back with a cricket bat. In sentencing, the judge refuted the victim’s vulnerability on the basis that she was ‘an intelligent woman with a network of friends’ and a university degree (Topping, 2017). This decision has since been altered by the judge under s. 155 Powers of Criminal Courts (Sentencing) Act 2000 on the basis that Bashir misled the court by claiming he had secured a career with Leicestershire Cricket Club (BBC News, 2017). The Sentencing Council’s current consultation on ‘Intimidatory Offences and Domestic Abuse Guidelines’ is a welcome opportunity to create sentencing guidelines that help to deal with the misperceptions of the harm caused to victims of domestic violence (Sentencing Council, 2017).

### Part three: Building the prosecution’s case

Outlining both the behaviour and harm associated with coercion and control reveals several evidential barriers likely to be encountered when trying to bring cases under the new offence. This part will reflect on a number of these. Difficulties in identifying the relevant behaviour in intimate relationships and the impact of trauma upon witness credibility will be explored. Recommendations will be advanced, including specialist training and increased use of pre-trial witness interviews and the ‘special measures’ under the Youth Justice and Criminal Evidence Act 1999. Domestic violence complainants may not be able to overcome their vulnerability to testify at court, even with the employment of special measures and other practices, and therefore, following an analysis of the legality of hearsay applications in the context of domestic violence cases generally and s. 76 specifically, it will be argued that the prosecution should

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abusive relationship as a result of the myriad tactics employed by the abuser and the context in which abuse of this kind occurs (Stark, 2007).

34. Kelly (1988); Hague and Mullender (2006). Pence and Paymar and Stark have also emphasised the role the perpetrator’s denial and minimisation of the abuse has upon the maintenance of a state of coercive control (Pence and Paymar, 1993; Stark, 2007: 203).

continue to build cases without relying on the live testimony of the complainant as the sole or central piece of evidence.

### *Training: Behaviours and harm*

In light of the complexities associated with recognising behaviour as abusive due to the ways in which gendered expectations may serve to normalise the abuse and the victim's response to it, training of criminal justice personnel is needed to understand the elements, particularly those aspects unique to the s. 76 offence. This would increase the ability of police officers and CPS to identify coercion and control when determining whether there is sufficient evidence to charge and prosecute a case. The Home Office definition describes controlling behaviour as 'a range of acts designed to make a person subordinate and/or dependent by isolating them from sources of support, exploiting their resources and capacities for personal gain, depriving them of the means needed for independence, resistance and escape and regulating their everyday behaviour'.<sup>35</sup> Coercive behaviour is defined as 'an act or pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim'.<sup>36</sup> However, the ongoing basis of behaviours within these definitions can be difficult to recognise.<sup>37</sup> Certainly, prior to the enactment of s. 76, a HMIC report revealed an inadequate response by the police to domestic violence (HMIC, 2014). Domestic violence, when it consists of a pattern of emotional abuse and coercive and controlling elements, lacks the clarity of the criminal offences that police officers are used to working with. This meant that even when the new offence was introduced, such forms of domestic violence were not readily recognisable to officers and in part explained the report's finding that the 'overall police response to victims of domestic abuse . . . [was] not good enough' (HMIC, 2014: 6). Despite the introduction of s. 76, it remains apparent that more police training is required to assist with identification, particularly where there is a lack of physical violence. Robinson et al. have found that 'the use of physical violence is at the forefront of many officers' expectations about domestic abuse and that when physical violence is absent, the police response is less proactive' (Robinson et al., 2016: 205). These expectations and habits meant police were less likely to report that they would carry out a risk identification checklist or make an arrest when presented with a non-violent vignette compared to a vignette containing physical violence.<sup>38</sup> Another indication that the offence has yet to change police practices significantly in this early period following implementation has been revealed by a Freedom of Information request made by Simpson Millar.<sup>39</sup> This revealed that in the first six months of enactment there had been very few cases of s. 76 charged overall and 11 police authority areas had made no charges at all. Furthermore, evaluation of the training provided by the College of Policing in an attempt to improve the police response to domestic abuse generally found that the one-day classroom-based training course for first responders had positive effects for some indicators of knowledge and understanding of coercive control, but no effect for others, and that the training had no impact on officers' general attitudes to domestic abuse (Wire and Myhill, 2016). Against this background of concerns, this article provides a timely opportunity to raise the profile of the offence and encourage police and prosecution lawyers to use the evidential tools available to them to bring more cases to trial.

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35. The Home Office definition of controlling behaviour is found at <https://www.gov.uk/guidance/domestic-violence-and-abuse>

36. Further analysis of these terms are discussed elsewhere (Bettinson, 2016; Bettinson and Bishop, 2015; Bishop, 2016)

37. As discussed above in part 1.

38. As a result of this research the College of Policing has begun a pilot, training officers in the identification of dangerous patterns of abusive behaviour. (<http://www.college.police.uk/News/College-news/Pages/Police-support-victims-of-coercive-control.aspx>).

39. Simpson Millar LLP. Police and victims urged to use new coercive control laws. Available at: [www.simpsonmillar.co.uk/news/police-and-victims-urged-to-use-new-coercive-control-laws-3818](http://www.simpsonmillar.co.uk/news/police-and-victims-urged-to-use-new-coercive-control-laws-3818) (2016, accessed 11 May 2017).

### *Continuous or repeated*

The Home Office Guidance on the application of this offence indicates that repeated or continuous behaviour is not confined to a time limited period and this approach should enable the context in which the behaviour occurred to be used in building a case.<sup>40</sup> An example of a relatively short time period in which the behaviour in question occurred is a case heard at Gloucester Crown Court. The defendant Lee Coleman carried out a number of tactics aimed at controlling the complainant between 15 and 22 January 2016 and, despite the short time period, the court accepted the prosecution's claim that this was continuous behaviour for the purposes of a s. 76 offence. The complainant had sought to end their 12-year relationship as she wanted to take up the tenancy of a local pub, which Coleman did not support. He called her names, threatened to damage her clothes and property at the family home if she left him, threatened to smother her to death, actually smothered her with a pillow whilst she was sleeping, and took her car keys and bank cards (Gloucestershire Live, 2016). All these factors led the jury to a guilty verdict for the s. 76 offence. From the media reports of this case it is evident that a variety of evidence was employed by the prosecution to show the continuous nature of the defendant's controlling behavior in a short time frame. The victim participated in the trial, text messages were used and Coleman's work colleagues gave evidence that he had bragged to them about smothering the complainant (This is Wiltshire, 2016). This case demonstrates how a wide variety of evidence can be used to establish continuous controlling behaviour sufficient to persuade a jury to convict. In many relationships the behaviour would have occurred over a longer period of time, enabling more evidence to be collated.

### *Unpicking victim compliance*

Identifying coercion and control in intimate relationships is also difficult to recognise where the victim seemingly complies with the demands of the coercer or controller. Pervasive myths and misconceptions surrounding domestic violence and the ways in which victims 'should' respond persist. One of the most prevalent stems from disbelief of the victim's story because if the violence and abuse was *that bad*, then the victim would have left the relationship. An explanation for the widespread nature of this myth can, perhaps, be sought in an unintended legacy of feminism; its construction of an individualistic discourse surrounding sexual equality which then 'disguises and displaces the power relations that continue to shape . . . people's intimate heterosexual interactions' (Chung, 2005). There is potential for this to act as a barrier preventing the behaviour from being seen as violent, abusive or coercive. In part this may occur because the individualistic discourse situates a victim's 'decision' to stay in an abusive relationship as a freely-made 'choice' because she is an individual with free will;<sup>41</sup> the social context of the prevailing gendered power relations and additional internal and external barriers to leaving may not be taken as fully into account as they need to be if the behaviour of victim and perpetrator is to be adequately understood. Gender inequality and Stark's concept of 'gendered entrapment', discussed above, make it possible to see how a victim may not be able to exit an abusive relationship even where there is support and protection available. Awareness of this and training on the dynamics and behaviours of domestic violence, particularly the type intended to fall under s. 76, is therefore of paramount importance in terms of building a case.

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40. The basis of the case must be built upon behaviour occurring after 29 December 2015, although bad character might be considered useful by the prosecution under s. 101 Criminal Justice Act 2003

41. See above and also Kelly and Westmarland (2016) argue that reframing victims as being controlled, rather than abused, might empower others to understand why victims don't 'just leave'.

## *Training and measures to overcome impact of trauma on credibility*

The criminal justice process places high demands on human memory in the giving of evidence: the amount of minute, often insignificant and peripheral, detail the victim remembers, and the internal consistency of the victim account, are key criteria used by the police and prosecution to assess the veracity of a complaint, and its potential credibility in court (Hohl and Conway, 2016; see also Ellison, 2005; Fisher et al., 2009; McMillan and Thomas, 2009. O'Keefe et al., 2009; Temkin, 1997, 2002). However, memory research indicates that during a traumatic event or experience the brain undergoes profound biological changes which significantly hinder memory processes (Vasterling and Brewin, 1998), meaning that the inconsistencies which are a normal feature of human memory are exacerbated during times of trauma (Conway et al., 2014). These changes include automatically adopted psychological mechanisms and defensive strategies which affect the ways in which information about the event or experience is stored and later how it is able to be accessed. As will be outlined below, the impact trauma has upon memory processes has a detrimental impact upon the ability of an individual to recount an event in a coherent, consistent and sufficiently detailed way, with the potential to significantly impair their ability to come across as a credible and reliable witness. Despite this, police decisions to charge and CPS decisions to prosecute continue to be strongly influenced by perceptions of witness credibility (Roberts and Saunders, 2010), either in terms of not believing the victim's account themselves, or concluding that there is no 'realistic prospect of conviction' (Crown Prosecution Service, 2013: 6) because of the way the witness will come across in court.

## *Trauma and memory*

Research indicates that during a traumatic incident, the brain switches off the parts of the brain associated with self-awareness (Frewin and Lanius, 2015), resulting in dissociation; 'a disruption of the normal integration of experience' (Chu, 1998) where aspects of the experience, such as consciousness, memory, emotions and bodily sensations, thoughts and sensory perceptions, are split off, or dissociated, from one another (American Psychiatric Association, 1994: 477). These dissociated aspects of experience are stored separately from one another and are unlikely to be recalled as a cohesive and comprehensive memory. This explains how a victim may be able to describe an event with little evidence of distress or emotion, and may have trouble explaining how she felt at the time of the attack; the emotions may be stored separately from the details, with no thoughts or cognitions attached to them. Research into memory recall for a traumatic experience shows that the narrative of the traumatic experience when *intentionally* recalled<sup>42</sup> – as would be done when a witness attempts to give evidence in response to questioning during a police or CPS interview or in court – is usually disorganised, showing variability and errors in recall across time.<sup>43</sup> Individuals 'typically remember that the traumatic event happened but describe blanks or periods during which their memory for the details of the event is vague and unclear' (Brewin, 2014: 207). These factors make a traumatised witness the antithesis of a 'good witness', who has been described as a person who gives a clear and sufficiently detailed account of events which they repeat in court and under cross-examination (Roberts and Saunders, 2010: 125). Given the frequency of a trauma response in domestic violence victims, this approach is particularly damaging when seeking to build a case under s. 76.

In building a case, the ways in which trauma manifests may therefore lead the police and Crown Prosecutors to conclude, based upon the witnesses demeanour and account, that she is not telling the truth, or is not aware of what actually happened, because she cannot talk convincingly and clearly about

42. As opposed to involuntary recall through the individual being spontaneously triggered by exposure to a traumatic cue. See Brewin (2014: 200) for more information on the two types of recall.

43. van Giezen A et al., 2005; Foa, 1995; Harvey and Bryant, 1999. The recall of non-traumatic memories in the same individuals were not disorganised, indicating that this disorganisation occurs only with memories of traumatic events.

her experience: '[d]etails, specificity and consistency in the victim's recollection are central criteria that criminal justice agents – police, prosecutors and juries – use to assess the credibility of the victim account' (Hohl and Conway, 2016). This can perhaps be explained by the strong and pervasive belief that the more detailed and vivid memories are, the more likely they are to be accurate, and the belief that highly emotional experiences give rise to highly accurate memories, despite the fact that scientific evidence does not support either of these beliefs (Conway et al, 2014; see also Magnussen, 2006; Talarico and Rubin, 2003). In addition, very intense emotional experiences, as seen above, can lead to distorted memories and amnesia, meaning that a coherent narrative of a traumatic event or experience is often neither accessible nor an indication of witness credibility. Furthermore, the process of giving evidence or a statement may themselves trigger a traumatic flashback, panic attack or episode of dissociation where the brain becomes foggy and perceptions become distorted and unreal, causing the individual to become confused or disorientated. Consequently, the witness may become anxious or forget momentarily where they actually are or be unable to grasp and/or answer the questions (see Ellison and Munro, 2016 for a further discussion). If these reactions are not recognised and understood by those involved in the gathering of evidence, perceptions of the witness as reliable, credible and truthful enough to take a case forward may be seriously undermined. Although the British Psychological Society provided recommendations in 2008 for those involved in legal work based on research into human memory (Conway and Holmes, 2010) and The Advocate's Gateway published a toolkit for those working with traumatised witnesses, defendants and parties in July 2015, their recommendations are not found routinely in legal responses, particularly in cases of alleged domestic violence, where the link between the abuse and traumatic stress is not often acknowledged. It is therefore recommended that specialised training is needed for those involved in evidence-gathering in cases of DVA to ameliorate these potential difficulties. In addition, the use of pre-trial witness interviews, discussed below, are also thought to have an important role in reducing the number of cases not taken forward due to concerns over how the victim will come across in court.

Since 2008, crown prosecutors have been able to interview witnesses prior to trial in any criminal case in which the prosecutor considers that an interview would assist either in clarifying or assessing the reliability of the witness's evidence or in understanding complex evidence (Crown Prosecution Service, 2008a). CPS guidance outlines the purpose of these interviews as being to enable the prosecutor to reach a better informed decision about any aspect of the case and, whilst interviews will normally be of most value in serious indictable-only cases, nothing precludes the holding of an interview in either-way or summary only cases (Crown Prosecution Service, 2008b). As noted by Roberts and Saunders, this gives witnesses the opportunity to explain any apparent discrepancies or inconsistencies in their account prior to trial and their use has improved crown prosecutors' perceptions of credibility ahead of trial (Roberts and Saunders, 2010). However, they are underutilised, particularly in the context of domestic violence cases and, currently, they are often avoided where possible when witnesses are 'vulnerable' to 'prevent trauma from repetition of the account' (Crown Prosecution Service, 2008a: 5). The authors suggest that as the witness can suffer a traumatic response before and during a court appearance, it may in fact be less traumatic for them to recount evidence and be questioned about their story prior to trial. This would reduce the prospect of details coming out at trial for the first time, which, given the ways in which trauma impacts upon memory and recall, seems likely, and with the witness ill-prepared for how to respond to cross-examination. It is our view that pre-trial witness interviews be *considered* in all domestic violence cases, prior to a decision being made about how well a witness is likely to come across in court. This is something that is already possible, and, even though there are obvious time and cost implications, they could prove to be necessary for the purposes of increasing prosecutions for cases of this kind.

Despite the possibility that training and other practices could be utilised to assist in recognising and evidencing the behaviour and its serious effect on the victim, evidential difficulties persist. The trial is highly likely to be a traumatic trigger for many (see Ellison and Munro, 2016) and difficulties are also encountered because of the impact that trauma has on memory processes, making the prosecution of cases where the victim's account is the only or the central piece of evidence problematic (Hohl and

Conway, 2016). It is recommended that the increased emphasis on taking cases forward without victim testimony, or without this being the sole piece of evidence, continues, therefore inviting a reflection on the hearsay exceptions that are available for prosecutors to use in domestic violence cases.

### *Hearsay: the provisions*

There are several hearsay exceptions available to the prosecution in domestic violence criminal cases contained within the Criminal Justice Act 2003 (CJA 2003) and Police and Criminal Evidence Act 1984 (PACE). Section 114(d) of the CJA 2003 enables the admission of a statement not made in oral evidence where the court is satisfied that it is in the interests of justice for it to be so.<sup>44</sup> However, the Court of Appeal has discouraged the use of this provision where the witness is described as ‘reluctant’ to give evidence in person.<sup>45</sup> This presents an onerous challenge in domestic violence cases, where victim participation is lower compared to general criminal cases.<sup>46</sup> The prosecution instead can make an application for admissibility of a witness statement under s. 116, which provides exceptions for witnesses who are unavailable for specific reasons, including fear.<sup>47</sup> Applications can be most convincingly made when they are based upon a consequence of the defendant’s own behaviour.<sup>48</sup> Fear is construed widely to include fear of physical injury to another person or financial loss.<sup>49</sup> An admissibility application under s. 116(e) requires the court to consider whether appropriate special measures under the YJCEA are available to mitigate the fear the complainant has about giving live testimony.<sup>50</sup> As stated in *Riat and others*,<sup>51</sup> ‘the court should take all possible steps to enable a fearful witness to give evidence notwithstanding his apprehension. That may be impossible, but very frequently it is perfectly practicable; a degree of (properly supported) fortitude can legitimately be expected in the fight against crime.’<sup>52</sup> As argued below, special measures may be available for the traumatised complainant and could reduce the relevance of s. 116(e) in cases involving coercive or controlling behaviour, although there is evidence to suggest that application levels for special measures are low.<sup>53</sup> Given the stance in *Riat*, a failure to apply for special measures is improper, notwithstanding that they carry a financial burden on the criminal justice system.

The prosecution may alternatively submit evidence under the *res gestae* provision preserved in s118(4)(a) CJA 2003, thereby enabling a statement made by a witness who is so emotionally overpowered by an event that the possibility of concoction or distortion can be disregarded. In *Barnaby v DPP*,<sup>54</sup> the significance of the length of time between the event and the making of the statement, alongside others factors such as the demeanour of the complainant, were emphasised. Barnaby was convicted of a battery offence against the complainant, his girlfriend, on the basis that he had strangled her and bitten her cheek. The complainant had ‘made a series of three emergency phone calls to the

44. Section 114(2) lists factors that the court must take into account when exercising its discretion under s. 114(d), which is in line with the jurisprudence from the European Court of Human Rights. See *Popov v Russia*, 13 July 2006, Application no. 26853/04 [188]; *Bocos-Cuesta v the Netherlands* 10 November 2005, Application no. 54789/00 [72].

45. *Z* [2009] EWCA Crim 20; *CT* [2011] EWCA Crim 2341 cf *Freeman* [2010] EWCA Crim 1997.

46. See fn 18.

47. Section 116(e); s. 116(2) states: through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence. In this regard the court must also consider the discretionary exclusion under PACE s. 78.

48. *Loveless* [2007] EWCA Crim 1041. Also see *Al-Khawaja and Tahery v UK* (2012) 54 EHRR 23 at [123]

49. See Spencer, 2014: 141; *R v Davies* [2006] EWCA Crim 2643.

50. Section 19 of the Youth Justice and Criminal Evidence Act 1999.

51. [2013] 1 WLR 2592.

52. *Ibid.* at para no. 16.

53. Ellison and Munro (2016). This is despite the fact that CPS research findings indicate that most applications for special measures are granted by the court (CPS, 2012).

54. [2015] EWHC 232 (Admin)

emergency services<sup>55</sup> and a transcript had been prepared. During these calls she stated that Barnaby had strangled her and that she was scared as he had done it on a previous occasion. When the officers arrived at the scene, six minutes after the calls were made, they saw that she had marks around her neck consistent with strangulation and a mark on her cheek. The complainant refused to sign a statement, fearing retaliation if she did so. A transcription of the 999 calls and the out-of-court statements made by the complainant to the officers were admitted into evidence, despite the fact that the complainant ‘attended court’ on the day of the trial.<sup>56</sup> Relying on Lord Ackner’s judgment in *R v Andrews*,<sup>57</sup> the appeal court accepted the magistrates’ approach. In the court’s view, both the 999 calls and the statements made to the police were made in circumstances so ‘dramatic as to dominate the thoughts of the victim . . . giving no real opportunity for reflection’ and made ‘in conditions of approximate but not exact contemporaneity’. For Fulford LJ, this reasoning was grounded in the fact that ‘there was clear evidence of recent attempted strangulation, and given . . . [the complainant’s] emotional state throughout the conversations, the court was entitled to dismiss the possibility of concoction.’<sup>58</sup> Similarly, time and demeanour were also relevant factors in the case of *Ibrahim v Crown Prosecution Service*,<sup>59</sup> in which a district judge also admitted evidence of an audio recording of a 999 call made an hour after an attack under the *res gestae* principle. Despite the timeframe between the event and the statement being made, Mr Justice Cranston noted the hysterical tone of her voice on the 999 call, the fact that the police saw the injuries developing, the disarray of the flat and the complainant’s demeanour when the police arrived. He reasoned that ‘time is to be considered along with the other circumstances of the case.’<sup>60</sup> In this case the district judge had provided ample reasons which had had a bearing on his view that concoction could be negated in the case. In the same vein, the decision in *Morgan v DPP Divisional Court*<sup>61</sup> further illustrates the effective use of the *res gestae* principle in the context of a domestic violence complainant where there is a time delay between the event and the statement. The court accepted the admissibility of a 999 tape of a call made by the complainant when she was hiding outside following the incident, and also bodycam footage worn by a police officer at the scene.<sup>62</sup> The court considered that the judge had been correct to consider, alongside the timeframe, the demeanour of the complainant, the content of the call and bodycam footage and ‘[o]f note . . . [was] not only that the complainant sounded extremely distressed but that she found it difficult to speak coherently to the operator . . .’<sup>63</sup>

The *res gestae* provisions therefore provide a useful means for the prosecution to build cases without victim participation. These cases provide encouraging indications towards the prosecutorial use of the *res gestae* principle in domestic violence cases, illustrating that judges can and do take into account relevant factors when determining admissibility under s. 118. However, concerns over the implications that use of the *res gestae* principle may have for the fair trial rights of defendants must be considered, before a clear recommendation for the increased usage of hearsay evidence in domestic violence cases can be made.

### *Hearsay evidence and human rights*

Domestic violence cases, including those brought under s. 76, whilst preserving a fair trial through the cross-examination of oral witness testimony where possible, must have regard to humane treatment, as

55. *Ibid.* at [3]

56. *Ibid.* at [16].

57. (1987) 84 Cr App R 382 at 391–392.

58. *Ibid.* at [31].

59. [2016] EWHC 1750 (Admin).

60. *Ibid.* at [26]

61. [2016] EWHC 3414 (Admin).

62. Under s. 118 Criminal Justice Act 2003; The duration of the time delay was not specified

63. [2016] EWHC 3414 (Admin) at [24].

one of the foundational principles of the law of evidence. The issue of hearsay is very much at the fulcrum of these concerns and, despite the careful balancing exercise required to achieve harmony of these two principles of evidence, it is entirely necessary for cases such as these to embrace them. The direction of human rights legal jurisprudence suggests that in the event that a balance is unachievable, the defendant's rights should be adapted to preserve the complainant's rights.<sup>64</sup> These developments provide a legal framework for considering the significance of hearsay evidence and the need to consider the fair trial rights of the defendant guaranteed under Article 6 of the European Convention on Human Rights (ECHR) in light of the complainant's right to be free from inhuman or degrading treatment protected under Article 3 ECHR.

On the face of it, hearsay applications are against the ordinary principle of cross-examination as enshrined in Article 6(3)(d), which provides that an individual charged with a criminal offence has the right 'to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him'. However, the Supreme Court in *Horncastle*<sup>65</sup> has confirmed that the right to confront a witness is not unqualified and that where there are safeguards to protect the fairness of the trial, exceptions are permissible.<sup>66</sup> As Heffernan succinctly states: 'If confrontation is a right grounded in the personal dignity of the accused then it must make space for the dignity rights of others within the trial process' (Heffernan, 2016: 107; see also Redmayne, 2012). Even where the conviction secured is based solely on hearsay evidence, the court has justified its inclusion, despite the witness being available, although, for prescribed reasons<sup>67</sup> on the basis that the legal framework provides an inherent code of fairness.<sup>68</sup>

This line of jurisprudence corresponds with the European Court of Human Rights' approach towards state responses to domestic violence. Choudhry and Herring (2006) advocated that a state must take particular care to fulfil its obligations towards victims of third party actions who are vulnerable, and made it clear that domestic violence victims are vulnerable.<sup>69</sup> A state is under a positive obligation to respond adequately when it becomes aware that an individual is experiencing domestic violence.<sup>70</sup> The Court has established that harm incurred in the context of domestic violence fell initially within the right to respect for private life, guaranteed under Article 8<sup>71</sup> and later as meeting the threshold required under Article 3 ECHR as being inhuman or degrading treatment.<sup>72</sup> This threshold will be met where the harm suffered by primary victims<sup>73</sup> of domestic violence is characterised by physical or psychological elements.<sup>74</sup> Once established that this threshold has been met, the state will only fulfil its positive obligations to protect these rights where it acts with due diligence and with legal systems capable of being effective in the prevention of harm (Burton, 2010). States cannot justify inaction or inadequate criminal justice responses in domestic violence cases based on a desire not to interfere with a perpetrator's right to respect for their private and home life. This principle is mirrored in international human rights legal developments emanating from the United Nations Convention on the Elimination of All Forms of

64. For example, *Opuz v Turkey* (2010) 50 EHRR 28; Meyersfeld (2010).

65. *R v Horncastle* [2009] UKSC 14; now approved by the European Court of Human Rights in *Horncastle v UK* (2015) 60 EHRR 31

66. Applying *Luca v Italy* 27 February 2001, App No 33354/96[39]; Heffernan, 2016: 104.

67. Section 116 CJA 2003.

68. Under the Criminal Justice Act 2003 and s. 78 of the Police and Criminal Evidence Act 1984.

69. *A v United Kingdom* (1999) 27 EHRR 611; *Opuz v Turkey* (2010) 50 EHRR 28

70. *Kontrova v Slovakia* 31 May 2007, Application no. 7510/04; *Opuz v Turkey* (2010) 50 EHRR 28.

71. *Bevacqua and S v Bulgaria*, 12 June 2008, Application no. 71127/01.

72. *Opuz v Turkey* (2010) 50 EHRR 28, *Valiunene v Lithuania* 26 March 2013, Application no. 3334/07.

73. The term 'primary victim' is used to refer to the direct recipient of the harm as opposed to a 'secondary victim', who witnesses the harm directed at the primary victim. The case law itself does not make the same distinction, although this is the effect of the decisions, see for example *Eremia v Moldova* [2013] ECHR 3564/11.

74. *Valiuliene v Lithuania* (Application no. 33234/07) 2013.

Discrimination Against Women (CEDAW) Committee.<sup>75</sup> Whilst *Horncastle* is not a discussion on the application of hearsay in domestic violence cases, it appears logical to read the decision as an extension of these human rights decisions. The right of confrontation is not an absolute right (see Dennis, 2010), just as a defendant's right to respect for private life is not, and a state seeking to provide adequate protection of a victim's Article 3 right is in a position to depart from the ordinary rule of inadmissible hearsay evidence and the right to confrontation. Despite this stance, it is not the case that a vulnerable victim should automatically prevent the defendant from the ability to cross-examine. It is that sufficient safeguards must be in place to protect the overall fairness of the trial, whilst at the same time protecting the victim from further attacks on their psychological integrity.

The principle of balancing the rights of the defendant and the complainant were also explored by the courts in the cases referred to above concerning the *res gestae* principle. Consideration was given to Lord Ackner's cautious approach to balancing the principle of humane treatment of the witness with the right of the defendant to cross-examine them. Contrasting the facts in *Barnaby* with that of *Attorney-General's Reference (No 1 of 2003)*,<sup>76</sup> Fulford LJ noted that the prosecution in the former had not sought the use of the *res gestae* principle because they were concerned the witness would give untruthful evidence. Instead, they did so in light of the vulnerable position of a victim of domestic violence, showing an informed and enlightened understanding of the court on this matter:

careful decisions need to be taken in situations of this kind if there is a real risk that a victim of domestic abuse may suffer further harm following her cooperation with the prosecuting authorities. Here the prosecution was aware from the outset that [the complainant] was frightened that providing a witness statement might provoke a violent reaction from the defendant . . . The Crown's stance was a seemingly sensible recognition of the potentially dangerous position in which [the complainant] had been placed.<sup>77</sup>

This progressive approach was also expressed in *Ibrahim*, recognising that the issue of using the *res gestae* doctrine as a device to avoid cross-examination had to 'be distinguished from the situation where a victim of domestic violence is in fear of a risk of harm following cooperation with the police'.<sup>78</sup> This progressive judicial approach is consistent with human rights legal developments. The EU Victims' Directive,<sup>79</sup> whilst aimed at State responses to victims of crime generally, makes specific reference to measures targeting violence against women.<sup>80</sup> Combative measures guarantee procedural rights to assist victims of domestic violence.<sup>81</sup> Furthermore, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)<sup>82</sup> describes a state's

75. See Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gülen Khan and Melissa Ozdemir (descendants of the deceased), alleged victim: *Fatma Yildirim (deceased) v Austria*, (Decision) CEDAW Committee (views adopted 1 October 2007) Communication no. 6/2005 UN Doc CEDAW/C/39/D/6/2005; *AT (Ms) v Hungary*, (Decision) CEDAW Committee (views adopted 26 January 2005) Communication no. 2/2003 UN Doc CEDAW/C/32/D/2/2003. The CEDAW Committee 'underline[d] that in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity'; *Fatma Yildirim v Austria* 6/2005 at [12.1.5] and *A.T. v Hungary* 2/2003 at [9.3].

76. [2003] EWCA 1286

77. Above n 55 at [34].

78. Above n 60 at [28].

79. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ 2012 L315/57

80. Member States are called upon 'to improve their national laws and policies to combat all forms of violence against women and to act in order to tackle the causes of violence against women, not least by employing preventive measures.' *Ibid.* at para. (5).

81. Declaration 19 of the Protocols to the Treaty on the Functioning of the European Union states that: 'in its general efforts to eliminate inequalities between women and men, the Union will aim in its different policies to combat all kinds of domestic violence . . . States should take all necessary measures to prevent and punish these criminal acts and to support and protect the victims.'

82. The Preventing and Combating Violence Against and Domestic Violence (Ratification of Convention) Bill 2016–17 is currently progressing through the legislative process. See Strickland and Allen (2017).

general obligation to adopt measures that ‘tak[e] into consideration the rights of the victim during all stages of the criminal proceedings’.<sup>83</sup> The decisions in the use of *res gestae* applications support the principle that prosecutions should not be determined solely on the willingness of the victim to participate.<sup>84</sup> Heffernan acknowledges that the boundaries of the participatory rights of victims and vulnerable witnesses are evolving but not set. Consequently, she recognises that ‘[i]t cannot be doubted... that vindicating the entitlement of a victim or a vulnerable witness to avoid confrontation necessitates some qualification of the accused’s positive confrontation right’ (Heffernan, 2016: 107). Indeed, Heffernan is correct in saying that the limits to protecting the rights of victims in the criminal justice process have not been settled. In the context of domestic violence, national action plans are determined to raise victim confidence with the criminal justice system and operate on a victim-centred basis. One method that is capable of providing some balance to the predicament of victims’ rights versus a fair trial is the use of special measures, although it must also be realised that these may not quite be the panacea for all cases.

### Special measures

The impact of trauma on sufferers of domestic violence can be addressed during the trial process in some cases. For example, the Youth Justice and Criminal Evidence Act 1999 provides for a variety of special measures to support ‘vulnerable and intimidated’ witnesses to give their ‘best evidence’ in court and relieve some of the stress associated with the giving of evidence.<sup>85</sup> These measures include video-recorded evidence-in-chief and the use of screens and live links so that a complainant does not need to face their alleged perpetrator in court. Victims of domestic violence are eligible to apply for special measures as ‘intimidated’,<sup>86</sup> witnesses because they are victims of the most serious crime. They may also fall into the category of ‘vulnerable’,<sup>87</sup> if they suffer from a physical disability, a mental disorder under the Mental Health Act 1983 (MHA), or have a ‘significant impairment of intelligence and social functioning’.<sup>88</sup> Post-traumatic stress disorder (PTSD) falls under the MHA, so a victim of domestic violence who meets the diagnostic criteria for this condition will be eligible to apply for special measures as a vulnerable witness. However, oftentimes PTSD is not diagnosed, or victims may not meet the narrow diagnostic criteria despite experiencing significant post-traumatic symptoms (Mol et al., 2005), and therefore this vulnerability may not be picked up by police at interview, particularly as research indicates that the police are particularly inept at identifying vulnerable witnesses (Burton et al., 2007).

Despite the fact that the Victim’s Code (Crown Prosecution Service, 2015b ) requires prosecutors to give early consideration to making a special measures application to the court, taking into account any views expressed by the victim, evidence suggests that insufficient applications are being made (Ellison and Munro, 2016). In part this could be because the process of qualification occurs in a context in which police and prosecutors receive limited training on mental health issues (Ellison and Munro, 2016). Indeed, research by Burton et al. suggests that the police find identifying vulnerable witnesses particularly difficult (Burton et al., 2007) and a recent HMIC Thematic Report investigating the extent to which police forces identify, protect and support those who are vulnerable exposed significant areas of concern (HMIC, 2015). Ellison and Munro emphasise that the types of trauma-related symptoms experienced may be pervasive enough amongst the general population of crime victims to have become normalised (Ellison and Munro, 2016). This latter point is particularly pertinent in the context of domestic violence victims due to the high correlation between ongoing abuse and traumatic stress (Dutton, 2009).

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83. Art. 49(1)

84. Art. 55(1)

85. Sections 16 and 17 of the Youth Justice and Criminal Evidence Act 1999.

86. Section 17(1) of the Youth Justice and Criminal Evidence Act 1999.

87. Section 16(2)(a)(i) of the Youth Justice and Criminal Evidence Act 1999.

88. Section 16(2)(a)(ii) of the Youth Justice and Criminal Evidence Act 1999.

To complicate matters further, different agencies within the criminal justice system use different definitions of ‘vulnerability’, with some being broader than others. Under the YJCEA, vulnerability is narrowly defined and, although the CPS guidance on the use of special measures imports these criteria, in its toolkit for prosecutors involved in cases with a vulnerable victim, a much wider stance on ‘vulnerability’ is taken (Crown Prosecution Service, 2015). Police guidance (Ministry of Justice, 2011) uses the statutory definition but elaborates by providing prompts that may assist in the identification of vulnerable witnesses (although, as noted above, there are serious difficulties with this identification at present). Therefore, it is unclear whether domestic violence victims will be eligible to apply as vulnerable witnesses, rather than intimidated, a distinction that is significant because of the emerging duties placed on judges<sup>89</sup> and guidance provided for barristers on how vulnerable witnesses should be treated in court (Advocacy Training Council, 2011). The authors believe that it is important for the emerging duties upon judges to control cross-examination of vulnerable witnesses – children and victims of sexual offences – to be utilised in the context of certain domestic violence cases to enhance the evidence provided and to ensure that states are not violating their duty to protect citizens from attacks upon their psychological integrity.<sup>90</sup> The authors support the provision of special measures to complainant-witnesses in domestic violence cases, to assist with their giving of evidence. Nevertheless, such measures still may be unable to support the complainant to provide live testimony.

In *Morgan* the district judge had taken the view that the prosecution had made a principled approach not to compel the complainant to give live testimony (see also Edwards, 2012). The police officer had reported that the complainant tearfully said that she ‘did not want to go to court to “go through it” and that she was terrified at the thought of having to relive the incident.’<sup>91</sup> This was taken into account by the judge when considering whether the prosecution should have explored the possibility of applying for special measures. On appeal the court agreed that the context of domestic violence in this particular case meant that special measures would not address the reason for ‘the witness’s unwillingness to attend, namely her fear of re-living the experience at the heart of this case. Special measures, which might have given reassurance in relation to being in the presence of the accused, could not address this witness’s concerns in the same way.’<sup>92</sup>

It is advocated that the court in *Morgan* is correct to emphasise that special measures may not be able to overcome the reasons for a complainant’s fear of providing live testimony before the court.<sup>93</sup> Fear does not need to ‘be attributable to threats or actions by . . . the defendant in order to constitute a good reason for the absence of the witness at trial.’ What is required is that the trial court conducted appropriate enquiries to determine whether there were objective grounds for the fear and whether those objective grounds were supported by evidence.<sup>94</sup> The court focused on whether the prosecution was seeking to resort to unfair tactics in the context of domestic violence cases. ‘It is plain that appropriate regard for the well-being of a witness in the domestic violence context may be a powerful indicator of a responsible attitude by a prosecutor. It may well mean that the prohibited improper motive for not calling a witness does not arise.’<sup>95</sup> This approach to the *res gestae* principle provides an opening for courts to address the common misconceptions regarding the traumatic experiences of victims that are ongoing. The method of police practices to gather a variety of evidence enables prosecutions to be brought

89. See discussion of cases, below.

90. *X and Y v The Netherlands* (1985) 8 EHRR 235.

91. *Morgan* at [5].

92. *Ibid.* at [34].

93. This approach is consistent with the decision in *Al-Khawaja* (2012) 54 EHRR 23 and was applied by the European Court of Human Rights in *Horncastle v UK* (2015) 60 EHRR 31.

94. *Horncastle v UK* (2015) 60 EHRR 31 at [145]; also *Al-Khawaja* (2012) 54 EHRR 23 at [124].

95. At [35] *Morgan*; In the *Horncastle* and *Al-Khawaja* cases the relevant provision under consideration is s. 116(2)(e) and not *res gestae* under s. 118. However, s. 78 allows consideration of the safeguards triggered under s. 116(2)(e) application and ought to raise no new argument.

without reliance upon the live testimony of the complainant. These decisions are encouraging and emphasise the need for all police officers and prosecutors to be trained in respect of ongoing domestic violence, the traumatic impact it can have and its ongoing nature. Furthermore, such practices will assist prosecutions under the controlling and coercive offence under s. 76, which will be dependent upon extensive evidence gathering beyond the live statements of the complainant.

## Conclusion

This article has provided an analysis of matters of evidence and proof with regards to the investigation and prosecution of domestic violence and abuse-related offences. It has taken as its specific focus the unique and complex issues raised by the new offence of controlling or coercive behaviour under s. 76 of the Serious Crime Act 2015. Attention has predominantly been paid to obstacles that are known to influence police and CPS decisions to charge and prosecute at the evidence-gathering stages. It is, however, acknowledged that the issues raised in this context may be equally problematic and deserving of attention once a case has gone to trial, but these are outside the scope of this article and the authors' aim of encouraging more prosecutions for these offences, where appropriate. Potential difficulties, and ways they may be ameliorated, were identified in the context of recognising behaviour that is coercive and controlling, and understanding the harm that results from this type of behaviour. Particular attention was paid to the ways in which gendered expectations may distort and hide the harmful nature of many controlling and coercive behaviours, and thus the need for specialist training in this area. It has been shown that the psychological impact of the trauma which frequently results from this type of behaviour is likely to impair the ability of complainant-witnesses to participate safely and effectively in the criminal justice process. Ways in which to minimise this effect on witness credibility were discussed, and it was emphasised that it is vital that measures are in place to educate criminal justice professionals and protect complainant-witnesses, whilst at the same time increasing the use of other forms of evidence, so that the victim's oral testimony is not the sole, or central, piece of evidence. The application of the *res gestae* principle to domestic violence cases does enable prosecutors to successfully pursue cases without reliance on the live testimony of the complainant. The combination of a wide variety of sources used in the cases discussed further highlight the need for investigative authorities to use body worn cameras and the role 999 calls can play in the case as a whole. Creative prosecution methods and progressive understandings by the courts in respect of the use of hearsay evidence have placed the rights guaranteed under the various human rights treaties owed to victims centre stage. The momentum of this progress needs to continue if the aim of greater victim confidence in the criminal justice system set out by the National Strategy to End Violence Against Women and Girls (Home Office, 2011, 2014) is to be achieved. Ensuring victim safety to participate in the trial process and enhanced training of police and prosecutors in respect of traumatic responses by complainants, is in our opinion essential in order for the offence of coercive or controlling behaviour in an intimate relationship to be effective.

## Authors' note

Throughout this article, the term 'domestic violence' is used to refer to violence and abuse (physical and non-physical) that occurs in the context of an intimate relationship, including behaviour deemed to fall under the new offence of coercive or controlling behaviour.

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