

# The Shadow Pandemic and Access to Justice: A Critical Assessment of the English and Welsh Legal Regime’s Effectiveness in Tackling Domestic Abuse

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## ABSTRACT

Since the COVID-19 outbreak, domestic abuse has intensified in regions that have implemented “stay at home” measures, including England and Wales. The phenomenon has been coined the “Shadow Pandemic” by the United Nations. This article questions the effectiveness of the newly introduced interim measures, combined with the traditional English and Welsh legal regime, in tackling domestic abuse. In terms of interim measures, it considers the effectiveness of exemptions to movement restrictions compromised by a low public awareness concerning their existence and a lack of supporting services. Efforts to increase accessibility to the criminal justice system remain hampered by burdensome evidentiary requirements and excessive limitation periods. Regarding the traditional legal regime, this article asserts that the effectiveness of non-molestation orders is hampered by an excessively wide definition of associated persons, unclear distinctions between civil and criminal offences and practical barriers to obtaining the order. It also contends that the coercive control offence is inherently obscure and provides a platform for renewed abuse. Finally, concerning Domestic Violence Protection Notices and Orders, this paper criticises their complex application process, where obtaining victims’ prior consent is unjustifiably not a necessity.

This article argues that the fundamental reason behind the legal framework’s ineffectiveness in tackling domestic abuse lies in the obscurity of the legal concept of domestic

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abuse itself. It discusses three prominent but divergent definitions of domestic abuse at the time when the Shadow Pandemic unravelled, including Dempsey's account, Stark's conceptualisation and the cross-government definition. It contends that the newly introduced Domestic Abuse Act only offers a partial solution to the definitional problem. Notably, its unified statutory definition attracts further disputes given its failure to recognise types of domestic abuse experienced disproportionately by BME and migrant women. Finally, this article suggests reforms to achieve a more comprehensive definition of domestic abuse, which better addresses structural inequalities and encapsulates an extensive list of domestic abuse-related offences.

*Keywords: The Shadow Pandemic; COVID-19; access to justice; England and Wales; domestic abuse*

## I. INTRODUCTION

According to World Health Organisation (WHO) statistics, the number of confirmed COVID-19 cases surpassed 200 million in August 2021.<sup>1</sup> Since the COVID-19 outbreak, emerging data have shown that violence against women, particularly domestic abuse, has intensified in countries where “stay at home” measures were in place.<sup>2</sup> The phenomenon was coined the “Shadow Pandemic” as part of a public awareness campaign launched by the United Nations (UN) to combat domestic violence amid the health crisis.<sup>3</sup>

In England, the National Domestic Abuse Helpline received more than 40,000 calls and contacts during the first three months of lockdown, 80% higher than usual.<sup>4</sup> In addition, 50% of respondents interviewed under a survey by Women's Aid reported that the abuse they experienced had escalated during the pandemic.<sup>5</sup> Statistics from the Welsh Women's Aid in June 2020 found that 94% of service providers supporting domestic abuse survivors

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<sup>1</sup> World Health Organisation, 'WHO Coronavirus Disease (COVID-19) Dashboard' (*World Health Organisation*, 4 August 2021) <<https://covid19.who.int/>> accessed 4 August 2022.

<sup>2</sup> International Rescue Committee, 'IRC Data Shows an Increase in Reports of Gender-Based Violence across Latin America' (*Rescue.org*, 9 June 2020) <<https://www.rescue.org/press-release/irc-data-shows-increase-reports-gender-based-violence-across-latin-america>> accessed 8 February 2021.

<sup>3</sup> United Nations, 'COVID-19 and Violence Against Women and Girls: Addressing the Shadow Pandemic' (Policy Brief No. 17, 2020) (*United Nations*, 2020) <<https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Policy-brief-COVID-19-and-violence-against-women-and-girls-en.pdf>> accessed 8 February 2021.

<sup>4</sup> June Kelly and Sally Graham, 'Coronavirus: Domestic Abuse Helpline Sees Lockdown Surge' *British Broadcasting Corporation* (London, 23 July 2020).

<sup>5</sup> Women's Aid, 'A Perfect Storm: The Impact of the Covid-19 Pandemic on Domestic Abuse Survivors and the Services Supporting Them' (*Women's Aid*, 18 August 2020) <<https://www.womensaid.org.uk/wp-content/uploads/2020/08/A-Perfect-Storm-August-2020-1.pdf>> accessed 8 February 2021.

experienced increased demand in one or more of their services, including online support, communications or information services support, child contact cases support and financial abuse support.<sup>6</sup> Upon witnessing the Shadow Pandemic unfold in England and Wales, Domestic Abuse Commissioner Nicole Jacobs remarked, “so much of this crisis is showing us some of the vulnerabilities and cracks in our system where people fall through the net and have been for many years.”<sup>7</sup> The Shadow Pandemic raises important questions about the effectiveness of the traditional English and Welsh legal regime, combined with newly introduced interim measures, in tackling domestic abuse. This paper argues that the Shadow Pandemic elucidates the flaws of the legal regime in tackling domestic abuse, mainly because of a failure to address a fundamental problem—the obscurity of the notion of “domestic abuse”. It further contends that the newly introduced Domestic Abuse Act offers only a partial solution to the definitional problem, with its unified statutory definition attracting further disputes given its failure to adequately recognise forms of domestic abuse experienced disproportionately by BME and migrant women. Finally, it suggests reforms to achieve a more comprehensive definition of domestic abuse, which better reflects structural inequalities and encapsulates a non-exhaustive list of domestic-abuse related offences.

## II. CONNECTING THE DOTS: LINKING COVID-19 TO DOMESTIC ABUSE

First and foremost, this article seeks to connect the surging rates of domestic abuse to the widespread COVID-19. It argues that there are three main reasons behind the linkage between the pandemic and domestic abuse. Firstly, the public policy of “stay at home” directives has led to surging domestic abuse rates. According to Caroline Bradbury-Jones and Louise Isham, in practice, heightened movement restrictions obstruct access to avenues of escape and help-seeking. They are likely to be manipulated by abusive partners within the domestic home, with abuse taking place behind closed doors and away from public scrutiny. In theory, “stay at home directives” exacerbate socially idealised representations of the home and the family, making it difficult for people to talk about and counter domestic abuse because of feelings of shame and urges to keep family affairs private.<sup>8</sup> These views are shared by Emma Williamson,

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<sup>6</sup> Welsh Women’s Aid, ‘Impact of COVID-19 on Violence Against Women, Domestic Abuse and Sexual Violence specialist services in Wales: June Report Summary’ (*Welsh Women’s Aid*, December 2020) <[https://www.welshwomensaid.org.uk/wp-content/uploads/2020/12/WWA-COVID-19-Impact-Report-Summary\\_JUNE\\_FINAL.pdf](https://www.welshwomensaid.org.uk/wp-content/uploads/2020/12/WWA-COVID-19-Impact-Report-Summary_JUNE_FINAL.pdf)> accessed 20 February 2022.

<sup>7</sup> Home Affairs Committee, *Oral Evidence: Home Office Preparedness for Covid-19 (Coronavirus)* (2020-21, HC 232) (*Home Affairs Committee*, 15 April 2020) 10.

<sup>8</sup> Caroline Bradbury-Jones and Louise Isham, ‘The Pandemic Paradox: The Consequences of COVID-19 on Domestic Violence’ (2020) 29(13-14) *Journal of Clinical Nursing* 2047.

Oona Brooks-Hay and Nancy Lombard, who argue that perpetrators are able to use the lockdown measures as a tool of control and coercion by, for example, either insisting on strict lockdown or failing to protect the health of family members.<sup>9</sup>

Secondly, surging rates in domestic violence stem from the economic downturn caused by COVID-19.<sup>10</sup> Erika Fraser suggests that violence against women increases when partners experience financial stress.<sup>11</sup> Insecurity over money, jobs, health and food supplies brought by COVID-19 have also been proved to correlate with domestic violence.<sup>12</sup> Research by the Women's Budget Group indicates that women are more likely to be in categories of the population disproportionately affected by the pandemic, such as low earners and temporary employees.<sup>13</sup> Such trends create greater financial dependency, leading to difficulties in leaving an abusive relationship.<sup>14</sup>

Thirdly, the COVID-19 pandemic has led to a worsening deficit in supporting services that help combat domestic abuse. As Phumzile Mlambo-Ngcuka, Executive Director of UN Women argues, as health systems are stretched beyond their capacity, domestic violence shelters are also at a breaking point, especially when centres are repurposed for additional response to COVID-19.<sup>15</sup> According to Women's Aid, 84.4% of service providers were forced to reduce or cancel one or more services because of the pandemic,<sup>16</sup> impeding access to supporting services. Fundraising activities have also been hindered, with 68.9% of service

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<sup>9</sup> Emma Williamson, Oona Brooks-Hay and Nancy Lombard, 'Domestic Violence and Abuse in Lockdown Needs More Accurate Media Reporting' (*Transforming Society*, 15 June 2020) <<https://www.transformingsociety.co.uk/2020/06/15/domestic-violence-and-abuse-in-lockdown-needs-more-accurate-media-reporting/>> accessed 8 February 2021.

<sup>10</sup> Dharshini David, 'Coronavirus: UK Worst Hit Among Major Economies' *British Broadcasting Corporation* (London, 26 August 2020).

<sup>11</sup> Erika Fraser, 'Impact of COVID-19 Pandemic on Violence against Women and Girls' (VAWG Helpdesk Research Report No. 284) (*UK Aid from the Department for International Development*, 16 March 2020) <<https://www.sddirect.org.uk/media/1881/vawg-helpdesk-284-covid-19-and-vawg.pdf>> accessed 8 February 2021.

<sup>12</sup> Sandra Walklate, Jane Richardson and Barry Godfrey, 'Domestic Abuse-Family Violence, Disasters and Restrictions under Covid-19: An Overview' (Working Paper No. 1, Domestic Abuse: Responding to the Shadow Pandemic, University of Liverpool) (*University of Liverpool, Research Councils UK*, 2020) <<https://www.liverpool.ac.uk/media/livacuk/law-and-social-justice/3research/Working,Paper,No1,-,Domestic,Abuse,-,Responding,to,the,Shadow,Pandemic.pdf>> accessed 20 February 2020.

<sup>13</sup> Women's Budget Group, 'Crises Collide: Women and Covid-19' (*Women's Budget Group*, April 2020) <<https://wbg.org.uk/wp-content/uploads/2020/04/FINAL.pdf>> accessed 8 February 2021.

<sup>14</sup> Dana Harrington Conner, 'Financial Freedom: Women, Money and Domestic Abuse' (2014) 20 *William and Mary Journal of Race, Gender and Social Justice* 339.

<sup>15</sup> Phumzile Mlambo-Ngcuka, 'Violence Against Women and Girls: The Shadow Pandemic' (*UN Women*, 6 April 2020) <<https://www.unwomen.org/en/news/stories/2020/4/statement-ed-phumzile-violence-against-women-during-pandemic>> accessed 8 February 2021.

<sup>16</sup> Women's Aid, 'The Impact of Covid-19 on Domestic Abuse Support Services: Findings from an Initial Women's Aid Survey' (*Women's Aid*, May 2020) <<https://www.womensaid.org.uk/wp-content/uploads/2020/05/The-impact-of-Covid-19-on-domestic-abuse-support-services-1.pdf>> accessed 8 February 2021.

providers reporting concerns about a future loss in income from fundraising.<sup>17</sup> Such changes have made access to supporting services more difficult, leading to the increased frequency and intensity of domestic abuse cases.

Therefore, it is evident that the prevalence of COVID-19 has led to a surge in domestic abuse rates, mainly because of a public policy embrace of “stay at home” directives in the pandemic, COVID-19-induced economic downturn and a worsening deficit in supporting services combating domestic abuse.

### III. QUESTIONING EXISTING MEASURES: ASSESSING THE EFFECTIVENESS OF THE ENGLISH AND WELSH LEGAL REGIME IN TACKLING DOMESTIC ABUSE

The increasing prevalence of domestic abuse in England and Wales raises questions on whether their legal framework effectively combats the problem. In addition to the current legal regime, which comprises the use of civil orders and criminal law measures, England and Wales have also introduced interim measures during the COVID-19 pandemic to alleviate the spike in domestic abuse rates. In March 2021, the Domestic Abuse Bill was introduced to provide a statutory definition of domestic abuse. The Bill received royal assent on 29 April 2021 and is hereinafter referred to as the Domestic Abuse Act.

Despite such efforts, the interim measures introduced to combat the Shadow Pandemic have fallen short of the mark in providing an adequate solution to the problem. On the contrary, the Shadow Pandemic reveals fundamental flaws of the English and Welsh legal regime governing domestic abuse that have long pre-dated COVID-19 but have been exacerbated by the pandemic.

#### A. EVALUATION OF INTERIM MEASURES

Various interim measures have been introduced to combat surging rates of domestic abuse, such as exemptions to movement restrictions and increased accessibility to the criminal justice system. It is, however, argued that such measures are ineffective in tackling domestic abuse, with such ineffectiveness exacerbated by a lack of public awareness of the measures, a lack of supporting services and unnecessary burdens imposed on victims of domestic abuse.

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<sup>17</sup> *ibid.*

(i) *Exemptions to movement restrictions*

During the pandemic, the government introduced the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020,<sup>18</sup> imposing movement restrictions to curb disease transmission. According to section 6, no person may leave the place where they live without a reasonable excuse during the emergency period.<sup>19</sup> Section 2(m), however, confirmed that a reasonable excuse would include avoiding injury or illness or escaping a risk of harm.<sup>20</sup> Subsequent government guidance confirmed that restrictions do not apply if victims find the need to leave their homes to escape domestic abuse.<sup>21</sup>

In theory, such exemptions allow for the restoration of avenues of escape and help-seeking. In practice, however, the low awareness of such exemptions in the community has largely compromised their effectiveness. For example, Welsh Deputy Minister Jane Hutt voices fears that domestic abuse victims may equate a national lockdown with the possibility that they would be mandated to stay at home with their perpetrator. Similar fears are expressed in England.<sup>22</sup> While victims leaving their homes would need substitute sites of residence,<sup>23</sup> corresponding supporting services have proved inadequate. For example, while women's refuges were already struggling to meet pre-pandemic demand, the pandemic has only served to escalate such shortages.<sup>24</sup> Moreover, despite £76 million in extra funding by the government to support victims and survivors of domestic abuse during the COVID-19 pandemic, reports have shown that the increased funding is not adequate in resolving the deficiency in supporting services.<sup>25</sup> Such inadequacies have led to glaring gaps in the existing legal framework.

(ii) *Accessibility to the criminal justice system*

During the lockdown, the government introduced measures to make the criminal justice system more accessible to domestic abuse victims. These include the relaxation of evidentiary

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<sup>18</sup> Health Protection (Coronavirus, Restrictions) (England) Regulations 2020.

<sup>19</sup> *ibid* s 6.

<sup>20</sup> *ibid* s 2(m).

<sup>21</sup> Gov.UK, 'National lockdown: Stay at Home' (*Gov.UK*, 29 March 2021)

<<https://www.gov.uk/guidance/national-lockdown-stay-at-home#when-you-can-leave-home>> accessed 8 February 2021.

<sup>22</sup> Mary O'Hara and Katie Tarrant, 'Fears Grow for Those Facing Domestic Abuse as England Enters Second Lockdown' *The Guardian* (London, 5 November 2020).

<sup>23</sup> Home Affairs Committee (n 7).

<sup>24</sup> Women's Aid, 'The Domestic Abuse Report 2021: The Annual Audit' (*Women's Aid*, January 2020)

<<https://www.womensaid.org.uk/research-and-publications/the-domestic-abuse-report/>> accessed 8 February 2021.

<sup>25</sup> Home Affairs Committee (n 7).

requirements needed to qualify for legal aid and the publication of information on how unrepresented victims can apply for an injunction in the family court.

While these measures appear *prima facie* useful, Nicole Jacobs and Vera Baird have criticised evidentiary requirements for legal aid applications. They argue that these requirements pose unnecessary burdens on applicants and that legal aid should be granted automatically to domestic abuse victims. This is because victims residing with their abusers may find it difficult to report abuse during the lockdown, and the delay in reporting domestic abuse may increase the difficulty in gathering evidence to support the case.<sup>26</sup> Moreover, some common offences in a domestic abuse context, such as common assault and battery, are subject to a time limit of six months from the commencement of proceedings at a Magistrates' Court under section 127 of the Magistrates' Courts Act 1980.<sup>27</sup> If victims are unable to report such offences during the lockdown, a significant proportion of this six-month limit may have elapsed by the time they are able to.<sup>28</sup> The limitations of current measures in considering practical difficulties have been extensively criticised.

Therefore, the effectiveness of interim measures to combat domestic abuse is hampered by their limitations. Unfortunately, it soon becomes apparent that the same trends characterise the fundamental English and Welsh legal framework.

## B. EVALUATION OF THE EXISTING LEGAL FRAMEWORK

Currently, there is no specific offence of domestic abuse.<sup>29</sup> The existing English and Welsh legal framework include a combination of civil law orders and criminal law measures. Such measures, however, are ineffective in tackling domestic abuse and merit rethinking given their increasing importance as safeguards against the Shadow Pandemic. Three examples support the proposition: the non-molestation order (NMO), the offence of coercive control and the Domestic Violence Protection Notices and Orders (DVPNs and DVPOs).

### (i) *Civil law orders: Non-molestation orders*

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<sup>26</sup> *ibid.*

<sup>27</sup> Magistrates' Courts Act 1980, s 127.

<sup>28</sup> Home Affairs Committee (n 7). This has recently changed with the abolition of the six-month limitation period. From 4 January 2022 onwards, there will be an overall time limit of two years from the offence's occurrence to bring a prosecution. See Gov.UK, 'Domestic abuse victims in England and Wales to be given more time to report assaults' (*Gov.UK*, 4 January 2022) <<https://www.gov.uk/government/news/domestic-abuse-victims-in-england-and-wales-to-be-given-more-time-to-report-assaults>> accessed 20 February 2022.

<sup>29</sup> Sentencing Council, 'Overarching Principles: Domestic Abuse' (*Sentencing Council*, 2018) <<https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/domestic-abuse/>> accessed 6 March 2021.

Under section 42 of the Family Law Act 1996, an NMO prohibits the respondent from molesting another person associated with the respondent or a relevant child. An NMO can be applied for by a person associated with the respondent or the court.<sup>30</sup> During the pandemic, applications for NMOs from April to June 2020 were up 26% compared to 2019.<sup>31</sup> While bearing in mind the noble aim to combat harassment suffered by domestic abuse victims, the measure is not without flaws.

The first of such shortcomings concerns the definition of NMOs. Under section 62(3) of the FLA 1996, a person is defined as associated with another person upon marriage, civil partnership, cohabitation, co-living, blood relationships, agreement to marry, engagement in an intimate personal relationship of significant duration, parenting of any child, or being parties to the same family proceedings.<sup>32</sup> Notably, the definition of associated persons in NMOs is the most expansive conception of “family” in law. Helen Reece has argued that the expansion of the definition is regressive. This is because the uniqueness of domestic abuse lies within its asymmetry of impacts on men and women, its combination of proximity and isolation, its encapsulation of controlled emotions in unequal power, barriers to leaving relationships and financial dependence. A failure to recognise domestic violence’s distinctive features as opposed to conventional violent crime, in turn, trivialises the offence. Her argument presents the very paradox that “if domestic violence occurs everywhere, then domestic violence occurs nowhere”.<sup>33</sup>

The second shortfall with NMOs lies within the blurring of the demarcations of civil and criminal offences. Under section 42A, a person who breaches an NMO without reasonable excuse is guilty of a criminal offence. On the one hand, critics argue the civil-criminal “hybridisation” of NMOs provides a quasi-criminal alternative to criminal law, which may deter the police from pursuing substantive criminal charges.<sup>34</sup> On the other hand, victims may also be disincentivised to apply for NMOs because of potential criminal consequences and their wishes not to prosecute their partners. For example, Jackie Barron and Emma Hitchings have noted that while civil law empowers victims by giving them a choice about how and when they

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<sup>30</sup> Family Law Act 1996, s 42.

<sup>31</sup> Gov.UK, ‘Family Court Statistics Quarterly: April to June 2020’ (*Gov.UK*, 24 September 2020) <<https://www.gov.uk/government/statistics/family-court-statistics-quarterly-april-to-june-2020>> accessed 8 February 2021.

<sup>32</sup> Family Law Act 1996, s 62(3).

<sup>33</sup> Helen Reece, ‘The End of Domestic Violence’ (2006) 69(5) *Modern Law Review* 770.

<sup>34</sup> Marianne Hester, ‘Making It through the Criminal Justice System: Attrition and Domestic Violence’ (2006) 5(1) *Social Policy and Society* 79.



can access protection, criminalising a breach of civil law orders may strip them of their comparative advantage and disempower victims.<sup>35</sup>

The third weakness of NMOs manifests itself in the barriers to acquiring NMOs. These include solicitors' advice that obtaining NMOs might make victims look "hostile in family proceedings", difficulties "proving" non-physical abuse, applications being downgraded to undertakings and unaffordability because of cuts in legal aid and so on.<sup>36</sup> Such barriers hinder access to justice by victims of domestic abuse.

Therefore, it is clear that the shortcomings of NMOs impact their effectiveness in combating domestic abuse.

(ii) *Criminal law measures: Coercive control*

Coercive control is defined in section 76 of the Serious Crime Act 2015. A person (A) commits the offence if he repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive. At the time of the behaviour, A and B must be personally connected. The behaviour must have a serious effect on B, and A must know or ought to know that the behaviour will have a serious effect on B.<sup>37</sup> Research by Women's Aid has found increased instances of coercive control during the pandemic, with perpetrators using lockdown restrictions as an excuse to exert increased monitoring and surveillance of behaviour or to move back in with victim-survivors and refusing to leave. Some have utilised the virus itself as a threat, coughing and spitting at victims or threatening to do so.<sup>38</sup> The relatively new offence was put to the test during the COVID-19 pandemic and has drawn the public's attention to its various shortcomings.

The first major flaw lies in the obscure notion of coercive control itself. As Conrad Brunk argues, identifying an intervention as coercive indicates that it departs from common practice and violates a norm of morality, custom, or the law.<sup>39</sup> Therefore, a consideration of normalcy, which remains an ambiguous and contested concept, logically applies to any attempt to define coercion. The same is observed by Tamara Kuennen, who argues that the offence of coercive

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<sup>35</sup> Jackie Barron, *Not Worth the Paper...? Effectiveness of Legal Protection for Women and Children Experiencing Domestic Violence* (London National Institute for Social Work 1990); Emma Hitchings, 'A Consequence of Blurring the Boundaries – Less Choice for the Victims of Domestic Violence?' (2005) 5(1) *Social Policy and Society* 91.

<sup>36</sup> Lis Bates and Marianne Hester, 'No Longer a Civil Matter? The Design and Use of Protection Orders for Domestic Violence in England and Wales' (2020) 42(2) *Journal of Social Welfare and Family Law* 133.

<sup>37</sup> Serious Crime Act 2015, s 76.

<sup>38</sup> Women's Aid, 'A Perfect Storm: The Impact of the Covid-19 Pandemic on Domestic Abuse Survivors and the Services Supporting Them' (n 5).

<sup>39</sup> Conrad Brunk, 'The Problem of Voluntariness and Coercion in the Negotiated Plea' (1979) 13(2) *Law and Society Review* 527.

control requires the law to draw the difficult line between abusive and non-abusive relationships.<sup>40</sup> Such theoretical ambiguities have led to difficulties in practice, given that the existing policing and justice system has proved incapable of understanding and tackling the complexities of coercive control. Prosecution rates for the offence have remained low, with only 584 defendants prosecuted and 293 offenders convicted of, and sentenced for, controlling or coercive behaviour in 2019,<sup>41</sup> with police reporting that coercive control charges are “hard to achieve” and “challenging to prove”.<sup>42</sup> Potential explanations are offered by Robinson, Pinchevsky and Guthrie—that the police tends to hold the misconception that only physical violence and isolated events constitute a crime, but not psychological violence nor a series of interrelated events.<sup>43</sup> Notably, coercive control falls into the latter two categories.

On the other hand, the criminal justice system is criticised for acting as a platform for renewed abuse. Victims have reported facing victim-blaming and denigration at court.<sup>44</sup> Providing compelling evidence of a mainly psychological pattern of behaviour in court, where the charges are contested, has proved difficult for many.<sup>45</sup> The criminal justice system has also inadvertently allowed abusive partners to continue their abuse post-separation<sup>46</sup> upon challenging their partner’s account in court.<sup>47</sup>

Therefore, it is evident that the flaws of the coercive control offence highly compromise its utility in combating domestic abuse.

(iii) *Criminal law measures: Domestic Violence Protection Notices and Orders*<sup>48</sup>

DVPNs and DVPOs are governed by section 24-33 of the Crime and Security Act 2010. A DVPN is an initial notice issued by the police to provide emergency protection to an

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<sup>40</sup> Tamara Kuennen, ‘Love Matters’ (2014) 56(4) *Arizona Law Review* 977.

<sup>41</sup> Office for National Statistics, ‘Domestic Abuse and the Criminal Justice System, England and Wales: November 2020’ (*Office for National Statistics*, 25 November 2020) <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabuseandthecriminaljusticesystemenglandandwales/november2020>> accessed 8 February 2021.

<sup>42</sup> Maeve McClenaghan and Charles Boutaud, ‘Questions Raised over Patchy Take-up of Domestic Violence Law’ (*The Bureau of Investigative Journalism*, 24 November 2017) <<https://www.thebureauinvestigates.com/stories/2017-11-24/coercive-control-concerns>> accessed 8 February 2021.

<sup>43</sup> Amanda Robinson, Gillian Pinchevsky and Jennifer Guthrie, ‘Under the Radar: Policing Non-violent Domestic Abuse in the US and UK’ (2016) 40(3) *International Journal of Comparative and Applied Criminal Justice* 195.

<sup>44</sup> Heather Douglas, ‘The Criminal Law’s Response to Domestic Violence: What’s Going On?’ (2008) 30(3) *Sydney Law Review* 439.

<sup>45</sup> Emma Williamson, ‘Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control’ (2010) 16(12) *Violence Against Women* 1412.

<sup>46</sup> Heather Douglas and Robin Fitzgerald, ‘Legal Processes and Gendered Violence: Cross-applications for Domestic Violence Protection Orders’ (2013) 36(1) *University of New South Wales Law Journal* 56.

<sup>47</sup> Jan Jordan, *Serial Survivors: Women’s Narratives of Surviving Rape* (Federation Press 2008).

<sup>48</sup> DVPNs and DVPOs formed part of the legal regime safeguarding victims against domestic abuse when the Shadow Pandemic first unravelled. They will, however, be repealed by s 55 of the Domestic Abuse Act 2021. DVPNs will be replaced by Domestic Abuse Protection Notices (DAPNs) and DVPOs will be replaced by

individual believed to be a victim of domestic violence. This notice, which a police superintendent must authorise, contains prohibitions that effectively prevent the suspected perpetrator from returning to the victim's home or otherwise contacting the victim for 48 hours.

DVPOs are civil orders that protect victims by enabling the police and magistrates' courts to put in place protective measures in the immediate aftermath of a domestic violence incident. A magistrate grants DVPOs, and the application must take place within 24 hours from the issuance of the DVPN. Courts must be satisfied on the balance of probabilities that the perpetrators have been violent toward or threatened to be violent towards another and that making the order is necessary to protect the victim. The order can last from 14 to 28 days.<sup>49</sup> During the pandemic, a total of 26 police forces provided data on both the number of DVPNs applied for and granted from April to June 2020. 91% of DVPNs applied for were granted (1,628 out of 1,797 applications). A total of 36 police forces provided data on the number of DVPOs applied for and the number of DVPOs granted by a magistrates' court. 88% of DVPOs applied for were granted (1,657 out of 1,873 applications).<sup>50</sup>

The complex application process of DVPNs and DVPOs, however, has evidently hindered its practical usage. High levels of time pressure and bureaucracy have caused police officers to struggle when complying with application requirements.<sup>51</sup> Police attitudes towards the issuance of DVPNs have proved to influence the frequency of using these orders. Research has indicated that a significant proportion of police officers view DVPNs and DVPOs as "disproportionate", especially for low-level violence, downplaying the importance of non-physical violence among the police force. In addition, senior officers are not always readily available to authorise DVPNs, and junior officers are sometimes anxious about contacting them. These factors have led to the limited use of DVPNs and DVPOs.<sup>52</sup>

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Domestic Abuse Protection Orders (DAPOs). Other protective orders, such as NMOs and Restraining Orders, will remain in place to be used in cases which are not domestic abuse-related, such as cases of stalking or harassment where the perpetrator is not a current or former intimate partner or a family member. This is to unify the different orders that can be applied for by domestic abuse victims into a single, comprehensive, and flexible order. DAPNs and DAPOs are now piloted in a small number of areas across the UK to assess the effectiveness and impact of the new model prior to national roll out. See Gov.UK, Domestic Abuse Protection Notices/Orders Factsheet (*Gov.UK*, 31 January 2022) <<https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/domestic-abuse-protection-notices-orders-factsheet>> accessed 21 February 2022.

<sup>49</sup> The Crime and Security Act 2010, s 28.

<sup>50</sup> Office for National Statistics (n 41).

<sup>51</sup> Liz Kelly, Joanna Adler, Miranda Horvath, Jo Lovett, Mark Coulson, David Kernohan and Mark Gray, 'Evaluation of the Pilot of Domestic Violence Protection Orders' (2013) Home Office Research Report 76 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/260897/horr76.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/260897/horr76.pdf)> accessed 20 February 2022.

<sup>52</sup> *ibid.*

Moreover, the fact that DVPNs and DVPOs can be made without the victim's consent poses a further obstacle to their effectiveness. This poses a *prima facie* interference of victims' rights under Article 8 of the European Convention of Human Rights (ECHR).<sup>53</sup> It is also argued that such non-consensual intervention by external agencies is in effect replicating the abuse by the perpetrator, which further disempowers the victim. Moreover, it is questionable whether a DVPN issued against the victim's wishes can be effective as the enforcement of the DVPN will ultimately rely on the victim's cooperation in reporting any breach.<sup>54</sup> It is therefore clear that the effectiveness of the usage of DVPOs is questionable.

#### IV. THE FUNDAMENTAL PROBLEM: AN OBSCURE DEFINITION OF DOMESTIC ABUSE

The inadequacies of different legal measures, civil or criminal, seem to converge into one common fundamental problem—the obscurity of the notion of “domestic abuse” itself. For example, the effectiveness of NMOs was hindered by uncertainties regarding the coverage of stakeholders encompassed within the concept and whether domestic abuse should be classified as a civil or criminal offence. The effectiveness of the coercive control offence was hampered by an inability to ascertain the nature of coercive control, a subcategory of domestic abuse. The issuance of DVPNs and DVPOs remained heavily dependent on the police's subjective conception of domestic abuse, given the lack of a comprehensive definition that captures the nature of the phenomenon.

Indeed, when the Shadow Pandemic unravelled, there was no statutory definition of domestic abuse. Instead, the government described the difficulties of formulating an appropriate response to the phenomenon—“Domestic abuse is a complex area, which is often misunderstood and goes unrecognised or unidentified. To transform our response to domestic abuse, we would first need to ensure that it is properly understood.”<sup>55</sup> Therefore, the Shadow Pandemic coincided with a legal regime centred on a phenomenon bearing divergent definitions.

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<sup>53</sup> Mandy Burton, ‘Emergency Barring Orders in Domestic Violence Cases: What Can England and Wales Learn from Other European Countries?’ (2015) 27(1) *Child and Family Law Quarterly* 25.

<sup>54</sup> Kelly and others (n 51) 76.

<sup>55</sup> HM Government, ‘Transforming the Response to Domestic Abuse: Government Consultation’ (HM Government, 31 May 2018) <[https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting\\_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf](https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf)> accessed 21 February 2022.

Michelle Madden Dempsey provides one of the leading accounts of domestic abuse.<sup>56</sup> She argues that domestic abuse encompasses three components: violence, domesticity, and structural inequality. She conceives violence as the direct, physical use of force; domesticity as tied to the location of the home and domestic relationships characterised by intimacy, familial ties or a shared household; and structural inequality as the sustenance and perpetuation of the uneven distribution of social power.<sup>57</sup> Other scholars, however, have demonstrated the narrowness of her conceptualisation of violence, as it is limited to physical violence and neglects other categories of abuse, such as emotional and economic abuse.<sup>58</sup> Moreover, domestic abuse could happen outside the home in the form of surveillance and behavioural regulation, such as stalking and cyberstalking.<sup>59</sup> Domesticity also raises questions of privacy and concerns of trivialism, with critics such as Jennifer Nedelsky<sup>60</sup> and Elizabeth Schneider<sup>61</sup> arguing that the notion perpetuates the unjustified belief that the state should not intervene in the private sphere.

Evan Stark provides an alternative account of domestic abuse. He describes domestic abuse as a form of coercive control, characterised by a range and pattern of non-physical abusive behaviour concerning violence, intimidation, isolation, and control, resulting in women's entrapment in abusive relationships.<sup>62</sup> While his account extends the notion of domestic abuse beyond physical violence to a form of emotional abuse and control, the concept remained obscure, as illustrated by the aforementioned difficulties in defining the coercive control offence at law.

The third leading account stems from a cross-government definition of domestic abuse pre-dating the Domestic Abuse Act. Domestic abuse is defined as any incident or pattern of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are or have been intimate partners or family members, regardless of gender or sexual orientation. The abuse can encompass, but is not limited to, psychological, physical, sexual, economic and emotional abuse. It also includes controlling and coercive behaviour.<sup>63</sup> While having been used by government departments, the police, the Crown Prosecution Service and the UK Border Agency to identify domestic violence cases, the definition remained

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<sup>56</sup> Michelle Madden Dempsey, 'What Counts as Domestic Violence? A Conceptual Analysis' (2006) 12(2) *William and Mary Journal of Women and the Law* 301.

<sup>57</sup> *ibid.*

<sup>58</sup> Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (OUP 2007) 198.

<sup>59</sup> *ibid.*

<sup>60</sup> Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011) 310.

<sup>61</sup> Elizabeth Schneider, 'The Violence of Privacy' (1991) 23 *Connecticut Law Review* 973.

<sup>62</sup> Stark (n 58).

<sup>63</sup> HM Government (n 55) 11.

non-statutory and open to contestation and divergence in application. For example, from a survey conducted by the Home Office, 36% of respondents thought that government departments did not apply the definition correctly, 38% found that local governments did not do so, and 40% regarded frontline practitioners to have failed to do the same. Instead, these institutions and their members created their own definitions, leading to a general lack of understanding of domestic violence.<sup>64</sup>

Hence, there is no consensus on a definition of domestic abuse, which has contributed to the existing legal framework's ineffectiveness in tackling the phenomenon. By blurring the demarcations of the scope of conduct that constitutes domestic abuse, and consequently, when political, legal or social intervention should occur, obscurity in the definition hinders target-efficiency by impeding the cultivation of a defined focus for response. Moreover, upon the lack of a defined scope of protection offered by the legal regime, it is easy for authorities to lose sight of their target audience in policy formulation, leading to uncertainties over the enforcement of such rules. Quoting Lucy Hadley of Women's Aid, formulating the "right" definition of domestic abuse is crucial for guiding policies, strategies, priorities, and funding locally and in public sector agencies.<sup>65</sup> Therefore, the lack of definition of domestic abuse would impede the prioritisation of needs and hence hinder the responsiveness of measures to the most pressing needs under time and resource constraints.

## V. THE DOMESTIC ABUSE ACT: THE LIGHT AT THE END OF THE TUNNEL?

In this context, the government introduced the Domestic Abuse Act to provide a statutory definition of domestic abuse. Section 1 of the Act provides that behaviour of a person towards another constitutes domestic abuse if both are aged 16 or over and are personally connected, and the behaviour is abusive, with the notion of abuse spanning across physical or sexual abuse, violent and threatening behaviour, controlling or coercive behaviour, economic abuse and psychological, emotional or other abuse.

The Act unified divergent definitions of domestic abuse under a common, statutory and authoritative definition. The definition was, however, not without dispute. In terms of the scope of the offence, the Joint Committee on the Act raises concerns that certain types of abuse

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<sup>64</sup> Home Office, 'Cross-Government Definition of Domestic Violence - A Consultation: Summary of Responses' (*Home Office*, September 2012) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/157800/domestic-violence-definition.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/157800/domestic-violence-definition.pdf)> accessed 21 February 2022.

<sup>65</sup> HM Government (n 55) 11.

experienced disproportionately by BME and migrant women were not recognised adequately by the Act. These types of abuse involve honour-based violence, forced marriage and spousal abandonment previously included in the cross-governmental, non-statutory definition. Such thoughts are echoed by the NGO Liberty, which argues the definition risked being “inadvertently discriminatory by not recognising coercive control related to immigration status”.<sup>66</sup>

The scope of the victims covered is also disputed. The campaign group Step Up Migrant Women argues that the Act does not help some migrant women who fall victim to domestic abuse because of their immigration status. The group calls for a provision that allows all women, regardless of their immigration status, to access public funds, support and routes to safety.<sup>67</sup> Similarly, the NGO Women’s Aid regards the Domestic Abuse Act to have “failed to deliver equal protection and support for migrant women”.<sup>68</sup> While the Act is a welcome first step towards a comprehensive definition of domestic abuse and a holistic legal framework, it would not and should not be the last word on the matter.

## VI. PROPOSALS FOR REFORM: TOWARDS A MORE COMPREHENSIVE DEFINITION OF DOMESTIC ABUSE

It is argued that steps should be taken to establish a more comprehensive definition of domestic abuse—one that addresses structural inequalities to a greater extent and encapsulates an extensive list of domestic-abuse related offences.

### A. ADDRESSING STRUCTURAL INEQUALITIES

Firstly, the definition should address structural inequalities to a greater extent. Structural inequality is integral to Dempsey’s account of domestic abuse, which she conceptualises as an imbalance of power and control within social structures,<sup>69</sup> where power is the ability or entitlement to exert control over another person.<sup>70</sup> In any relationship, the more powerful person may use their power as an instrument of control over their less powerful counterpart.

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<sup>66</sup> House of Commons Library Briefing Paper, ‘Domestic Abuse Bill 2017-19’ (House of Commons Library, 30 September 2019) <<https://researchbriefings.files.parliament.uk/documents/CBP-8630/CBP-8630.pdf>> accessed 21 February 2022.

<sup>67</sup> *ibid.*

<sup>68</sup> Farah Nazeer, Domestic Abuse Act (*Women’s Aid*, 29 April 2021) <<https://www.womensaid.org.uk/womens-aid-statement-on-the-royal-assent-of-the-domestic-abuse-bill/>> accessed 21 February 2021.

<sup>69</sup> The Duluth Abuse Intervention Project, ‘The Power and Control Wheel’ (*Domestic Abuse Intervention Programs*, 2022) <<https://www.theduluthmodel.org/wheels/>> accessed 20 February 2022.

<sup>70</sup> Hannah Arendt, *On Violence* (Harcourt Brace Jovanovich Publishers 1970) 44.

Dempsey views structural inequality as an element that exacerbates domestic abuse and what constitutes domestic abuse in the “strong” sense. As opposed to domestic abuse in the “weak” sense, which does not feature structural inequality, relevant authorities should prioritise tackling domestic abuse in the “strong” sense considering limited resources to alleviate the most harm. In the modern context, potential structural inequalities include patriarchy,<sup>71</sup> racial disparity,<sup>72</sup> discrimination based on citizenship and immigrant status<sup>73</sup> and so on.

Contrary to Dempsey’s suggestions, it is clear that the government has failed to fully consider structural inequalities in tackling domestic abuse and resource allocation. Currently, statutory guidance accompanying the Domestic Abuse Act provides that the fact that most victims are female must be considered, directing the attention of the Domestic Abuse Act towards alleviating domestic violence exacerbated by patriarchy.<sup>74</sup> Other forms of structural inequality, such as racial disparity and citizenship-based discrimination, however, were not addressed in the Act. Arguably, to address such instances of inequality entrenched in societal reality, the Act should afford recognition to abuse currently experienced disproportionately by BME and migrant women, such as female genital mutilation (FGM).

Additionally, a provision allowing all domestic abuse victims, regardless of their immigration status, to access public funds and support should also be promulgated. The establishment of such provisions will elevate the protection of victims’ rights to those under the Human Rights Act 1998 (HRA), which may be exercised by all residents in the UK regardless of citizenship.<sup>75</sup> This is justified given domestic abuse’s direct relevance to human rights, as confirmed by case law on the interpretation of the ECHR, which the HRA seeks to incorporate into English and Welsh law. In particular, it was noted in cases such as *Kontrová v Slovakia*, *Bevacqua and S v Bulgaria*, *ES and Others v Slovakia*, and *Opuz v Turkey*, that domestic abuse may potentially fall within the scope of Articles 2 (right to life), 3 (freedom from torture and inhuman and degrading treatment), 8 (respect for private and family life, home and correspondence) and 14 (protection from discrimination in respect of the rights and freedoms in the Convention) ECHR, and that a state can be held to be in breach of those rights

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<sup>71</sup> Michelle Madden Dempsey, ‘Toward a Feminist State: What Does “Effective” Prosecution of Domestic Violence Mean?’ (2007) 70(6) *The Modern Law Review* 908.

<sup>72</sup> Stokely Carmichael and Charles Hamilton, *Black Power: The Politics of Liberation* (Vintage Books 1992).

<sup>73</sup> The Migration Observatory at the University of Oxford, ‘Migrants and Discrimination in the UK’ (*The Migration Observatory*, 20 January 2020) <<https://migrationobservatory.ox.ac.uk/resources/briefings/migrants-and-discrimination-in-the-uk/>> accessed 20 February 2022.

<sup>74</sup> Home Office, ‘Domestic Abuse: Draft Statutory Guidance Framework’ (*Gov.UK*, 19 October 2021) <<https://www.gov.uk/government/consultations/domestic-abuse-act-statutory-guidance/domestic-abuse-draft-statutory-guidance-framework>> accessed 20 February 2022.

<sup>75</sup> Liberty, ‘The Human Rights Act’ (*Liberty*, 2022) <<https://www.libertyhumanrights.org.uk/your-rights/the-human-rights-act/>> accessed 6 March 2021.



if it has not taken sufficient steps to protect victims from further abuse.<sup>76</sup> Scholars such as Jeremy Birchall and Shazia Choudhry have even gone further in arguing for “a right not to be abused”.<sup>77</sup> The provision would extend protection against domestic abuse to all victims, irrespective of immigration status, and thus alleviate structural inequalities based on citizenship.

## B. AN EXTENSIVE BUT NON-EXHAUSTIVE LIST OF DOMESTIC ABUSE-RELATED OFFENCES

Secondly, an extensive but non-exhaustive list of domestic abuse-related offences can be included within the Act. While the Domestic Abuse Act provides a theoretical definition of the phenomenon, it could merit an equally comprehensive definition of the offence in practice. Domestic abuse is not currently a specific offence at law in England and Wales. Different domestic abuse-related offences and remedies are manifested in a wide array of criminal and civil measures, contained in different statutes (such as the Domestic Abuse Act, Family Law Act 1996, Serious Crime Act 2015 and Crime and Security Act 2010; see Section III above) scattered across the legal framework in a disorganised manner.

At present, there is no complete statutory list of such offences and consequent remedies. For example, the Domestic Abuse Act only provides a narrow list of offences involving abusive and violent behaviour in Part 6 (“Offences Involving Abusive or Violent Behaviour”). The list encapsulates controlling or coercive behaviour in an intimate or family relationship, threats to disclose private sexual photographs and films with intent to cause distress, strangulation or suffocation and serious harm for sexual gratification.<sup>78</sup> This is, however, far from a complete list, with common offences, such as common assault and battery in a domestic context, and molestation, falling beyond the scope of the statutory list. This omission has the potential to lead to confusion from victims and practitioners in domestic abuse cases.

These problems can be alleviated by providing a comprehensive list of domestic abuse-related offences in practice, which would enhance the law’s accessibility and clarity and offer a one-stop-shop for anyone seeking to ascertain the law on domestic abuse. In practice,

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<sup>76</sup> *Kontrová v Slovakia* App no 7510/04 (ECtHR, 1 May 2007); *Bevacqua and S v Bulgaria* App no 71127/01 (ECtHR, 12 June 2008); *ES and Others v Slovakia* App no 8227/04 (ECtHR, 15 September 2009) and *Opuz v Turkey* ECHR 2009-III 107.

<sup>77</sup> Jenny Birchall and Shazia Choudhry, ‘What about my right not to be abused? Domestic Abuse, Human Rights and the Family Courts’ (*Women’s Aid*, 2018) <<https://1q7dqy2unor827bjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2018/05/Domestic-abuse-human-rights-and-the-family-courts-report.pdf>> accessed 20 February 2022.

<sup>78</sup> Domestic Abuse Act 2021, s 68–71.

such a comprehensive list is adopted by Tasmania in Part 2 (“Family Violence Offences”) of the Family Violence Act 2004. Family violence is defined in section 7 to encapsulate the offences of assault (including sexual assault); threats, coercion, intimidation or verbal abuse; abduction; stalking; attempting or threatening to commit the aforementioned conduct, economic abuse; emotional abuse or intimidation; contravening an external family violence order, an (interim) Family Violence Order (FVO) or a Police Family Violence Order (PFVO); and damaging property jointly owned by the respondent and their spouse or partner, or owned by the respondent’s spouse or partner, or owned by an affected child.<sup>79</sup> Guidelines on penalties including arrest and detention, bail and sentencing factors are detailed in the same part. Enforcement mechanisms, such as the PFVO and the FVO, are described in Part 3 (“Police Family Violence Orders”) and Part 4 (“Family Violence Orders”) of the same Act.<sup>80</sup> Such a comprehensive list allows one to anticipate the extent of legal action per the severity and context of domestic abuse, which improves legal certainty. This may encourage victims to recognise their rights and remedies under the current legal regime and potential perpetrators to regulate their behaviour correspondingly.

## VII. CONCLUSION

Such discussions lead to a further question: Do we need an independent offence of domestic abuse? There have recently been discussions in Scotland regarding the establishment of such an offence. Reasons cited include the current legal regime’s lack of recognition of domestic abuse’s precise nature and consequences. Respondents noted that Scotland’s existing legal framework focuses on individual incidents instead of a pattern of abusive behaviour over time and that it had failed to recognise coercive and controlling behaviour.<sup>81</sup> Such justifications are however inapplicable in the England and Wales context since these considerations are already incorporated into the Domestic Abuse Act. Moreover, construing domestic abuse as a separate offence is unlikely to allow for the divergent consequences and remedies of various forms of domestic abuse currently afforded under individual offences, undermining the current framework’s flexibility. On the contrary, the legal framework is likely to benefit from a comprehensive account of all existing offences grouped under the umbrella term “domestic abuse” to confer legal protection and certainty.

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<sup>79</sup> Family Violence Act 2004, s 7.

<sup>80</sup> *ibid* s 14, 15–29.

<sup>81</sup> The Scottish Government, *Scottish Government Consultation Paper, a Criminal Offence of Domestic Abuse* (2015) 5.

All in all, the Shadow Pandemic has shed light on the importance of the legal regime in tackling domestic abuse and the fundamental flaws of the English and Welsh legal framework, which have overshadowed its achievements in combating the global problem. These flaws mainly stem from an obscure definition of “domestic abuse” as a concept and are only partially alleviated by the introduction of the Domestic Abuse Act, which arguably triggers more disputes pertaining to the definition. The Shadow Pandemic’s converse effects are, however, not to be neglected—by raising awareness of the phenomenon and creating a context where thinking about this question is necessary, the pandemic surely also poses a timely reminder for constructive change.